Immigration Policy v. Labor Policy: An Analysis of the Application of Domestic Labor Laws to Unauthorized Foreign Workers

Konrad Batog[†]

I. Introduction

When unauthorized foreign workers[1] are subjected to unlawful labor practices, a potential or perceived conflict between national immigration policy and national labor policy arises. This problem is especially pronounced when a central principle of a country's immigration policy is the prevention of the employment of unauthorized aliens. The apparent tension occurs because countries aim to protect all workers within their borders by enforcing labor standards. At the same time, they desire to discourage entry and employment of unauthorized workers in order to preserve jobs and wages for the country's authorized workers.[2]

In *Hoffman Plastic Compounds, Inc. v. NLRB*, the United States Supreme Court held that combating the employment of unauthorized aliens was central to the United States immigration policy after passage of the Immigration Reform and Control Act of 1986 ("IRCA").[3] The court noted that this policy was furthered "by establishing an extensive 'employment verification system' designed to deny employment to aliens who (a) are not lawfully present in the United States, or (b) are not lawfully authorized to work in the United States."[4] The foundation of such a system is an employer sanctions regime that punishes employers who hire unauthorized individuals or fail to determine if an employee is eligible to work in the United States.[5]

This paper will examine how the United States, the United Kingdom, Germany, and South Korea dealt with issues arising out of a possible conflict between national labor policy and national immigration policy by way of enforcing domestic labor laws for unauthorized foreign workers. These specific countries

[†] Konrad Batog is a January 2006 Juris Doctor of Loyola University Chicago School of Law. B.A., Syracuse University, 1999. Konrad currently works as a Federal Investigator for the U.S. Equal Employment Opportunity Commission Chicago District Office. This article represents the views of the author, and does not represent the views of the EEOC.

[1] Throughout this paper, I will use the term undocumented worker or unauthorized worker to mean a foreign alien who is illegally residing and working in a country.

[2] Sure-Tan, Inc. v. NLRB, 467 U.S. 883, 893 (1984); Phillip Martin & Mark Miller, Employer Sanctions: French, German and U.S. Experiences 1 (Sept. 2000) (unpublished comment, on file with Int'l Labour Office of Geneva); Georges Tapinos, *Irregular Migration: Economic and Political Issues, in* Combating the Illegal Employment of Foreign Workers 13, 13-43 (Organization for Econ. Co-Operation and Dev., 2000).

[3] Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137, 147 (2002) (citing INS v. Nat'l Ctr. for Immigrants' Rights, Inc., 502 U.S. 183, 194, n.8 (1991)).

[4] *Id.*

[5] *See id.* at 147-48.

will be examined because they all have employer sanctions laws that punish employers who hire and employ unauthorized individuals or fail to determine if an employee is eligible to work.[6] While countries that do not have an employer sanctions regime may seek to limit unauthorized employment of undocumented workers, employer sanctions are evidence that combating unauthorized employment is central to a country's immigration policy.[7] Though the countries with employer sanctions regimes are numerous, a complete analysis of how these countries treat conflicts between immigration and labor policy in the enforcement of labor laws for unauthorized foreign workers is beyond the scope of this paper.[8] As a result, this paper's examination will be limited to the countries mentioned above.

This examination will be valuable because these states share similarities in their economies and rates of immigration.[9] The World Bank lists the four countries as "high income" economies.[10] Indeed, the United States, the United Kingdom, and Germany are three of the top four nations in gross national income and gross domestic product.[11] South Korea is ranked twelfth in gross national income and eleventh in gross domestic product.[12] In terms of immigration, in 2002 the United Kingdom admitted 513,000 immigrants,[13] and the United States admitted 1,063,732 immigrants.[14] In the same year, 842,543 immigrants entered Germany,[15] and South Korea admitted 170,873 immigrants.[16]

---

[6] *Id.* at 148; Mark Miller, Employer Sanctions in France: From the Campaign Against Illegal Alien Employment to the Campaign Against Illegal Work 27-29 (1995) (unpublished comment, on file with the U.S. Comm'n on Immigration Reform).

[7] *See Hoffman*, 535 U.S. at 147.

[8] The author has identified through various sources the following countries with either civil, criminal, or both civil and criminal employer sanctions: Argentina, Australia, Austria, Belgium, Canada, Costa Rica, Denmark, Finland, France, Germany, Greece, Hong Kong, Italy, Japan, Lichtenstein, Luxembourg, Netherlands, New Zealand, Norway, Singapore, South Korea, Spain, Sweden, Switzerland, Taiwan, Thailand, and the United Kingdom. *See* Martin & Miller, *supra* note 2; Miller, *supra* note 6; M. Isabel Medina, *Employer Sanctions in the United States, Canada and Mexico: Exploring the Criminalization of Immigration Law*, 3 SW.J.L. & TRADE AM. 333, 340 n.28 (Fall 1996); Legal Status and Rights of Undocumented Migrants, 18/03 Op. Inter-Am. Ct. H.R. (2003).

[9] World Bank Group, Data & Statistics: Total GDP 2004, http://www.worldbank.org/data/country class/classgroups.htm#High_income (last visited Nov. 17, 2004); Office for National Statistics, International Migration: Migrant's Entering or Leaving the United Kingdom and England and Wales, 2002 (April 29, 2004), *available at* http://www.statistics.gov.uk/statbase/Product.asp?vlnk=507 [hereinafter Office for National Statistics]; U.S. Department of Homeland Security, Yearbook of Immigration Statistics 2002, U.S. Government Printing Office: Washington D.C., 2003, at 7 [hereinafter 2002 Yearbook].

[10] World Bank Group, Data & Statistics: Total GDP 2004, http://www.worldbank.org/data/country class/classgroups.htm#High_income (last visited Nov. 17, 2004).

[11] World Bank Group, Data & Statistics: Total GNI 2004, http://www.worldbank.org/data/databy topic/GNI.pdf (last visited Nov. 17, 2004); World Bank Group, Data & Statistics, http://www.worldbank.org/data/databytopic/GDP.pdf.

[12] World Bank Group, Data & Statistics: Total GDP 2004, *supra* note 10; World Bank Group, Data & Statistics: Total GNI 2004, *supra* note 11.

[13] Office for National Statistics, *supra* note 9.

[14] 2002 Yearbook, *supra* note 9.

[15] BUNDESMINISTERIUM DES INNERN ET AL., MIGRATIONSBERICHT IM AUFTRAG DER BUNDESREGIERUNG 10 (2004), *available at* http://www.bmi.bund.de/cln_012/nn_121894/Internet/Con-

Part II will examine the United States and the United Kingdom, which do not provide the same labor protections to undocumented workers as to authorized workers. Sections II.A and II.B include an analysis of how each respective country deals with unlawful labor practices towards undocumented workers. Section II.C will evaluate how these two countries are similar in their treatment of labor laws for undocumented workers and critiques the approach adopted by both. Part III will apply the same methodology to countries that provide equivalent labor protections to undocumented workers and authorized workers, namely Germany in Section III.A and South Korea in Section III.B. The examination will focus on domestic laws and policies instead of international instruments pertaining to foreign workers because international measures have had little effect on alleviating the plight of foreign workers.[17] Part IV concludes by suggesting that national immigration policy does not have to trump or conflict with national labor policy, even when a country utilizes employer sanctions.

