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Whose Job is it Anyway: How the Statutory and Regulatory Scheme Prohibiting Employers from Hiring Undocumented Workers Falls Short of Achieving its Intended Purpose *

I. INTRODUCTION

Illegal immigration and jobs are and have been hot-button issues in American politics for quite some time. The further politicization of immigration policies and immigrants themselves in the 2016 presidential election cycle only exacerbated the prescience of America's illegal immigration woes. Inflammatory rhetoric suggesting that illegal immigrants are "stealing" jobs from American citizens permeated the political landscape in 2016. Rhetoric, which, at the same time, gives little credence to the fact that some American companies and industries actively lure immigrant workers as a source of cheap labor, which, in turn, allows those companies to offer their goods and services to American consumers at lower prices.

Against that backdrop, it seems unsurprising that commentators view the federal statutory and regulatory scheme designed to punish employers for hiring undocumented workers as an abject failure because that system is too lenient on employers that knowingly engage in such hiring practices. Ironically, the state of affairs concerning this area of federal law has the same adverse effects on immigrant populations as the Trump administration's spate of migrant border detentions. Undocumented immigrants are detained or deported, resulting in the

* This work is the product of skills and experiences made possible by my family and friends that have always supported and believed in me. Your patience, persistence, and guidance does not go unnoticed and is greatly appreciated. Special thanks to Professor Oren Griffin for his invaluable instruction and taking the time to work with me on this project.

separation of migrant families, which places a significant strain on the United States judicial system and other public infrastructure to determine the best way to deal with the children of those deported and detained immigrants. Some of whom are American citizens.

This Comment begins with a review of situations in the news where employers involved in the employment of undocumented workers realized minimal or non-existent penalties for doing so. In contrast, the undocumented workers, on the other hand, are exposed to felony prosecutions and deportation.

From there, this Comment goes on to introduce and discuss the legislative history and purpose of the Immigration Reform and Control Act (“IRCA”),¹ the enactment of which introduced Title 8 U.S.C. § 1324a,² the federal statute prohibiting employers from engaging in the employment of undocumented workers.

Next, this Comment delves into the substance and structure of 8 U.S.C. § 1324a, including the statute’s prohibitions, exceptions, requirements, enforcement mechanisms, and penalties. After that, there is a discussion concerning how and why 8 U.S.C. § 1324a falls short of achieving the statute’s intended purpose and fosters conditions that promote a culture war among minority blue-collar workers.

The Comment then closes with the writer’s assessments concerning a way forward under 8 U.S.C. § 1324a that makes sense for the American people and moves the statute closer to achieving its intended purpose.

A. *The Illegal Immigration “Problem”*

There were 10.5 million unauthorized immigrants in the United States in 2017, 7.6 million of which participated in the U.S. civilian workforce.³ According to the Brookings Institute, in 2016, the majority of unauthorized immigrants, 62%, were in the United States because they overstayed their visas, compared to 38% who crossed the border illegally.⁴

Commentators believe illegal immigration is problematic for a host of reasons. Some think that illegal immigrants cause harm to Americans

¹ Pub. L. No. 99-603, 100 Stat. 3359 (1986).

² 8 U.S.C. § 1324a (2020).

³ Jens Krogstad, Jeffrey Passel, and D’vera Cohn, *Five Facts About Illegal Immigration in the U.S.*, PEW RESEARCH CENTER (June 12, 2019), <https://www.pewresearch.org/fact-tank/2019/06/12/5-facts-about-illegal-immigration-in-the-u-s/>.

⁴ Elaine Kamarck and Christine Stenglein, *How Many Undocumented Immigrants are in the United States and Who are They?*, BROOKINGS INSTITUTE (Nov. 12, 2019), <https://www.brookings.edu/policy2020/votervital/how-many-undocumented-immigrants-are-in-the-united-states-and-who-are-they/>.

and legal resident aliens “[b]y draining public funds, creating unfair competition for jobs . . . and thereby lowering wages and working conditions, and by imposing unwanted strains on [public] services designed to provide [support] to American[] [citizens].”⁵

Other commentators, however, acknowledge that the United States at times in its past “has invited illegal immigrants even as it has pushed them away, [through] a century of policies facilitating the recruitment and hiring of unskilled Mexican [workers]—regardless of whether those workers were legal or illegal.”⁶ For example, the Bracero Program, under which the United States in 1942, in response to wartime shortages of agricultural laborers, permitted the importation of temporary guest workers to fill vacancies in the agricultural industry. By the time the Bracero Program ended in 1946, more than 4.6 million Mexican guest workers had participated in the program. Many failed to return home to Mexico and remained in the United States illegally.⁷

These same commentators further believe that it is antithetical to the United States’ history as a nation of immigrants to implement immigration policies in a manner that merely pays lip service to the nation’s immigrant roots.⁸

B. Immigration and Customs Enforcement Workplace Raids

Through its Homeland Security Investigations (“HIS”) division, U.S. Immigration and Customs Enforcement (“ICE”) is the federal agency that enforces 8 U.S.C. § 1324a. ICE executes 8 U.S.C. § 1324a through the agency’s Worksite Enforcement Strategy, which “focus[es] on the criminal prosecution of employers who knowingly break the law” related to an employer’s obligation to verify the identity and employment eligibility of all individuals they hire, and to document that information using the Employment Eligibility Verification Form I-9.⁹

⁵ *What’s Wrong with Illegal Immigration*, FEDERATION FOR AMERICAN IMMIGRATION REFORM (Mar. 2005), <https://www.fairus.org/issue/illegal-immigration/whats-wrong-illegal-immigration>.

⁶ Peter Skerry, *Splitting the Difference on Illegal Immigration*, NATIONAL AFFAIRS (2013), <https://www.nationalaffairs.com/publications/detail/splitting-the-difference-on-illegal-immigration>.

⁷ *Id.*

⁸ Tom Jawetz, *Restoring the Rule of Law Through a Fair, Humane, and Workable Immigration System*, CENTER FOR AMERICAN PROGRESS (July 22, 2019), <https://www.americanprogress.org/issues/immigration/reports/2019/07/22/472378/restoring-rule-law-fair-humane-workable-immigration-system/>.

⁹ *Worksite Enforcement*, Official Website of the Department of Homeland Security, U.S. IMMIGRATIONS AND CUSTOMS ENFORCEMENT (Aug. 25, 2020), <https://www.ice.gov/worksite#wcm-survey-target-id>.

The tools available to ICE to carry out its mission include Form I-9 audits, where ICE agents review a company's I-9 forms, either on-site or remotely, after requesting that an employer make the documents available. ICE also can conduct workplace raids upon obtaining a warrant predicated on a showing of probable cause that an employer is knowingly violating 8 U.S.C. § 1324a or that illegal immigrants may be on an employer's premises.¹⁰ These workplace raids typically involve federal agents confiscating an employer's employment eligibility related paperwork and arresting any employees suspected of being in the United States illegally.

