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# Undocumented Immigrants and Their Personal Injury Actions: Keeping Immigration Policy Out of Lost Wage Awards and Enforcing the Compensatory and Deterrence Functions of Tort Law

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# Undocumented Immigrants and Their Personal Injury Actions: Keeping Immigration Policy Out of Lost Wage Awards and Enforcing the Compensatory and Deterrent Functions of Tort Law

*Immigration is by definition a gesture of faith in social mobility. It is the expression in action of a positive belief in the possibility of a better life. It has thus contributed greatly to developing the spirit of personal betterment in American society and to strengthening the national confidence in change and the future. Such confidence, when widely shared, sets the national tone. The opportunities that America offered made the dream real, at least for a good many; but that dream itself was in large part the product of millions of plain people beginning a new life in the conviction that life could indeed be better, and each new wave of immigration rekindled the dream.*

*John F. Kennedy*[1]

## I. INTRODUCTION

Today approximately 10.5 million undocumented immigrants[2]

1. JOHN F. KENNEDY, A NATION OF IMMIGRANTS 67-68 (1964).

2. For the purposes of this article, the population of immigrants who do not have documentation to reside legally in the United States will be referred to as "undocumented immigrants." Besides the negative social implications associated with the term, referring to a portion of the population as "illegal" can be equated with assuming one is guilty until proven innocent. *See* STEPHEN H. LEGOMSKY, IMMIGRATION AND REFUGEE LAW AND POLICY 1192 (4th ed. 2002). When such dangerous assumptions are made, they negate the viability of immigration laws because just as in other areas of the law, people who must navigate through immigration proceedings may have valid legal claims which afford them remedies under the law. *See id.* Furthermore, the term "alien" even when used alone, carries its own negative implications. *Id.*

live within the borders of the United States and the number keeps growing.[3] The undocumented population is increasing at the average rate of 408,000 people per year.[4] Combined with the documented population, the immigrant population is at its largest level in history and continues to increase.[5] It is against this backdrop that the topic of immigration receives extensive publicity via the media and, with the advent of the internet, public opinion is much more accessible.[6] While at first glance, public sentiment about immigrants appears increasingly negative, public opinion fluctuates dramatically over short periods of time.[7] This wavering opinion of and uncertainty about the immigrant population is not surprising, however, considering that the factual basis on which such opinions are premised is mixed and inconsistent at best.[8]

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The term is isolationist, relegating even "legal" immigrants to the outer fringes of our society. *Id.*

3. MICHAEL HOEFER ET AL., U.S. DEP'T OF HOMELAND SECURITY, OFFICE OF IMMIGRATION STATISTICS, ESTIMATES OF THE UNAUTHORIZED IMMIGRANT POPULATION RESIDING IN THE UNITED STATES 1 (Jan. 2005), http://www.dhs.gov/xlibrary/assets/statistics/publications/ILL_PE_2005.pdf.

4. *Id.*

5. MARC J. PERRY ET AL., U.S. CENSUS BUREAU, MIGRATION OF NATIVES AND THE FOREIGN BORN: 1995 TO 2000, at 1 (Aug. 2003), *available at* http://www.census.gov/prod/2003pubs/censr-11.pdf. The total immigrant population (documented and undocumented) in 2000 was 31.1 million, an increase of 57% in 10 years. *Id.*

6. The advent of the internet perhaps allows more fringe views on immigration to be accessible to the average citizen. There are innumerable websites devoted to anti-immigration policy which might give rise to an inference that Americans are anti-immigrant. *See, e.g.*, Border Guardians, http://www.borderguardians.org (promoting the burning of Mexican flags at anti-immigration rallies); Boycott Mexico, http://www.boycottmexico.com (calling Mexico the "neighbor from hell"); NoInvaders.org, http://www.NoInvaders.org (listing the names, addresses and related information of companies across the United States that allegedly hire undocumented immigrants).

7. In a recent Gallup Poll, people were asked whether they favored reducing immigration. Only 39% of respondents to the June 2006 poll favored a reduction in immigration. *See* Gallup's Pulse of Democracy: Immigration, http://www.galluppoll.com/content/?ci=1660. Compare this number with the results of the same poll in April 2006, in which 47% of respondents favored reducing immigration. *Id.* The number fluctuated, at times erratically, from 58% in October 2001 to 49% in 2002 to 38% in 2000, for example. *Id.*

8. Discourse as to the actual effects of immigration on the economic, social and environmental areas of American life is diverse. There is no consensus. Is it a wonder Americans are confused? For example, some argue

This inconsistency seeps not only into the minds of Americans but also into the law. While controlling immigration, with an emphasis on undocumented immigration, is the traditional focus of immigration law,[9] there is an insidious movement to address immigration issues through the back door of tort law by denying undocumented immigrants a full course of remedies for their injuries.[10] Specifically, attempts have been made to deny undocumented immigrants the right to collect lost wages[11] in personal injury actions with varying results.[12] The result of focusing on immigration policy when awarding lost wages in tort actions is nothing less than erratic.[13] Some undocumented immigrants are denied any right to collect lost wages,[14] whereas others are allowed to collect lost wages based on American wage rates,[15] while yet others are allowed to establish lost wages based

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that immigration causes economic disadvantage for low-skilled Americans who must compete for jobs with immigrants, *see, e.g.*, GEORGE J. BORJAS, HEAVEN'S DOOR – IMMIGRATION POLICY AND THE AMERICAN ECONOMY 63-64 (1999), while others argue that American workers are utilized in a more productive fashion, resulting in an efficiency that is beneficial to the economy. *See, e.g.*, NATIONAL RESEARCH COUNCIL OF THE NATIONAL ACADEMY OF SCIENCES, THE NEW AMERICANS – ECONOMIC, DEMOGRAPHIC, AND FISCAL EFFECTS OF IMMIGRATION 4-8 (James P. Smith et al. eds., 1997). As for social implications, some argue that we cannot be a sovereign nation because we are too diverse, *see, e.g.*, PETER BRIMELOW, ALIEN NATION – COMMON SENSE ABOUT AMERICA'S IMMIGRATION DISASTER 209-11 (1995), while others argue that it is our unique cultural differences that unify us. *See, e.g,* Stephen J. Legomsky, *Immigrants, Minorities and Pluralism: What Kind of Society Do We Really Want?*, 6 WILLAMETTE J. INT'L L. & DISP. RESOL. 153, 160-61 (1998).

9. *See infra* Part II.A.

10. *See infra* Part III.A-D.

11. For purposes of this article, the term "lost wages" includes both past and future lost wages unless otherwise indicated.

12. *See infra* Part III.A.

13. *See infra* Part III.A.

14. *See* Veliz v. Rental Serv. Corp. USA, Inc., 313 F. Supp. 2d 1317, 1334 (D. Fla. 2003).

15. *See* Hernandez v. M/V Rajaan, 848 F.2d 498, 500 (5th Cir. 1988); Barros v. E.W. Bliss Co., Civ. A. No. 91-126330Z, 1993 WL 99930, at *2 (D. Mass. 1993); Hagl v. Stern, 396 F. Supp. 779, 779 (E.D. Pa. 1975); Balbuena v. IDR Realty LLC, 845 N.E.2d 1246, 1260 (N.Y. 2006); Majlinger v. Cassino Contracting Corp., 802 N.Y.S.2d 56, 70 (App. Div. 2d Dep't 2005), *aff'd sub nom.* Balbuena v. IDR Realty LLC, 845 N.E.2d 1246 (2006); Collins v. N.Y. City Health and Hosp. Corp., 607 N.Y.S.2d 387, 388 (App. Div. 2d Dep't 1994); Klapa v. O&Y Liberty Plaza Co., 645 N.Y.S.2d 281, 282 (Sup. 1996); Tyson Foods, Inc. v. Guzman, 116 S.W.3d 233, 247 (Tex. App. 2003); Peterson v. Neme, 281 S.E.2d 869, 874 (Va. 1981).

on the wage rates of their country of origin.[16] The focus on immigration policy thus negates the compensatory nature of tort law by inadequately and sporadically compensating undocumented immigrants for injuries they suffer as a result of another's negligence.

As a hypothetical example, assume Ms. A, an undocumented immigrant from Guatemala, has resided in Rhode Island for 12 years. Ms. A has worked all twelve years at a local mill on a full-time basis at the rate of $8.00 per hour. While walking home from work one evening, she is hit by a drunk driver. Ms. A sustains serious injuries and is out of work for one year, losing over $16,000.00 in wages. Under the present system of awarding lost wages, there are three possible outcomes to this scenario. First, Ms. A finds herself before a court whose primary agenda is promoting federal immigration policy and is thus denied lost wages because she is in the country illegally. Alternately, Ms. A finds herself before a court that tries to balance tort policy and federal immigration policy resulting in an award of past lost wages based on the rate of pay she would earn in Guatemala, $2.00 per hour, leaving her with a lost wage award of approximately $4,000.00. Finally, Ms. A finds herself before of a court whose interest in a personal injury case is to abide by the compensatory and deterrence functions of tort law, in which case Ms. A is granted the opportunity to collect lost wages based on American wage rates, thus being fully compensated for her injury.