II. Countries that have Different Labor Protections for Undocumented Workers and Authorized Workers

A. United States of America

The United States adopted employer sanctions as part of national immigration policy through IRCA[18] and made it unlawful to: (1) hire, recruit, or receive compensation for referring an alien to work in the United States, if it is known that the alien is unauthorized; (2) continue to employ the alien in the United States, knowing the alien is (or has become) unauthorized; and (3) fail to examine documents establishing both employment authorization and identity.[19] A good faith attempt to comply with IRCA's document verification requirements provides an employer with a defense to alleged violations of the act.[20]

IRCA provides for both civil and criminal sanctions against employers.[21] An employer is subject to a fine of up to $2,000 for each undocumented worker in its employ. The fine rises to $10,000 for each undocumented worker if the em-

tent/Common/Anlagen/Broschueren/2004/Migrationsbericht__2004,templateId=raw,property=publicationFile.pdf/Migrationsbericht_2004 [hereinafter MIGRATION REVIEW 2004].

16 Korea National Statistical Office: International Migration in 2003, http://www.nso.go.kr/eng/releases/report_view.html?num=368 (last visited Jan. 28, 2006). While South Korea appears to have admitted a great deal less immigrants than the United States, United Kingdom, or Germany, South Korea is comparatively much smaller in many respects than these other three countries. So, that, for example, as a percentage of a country's population, South Korea admitted almost exactly the same percentage as the United States. *See* World Population Prospects: The 2002 Revision, http://www.un.org/esa/population/publications/wpp2002/WPP2002-HIGHLIGHTSrev1.PDF (last visited Nov. 14, 2005). As a percentage of these four countries' populations, Germany has the highest level of immigration followed by the United Kingdom, and then the United States, and South Korea. *Id.*

17 Martin Ruhs, Temporary Foreign Worker Programmes: Policies, Adverse Consequences, and the Need to Make Them Work 13 (2002) (unpublished comment, on file with the Univ. of Cal., San Diego), *available at* http://repositories.cdlib.org/ccis/papers/wrkg56.

18 8 U.S.C. § 1324a (2005).

19 *Id.* at § 1324a(a); *Id*. at § 1324a(b).

20 *Id.* at § 1324a(a)(3).

21 *Id.* at § 1324a(e); *Id*. at § 1324a(f).

ployer has previously violated IRCA.[22] Criminal penalties of up to six months imprisonment are available in cases where a pattern or practice of employing undocumented workers is established.[23]

U.S. Immigration and Customs Enforcement ("ICE") is the government agency responsible for investigating and enforcing the employer sanctions.[24] In 2003, ICE conducted 2,194 employer investigations and issued 162 notices of intent to fine, only 124 of which resulted in fines.[25] This is an extreme decline from 1997, when 7,537 investigations were conducted, 865 intentions to fine were issued, and 778 final orders were issued.[26] The number of work site investigation cases also declined eighty percent between 1998 and 2001.[27] Additionally, the number of undocumented workers arrested as a result of work site investigations has decreased tremendously.[28] While such investigations yielded 17,554 arrests in 1997, there were only 445 arrests in 2003.[29]

Some administrative agencies that enforce U.S. labor laws have argued that those laws apply to workers regardless of whether or not they are documented.[30] One example is the U.S. Department of Labor Wage and Hour Division ("WHD"), which is responsible for administering and enforcing labor laws such as minimum wage, overtime, and child labor provisions of the Fair Labor Standards Act ("FLSA").[31] It also enforces employment-related protections for migrant and seasonal agricultural workers under the Migrant and Seasonal Agricultural Worker Protection Act ("MSPA").[32] The MSPA was created to ensure that employers of migrant workers pay them wages, provide certain safety conditions, and comply with the terms of working contracts.[33] The WHD has

[22] *Id.* at § 1324a(e).

[23] *Id.* at § 1324a(f).

[24] U.S. Department of Homeland Security, Yearbook of Immigration Statistics 2003, U.S. Government Printing Office: Washington D.C., 2004, at 144-45. [hereinafter 2003 Yearbook]

[25] *Id.* at 157. The Notice of Intent to Fine shall contain the basis for the charge(s) against the [employer], the statutory provisions alleged to have been violated, and the monetary amount of the penalty [ICE] intends to impose. If the [employer] does not file a written request for a hearing within 60 days of service of the Notice of Intent to Fine, [ICE] shall issue a final order from which there shall be no appeal. 8 C.F.R. § 270.2 (2005).

[26] 2003 Yearbook, s*upra* note 24, at 157.

[27] *I*d. at 147.

[28] *Id.*

[29] *Id.* at 157.

[30] There are three major types of labor laws: (i) labor relations laws that give workers rights to organize and bargain collectively; (ii) protective labor laws that establish minimum wages, maximum hours of work, and establish eligibility for work-related benefits such as unemployment insurance, and (iii) sanctions and antidiscrimination laws that prohibit employers from hiring or retaining unauthorized aliens or using prohibited criteria such as race or sex to hire, promote and lay off workers. Martin & Miller, *supra* note 2, at 2.

[31] 29 U.S.C. § 201 (2005).

[32] *Id*.

[33] 29 U.S.C. § 1801 (2005).

specifically stated that it will enforce the FLSA and the MPSA irrespective of an employee's documentation.[34]

While the WHD intends to enforce labor laws for unauthorized workers, federal courts have denied undocumented workers some of the most critical remedies under both state and federal labor laws. The most significant decision was the United States Supreme Court's ruling in *Hoffman Plastic Compounds, Inc. v. NLRB*.[35] *Hoffman* held that because IRCA "'forcefully' made combating the employment of illegal aliens central to '[t]he policy of immigration law,'" unauthorized workers could not receive back pay remedies under the National Labor Relations Act ("NLRA") when they were illegally discharged for organizing unions.[36] The Court reasoned that awarding back pay to an undocumented worker was contrary to the policy of IRCA, as it would condone and encourage undocumented workers to illegally stay and work in the United States.[37] The Supreme Court also concluded that the National Labor Relations Board, which enforces the NLRA laws, was "prohibited from effectively rewarding a violation of the immigration laws by reinstating workers not authorized to reenter the United States."[38]

