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Aristides Diaz-Pedrosa†

"As long as it is possible to hire wetbacks at 10 cents an hour, they will be coming across the border until kingdom come."\(^1\)

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Illegal immigration generally occurs when there is a mismatch between the numbers of persons seeking to immigrate to a country and the legal opportunities available for this purpose. This general statement, however, begs three important questions. First, why do immigrants leave their host country? Second, why do destination countries restrict the amount of immigrants that they are willing to accept within their borders? And lastly, why do migrants head towards a given destination country as opposed to another?

There is no simple answer to these three questions. After all, immigrants' stories are rarely alike, and different countries may have diverging reasons for regulating, or not, the influx of immigrants within their borders. Nevertheless, a great deal can be achieved by analyzing the generalities that, to some extent, hold true for all of those who decide (or are forced) to leave their country and for all the countries that are willing (or unwilling) to receive them.

Generally speaking, an immigrant may decide to leave a “sending” country because of factors such as unemployment or political instability. These factors are generally called “push” factors because they force an immigrant out of the “sending” country. The other elements that play a part in the transnational movement of migrants are usually called “pull”
factors. These are the factors that together conspire to bring a migrant into a destination country.

The legal restrictions on such movements of people generally originate in the destination country because it is unwilling or unable to accommodate all the potential immigrants. The reasons behind restrictive immigration policies depend on the needs and constraints of each country. Examples of these reasons range from simple xenophobia to national security. But, regardless of the reason, the regulation of immigration in a destination country usually brings along a correlated issue: illegal immigration.

Destination countries adopt preventive measures to curb or eradicate illegal immigration. These measures include border regulations and punitive actions against unlawful entry and related crimes, including aiding and abetting, forgery of documents, smuggling of migrants, and transportation of illegal immigrants. Other measures specifically target the control of illegal immigration through the labor markets. These measures generally make it a crime to hire illegal immigrant workers.

Destination countries regulate illegal immigration through the labor market because the availability of jobs serves as a strong pull factor within a given destination country. Despite legal restrictions prohibiting the employment of illegal immigrants, there is often a demand for them within a destination country's labor market. As such, illegal immigrants usually receive a warm welcome from the black market economy of a country that officially wants to keep them out of its borders.

The employment of illegal immigrants in the black market economy generates a complex set of economic and social consequences in the destination country. Undocumented workers are especially vulnerable to discrimination and unfair labor practices because their fear of deportation makes them unlikely to report such illegal behavior. Their reluctance to report illegal practices, in turn, creates an incentive for employers to hire and exploit undocumented workers—thus keeping production costs down. But employers are not the only ones who benefit from this employment relationship. Illegal immigrants also benefit from the black

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3. See discussion infra Part I.C.
4. See discussion infra Part I.D.
5. See discussion infra Parts II, III.
7. The term black market or underground economy is defined as "a process of income-generation characterized by one central feature: it is unregulated by the institutions of society, in a legal and social environment in which similar activities are regulated." Manuel Castells & Alejandro Portes, World Underneath: The Origins, Dynamics, and Effects of the Informal Economy, in THE INFORMAL ECONOMY: STUDIES IN ADVANCED AND LESS DEVELOPED COUNTRIES 12 (Alejandro Portes et al. eds., 1989); see Bimal Ghosh, Huddled Masses and Uncertain Shores: Insights into Irregular Migration 4-5 (1998).
8. See discussion infra Part I.B-C.
10. See id.
market economy because, to some extent, it is the only source of income available in a country in which they reside unlawfully.

More importantly, the employment of illegal immigrants brings to light the politics of immigration policies in a destination country.\footnote{See discussion \textit{infra} Parts I.D.2, II.D.} That is, while employers of illegal immigrants lobby for lax enforcement of immigration control in order to reap the benefits of a cheap source of labor, groups that are responsible for the existence of immigration laws in the first place—such as citizens and unions—lobby for tighter control of immigration laws. The result is a political compromise that leads to the presence of a black market. That is, politicians are forced to speak through both sides of their mouths. They appease the citizenry's fears of an immigrant invasion through external manifestations of immigration regulation such as border control. But, they also protect the needs of employers through means that do not jeopardize the image of a strong hand against illegal immigration, namely the lax enforcement of immigration laws in the labor market.

The United States serves as a practical example of how the presence of pressure groups may undermine the effective implementation of laws that regulate illegal immigration through the labor market.\footnote{See discussion \textit{infra} Part II.D.} The United States addresses the problem of illegal immigration through a set of laws that regulates both the entry of immigrants through its external borders and their employment once they are inside the country. In fact, in the United States it is both illegal for an employer to hire an illegal immigrant and for an illegal immigrant to work for an employer.\footnote{See discussion \textit{infra} Part II.B.} These laws, however, are selectively enforced depending on the needs of the employers who are accustomed to the use of cheap labor that illegal immigrants provide.

The United States also illustrates how measures regulating illegal immigration in the labor market may lead to tension between the underlying policies of labor and immigration laws.\footnote{See discussion \textit{infra} Part I.A-C.} This issue is best illustrated in \textit{Hoffman Plastic Compounds, Inc. v. NLRB} the most recent Supreme Court decision concerning the employment of illegal immigrants. This case shows how the enactment of these laws raises important questions relating to how the policies behind them can be furthered. For example, should the labor laws of the Unites States protect illegal immigrants? Would protecting illegal immigrants under these laws provide further incentives for illegal immigrants to seek jobs in the United States? Or, would denying illegal immigrants the protection of the labor laws provide further incentive for employers to hire them?

Clearly the United States is not the only destination country that faces this dilemma. However, the United States does not have to confront the problem of the lack of uniformity of laws within its borders. Given that
immigration is addressed at a federal level, the laws apply equally among all the states in the federation. Furthermore, there is a federal agency, the Immigration and Naturalization Service (INS), which is in charge of the implementation of these laws at a national level.

In contrast to the United States, the European Union ("EU") is still trying to develop new laws and a common policy on immigration. Adding to the EU's lack of legal uniformity is the lack of enforcement uniformity. This is so because each Member State of the EU is in charge of implementing the laws that regulate immigration through the labor markets. That is, the EU does not have an agency equivalent to the INS. Thus, it would be the same as having, for example, Maine and California in charge of independently implementing federal immigration laws. The result would be diverging application of these laws depending on the particular needs and leverage of the interest groups present in each of these states.