This Note argues that whether or not an immigrant is documented or undocumented, lost wage awards in personal injury actions should always be based on American wage rates. There is no legal basis for denying undocumented immigrants lost wage awards based on American wage rates in personal injury actions. The Supreme Court has never decided such a case. In addition, while the Federal Government is responsible for developing immigration law and policy, awarding lost wages to undocumented immigrants in personal injury actions is not preempted by federal immigration policy. Finally, when the

16. *See* Hernandez-Cortez v. Hernandez, No. Civ. A. 01-1241-JTM, 2003 WL 22519678, at *7 (D. Kan. 2003); Sanango v. 200 East 16th St. Housing Corp., 788 N.Y.S.2d 314, 316-19 (App. Div. 1st Dep't 2004); Jallow v. Kew Gardens Hills Apartments Owners, No. 28907/2003, 2005 WL 1712206, at *2 (N.Y. Sup. Ct. 2005).

courts fail to award lost wages based on American wage rates, the compensatory and deterrent functions of tort law, which should be the primary consideration in personal injury cases, are completely diminished. Not only do lost wage awards based on an undocumented immigrant's home country wage rates diminish the efficacy of tort principles, but they also hinder the enforcement of immigration law. Awarding lost wages based on American wage rates serves a dual purpose in the enforcement of immigration law. First, it serves as a deterrent for employers who might otherwise be willing to hire undocumented immigrants to work in unsafe working conditions and take the risk knowing that even if an immigrant is injured, the employer may not have to pay lost wages. Second, even when the negligent party is not an employer, the backlash employers might face when a negligent party is forced to pay an undocumented immigrant lost wages serves as a secondary deterrence function which promotes immigration policy.

Part II of this Note outlines the historical development of the areas of immigration law and tort law, delineating the unique policies driving each area of the law. Part III of this Note examines the issue of awarding lost wages to undocumented immigrants and the bases of analysis in addressing the manner and method of awards. Specifically, there is a close examination of the Supreme Court case of *Hoffman Plastic Compounds, Inc. v. NLRB*[17] and a discussion of why this lost wage case arising out of a conflict between two federal labor law statutes is not applicable to tort actions. Further, this Note addresses the preemption argument against awarding lost wages. This Note analyzes how, in fact, lost wage awards in personal injury actions are not preempted by federal immigration policy. Part III of this Note examines the policy arguments supporting awards of lost wages to undocumented immigrants. This Note concludes with the suggestion that lost wage awards in personal injury cases of undocumented immigrants should always be based on American wage rates in order to promote the policies of tort law and that, further, in promoting tort policy, immigration law and policy will be best served.

## II. HISTORICAL DEVELOPMENT OF IMMIGRATION LAW AND TORT LAW IN

17. 535 U.S. 137 (2002).

THE UNITED STATES

## A. Evolution of Immigration Law

### 1. Early Developments

Prior to the 1800s, immigration law was primarily committed to the control of the states.[18] Immigration legislation was largely unnecessary in a fledgling nation in need of populating itself.[19] The policy of the time was come one, come all.[20] Unspoken promises of religious freedom and a tolerant government induced immigrants to leave their homelands.[21] With undeveloped land and a new world came the knowledge that a hard-working person could create a new life and accumulate wealth.[22] States passed few anti-immigration laws at this time because of the need for and value of labor.[23] Furthermore, early attempts by the federal government to restrict immigration met with animosity.[24] Thus, federal regulation was generally restricted to pro-immigrant legislation.[25] Under this policy of promoting the growth of a fledgling country, the nation grew exponentially.[26] From 1790 to 1850 approximately 2,515,000 foreigners migrated to the United States.[27]

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18. LEGOMSKY, *supra* note 2, at 2.

19. CHARLES GORDON ET AL., IMMIGRATION LAW AND PROCEDURE § 2.02[1] (2004).

20. *Id.* There is some dissent as to how inclusive immigration laws were even under state control. *See* Gerald L. Neuman, *The Lost Century of American Immigration Law (1776-1875)*, 93 COLUM. L. REV. 1833, 1835-36 (1993) (arguing that immigration was not as unrestricted as today's scholars purport it to be).

21. EMBERSON E. PROPER, COLONIAL IMMIGRATION LAWS: A STUDY OF THE REGULATION OF IMMIGRATION BY THE ENGLISH COLONIES IN AMERICA 9-10 (2003).

22. *Id.* at 10.

23. *Id.* at 17.

24. GORDON, *supra* note 19, § 2.02[1]. The Alien Act of 1798 gave the President power to remove any alien he thought to be dangerous from the U.S. *Id.* The Act was allowed to lapse after a two year time period because it was so unpopular. *Id.*

25. *Id.* For example, in 1819 federal legislation controlling conditions on ships carrying immigrants to the U.S. was passed. *Id.*

26. *Id.*

27. GEORGE M. STEPHENSON, A HISTORY OF AMERICAN IMMIGRATION: 1820-1924, at 99 (1926).

With the late 1800s came increased involvement by the federal government in the area of immigration. The first general immigration law[28] enacted by the Federal Government was a tax of 50 cents imposed on any non-citizen passenger coming by ship to the United States.[29] During this time period, labor groups were organizing with an agenda focused on limiting the influx of contracted labor from outside of the United States.[30] While the agenda was focused on labor issues, much of the labor group agendas also carried racial undertones.[31] Under the pressure of labor groups and other anti-immigrant proponents, the rise of immigration restriction began in 1882 with the enactment of the Chinese Exclusion Act,[32] which banned the entry of Chinese laborers into the United States.[33] In 1885, Congress passed a law[34] to discourage the importation of foreign laborers unless they were needed for a new industry in which there was unmet demand.[35] The law was amended in 1888[36] to allow for deportation of certain contract laborers.[37] It is important to note that much of this legislation passed during a period of time in which depletion of open land and the competitive labor force was

28. Act of August 3, 1882, ch. 376, 22 Stat. 214.

29. STEPHENSON, *supra* note 27, at 142.

30. *Id.* at 143.

31. ROGER DANIELS, GUARDING THE GOLDEN DOOR: AMERICAN IMMIGRATION POLICY AND IMMIGRANTS SINCE 1882, at 17 (2004). In the 1870s, the National Labor Union promoted the restriction of Chinese immigration, pressuring legislatures to stop the "evil" presence of Chinese laborers in the United States. *Id.* at 16-17.

32. Act of May 6, 1882, ch. 126, 22 Stat. 58.

33. DANIELS, *supra* note 31, at 19. The Chinese Exclusion Act included a provision that any Chinese person who was in the United States on November 17, 1880 or had come to the United States between November 17, 1880 and August 4, 1882 could leave the United States and return. *Id.* This provision was repealed in 1888, leaving many Chinese unable to return to the United States even though they fell within the date requirement of the Chinese Exclusion Act. *Id.* at 20. While the repealing act was challenged in *Chae Chan Ping v. United States*, the resulting decision produced further restrictions on immigration law with the court reasoning that exclusion of non-citizens was not a question for the judiciary, being a political issue and incident to sovereignty. *See* 130 U.S. 581, 609 (1889).

34. Act of Feb. 26, 1885, ch. 164, 23 Stat. 332.

35. STEPHENSON, *supra* note 27, at 143.

36. Act of Oct. 19, 1888, ch. 1210, 25 Stat. 566.

37. GORDON, *supra* note 19, § 2.02[2].

increasing.[38] Thus, the open policy of immigration which incited development of a nation quickly turned into immigration control. Even during this time period, the focal point of many of the immigration laws was not only centered on labor but, more importantly, on employers.[39] Finally, in 1891, immigration came under federal control[40] with the creation of the Bureau of Immigration.[41]

While earlier legislation generally focused on labor and employment issues, the development of the Bureau of Immigration brought about an even more exclusionist immigration policy. The Bureau's creation incidentally occurred in the "depression-scarred" 1890s.[42] The 1891 act that created the Bureau also excluded from entering the United States various groups including paupers, people suffering from contagious diseases, and people convicted of crimes of moral turpitude.[43] The act further called for deportation proceedings against anyone who entered the country illegally.[44] In 1903, the list of excludable immigrants grew to include such groups as beggars and epileptics.[45] In 1907, the feeble-minded and children without parents were added to the ever-growing list of excludable immigrants.[46] While exclusion of the above classes of immigrants was originally intended to limit entry for those immigrants who were unable, due to physical or mental health problems, to care for themselves, the restrictions ultimately were used to exclude physically and mentally capable but poor immigrants.[47] Restrictive immigration regulation reached its zenith in 1917[48] with the passage of legislation requiring a literacy test for all

38. STEPHENSON, *supra* note 27, at 145.
39. *See* DANIELS, *supra* note 31, at 28. Laws made it unlawful for employers to contract with or import immigrants, publish advertising that promoted immigration with promises of work or to pay for the importation of immigrants to the U.S. *See* STEPHENSON, *supra* note 27, at 145-48.
40. Act of March 3, 1891, ch. 551, 26 Stat. 1084.
41. *See* DANIELS, *supra* note 31, at 29.
42. *Id.* at 11.
43. GORDON, *supra* note 19, § 2.02[2].
44. *Id.*
45. Act of Mar. 3, 1903, ch. 1012, 32 Stat. 1213.
46. Act of Feb. 20, 1907, ch. 1134, 34 Stat. 898.
47. DANIELS, *supra* note 31, at 28.
48. Act of Feb. 5, 1917, ch. 29, 39 Stat. 874.

incoming immigrants.[49] While the earlier exclusionist laws targeted what were thought to be "undesirables,"[50] the literacy test was a general restriction on all immigrants to the United States signaling a nuanced shift in immigration policy in the United States. Even though the literacy test was only enacted in 1917, it was discussed and promoted as early as 1912,[51] at which time immigration was reaching its peak.[52] Compounding the problem was the fact that World War I brought with it a sharp decrease in immigration,[53] but people realized that the end of the War would bring along with it refugees from war-torn, ravaged countries,[54] resulting in mass immigration. Thus, the political climate of the times facilitated passage of the literacy requirement. While the literacy requirement was ineffective in limiting immigration to the United States, its significance lay in the fact that it garnered overwhelming support despite its restrictionist nature. [55]

By the end of World War I, immigration began to increase but not at the "flood" rates that many anticipated.[56] Even so, the trend of restrictionist immigration policy continued influenced largely by the post-war economic depression.[57] Many of the unemployed were war veterans, and this fact combined with the threat of jobs being taken away from these men by immigrants, stirred up "anti-immigrant hysteria."[58] At this time the United States adopted a quota system[59] to control immigration, beginning

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49. DANIELS, *supra* note 31, at 46.