The Court's holding affected how some administrative agencies evaluate remedies available to undocumented workers. Prior to *Hoffman,* the U.S. Equal Employment Opportunity Commission ("EEOC"), which enforces employment anti-discrimination laws, unequivocally argued that "unauthorized workers who are subjected to unlawful employment discrimination are entitled to the same relief as other victims of discrimination."[39] However, after *Hoffman*, the EEOC stated in its compliance manual that while employers cannot discriminate against undocumented workers, relief for undocumented workers may be limited.[40] Additionally, one federal appellate court has ruled that IRCA completely prevents undocumented workers from any relief under federal anti-discrimination laws.[41]

Following *Hoffman,* U.S. federal and state courts have ruled that relief under other labor laws is also unavailable to undocumented workers.[42] For example, undocumented workers have been denied back pay and front pay for violations of the FLSA, which goes against the advice of the WHD.[43] In New York, one state

[34] U.S. Department of Labor: Employment Standards Administration Wage and Hour Division, Fact Sheet #48: Application of U.S. Labor Laws to Immigrant Workers: Effect of Hoffman Plastics Decision on Laws Enforced by the Wage and Hour Division, available at http://www.dol.gov/esa/regs/compliance/whd/whdfs48.htm (last updated Oct. 4, 2004).

[35] Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137 (2002).

[36] *Id.* at 147 (citing Nat'l Ctr. for Immigrants' Rights, Inc., 502 U.S. at 194, n. 8).

[37] *Id.* at 149-51.

[38] *Id.* at 145 (citing Sure-Tan, Inc. v. NLRB, 467 U.S. 883, 903 (1984)).

[39] EQUAL EMPLOYMENT OPPORTUNITY COMM'N, EEOC COMPLIANCE MANUAL, SECTION 622: CITIZENSHIP, RESIDENCY, REQUIREMENTS, ALIENS AND UNDOCUMENTED WORKERS 2 (2000).

[40] EQUAL EMPLOYMENT OPPORTUNITY COMM'N, EEOC COMPLIANCE MANUAL, SECTION 13: NATIONAL ORIGIN DISCRIMINATION 21, n.61 (2002).

[41] Egbuna v. Time-Life Libraries, Inc., 153 F.3d 184, 188 (4th Cir. 1998).

[42] Renteria v. Italia Foods, Inc., No. 02 C 495, 2003 WL 21995190, (N.D. Ill. Aug. 21, 2003) at *6.

[43] *Id.*

district court following *Hoffman* denied undocumented workers any kind of relief under state health and safety laws.[44] Undocumented workers also have been denied remuneration under state worker's compensation laws, as courts have concluded that under the *Hoffman* rationale, IRCA preempts undocumented workers from receiving certain types of relief.[45]

B. United Kingdom

The Asylum and Immigration Act of 1996, which introduced employer sanctions in the United Kingdom, went into effect on January 27, 1997.[46] Under the statute, an employer is guilty of an offense if it employs a person subject to immigration control who has attained the age of 16, and (a) the employee has not been granted leave to enter or remain in the United Kingdom, or (b) the employee's leave is not valid and subsisting, or is subject to a condition precluding him from accepting the employment.[47] The Act also requires employers to check the identity and work authorization of employees and new hires.[48] An employer can escape sanctions if it can prove that it saw and kept a copy of documentation that seemed to relate to the job applicant and appeared to prove that the applicant was entitled to work in the United Kingdom.[49]

The British statute only provides for civil sanctions. An employer found guilty of an offense is liable for a fine of up to 5,000 pounds ($9,405).[50] The U.K. Immigration and Nationality Directorate is responsible for enforcing employer sanctions. From 1998 until 2002, there were twenty-two enforcement actions against employers who employed undocumented workers, of which eight resulted in convictions.[51] In 2002, there were only two enforcement actions and one conviction.[52] While there are no official statistics for 2003, evidence shows that enforcement has not increased.[53]

There is little case law on how the United Kingdom enforces labor laws in regards to undocumented workers. One recent decision by the Court of Appeal

---

[44] Majlinger v. Cassino Contracting Corp., 766 N.Y.S.2d 332, 333 (N.Y. Sup. Ct. 2003).

[45] Marjorie A. Shields, *Application of Workers' Compensation Laws to Illegal Aliens*, 121 A.L.R. 5th 523 (2004); Jason Schumann, *Working in the Shadows: Illegal Aliens' Entitlement to State Workers' Compensation*, 89 IOWA L. REV. 709, 724 -26 (2004).

[46] Martin & Miller, *supra* note 2, at 1.

[47] Asylum and Immigration Act, 1996, c. 49, § 8 (Eng.).

[48] *Id.*; HOME OFFICE, CHANGES TO THE LAW ON PREVENTING ILLEGAL WORKING: SHORT GUIDANCE FOR UNITED KINGDOM EMPLOYERS 4-5 (April 2004) [hereinafter HOME OFFICE, CHANGES], *available at* http://www.ind.homeoffice.gov.uk/ind/en/home/0/preventing_illegal.Maincontent.0004.file.tmp/changes_to_law.pdf.

[49] Asylum and Immigration Act, 1996 c. 49, § 8(2) (Eng.).

[50] HOME OFFICE, CHANGES, *supra* note 48, at 8. **R**

[51] HOME OFFICE, CONTROL OF IMMIGRATION: STATISTICS UNITED KINGDOM 2002 (Nov. 27, 2003) [hereinafter HOME OFFICE, CONTROL], *available at* www.homeoffice.gov.uk/rds/immigration1.html.

[52] *Id.*

[53] HOME AFFAIRS COMM., SECOND REPORT OF SESSION 2003-04: ASYLUM APPLICATIONS 77-82 (2004), *available at* www.publications.parliament.uk/pa/cm200304/cmselect/cmhaff/218/218.pdf.

(Civil Division) in *Vakante v. Addey & Stanhope School,*[54] [2004] EWCA (Civ) 1065 (Eng.) at para. 24, 27, indicates that the United Kingdom is also limiting labor law remedies for undocumented workers.[55] In *Vakante*, the plaintiff, a Croatian citizen, appealed a decision of an employment tribunal, which held that he was barred by his illegal immigration status from bringing a complaint of employment discrimination against the defendant secondary school.[56]

Mr. Vakante, an asylum seeker who was not permitted to take up employment in the United Kingdom, applied for a position as a teacher at Addey and Stanhope School.[57] He knowingly entered false information on his application form about his ability to be legally employed in the United Kingdom without a work permit.[58] He worked for the school for eight months before being discharged.[59] Mr. Vakante was found guilty of violating section 24 of the Immigration Act of 1971 because he did not abide by his conditional stay in the United Kingdom, which prohibited him from working.[60] Following his dismissal, Mr. Vakante filed a claim against the school, alleging race and national origin discrimination on the grounds that he was not given equal opportunities for training, benefits, services and facilities, in addition to being discharged.[61]

Because Mr. Vakante violated section 24 of the Immigration Act 1971 by obtaining and continuing employment, the claim was dismissed by the courts that heard his case.[62] The Employment Tribunal first held that Mr. Vakante was precluded from relief because the claims were "so closely connected with the deliberate illegality of that contract on Mr. Vakante's part that were the tribunal to allow the originating application to go forward to a hearing, it would appear to be endorsing the applicant's illegal actions."[63] The Employment Appeal Tribunal agreed.[64] The Court of Appeal (Civil Division) likewise held that Mr. Vakante could not pursue his complaints of discrimination where those complaints were so inextricably bound with his own illegal conduct that if the tribunal permitted him to pursue the complaints, it would give the appearance of condoning the illegal conduct.[65]

---

[54] The Court of Appeal (Civil Division) is the intermediary appellate court for civil cases. The next higher appellate court would be the House of Lords which is the supreme court of appeal. Sarah Carter, *A Guide of the UK Legal System-Updated*, http://www.llrx.com/features/uk2.htm (last visited Nov. 13, 2004).