The Obama administration took a more hands-off approach to enforcement of work-related immigration laws by choosing to audit employers' compliance in documenting their workers' status, rather than conducting many on-site investigations.¹¹ However, after President Trump took office, then-Acting Director of ICE, Thomas Homan, declared that ICE would increase its worksite enforcement actions by 400%.¹² So it is unsurprising that workplace raids have become more common under the Trump administration. ICE opened about 6,850 workplace investigations in 2018, compared to only 1,700 such investigations in 2017.¹³

On May 12, 2008, ICE agents raided Agriprocessors, Inc., located in Postville, Iowa.¹⁴ Agriprocessors was the nation's largest kosher meatpacker at the time.¹⁵ The raid was prompted by allegations that 80% of Agriprocessors' employees used falsified documents to obtain employment and resulted in the arrests of nearly 400 unauthorized workers.¹⁶ Following their arrests, those workers were transported to a nearby event venue where federal agents had set-up a makeshift detention facility and court to prosecute those unauthorized workers.¹⁷

¹⁰ *Id.*

¹¹ Sarah Mervosh, *Immigration Authorities Arrest More than 280 in Texas in Largest Workplace Raid in a Decade*, N.Y. TIMES (Apr. 4, 2019), <https://www.nytimes.com/2019/04/04/us/texas-immigration-raid.html?searchResultPosition=1>.

¹² Nooman Merchant, *ICE Raids Raise Question: What About the Employers?*, ASSOCIATED PRESS (Aug. 14, 2019), <https://apnews.com/e7113c50a6fd4d2688fc2f2b8a9a91cd>.

¹³ Mervosh, *supra* note 11.

¹⁴ Tim Belay, *Immigration Raid Leaves Mark on Iowa Town*, NPR (June 9, 2008), <https://www.npr.org/templates/story/story.php?storyId=91327136>.

¹⁵ *Id.*

¹⁶ *Deportation Hearings Follow Iowa Raid*, NPR: ALL THINGS CONSIDERED (May 19, 2008), <https://www.npr.org/templates/story/story.php?storyId=90603031>.

¹⁷ *Id.*

Generally, the punishment for a person found to have been working in the United States without proper authorization is deportation.¹⁸ However, under the direction of the Bush administration, prosecutors brought identity-theft related charges against the unauthorized workers who were arrested during the raid on Agriprocessors.¹⁹ Faced with the possibility of two-year minimum prison sentences, more than 250 unauthorized workers accepted plea deals to serve five months in prison.²⁰

The prosecution of those unauthorized workers was unusual. The government's actions garnered criticism from immigrants' rights groups, defense lawyers, and judges, but what is more novel is that Agriprocessors' plant manager at the time of the raid, Sholom Rubashkin, was arrested and charged with several violations of labor-related immigration laws.²¹ Agriprocessors' human resources manager also pled guilty to conspiracy to harbor illegal immigrants.²²

The prosecution voluntarily dismissed the labor and immigration-related charges against Rubashkin.²³ Instead, Rubashkin was prosecuted and convicted on charges of federal bank fraud and money laundering and sentenced to twenty-seven years in prison.²⁴ Although Rubashkin avoided prosecution on any labor and immigration-related charges, commentators viewed Rubashkin's sentencing as the court's way of putting employers on notice to avoid engaging in the employment of unauthorized workers.²⁵ However, against a backdrop of allegations of prosecutorial misconduct and the Rubashkin family's contributions to mostly republican political campaigns, President Trump commuted

¹⁸ Jennifer Ludden, *Immigrant Rights Groups Challenge ID Theft Arrests*, NPR (July 24, 2008), <https://www.npr.org/templates/story/story.php?storyId=92830188>.

¹⁹ *Id.*

²⁰ *Id.*

²¹ Wayne Drash, *Former Manager of Largest U.S. Kosher Plant Arrested*, CNN, <https://www.cnn.com/2008/CRIME/10/30/kosher.plant.arrest/index.html> (Rubashkin was charged with conspiracy to harbor illegal aliens for profit, aiding and abetting document fraud, and aiding and abetting aggravated identity theft). *See also* Julia Preston, *27-Year Sentence for Plant Manager*, N.Y. TIMES (June 21, 2010), <https://www.nytimes.com/2010/06/22/us/22iowa.html> (Rubashkin was acquitted of knowingly employing underaged workers).

²² Drash, *supra* note 21.

²³ Derek Hawkins, *How Trump Came to Commute an Ex-meatpacking Executive's 27-year Prison Sentence*, THE WASHINGTON POST (Dec. 21, 2017), <https://www.washingtonpost.com/news/morning-mix/wp/2017/12/21/how-trump-came-to-commute-an-ex-meatpacking-executives-27-year-prison-sentence/>.

²⁴ *Id.*

²⁵ Preston, *supra* note 21.

Rubashkin's sentence in December 2017, after Rubashkin had served only eight years in prison.²⁶

Roughly two years later, on August 7, 2019, ICE agents raided several food-processing plants in Mississippi to further the Trump administration's crackdown on workplaces that hire employees without proper work authorization.²⁷ ICE had reason to believe that the affected plants violated immigration law by knowingly hiring undocumented immigrants.²⁸ "There were clear signs that the companies were hiring people who could not legally work in the country Some workers wore ankle monitors as they awaited deportation hearings, gave Social Security numbers belonging to the deceased or were hired twice by the same manager even though the worker used different names on each occasion."²⁹

The raids resulted in the arrests of 680 undocumented workers and the seizure of the companies' business records.³⁰ While information is yet to be published regarding the outcomes of any criminal prosecutions against those undocumented workers, about 300 were released with orders to appear before an immigration judge.³¹ At least forty of them were charged with being in the United States illegally within two weeks of the raids.³²

Despite substantial evidence that the plants raided in Mississippi knowingly hired unauthorized workers, as of December 2019, no charges had been brought against the owners or managers of any of the plants

²⁶ Hawkins, *supra* note 23.

²⁷ Roy Maurer, *Hundreds Arrested in Worksite Immigration Raids*, SOCIETY FOR HUMAN RESOURCE MANAGEMENT (Aug. 8, 2019), <https://www.shrm.org/ResourcesAndTools/hr-topics/talent-acquisition/pages/hundreds-arrested-worksite-immigration-raids.aspx>.

²⁸ Hannah Denham, *Investigators Believe Five Poultry Companies Violated Immigration Law, Search Warrant Says*, THE WASHINGTON POST (Aug. 15, 2019), <https://www.washingtonpost.com/business/2019/08/15/investigators-believe-five-poultry-companies-violated-immigration-law-search-warrants-say/>.

²⁹ *Id.*

³⁰ Richard Gonzales, *Mississippi Immigration Raids Lead to Arrests of Hundreds of Workers*, NPR (Aug. 7, 2019), <https://www.npr.org/2019/08/07/749243985/mississippi-immigration-raids-net-hundreds-of-workers>.

³¹ Roy Maurer, *Do Employers Face Consequences for Hiring Unauthorized Workers?*, SOCIETY FOR HUMAN RESOURCES MANAGEMENT (Sep. 24, 2019), <https://www.shrm.org/resourcesandtools/hr-topics/talent-acquisition/pages/do-employers-face-consequences-hiring-unauthorized-workers.aspx>.

³² Luke Pamseth and Jimmie E. Gates, *More than 40 Charged in Federal Court from Mississippi ICE Raid, but No Company Officials*, USA TODAY (Aug. 17, 2019), <https://www.usatoday.com/story/news/nation/2019/08/17/mississippi-ice-raid-more-than-40-charged/2040080001/>.

involved.³³ A human resources employee for one of the plants told a confidential informant that management did not care about employing immigrants with questionable documentation, and investigators found that some of the plants had not run employees' names through E-Verify at all.³⁴

One of the plants is owned by Koch Foods, Inc., which is one of the largest poultry processors in the U.S. with 13,000 employees. The company has an estimated \$3.2 billion in annual revenue.³⁵ Koch Foods, Inc. is not affiliated with the Koch brothers or Koch industries, but it does, along with other companies affected by the Mississippi raids, contribute to republican political campaigns.³⁶

The question that is prompted by ICE enforcement actions similar to what happened with Agriprocessors and the food-processing plants in Mississippi is, why are unauthorized workers subjected to harsher penalties than the companies and their personnel who unlawfully hire them? An easy but misguided answer is that unauthorized workers fill roles that would otherwise be filled by American citizens, thereby "stealing jobs from the American people." But such a menial suggestion, lacking in nuance and perspective, overlooks the fact that hiring unauthorized workers makes sense, and dollars, for employers.³⁷ "Across the country, immigrants who are in the country unlawfully often do manual, low-paying jobs, and employers say they have no choice but to rely on them" because "[y]ou cannot hire an American here that will show up to work. They will not be committed to their job."³⁸ So, employers that employ unauthorized workers are no less complicit in robbing the American people than the unauthorized workers they hire.