50. STEPHENSON, *supra* note 27, at 156.

51. *See id.* at 161.

52. 9.9 million immigrants entered the United States from 1905 to 1914, more than any other ten year period in the history of immigration. DANIELS, *supra* note 31, at 45.

53. STEPHENSON, *supra* note 27, at 157.

54. *See* DANIELS, *supra* note 31, at 45-47; STEPHENSON, *supra* note 27, at 157-58.

55. *See* DANIELS, *supra* note 31, at 46-47.

56. *See* STEPHENSON, *supra* note 27, at 178. 805,228 immigrants entered the United States by fiscal year end June 30, 1921, a lower number of immigrants than had entered the United States before the start of World War I when the average rate of entry between 1910 and 1914 was over one million immigrants per year. *Id.* It seems that fear of a mass immigration was unfounded.

57. GORDON, *supra* note 19, § 2.02[3].

58. *See* DANIELS, *supra* note 31, at 47.

59. The quota systems have always generated interesting scholarly

with the Quota Law of 1921,[60] a temporary measure that remained in place until 1924 when a permanent quota policy[61] was enacted by Congress.[62] The quota laws signaled another subtle shift in immigration policy towards decreasing immigration altogether.[63] The quota policy implemented by the Immigration Act of 1924 limited immigration by nationality, based on the number of people of that nationality in the United States in 1920 up to 150,000.[64] The result was a decrease in immigration of nationalities governed by the quota system, particularly southern and eastern European immigrants.[65] The restrictive limitations on immigration that developed over the years remained largely unchanged until 1952.

2. The Immigration and Nationality Act

In 1952, Congress enacted the Immigration and Nationality Act (INA), which codified existing legislation, loosened some restrictions barring naturalization of East Asians, and simplified reunification of husbands and wives.[66] The most restrictive aspect of the previous immigration laws, however—the national origins quota system based on 1920 census statistics—remained intact.[67] While still largely restrictive, the more liberal elements of the legislation were the result of the post-Cold War sentiment which emphasized America's role as the leader of the free world.[68] The national origins quota system was finally abolished in 1965

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debate. *See, e.g.*, KENNEDY, *supra* note 1, at 74-75 (arguing, among other things, that the system is illogical and unreasonable and discriminates among immigrants on "the basis of accident of birth"); Patrick Weil, *Races at the Gate: A Century of Racial Distinctions in American Immigration Policy (1865-1965)*, 15 GEO. IMMIGR. L.J. 625 (2001) (discussing the racial undertones of the quota system).

60. Act of May 19, 1921, ch.8, 42 Stat 5. The Act implemented a quota system which limited the number of aliens of any nationality that could immigrate to the United States at 3% of the number of foreign born people of the same nationality already residing in the United States as calculated by the 1910 U.S. Census. *Id.* at § 2(a).

61. Immigration Act of 1924, ch. 190, 43 Stat. 153.

62. GORDON, *supra* note 19, § 2.02[3].

63. *See* DANIELS, *supra* note 31, at 48-50.

64. Immigration Act of 1924, ch. 190, 43 Stat 153, sec. 11(b).

65. GORDON, *supra* note 19, § 2.02[3].

66. KENNEDY, *supra* note 1, at 77.

67. *See* GORDON, *supra* note 19, § 2.04[1].

68. DANIELS, *supra* note 31, at 113.

and replaced with a fixed quota system.[69] This change occurred as a result of pressure from the Democratic platform of the early 1960s which described the national origins quota system as "a policy of deliberate discrimination" contradicting "the founding principles of this nation."[70] The pressure for immigration reform continued under the administration of President John F. Kennedy, and abolition of the system came to fruition under the administration of President Lyndon B. Johnson.[71] Other than abolition of the national origins quota system, however, immigration law remained largely restrictionist in scope, with the focus always on control.[72] The system remained largely untouched until the mid-1980s, when the focus began to shift back to employment and labor concerns.[73]

3. The Immigration Reform and Control Act

The Immigration Reform and Control Act of 1986[74] (IRCA) represents the single most extensive change to U.S. immigration laws since the demise of the quota system in 1965.[75] Fear of undocumented immigration was at a peak during the 1980s as a result of economic factors including inflation, recession, runaway interest rates, and the highest unemployment rates since the Depression.[76] Implemented as a result of national dissatisfaction with an immigration policy that was ineffective in preventing undocumented immigration,[77] the primary policy behind IRCA was to deter illegal immigration.[78] IRCA aimed to reduce undocumented immigration via a multi-directional approach emphasizing three areas: first, controlling illegal immigration;[79] second, imposing penalties on employers[80] who hired

69. GORDON, *supra* note 19, § 2.04[3].
70. DANIELS, *supra* note 31, at 129.
71. *Id.* at 133-35.
72. *Id.* at 135.
73. GORDON, *supra* note 19, § 2.04[9][c].
74. Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (1986).
75. UNDOCUMENTED MIGRATION TO THE UNITED STATES: IRCA AND THE EXPERIENCE OF THE 1980S, at 2 (Frank D. Bean et al. eds., 1990).
76. *See* DANIELS, *supra* note 31, at 220.
77. UNDOCUMENTED MIGRATION, supra note 75, at 1-3.
78. *Id.* at 2.
79. H.R. Rep. No. 99-682(I), at 45 (1986).
80. *Id.*

undocumented immigrants;[81] and third, allowing legalization for certain undocumented immigrants already in the United States.[82] While IRCA continued to place restrictions on immigration policy in the United States, Congress emphasized that employer sanctions were the "most humane, credible and effective way to respond to the large-scale influx of undocumented aliens."[83] Thus, the focus of punitive sanctions was not on the immigrant as much as it was on the employer.[84] Furthermore, in making allowances for undocumented immigrants already in the United States, Congress focused not only on the contributions of these immigrants, but also on their victimization and exploitation.[85] While the focus of overall immigration policy remained on restriction, punishing undocumented immigrants was not in the minds of our legislature.[86]

4. Developments After IRCA

Since IRCA, various legislative acts have continued to place controls on immigration to the United States. The Immigration Act of 1990, a great example of the historical ambivalence of the United States towards immigration, increased the number of immigrants allowed into the United States in future years while simultaneously restricting due process rights of deportees.[87] By the mid 1990s, the ambivalence tipped towards restriction with a

81. UNDOCUMENTED MIGRATION, *supra* note 75, at 2.
82. H.R. Rep. No. 99-682(I), at 49 (1986).
83. *Id.* at 46.
84. *See id.* Jobs and the economic benefits that flow therefrom are a primary motivator for immigration to the United States. Take the story of Elmer Jacinto, for example. Adam Geller, *One Country's Loss Is Another's Gain*, THE STANDARD-TIMES, Jan. 14, 2007, at B6, *available at* http://archive.southcoasttoday.com/daily/01-07/01-14-07/07perspective.htm. Mr. Jacinto left the Philippines, where he was considered one of the nation's up and coming doctors, to work in the United States as a nurse. *Id.* A doctor in the Philippines makes between $300 and $800 per month whereas a nurse in the United States makes $4,000 per month. *Id.*
85. H.R. Rep. No. 99-628(I), at 49 (1986).
86. Punishing undocumented immigrants is arguably counterproductive. *See, e.g.*, Peter Margulies, *Stranger and Afraid: Undocumented Workers and Federal Employment Law*, 38 DEPAUL L. REV. 553 (1989) (arguing that demand for undocumented workers can be decreased by affording undocumented workers access to extensive remedies for employment law violations).
87. Immigration Act of 1990, Pub. L. 101-649, 104 Stat. 4978 (1990).

proposed ballot initiative in California that prohibited undocumented immigrants from attending public schools.[88] The ambivalence culminated in 1996 with the passage of a series of restrictive acts. The Illegal Immigration Reform and Immigrant Responsibility Act of 1996[89] (IIRAIRA) restricted immigration by increasing border patrols, increasing punishments for immigration law violations, providing for the building of more barriers on the United States/Mexico border, and placing 10-year bans on admission for immigrants attempting to enter the United States after having been illegally in the United States at any time.[90] Other acts passed during this time decreased the rights of legal immigrants to food stamps and supplemental social security income.[91] The tides had turned once again towards decreasing immigration to the United States.

