IMMIGRATION, COMPENSATION AND PREEMPTION: THE PROPER MEASURE OF LOST FUTURE EARNING CAPACITY DAMAGES AFTER *HOFFMAN PLASTIC COMPOUNDS, INC. V. NLRB*

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I. INTRODUCTION

America has long had a dichotomous relationship with illegal immigrants. Citizens overwhelmingly favor restrictions on the yearly flood of illegal immigrants and the services provided for them by federal, state and local government,[1] while corporate America pays undocumented workers low wages for dirty and dangerous jobs with near total impunity.[2] Estimates of the number of illegal immigrants living in the United States range from a low of seven million[3] up to a high of fifteen million.[4] Millions work in America's fields (up to 1,400,000), factories (1,200,000), and construction sites (over 600,000)[5]—some of the nation's most hazardous working environments.[6]

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[1] Donald L. Barlett & James B. Steele, *Who Left the Door Open?*, TIME, Sept. 20, 2004, at 51, 52.

[2] *See id.* at 58–62.

[3] OFFICE OF POLICY & PLANNING, U.S. IMMIGRATION AND NATURALIZATION SERV., ESTIMATES OF THE UNAUTHORIZED IMMIGRANT POPULATION RESIDING IN THE UNITED STATES: 1990 TO 2000, at 1 (2003), http://www.uscis.gov/graphics/shared/aboutus/statistics/Ill_Report_1211.pdf.

[4] Barlett & Steele, *supra* note 1, at 52.

[5] Rebecca Smith et al., *Low Pay, High Risk: State Models for Advancing Immigrant Workers' Rights*, 28 N.Y.U. REV. L. & SOC. CHANGE 597, 598–99 (2004) (citing B. LINDSAY LOWELL & ROBERT SURO, HOW MANY UNDOCUMENTED: THE NUMBERS BEHIND THE U.S.–MEXICO MIGRATION TALKS 7–8 (2002), http://pewhispanic.org/files/reports/6.pdf.).

[6] Agriculture represents less than one percent of all jobs in the United States, but accounts for six percent of all occupational deaths, while construction and manufacturing jobs have even

Millions of illegal immigrants living in this nation and working in hazardous environments means that, through the vagaries of chance, many thousands are tortiously injured yearly.[7] For the severely injured, returning to the labor-intensive work that many illegal immigrants perform may be impossible. In these cases, their tort damages would include compensation for lost earning capacity.[8] Damages for lost earning capacity are compensatory damages designed to compensate for the reduction in the plaintiff's ability to earn income in the future.[9] Potentially stretching over the plaintiff's remaining lifespan, these damages are often a large percentage of total damages. Typically, in order to determine the proper measure of lost earning capacity damages, "any evidence is admissible that would fairly indicate [the plaintiff's] present earning capacity and the probability of its increase or decrease in the future."[10] For most workers, this evidence is based on their wages in their present job, extrapolated into the future through complicated economic analyses.[11] However, federal law prohibits employers from knowingly hiring or retaining illegal aliens,[12] and prohibits aliens from using fraudulent means to secure employment.[13] Illegal aliens are further subject to arrest[14] and deportation by the Immigration and Naturalization Service.[15] Simply put, there is no guarantee that they will remain in their present job, or even in the country, for the remainder of their working lives.

This leads to a difficult question: should the measure of damages available for lost earning capacity for illegal aliens be based on the wages that could have been earned in America or on the wages that the worker

higher rates of injury. *Id.* at 599 (citing BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, NATIONAL CENSUS OF FATAL OCCUPATIONAL INJURIES IN 2002, at 8 tbl.2 (2003), http://www.bls.gov/news.release/archives/cfoi_09172003.pdf).

[7] *See* Abel Valenzuela, Jr. et al., *On the Corner: Day Labor in the United States* (January 2006), http://www.sscnet.ucla.edu/issr/csup/uploaded_files/Natl_DayLabor-On_the_Corner1.pdf.

[8] In this Comment, as in the case law, "lost earning capacity," "lost wages" and "lost future earnings" are used interchangeably. All refer to damages for the impairment of future earning capacity, "measured by the reduction in the value of the power to earn." 22 AM. JUR. 2D *Damages* § 142 (2003).

[9] *See id.*

[10] *Id.* § 738.

[11] *Id.*

[12] 8 U.S.C. § 1324a (2000).

[13] *Id.* § 1325.

[14] *Id.*

[15] *Id.* § 1227.

could have earned in their country of origin? Various state and federal courts have taken different approaches to this question in the past. More recently, the reasoning behind a seemingly unrelated Supreme Court decision, *Hoffman Plastic Compounds, Inc. v. NLRB*,[16] has convinced a number of state and federal courts to reconsider and limit the measure of lost earning capacity damages in cases involving illegal aliens.[17] While some courts have distinguished *Hoffman*, others have found it to be either persuasive or controlling authority limiting the measure of lost wages to the wage scale of the country of origin, or possibly even denying the recovery of lost future earnings altogether.

The following examples are illustrative of the problems courts face today. Manuel Gonzalez, a factory worker in Texas, earns $12.00 per hour, plus benefits—substantially more than he would make working on his farm in Mexico. Manuel crosses the border and secures work with false identification, a violation of federal law.[18] While driving to work, his automobile is involved in an accident with an eighteen-wheeler. Manuel suffers severe, permanent back and leg injuries impairing his ability to work at either his factory job in the United States or on his farm in Mexico. He sues the trucking company. At trial, an economist hired as an expert witness testifies to Manuel's lost earning capacity based on United States wage rates. The trial judge refuses to allow in evidence of Manuel's citizenship status or the wage rates of Mexican workers. After being awarded $300,000 in lost earning capacity, based on United States wage rates, Manuel, who never had any intention of residing permanently in the United States, returns home to his family in Mexico with a windfall damages award.

Henry Bazin, a construction worker in Florida, similarly enters the United States from Haiti without documentation. Henry obtains a job in construction but does not tender any fraudulent documents to do so. On a construction job where a subcontractor employs him, Henry is injured by equipment wielded by an employee of the general contractor and receives disabling injuries. He sues for damages, including lost future earnings, and the case in diversity is removed to federal court. The court refuses to allow the recovery of lost earning capacity based on any measure, holding that

[16] 535 U.S. 137, 142–43, 147 (2002) (forbidding the award of unearned backpay to an illegal immigrant wrongfully discharged under the National Labor Relations Act).

[17] *See infra* Part IV.B.

[18] 8 U.S.C. § 1324(a), 1325.

awarding lost wages violates both the letter and spirit of the federal Immigration Reform and Control Act.[19] Henry's family resides in Florida, and he is not in any immediate danger of deportation. He is working towards naturalization and has no intention of returning to Haiti because of the lack of available medical treatment. Nevertheless, he may only receive a damages award intended to compensate him for his medical treatment and pain and suffering. He is prevented from claiming the lost earning capacity damages designed to compensate him for the wages he can no longer earn, and, unable to work, eventually becomes reliant on government and charitable aid.