"[T]he latest available data show[s] that during the last twelve months [between] April 2018 [and] March 2019[,] only [eleven] individuals and no [corporations] were prosecuted" for knowingly hiring or continuing to

³³ Denham, *supra* note 28.

³⁴ *Id.*

³⁵ Gonzales, *supra* note 30.

³⁶ Robert Channick, *Mississippi ICE Raids Hit Koch Foods, a Large Suburban Chicago-based Poultry Processor that Mostly Flies Under the Radar*, CHICAGO TRIBUNE (Aug. 8, 2019), <https://www.chicagotribune.com/business/ct-biz-cb-ice-raids-koch-foods-chicago-20190808-nxri7je3qvhrnes3gqnqwxgulq-story.html>. See also Denham, *supra* note 28.

³⁷ John Burnett, *Employers Struggle with Hiring Undocumented Workers: "You Cannot Hire American Here,"* NPR (Aug. 21, 2019), <https://www.npr.org/2019/08/21/752336132/employers-struggle-with-hiring-undocumented-workers-you-cannot-hire-american-her>.

³⁸ *Id.*

employ undocumented workers.³⁹ In stark contrast, over the same period, “85,727 individuals [were] prosecuted for illegal entry[] [into the United States], 34,617 [individuals were] prosecuted for illegal re-entry, and 4,733 [individuals were] prosecuted for illegally bringing in or harboring [illegal] immigrants.”⁴⁰ The disparity between punishments for unauthorized workers and sanctions for employers who hire unauthorized workers becomes clear upon reviewing the applicable statutory and regulatory framework. The best place to begin this analysis is with the Immigration Reform and Control Act.⁴¹

II. IMMIGRATION REFORM AND CONTROL ACT

A. Legislative History

Congress enacted the Immigration and Nationality Act (“INA” or “Act”) ⁴² in 1952 as the nation was confronting how to deal with refugees displaced by World War II, as well as the uncertainties associated with the Cold War.⁴³ The purpose of the INA was to control immigration into the United States in response to criticism that preceding legislation adversely affected U.S. international relations.⁴⁴ Although the INA ended racial restrictions on citizenship, the Act retained national origin quotas on immigration from other countries.⁴⁵ The INA also authorized a preference system that prioritized immigration into the United States for skilled workers.⁴⁶ Senator Pat McCarran saw the INA as the nation’s tool against the spread of Communism.⁴⁷

³⁹ *Few Prosecuted for Illegal Employment of Immigrants*, TRAC IMMIGRATION (2019), <https://trac.syr.edu/immigration/reports/559/>.

⁴⁰ *Id.*

⁴¹ 8 U.S.C. § 1324a.

⁴² See Immigration and Nationality Act, ch. 477, 66 Stat. 163 (1952) (codified at 8 U.S.C. §§ 1101–1537).

⁴³ *Immigration and Nationality Act*, OFFICIAL WEBSITE OF THE DEPARTMENT OF HOMELAND SECURITY, U.S. CITIZENSHIP AND IMMIGRATION SERVICES, <https://www.uscis.gov/legal-resources/immigration-and-nationality-act>. See also *Immigration and Nationality Act of 1952 (The McCarran-Walter Act)*, IMMIGRATION AND ETHNIC HISTORY SOCIETY (2019), <https://immigrationhistory.org/item/immigration-and-nationality-act-the-mccarran-walter-act/>.

⁴⁴ Margaret C. Jasper, *The Immigration and Nationality Act of 1952*, Legal Almanac: The Law of Immigration § 1:7 (2012). See also Immigration and Ethnic History Society, *supra* note 43.

⁴⁵ Immigration and Ethnic History Society, *supra* note 43.

⁴⁶ *Id.*

⁴⁷ *Id.* (Senator McCarran saw the INA as a “necessary weapon to preserve this Nation, the last hope of Western Civilization If this oasis of the world shall be overrun,

As initially enacted, the INA did not prohibit the employment of illegal aliens.⁴⁸ The INA was amended with the passage of the Immigration Reform and Control Act of 1986 (“IRCA” or “Act”).⁴⁹ “Congress enacted IRCA as a comprehensive framework for combating the employment of illegal aliens.”⁵⁰ The IRCA was enacted amidst a confluence of business’ needs to hire cheap labor and “[f]ears traditionally associated with waves of immigration, such as the loss of jobs to lower-wage earners.”⁵¹ Chief among the IRCA’s provisions are its prohibition on employers from knowingly hiring unauthorized workers and provisions providing a path to citizenship for unauthorized workers in the United States at the time the IRCA was enacted.⁵²

President Ronald Reagan, who signed the IRCA into law, viewed the Act as the culmination of the nation’s effort to “humanely regain control of [its] borders and . . . preserve the value of . . . American citizenship.”⁵³ More specifically, President Reagan believed that the Act’s authorization of civil and criminal penalties for employers who hire illegal aliens was the “keystone” of the Act and that it would “remove the incentive for illegal immigration by eliminating the job opportunities [that] draw illegal aliens” to the United States.⁵⁴

Notably, the IRCA nearly failed to make its way to the president’s desk due to Republican opposition to the legislation in the House of Representatives.⁵⁵ Although House Republicans favored provisions in the bill that would provide amnesty for illegal immigrants who had lived in the United States for the five year period preceding its enactment, they took issue with a Democratic proposal that would have offered permanent resident status to illegal immigrants who could prove that they had worked in the agricultural industry for at least sixty days from

perverted, contaminated, or destroyed, then the last flickering light of humanity will be extinguished”).

⁴⁸ *Kansas v. Garcia*, 140 S. Ct. 791, 797 (2020).

⁴⁹ Pub. L. No. 99-603, 100 Stat. 3359 (1986).

⁵⁰ *Arizona v. United States*, 567 U.S. 387, 404 (2012).

⁵¹ *Immigration Reform and Control Act of 1986*, IMMIGRATION TO THE UNITED STATES (2015), <https://immigrationtounitedstates.org/602-immigration-reform-and-control-act-of-1986.html>.

⁵² *Id.*

⁵³ Robert Pear, *President Signs Landmark Bill on Immigration*, N.Y. TIMES (Nov. 7, 1986), <https://www.nytimes.com/1986/11/07/us/president-signs-landmark-bill-on-immigration.html>.

⁵⁴ *Id.*

⁵⁵ Jerry Kammer, *IRCA’s 30th Anniversary: Looking Back at October 10, 1986*, CENTER FOR IMMIGRATION STUDIES (Oct. 10, 2016), <https://cis.org/Kammer/IRCA-30th-Anniversary-Looking-Back-October-10-1986>.