[55] *See generally* Vakante v. Addey & Stanhope Sch., [2004] EWCA (Civ) 1065 (Eng.).

[56] *Id*. at para. 10, 12.

[57] *Id.* at para. 12-13.

[58] *Id.* at para. 13.

[59] *Id.* at para. 14.

[60] *Id.* at para. 18.

[61] *Id.* at para. 15-16. Under the Race Relations Act 1976, it is illegal to treat a person less favorably than another person on the basis of color, race, nationality or ethnic or national origins of the person. Race Relations Act 1976, 1976 c. 74 Pt I s 1 (Eng.).

[62] Vakante v. Addey & Stanhope Sch., [2004] EWCA (Civ) 1065 (Eng.). at para. 24, 27.

[63] *Id.* at para. 26.

[64] *Id.* at para. 27.

[65] *Id.* at para. 36.

C. Analysis

The Court of Appeal in *Vakante* applied reasoning similar to that of the U.S. Supreme Court in *Hoffman*. Essentially both courts based their decision on the legal principle of *ex turpi causa non oritur actio*, which provides that a cause of action cannot be founded on an immoral or illegal act, or a transgression of positive law.[66] One main policy behind this principle is that the plaintiff should not be granted relief where it would enable him to benefit from his criminal conduct.[67] In the context of denying undocumented workers the protections of labor laws, the argument is that the employee cannot receive the benefits of the law because the employment that gave rise to the benefits was illegally created or could not have been created except in violation of the law.

Another major policy behind the principle of denying legal protections to undocumented workers is deterrence.[68] Nevertheless, this approach will not necessarily dissuade unauthorized employees from staying and working in countries like the United States or the United Kingdom. To begin with, it is unlikely that the undocumented workers know that they will be denied protections under domestic labor laws because of their immigration status.[69] If they do not know that they are being denied these labor law protections, denial will have no effect on whether they stay or leave.[70] Even if they were aware, undocumented workers do not come into the United States or the United Kingdom for the protection of the respective country's labor laws.[71] As one federal court has put it, "[r]ather it is the hope of getting a job — at any wage — that prompts most illegal aliens to cross our borders."[72] Undocumented workers enter the United States or the United Kingdom regardless of whether they are provided labor law protections, therefore denying them those protections will not deter them from entering and staying.[73]

Additionally, where there is "joint illegality, knowledge that the other could not make a claim could equally be an inducement to crime."[74] The courts have focused only on deterring undocumented workers, but have failed to examine what effect their decisions have had in discouraging labor law violations commit-

---

66 THE LAW COMM'N, CONSULTATION PAPER NO 154 - ILLEGAL TRANSACTIONS: THE EFFECT OF ILLEGALITY ON CONTRACTS AND TRUSTS 86 (1999) [hereinafter LAW COMM'N, ILLEGAL TRANSACTIONS].

67 THE LAW COMM'N, CONSULTATION PAPER NO 160 - THE ILLEGALITY DEFENCE IN TORT: A CONSULTATION PAPER 74-77 (2001) [hereinafter LAW COMM'N, THE ILLEGALITY DEFENCE].

68 *Id.* at 72-74. Additional policy reasons behind the principle are upholding the dignity of the courts and punishment. LAW COMM'N, ILLEGAL TRANSACTIONS, *supra* note 66, at 86-89. As neither the U.K. nor U.S. courts have used these other policy reasons for denying undocumented workers labor law protections, only the policies of deterrence and prohibiting profit from the plaintiff's own wrongdoing will be examined.

69 Thomas J. Walsh, *Hoffman Plastic Compounds, Inc. v. NLRB: How the Supreme Court Eroded Labor Law and Workers Rights in the Name of Immigration Policy*, 21 LAW & INEQ. 313, 331-32 (2003).

70 *See generally id.*

71 Patel v. Quality Inn S., 846 F.2d 700, 704-05 (11th Cir. 1988).

72 *Id.* at 704-05.

73 *See generally id.*

74 LAW COMM'N, THE ILLEGALITY DEFENCE , *supra* note 67, at 73.

ted by employers. Awarding back pay to an unauthorized employee not only compensates the employee, but also admonishes the employer who violated the law.[75] The U.S. Supreme Court itself admitted that back pay was one of the more effective remedies under the NLRA.[76] "In the absence of the back pay weapon, employers could conclude that they can violate the labor laws at least once with impunity."[77] By failing to provide effective relief to undocumented workers and by focusing on only deterring undocumented workers, the courts not only fail to deter the employer's illegal labor practices, but in fact sanction them.[78]

The undocumented worker who seeks a legal remedy does not do so for profit or benefit, but rather as compensation for the illegal act of the employer.[79] While the undocumented worker is potentially entitled to mere compensation, the employer enjoys pecuniary benefits by violating labor laws with no effective implications. Although both parties are in pari delicto, the courts ultimately punish the unauthorized employment of the undocumented employee without sanctioning the employer's unlawful conduct.[80] Thus, by refusing to provide remedies to undocumented workers, courts incorrectly overplay the potential threat posed by condoning illegal conduct by the undocumented worker in relation to the harm that results from the employer's violation of the law.

Additionally, in determining whether condoning the illegality of the undocumented employee's conduct is a significant concern, the seriousness of the misconduct must be considered.[81] In this case, the employee's illegal conduct is, in itself, his or her unauthorized employment. While both the United States and the United Kingdom have laws preventing the illegal employment of undocumented workers, data indicates that little is done to prevent or punish such practices by way of enforcement.[82] The seriousness of unauthorized employment is questionable when laws are not even enforced to prevent it.

Another similarity between the United States and the United Kingdom is that the agencies that enforce employer sanctions are different from the agencies enforcing labor laws. In the United States, immigration officers enforce sanctions with very little cooperation between the labor and immigration departments.[83] Such cooperation is rare because the labor department recognizes that interagency collaboration would make it difficult to enforce labor laws.[84] For exam-

[75] Hoffman Plastics Compounds, Inc., v. NLRB, 535 U.S. 137, 160 (2002) (Breyer, S., dissenting).