Clearly, both of these situations leave much to be desired. One plaintiff is over compensated, while the other is under compensated; one defendant pays too much, while another defendant pays too little. Neither result is equitable. The purpose of this Comment is to determine how best to measure lost earning capacity in cases involving illegal immigrants with the aim of a fair and just result for all parties involved. Section I of this Comment discusses the approaches to the measure of lost earning capacity damages in both state and federal courts pre-*Hoffman*. Section II discusses the Supreme Court's decision in *Hoffman* itself. Section III examines state and federal case law approaches to lost earning capacity damages post-*Hoffman*. Section IV analyzes whether *Hoffman's* interpretation of the Immigration Reform and Control Act preempts state tort law regarding lost wages, while Section V discusses the most equitable measure of lost earning capacity damages in cases involving illegal alien plaintiffs.

II. PRE-*HOFFMAN* STATE AND FEDERAL APPROACHES TO THE MEASURE OF LOST EARNING CAPACITY

Illegal immigrants have standing to sue in every state and federal court in the United States. *Coules v. Pharris*, an early case decided by the Wisconsin Supreme Court in 1933, held that illegal immigrants have no right to prosecute a lawsuit in a court of law.[20] *Coules* was expressly overruled in 1978.[21] While the Supreme Court of the United States has never heard a case on an undocumented alien's access to the courts, state

[19] *Id.* § 1101.

[20] 250 N.W. 404, 404 (Wis. 1933), *overruled by* Arteaga v. Literski, 265 N.W.2d 148 (Wis. 1978).

[21] *Arteaga*, 265 N.W.2d at 150.

and federal courts confronted with the issue have held that illegal immigrants have unfettered access to this country's legal system.[22]

However, the number of states and federal circuits to consider the question of the measure of lost future earning capacity damages is fairly limited, perhaps because of reluctance on the part of illegal immigrants to expose themselves to a legal system overseen by a government whose stated policy is to deport them.[23] Despite the limited number of opinions, the approaches taken by different states and federal courts diverged widely. In the jurisdictions to rule on the matter, three distinct approaches emerged prior to *Hoffman*. The first mandates recovery at the wage rates of the immigrant's country of origin. The second standard arguably mandates full recovery of lost earning capacity at United States wage rates. The third standard allows recovery at United States wage rates, but permits the defendant to rebut the plaintiff's damages figure with proof the plaintiff is an illegal immigrant at imminent risk of deportation.

A. The Measure of Lost Earning Capacity Is Based on the Wages of the Immigrant's Country of Origin

This measure of damages is typified by the Michigan case styled *Melendres v. Soales*.[24] *Melendres* involved an illegal alien who, while at an

[22] *See, e.g.*, Torrez v. State Farm Mut. Auto. Ins. Co., 705 F.2d 1192, 1203 (10th Cir. 1982); Mischalski v. Ford Motor Co., 935 F. Supp. 203, 204–05 (E.D.N.Y. 1996); Martinez v. Fox Valley Bus Lines, Inc., 17 F. Supp. 576, 578 (N.D. Ill. 1936); Janusis v. Long, 188 N.E. 228, 231–32 (Mass. 1933); Torres v. Sierra, 553 P.2d 721, 724 (N.M. Ct. App. 1976); Cano v. Mallory Mgmt., 760 N.Y.S.2d 816, 818 (Sup. Ct. 2003); Commercial Standard Fire & Marine Co. v. Galindo, 484 S.W.2d 635, 637 (Tex. Civ. App.—El Paso 1972, writ ref'd n.r.e); Peterson v. Neme, 281 S.E.2d 869, 871 (Va. 1981).

[23] *See Developments in the Law—Jobs and Borders*, 118 HARV. L. REV. 2171, 2233–34 (2005).

[24] 306 N.W.2d 399 (Mich. Ct. App. 1981). California's rule is similar. In the case of *Rodriguez v. Kline*, the trial court awarded Jesus Rodriguez substantial damages against Samuel Kline for injuries incurred in a traffic accident. 232 Cal. Rptr. 157, 157 (Ct. App. 1986). The appellate court remanded the case to the trial court to determine whether or not the damages award included lost earning capacity damages, and if so, whether they were premised on his earning capacity in the United States or in Mexico. *Id.* at 159. In California, after *Rodriguez*, a plaintiff's immigration status is a matter to be determined by the trial court as a preliminary question of law. *Id.* at 158. If the defendant is able to prove that the plaintiff is an illegal migrant, "then evidence of the plaintiff's future earnings must be limited to those he could anticipate receiving in his country of lawful citizenship." *Id.* However, plaintiffs are allowed to rebut that evidence by showing the correction of his deportable condition. *Id.*

employee picnic sponsored by his employer, was paralyzed when he dove into a shallow lake from a dock at the defendant's lakefront property.[25] No signs were posted warning about the depth of the murky, shallow water, even though the dock extended forty feet out into the water.[26] Melendres, the plaintiff, brought suit under a theory of intentional nuisance.[27] At trial, the defendant's attorney asked an expert witness to calculate future wage loss based on a scenario where the plaintiff would not remain in the United States.[28] The appellate court, remanding for a new trial on other grounds, held that while the plaintiff's status as an illegal alien was irrelevant as to the issue of liability, "the jury had a right to know of plaintiff's illegal status when calculating damages."[29] The court reasoned that because the plaintiff was an illegal alien, he was subject to deportation to his home country of Mexico at any time.[30] Therefore, because the wages he could expect to earn lawfully in that country were much lower than those he could earn in the United States, his status was both material and relevant on the question of damages.[31] In order to avoid prejudice, the court required that the retrial be bifurcated, with a separate damages phase where the plaintiff's immigration status would be presented to the jury.[32]

B. The Measure of Lost Earning Capacity is (Presumably) Based on United States Wages

In the Texas case *Wal-Mart Stores, Inc. v. Cordova*, Maria Cordova filed a lawsuit after slipping on a damp spot on the floor in her local Wal-Mart and experiencing immediate pain.[33] Despite an irregular work history, the court awarded her damages that included lost future earning capacity at United States minimum wage rates.[34] On appeal, Wal-Mart urged the El Paso Court of Appeals to deny lost earning capacity damages, pointing out that Cordova was not a citizen of the United States and possessed no

[25] *Melendres*, 306 N.W.2d at 400–01.
[26] *Id.* at 401.
[27] *Id.* at 400.
[28] *Id.* at 401.
[29] *Id.* at 402.
[30] *Id.*
[31] *Id.*
[32] *Id.*
[33] 856 S.W.2d 768, 769 (Tex. App.—El Paso 1993, writ denied).
[34] *See id.* at 770.

authorization to legally work in this country.[35] In a footnote with no citation of authority or discussion, the appellate court dismissed Wal-Mart's challenge, stating only that "[t]he current state of Texas law does not require citizenship or the possession of immigration work authorization permits as a prerequisite to recovering damages for loss of earning capacity, nor will this [c]ourt espouse such a theory."[36] Although this ruling allowed the recovery of lost earning capacity damages at United States minimum wage rates,[37] it is significant to note the *Cordova* court did not discuss whether those damages should be measured at United States wage rates or the wages available in Cordova's country of origin.