This Note argues that the lack of uniformity in the implementation of immigration laws poses a real threat to the effectiveness of any system that attempts to regulate illegal immigration within a federation or union of states. As such, the EU needs to create not only a common policy on illegal immigration, but also measures that guarantee the common and equal application of these laws and policies among the Member States. Otherwise, the lack of cohesion among EU Member States regarding the control of the internal labor markets will lead to the consolidation of black market economies in countries where laws against the employment of illegal immigrants are more lenient or rarely enforced. The consequences of this phenomenon will be two-fold. First, it will encourage immigrants to engage in "labor-market shopping" and to prefer those countries where the laws are friendlier to the employment of illegal immigrants. Second, it will give the employers of illegal immigrants in these countries a competitive advantage over employers that do business in countries where the relevant laws and their enforcement are stricter.

This Note also proposes a solution to the problem of disuniformity. The solution is based on the premise that laws that prohibit the employment of illegal immigrants are intrinsically flawed because they do not consider the presence and leverage of pressure groups that benefit from the employment of illegal immigrants. As such, a sound approach to this problem is to empower those who are negatively affected by the employment of illegal immigrants, but who do not have the political leverage to effectuate a change in the enforcement of immigration laws. In other words, the proposed solution attempts to depoliticize enforcement through private
actions against employers in breach of immigration laws. As such, this solution advocates the deputization of the citizenry.

Section I analyzes the causes of illegal immigration, providing a backdrop for the study of general immigration trends worldwide. It argues that the degree of labor market regulation in a destination country influences illegal immigration trends. Section II explores how laws in the United States, as underscored by the *Hoffman* case, balance the tension between immigration and labor policies. It argues that, regardless of its outcome, *Hoffman* should stand for the benefits of a uniform body of law applying equally among the states of a federation. Against the backdrop of the United States, Section III studies the current immigration laws and policies of the EU. It contends that the uniform regulation of immigration through EU-border enforcement should progress hand-in-hand with broadly applicable labor market regulations in the Member States. As such, it suggests that the EU should deputize the enforcement of immigration laws by giving private parties the right to sue employers who hire illegal immigrants. Consequently, Section IV contends that the best way to combat a highly political issue such as immigration is to change the terms of the debate by delegating the power to enforce immigration laws on the citizenry.

I. The Forces at Work in Transnational Immigration

Although each immigrant's story differs, several basic factors usually contribute to the transnational movement of individuals. In general, transnational immigration results from push factors within the country of origin and pull factors in the destination or host country. In other words, an individual's need or desire to leave a country (push factor) is related to a demand (pull factor) for that individual in the destination or host country. This Note will first address how push factors within an immigrant's home country, when combined with restrictive immigration regulations in the receiving country, may contribute to the problem of illegal immigration. For the sake of clarity, this Note will reserve for later an analysis of the pull factors and their contribution to the employment of illegal immigrants.

A. Push Factors of Immigration

Economic forces in an immigrant's home country are commonly known push factors. These economic forces include the need to escape financial distress, poverty, and unemployment. As such, prospects of a

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20. See id. at 34-35.
21. At this point, the reader should be aware that, when discussing push factors, this Note considers those phenomena as they relate to both illegal and legal immigration. This point's relevance will be made clear in the upcoming discussion of pull factors. See discussion infra Part I.D.
22. See GHOSH, supra note 7, at 35.
23. See SARAH COLLINSON, BEYOND BORDERS: WEST EUROPEAN MIGRATION POLICY TOWARDS THE 21ST CENTURY 47 (1993); see also Gordon Hanson et al., Immigration and the US Economy: Labour-Market Impacts, Illegal Entry, and Policy Choices, in Immigration Policy and the Welfare System 169, 222 (Tito Boeri et al. eds., 2002) (analyzing the
better economic future elsewhere and pessimism about the future of the home economy heavily influence those who emigrate. For example, Victor Zavala Jr., an illegal immigrant in the United States who worked at a Wal-Mart in New Jersey before he was arrested on October 23, 2003, personifies the force of the economic push factors that drive an individual to leave his country: "When I talk on the phone to friends in Mexico, they ask me how the pay is, and I say, ‘We’re getting $350 a week.’ . . . They say, ‘Wow, in Mexico we’re earning 300 pesos a week.’ That’s just $30 a week. So compared with Mexico, it’s good money."

Noneconomic reasons such as war, ethnic discrimination, or political persecution in the home country may also motivate emigration. Some of these noneconomic push factors influenced emigration in Somalia, Rwanda, the Balkans, and the former Yugoslavia. More recently, the events that have developed in Haiti, with the overthrow of former President Jean-Bertrand Aristide, have underscored the relationship between the political instability in a country and its citizens’ desire to emigrate. Indeed, the interception in February 2004 of 546 Haitians attempting to reach the United States by boat has increased fears that large numbers of refugees could land on South Florida shores in the near future. Cheryl Little, head of the Florida Immigration Advocacy Center in Miami, has said that "[t]he numbers at this point aren’t alarming, but given the current political crisis in Haiti, [she] think[s] it [i]s reasonable to expect greater numbers in the coming days and weeks."

B. State Regulation of Immigration

National governments have the right to decide which, and how many, non-nationals can enter, stay, and work in their territories. Although national governments may in theory restrict all immigration, in practice causes of illegal immigration to the United States and concluding that “[i]llegal immigration appears to be highly sensitive to changes in Mexican wages and moderately sensitive to changes in U.S. wages”).

24. See GHOSH, supra note 7, at 42; see also Address of the UN Secretary-General Kofi Annan to the European Parliament upon Receipt of the Andrei Sakharov Prize for Freedom of Thought, European Parliament, UN Press Release SG/SM/9131 (Jan. 29, 2004) (stating that many immigrants “leave their home countries not because they really want to, but because they see no future at home”).


27. See id.


29. See id.

30. Id.

this is both unfeasible and undesirable. In fact, immigration policies reflect the state's understanding that immigration can be a double-edged sword: although the right amount may be a blessing, too much immigration can be a real burden.

1. **The Blessings**

Historically, immigrants have contributed to their host countries. In the United States, for example, the uncontested contribution of immigrants is part of the contemporary political discourse. This is so, at least in part, because of the important role that immigrants have played in strengthening the national economy. In fact, on January 7, 2004 President George W. Bush clearly addressed this issue when he remarked, "During one great period of immigration, between 1891 and 1920, our Nation received some 18 million men, women, and children from other nations. The hard work of these immigrants helped make our economy the largest in the world."

Historical facts support the President's words. Indeed, the active role of Chinese immigrant workers in the building of American railroads is well documented. Similarly, the seasonal immigration of Mexicans to the United States has aided the agricultural industry in some regions.