B. Evolution of Tort Law[92]

1. Early Developments

The political and economic pressures that influenced the development of American immigration policy emphasizing restriction and control lie in stark contrast to the amorphous policies underlying the development of tort law in the United States. While immigration law was slowly federalized in the late

88. *See* Philip Martin, *Proposition 187 in California*, 29 INT'L MIGRATION REV. 255 (1995).

89. Pub. L. No. 104-208, 110 Stat. 3009 (1996).

90. DANIELS, *supra* note 31, at 246.

91. *Id.* at 246-48.

92. The focus of Part II.B of this Note is the deterrence and compensation functions of tort law and development of those functions through history. This section is by no means meant to be an exhaustive analysis of tort doctrine, which is beyond the scope of this Note. There are varying thoughts on the purpose of tort law, theories behind tort law and whether the policies behind the development of tort law are successfully served. The depth and breadth of scholarly literature on the subject is limitless. *See generally* CARL T. BOGUS, WHY LAWSUITS ARE GOOD FOR AMERICA (2001) (discussing the regulatory nature of lawsuits); ROBERT L. RABIN, PERSPECTIVES ON TORT LAW (1976) (compiling essays of varying viewpoints on tort theory); Victor E. Schwartz et al., *Toward Neutral Principles of Stare Decisis in Tort Law*, 58 S.C. L. REV. (2006) (discussing neutral principles available to judges to evaluate stare decisis while simultaneously changing tort law rules); Ernest J. Weinrib, *Understanding Tort Law*, 23 VAL. U. L. REV. 485 (1989) (discussing tort law theory from an instrumentalist viewpoint).

1800s,[93] tort law evolved into its own distinct field of law.[94] The development of tort law was a direct result of the industrial revolution, which brought with it not only jobs but also modern machines and tools capable of crushing, slicing, and crippling those who were unfortunate enough to cross their paths.[95] With modernization came increased risks, and by the late 1800s and early 1900s industrial accidents accounted for about 35,000 deaths and close to 2,000,000 injuries per year.[96] The development of tort law thus arose "out of the various and ever-increasing clashes of the activities of persons living in a common society."[97] Increased modernization brought with it "losses, or injuries of many kinds sustained by one person as the result of the activities of others."[98] "The purpose of the law of torts was to adjust these losses and to afford compensation for injuries sustained by one person as the result of the conduct of another."[99] The resulting system for combating these newfound risks was one focused on negligence, which arises when the conduct of one person fails to meet a standard of reasonable care and results in injury to another.[100] Thus, an important policy underlying the development of tort law was compensating individuals for injuries sustained as a result of another person's faulty conduct.[101]

While compensating the injured for their injuries was a primary consideration of tort policy, there was some tension in the early period of tort law resulting from the desire to redress the injured as balanced against the economic growth and wealth which in the late 1800s were thought to be for the "greater good of society."[102] The same machines that happened to cut off one man's finger were giving thousands of other men jobs, and

93. *See supra* Part II.A.

94. G. EDWARD WHITE, TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY 3 (1980).

95. LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 262 (1973).

96. *Id.* at 422.

97. Cecil A. Wright, *Introduction to the Law of Torts*, 8 CAMBRIDGE L.J. 238, 238 (1944).

98. *Id.*

99. *Id.*

100. HENRY J. STEINER, MORAL ARGUMENT AND SOCIAL VISION IN THE COURTS: A STUDY OF TORT ACCIDENT LAW 18 (1987).

101. WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS § 2 (4th ed. 1971).

102. FRIEDMAN, *supra* note 95, at 410.

producing, for example, railroad tracks that would be laid across the country by tens of thousands of other men.[103] There was concern about placing so much liability on companies that it would still the American economy.[104] The courts developed numerous doctrines to counter these concerns. The doctrine of contributory negligence came into use in the United States in the 1850s, forcing any plaintiff in a personal injury case not only to prove that defendants were negligent but also to show that the plaintiff herself was faultless.[105] In 1842, the fellow-servant rule, which barred employees from suing their employers for injuries caused by the negligence of other employees, developed in American courts.[106] Other doctrines, such as the doctrine of immunity of charities,[107] assumption of risk,[108] and the doctrine of imputed negligence,[109] continued to immunize companies from tort actions.[110] Negligence theory during this time period in history had a marked affect on the ability of tort law to function as a compensatory system.[111] Arguably, during these early stages, tort law was primarily about balancing economic interests against the welfare of the injured, with a slight tendency to favor industry.[112]

Despite the fact that tort law development in the 1800s was quite restrictionist, the courts were loath to encourage carelessness.[113] After all, another equally important policy behind the development of tort law was that of impeding socially

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103. This hypothetical is not based on any statistical information and is merely used as an example.

104. *See* FRIEDMAN, *supra* note 95, at 410-12.

105. *See* Wex S. Malone, *The Formative Era of Contributory Negligence*, 41 ILL. L. REV. 151, 151 (1946).

106. *See* Farwell v. Boston & Worcester R.R. Corp., 45 Mass. 49 (1842).

107. The doctrine of immunity of charities protected charitable entities such as hospitals from liability as a result of the negligence of employees or others on their premises. *See* FRIEDMAN, *supra* note 95, at 416.

108. *See, e.g.*, Lamson v. Am. Axe & Tool Co., 58 N.E. 585, 585 (1900) (holding that an employee who understands a danger and takes the risk is barred from suing his employer for negligence).

109. This doctrine imputed the negligence of a parent to his child and a driver to his passenger resulting in the child or passenger being unable to recover for his or her injury. FRIEDMAN, *supra* note 95, at 417.

110. *Id.* at 416-17.

111. WHITE, *supra* note 94, at 61.

112. TORT LAW IN AMERICAN HISTORY: MAJOR HISTORICAL INTERPRETATIONS, at xiii, (Kermit L. Hall ed., 1987).

113. *See* FRIEDMAN, *supra* note 95, at 417.

unreasonable conduct.[114] The more that people are held liable for injuring others, the stronger the incentive to prevent similar harms from occurring.[115] Therefore, the driving force behind liberal changes in tort policy during this time period was the goal to counter the restrictionist nature of early developments in tort law.[116] Judges rejected the doctrine of imputed negligence.[117] The vice-principal doctrine developed, allowing injured employees to sue their employers if their injuries were due to the negligence of a supervisor.[118] Legislative acts imposed higher standards of care on tortfeasors,[119] created negligence *per se* laws,[120] and imposed safety regulations on corporations.[121] Finally, many of the restrictionist rules were rejected by juries, who would "let their hearts dictate results."[122] While ultimately the restrictionist developments of the 1800s exceeded the expansionist developments, the policies of compensation and deterrence survived.

2. Early 20th Century Developments

The early 20th century saw a general stability in the system of tort law, with cases during this period tending to clarify tort doctrine.[123] Some change did occur during this period, however, particularly in the area of causation.[124] These developments resulted from a shift in theoretical legal thought, from a more scientific methodology to one largely influenced by the realism of the 1900s.[125] The nature of legal analysis took a turn toward more policy-oriented doctrine.[126] According to some scholars, the

114. PROSSER, *supra* note 101, § 5.
115. *Id.* § 4.
116. *See* FRIEDMAN, *supra* note 95, at 417-25.
117. *See id.* at 417 (citing Little v. Hackett, 116 U.S. 366 (1885); Bunting v. Hogsett, 21 Atl. 31 (1891)).
118. *See* WHITE, *supra* note 94, at 51-55.
119. *See* FRIEDMAN, *supra* note 95, at 419.
120. *Id.* at 419-20.
121. *Id.* at 420-21.
122. *Id.* at 423.
123. Gary T. Schwartz, *The Beginning and the Possible End of the Rise of Modern American Tort Law*, 26 GA. L. REV. 601, 605 (1992).
124. *See* WHITE, *supra* note 94, at 93-102.
125. *See id.* at 91-93.
126. *Id.* at 98.

case of *Palsgraf v. Long Island Railroad*[127] marked the shift in the concept of causation, from a legal doctrine to an issue of public policy.[128] The *Palsgraf* case involved two men, one carrying a package, trying to board a train.[129] The guard on the train tried to help the men onto the train as it moved away and, in the process, dislodged the package, which fell to the rails and exploded.[130] Mrs. Palsgraf, who was standing near the platform but at a distance, was hit in the head by a scale that fell as a result of the explosion.[131] The Cardozo majority opinion focused on the fact that the railroad owed no duty to Mrs. Palsgraf because she was not within the zone of danger, making her injury unforeseeable.[132] The Andrews dissent was policy-driven, reasoning that everyone owed "to the world a large duty of refraining from those acts that may unreasonably threaten the safety of others."[133] After this decision, causation was increasingly seen as an aspect of tort theory that involved policy considerations such as fairness and social justice.[134] This policy shift complemented the notions of redress and deterrence that had originally influenced the development of tort law.