C. The Measure of Damages Depends on Imminent or Probable Deportation

The most influential pre-*Hoffman* case concerning the issue of lost earning capacity damages for illegal aliens is *Hagl v. Jacob Stern & Sons, Inc.*[38] In *Hagl*, the plaintiff, Janos Hagl, fell into an open vat of waste-water, fats, and grease while working on a catwalk at a grease processing plant in Philadelphia.[39] Although both plaintiff and defendant were residents of Pennsylvania, because Hagl was a Canadian citizen, he was entitled to bring a diversity suit in federal court.[40] Hagl was awarded damages by the jury, including damages for lost earning capacity based on United States wages.[41] The court noted that while there was evidence that Hagl was subject to deportation due to his illegal status, there was no evidence presented that he would in fact have been deported or would have left the country on his own.[42] As the court put it, "there was nothing which would have justified the jury's reducing damages because plaintiff is an alien who might conceivably face some unspecified immigration action at

[35] *Id.* at 770 n.1.

[36] *Id.*

[37] *See id.* at 770.

[38] 396 F. Supp. 779, 785 (E.D. Pa. 1975).

[39] *Id.* at 781.

[40] 28 U.S.C. § 1332(a)(2) (2000); *Hagl*, 396 F. Supp. at 782. Because federal courts are often viewed as more moderate than state courts regarding the award of damages, removal to federal court is often desirable for defendants. In cases involving illegal immigrants, that incentive to remove to federal court may be greater than ever after *Hoffman* and the federal case applying its reasoning to tort cases, as discussed below.

[41] *Hagl*, 396 F. Supp. at 781.

[42] *See id.* at 784–85.

an unknown time."[43] The court indicated that the defendant might be able to reduce the plaintiff's damages by proving that the plaintiff was about to be deported.[44]

The Fifth Circuit Court of Appeals used similar reasoning in *Hernandez v. M/V Rajaan*, in which the court awarded an injured illegal alien longshoreman lost future earnings damages at United States wage rates.[45] The trial court's award was held proper because the defendant "presented no proof that Hernandez was about to be deported or would surely be deported."[46] Again, the defendant would be entitled to have the trial court base its measure of lost earning capacity on foreign wage rates, but only if they proved the plaintiff was facing imminent or inevitable deportation.

III. *HOFFMAN PLASTIC COMPOUNDS, INC. V. NLRB*

Until 2002, the award of lost future income damages to illegal aliens was firmly rooted within the parameters of the individual states' tort law. In that year, however, the Supreme Court decided a case that would throw that state law into question. In 1988, Hoffman Plastic Compounds, Inc. hired Jose Castro as a mixing machine operator.[47] Three years later, Castro was fired after supporting and assisting a union-organizing campaign at the company.[48] The National Labor Relations Board (the Board) found that Hoffman's actions violated the National Labor Relations Act and ordered that Castro be awarded backpay, despite Castro's admission that he was a

[43] *Id.* at 785.

[44] *Id.* at 784. Appellate courts in Wisconsin and New York adopted the reasoning in *Hagl*. In *Gonzalez v. City of Franklin,* the Wisconsin Supreme Court indicated the plaintiff, an illegal immigrant, would be able to recover damages at United States wage rates unless the defense was able to present evidence that the plaintiff's deportation was more than a speculative or conjectural possibility. 403 N.W.2d 747, 759–760 (Wis. 1987). In New York's *Klapa v. O & Y Liberty Plaza Co.*, the court determined that the mere fact that a plaintiff was deportable was not enough to allow a jury to reduce lost earning capacity damages without some evidence that deportation would actually occur, noting, "there was no evidence indicating plaintiff would not live and work in the [United States] for the remainder of his life." 645 N.Y.S.2d 281, 282–83 (Sup. Ct. 1996). In order to rebut the plaintiff's claim for lost earning capacity, the defendant would be forced to establish "a date of deportation or the inability of plaintiff to obtain future employment in the United States." *Id.* at 282.

[45] 848 F.2d 498, 499 (5th Cir. 1988).

[46] *Id.* at 500.

[47] Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137, 140 (2002).

[48] *Id.*

Mexican citizen with no authorization to be in the United States and had obtained his job using fraudulent documents.[49] The Supreme Court reversed, in a 5-4 opinion written by Chief Justice Rehnquist.[50] The Court held that the Board's broad discretion to fashion remedies was limited, that precedent dictated that the Board's award of backpay was unavailable to employees who had committed serious criminal violations in connection with their employment, and that when the Board's remedy conflicted with a federal policy outside of the Board's authority, the remedy must yield to the policy.[51]

In Castro's case, the Immigration Reform and Control Act (IRCA), "a comprehensive scheme prohibiting the employment of illegal aliens in the United States," defined both the criminal violation and underlying Congressional policy.[52] IRCA, enacted in 1986, imposes severe civil and criminal penalties on employers who knowingly hire or retain illegal alien workers and provides for both fines and criminal prosecution for aliens who use fraudulent documents to gain employment.[53] The result of IRCA's prohibitions was that it became "impossible for an undocumented alien to obtain employment in the United States without some party directly contravening explicit congressional policies."[54] The Court then refused to allow the Board to "award backpay to an illegal alien for years of work not performed, for wages that could not lawfully have been earned, and for a job obtained in the first instance by a criminal fraud."[55] The Court found that the award of backpay in situations like this "trivializes the immigration laws" and "condones and encourages future violations," noting that, had Castro been deported, he would not have been eligible for backpay.[56] Finally, the Court noted that Castro would have been unable to mitigate his damages without a further violation of the law.[57] Importantly, however, Justice Rehnquist also noted that "[t]he Board here has already imposed other significant sanctions against Hoffman . . . [and that the Court has] deemed such 'traditional remedies' sufficient to effectuate national labor

[49] *Id.* at 140–41.

[50] *Id.* at 140.

[51] *Id.* at 142–43, 147.

[52] *Id.* at 147.

[53] *Id.* at 147–48; 8 U.S.C. § 1324(a), 1325 (2000).

[54] *Hoffman*, 535 U.S. at 148.

[55] *Id.* at 149.

[56] *Id.* at 150.