In the EU, the importance and potential blessings of immigration are more palpable and urgent. According to a United Nations (U.N.) report, the population of virtually all European countries will likely decrease dur-

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32. See, e.g., Bradly J. Condon & J. Brad McBride, Do You Know the Way to San José? Resolving the Problem of Illegal Mexican Migration to the United States, 17 Geo. Immigr. L.J. 251, 253 (stating that the U.S. and Mexican economies both benefit from Mexican immigration to the United States.).

33. See, e.g., Remarks at the Immigration and Naturalization Service Ceremony on Ellis Island, New York, 2 Pub. Papers 837 (July 10, 2001) [hereinafter Remarks at INS Ceremony] ("Immigration is not a problem to be solved. It is a sign of a confident and successful nation."); Remarks and an Exchange with Reporters on Immigration Policy, 1 Pub. Papers 1194 (July 23, 1993) ("Our nation has always been a safe haven for refugees and always been the world's greatest melting pot.") (emphasis added).

34. See, e.g., Remarks at INS Ceremony, supra note 33 ("We welcome not only immigrants themselves but the many gifts they bring. . . . And together, they make our Nation more, not less.").


37. See Agricultural Guest Worker Programs: Joint Hearing Before the Subcomm. on the Risk Mgmt. and Specialty Crops of the House Comm. on Agric. and the Subcomm. on Immigration and Claims of the Comm. on the Judiciary, 104th Cong. 79 (1995) ("Like most other Georgia growers and processors, I am totally dependent on migrant labor to plant and harvest my crops.").

38. See, e.g., Kitty Calavita, Immigration, Law, and Marginalization in a Global Economy: Notes from Spain, 32 Law & Soc'y Rev. 529, 558-59 (1998) (noting that "Spanish politicians regularly . . . proclaim the dependence of the Spanish economy on Third World labor, not simply as a way to supplement the labor supply . . . but to offset rigidity and enhance competitiveness in a post-Fordist global economy.").
ing the next fifty years. For example, Italy's population, which is currently fifty-seven million, is expected to decline to forty-one million by the year 2050. In addition to this decrease in population size, these countries are undergoing a rapid aging process. In Italy, for example, the population's median age will increase from forty-one years to fifty-three years, and the proportion of the population sixty-five years or older will increase from eighteen percent to thirty-five percent. The decline in birth rates, coupled with the increase in the median age, will result in an increasing number of pensioners supported by a diminishing workforce. The U.N. report concludes that the best solution lies in an open immigration policy that increases the workforce. A less desirable alternative calls for a dramatic increase in the retirement age.

2. The Burdens

In spite of the contributions that immigrants may make to a host country, other considerations make a country hesitant to adopt an open immigration policy. For example, concern about the loss of cultural homogeneity and national cohesiveness may restrain a country from encouraging large-scale immigration. In Europe, for instance, there is a growing disquiet over a perceived rise of immigrant-related problems that has manifested itself in a surge of support for far-right political parties, including France's National Front, the Freedom Party in Austria, the Pim Fortuyn List in the Netherlands, the Northern League in Italy, and the Danish People's Party. In fact, the President of the National Front in France has publicly stated that immigration is the biggest problem facing France because it threatens French national identity.

Another consideration that often contributes to internal constraints on

40. Id.
41. Id.
42. Id.
43. See id. at 93.
44. Id.
45. Id. at 94.
46. See, e.g., Herbert Brucker et al., Managing Migration in the European Welfare State, in Immigration Policy and the Welfare System 1, 105 (Tito Boeri et al. eds. 2002) (noting that the preferences of Europeans for cultural homogeneity result in racist attitudes towards migrants); see Leilo Marmora, Las Políticas De Migraciones Internacionales 285-88 (1997); Hans van Amersfoort & Rinus Penninx, Western Europe as an Immigration Area, in International Migration: Processes and Intervention 42, 60 (Hans van Amersfoort & Jeroen Doomenk eds., 1998) (noting that the definition of "German," which is characterized on ethnic rather than legal grounds, significantly impacts Germany's immigration policies).
the formulation of immigration policy is national security. An increased presence of immigrants is often perceived as a source of economic and political vulnerability that most countries try to avoid. This is so because, although immigrants generally forge new attachments to the receiving country, they rarely detach themselves entirely from their countries of origin. Therefore, immigrant groups potentially render the receiving country more vulnerable to developments in sending countries or elsewhere that would otherwise have a minimal impact on the receiving country. In France, for example, the Gulf War and the terrorist attacks in Paris in 1986 and 1995 injected the issue of national security into the public debate on immigration. Since those events, growing concern over Islam as a "new threat to facing the developed Western world" has dominated those discussions.

Finally, additional constraining factors include shortages in housing, transportation, and other infrastructural facilities. In fact, many believe that immigrants exploit the welfare system by relying on welfare payments more heavily than the destination country’s native citizens. For instance, Maine, the second least diverse state in the United States, has recently faced a rapid influx of Somali immigrants in its school systems and city government. As a resident of Lewiston, Maine’s second largest city, observed, “One day they [Somali immigrants] weren’t around. They came—next day they [were] all over the place. It was quite a shock really. Now you see them everywhere around here.” The mayor of Lewiston, Larry Raymond, even wrote an open letter in which he warned of a strain on resources if more Somalis moved to the city, and discouraged friends and families of Somali immigrants from moving to Lewiston. The letter presents an example of the real and perceived negative effects of immigration when it states the following: “We have been overwhelmed and have responded valiantly. Now we need breathing room. Our city is maxed-out financially, physically and emotionally.”

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50. See COLLINSON, supra note 23, at 15.
51. See id.
52. See id.
53. See Wihtol de Wenden, supra note 49, at 107.
54. See id.
56. See Hanson et al., supra note 23, at 105.
58. See id.
60. See id. This feeling was echoed recently by U.S. Congressman Mark Foley, a West Palm Beach Republican, who, in reference to the exodus of Haitians escaping politi-
C. Labor Needs in the Receiving State

Naturally, the solution to the perceived and real threats of unrestricted immigration is regulation. However, a state's need to regulate immigration flows can create illegal channels of immigration when the immigrants wanting to emigrate to a country exceed the number of immigrants a country is willing to receive.61

In light of the seemingly unavoidable presence of illegal immigrants within its borders, each destination country must also address the socio-economic phenomenon of the employment of illegal immigrants.62 In fact, the black market economy results partly from the mutual convenience for employers who hire illegal immigrants and the illegal immigrants themselves.63 While the former benefits from this workforce because they avoid paying, *inter alia*, high taxes and welfare payments, the latter does not alert the authorities responsible for enforcement of the labor and welfare laws because they want to avoid deportation.64

States that deal with this issue usually speak out of both sides of their political mouths. Officially, states condemn illegal immigration because it creates the same undesired social and demographic effects of unrestricted legal immigration.65 Unofficially, states to some extent acquiesce to the employment of illegal immigrants because they fulfill the need for a cheap
labor force within the destination country. In fact, as the following sections demonstrate, illegal immigration continues to exist because its perceived benefits outweigh the costs of completely regulating it.