May 1, 1985, to May 1, 1986.⁵⁶ The Democrat's proposal intended to address the needs of farmworker unions and agricultural producers who had become accustomed to a large workforce of unauthorized workers, which allowed agrarian producers to keep their costs of production down, which in turn, allowed those producers to bring their products to market at reasonable prices for consumers.⁵⁷ House Republicans sought to replace the amnesty provision for farm workers with a provision that would allow farmers to hire up to 350,000 undocumented temporary farm workers every year.⁵⁸ Ultimately, the House rejected a proposal to eliminate the Democrat's amnesty provision for farmworkers by a vote of 199 to 192.⁵⁹

B. The Purpose of 8 U.S.C. § 1324a

The IRCA amendments to the INA included the enactment of 8 U.S.C. § 1324a, which makes it unlawful for employers to knowingly hire unauthorized aliens.⁶⁰ The purpose of 8 U.S.C. § 1324a is to eliminate the United States labor market's potential to induce illegal immigration by imposing sanctions on employers for knowingly hiring workers who are not authorized to work in the United States.⁶¹

Numerous federal courts have commented on the purpose of 8 U.S.C. § 1324a. For example, in *Collins Foods International v. United States Immigration and Nationalization Service*,⁶² the United States Court of Appeals for the Ninth Circuit held that "the legislative history of § 1324a indicates that Congress intended to minimize the burden and the risk placed on the employer in the [employment eligibility] verification process."⁶³ With "[t]he primary enforcement threat in the legislation [] directed at the unauthorized alien presenting the false documentation[.]"⁶⁴

However, the weight of authority supports the conclusion that the purpose of 8 U.S.C. § 1324a is as stated by the United States Court of

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Garcia*, 140 S. Ct. at 797.

⁶¹ Margaret C. Jasper, *The 1980s and Major Immigration Legislation Changes—The Immigration Reform and Control Act of 1986*, Legal Almanac: The Law of Immigration § 1:10 (2012).

⁶² 948 F.2d 549 (9th Cir. 1991).

⁶³ *Id.* at 554.

⁶⁴ *Id.*

Appeals for the Eleventh Circuit in *Patel v. Quality Inn South*.⁶⁵ In *Patel*, the court held that “Congress enacted [8 U.S.C. § 1324a] to reduce illegal immigration by eliminating employers’ economic incentive to hire undocumented aliens. To achieve this objective[,] [the statute] imposes an escalating series of sanctions on employers who hire [undocumented workers].”⁶⁶

III. UNLAWFUL EMPLOYMENT OF ALIENS: TITLE 8 U.S.C. § 1324A

A. Prohibitions

Title 8 U.S.C. § 1324a makes it “unlawful for a person or other entity to hire . . . an alien knowing the alien is an unauthorized alien.”⁶⁷ The statute further prohibits persons or other entities from hiring any individual without complying with the I-9 system for verification of employment eligibility.⁶⁸ The statute’s prohibition expressly extends the same requirements to agricultural associations, agricultural employers, and farm contractors.⁶⁹ It also imposes a continuing obligation on employers that hire authorized aliens to monitor their work authorization and terminate their employment if they become unauthorized to work in the United States at any time after their date of hire.⁷⁰

Title 8 U.S.C. § 1324a defines an “unauthorized alien” as an employee that is either not lawfully admitted for permanent residence in the United States at the time of employment or an employee that is not authorized to work in the United States under the INA or by the Attorney General.⁷¹

1. Unlawful for Employer to Knowingly Hire Unauthorized Aliens

In *Maka v. U.S. Immigration and Naturalization Service*,⁷² the United States Court of Appeals for the Ninth Circuit affirmed an administrative order finding that the employer violated 8 U.S.C. § 1324a(a)(1)(A), by

⁶⁵ 846 F.2d 700 (11th Cir. 1988).

⁶⁶ *Id.* at 704.

⁶⁷ 8 U.S.C. § 1324a(a)(1)(A).

⁶⁸ See 8 C.F.R. § 274a.2(a)(2) (establishing Form I-9). See also 8 U.S.C. §§ 1324a(a)(1)(B)(i)–(ii).

⁶⁹ § 1324a(a)(1)(B).

⁷⁰ § 1324a(a)(2).

⁷¹ § 1324a(h)(3).

⁷² 904 F.2d 1351 (9th Cir. 1990).

knowingly hiring an unauthorized alien.⁷³ The charge stemmed from an Immigration and Naturalization Service (“INS”)⁷⁴ raid conducted on the employer. The agency discovered that an individual employed by the employer could not produce any documentation that he was lawfully authorized to work in the United States.⁷⁵ The employer argued that it was not required to provide I-9 documentation for the subject employee because that employee had worked for the employer prior to the enactment of § 1324a. Therefore, the employer was covered by the Act’s “grandfather provision.”⁷⁶

The court concluded that the employer knew that the subject employee entered the United States without work authorization on a nonimmigrant visitor visa and, in fact, hired the employee after the enactment of § 1324a.⁷⁷ The employee lost his “grandfather” status because he quit his initial employment with the defendant employer, and the employer rehired him after the enactment of § 1324a.⁷⁸ As such, the court held that there was substantial evidence to support the finding of the administrative order that the employer knowingly hired an unauthorized alien.⁷⁹

a. Affirmative Defense

An employer’s good faith compliance with the requirements of Form I-9 provides an affirmative defense when the employer is charged with having knowingly hired an unauthorized alien.⁸⁰

⁷³ *Id.* at 1353.

⁷⁴ See *Immigration and Naturalization Service*, CORNELL LAW SCHOOL LEGAL INFORMATION INSTITUTE, [https://www.law.cornell.edu/wex/immigration_and_naturalization_service_\(ins\)](https://www.law.cornell.edu/wex/immigration_and_naturalization_service_(ins)) (INS was tasked with enforcing immigration and naturalization laws until 2003. The INS was abolished in 2003 and its function placed under three agencies—the United States Citizenship and Immigration Services (USCIS), Immigration and Customs Enforcement (ICE), and Customs and Border Patrol (CBP)).

⁷⁵ 904 F.2d at 1354.

⁷⁶ *Id.* at 1354–55. See Pub. L. No. 99-603, § 101(n)(3) (“(A) Section 274a(a)(1) [] of the Immigration and Nationality Act [(Title 8 U.S.C. § 1324a(a)(1))] shall not apply to the hiring, or recruiting[,] or referring of an individual for employment which has occurred before the date of the enactment of this Act”). See also 8 C.F.R. § 274a.7(b) (“[A]n employee who was hired prior to November 7, 1986 . . . shall lose his or her pre-enactment status if the employee: (1) Quits; or (2) Is terminated by the employer . . . ; or (3) Is excluded or deported from the United States or departs the United States [voluntarily]; or (4) Is no longer continuing his or her employment . . .”).

⁷⁷ 904 F.2d at 1359.

⁷⁸ *Id.* at 1361.

⁷⁹ *Id.*

⁸⁰ 8 U.S.C. § 1324a(a)(3).

2. Unlawful for Employer to Fail to Comply with Employment Verification System

An employer violates § 1324a if it fails to comply with the federal employment eligibility verification system to assure that a newly hired employee is authorized to work in the United States. The requirements of the I-9 system are laid out in further detail below, but *Split Rail Fence Co. v. United States*⁸¹ provides an excellent example of an employer's deficiencies regarding Form I-9 requirements.