[57] *Id.* at 150–51.

policy regardless of whether the 'spur and catalyst' of backpay accompanies them."[58] As these words imply, and as Justice Breyer notes in his dissent, compensating the victim of labor discrimination is only one function of the punitive measures under the National Labor Relations Act, while another critically important purpose is deterring employers from violating the nation's labor laws.[59]

IV. *HOFFMAN'S* IMPACT ON LOST EARNING CAPACITY DAMAGES IN FEDERAL AND STATE COURTS

Many of the cases that have cited *Hoffman* have distinguished it or limited its holding to the facts of that case.[60] However, *Hoffman* has begun to have an effect on both federal and state courts, not least of which is the application of Justice Rehnquist's broader language to state tort law.[61] While some courts have distinguished *Hoffman* and refused to apply it to state remedies for future lost earnings, many others have applied it to limit future lost earning capacity damages in state courts.

A. Hoffman *Distinguished As Inapplicable to State Tort Law*

The Twelfth Court of Appeals in Texas distinguished *Hoffman* and expanded on the state's openhanded lost earning capacity damages model first articulated by the Eighth Court of Appeals in *Wal-Mart Stores, Inc. v. Cordova*.[62] In *Tyson Foods, Inc. v. Guzman*, a forklift struck Guzman, an

[58] *Id.* at 152.

[59] *See id.* at 153–54 (Breyer, J., dissenting).

[60] Cano v. Mallory Mgmt., 760 N.Y.S.2d 816, 818 (Sup. Ct. 2003); *see, e.g.*, Escobar v. Spartan Sec. Serv., 281 F. Supp. 2d 895, 897 (S.D. Tex. 2003) (*Hoffman* is only limited to backpay and does not speak to reinstatement of front pay); Flores v. Amigon, 233 F. Supp. 2d 462, 464 (E.D.N.Y. 2002) (*Hoffman* does not extend to wages for work already performed); Singh v. Jutla & C.D. & R's Oil, Inc., 214 F. Supp. 2d 1056, 1061 (N.D. Cal. 2002) (allowing recovery under the Fair Labor Standards Act).

[61] *See infra* Part IV.B.

[62] 856 S.W.2d 768, 770 (Tex. App.—El Paso 1993, writ denied). While at first glance the language used in the Texas cases requires that illegal immigrants be paid lost earning capacity damages at United States rates, it is more accurate to say that the issue of the proper measure of those damages has not yet been fully adjudicated in that state. *Wal-Mart Stores, Inc.* failed to discuss the measure of damages other than to say that an immigrant's status is irrelevant as to the issue of lost earning capacity. *Id.* at 771 n.1. The Texas Supreme Court denied writ on this case indicating that there was no reversible error in the appellate decision. Likewise, *Tyson Foods, Inc. v. Guzman* did not decide whether Texas courts will allow the plaintiff's illegal status into

employee of a Tyson subcontractor, causing permanent spine and nerve damage.[63] At trial, Guzman was awarded $210,000 in future lost earning capacity damages.[64] Tyson appealed, claiming that *Hoffman* held that "national public policy, as expressed by the United States Congress in enacting immigration reforms, militates against any award of wages as damages to undocumented alien laborers."[65] The court of appeals disagreed, holding that *Hoffman's* concern was with NLRB remedies and did not apply to state common law personal injury damages.[66] The court further noted that *Hoffman* only applied to remedies for an employer's violations of the NLRA, and that Texas does not require citizenship or work authorization permits in order to recover lost future earnings.[67] However, the court noted that Tyson's objection was in the nature of a federal preemption defense, was not raised in the trial court, and thus was waived, leaving the possibility of a preemption defense open to tort defendants in Texas.[68]

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evidence when determining lost earning capacity if the plaintiff is about to be or is certain to be deported. 116 S.W.3d 233, 247 (Tex. App.—Tyler 2003, no pet.). *Guzman's* holding has gone unchallenged in the Texas Supreme Court, as indicated by the lack of subsequent history, and the Texas Supreme Court has never addressed *Guzman* in any other case. Currently, in Texas, illegal alien plaintiffs may recover lost earning capacity measured in United States wage rates, but Texas courts may still be open to measuring damages based on the plaintiff's possible wages in the plaintiff's home country, or to a federal preemption defense requiring that the plaintiff recover at the reduced measure of damages.

[63] 116 S.W.3d 233, 237 (Tex. App.—Tyler 2003, no pet.).

[64] *Id.*

[65] *Id.* at 243.

[66] *Id.* at 244. Ultimately, while this Author believes that *Guzman* was correctly decided, its defense of the status quo is a mere restatement of the law and a cursory dismissal of *Hoffman* lacking in critical analysis of policy and precedent. As such, it is not terribly persuasive. This lack of analysis is a problem common to the courts that have limited *Hoffman* in the area of lost future damages. *See* Madeira v. Affordable Hous. Found., Inc., 315 F. Supp. 2d 504, 507 (S.D.N.Y. 2004); Echeverria v. Estate of Lindner, No. 018666/2002, 2005 WL 1083704, at *11–12 (N.Y. Sup. Ct. Mar. 2, 2005). In *Madeira*, the court held "[w]ith respect to the front pay issue, *Hoffman* is irrelevant" because *Hoffman* dealt only with the issue of backpay. 315 F. Supp. 2d at 507. "The jury was not required to specify where plaintiff would have earned money in the future, and clearly reached a verdict that he would have been able to earn some money somewhere . . . . The jury's determination will not be set aside." *Id.* at 508. *Echeverria* depends upon *Maderia's* reasoning, ignoring other New York state cases to the contrary. 2005 WL 1083704, at *11–12. Like *Guzman*, these cases are lacking in sufficient analysis to make them truly persuasive.

[67] *Guzman*, 116 S.W.3d at 244.

[68] *Id.* For a discussion of preemption see *infra* Part V.

B. Hoffman *As Controlling Authority*

While a few courts have distinguished *Hoffman*, many federal and state post-*Hoffman* cases have held that *Hoffman* and IRCA preempt state tort law claims for future lost earning capacity damages.[69] The result in *Sanango v. 200 E. 16th St. Hous. Corp.*,[70] a case decided by the First Department of the New York Supreme Court, Appellate Division, is typical of the new direction post-*Hoffman* courts are heading. In *Sanango*, the plaintiff, Arcenio Sanango, fell from a ladder on a worksite and sued for damages including lost future earning capacity based on United States wages.[71] The *Sanango* court believed that awarding lost future wages based on United States pay rates interfered with "IRCA's federal immigration policy in substantially the same manner as did the NLRB backpay award in *Hoffman*," by compensating an illegal alien in the United States for wages that he could not earn legally and could only collect through evasion of the authorities, as well as by encouraging future IRCA violations.[72] The court buttressed its argument by holding that the Supremacy Clause mandates the preemption of state laws that "frustrate[] the accomplishment of a federal objective."[73] The court held, "we believe that plaintiff's acceptance of unlawful employment [is] misconduct contravening IRCA's policies" no matter who the actual violator of the law is.[74] However, the court went on to note that it was unaware of any federal policy forbidding the awarding of lost future earnings at the wage scale of the plaintiff's home country and thus remanded for a new trial to determine the proper measure of damages.[75]