3. The Mid to Late 20th Century Developments

Spurred by the public policy activism of the 1960s, which abolished the national origin quota system,[135] the mid to late 20th century signaled a further shift in tort theory, strengthening the deterrence and compensation policies of tort law with the expansion of tort liability.[136] The scope of liability broadened with the abolition of immunities for charities and government.[137] Comparative negligence replaced the contributory negligence; the latter had barred recovery for plaintiffs bearing any responsibility

127. 162 N.E. 99 (N.Y. 1928).
128. *See* WHITE, *supra* note 94, at 101.
129. *Palsgraf*, 162 N.E. at 99.
130. *Id.*
131. *Id.*
132. *Id.* at 100.
133. *Id.* at 102-03 (Andrews, J., dissenting).
134. WHITE, *supra* note 94, at 101.
135. *See supra* Part II.A.
136. Schwartz, *supra* note 123, at 601.
137. *Id.* at 605-06.

for the negligence, while the new doctrine merely apportioned liability, allowing plaintiffs some recovery.[138] The National Traffic and Motor Vehicle Safety Act of 1966[139] was a response to the realization that the most effective way to address highway safety and decrease injuries and deaths was through better product design.[140] The 1972 Consumer Product and Safety Act[141] placed a new emphasis on protecting consumers and deterring poor manufacturing practices.[142] The policymakers of the era therefore emphasized and promoted the deterrence function of tort doctrine.

From the late 20th century to the present, the trend of expanding liability has slowed, largely as a result of lobbying by corporations concerned about the skyrocketing cost of liability.[143] There have been a couple of notable exceptions, one in the area of medical malpractice: the loss of chance doctrine allows patients to recover in instances where doctors negligently diagnose their conditions, even if their pre-diagnosis chances of recovery were less than 50%.[144] There was also an increase in the ability of crime victims to sue landlords, public agents, and agencies for negligence.[145] However, expansion of liability has been largely curtailed as a result of the legislative movement towards tort reform.[146] This type of tort reform focuses on reforming punitive damages and pain and suffering damages, and on revising rules for joint and several liability.[147] Even so, the principles of deterrence and compensation remain alive and well hundreds of years after their development.

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138. *See id.* at 606.
139. National Traffic and Motor Vehicle Safety Act of 1966, Pub. L. No. 89-563, 80 Stat. 718 (1966).
140. *See* Schwartz, *supra* note 123, at 612-13.
141. Consumer Product Safety Act of 1972, Pub. L. No. 92-573, 86 Stat. 1207 (1972).
142. *See* Schwartz, *supra* note 123, at 612-13.
143. *Id.* at 691.
144. Lars Noah, *An Inventory of Mathematical Blunders in Applying the Loss-of-Chance Doctrine*, 24 REV. LITIG. 369, 370-72 (2005).
145. *See* Schwartz, *supra* note 123, at 649-50.
146. *Id.* at 681.
147. *Id.*

### C. Countervailing Interests of Immigration Law and Tort Law

When comparing the underlying purposes of immigration law and tort law, it is notable from the historical development of each area of law that each serves a separate and distinct function in our society.[148] Moreover, these functions lead in two very different directions. Immigration legislation, often influenced by the prevailing political winds, serves to appease the masses by excluding the powerless, whereas tort law serves to protect the masses by holding negligent companies and people accountable for their actions, and by allowing the injured to be compensated for the injuries they have suffered.[149] Because each area of law serves a distinct and arguably useful[150] function, the question then becomes whether or not awarding lost wages to undocumented immigrants in personal injury actions serves the policies of each area of law. Despite what may seem like countervailing interests, the policies of both tort law and immigration law are best served by awarding lost wages to undocumented immigrants in personal injury actions based on American wage rates.

## III. BASING LOST WAGE AWARDS ON AMERICAN WAGE RATES

### A. The Country-Wide Inconsistencies

In awarding lost wages to undocumented immigrants in personal injury actions, courts across the country take four general routes. First, courts allow lost wages to be based on American wage rates.[151] Second, courts limit the award of lost

148. *See supra* Part I.

149. *Id.*

150. In implementing the term "useful" by no means is it my intent to support the current state of immigration law. It is likely that there are those who would disagree that tort law as it stands today serves any useful purpose. However, the purpose of this Note is to address the viability and utility of awarding lost wages in personal injury actions of undocumented immigrants only.

151. *See* Hernandez v. M/V Rajaan, 848 F.2d 498, 500 (5th Cir. 1988) (affirming award of future lost wages); Barros v. E.W. Bliss Co., Civ. A. No. 91-126330Z, 1993 WL 99930, at *2 (D. Mass. 1993); Hagl v. Stern, 396 F. Supp. 779, 779 (E.D. Pa. 1975); Balbuena v. IDR Realty LLC, 845 N.E.2d 1246, 1260 (N.Y. 2006); Majlinger v. Cassino Contracting Corp., 802 N.Y.S.2d 56, 70 (App. Div. 2d Dep't 2005), *aff'd sub nom.* Balbuena v. IDR Realty LLC,

wages to wages immigrants would earn in their country of origin.[152] Third, courts elect not to award any lost wages whatsoever for undocumented immigrants.[153] Finally, courts give juries[154] the opportunity to award wages based on either American wage rates or country of origin wage rates.[155] The inconsistencies in lost wage awards arise as a result of some courts emphasizing policies underlying immigration law[156] while other courts emphasize policies underlying tort law.[157] These

845 N.E.2d 1246 (2006); Collins v. N.Y. City Health and Hosp. Corp., 607 N.Y.S.2d 387, 388 (App. Div. 2d Dep't 1994); Klapa v. O&Y Liberty Plaza Co., 645 N.Y.S.2d 281, 282 (Sup. 1996) (pertaining to future lost wages); Tyson Foods, Inc. v. Guzman, 116 S.W. 3d 233, 247 (Tex. App. 2003); Peterson v. Neme, 281 S.E.2d 869, 874 (Va. 1981).

152. *See* Hernandez-Cortez v. Hernandez, No. Civ. A. 01-1241-JTM, 2003 WL 22519678, at *7 (D. Kan. 2003) (pertaining to future lost wages); Sanango v. 200 East 16th St. Housing Corp., 788 N.Y.S.2d 314, 316-19 (App. Div. 1st Dep't 2004); Jallow v. Kew Gardens Hills Apartments Owners, No. 28907/2003, 2005 WL 1712206, at *2 (N.Y. Sup. Ct. 2005) (pertaining to both past and future lost wages).

153. *See* Veliz v. Rental Serv. Corp. USA, Inc., 313 F. Supp. 2d 1317, 1334 (D. Fla. 2003).

154. In these cases, juries are allowed to weigh evidence of immigration status. For an analysis of evidentiary issues relating to immigration status, *see* Benny Agosto, Jr. and Jason B. Ostrom, *Can the Injured Migrant Worker's Alien Status Be Introduced at Trial?*, 30 T. MARSHALL L. REV. 383 (2005) (examining how evidence of immigration status is used in American courts and ways to safeguard against admissibility of status).

155. *See* Madeira v. Affordable Housing Found., Inc., 315 F. Supp. 2d 504, 507 (S.D.N.Y. 2004) (conceding that immigration status was relevant to determining lost wages but holding that the jury's award based on U.S. wages should stand); Mischalski v. Ford Motor Co., 935 F. Supp 203, 207 (E.D.N.Y. 1996) (holding that while immigration status could not be considered to calculate damages, it could be used in calculating lost wages); Rodriguez v. Kline, 232 Cal.Rptr. 157, 158 (Cal. App. 2d Dist. 1986) (discussing that it is for the court to decide whether or not lost wages shall be calculated based on U.S. rates or limited to country of citizenship); Melendres v. Soales, 306 N.W.2d 399, 402 (Mich. Ct. App. 1981) (allowing jury to consider immigration status in calculating lost wages); Rosa v. Partners in Progress, Inc., 868 A.2d 994 (N.H. 2005); Oro v. 23 East 79th St. Corp., 810 N.Y.S.2d 779, 781 (Sup. App. Term 2005) (holding that immigration status could be considered in awarding lost wages); Echeverria v. Lindner, No. 018666/2002, 2005 WL 1083704, at *12 (N.Y. Sup. Ct. 2005) (allowing immigration status to be considered in determining future lost wages).

156. *See, e.g., Veliz*, 313 F. Supp. 2d at 1335; *Hernandez-Cortez*, 2003 WL 22519678, at *6.

157. *See, e.g., Madeira*, 315 F. Supp. 2d at 507; Martinez v. Fox Valley Bus Lines, Inc., 17 F. Supp. 576, 577 (N.D. Ill. 1936); *Rosa*, 868 A.2d at 1000; *Majlinger* 802 N.Y.S.2d at 65.

inconsistencies reveal the tensions the courts face in both considering fairness to the injured and honoring the purposes of immigration law and tort law. To compound the problem, the Supreme Court has *never* addressed the issue of awarding lost wages in personal injury actions of undocumented immigrants; thus, the states are left to fend for themselves.[158]

In considering awards of lost wages for undocumented immigrants in personal injury actions, a tri-focal pattern evolves: first, because there is no Supreme Court decision with respect to lost wages in personal injury actions, proponents rely on *Hoffman* as applicable to personal injury actions.[159] Second, the courts focus on preemption of state tort law by federal immigration policy.[160] Finally, the courts emphasize the policy arguments for and against both tort law and immigration law.[161] However, a closer examination of cases across the United States will show that awarding "American" lost wages to undocumented immigrants promotes the policies behind both immigration law and tort law despite their countervailing interests.