1. The "Contributions" of Illegal Immigration—The Black Market Economy

Illegal immigration can benefit the host country's economy to the extent that it contributes to a better matching of labor supply and demand. For example, in most immigration-attracting countries, there are labor shortages in both the highly-skilled and low-skilled sectors. Jobs in the first category include internet technology specialists, medical staff, researchers, scientists, technicians, and teachers. Some examples of jobs in the second category are farm laborers, construction workers, and workers in the hotel and restaurant sectors. Thus, employers benefit from illegal immigration when, even in the face of a general (legal) labor surplus, there is still an unmet labor demand. This unmet labor demand exists because local workers are unwilling or unavailable to perform certain types of jobs. These jobs are often dirty, dangerous, and difficult, and only illegal immigrants are willing to take them. Moreover, many of these jobs—retail trade, housekeeping and other personal services, construction, tourism, catering, and agricultural labor—cannot be transferred to countries that have lower labor costs.

Illegal employment also allows some industries to stay afloat in an increasingly competitive global market because it lowers production costs for the employer. For example, some argue that the unavailability of illeg-

66. See Caruso, supra note 63, at 303 ("It seems likely that the relative inefficiency of the control systems in Italy and other countries such as Greece does not derive from an excess of legal guarantees in favour of immigrants, but from the calculation of the benefits involved"). In fact, Professor Caruso notes that illegal immigrants provide a readily available and flexible workforce for the black market economy that also safeguards the welfare system. See id.
67. See GHOSH, supra note 7, at 4; see also Hanson et al., supra note 23, at 217 (stating that there is the perception that, "whether intended or not, border enforcement in the United States is designed to work, just not very well").
68. See GHOSH, supra note 7, at 74.
70. See id.
71. See id.
73. See id.; GHOSH, supra note 7, at 75.
74. See Brochmann, supra note 62, at 35.
76. See Francisco Javier Moreno Fuentes, Immigration Policies in Spain: Between External Constraints and Domestic Demand for Unskilled Labour, at 27 (2000) (working paper and permission grant on file with author) (noting that the black market economy is "extremely important" in some regions of Spain because it allows businesses that would otherwise be struggling, such as textiles and shoe manufacturing, to survive in an increasingly competitive global economy).
gal immigrants who perform agricultural work at a low wage would cause a decrease in agricultural production. Thus, countries that do not have illegal immigrants would have to import products from countries that have a cheaper agricultural workforce. This in turn would harm the domestic agricultural economy. Regardless of whether this chain of events could actually occur, agricultural producers in the United States believe that their fears are well founded. Furthermore, this real or perceived competitive advantage is not limited to the realm of labor-intensive or small manufacturing firms. Employers of large firms and several skill-intensive sophisticated industries, such as software development, now rely upon illegal immigration labor to confront intense international competition.

As such, the black market economy may even be crucial to the economic competitiveness of entire countries. Two key factors contribute to the need for illegal immigration in these economies: the labor-intensive nature of the work and the firms' low productivity. These firms could not remain competitive if they paid workers union rates. But, these firms remain competitive and overcome their low productivity and the high labor costs of legally employed workers by employing illegal immigrants.

Furthermore, employers are not the only ones who benefit from illegal immigrants who meet the demand for unwanted jobs. Indeed, consumers in a receiving country benefit from the lower prices of labor-intensive prod-

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77. See Reyneri, supra note 75, at 14. A similar example of an industry dependence on the employment of illegal immigrants is the janitorial industry in the United States. That is, it has been reported that reliance on immigrants has put janitorial services in a market race to the bottom because those who follow federal immigration, labor, and tax laws find it harder to stay afloat in a competitive market. See e.g., Greenhouse, supra note 25, at A1 (describing how the illegal employment of janitors at Wal-Mart stores across the United States minimized the company's costs).

78. See Reyneri, supra note 75, at 14.

79. See William M. Ross, Note, The Road to H-2A and Beyond: An Analysis of Migrant Worker Legislation in Agribusiness, 5 Drake J. Agric. L. 267, 269 (2000) (noting that agricultural producers fear that the reduction in the seasonal labor supply that would result from effective regulation of illegal immigration would "cripple the U.S. agricultural community").

80. See Ghosh, supra note 7, at 86.

81. See, e.g., Julia Hayley, Immigrants Lower Spanish Labour Costs, XTRAMSN, Sept. 27, 2003, at http://xtramsn.com (last visited Oct. 9, 2003) (on file with author) (stating that the availability of illegal immigrants in the Spanish workforce allows Spain to stay competitive and to continue to grow economically, despite the cheaper labor forces available in countries about to join the EU); see also Martin Baldwin-Edwards, The Emerging European Immigration Regime: Some Reflections on Implications for Southern Europe, 35 J. Common Mkt. Stud. 497, 508 (1997) (stating that the black market economy is "a major structural feature of all southern European countries"). Italy's dependence on the black market economy is reflected by the fact that its GDP figures, after taking this activity into account, are boosted fifteen to thirty percent. See id.

82. See Reyneri, supra note 75, at 14.

83. See id.

84. See id.

85. See id.
ucts when employers cut employment costs by hiring illegal workers. In the United States, even the consumers of big businesses benefit from this economic dynamic. For instance, the employment of illegal workers helped Wal-Mart, its shareholders, and managers by reducing the company's costs. This, in turn, benefited consumers because Wal-Mart consequently lowered its retail prices. At least some of those involved in the underground economy in the United States recognize this effect on consumers. Robert, a Czech national who runs a web site dedicated to attracting Eastern Europeans to do janitorial work in the United States, said that "if they [Wal-Mart] hired Americans, it would take [ten] of them to do the work done by five Czechs. This helps Wal-Mart keep prices low."89

2. The Disadvantages of Illegal Immigration

Although the use of illegal immigrants as an accessible workforce may translate into short-term economic benefits, in the long term it may cause a distortion of the market because it discourages beneficial investments. Put simply, a cheap labor source does not provide an incentive for an employer to find newer and more efficient ways to conduct business. The negative effects of this behavior ripple throughout the entire economy because it does not allow more productive industries to replace less competitive ones.