Veliz v. Rental Serv. Corp. USA, a Florida case involving a claim for future lost earnings after a forklift struck and killed a worker, reached a similar, yet subtly different result.[76] In contrast to the result in *Sanango*, the

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[69] *See, e.g.*, Veliz v. Rental Serv. Corp. USA, 313 F. Supp. 2d 1317, 1336 (M.D. Fla. 2003); Hernandez-Cortez v. Hernandez, No. CIV.A.01-1241-JTM, 2003 WL 22519678, at *5–7 (D. Kan. Nov. 4, 2003); Sanango v. 200 E. 16th St. Hous. Corp., 788 N.Y.S.2d 314, 318–19 (App. Div. 2004). New York Supreme Courts have come to diverging conclusions on Hoffman's effect on lost earning capacity damages. *Supra* note 66; *infra* notes 70–75.

[70] *See generally* 788 N.Y.S.2d 314 (App. Div. 2004).

[71] *Id.* at 316.

[72] *Id.* at 318–19.

[73] *Id.* at 319 (quoting Geier v. Am. Honda Motor Co., 529 U.S. 861, 873 (2000)).

[74] *Id.*

[75] *Id.* at 321.

[76] 313 F. Supp. 2d 1317, 1321 (M.D. Fla. 2003).

Veliz court does not even refer to the possibility of recovery for future wages.[77] Accordingly, the court "grants the Defendants summary judgment on the Plaintiff's claim for lost support insofar as it encompasses the lost wages Mr. Ignacio would have earned as an employee in the United States of America."[78] No further distinction is made between past lost wages and future lost wages, and no mention is made of measuring lost wages by United States wage rates or rates in the immigrant's country of origin.[79]

C. Hoffman *As Persuasive Authority*

Even in states where *Hoffman* is not found to be controlling, it may still be regarded as persuasive. In *Rosa v. Partners in Progress, Inc.*, the New Hampshire Supreme Court rejected *Hoffman* as controlling state tort law.[80] However, it looked to both *Hoffman* and the conflicting decisions discussed above as persuasive authority in holding that illegal aliens "generally . . . may not recover lost United States earnings, because such earnings may be realized only if that illegal alien engages in unlawful employment."[81] The court then went on to carve out a narrow exception in cases where the tortfeasor is an employer who hires an illegal alien knowing of his illegal status.[82]

V. THE PREEMPTION QUESTION

The extent of *Hoffman* and IRCA preemption of state laws is the predicate question that must be answered before deciding which measure of lost earning capacity damages is most appropriate for illegal aliens. The lost future earning capacity cases post-*Hoffman* have for the most part concluded that *Hoffman* impliedly preempts state tort law regarding lost wages, while those cases reaching the opposite conclusion either leave the door open for a future preemption challenge or give the question a cursory treatment at best.[83] Surprisingly, however, these courts have yet to give the preemption question a thorough critical analysis.

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[77] *See generally id.*

[78] *Id.* at 1337.

[79] *See generally id.*

[80] 868 A.2d 994, 1000 (N.H. 2005).

[81] *Id.*

[82] *Id.*

[83] *See supra* Part IV.

A. The Law of Preemption

The law of federal preemption originates in the Supremacy Clause, which states "[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."[84] Preemption analysis begins with "the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress."[85] The ultimate inquiry is one of Congressional intent.[86] This intent may be shown by express language in a congressional enactment,[87] impliedly through Congressional occupation of a given field,[88] or impliedly through actual conflict between state and federal law.[89] Congressional occupation of a given field is determined by factors including (1) a "scheme of federal regulation . . . so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it," (2) the federal interest in that field is "so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject," and (3) when "the object sought to be obtained by the federal law and the character of obligations imposed by it . . . reveal the same purpose."[90] Actual conflict between federal and state law is found when "compliance with both federal and state regulations is . . . impossib[le]," and when the law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[91]

IRCA established "an extensive 'employment verification system,' designed to" prevent employers from hiring or retaining illegal aliens and providing civil and criminal penalties for employers knowingly violating the law.[92] It also provides criminal penalties for aliens using fraudulent,

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[84] U.S. CONST. art. VI, cl. 2.

[85] Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947).

[86] Cipollone v. Liggett Group, Inc., 505 U.S. 504, 516 (1992).

[87] *Id.* at 516.

[88] *See Rice*, 331 U.S. at 230.

[89] *See* Maryland v. Louisiana, 451 U.S. 725, 746–47 (1981).

[90] *Rice*, 331 U.S. at 230.

[91] *Maryland*, 451 U.S. at 747 (quoting Fla. Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142–43 (1963) and Hines v. Davidowitz, 312 U.S. 52, 67 (1941)).

[92] Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137, 147–48 (2002).

forged, altered or counterfeit documents to "subvert the employer verification system."[93] Aliens who do not present specified authentic documents cannot be hired.[94] The ultimate result is that "it is impossible for an undocumented alien to obtain employment in the United States without *some party* directly contravening explicit congressional policies."[95]

B. The Approach to Preemption Under IRCA and Hoffman

IRCA contains no express preemption language.[96] Neither does it occupy the field of state tort law: IRCA fully occupies and pervasively regulates the field of immigration and employer-alien employee relations with the goal of preventing the employment of illegal aliens.[97] It does not speak at all, however, to state tort laws and their damage awards. While states clearly may not create their own immigration laws or permit employers to legally hire illegal aliens, it remains far less clear that Congress intended to prevent states from exercising their traditional police power over torts. "Although the IRCA and accompanying regulations address in detail the hiring of undocumented aliens, they do not purport to intrude into the area of what protections a State may afford these aliens."[98]

The courts that have found preemption have found it implicitly, holding that awarding lost wages is in conflict with federal law, "frustrat[ing] the accomplishment of a federal objective"[99]—essentially stating that state tort laws "stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[100] Congress's purpose and stated policy, the argument goes, is to preclude the employment of illegal aliens. Illegal aliens are not entitled to earn United States wages under IRCA. Allowing them to recover lost future wages means they can receive

[93] *Id.* at 148.

[94] *Id.*

[95] *Id.* (emphasis added).

[96] Safeharbor Employer Servs. I, Inc. v. Velazquez, 860 So. 2d 984, 986 (Fla. Dist. Ct. App. 2003).

[97] *Hoffman*, 535 U.S. at 147. *See also* Dowling v. Slotnik, 712 A.2d 396, 410–11 (Conn. 1998); Correa v. Waymouth Farms, Inc., 664 N.W.2d 324, 328 (Minn. 2003).

[98] Cont'l PET Tech., Inc. v. Palacias, 604 S.E.2d 627, 630 (Ga. Ct. App. 2004).