[76] Sure-Tan, Inc., v. NLRB, 467 U.S. 883, 904 (1983) (Breyer, S., dissenting).

[77] *Hoffman*, 535 U.S. at 154 (Breyer, S., dissenting).

[78] GEN. ACCT. OFF., GARMENT INDUSTRY: EFFORTS TO ADDRESS THE PREVALENCE AND CONDITIONS OF SWEATSHOPS 8 (1994) (noting a higher incidence of labor violations in areas with large populations of undocumented aliens).

[79] LAW COMM'N, THE ILLEGALITY DEFENCE, *supra* note 67, at 75.

[80] *Hoffman*, 535 U.S. at 146, 150.

[81] Vakante v. Addey & Stanhope Sch., [2004] EWCA (Civ) 1065 (Eng.) at para. 9.

[82] Donald L. Barlett & James B. Steele, *Who Left the Door Open?*, TIME, Sep. 21, 2004, at 51.

[83] Martin & Miller, *supra* note 2, at 1.

[84] *Id.* at 34.

ple, undocumented employees would not be willing to testify against their employers if they knew that they would be arrested and deported.[85]

The divide between enforcement of labor laws and employer sanctions indicates a disconnect between labor and immigration policy in the United States and the United Kingdom. Instead of viewing illegal employment as a labor law violation, the United States and the United Kingdom consider it only an immigration violation.[86] However, the illegal employment of undocumented foreigners can be addressed as both a labor policy issue and an immigration policy issue.

III. Countries That Provide Equivalent Labor Protections To Undocumented Workers And Authorized Workers

A. Germany

The Employment Promotion Act (*Arbeitsfoerderungsgesetz* or AFG)[87] delineates employer sanctions in Germany. Employer sanctions law was first enacted in 1972 in Germany and has undergone several revisions since then.[88] Currently, the maximum fine for an employer who employs an undocumented worker is 500,000 Euros ($651,704).[89] An employer can also receive a fine of 50,000 Euros ($33,323) for obtaining a work permit for a foreign worker under false pretenses through the provision of false information on wages, work hours, or other working conditions.[90] An employer also faces criminal sanctions of up to one-year imprisonment if the employer employs more than five undocumented workers for more than thirty days.[91] For particularly serious violations, an employer may face up to three years in prison.[92] Additionally, if an employer is found to have employed undocumented workers, the employer is responsible for paying repatriation costs and any taxes or social insurance in arrears.[93] Employers who have been fined more than 5,000 Euros ($3,332) or sentenced to more than three months in prison can be excluded from public contracts for two years.[94]

---

[85] *Id.* at 35.

[86] *Id.* at 1, 31.

[87] In 1998, the AFG was re-codified and the law was incorporated into Sozialgesetzbuch III (Social Insurance Code III). *Id.* at 20-21; Hubertus Schick, *Job Rotation from the Perspective of Enterprises, Employees and Political Decisionmakers– Expectations and Results Illustrated by the Example of 'Job Rotation for the Bremen Region', in* AGORA VIII JOB ROTATION 86 (Eur. Ctr. for the Dev. of Vocational Training ed., 2002).

[88] Martin & Miller, *supra* note 2, at 20-22.

[89] FEDERAL REPUBLIC OF GERMANY, NATIONAL ACTION PLAN FOR EMPLOYMENT POLICY 2003 32 (2003).

[90] Rainer Irlenkaueuser, *Combating the Irregular Employment of Foreigners in Germany: Sanctions against Employers and Key Areas of Irregular Employment, in* COMBATING THE ILLEGAL EMPLOYMENT OF FOREIGN WORKERS 153 (Org. for Econ. Co-operation and Dev. 2000).

[91] *Id.*

[92] *Id.*

[93] *Id.*

[94] *Id.*

The German Department of Labor enforces employer sanctions laws.[95] The Ministry had 184 offices in 1996.[96] Some of these offices included special enforcement teams created to prevent undocumented foreign worker employment.[97] There were about 1,600 inspectors and an additional 840 inspectors appointed specifically for inspection of construction sites.[98] Also, there were some 1,000 employees of the former West-East German customs office assigned to labor law enforcement in the mid-1990s.[99]

Germany spends five times more per worker than the United States to prevent the employment of unauthorized workers.[100] Germany spends almost $3 per worker per year in contrast to the United States, which spends about $0.66 per worker a year.[101] Some commentators have stated that this is more than any other country spends on employer sanctions enforcement activities.[102]

Germany also has passed stringent laws to prevent the exploitation of undocumented workers and to provide undocumented workers the same labor rights as authorized workers.[103] A German employer who deviates substantially in the working conditions it provides to undocumented workers as compared to similarly situated authorized workers faces punishment of up to three years in prison.[104] A prison sentence of six months to five years is available in particularly serious cases.[105]

Unlike in the United Kingdom or the United States, German authorities also try to provide back wages owed to illegal workers by employers.[106] Additionally, German prosecutors can ask courts to fine employers the equivalent of any profits they derived from employing illegal workers.[107] The intent in passing these laws has been to maintain fair competition in the labor market.[108]

Acknowledging that many undocumented workers may be exploited through small subcontracting companies, especially in the construction industry, Germany has passed even tougher laws dealing with subcontractors' failure to provide foreign workers with minimally acceptable working conditions.[109]

---

95 Martin & Miller, *supra* note 2, at 21.

96 *Id.*

97 *Id.*

98 *Id.*

99 *Id.*

100 *Id.*

101 *Id*. at 22.

102 *Id*.

103 *Id*. at 21.

104 Arbeitsfoerderungsgesetz [AFG] [Employment Promotion Act] 1972, § 227a; Irlenkaueuser, *supra* note 90, at 153.

105 *Id*.