B. The Role of Hoffman Plastics in Tort Actions

Although there is no Supreme Court decision on awarding lost wages to undocumented immigrants in personal injury actions, *Hoffman Plastic Compounds, Inc. v. NLRB*[162] and its predecessor *Sure-Tan v. NLRB*[163] are often cited as a bar to such awards.[164]

158. However, the Supreme Court has addressed the issue of awarding lost wages to undocumented immigrants who were fired by their employers for participating in unions. The Court has held that awarding lost wages would be counter to federal immigration policy. Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137, 137 (2002); Sure-Tan v. NLRB, 467 U.S. 883, 891 (1984). While advocates of prohibiting lost wage awards argued that *Hoffman* and *Sure-Tan* apply to personal injury actions, the courts have overwhelmingly rejected the argument. *See Rosa*, 868 A. 2d at 1000; Tyson Foods, Inc. v. Guzman, 116 S.W. 3d 233, 244 (Tex. 2003). *Hoffman* and *Sure-Tan* are discussed further *infra* Part III.C. For a further look at how lost wage awards for undocumented immigrants are treated in various areas of law after *Sure-Tan*, see Timothy M. Cox, *A Call To Revisit* Sure-Tan v. NLRB*: Undocumented Workers and Their Right to Back Pay*, 30 SW. U. L. REV. 505 (2001).

159. *See supra* Part III.B.

160. *See supra* Part III.C.

161. *See supra* Part III.D.

162. 535 U.S. at 137.

163. 467 U.S. at 883.

In the *Hoffman* case, Jose Castro, who was not legally authorized to work in the United States, was laid off from his employment with Hoffman Plastic Compounds as a result of his participation in a union organizing campaign.[165] Castro filed a complaint with the National Labor Relations Board (NLRB) arguing that the layoff violated the National Labor Relations Act.[166] The NLRB agreed with Castro and ordered back pay from the date of termination to the date the employer discovered Castro was unable to work.[167] Hoffman Plastic Compounds petitioned for review, arguing that IRCA, which made it unlawful to both employ undocumented immigrants and to use fraudulent documents to gain employment as an undocumented immigrant, precluded the NLRB from awarding back pay.[168] The Supreme Court agreed with the petitioner and held that "federal immigration policy, as expressed by Congress in IRCA, foreclosed the Board from awarding back pay to an undocumented alien who has never been legally authorized to work in the United States."[169] The Court reasoned that in enacting IRCA, Congress had implemented a comprehensive scheme to deter the employment of undocumented immigrants, and that allowing a back pay award in a labor dispute violated specific prohibitions of federal immigration law.[170]

While there have been numerous attempts to apply *Hoffman* in personal injury cases,[171] such application poses several

164. *See* Madeira v. Affordable Housing Found., Inc., 315 F. Supp. 2d 504, 507 (S.D.N.Y. 2004); Hernandez-Cortez v. Hernandez, No. Civ. A. 01-1241-JTM, 2003 WL 22519678, at *6 (D. Kan. 2003); Majlinger v. Cassino Contracting Corp., 802 N.Y.S.2d 56, 60 (App. Div. 2d Dep't 2005); Tyson Foods, Inc. v. Guzman, 116 S.W.3d 233, 243 (Tex. 2003).

165. *Hoffman*, 535 U.S. at 137.

166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.* at 138.

171. *See* Hernandez-Cortez v. Hernandez, No. Civ. A. 01-1241-JTM, 2003 WL 22519678, at *1 (D. Kan. 2003); Uribe v. Aviles, No. B166839, 2004 WL 2385135, at *1 (Cal. App. 2d Dist. 2004); Balbuena v. IDR Realty LLC, 845 N.E.2d 1246, 1260 (N.Y. 2006); Majlinger v. Cassino Contracting Corp., 802 N.Y.S.2d 56, 58 (App. Div. 2d Dep't 2005); Sanango v. 200 East 16th St. Housing Corp., 788 N.Y.S.2d 314, 316 (App. Div. 1st Dep't 2004); Jallow v. Kew Gardens Hills Apartments Owners, No. 28907/2003, 2005 WL 1712206, at *2 (N.Y. Sup. Ct. 2005); Gonzalez v. Franklin, 383 N.W.2d 907, 909 (Wis.

problems due to the limited holding of *Hoffman*. The *Hoffman* court's decision involved resolving an apparent conflict between two federal statutes, IRCA and the National Labor Relations Act ("NLRA").[172] In contrast, tort actions are generally governed by state statutory regulation. Further, a prevailing issue in *Hoffman* was the conflict between IRCA's purpose of deterring employment of undocumented workers and awarding lost wages as a result of employer violations of NLRA.[173] Federal labor law governs employer/employee relationships. The same cannot be said, however, for cases that arise under tort law. Tort law does not regulate employer/employee relationships but governs negligent behavior by negligent parties regardless of whether such a party is an employer, a friend, or a stranger. Many personal injury cases arise as a result of car accidents,[174] medical malpractice,[175] fireworks injuries,[176] slips and falls,[177] and subcontractor work,[178] to name a few. Furthermore, while the undocumented immigrants in *Hoffman* were unnecessarily terminated from their employment, they did not suffer any physical injuries that prevented them from working or living their daily lives.[179] In contrast, when undocumented immigrants seek lost wages under tort law, they suffer physical, sometimes permanent injuries. *Hoffman*, which resolved a labor law conflict, is thus inapplicable in personal injury cases, and this view is supported by courts across the country.

Courts across the United States overwhelmingly reject application of *Hoffman* to tort actions of undocumented immigrants. While the court in a New York case, *Madeira v.*

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1986).

172. *Hoffman*, 535 U.S. at 137-41.

173. *Id.* at 137-39.

174. *Hernandez-Cortez*, 2003 WL 22519678, at *1; *Uribe* 2004 WL 2385135, at *1; *Rodriguez*, 232 Cal. Rptr. at 157.

175. Collins v. N.Y. City Health and Hosp. Corp., 607 N.Y.S.2d 387, 388 (App. Div. 2d Dep't 1994).

176. *Gonzalez*, 383 N.W.2d at 909.

177. Wal-Mart Stores, Inc. v. Cordova, 856 S.W.2d 768, 769 (Tex. 1993).

178. Madeira v. Affordable Housing Found., Inc., 315 F. Supp. 2d 504, 505 (S.D.N.Y. 2004); Hagl v. Stern, 396 F. Supp. 779, 781 (E.D. Pa. 1975); Majlinger v. Cassino Contracting Corp., 802 N.Y.S.2d 56, 58 (App. Div. 2d Dep't 2005); Cano v. Mallory Mgmt., 760 N.Y.S.2d 816, 817 (Sup. 2003).

179. *See* Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137, 137 (2002).

*Affordable Housing Foundation, Inc.*, found that the plaintiff's immigration status was relevant to determining the nature and extent of the lost wage award, the court explicitly rejected the defendant's argument that, pursuant to the decision in *Hoffman*, an award of lost wages would be in contravention of IRCA.[180] Beside the fact that the case was based on diversity jurisdiction, an award of lost wages to an undocumented immigrant in a personal injury action based on state common law does not offend the holding of *Hoffman*, the court held, because *Hoffman* does not bar undocumented immigrants from utilizing state courts to seek compensation for a defendant's tortious conduct.[181] The *Majlinger* court dismissed *Hoffman* along the same lines, arguing that to read *Hoffman* as extending to personal injury actions would expand *Hoffman*'s limited holding.[182] In *Tyson Foods Inc., v. Guzman*, the Texas Appellate Court also rejected application of *Hoffman* in personal injury actions.[183] While the defendant argued that *Hoffman* precluded awarding undocumented immigrants lost wages, the court's analysis of *Hoffman* limited its scope.[184] The *Tyson* case involved a common law personal injury claim, whereas *Hoffman* involved an employer's violation of labor laws.[185] Thus, the lower court's award of past and future lost wages was upheld as to Mr. Guzman, who was injured when hit by a forklift as he rounded up chickens.[186] Overall, the courts go to great lengths to distinguish between the *Hoffman* line of cases, which involved labor policy considerations, and personal injury cases, which involve disputes between two private citizens as a result of tortious conduct.[187]

Even where a court applied *Hoffman* to a personal injury case, this application was limited in scope.[188] In *Hernandez-*

180. *Madeira*, 315 F. Supp. 2d at 506-07.
181. *Id.* at 507.
182. *Majlinger*, 802 N.Y.S.2d at 62.
183. Tyson Foods, Inc. v. Guzman, 116 S.W.3d 233, 243-44 (Tex. 2003).
184. *Id.* at 244.
185. *Id.*
186. *Id.* at 237-47.
187. Hernandez v. M/V Rajaan, 848 F.2d 498, 500 (5th Cir. 1988).
188. *See* Hernandez-Cortez v. Hernandez, No. Civ. A. 01-1241-JTM , 2003 WL 22519678, at *6 (D. Kan. 2003). Plaintiff who was injured in a motor vehicle accident sought an award of past and future lost wages and defendant argued that *Hoffman* precluded plaintiff from being awarded U.S. wages

*Cortez*, the only personal injury case to use *Hoffman*, the plaintiffs were injured in a car accident while being illegally transported from Mexico to North Carolina.[189] The plaintiffs sought past and future lost wages based on projected earnings rather than on actual earnings.[190] The court agreed with the plaintiffs' contention that *Hoffman* did not preclude the ability of undocumented immigrants to recover wages for work actually performed.[191] However, the court distinguished the instant case from other personal injury cases which rejected the application of *Hoffman*, because in the instant case there were no wages earned and no actual work performed.[192] The court was unwilling to award lost wages based on an entirely imaginary figure.[193] The court relied heavily on the fact that the undocumented immigrants in this case did not work at all in the United States.[194] Application of *Hoffman* in this particular case did not, therefore, support any arguments that *Hoffman* should be applied generally in other personal injury actions because *Hernandez-Cortez* is so easily distinguished. Personal injury cases rejecting *Hoffman* have all involved injured parties who sought lost wage awards based on actual work in the United States,[195] unlike the instant case.