[99] Sanango v. 200 E. 16th St. Hous. Corp., 788 N.Y.S.2d 314, 319 (App. Div. 2004). *See also* Veliz v. Rental Serv. Corp. USA, 313 F. Supp. 2d 1317, 1335 (M.D. Fla. 2003); Hernandez-Cortez v. Hernandez, No. CIV.A.01-1241-JTM, 2003 WL 22519678, at *7 (D. Kan. Nov. 4, 2003).

[100] Maryland v. Louisiana, 451 U.S. 725, 746 (1981).

compensation to which they are not entitled, creating a paradox "in which an illegal alien can lawfully become entitled to the value of United States wages only if he becomes physically unable to work."[101] On the surface, this argument seems compelling.

C. IRCA Does Not Preempt the Award of Lost Earning Capacity Damages

1. Some Illegal Aliens Are Entitled to United States Wages

Upon closer inspection, the argument's façade shows cracks. First, IRCA prohibits employers from knowingly hiring illegal aliens, and criminalizes the act of tendering fraudulent documents to employers from those aliens,[102] but refuses to criminalize the very act of working.[103] "Aside from the prohibition on tendering fraudulent documents, the IRCA does not prohibit unauthorized aliens from seeking or accepting employment in the United States."[104] According to the Supreme Court in *Hoffman*, aliens who fraudulently obtain employment are not entitled to an award of "backpay . . . for years of work not performed, for wages that could not lawfully have been earned, and for a job obtained in the first instance by a criminal fraud."[105] This does not mean that aliens who are employed by an employer with full knowledge of their illegal status or illegal aliens who obtain employment from an unwitting employer without tendering any fraudulent documents are not entitled to United States wages. It does not mean that illegal immigrants are not entitled to wages for work they have already performed. In the absence of laws prohibiting their employment, illegal aliens who do not commit fraud to gain work are as legally entitled to United States wages as any other member of the workforce and will always be entitled to payment for completed work. It is far from settled whether an alien who has committed no wrong other than to cross the border without permission is automatically precluded from an award of lost earning capacity damages.

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[101] Rosa v. Partners in Progress, Inc., 868 A.2d 994, 1000 (N.H. 2005).

[102] *Hoffman*, 535 U.S. at 148.

[103] 8 U.S.C. § 1324(a)(1)–(2) (2000); Correa v. Waymouth Farms, Inc., 664 N.W.2d 324, 329 (Minn. 2003).

[104] *Correa*, 664 N.W.2d at 329.

[105] *Hoffman*, 535 U.S. at 149.

2. *Hoffman* Is a Narrow Decision That Does Not Concern State Tort Law

Second, any preemption decision based on *Hoffman* rests on tenuous ground. Despite the majority's broad language, *Hoffman* itself is a narrow decision that does not touch on state common law. Instead, it is limited exclusively to the powers of the National Labor Relations Board,[106] and is based at least in part on the fact that even without compensation paid to the illegal alien employee, other significant and traditional remedies are available to further the purposes of the NLRA.[107] Such substitute traditional and significant remedies do not exist in state compensatory damages schemes: money is the only compensation a plaintiff is entitled to recover for his injuries.

3. Preemption Does Not Apply to Similar State Law Compensatory Schemes

Third, in contrast to the weight of authority applying *Hoffman* and IRCA to state tort claims for future lost earning capacity,[108] the majority of courts applying preemption analysis post-*Hoffman* to state workers' compensation laws in cases involving illegal aliens have held the laws not to be preempted.[109] While there are substantive differences between workers' compensation and tort law, they share some similarities: both are within the purview of the state's police power,[110] both compensate an injured person for work never to be done,[111] and both are based on United States wage rates.[112] The workers' compensation cases can be analogized

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[106] *See id.* at 142–43; *see also* Tyson Foods, Inc. v. Guzman, 116 S.W.3d 233, 244 (Tex. App.—Tyler 2003, no pet.).

[107] *See Hoffman*, 535 U.S. at 152.

[108] *See supra*, Parts IV.B. & IV.C.

[109] *See generally* Marjorie A. Shields, Annotation, *Application of Workers' Compensation Laws to Illegal Aliens*, 121 A.L.R. 5th 523 (2004). *See also* Safeharbor Employer Servs. I, Inc. v. Velazquez, 860 So. 2d 984, 986 (Fla. Dist. Ct. App. 2003); Cont'l PET Techs., Inc. v. Palacias, 604 S.E.2d 627, 629 (Ga. Ct. App. 2004); Wet Walls, Inc. v. Ledezma, 598 S.E.2d 60, 63 (Ga. Ct. App. 2004); *Correa*, 664 N.W.2d at 328–29. A discussion of worker's compensation law is beyond the scope of this Comment.

[110] *See Safeharbor*, 860 So. 2d at 986.

[111] *See* Collins v. New York City Health & Hosp. Corp., 607 N.Y.S.2d 387, 387 (App. Div. 1994).

[112] *See* Wal-Mart Stores, Inc. v. Cordova, 856 S.W.2d 768, 770 (Tex. App.—El Paso 1993, writ denied).

to state tort laws, and provide an additional source of persuasive authority to courts willing to protect illegal immigrants.

4. No Clear Congressional Policy on Illegal Immigration Exists

Fourth, awarding lost future wages to illegal alien plaintiffs does not violate congressional policy because no clear policy on illegal immigration exists at any level of government. IRCA allows a fine to be imposed under Title 18 of the United States Code for employers knowingly employing at least ten illegal immigrants.[113] If those regulations do not provide adequate deterrence, employers in violation of the Code may also be imprisoned for up to five years.[114] IRCA also provides for the possibility of prison time for an unlawful entry into the United States.[115] However, penalties will not deter illegal immigration if they are never imposed. IRCA was enacted in 1986, but enforcement has been steadily declining since then. In the ten-year period from 1992 to 2002, the number of investigations of employers of illegal aliens declined seventy percent, from 7053 to 2061, on-site job arrests of illegal aliens declined from 8027 to 451, and the fines imposed on employers declined from 1063 to thirteen—a staggering ninety-nine percent decrease.[116]

Attempting to stop and punish the illegal migrants themselves is quixotic. If appreciable numbers were to be sentenced to jail time, the sheer quantity of those arrested would overwhelm the United States prison system. The Border Patrol arrested 1,150,000 illegal aliens trying to cross the border in 2004, a twenty-four percent increase from 2003.[117] Up to three times that many actually made it across.[118] Today, corporations go so far as to place orders for workers, obtain fraudulent documentation for them, and then arrange transportation to their destinations, as was demonstrated in a recent investigation involving Tyson Foods, Inc.[119] The

[113] 8 U.S.C. § 1324(a)(3)(A) (2000).

[114] *Id.*

[115] *Id.* § 1325.