106 Martin & Miller, *supra* note 2, at 21.

107 *Id.*

108 Irlenkaueuser, *supra* note 90, at 153.

109 In 1998, most of the cases of illegal employment were in the construction industry. Martin & Miller, *supra* note 2, at 21. In June 1999, over half of the 66 foreign construction firms inspected in the

Subcontractors who employ foreign workers in violation of minimum working conditions for these workers (e.g. do not pay them minimum wage) face a fine of 1,000,000 Euros ($666,469).[110] General contractors who knowingly or negligently allow subcontractors to employ foreign workers below minimum working conditions also face a fine of 1,000,000 Euros ($666,469).[111] In order to hold general contractors liable, courts are required to find only negligence, as opposed to gross negligence.[112] Furthermore, employers must pay for their contract employees' work permits; if an employer requires reimbursement for the cost of the permit, the employer can be fined 50,000 Euros ($33,323).[113]

In fighting the illegal employment of undocumented workers, Germany focuses its enforcement efforts on employers, as opposed to employees.[114] This is due to that fact that employers make a substantial profit by exploiting undocumented workers.[115] German authorities have declared that such exploitation distorts the labor market.[116] Rainer Irlenkaueuser, Director of the Ministry of Labor and Social Affairs, wrote that "[i]n Germany the irregular employment of foreigners is considered socially harmful, undesirable from the point of view of labor market policy and as having [a] negative effect on fair competition."[117]

Statistics for 2003 indicate that there were a total of 59,630 penalties issued and criminal prosecutions initiated against employers and employees.[118] The most recent enforcement statistics the author was able to obtain relating to enforcement actions taken against employers of undocumented workers date from 1998.[119] During that year, 47,400,000 Euros ($29,197,936) in fines were levied against employers of unauthorized workers.[120] Additionally, fines totaling 580,000 Euros ($357,281) were imposed on employers who employed undocumented temporary workers, while general contractors paid 910,000 Euros ($560,526) for the indirect employment of undocumented workers.[121] Recent data on enforcement activities against employers and employees indicates a trend of increasing enforcement against employers.[122]

State of Baden-Württemberg in Southwest Germany violated German labor laws by not paying their foreign workers the legal minimum wage. Id.

110 Irlenkaueuser, *supra* note 90, at 153.

111 *Id.*

112 *Id.*

113 *Id.*

114 *See generally id.*

115 *Id.* at 152.

116 *Id.*

117 *Id.*

118 MIGRATION REVIEW 2004, *supra* note 15, at 115.

119 Irlenkaueuser, *supra* note 90, at 153.

120 *Id.*

121 *Id.*

122 *See* FEDERAL REPUBLIC OF GERMANY, *supra* note 89, at 32; MIGRATION REVIEW 2004, *supra* note 15, at 59; Martin & Miller, *supra* note 2, at 77.

B. South Korea

In South Korea, the Immigration Control Act is the primary authority detailing the country's prohibitions against the employment of undocumented workers.[123] Originally enacted on March 5, 1963, the Act has been amended twelve times, with the most recent amendment dating December 5, 2002.[124] It makes it illegal for employers to employ or solicit for employment unauthorized foreign workers.[125] The Act provides that an employer who employs or solicits for employment an undocumented worker is subject to three years imprisonment and a fine not exceeding 20,000,000 won ($19,265).[126] An employer is also liable for the repatriation costs of any undocumented workers it has employed.[127]

In a more recent legislative measure, South Korea promulgated the Act on the Foreign Workers' Employment, etc. ("Employment Permit Act")[128] on August 16, 2003. The Employment Permit Act offers amnesty to many undocumented workers in South Korea, provides more stringent enforcement for foreign workers' labor rights, and implements a temporary worker program.[129] A primary motivation in passing the law was to prevent the exploitation of both documented and undocumented foreign workers.[130]

Under the Employment Permit Act, additional penalties were created for employers of foreign workers.[131] An employer who fails to obtain the necessary work permit for a foreign worker faces a fine of 10,000,000 won ($9,632) and imprisonment for one year.[132] In order to protect the labor rights of undocumented workers, an employer may be barred from legally employing foreign workers if the employer violates either a foreign worker's contract or any labor-related laws covering undocumented workers.[133] When the employer loses this

[123] Immigration Control Act, Law No. 1289 (1963) (S. Korea), *available at* http://unpan1.un.org/intradoc/groups/public/documents/APCITY/UNPAN011498.pdf.

[124] *Id.* at Introduction.

[125] *Id.* art. 18.

[126] *Id.* art. 94.

[127] *Id.* art. 90-2(1).

[128] Act on Foreign Workers' Employment, etc., Law No. 6967 (2003) (S. Korea), *available at* http://www.welco.or.kr/english/e_main.asp (last visited Oct. 9, 2005).

[129] *See id.;* Ki Sup Kwon, Dir. of Foreign Employment Div., Presentation Before the 3rd Meeting of the Immigration Policy Forum: The Prospects and Challenges for the Employment Permit System, at 17 (June 17, 2004) (translated Summary Report), *available at* http://www.immigration.go.kr/ipf/. ("A total of 184,000 undocumented foreign workers, or 81% of the estimated total, filed for and were granted legal working permits during the grace period from September 1, 2003, through November 30, 2003.") Dae-Hwan Kim, 2004 Labor Policies (April 19, 2004), *available at* http://152.99.129.68:8787/English/libr/sub_Content1.jsp.

[130] Ki Sup Kwon, *supra* note 129, at 5; REPUBLIC OF KOREA INTERNATIONAL COOPERATION BUREAU, LABOR ADMINISTRATION 2004 17 (2003), *available at* http://152.99.129.68:8787/board/pds_view.jsp?idx=77&code=A&pageNum=0&searchWord=&searchType=null.

[131] Act on Foreign Workers' Employment, etc. art. 29 (S. Korea).

[132] *Id.* arts. 8(5), 29(1).

[133] *Id.* art. 19. '"The Government has also declared that employers reported to have abused foreign workers are subject to criminal charges and can be disadvantaged in the Government's allocation of jobs for foreign workers.") U.S. DEP'T OF STATE BUREAU OF DEMOCRACY, HUMAN RIGHTS AND LABOR, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES - 2000: REPUBLIC OF KOREA, §6 (2001), *available at*

right, the foreign workers who were employed by the employer at that time may then transfer to another employer.[134] However, if the employer continues to employ foreign workers or attempts to obstruct the foreign worker's right to transfer, the employer faces a fine of 10,000,000 won ($9,632).[135] Thus, the Employment Permit Act provides the foreign worker some protection when reporting employers who violate labor laws.

The Employment Permit Act specifies both documented, and undocumented, "foreign workers in Korea are accorded the same legal rights as Korean workers, such as the right to join labor unions, minimum wage guarantees, and industrial accident insurance."[136] Government officials have added that undocumented workers who have had their wages withheld, suffered industrial accidents, or filed suits against employers will be allowed to extend their stay until these issues have been resolved.[137] However, this was not the first time that the Korean government had contemplated suspending removal proceedings to protect the labor rights of undocumented workers. Since 2000, the Ministry of Justice has periodically postponed deportations for undocumented workers waiting for back pay, medical care, compensation for industrial accidents, or the resolution of lawsuits against employers.[138] Furthermore, even if the employee returns or is removed to his or her country, an employer is still required to provide the undocumented employee any back wages due.[139] An employer who fails to pay back wages to a terminated foreign worker can be fined 10,000,000 won ($9,632).[140]

In addition to the Employment Permit Act, the Korean government has utilized other means to provide undocumented workers the same labor protections as documented workers. In fact, for several years counseling centers have heard complaints from foreign workers about overdue wages and industrial accidents.[141] Regional labor offices have also assisted foreign workers in collecting

http://www.state.gov/g/drl/rls/hrrpt/2000/eap/723.htm [hereinafter DEP'T OF STATE REPORTS 2000]; U.S. DEP'T OF STATE BUREAU OF DEMOCRACY, HUMAN RIGHTS AND LABOR, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES - 2001: REPUBLIC OF KOREA, §6 (2002), *available at* http://www.state.gov/g/drl/rls/hrrpt/2001/eap/8336.htm [hereinafter DEP'T OF STATE REPORTS 2001].