The availability of illegal immigrants as a cheap workforce also has detrimental effects on unions. Unions may oppose the presence of illegal immigrants in the labor market because they see it as a threat to the job security of their constituencies. However, even when illegal immigrants do not compete with legal workers for jobs, unions will still oppose their presence because they fear that the immigrants will weaken their ability to achieve improvement in labor conditions. This is especially true if the host country does not provide illegal immigrants with the same rights as legal workers. By hiring illegal immigrants, employers can circumvent the costs of compliance with a country's labor laws, such as minimum wage, social security benefits, and health insurance. Under these circumstances, illegal immigrants are a more attractive source of work, which consequently undermines the interests of unions and other legal workers

86. See Ghosh, supra note 7, at 78.
88. Id.
89. Id.
90. See Ghosh, supra note 7, at 85; The Longest Journey, supra note 72, at 14.
91. See Ghosh, supra note 7, at 85.
92. See id.
94. Marmora, supra note 46, at 58.
95. See id.; see also Condon & McBride, supra note 32, at 263.
in the host country who are placed at a competitive disadvantage.98

D. The Power of the Pull

As seen above, in countries where there is an expansion of black market economies and the continued existence of inefficient and non-competitive industries, there is a demand for cheap and illegal immigrant labor, thus encouraging illegal immigration.99 This demand for unauthorized employment serves as a pull factor for illegal immigration.100 This Note next analyzes the factors that contribute to the continued existence of a pull that attracts illegal immigration toward a specific country.

1. Pull Factors

The legal framework of the destination country and the lax enforcement of laws that prohibit the employment of illegal immigrants serve as pull factors that may foment illegal immigration. Indeed, in a study of illegal immigrant workers in London, Bill Jordan reported an interview with a Polish immigrant who had been illegally employed in London for seven years, during which time he tripled his hourly wages.101 According to the interview, the Polish immigrant said the following:

I had been to Germany three or four times. . . . [Y]ou can earn better money there, but there is no freedom there; you have to be able to produce your documents at any time, whereas here . . . nobody ever asked to see my passport. . . . I would never have been able to live illegally in Germany for so long.102

As such, it is generally accepted that illegal immigrants gravitate toward countries that have open labor markets and few internal checks.103

Another pull factor is the information or misinformation that immigrants in a host country transmit to those who remained in the sending country.104 This usually includes information regarding legal provisions and regulatory measures on entry, viability of residing and working in the receiving country, the accessibility of housing, and the living condi-

98. See Seitz, supra note 96, at 406.
100. See Brochmann, supra note 62, at 35; Reyneri, supra note 75, at 15.
102. Id.
103. See The Longest Journey, supra note 72, at 8; Reyneri, supra note 75, at 8. According to Reyneri, in a study conducted in 1996 regarding regularization in Spain and Italy, illegal immigrants were asked how they chose which country to which they would migrate. See id. Those who had migrated to Spain answered that they believed it would be easier to work in Spain than other European countries. See id. Others mentioned that they would have preferred to go to another country, but that it was easier to enter and reside in Spain. Id. Similarly, some of those interviewed stated that they initially had migrated to other European countries, but had moved to Spain because they did not succeed in finding jobs elsewhere. See id.
104. See Ghosh, supra note 7, at 67.
The information tends to change and become distorted at each new link in the transmission process because it is often transmitted through informal channels. Potential immigrants are thus presented with a rosy picture of the receiving country that raises expectations of a better future and creates a desire to emigrate. For instance, an investigation in Poland revealed that those who return to their home country are a primary source of information about migration possibilities. However, the disseminated information exaggerates the migrants' success and the opportunities abroad.

Social and family considerations, as well as kinship factors, play important roles in the networking that sustains the process of illegal immigration. Assurances of support in the forms of food, shelter, and initial business contacts encourage more immigrants to choose a certain country as their destination, especially if that country has traditionally accommodated illegal immigrants. For instance, The Economist recently published an article describing the journey of many immigrants from Honduras, Guatemala, and Nicaragua through Mexico's southern frontier in Tapachula. According to this article, “many of the migrants already have families or friends and promised jobs in the United States[.]” For example, the article reported that Roberto, an immigrant from El Salvador, was preparing for his ninth journey to meet his girlfriend in the United States.

Although family and kinship factors are important, a much wider network of contacts may sometimes facilitate the practical aspects of immigration. Such a network often serves a very specific part of the host country's labor market and recruits workers from certain regions in the sending country to work in particular jobs in the host country. For instance, in Spain's labor market, eighty-two percent of Dominicans work in domestic services. Furthermore, according to a study on immigrants in the Spanish labor market, the majority of the domestic servants who work near a certain town in Spain, and who meet every Sunday in the town's plaza, originate from a particular area in the southeast of the

105. See id.
106. See Reyneri, supra note 75, at 9.
108. See Ghosh, supra note 7, at 67.
109. See id.
110. See id.
111. See id.
113. Id.
114. See id.
115. See Integrating Migration Issues, supra note 69, at 11.
116. See id.
Dominican Republic called Vicente Noble. The study concluded that the women at these meetings in the plaza shared information about the salaries, the quality of households and families for which they would potentially work, and job availability.

2. The Politics of Regulating the Pull

In recognition of the causes behind the phenomenon of immigration, countries try to control as much of the inflow of immigration as is politically viable. One strategy is to externally control migration flows through border control. However, border control cannot completely eradicate the problem of illegal immigration because many illegal immigrants may have entered the country lawfully. Moreover, strict border control may have unintended consequences. Tighter border control might encourage immigrants to pay a trafficker to transport them to the destination country. The expertise of organized traffickers creates new and costly challenges to the enforcement of border control. Furthermore, strict border control may deter illegal immigrants from returning home because they know it will be difficult to reenter once they leave. For example, an Ecuadorian who lives and works in Spain illegally in order to support his family back home recently stated, "When I talk to them on the phone and they ask me when I'm coming back my eyes fill with tears. I can't go back because I won't be allowed to enter Spain again." Countries also try to control illegal immigration internally through control of the labor markets. A system of internal control of illegal