In *Split Rail Fence Co.*, the employer was the subject of an ICE enforcement action involving multiple counts for violations of § 1324a. One count related to the employer's verification of a Mexican national's employment eligibility.⁸² The employer verified that employee's employment eligibility using his Mexican passport, which included a temporary I-551 stamp. The I-551 stamp authorized the employee to work in the United States until a specified future date. However, the employee worked beyond the expiration of his work authorization, and the employer failed to update or re-verify his employment authorization on or after the date his employment authorization expired.⁸³

The United States Court of Appeals for the Tenth Circuit denied the employer's petition for review of the outcome of ICE's enforcement action concerning the charge that the employer failed to comply with I-9 requirements.⁸⁴ The court held that the I-9 Employment Eligibility Verification System required the employer to, in the case of an individual authorized to work in the United States for a fixed-term, record the date of expiration of that individual's work authorization on Form I-9, and re-verify that employee's work authorization on or before the work authorization expiration date.⁸⁵ The employer's failure to do so was sufficient to find the employer liable under § 1324a.

3. Unlawful for Employer to Knowingly Continue to Employ Alien with Knowledge that Alien has Become Unauthorized to Work in the United States After the Date of Hire

In *New El Rey Sausage Co. v. U.S. Immigration and Naturalization Service*,⁸⁶ the employer petitioned for the review of an order finding that

⁸¹ 852 F.3d 1228 (10th Cir. 2017).

⁸² *Id.* at 1236.

⁸³ *Id.* at 1235.

⁸⁴ *Id.* at 1237.

⁸⁵ *Id.* at 1237–40; *see also* 8 C.F.R. § 274a.2(b)(1)(vii) (“[i]f an individual’s employment authorization expires, the employer . . . must reverify on the Form I-9 to reflect that the individual is still authorized to work in the United States; otherwise, the individual may no longer be employed, recruited, or referred”).

⁸⁶ 925 F.2d 1153 (9th Cir. 1991).

the company violated § 1324a by knowingly continue to employ two unauthorized aliens, with knowledge that they were unauthorized to work in the United States.⁸⁷

The case began when INS informed the employer that an agent would visit their site to inspect the employer's I-9 forms. The inspection uncovered deficiencies with the employer's I-9 forms, so the agent checked alien registration numbers provided by the company's employees. The INS agent found that the alien registration numbers the employer submitted for nine employees were either non-existent or had been issued to someone else. The INS agent then informed the employer by letter of the deficiencies regarding those employees' employment authorization. The agent further informed the employer that unless those individuals could provide valid employment authorization, they are considered to be unauthorized aliens, and their continued employment could expose the employer to civil proceedings.⁸⁸

In response to INS's mandate, the employer merely asked the employees on the list whether the documents they submitted to show their work authorization were valid. Two of the subject employees orally maintained that they were authorized to work in the United States. The employer accepted their word and did not ask those employees to produce further documentation of their work authorization. INS later found that the employer continued to employ the two employees listed on the agency's initial list of employees with invalid work authorization.⁸⁹

The United States Court of Appeals for the Ninth Circuit affirmed the administrative order finding the employer liable for knowingly continue to employ unauthorized aliens.⁹⁰ The court held that an employer's constructive knowledge that an employee is unauthorized to work in the United States is sufficient to find that the employer knew of an employee's unauthorized status.⁹¹ The court reasoned that INS's letter to the employer informing the employer of what employees were unauthorized and why provided the employer with constructive knowledge that those employees' work authorizations were invalid. Therefore, the employer's failure to take corrective action, despite continuing the employment relationship with those unauthorized individuals, constituted a violation of § 1324a(a)(2).⁹²

⁸⁷ *Id.* at 1154.

⁸⁸ *Id.* at 1154–55.

⁸⁹ *Id.* at 1155.

⁹⁰ *Id.* at 1154.

⁹¹ *Id.* at 1157–58.

⁹² *Id.* at 1159.

B. Requirements: I-9 Employment Eligibility Verification System

To enforce its prohibition on employers knowingly hiring unauthorized aliens, § 1324a requires that employers comply with the federal employment verification system, Form I-9, by “attest[ing] [under the penalty of perjury] that they have verified that an employee is not an unauthorized alien by examining approved documents” provided by prospective or newly hired employees.⁹³ “This requirement applies to the hiring of any individual regardless of citizenship or nationality.”⁹⁴

On Form I-9, an employee must attest under the penalty of perjury to his or her authorization to work in the United States and present the employer with acceptable documents evidencing identity and employment authorization.⁹⁵ The employer must examine the employment eligibility and identity documents an employee presents to determine whether the documents reasonably appear to be genuine and to relate to the employee and record the document information on the Form I-9.⁹⁶

1. Good Faith Compliance

An employer that fails to adhere to a technical or procedural requirement in attempting to comply with the I-9 system will avoid sanctions if there was a good faith attempt to comply with the requirement the employer is charged with having violated.⁹⁷ However, the good faith argument is not available for employers under certain circumstances.

a. Exception for Failure to Correct After Notice

An employer’s good faith attempt to comply with the I-9 system’s technical or procedural requirements will not absolve the employer of liability for its failure to comply if: (1) ICE has explained the basis for the failure to the employer; (2) the employer has been provided at least ten

⁹³ *Garcia*, 140 S. Ct. at 797.

⁹⁴ *Id.*

⁹⁵ *I-9, Employment Eligibility Verification*, OFFICIAL WEBSITE OF THE DEPARTMENT OF HOMELAND SECURITY, U.S. CITIZENSHIP AND IMMIGRATION SERVICES, <https://www.uscis.gov/i-9>. See also 8 C.F.R. §§ 274a.2(b)(1)(v)(A)(1)–(7) (acceptable documents evidencing both identity and employment authorization). See also 8 C.F.R. §§ 274a.2(b)(1)(v)(B)(1)–(4) (acceptable documents establishing identity only). See also 8 C.F.R. §§ 274a.2(b)(1)(v)(C)(1)–(7) (acceptable documents establishing employment authorization only).

⁹⁶ Official Website of the Department of Homeland Security, U.S. Citizenship and Immigration Services, *supra* note 95.

⁹⁷ 8 U.S.C. § 1324a(b)(6)(A).

business days to correct the failure; and (3) the employer does not correct the failure voluntarily within the period allotted for correction.⁹⁸

b. Exception for Pattern or Practice Violators

The good faith exemption is also unavailable when an employer fails to comply with the I-9 system for employers that have engaged in a pattern or practice of knowingly hiring or knowingly continuing to employ unauthorized aliens.⁹⁹

C. Enforcement Mechanism

“The regulations implementing the IRCA authorize [ICE] . . . to conduct investigations for violations [of § 1324a] on its own initiative.”¹⁰⁰ The ICE investigation process typically begins with the agency’s service of a Notice of Inspection (“NOI”) on an employer believed to be in violation of § 1324a. Upon receipt of an NOI, an employer must produce its I-9 forms and other supporting documentation to ICE officials for inspection for compliance. ICE then notifies the employer of the results of its investigation in writing. If ICE determines that an employer has violated § 1324a, the agency may issue a Warning Notice, such as a Notice of Suspect Documents (“NSD”), stating the basis for the violations and the statutory provision alleged to have been violated.¹⁰¹ In addition to or in place of a Warning Notice, ICE may serve a Notice of Intent to Fine (“NIF”), which commences proceedings to assess administrative penalties against the employer.¹⁰² An employer served with a NIF may negotiate a settlement with ICE or request a hearing before an administrative law judge (“ALJ”).¹⁰³

When an employer requests a hearing before an ALJ, after conducting the hearing, the ALJ will issue an order stating his findings of law and fact. The ALJ’s order becomes the final agency decision on the matter, but a party adversely affected by a final order may petition a circuit court for review.¹⁰⁴

⁹⁸ 8 U.S.C. § 1324a(b)(6)(B).