134 Act on Foreign Workers' Employment, etc. art. 25 (S. Korea).

135 *Id.* art. 29(4).

136 Sean Hayes, Columnist, *New Work System Benefits Migrants,* THE KOREA HERALD, Aug. 15, 2003.

137 Press Release, Republic of Korea Ministry of Justice, Roundup of Illegal Foreign Workers to Begin (Nov. 17, 2003), *available at* http://www.moj.go.kr.

138 DEP'T OF STATE REPORTS 2000, *supra* note 133; DEP'T OF STATE REPORTS 2001, *supra* note 133; U.S. DEP'T OF STATE BUREAU OF DEMOCRACY, HUMAN RIGHTS AND LABOR, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES - 2002: REPUBLIC OF KOREA, §6 (2003), *available at* http://www.state.gov/g/drl/rls/hrrpt/2002/18250.htm [hereinafter DEP'T OF STATE REPORTS 2002]; U.S. DEP'T OF STATE BUREAU OF DEMOCRACY, HUMAN RIGHTS AND LABOR, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES - 2003: REPUBLIC OF KOREA, §6 (2004) *available at* http://www.state.gov/g/drl/rls/hrrpt/2003/27776.htm [hereinafter DEP'T OF STATE REPORTS 2003].

139 Act on the Foreign Workers' Employment, etc. art. 16 (S. Korea).

140 *Id.* art. 29(2).

141 U.S. DEP'T OF STATE BUREAU OF DEMOCRACY, HUMAN RIGHTS AND LABOR, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES for 1999: REPUBLIC OF KOREA, §6 (2000) http://www.state.gov/g/drl/rls/hrrpt/1999/292.htm [hereinafter DEP'T OF STATE REPORTS 1999]; DEP'T OF STATE REPORTS 2000, *supra*

back wages.[142] In 2000, the Ministry of Justice announced the establishment of the Foreign Workers Human Rights Commission, which was created to "address employer mistreatment of foreign workers, such as beatings, forced detention, withheld wages, and seizure of passports."[143] Since its establishment, the Commission has met several times to hear complaints and to discuss inter-agency methods to protect foreign workers.[144]

In furtherance of Korea's labor and immigration policies, several government agencies have been granted jurisdiction to enforce laws related to the employment of undocumented workers.[145] For example, the Ministry of Labor has jurisdiction to enforce the Employment Permit Act.[146] It conducts inspections and investigations, as well as sets up counseling and education services for foreign workers.[147] On the other hand, the Ministry of Justice and the Law Enforcement Agency are the primary agencies in charge of enforcing employer sanctions under the Immigration Control Act.[148] As many as five government agencies may be involved in enforcement efforts, including the Justice Ministry, the Labor Ministry, the Small and Medium Business Administration, the National Maritime Policy Agency and the National Policy Agency.[149]

Since the Employment Permit Act was promulgated on August 16, 2003, there have been large-scale enforcement efforts against undocumented workers and their employers.[150] Kwon Ki Sup, Director of Foreign Employment Division, Ministry of Labor, has stated that South Korea's strategy under the Employment Permit Act is to step up enforcement of employer sanctions.[151] In 2004, there were at least five reported major crackdowns in the construction, manufacturing, and video game parlor industries, during which hundreds of undocumented workers were arrested.[152] These large-scale enforcement efforts directed towards un-

note 133; DEP'T OF STATE REPORTS 2001, *supra* note 133; DEP'T OF STATE REPORTS 2002, *supra* note 138.

142 DEP'T OF STATE REPORTS 2002, *supra* note 138.

143 *Id.*

144 DEP'T OF STATE REPORTS 2003, *supra* note 138.

145 *See id*; Act on the Foreign Workers' Employment, etc. art. 4(4) (S. Korea).

146 *See* Act on the Foreign Workers' Employment, etc. art. 5 (S. Korea).

147 *Id.* at arts. 5, 21, 24, 26; Enforcement Decree of the Act on Foreign Workers' Employment, etc., Presidential Decree No. 18314 art. 23(2) (Mar. 17, 2004) (S. Korea), *available at* http://www.welco.or.kr/english/law/down_files/decree%20of%20foreign.pdf.

148 KOREA LABOUR WELFARE CORP., PUBLIC NOTICE FOR FOREIGN WORKERS AND THEIR EMPLOYERS (2004), *available at* http://www.welco.or.kr/english/news/2004/notice(040210).htm.

149 Press Release, Republic of Korea Ministry of Justice, Government Crackdown on Illegal Aliens Begins Next Week (Nov. 13, 2003), *available at* http://www.moj.go.kr.

150 *See* Press Release, Republic of Korea Ministry of Justice, Government to Crack Down on Illegal Aliens (Feb. 21, 2004), *available at* http://www.moj.go.kr.

151 Ki Sup Kwon, *supra* note 129, at 6.

152 Press Release, Republic of Koreas Ministry of Justice, Justice Ministry Uncovers 140 Illegal Foreign Workers (Aug. 23, 2004), *available at* http://www.moj.go.kr (last visited Oct. 10, 2005); Press Release, Republic of Korea Ministry of Justice, Crackdown Uncovers 305 Illegal Foreign Workers (Nov. 27, 2004), *available at* http://www.moj.go.kr.

documented workers have been coupled with doubled penalties against employers who employ those workers.[153]

IV. A System Which Combines Both Labor and Immigration Policies More Effectively Combats the Unauthorized Employment of Undocumented Workers

In contrast to the United States and the United Kingdom, South Korea and Germany have implemented and enforced employment sanctions laws in a stringent manner. Also distinguishable from the United Kingdom, both Germany and South Korea provide for imprisonment as a criminal penalty against employers who employ undocumented workers.[154] In comparison to the United States, which also provides for imprisonment penalties as a possible sanction, the potential imprisonment sentences imposed by Germany and South Korea are longer.[155] Furthermore, unlike the United States and the United Kingdom, Germany and South Korea require employers to pay the costs of repatriating the undocumented workers they once employed.[156] In terms of applying governmental resources to enforcing employer sanctions, Germany has invested much more than either the United States or the United Kingdom, obtaining millions of dollars in fines as a result.[157] Additionally, whereas the United Kingdom and the United States have decreased enforcement, South Korea has instead increased employer penalties in addition to pursuing greater enforcement actions targeting the employment of undocumented workers.[158]

The relatively minimal efforts taken by the United States and the United Kingdom in enforcing employer sanctions, when compared to Germany and South Korea, undermine one of the key rationales of the U.S. Supreme Court's decision in *Hoffman Plastics Compounds, Inc., v. NLRB*. The *Hoffman* Court held that because IRCA "'forcefully' made combating the employment of illegal aliens central to '[t]he policy of immigration law,'" undocumented workers are unable to receive the same remedies as authorized workers.[159] Although South Korea and Germany are much more forceful in combating the employment of undocumented workers than either the United States or the United Kingdom, they still provide greater access to the same labor law remedies as those afforded to authorized workers. Thus, in contrast to the Supreme Court's opinion in *Hoffman*, South Korea and Germany demonstrate that just because a country promulgates

153 Press Release, Republic of Korea Ministry of Justice, Harsher Penalties Set for Employment of Illegal Foreign Workers (Oct. 9, 2003), *available at* http://www.moj.go.kr [hereinafter Harsher Penalties].