[116] Barlett & Steele, *supra* note 1, at 53.

[117] Jerry Seper, *Border Patrol Grabs 1.15 Million Illegals in '04*, WASH. TIMES, Jan. 10, 2005, at A01.

[118] Barlett & Steele, *supra* note 1, at 53.

[119] *Id.* at 59–62. It is revealing that Tyson Foods both knowingly hires illegal immigrants and tries to use their illegal status against them when the company is sued by those employees. *See* Tyson Foods, Inc. v. Guzman, 116 S.W.3d 233, 242–43 (Tex. App.—Tyler 2003, no pet.).

migrants, looking for work, are sympathetic and, moreover, are too numerous to be controlled.[120] The obvious remedy, as contemplated by IRCA, is to target those knowingly hiring the illegal aliens—but this is easier said than done. In 1998, when the Immigration and Naturalization Service attempted to implement Operation Vanguard, a pilot program in Nebraska aimed at the employers of illegal immigrants, there was an immediate outcry from community leaders, local Hispanic leaders, the agriculture lobby, and the state's congressional delegation.[121] After 24,000 subpoenas were issued and 4700 interviews were conducted, all aimed at gathering evidence against the employers of illegal immigrants, the entire operation was shut down.[122] While congressional representatives working against the stated policy of Congress may be commonplace, the sheer depth of congressional neglect is shocking. Eighteen years after the passage of IRCA, no action had been taken to implement the nationwide telephone employment verification system that the law mandates.[123] The recent dispute between the House of Representatives and the Senate over their conflicting immigration plans seems designed to delay the resolution of the illegal immigration question.[124] Given the depth of congressional neglect on the issue, and substantial interference by members of Congress with attempts to enforce existing immigration laws, it is tempting to infer that Congress has no clear policy on immigration for state tort laws to subvert.

5. Congressional Policy As Interpreted in *Hoffman* Will Not Be Furthered by Restricting the Wages of Illegal Immigrants to the Wages of Their Home Countries

Finally, and most practically, no reason exists to believe that state tort laws allowing the award of lost earning capacity damages will have any effect on federal immigration policy whatsoever, whether found in *Hoffman*

Exactly what this reveals is a subject for another article.

[120] *See* Barlett & Steele, *supra* note 1, at 53.

[121] *Id.* at 59–62.

[122] *Id.*

[123] *Id.* at 59.

[124] *See, e.g.*, *Immigration Reform Approved in Senate*, THE WK. IN CONGRESS (CCH, Chicago, Ill.), May 26, 2006. The Senate approved the Comprehensive Immigration Reform Act on May 25, 2006, providing a means for millions of illegal immigrants to become United States citizens. *Id.* "After they return from their Memorial Day recess, the House and Senate still need to hammer out wide differences between their versions of immigration legislation. . . . 'The House and Senate bills are so far apart that it's difficult to foresee a compromise in the near future.'" *Id.*

or IRCA. Assuming that Congress's immigration policy is accurately reflected by IRCA, the *Hoffman* decision, and the decisions of lesser courts in response to it, will not be likely to do anything to further that policy. As Justice Breyer noted in his dissent in *Hoffman*:

> [T]he general purpose of the immigration statute's employment prohibition is to diminish the attractive force of employment . . . [t]o permit the Board to award backpay could not significantly increase the strength of this magnetic force, for so speculative a future possibility could not realistically influence an individual's decision to migrate illegally.[125]

Justice Breyer then goes on to note that, if anything, the denial of backpay makes it more attractive for employers to hire illegal immigrants by "lower[ing] the cost to the employer of an initial labor law violation . . . [and] increases the employer's incentive to find and to hire illegal-alien employees."[126] While Justice Breyer's dissent was aimed at the Court's denial of the backpay remedy under the NRLA, similar considerations apply to the denial of lost future wages at United States rates.

No criminal commits crimes expecting to be caught, and no illegal alien migrates to the United States expecting to be severely injured and permanently incapacitated. When over 300 illegal immigrants die each year trying to cross the border, and thousands more endure extreme privations in the desert without food and water,[127] it may be assumed that they will also disregard the danger of a highly speculative disabling injury and a prohibition on the recovery of a certain type of compensatory damages. Illegal migrants who endure untold dangers just to arrive at low paying, high risk jobs in which they are routinely exploited are unlikely to be fazed by the speculative prospect of tortious injury itself, much less a reduced measure of damages for one component of damages for that injury.[128] "While awarding damages for lost [future] earnings in tort cases would benefit injured undocumented aliens, it would not have any significant

[125] Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137, 155 (2002) (Breyer, J., dissenting).

[126] *Id.*

[127] James C. McKinley, Jr., *A Mexican Manual for Illegal Migrants Upsets Some in U.S.*, N.Y. TIMES, Jan. 6, 2005, at A5, *available at* 2005 WL 154412.

[128] *See* Smith, *supra* note 5, at 598–600.

impact upon the IRCA's objective of 'prohibiting' their employment."[129] Indeed, "[a]s *all* the relevant agencies (including the Department of Justice)" admit, limiting the ability of illegal aliens to recover compensation based on United States wages "will *not* interfere with the implementation of immigration policy."[130] It is unclear how, exactly, Congress's policy forbidding the employment of illegal aliens is furthered by changing the measure of tort damages to which such aliens are entitled.

The ultimate question in the preemption analysis is whether Congress intended to preempt state law.[131] Given the presumption that Congress does not intend to preempt state law, the lack of express preemption language in IRCA, the fact that IRCA does not occupy the field of state tort law, and that awarding lost earning capacity damages to illegal immigrants does not violate, or at least has no effect on, congressional policy, the proper conclusion is that Congress did not intend to preempt state tort damages law involving awards of lost earning capacity damages to illegal aliens. State tort law should remain within the purview of the states.

VI. THE PROPER MEASURE OF LOST EARNING CAPACITY FOR ILLEGAL ALIENS

If congressional policy does not control the measure of lost earning capacity damages for undocumented aliens, the question becomes what that measure should be. Ultimately, identifying the ideal measure is a policy choice, and the best policy for determining that measure is the original policy for awarding lost future earnings. The purpose of lost earning capacity damages is to compensate the plaintiff for the income that he likely would have earned in the future, but is unable to earn now that he has been injured.[132] No fixed rule determining how to measure such damages exists,[133] but the plaintiff must put on some evidence other than mere "guesswork and speculation."[134] The court should take into account the plaintiff's probable future income, the length of time the plaintiff would have earned that income, and the plaintiff's age and future increase in

[129] Balbuena v. IDR Realty LLC, 787 N.Y.S.2d 35, 37 (App. Div. 2004) (Ellerin, J., dissenting), *rev'd*, 812 N.Y.S.2d 416 (App. Div. 2006).

[130] *Hoffman*, 535 U.S. at 153 (Breyer, J., dissenting).