⁹⁹ 8 U.S.C. § 1324a(b)(6)(C).

¹⁰⁰ *Split Rail Fence Co.*, 852 F.3d at 1233.

¹⁰¹ 8 C.F.R. § 274a.9(c).

¹⁰² 8 C.F.R. § 274a.9(d).

¹⁰³ 8 C.F.R. § 274a.9(e).

¹⁰⁴ *Split Rail Fence Co.*, 852 F.3d at 1234.

*D. Penalties***1. Cease and Desist Order with Civil Money Penalty for Hiring, Recruiting, and Referral Violations**

An employer found to have knowingly hired an unauthorized alien, or to have knowingly continued to employ an alien who became unauthorized to work in the United States after his date of hire, will be ordered by an ALJ to cease and desist engaging the violative conduct and to pay a civil penalty. The civil penalty varies with the number of unauthorized aliens an employer is found to have knowingly hired or continued to employ and whether the employer has been adjudged guilty of previously having hired or continued to employ unauthorized aliens with knowledge of their unauthorized status.¹⁰⁵

The first time an employer is found to have knowingly hired or continued to employ unauthorized aliens, the employer may be subject to a civil penalty between \$250 and \$2000 for each unauthorized alien at issue in its case. An employer that has been subject to a prior action under the statute may be assessed a penalty of between \$2,000 and \$5,000 for each unauthorized alien involved in its case. While an employer that has been subject to more than one action for violating § 1324a can be subjected to a fine between \$3,000 and \$10,000 for each unauthorized alien it was found to have knowingly hired or continued to employ.¹⁰⁶

2. Civil Money Penalty for Paperwork Violations

An employer that is found to have failed to comply with technical or procedural I-9 requirements may be forced to pay a civil penalty between \$100 and \$1,000 for each individual with respect to whom the violation occurred. In determining the amount of the penalty, the ALJ is to consider the size of the employer being charged, the good faith of the employer, the seriousness of the violation, whether the individual involved was an unauthorized alien, and the employer's history of previous I-9 violations.¹⁰⁷

3. Criminal Penalties and Injunctions for Pattern or Practice Violations

An employer that engages in a pattern or practice of knowingly hiring or continuing to employ unauthorized aliens will be fined \$3000 or less for each unauthorized alien it is charged with having hired or continued

¹⁰⁵ 8 U.S.C. § 1324a(e)(4)(A).

¹⁰⁶ *Id.*

¹⁰⁷ 8 U.S.C. § 1324a(e)(5).

to employ. Pattern or practice violators are also subject to six months imprisonment, and the Attorney General may bring a civil action requesting a permanent or temporary injunction against the employer or other relief as the Attorney General deems necessary.¹⁰⁸

IV. ANALYSIS

A. Title 8 U.S.C. § 1324a Falls Short of Achieving its Intended Purpose

The purpose of 8 U.S.C. § 1324a is to eliminate the United States labor market's potential to induce illegal immigration by imposing sanctions on employers for knowingly hiring workers who are not authorized to work in the United States.¹⁰⁹ In light of that purpose and the influx of undocumented aliens into the United States between 1986 and today, the statute falls short of achieving its intended goal.¹¹⁰ It is estimated that the population of 3.2 million unauthorized immigrants in the United States grew to 11 million by 2017.¹¹¹ Title 8 U.S.C. § 1324a falls short of stemming the tide of illegal immigration because the statute and its enforcement are too lenient on employers.

Commentators cite § 1324a's "knowingly" standard as the main reason employers are rarely prosecuted under the statute.¹¹² For liability under the statute, an employer must have either actual or constructive knowledge that a worker is unauthorized to work in the United States.¹¹³ This "knowing" standard virtually absolves an employer of liability for knowingly hiring or continuing to employ an unauthorized alien when the employee used fraudulent documents to show employment authorization.¹¹⁴ However, although unauthorized workers' prevalent use of forged documents makes it difficult for employers to be certain they are hiring authorized workers, it makes more sense to take a hardline approach in punishing employers for violating § 1324a.

¹⁰⁸ 8 U.S.C. § 1324a(f).

¹⁰⁹ Jasper, *supra* note 61.

¹¹⁰ Robert Siegel and Selena Simmons-Duffin, *How Did We Get to 11 Million Unauthorized Immigrants?*, NPR: ALL THINGS CONSIDERED (Mar. 7, 2017), <https://www.npr.org/2017/03/07/518201210/how-did-we-get-to-11-million-unauthorized-immigrants> (Estimated that population of 3.2 million unauthorized immigrants in U.S. grew to 11 million by 2017).

¹¹¹ *Id.*

¹¹² Maurer, *supra* note 31.

¹¹³ *Id.*

¹¹⁴ *Id.*

Additionally, Title 8 U.S.C. § 1324a's exceptions for good faith and the tiered system for the assessment of civil and criminal penalties against employers discourages employers from refraining from hiring unauthorized workers. It seems antithetical that an employer is allowed to reap the benefits of hiring unauthorized workers to the detriment of American workers and to engage in that same behavior once or twice more before facing the potential for any serious penalty.

The result is that some employers do not take 8 U.S.C. § 1324a seriously, and at the same time, hiring undocumented workers makes sense for employers. So naturally, employers continually engage in the unlawful employment of undocumented workers. This problem is laid bare in the case involving a Texas Construction Company, Speed Fab-Crete Corporation. Although Speed Fab-Crete and its officers were ultimately assessed criminal and civil penalties, this case provides an excellent example of the lengths employers will go to in order to source cheap, often undocumented, labor.

Speed Fab-Crete, a construction company in Dallas, Texas, produces prefabricated materials used in the construction of structures. Speed Fab-Crete has been in business since 1951, and its owners have over 150 years of management experience.¹¹⁵ Speed Fab-Crete holds several local and federal accreditations and received multiple government grants and awards. Speed Fab-Crete also received a loan for between \$1 million and \$2 million under the Paycheck Protection Program (PPP), which was enacted to support small businesses in response to COVID-19 related closures.¹¹⁶

In 2017 an investigation conducted by ICE's department of Homeland Investigations ("HIS") revealed that 43 of Speed Fab-Crete's 106 employees were not authorized to work in the United States. Speed Fab-Crete subsequently entered into a settlement with HIS, under which Speed Fab-Crete agreed to correct the problem. In exchange, HIS agreed to forego any I-9 inspection related to the company for six months, giving Speed Fab-Crete time to correct the deficiencies concerning the forty-three undocumented workers.¹¹⁷

Instead of firing the undocumented workers or determining whether those workers could provide proper employment eligibility documents,

¹¹⁵ SPEED FAB-CRETE, <https://www.speedfabcrete.com/aboutus>.

¹¹⁶ *Speed Fab-Crete Corporation*, CNN, <https://www.cnn.com/projects/ppp-business-loans/businesses/speed-fab-crete-corporation>.