C. State Tort Law and the Preemption Argument

1. Preemption Basics

Courts which bar lost wage awards often rely on federal immigration legislation which allegedly preempts such awards. Deterring the employment of undocumented immigrants in the United States is a focal point of federal immigration law.[196] Specifically, 8 U.S.C. § 1324a[197] bars the employment of

because he was not able to work legally in the United States; the court still allowed the plaintiff to claim lost wages based on earnings in Mexico. *Id.*

189. *Id.* at *1.
190. *Id.*
191. *Id.* at *6.
192. *Id.*
193. *Id.*
194. *See id.* at *3-*6.
195. *See supra* Part III.B.
196. *See* 8 U.S.C. § 1324a (2006).
197. *Id.*

undocumented immigrants,[198] provides mechanisms by which an employer is to examine the appropriate documentation of employees,[199] and includes penalties for employers who fail to abide by the statutory provisions.[200] The argument that develops in cases wherein undocumented immigrants seek lost wage awards for their personal injuries is that the "wages" earned in the past, or those that could be earned in the future, are a result of illegal employment in the United States.[201] Because immigration law seeks to deter employment of undocumented immigrants, courts have argued that federal immigration policy preempts any lost wage award based on illegal employment.[202]

Under the Supremacy Clause, Congress is empowered to preempt state law.[203] Preemption arises in one of three ways. First, state law may be preempted by explicit statutory language, known as express preemption.[204] Second, "[i]n the absence of explicit statutory language signaling an intent to preempt, a court may infer such intent where Congress has legislated comprehensively to occupy an entire field of regulation."[205] This type of preemption is known as field preemption. Third, federal law preempts a state law that stands as an obstacle to the purposes of the federal law, a type of preemption known as conflict preemption.[206] Thus, unless a state statute is expressly preempted, field preempted, or conflict preempted, it will survive the Supremacy Clause. In the case of awarding lost wages to undocumented immigrants in personal injury actions, such awards survive all three prongs of the analysis.

2. Express Preemption

There is little contention as to whether or not a lost wage award to documented immigrants in personal injury actions is

198. *Id.* § 1324a(a)(1)(A) & (B).
199. *Id.* § 1324a(b).
200. *Id.* § 1324a(e)(4).
201. Balbuena v. IDR Realty LLC, 845 N.E.2d 1246, 1250 (N.Y. 2006).
202. *Id.* at 1254.
203. U.S. CONST. art. VI, § 2.
204. P.G. & E. v. State Energy Res. Conservation & Dev. Comm'n, 461 U.S. 190, 203 (1983).
205. Northwest Cent. Pipeline Corp. v. State Corp. Comm'n. of Kansas, 489 U.S. 493, 509 (1989).
206. Geier v. Am. Honda Motor Co., 529 U.S. 861, 873 (2000).

expressly preempted by federal immigration policy, particularly IRCA. Federal immigration statutes only preempt "any State or local law imposing civil or criminal sanctions upon those who employ"[207] undocumented immigrants. Congress thus limited express preemption to sanctions against employers, not employees. For example, in summarily rejecting the express preemption argument, the *Majlinger* court reasoned that in enacting IRCA, Congress gave no indication nor did it provide that undocumented immigrants would be barred from their ability to sue in state courts for personal injuries or barred from the right to recover lost wages.[208] What Congress did choose to do was to implement *employer* sanctions.[209]

3. Field Preemption

While the federal government has the exclusive authority to regulate immigration,[210] this authority cannot be construed to give the federal government exclusive authority to regulate immigration through tort law. The premise on which field preemption arguments are based is that field preemption prohibits an award of lost wages because the federal government has exclusive authority to regulate immigration, and this power was exercised by Congress in its enactment of INA and IRCA.[211] While this may be true, such an argument fails to consider that lost wage awards in personal injury actions are based on state tort law which is not a regulatory "arm" or extension for immigration policy. Any lost wage awards that result from a personal injury action are a result of tort policy, not immigration policy. Take, for example, the case of Gorgonio Balbuena, a native of Mexico, who suffered severe head trauma after falling from a ramp while pushing a wheelbarrow, then sought redress under common law negligence and labor law theories.[212] The court quickly dismissed the defense's field preemption argument, noting that while IRCA occupied the spectrum of immigration law, the state law in this

207. 8 U.S.C. § 1324a(h)(2) (2006).
208. Majlinger v. Cassino Contracting Corp., 802 N.Y.S.2d 56, 62 (App. Div. 2d Dep't 2005).
209. *Id.* at 68.
210. *See supra* Part II.A.
211. Balbuena v. IDR Realty LLC, 845 N.E.2d 1246, 1250 (N.Y. 2006).
212. *Id.*

case occupied regulation of health and safety.[213] In fact, the federal government does not occupy the field of common-law torts, which is traditionally an area of state control.[214] Thus, an award of lost wages in personal injury actions does not fall within the scope of field preemption.

4. Conflict Preemption

Awarding lost wages to undocumented immigrants under state tort law is not an obstacle to Congress' objectives in implementing IRCA or federal immigration policy in general.[215] The manner in which Congress intended to combat illegal immigration via adoption of IRCA and other immigration statutes supports the notion that such awards are not counter to federal immigration law.[216] As previously discussed, federal immigration law, including IRCA, places a burden on employers only.[217] It was never the intent of Congress to place immigrants, documented or undocumented, in a position of undue hardship or suffering.[218] Historically, Congress chose not to punish undocumented immigrants by making "their contracts void and thus unjustifiably enriching employers of such alien laborers."[219] To the contrary, while Congress could very well implement legislation penalizing undocumented immigrants for accepting jobs or preventing undocumented immigrants from collecting lost wages, Congress has chosen not to do so.[220]

In addition, occupational health and safety falls under the broad police power of states, and barring access to lost wage claims by injured undocumented workers decreases employer incentives to abide by the state's labor laws.[221] Rejection of the conflict preemption argument by the courts is even more understandable in light of the fact that IRCA's legislative history expressly indicates that there was no intent "to undermine or

213. *Id.* at 1256.
214. *Majlinger*, 802 N.Y.S.2d at 62.
215. *See id.* at 66.
216. *Id.* at 62.
217. *See supra* Part II.A.
218. *Id.*
219. *Majlinger*, 802 N.Y.S.2d at 62 (citing Gates v. Rivers Constr. Co., 515 P.2d 1020, 1023 (Alaska 1973)).
220. *Id.*
221. Balbuena v. IDR Realty LLC, 845 N.E.2d 1246, 1257 (N.Y. 2006).

diminish in any way labor protections in existing law."[222] Furthermore, awarding lost wages in tort actions is complementary rather than contradictory to immigration policy because it makes the employment of undocumented immigrants less attractive to "unscrupulous employers."[223] "Only by equalizing defendants' potential liability for injuries to authorized and unauthorized workers can the objectives underlying both federal immigration law and this State's tort law and workplace safety statutes be realized."[224]

D. Policy Battle: Immigration vs. Tort Law

1. Where to Draw the Line

If *Hoffman* is inapplicable to personal injury cases because of its limited scope and state tort law is not preempted by federal immigration law, then there should be no problem with awarding American rate lost wages to undocumented immigrants in personal injury actions. Furthermore, in addition to legal arguments that support awarding American lost wages to undocumented immigrants, policy factors support the theory. Underlying the majority of court decisions in such personal injury cases is the struggle to balance the countervailing interests in tort law and immigration law. Historically, tort law serves the function of compensating injured parties and deterring negligent behavior.[225] Immigration law serves to control the flow of immigration into the United States. Strict enforcement of tort law principles will promote the policies behind both tort law and immigration law.[226]

2. Enforcement of Tort Policies

Juliet Neme was struck by a car while crossing the street.[227] Mr. Rosa was severely injured when an aerial lift tipped over and fell on him while he was working.[228] Mr. Hagl's employer was

222. H.R. Rep. No. 99-682(I), at 58 (1986).
223. *Balbuena*, 845 N.E.2d at 1266.
224. *Majlinger*, 802 N.Y.S.2d at 70.
225. *See supra* Part II.B.
226. *See supra* Part III.D.
227. Peterson v. Neme, 281 S.E.2d 869, 870 (Va. 1981).
228. Rosa v. Partners in Progress, Inc., 868 A.2d 994, 996 (N.H. 2005).

hired by a factory to do some welding work and, because of the factory's negligence, Mr. Hagl fell into an open grease pit.[229] Mr. Melendres was enjoying an employee picnic when he decided to join in the fun of diving into a lake from the dock.[230] The facility owners had not posted any signs barring diving or jumping into the lake.[231] Other people at the picnic had been diving into the lake.[232] Unfortunately, unlike the others, Mr. Melendres's last dive into murky waters of the lake left him paralyzed.[233] All of these people have several things in common: they are all undocumented immigrants working in the United States, they were all seriously injured and, most importantly, they all lost wages as a result of their injuries.[234] Under tort principles, the losses these injured parties bore, including lost wages, should be redressed.[235] However, barring or decreasing recovery to the injured if they are undocumented immigrants places the emphasis on immigration control and not the principles of tort law.