[131] *See* Cipollone v. Liggett Group, Inc., 505 U.S. 504, 517 (1992).

[132] 22 AM. JUR 2D *Damages* § 142 (2003).

[133] *Id.*

[134] *Id.* § 738.

skill.[135] In cases involving illegal aliens, the court should also take into account other factors, such as whether the alien committed a fraudulent act in obtaining employment,[136] the possibility of deportation, the likelihood of the alien voluntarily returning to his home country, and the individual alien's migration patterns.[137] In any event, the determination should be based on "what the plaintiff *would* have earned,"[138] instead of what the plaintiff *should* have earned. The proper measure of damages is the one that comes closest to measuring the plaintiff's actual, probable future income under the greatest variety of circumstances.[139]

An approach denying United States wage rates to illegal migrants in all cases cannot meet this test because it will often deny the proper measure of actual lost earning capacity to illegal immigrants remaining in the United States for the rest of their working lives. "The fact that a[n] [alien] is deportable does not mean that deportation will actually occur."[140] Of the seven to fifteen million illegal aliens living within our borders,[141] the United States Department of Homeland Security will detain and deport less than 150,000 this year.[142] This means that an illegal alien plaintiff faces the possibility of spending the remainder of his life in this country, unable to work, yet granted a recovery for lost future earnings significantly less than that available to an American citizen. Such an individual, especially one with severe injuries, is especially vulnerable to becoming dependent on state or federal assistance for his survival. Under this approach, tortfeasors receive a windfall by escaping some of the consequences of their torts.

Texas' approach, awarding lost earning capacity at full United States wage rates, also falls short of the ideal.[143] While many illegal aliens could

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[135] *Id.* §§ 142, 738.

[136] *See* Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137, 148–49 (2002).

[137] *See* Echeverria v. Estate of Lindner, No. 018666/2002, 2005 WL 1083704, at *10 (N.Y. Sup. Ct. Mar. 2, 2005).

[138] Hilliard v. A.H. Robins Co., 196 Cal. Rptr. 117, 142 (Ct. App. 1983) (emphasis added).

[139] 22 AM. JUR. 2D *Damages* § 142 (2003).

[140] Klapa v. O & Y Liberty Plaza Co., 645 N.Y.S.2d 281, 282 (Sup. Ct. 1996).

[141] OFFICE OF POLICY AND PLANNING, *supra* note 3, at 1; Smith, *supra* note 5, at 598; Barlett & Steele, *supra* note 1, at 52.

[142] *See* U.S. DEP'T OF HOMELAND SECURITY, SECURING OUR HOMELAND: UNITED STATES DEPT OF HOMELAND SECURITY STRATEGIC PLAN, at 48 (2004), http://www.dhs.gov/interweb/assetlibrary/DHS_StratPlan_FINAL_spread.pdf.

[143] *See supra* Part II.B. *But see* Tyson Foods, Inc. v. Guzman, 116 S.W.3d 233, 244 (Tex. App.—Tyler 2003, no pet.).

feasibly spend their entire working lives in the United States, some illegal immigrants are actually caught and deported. Many others return to their home countries voluntarily, or migrate back and forth as the job market dictates. If awarded lost future earnings at United States wage rates, those aliens who would have migrated back to their homeland or were under threat of imminent deportation would end up with far more in damages than they would actually have earned, turning compensatory damages designed to make them whole into an unwarranted windfall for the plaintiff. This approach further fails to take into account those aliens who have obtained their jobs through fraudulent means in violation of IRCA, and what effect this fraud should have on their recovery of lost future wages.

Awarding United States wages unless the defendant is able to prove the plaintiff is subject to immediate or imminent deportation is closer to the mark, but ultimately insufficient. This approach fails to take into account many of the other factors that courts and fact-finders should review when making a damages award, such as the plaintiff's voluntary return to his country of origin.

The approach most consistent with the rationale behind compensatory damages is to allow the award of lost future earnings based on United States wage rates, tempered by the ability of the defendant to produce evidence showing another measure is more appropriate. To make the measure of damages as equitable as possible, when determining damages the fact-finder should take into account, among other factors, whether the plaintiff is subject either to imminent or probable deportation, whether the plaintiff is likely to leave the country, whether the plaintiff tendered fraudulent documents in violation of IRCA to gain employment, the plaintiff's migratory habits, the level of attachment the plaintiff has exhibited in this country by putting down roots in the community, the location of the plaintiff's family, whether adequate medical care is available in the plaintiff's nation of origin, and the plaintiff's progress toward naturalization. To prevent defendants from having their cake and eating it too, a defendant who knew the plaintiff was in the country illegally and violated IRCA by hiring him should be prohibited from introducing evidence of the plaintiff's immigration status. This policy would protect those migrants who are unlikely or unable to leave the country and those who have been brought or enticed into this country by unscrupulous employers, while limiting the damages of aliens who have committed fraudulent acts or whose departure or deportation is imminent or inevitable. Under this approach, the injured illegal immigrant is more likely to recover

lost earning capacity damages based on the income he would actually have earned and the wage rates he would likely have earned that income under, instead of an artificially high or low award inconsistent with the policy underlying compensatory damages.

VII. CONCLUSION

Applying this approach to the examples in the introduction illustrates the benefits it provides. In the case of Manuel Gonzalez, the fact-finder would be able to consider the likelihood of his permanent residence in the United States in light of his permanent residence and the location of his family in Mexico, his lack of roots in the United States, his lack of interest in naturalization, and the fact that he committed a illegal fraudulent act in obtaining his employment in this country. In this case, because all evidence points to the likelihood of Manuel's return to Mexico, the fact-finder would be more likely to award lost earning capacity damages based on wage rates available in that country instead of awarding him a windfall based on United States wage rates.

The opposite result would occur in the case of Henry Bazin. The fact-finder would consider that Henry's family resides in the United States, the roots he has placed in this country, that Haiti does not have the facilities to treat him for his injuries, his progress towards naturalization, and the fact that he did not violate IRCA by tendering fraudulent documents to his employer. In this case, Henry is more likely to be awarded lost future earning capacity damages based on prevailing United States wage rates, and rightfully so—he is unlikely to ever leave the country.

With this policy in place, plaintiffs are much less likely to recover unwarranted windfalls, and are also much less likely to recover damages insufficient to compensate them for their injuries. Defendants will not be harmed; they will almost certainly have at least a chance to reduce their damages liability by putting on evidence of the plaintiff's immigration status. However, defendants complicit with violations of immigration laws will be liable for no more damages to an illegal alien than to a United States citizen. Furthermore, and importantly, instead of a one-size-fits-all analysis, the fact-finder may evaluate each plaintiff's individual circumstances, furthering the goal of actual compensation. Not only does this approach best fulfill the policy behind the awarding of lost future earning capacity, it is fundamentally fair, just, and equitable for all parties involved.