154 Asylum and Immigration Act, 1996, c. 49, § 8 (Eng.); Irlenkaueuser, *supra* note 90, at 154; Immigration Control Act art. 94 (S. Korea).

155 Irlenkaueuser, *supra* note 90, at 154; Immigration Control Act art. 94 (S. Korea); 8 U.S.C. § 1324a(f) (1952).

156 Immigration Control Act art. 90-2 (S. Korea); Irlenkaueuser, *supra* note 90, at 153.

157 Martin & Miller, *supra* note 2, at 21, 22; Irlenkaueuser, *supra* note 90, at 152.

158 Harsher Penalties, *supra* note 153. R

159 Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137, 149 (2002) (citing INS v. Nat'l Ctr. for Immigrants' Rights, Inc., 502 U.S. 183, 194, n. 8 (1991)).

employer sanctions does not mean that it also intends or would allow undocumented workers to be deprived of legal remedies or any additional protections afforded to documented workers.

The efforts to stop the exploitation of undocumented foreign workers by Germany and South Korea also serve to stop the illegal trafficking of people.[160] The International Labor Organization recommends that one of the necessary requirements in a comprehensive plan to halt human trafficking is the "[e]nforcement of minimum national employment conditions standards in all sectors of activity, to serve as a complementary system of criminalizing abuse of persons and of discouraging irregular employment."[161] Providing undocumented workers with the same labor law remedies as documented workers is one of the best methods of enforcing minimum working conditions and deterring the exploitation of undocumented workers.[162] Germany and South Korea exemplify the notion that immigration policy is compatible with labor policy by combining the former's policy goal of stopping illegal trafficking of human beings with the latter's aim of providing labor protection to those working inside the country.[163]

As described above, Germany and South Korea use both labor law enforcement agencies and cooperation between various types of agencies to enforce employer sanctions. This practice also occurs in many other European countries where labor department inspectors are used to both enforce labor laws and employer sanctions.[164] As these examples demonstrate, there can be compatible immigration and labor policies that work to prevent unauthorized employment while at the same time promoting labor rights for undocumented workers.

V. Conclusion

Maintaining the fight against the employment of illegal aliens as a central tenet of a country's immigration policy does not automatically lead to the conclusion that immigration policy is more important than labor policy, nor does it imply that the goals of one are incompatible with that of the other. In order to appreciate the commonality between immigration and labor policy, one must recognize the deeper policy objectives behind employer sanctions, including the

160 *See* PATRICK A. TARAN & GLORIA MORENO-FONTES CHAMMARTIN, INTERNATIONAL LABOUR ORGANIZATION, GETTING AT THE ROOTS: STOPPING THE EXPLOITATION OF MIGRANT WORKERS BY ORGANIZED CRIME, 15 (2003) *available at* http://www.ilo.org/dyn/dwresources/dwbrowse.page?p_lang=en&p_tool_id=132.

161 *Id.*

162 *See* Sure-Tan Inc., v. NLRB, 467 U.S. 883, 904 (1984); Ruben J. Garcia, *Ghost Workers in an Interconnected World: Going Beyond the Dichotomies* ILO's COMMITTEE ON FREEDOM OF ASSOCIATION, REPORT NO. 332: COMPLAINTS AGAINST THE GOVERNMENT OF THE UNITED STATES PRESENTED BY AMERICAN FEDERATION OF LABOR AND THE CONGRESS OF INDUSTRIAL ORGANIZATIONS (AFL-CIO) AND THE CONFEDERATION OF MEXICAN WORKERS (CTM), ¶ 609 (2003) *available at* http://www.ilo.org/public/english/bureau/inst/edy/cornell05/aflcio.pdf.

163 *See* Colin L. Powell, *No Country Left Behind*, FOREIGN POL'Y, Jan./Feb. 2005, *available at* 2005 WLNR 74766 (former U.S. Secretary of State calling for international partnerships to stop the illegal trafficking of persons).

164 Martin & Miller, *supra* note 2, at 1, 4.

preservation of jobs, working conditions, and wages for the country's workers.[165] As the employer sanctions systems of Germany and South Korea indicate, enforcement of labor laws actually fosters immigration policy by discouraging employers from hiring undocumented workers that they can exploit.[166]

As Ruben Garcia has observed, "[h]istorically, immigration law and labor law have not been linked in the policymaking process. This disconnect has led to a failure to see immigration as a labor issue and vice versa."[167] Accordingly, there must be an integrated approach if a country is to harmonize immigration and labor policy. Unless otherwise indicated by law, a country's courts should not assume that the policy of employer sanctions automatically disallows equal labor law remedies for undocumented workers. Countries need to recognize that enforcement of labor laws is compatible with the enforcement of immigration laws and that equal enforcement of labor laws for all workers can simultaneously further both labor and immigration policy. Taking into mind the Inter-American Court of Human Rights' advice, differential treatment between documented workers and undocumented workers is only permissible to the extent it is "reasonable, objective, proportionate and does not harm human rights."[168]

165 *See Sure-Tan*, 467 U.S. at 893; H.R. REP. NO. 99-682 (I), at 48, 90-91, 124 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5649, 5652, 5694, 5728; H.R. REP. NO. 99-682 (II), at 9 (1986) *reprinted in* 1986 U.S.C.C.A.N. 5757, 5758; Martin & Miller, *supra* note 2, at 1.

166 *See* Patel v. Quality Inn S., 846 F.2d 700, 704-5 (11th Cir. 1988).

167 Garcia, *supra* note 162, at 740.

168 Advisory Opinion OC-18/03, Juridical Status and Rights of the Undocumented Migrants, Inter-Am. Ct. H.R.(ser. A) No. 18, at 119 (Sept. 17, 2003), *available at* http://www.corteidh.or.cr/seriapdf_ing/seriea_18_ing.pdf (last visited Oct 25, 2005) (holding that *Hoffman* decision violated undocumented workers' equal protection and due process rights).