¹¹⁷ *Texas Company to Pay \$3 Million after Investigation Reveals Hiring Illegal Aliens*, OFFICIAL WEBSITE OF THE DEPARTMENT OF HOMELAND SECURITY, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT (Jan. 27, 2020), <https://www.ice.gov/news/releases/texas-company-pay-3-million-after-investigation-reveals-hiring-illegal-aliens>.

representatives of Speed Fab-Crete sought to engage in the unlawful employment of undocumented workers by consulting with Take Charge Staffing. Representatives of Speed Fab-Crete asked Take Charge Staffing to transfer the undocumented workers from Speed Fab-Crete's payroll system and onto Take Charge Staffing's payroll and have those workers assigned to work at Speed Fab-Crete.¹¹⁸

Take Charge initially declined Speed Fab-Crete's request and offered to source authorized workers instead. However, after struggling to find authorized workers, Take Charge Staffing hired twenty-three undocumented workers who had been previously terminated by Speed Fab-Crete and assigned them to work at Speed Fab-Crete. Speed Fab-Crete then sent a letter to HIS stating that all of the thirty-nine unauthorized workers identified during the I-9 inspection had been released and were no longer working at Speed Fab-Crete.¹¹⁹

HIS eventually caught on to Speed Fab-Crete's unlawful scheme, and the owners of the company pled guilty to federal charges in connection with knowingly hiring unauthorized workers. A fine of \$3 million was assessed against Speed Fab-Crete, and the owners of Speed Fab-Crete and Take Charge Staffing face civil and criminal sanctions.¹²⁰

Although the case of Speed Fab-Crete resulted in the culpable company and its officers facing civil and criminal sanctions, this case shows how employers shirk their obligation to refrain from hiring undocumented workers in the interest of lowering operating costs, thereby increasing their capacity for profits, which, when combined with the lenient nature of the penalties for such culpable conduct, disincentivizes employers from complying with 8 U.S.C. § 1324a.

B. Executing 8 U.S.C. § 1324a in a Manner that is Lenient on Culpable Employers and Harsh on Undocumented Workers Adversely Affects Immigrant Populations and Contributes to a Public Crisis

In a 2008 House of Representatives hearing held before the Subcommittee on Workforce Protections, speakers addressed the impact of ICE workplace raids on children, families, and communities.¹²¹

In opening remarks, former United States Representative for California's Sixth congressional district, Lynn Woolsey, began by noting that ICE's arrests of undocumented workers resulting from workplace raids intensified under the George W. Bush Administration. In 2004, ICE

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ ICE Workplace Raids: Their Impact on U.S. Children, Families and Communities: Hearing Before the House Subcommittee on Workforce Protections, 110th Cong. (2008).

arrested 445 unauthorized workers in workplace raids. That number increased to 1,300 by the end of 2005, and in 2006, ICE arrested 4,400 undocumented workers as the result of workplace raids.¹²²

Former Representative Woolsey pointed out that there are about 3.1 million children of undocumented workers who are United States citizens, and thousands of such children had been affected by ICE workplace raids where their parents were arrested or deported.¹²³ Representative Woolsey also addressed stories of specific children who had faced traumatic experiences and been separated from their parents as the result of ICE workplace raids. One child was a six-year-old U.S. citizen whose father was arrested in a workplace raid. The child's father was his only parent in the United States. That child was detained for six weeks until his father was released from custody.¹²⁴

Ruben Hinojosa, a former Congressman from Texas, stated in his remarks that “[c]hildren are paying the highest price” for the broken Federal immigration system and enforcement mechanisms that allow children to be separated from their families, causing the children of undocumented immigrants to live in constant fear.¹²⁵

James Spero, Acting Deputy Assistant Director of ICE's Office of Investigations, Critical Infrastructure, and Fraud, testified on behalf of ICE. Mr. Spero assured the Subcommittee that “ICE strikes a balance between the operational objectives of enforcing [federal immigration] law[s] and any humanitarian issues that may arise as a result of [any] enforcement operation.”¹²⁶ Mr. Spero testified that, when making a custody determination, ICE takes into account whether a detained undocumented worker may have unattended minors and/or is a sole caregiver for a family member with health problems. ICE does this by coordinating with social services agencies and processing detainees' information, “including the arrestee's criminal record, immigration history[,] or other relevant factors.”¹²⁷ “[I]f appropriate, [ICE] may modify the conditions of [a detainee's] release[]” by, for example, ordering that a detainee be released under electronic surveillance.¹²⁸

Janet Murguia, President of the National Council of La Raza, testified next. Ms. Murguia, citing evidence that ICE's use of workplace raids is “causing . . . harm to children, schools, child care centers[,] and

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.*

communities[,]” argued that ICE’s enforcement strategies created a public crisis.¹²⁹ Ms. Murguia stated that when undocumented workers are detained in ICE workplace raids, “[s]chool systems and childcare centers are forced to mobilize on very short notice to provide protection for children whose parents have been detained.”¹³⁰ Such rapid mobilization and response has the effect of impairing an affected school system’s ability to educate children at large. Ms. Murguia also referenced the aftermath of the Agriprocessors raid, described above in Section I(B), where hundreds of migrants were forced to rely on a local church for food and shelter following the arrests of nearly 400 undocumented workers as the result of ICE’s workplace raid.¹³¹

Ms. Murguia concluded her testimony by stating that, although America should enforce its immigration laws, there is a better way to do so that does not result in the forceful separation of families, thus placing strain on public resources to fill gaps caused by ICE’s enforcement actions.¹³²

Most of the empirical evidence relied on by Ms. Murguia is detailed in a report compiled by the Urban Institute titled, *Paying the Price: The Impact of Immigration Raids on America’s Children*.¹³³ The Urban Institute suggests that ICE’s workplace enforcement actions erode a core value of American democracy, that “children should not be punished for the sins of their parents.”¹³⁴ Based on observations conducted by Urban Institute staff in the aftermath of three large-scale ICE workplace raids in Greeley, Colorado; Grand Island, Nebraska; and New Bedford, Massachusetts, the Urban Institute reported the following findings:

- ❖ The three raids resulted in the arrest of over 900 adults, and the parents among those adults arrested had just over 500 children.¹³⁵
- ❖ A large majority of the children affected were U.S. citizens and included infants, toddlers, and preschoolers.¹³⁶

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.*

¹³³ Randy Capps, Rosa Castaneda, Ajay Chaudry, and Robert Santos, *Paying the Price: The Impact of Immigration Raids on America’s Children*, THE URBAN INSTITUTE (2007), <https://www.urban.org/sites/default/files/publication/46811/411566-Paying-the-Price-The-Impact-of-Immigration-Raids-on-America-s-Children.PDF>.

¹³⁴ *Id.* at 1.

¹³⁵ *Id.* at 2.

¹³⁶ *Id.*

- ❖ ICE's processing and detention procedures made it difficult to arrange care for children whose parents were arrested. Detained immigrants had very limited access to telephones to communicate with their families.¹³⁷
- ❖ Some single parents and other primary caregivers were released late on the same day as the raids, but others were held overnight or for several days.¹³⁸
- ❖ In the days and weeks following the raids, informal family and community networks took on significant caregiving responsibilities and economic support of children. Families faced major economic instability as their incomes plunged following the arrest of working parents, usually the primary breadwinners.¹³⁹
- ❖ Many immigrant families hid in their homes following the raids out of fear they would be arrested or deported.¹⁴⁰
- ❖ Some adolescents were left in the company of other teenagers and children for days and even weeks. Some younger children remained in the care of babysitters for weeks or months.¹⁴¹
- ❖ Many parents were deported within a few days of their arrest, and in such cases, families had to make arrangements depending on whether the arrested parent could eventually reenter the United States legally or would be willing to face the grave risks involved with attempting illegal re-entry at some point in the future. Other parents were held in detention for months and only released after paying substantial bonds, or not released at all before their deportation.¹⁴²
- ❖ During the time these parents were held, their children and other family members experienced significant hardship, including difficulty coping with the economic and psychological stress caused by the arrest and the uncertainty of not knowing when or if the arrested parent would be released.¹⁴³
- ❖ Hardship increased over time, as families' meager savings and funds from previous paychecks were spent. Privately funded assistance generally lasted for two to three months, but many parents were detained for up to five or six months, and others were released but waited for several months for a final

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.* at 3.