118. See id. at 107-08.
119. See id.
120. See generally Hanson et al., supra note 23, at 212-21 (briefly describing border enforcement in the United States and analyzing its strengths and weaknesses). At least one state in the United States has even claimed that it had a constitutional right to federal aid to protect the borders from the inflow of immigrants. See A Memorial Urging the Congress of the United States to Consider Legislation that Would Provide Greater Federal Resources to Border States for Border Enforcement, 2003 Ariz. Legis. Serv. Hs. Mem. 2001 (West) (stating that "[w]hereas, Article IV, section 4 of the Constitution of the United States states that 'The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion,' Arizona is entitled to further resources to protect its borders from illegal immigration) (emphasis added).
121. See Jahn & Straubhaar, supra note 31, at 18-19. In addition, border enforcement may be extremely inefficient, given the vast possibilities for illegal entry into a country that has extensive borders. See Hanson et al., supra note 23, at 218-19. For instance, in Italy the problem of controlling the border is particularly difficult because it entails controlling five thousand miles of coastline. See Caruso, supra note 63, at 300.
122. See Jahn & Straubhaar, supra note 31, at 31.
123. See id. at 31-32.
124. See The Longest Journey, supra note 72, at 6.
125. Hayley, supra note 81.
126. See The Longest Journey, supra note 72, at 8. Some note that, although it is difficult to detain illegal immigrants as they cross the border along the 2,000 mile U.S.-Mexico border, "it is relatively easy do so at many places of work, especially during peak production periods, such as agricultural fields at harvest time or apparel factories prior to the annual pre-Christmas production boom." See Hanson et al., supra note 23, at 218.
immigration generally holds employers civilly or criminally liable for hiring illegal immigrants.\textsuperscript{127} Nevertheless, some commentators argue that this form of internal control may not effectively curb the demand for illegal employment when wage differentials are sufficiently high to compensate for the risk involved in recruiting illegal workers, and when geographical proximity and the existence of networks give employers easy access to immigrant labor.\textsuperscript{128}

States have even attempted to deter illegal migration by imposing penalties on those who facilitate this phenomenon, such as carriers, employers, migrant smugglers, and traffickers.\textsuperscript{129} The introduction of employer sanctions has been criticized as "part of a tendency to privatize immigration control."\textsuperscript{130} Some contend that employer sanctions will lead to racial discrimination on the part of the employer, who will refrain from hiring ethnic minorities, regardless of their legal status, in order to avoid sanctions.\textsuperscript{131} Furthermore, some argue that if such sanctions are to be imposed, they should be aimed at all unlawfully employed workers, most of whom are nationals and not illegal immigrants.\textsuperscript{132}

II. The U.S.'s Control of Illegal Immigration Through the Labor Market

As seen, the phenomenon of illegal immigration in a destination country is closely linked to the demand for the employment of illegal immigrants in that country.\textsuperscript{133} This interrelationship reveals an overlap of two complicated areas of laws: labor and immigration law. Labor law regulates the relationship between employees and employers, whereas immigration law aims to regulate the flow of immigrants within a country.\textsuperscript{134} Naturally, questions arise when the policies behind the former category of laws conflict with, or run counter to, the policies of the latter. An example of a situation in which the conflicting policies of these laws need to be recon-

\textsuperscript{127} See Jahn & Straubhaar, supra note 31, at 33.
\textsuperscript{128} See id. at 33-34.
\textsuperscript{129} See supra Parts II, III.
\textsuperscript{130} See European Council on Refugees and Exiles (ECRE), European Network Against Racism (ENAR) and Migration Policy Group (MPG), Guarding Standards—Shaping the Agenda (May 1999), at 21 [hereinafter Guarding Standards].
\textsuperscript{131} See, e.g., id.; Monica L. Heppel & Luis R. Torres, Mexican Immigration to the United States After NAFTA, 20 Fletcher F. World Aff. 51, 61 (1996) ("Even if enforcement of employer sanctions were strengthened, the verification process [of the legal status of the workers] invites confusion, discrimination, and fraud.").
\textsuperscript{132} See, e.g., Guarding Standards, supra note 130, at 21.
\textsuperscript{133} See Lok v. INS, 548 F.2d 37, 38 (2d Cir. 1977) (comparing U.S. federal immigration law to King Mino's labyrinth in ancient Crete).
cced can be found in the context of the employment of illegal immigrants in the United States.

The question, however, is not whether the application and enforcement of labor laws should minimize the pull factors within a destination country's labor market. Rather, the real question is how. That is, which of the key players—employers or employees—should the law penalize or protect? This, in turn, raises the issue of whether an illegal immigrant should be granted the same rights and remedies as one who is legally employed. In the United States, the debate focuses primarily on the policy arguments of two opposing camps. Some argue that the law should treat all employees alike, regardless of their legal status. According to this camp, enforcing these laws regardless of an employee's legal status would cause employers to hesitate before hiring illegal immigrants in the first place, thus reducing the demand for this kind of workforce. Others argue that granting illegal immigrants the same benefits as legal employees is counterintuitive because it would encourage them to remain and work in the destination country illegally.

This section discusses the U.S.'s position regarding the regulation of illegal immigration flows by addressing two U.S. Supreme Court decisions that center on the right of undocumented immigrant employees to obtain backpay under the National Labor Relations Act (NLRA). These two cases must be viewed in light of Congressional action that, through the enactment of the Immigration Reform and Control Act (IRCA), redefined the terms of the debate by prohibiting the knowing employment of illegal immigrants. Thus, it is also important to look at the politics behind the Immigration and Naturalization Services' (INS) unwillingness or inability to enforce the relevant provisions of the IRCA. Ultimately, this section concludes that, to successfully control the employment of illegal

135. See, e.g., Sure-Tan, Inc. v. Nat'l Labor Relations Bd., 467 U.S. 883, 912 (1984) (Brennan, J., dissenting) ("Once employers . . . realize that they may violate [national labor laws] with respect to their undocumented alien employees without fear of having to recompense those workers for lost backpay, their 'incentive to hire such illegal aliens' will not decline, it will increase.").

136. See id.; see also Local 512, Warehouse & Office Workers' Union, 795 F.2d 705, 720 (9th Cir. 1986) (reasoning that allowing undocumented aliens to receive backpay for a violation of the NLRA would make hiring undocumented aliens less attractive to employers, and therefore "reduce illegal entry to the United States").


140. The pertinent part of the statute provides that "[i]t is unlawful for a person or other entity—to hire . . . for employment in the United States an alien knowing the alien is an unauthorized alien . . . or . . . to hire for employment in the United States an individual without complying with the requirements of subsection (b) of this section." 8 U.S.C § 1324a(a) (1996).
immigrants, there must not only be uniformity in the law, but also uniformity in application and enforcement.