In upholding an undocumented immigrant's right to lost wage awards based on American rates of pay, courts should emphasize the compensatory function of tort law. Someone who is injured as a result of another party's negligence has a right to recover damages for his injury.[236] The right to recover lost wages is not limited to Americans but is a right that runs to immigrants regardless of whether or not they are appropriately documented.[237] What is important is not the injured party's immigration status, but redressing a wrong that has occurred.[238]

Deterrence should also be a primary consideration in awarding lost wages to undocumented immigrants. Even courts that express some disfavor with the policy of awarding "American" lost wages come to the conclusion that doing so is important for the deterrence function of tort law. When Mr. Rosa filed a

229. Hagl v. Stern, 396 F. Supp. 779, 779 (E.D. Pa. 1975).
230. Melendres v. Soales, 306 N.W.2d 399, 401 (Mich. Ct. App. 1981).
231. *Id.*
232. *Id.*
233. *Id.*
234. *See supra* notes 174-178.
235. *See supra* Part II.B.
236. Martinez v. Fox Valley Bus Lines, Inc., 17 F. Supp. 576, 577 (N.D. Ill. 1936).
237. *Id.*
238. *Id.*

negligence claim against various defendants as a result of injuries he sustained when an aerial lift tipped over and fell on him, he sought damages which included a claim for lost wages at United States wage rates.[239] The Superior Court of New Hampshire transferred questions to the Supreme Court of New Hampshire all surrounding the issue of whether or not the defendant was entitled to lost wages.[240] The Supreme Court acknowledged the strong policies against awarding lost wages at U.S. rates in light of the policies underlying federal immigration law.[241] However, in the same instance, the court recognized that the deterrence principles of tort doctrine are in and of themselves an important enough policy to allow lost wage awards against employers who "knew or should have known" of the worker's status.[242] The court found the fact that tort liability acts as a deterrent to reduce the risk of injuries to be compelling.[243] As Justice Dalianis so eloquently put it:

> To refuse to allow recovery against a person responsible . . . would provide an incentive for such persons to target illegal aliens for employment in the most dangerous jobs or to provide illegal aliens with substandard working conditions. It would allow such persons to treat illegal aliens as disposable commodities who may be replaced the moment they are damaged. Such a result is incompatible with tort deterrence principles.[244]

Thus, the deterrence function of tort law has been a primary consideration when the courts undertake to allow lost wage awards in the personal injury actions of undocumented immigrants.

3. Immigration Policy in Tort Decisions

Even as they promote tort policy, lost wages awards also serve the secondary role of furthering federal immigration policy. Holding a defendant liable for lost wages regardless of the

239. Rosa v. Partners in Progress, Inc., 868 A.2d 994, 996 (N.H. 2005).
240. *Id.*
241. *Id.* at 1000.
242. *Id.*
243. *See id.*
244. *Id.*

plaintiff's immigrant status is compatible with and promotes the IRCA's policy of deterring employment of undocumented immigrants.[245] Preventing undocumented immigrants from access to all remedies would not promote federal immigration policy, but would create incentives for employers to hire undocumented immigrants, "secure in the knowledge that such employees would have no recourse in pursuing proper wages. . ." for their injuries.[246] By holding a negligent party as accountable to an undocumented immigrant as that party would be to an American employee, courts can reduce the incentive to hire undocumented workers.[247] Enforcement of tort law thus not only supports the deterrence and compensation principles of tort law, but also enforces deterrence of the hiring of undocumented immigrants—the actual purpose of IRCA.[248]

In addition to serving as a deterrent to the hiring of undocumented immigrants, awarding lost wages in tort actions serves federal immigration policy by keeping the burden on employers, thus comporting with the intent of IRCA.[249] Under IRCA, the emphasis is not on the duty of employees but on the affirmative duty of employers to make sure that employees are properly authorized to work in the United States.[250] The intent of IRCA was to hold employers accountable for unauthorized employment; in fact, sanctions under IRCA are against employers, not undocumented immigrants.[251] Employers could avoid liability issues by not hiring undocumented immigrants.[252] As opposed to frustrating the policy objectives of IRCA, awarding lost wages supports these policies.[253]

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245. Majlinger v. Cassino Contracting Corp., 802 N.Y.S.2d 56, 58 (App. Div. 2d Dep't 2005).
246. *Id.* at 66.
247. *Id.*
248. *See id.*
249. *See supra* Part II.A.
250. Rosa v. Partners in Progress, Inc., 868 A.2d 994, 1001 (N.H. 2005) (*citing* Zamora v. Elite Logistics, Inc., 316 F. Supp. 2d 1107, 1119 (D. Kan. 2004)).
251. *Majlinger*, 802 N.Y.S.2d at 68.
252. *Rosa*, 868 A.2d at 1000.
253. *See id.*

## IV. CONCLUSION

Injured plaintiffs who are deprived of their ability to work because of their injuries should be able to avail themselves of all tort remedies, including lost wage awards, regardless of their immigration status. Not only should undocumented immigrants be allowed to collect lost wage awards in tort actions, those awards must be based on American wage rates. Regardless of immigration status, undocumented immigrants who seek lost wage awards have, with limited exceptions, worked in the United States. As a result of injuries sustained due to another's negligence, they are prevented from continuing to work to their previous capacity. Tort law is about compensating the injured. When a plaintiff seeks a lost wage award, he is merely seeking to be compensated for his loss. Immigration status has absolutely nothing to do with the loss suffered. If an immigrant was earning an American wage before his injury, his compensation should be that same American wage.

Tort law also serves as a deterrent to future negligence. This deterrent effect in and of itself is an important reason to award American lost wages to undocumented immigrants. We send a dangerous message when we punish the injured and not the tortfeasor by limiting or rejecting their ability to collect lost wage awards. Not only are we sending the message that undocumented immigrants are a disposable commodity but we are also conveying the message that unsafe work conditions, unsafe products, poor driving skills, and other negligent behaviors are completely acceptable. To diminish the ability of undocumented immigrants to collect American lost wages is to eliminate the deterrence function of tort law.

Finally, awarding American lost wages to undocumented immigrants in personal injury actions keeps immigration as a secondary issue, which is where it should be in tort decisions. Basing tort law decisions on immigration policy is nothing less than dangerous. Such decisions diminish the efficacy of tort law. More importantly, decisions that focus on immigration policy remove the burden of setting immigration policy from its rightful owners, the legislature and the federal government. If, in fact, there is an immigration "problem," it is the legislature's job to fix it. "[E]nforcement of immigration laws is the role of the

Immigration and Naturalization Service. . ."[254] not the courts that are sought out by plaintiffs to remedy their injuries.

While immigration policy should take a back seat in tort law decisions, awarding American wages to undocumented immigrants in personal injury actions actually promotes principles of immigration law, diminishing the strength of any arguments to the contrary. A broad range of immigration legislation focuses on employers.[255] In implementing IRCA, Congress emphasized that employer sanctions were the most appropriate way to deal with the issue of undocumented immigration, which is largely a function of economic necessity.[256] Failing to award American lost wages in personal injury actions thus diminishes the deterrence function of employer sanctions imposed by immigration legislation further compounding the immigration "problem." Employers have no reason to discontinue illegal hiring practices if those practices result in economic benefit to employers.

Perhaps the best way to enforce access to lost wages and other remedies in tort actions is for the states to implement legislation protecting the rights of immigrants in tort actions. Presently, California is the only state that legislates that all people, regardless of immigration status, have access to all "protections, rights and remedies available under state law."[257] This type of legislation protects immigrants and allows tort law to function as it was intended. Further, this type of legislation sends a message that may not have much to do with the law but says a great deal about our nation and its policies; that the injured should be treated fairly and with dignity regardless of who they are or where they come from. In the words of President Franklin D. Roosevelt, "remember, remember always that all of us, and you and I especially, are descended from immigrants and revolutionists."[258]

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254. Cano v. Mallory Mgmt., 760 N.Y.S.2d 816, 818 (Sup. 2003). The Immigration and Naturalization Service no longer exists and enforcement of federal immigration laws is the responsibility of the Department of Homeland Security.

255. *See supra* Part II.A.

256. *Id.*

257. CAL. CIV. CODE § 3339(a) (2006).

258. FRANKLIN D. ROOSEVELT, REMARKS BEFORE THE DAUGHTERS OF THE AMERICAN REVOLUTION, WASHINGTON, D.C., APRIL 21, 1938, published in THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT, 259 (1941).

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