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.* at 4.

¹⁴³ *Id.*

appearance before an immigration judge—during which time they could not work. Hardship also increased among extended families and nonfamily networks over time, as they took on more and more responsibility for taking care of children with arrested parents.¹⁴⁴

- ❖ After the arrest or disappearance of their parents, children experienced feelings of abandonment and showed symptoms of emotional trauma, psychological duress, and mental health problems. However, due to cultural reasons, fear of possible consequences in asking for assistance, and barriers to accessing services, few affected immigrants sought mental health care for themselves or their children.¹⁴⁵
- ❖ In all three raids, community leaders and institutions initiated intensive and broad response efforts to assist immigrant families. Religious institutions emerged as central distribution points for relief because they were considered safe by families. In the long run, church-based assistance was not sustainable due to the limited capacity of infrastructure and staff.¹⁴⁶

The details set forth in The Urban Institute's report concerning the three

subject workplace raids shed some light on the predicament of immigrant populations and communities in the aftermath of ICE's workplace raids. However, the information cited above fails to capture the significance of the public crisis caused by ICE's enforcement actions. When workplace raids resulting in mass detention and/or deportation are intensifying in frequency and number of arrests and/or deportations, it becomes clear that ICE's choice enforcement mechanism will have substantial adverse effects on immigrant populations and communities that are innumerable and far-reaching.

*C. The Politicization of Immigration Enforcement Actions Under Title 8
U.S.C. § 1324a Promotes a Culture War Among Minority Blue
Collar Workers*

The current enforcement of laws prohibiting employers from employing undocumented workers favors the punishment and removal of immigrant populations. It also gives life to socioeconomic undertones that paint a bleak picture for the nation going forward. Take, for example, the story of an African American employee hired by one of the

¹⁴⁴ *Id.* at 3.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

plants involved in the Mississippi raids after it lost a sizable portion of its workforce due to the raids. The employee, two years removed from high school, secured an almost four-dollar raise (from minimum wage to \$11.23 an hour) with his new position, but the employee had some reservations about his seemingly good fortune.¹⁴⁷ The employee expressed concerns that he gained a benefit at the expense of the unauthorized workers who lost their livelihood as a result of the ICE raids. Concerning his new job, the employee stated, “It’s like I stole it . . . , and I really don’t like what I stole.”¹⁴⁸

Stories like the one above and the potential for recurring racially charged socioeconomic disparities can be eliminated by putting the onus on employers to refrain from employing unauthorized workers. Doing so would prove beneficial to American workers. For instance, an employer that relied on unauthorized workers because American workers are reluctant to take the same job for a similar wage would have to respond to the will of the people and offer a higher wage to attract workers. Such a result is more desirable and evocative of the free-market theory than allowing employers to benefit from the use of unauthorized workers, only to turn around and victimize American workers by paying them an incrementally higher wage. But only if the employer’s practice of hiring unauthorized workers leads to any consequences for the employer.

D. A Way Forward: Employer Accountability

Any serious attempt to bring 8 U.S.C. § 1324a closer to achieving its intended purpose of curbing illegal immigration by punishing employers that hire and continually employ undocumented workers begins with amending the statute and its accompanying regulations to provide harsher penalties and fewer exceptions for employers found to have engaged in prohibited conduct under the statute. Employers, rather than the undocumented workers seeking employment under terms that are drastically better than those otherwise available in their home country, are in a better position to assure compliance with United States immigration laws. The placement of such a burden on employers is no different in operation than any other compliance requirement already imposed on employers.

¹⁴⁷ Richard Fausset, *After ICE Raids, a Reckoning in Mississippi’s Chicken Country*, N.Y. TIMES (Dec. 28, 2019), <https://www.nytimes.com/2019/12/28/us/mississippi-ice-raids-poultry-plants.html>.

¹⁴⁸ *Id.*

1. Do Away with Exceptions for Employers found to have Knowingly Hired or Continually Employed Undocumented Workers.

The statutory and regulatory scheme prohibiting employers from knowingly hiring or continuing to employ undocumented workers simply makes too many exceptions for employers that engage in prohibited conduct. An exception makes sense when false documents are involved because, in that case, the employer's ability to determine whether a prospective employee is authorized to work in the United States is compromised if a prospective employee submitted falsified employment eligibility documents, i.e., a false social security number or passport. However, in all other cases, an employer should be exposed to criminal liability for failing to comply with federal law as it relates to the company's obligation to refrain from hiring undocumented workers. The quasi civil-criminal nature of 8 U.S.C. § 1324a works an injustice on American and undocumented workers alike.

2. Increase the Minimum Wage to a Living Wage to Encourage American Citizens to Fill Jobs that Typically Rely on Immigrant Workers.

A key factor driving the employment of undocumented workers in the United States is the fact that jobs typically held by undocumented workers are undesirable for American citizens. One way to eliminate that problem is to federally mandate a living wage for all jobs and institute price controls so that employers do not pass those increased operating expenses to consumers.

The employment of undocumented workers is prevalent in industries that typically involve manual, repetitive, low-skilled labor. For example, the agricultural and food-service industries. Aside from the fact that jobs typically held by undocumented workers require exposure to the elements and other undesirable terms, those jobs usually do not pay a living wage.¹⁴⁹ A living wage is defined as the amount an individual would "need to earn to meet all of [his] basic needs, such as food, childcare, housing, and healthcare."¹⁵⁰

The working conditions and wages for jobs typically held by undocumented workers make those positions undesirable for American citizens, who ideally relegate themselves to such roles out of necessity and a lack of available alternatives.

¹⁴⁹ National Education Association, *supra* note 38.

¹⁵⁰ *How to Calculate Your Living Wage*, NATIONAL EDUCATION ASSOCIATION (June 8, 2020), <https://www.nea.org/resource-library/how-calculate-your-living-wage>.

V. CONCLUSION

The legislative intent behind the enactment of 8 U.S.C. § 1324a, as supported by the weight of authority, indicates that Congress contemplated that the statute would operate to dissuade employers from hiring undocumented workers by instituting a staggered scheme imposing civil liability and criminal liability on employers that engaged in this prohibited behavior. Thus, it seems incompatible with Congress' intent that in contemporary America, employers that hire and benefit from employing undocumented workers, in the overwhelming majority of cases, avoid the prospect of serious penalties while the undocumented workers they employ face harsh sanctions such as deportation and time in jail.

The American people can ill afford the very law enacted to discourage companies from hiring undocumented workers to be executed in a manner that forgives corporations for breaking the law while imposing harsh sanctions on individuals trying to take care of themselves and their families. Moreover, it is wholly inappropriate for companies to engage in criminal behavior and escape with a slap on the wrist when the consequences are born by the public at large. When ICE engages in workplace raids that promulgate the inequity sewn by the current enforcement of 8 U.S.C. § 1324a, immigrant families are torn apart. At the same time, the rest of us are left to squabble over jobs that do not even pay a living wage. Therefore, it is in the American public's best interest that 8 U.S.C. § 1324a is enforced in a manner that puts the onus on employers to refrain from hiring undocumented workers. That can only be accomplished by amending the statute to remove some of the exceptions available to employers found to have knowingly hired or continued to employ undocumented workers and making the punishment available under the statute purely criminal in nature.

Antonio Solomon