A. Sure-Tan, Inc. v. NLRB

The first relevant case to this discussion is Sure-Tan, Inc. v. NLRB.141 It involved a group of undocumented workers who attempted, as part of a union organization, to authorize the Chicago Leather Workers Union to be their collective bargaining representative.142 Although the Union prevailed in a National Labor Relations Board (NLRB) election, Sure-Tan, Inc. protested that the election was void because "six of the seven eligible voters were illegal aliens."143 Despite this objection, the NLRB certified the Union as the employees' collective bargaining representative.144 Unhappy with this result, the company's president reported the employees to the INS.145 Upon visiting the premises, INS agents discovered that almost half of Sure-Tan, Inc.'s employees were living and working illegally in the United States, and subsequently arrested them.146 The undocumented immigrants agreed to voluntarily leave the United States to avoid official deportation.147 The NLRB, however, issued complaints against Sure-Tan, Inc., alleging that it had engaged in unfair labor practices, in violation of the NLRA, by reporting the undocumented workers to the INS in retaliation for their support of the Union.148

The Supreme Court in Sure-Tan confronted, for the first time, a potential conflict between the NLRA and federal immigration policy, as then expressed in the Immigration and Naturalization Act (INA).149 As such, there were two major questions before the Court. First, the Court had to address whether the NLRA applied to undocumented workers.150 This, in turn, required the Court to determine whether an illegal worker was an

142. See id. at 886-87.
143. Id. at 887. In fact, the president of the company executed an affidavit, stating that "he had known about the employee's illegal presence in [the United States] for several months prior to the election." Id.
144. See id.
145. See id.
146. See id. Sure-Tan, Inc. employed eleven workers, most of whom were Mexican nationals. When the INS came to Sure-Tan's leather processing firm, it investigated the Spanish-speaking employees and found that five were illegal workers. Id. at 886-87.
147. See id. at 887.
148. Id. at 887-88. The NLRA makes it an unfair labor practice for an employer "(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title" or "(3) by discrimination in regard to hire or tenure of employment . . . to encourage or discourage membership in any labor organization." 29 U.S.C. §§ 158(a)(1), (a)(3) (2000). Section 157 guarantees employees "the right to self-organization, to form, join, or assist labor organizations, [and] to bargain collectively through representatives of their own choosing[.]" 29 U.S.C. § 157 (2000).
150. See Sure-Tan, 467 U.S. at 886. In other words, the question was whether the NLRB could properly hold that, when an employer reports an undocumented alien to the INS in retaliation for engaging in union activity, the employer engages in an unfair labor practice. See id.
"employee" within the meaning of the NLRA.\textsuperscript{151} Second, the Court needed to resolve whether the NLRB could make the usual remedy of reinstatement and backpay available to illegal immigrants under the NLRA.\textsuperscript{152} An answer to these two questions called for a reconciliation of the policies and principles behind labor and immigration laws.\textsuperscript{153}

The Court found that the language of the NLRA supported the NLRB's interpretation that undocumented workers were "employees" for purposes of the Act.\textsuperscript{154} First, the Court noted that the NLRA's definition of employee is extremely broad: it provides that "[t]he term 'employee' shall include any employee," unless a specific exception applies.\textsuperscript{155} Furthermore, the enumerated exceptions only cover employees in the agricultural or domestic sectors, employees who work for family members or independent contractors, and employees who work for someone who is not an "employer" under the NLRA.\textsuperscript{156} As such, the Court reasoned that, because undocumented immigrants were not among the specific exceptions, they were included in the broad definition of "employee."\textsuperscript{157}

In addition, the Court stated that the consideration of undocumented immigrants as "employees," which would guarantee them rights under the NLRA, would further the Act's purpose of encouraging the collective bargaining process.\textsuperscript{158} Recognizing the potentially undesirable spillover effects on citizens and legal aliens, the Court further explained that the depressed working conditions of illegal aliens, who do not otherwise enjoy the same rights as legal workers, could render labor unions ineffective:\textsuperscript{159}

If undocumented alien employees were excluded from participation in union activities and from protections against employer intimidation, there would be created a subclass of workers without a comparable stake in the collective goals of their legally resident co-workers, thereby eroding the unity of all the employees and impeding effective collective bargaining.\textsuperscript{160}

\textsuperscript{151} See id. at 891.
\textsuperscript{152} See id. at 888-90. The Board's general order of reinstatement and backpay was modified by the court of appeals, which ordered that the reinstatement offers be left open for four years and that the workers could try to legally reenter during this period. \textit{Id.} The Court reviewed the proposed remedy in light of these modifications. See \textit{id}.
\textsuperscript{153} See id. at 892-96; see also \textit{id} at 902-904 ("By conditioning the offers of reinstatement on the employees' legal reentry, a potential conflict with the INA is thus avoided.").
\textsuperscript{154} See \textit{id} at 891-92 ("The terms ... of the Act fully support the Board's interpretation in this case.").
\textsuperscript{155} \textit{Id.} at 891 (citing 29 U.S.C. § 152(3) (2000)).
\textsuperscript{156} See \textit{id}.
\textsuperscript{157} \textit{Id.} at 892.
\textsuperscript{158} See \textit{id}.
\textsuperscript{159} See \textit{id}. ("[A]cceptance by illegal aliens of jobs on substandard terms as to wages and working conditions can seriously depress wage scales and working conditions of citizens and legally admitted aliens; and employment of illegal aliens under such conditions can diminish the effectiveness of labor unions.") (citing De Canas v. Bica, 424 U.S. 351 (1976)).
\textsuperscript{160} Sure-Tan, 467 U.S. at 892.
According to the Court, the driving purpose behind the NLRA called for just the opposite, demanding that all employees be treated alike.\textsuperscript{161}

Although the Court was aware that granting undocumented workers rights under the NLRA was counterintuitive, it did not find that its interpretation of the NLRA conflicted with the mandates of the INA.\textsuperscript{162} The Court reiterated that "[the] central concern of the INA is with the terms and conditions of admission to the country and the subsequent treatment of aliens lawfully in the country."\textsuperscript{163} Thus, the INA evinced only a "peripheral concern" with the employment of undocumented immigrants.\textsuperscript{164}

In fact, the Court remarked that the provisions of the INA do not make it unlawful for an employer to hire someone who is illegally present in the United States.\textsuperscript{165} Instead, it is only unlawful to "conceal[], harbor[, or] shield from detection" illegal aliens in the United States.\textsuperscript{166} Of special importance, Congress explicitly provided that employment and practices incident thereto do not constitute "harboring" under the INA.\textsuperscript{167} Moreover, under the then-current state of the law, it did not constitute a separate criminal offense for an undocumented immigrant to accept employment in the United States after that immigrant entered the country illegally.\textsuperscript{168}

Given that the INA treated the relationship between an employer and an undocumented immigrant employees as lawful, the Court found that granting undocumented workers rights under the NLRA would also further the purposes of the INA.\textsuperscript{169} The chain of events, at least according to the Court, would proceed as follows:

If an employer realizes that there will be no advantage under the NLRA in preferring illegal aliens to legal resident workers, any incentive to hire such illegal aliens [would be] correspondingly lessened. In turn, if the demand for undocumented aliens declines, there may then be fewer incentives for aliens themselves to enter in violation of the federal immigration laws.\textsuperscript{170}

Thus, the Court identified the demand for undocumented workers as one of the pull factors that contributes to illegal immigration.\textsuperscript{171} As such, by enforcing the NLRA, the NLRB could achieve two objectives: protect employees from an employer’s unfair labor practices and reduce the flow of illegal immigrants by reducing the incentive to hire undocumented workers.\textsuperscript{172}

\textsuperscript{161} See id.
\textsuperscript{162} See id.
\textsuperscript{163} Id. (citing De Canas, 424 U.S. at 359).
\textsuperscript{164} Sure-Tan, 467 U.S. at 892.
\textsuperscript{165} Id. at 892–93.
\textsuperscript{166} Id. at 893 (citing 8 U.S.C. § 1324(a)(3)).
\textsuperscript{167} Sure-Tan, 467 U.S. at 893.
\textsuperscript{168} See id.
\textsuperscript{169} See id.
\textsuperscript{170} Id. at 893–94.
\textsuperscript{171} See supra Part I.D.1 (discussing pull factors generally).
\textsuperscript{172} See Sure-Tan, 467 U.S. at 894 ("The Board's enforcement of the NLRA as to undocumented aliens is therefore clearly reconcilable with and serves the purposes of the immigration laws as presently written.").
Having decided that the provisions of the NLRA applied to undocumented employees, the Court then addressed the remedies available to them. Naturally, the Court assumed that if undocumented workers had the same rights under the NLRA as legal resident workers, they should also have the same remedies. The Court, however, was aware that these remedies needed to be tailored to the circumstances of illegal immigrants in light of the policies behind the INA. As such, the Court decided that reinstatement must be conditioned upon the employees' legal reentry to the United States. Similarly, until an employee is legally readmitted, the Court held that he must be considered "unavailable" for work, and the accrual of his backpay must be tolled. In short, because the expelled employees might not be able to gain legal entry back into the United States, the Court's holding provided the undocumented workers a right without a likely remedy.

B. The IRCA

After the Supreme Court decided Sure-Tan, Congress changed the terms of the debate over the employment of undocumented immigrants. In 1986, Congress enacted the IRCA in an attempt to control illegal immigration through the national job market. Specifically, the IRCA aimed at reducing the influx of illegal immigrants into the United States by eliminating the "job magnet" which legislators suspected was the major lure. To achieve this end, the IRCA introduced an "employer verification system" designed to ensure that unauthorized aliens are not able to gain employ-

173. See id. at 898.
174. See id. at 898-99 (explaining the remedial provision provided for under the NLRA without questioning whether it should be applied in this case).
175. See id. at 903 ("In devising remedies for unfair labor practices, the Board is obliged to take into account another 'equally important Congressional objectiv[e],--to wit, the objective of deterring unauthorized immigration that is embodied in the INA.'").
176. Id.
177. See id. (holding that backpay must be tolled during "any period when [the undocumented employees] were not lawfully entitled to be present and employed in the United States").
178. See id. at 904 ("The probable unavailability of the Act's more effective remedies in light of the practical workings of the immigration laws, however, simply cannot justify the judicial arrogation of remedial authority not fairly encompassed within the Act.").
179. See Egbuna v. Time-Life Libraries, Inc., 153 F.3d 184, 188 (4th Cir. 1998) ("IRCA effected a monumental change in [the United States'] immigration policy by criminalizing the hiring of unauthorized aliens.").
180. See H.R. Rep. No. 99-682(I), at 546 (1986), reprinted in 1986 U.S.C.C.A.N. 5649, 5660 (explaining that "as long as job opportunities are available to undocumented aliens, the intense pressure to surreptitiously enter this country or to violate status once admitted as a nonimmigrant in order to obtain employment will continue").
181. See, e.g., Statement on Signing S. 1200 into Law, 22 WEEKLY COMP. PRES. DOC. 1534 (Nov. 6, 1986) ("The employer sanctions program is the keystone and major element. It will remove the incentive for illegal immigration by eliminating the job opportunities which draw illegal aliens here.").
182. The IRCA categorizes authorized employees as those workers who have a "social security account number card," 8 U.S.C. § 1324a(b)(C)(i) (1996), or "other documentation evidencing authorization of employment in the United States which the Attorney General finds, by regulation, to be acceptable for purposes of this section." 8 U.S.C.
ment in the United States.\textsuperscript{183} In order to control the "job magnet," the IRCA established sanctions for employers who knowingly hire or continue to employ unauthorized aliens.\textsuperscript{184} Furthermore, with the enactment of the Immigration Act of 1990\textsuperscript{185} and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996,\textsuperscript{186} Congress demonstrated its resolve to not only reduce the demand for undocumented workers, but to criminalize its supply.\textsuperscript{187} Accordingly, these amendments to the IRCA also make it a crime for an unauthorized alien to subvert the employer verification system by tendering fraudulent documents.\textsuperscript{188}

C. Hoffman Plastic Compounds, Inc. v. NLRB

Almost two decades after Sure-Tan, the Supreme Court revisited the question of whether an undocumented worker is entitled to backpay under the NLRA in Hoffman Plastic Compounds, Inc. v. NLRB.\textsuperscript{189} Prior to this case, the courts of appeals had been divided on this issue in light of Sure-Tan and the subsequent enactment of the IRCA and its amendments.\textsuperscript{190}

\textsuperscript{183} To guarantee that employers do not hire unauthorized aliens, the IRCA mandates that the employers verify the identity and work eligibility of each new hire by examining specific documents before they begin to work. See 8 U.S.C. § 1324a(b) (1996). If an alien applicant is unable to present the required documentation, the alien cannot be hired. See 8 U.S.C. § 1324a(a)(1) (1996). Similarly, if an employer unknowingly hires an unauthorized alien, or if an alien becomes unauthorized while employed, the employer is compelled to discharge the worker upon discovery of the worker's undocumented status. See 8 U.S.C. § 1324a(a)(2) (1996).

\textsuperscript{184} Employers who violate the IRCA are punished not only by a series of civil fines, see 8 U.S.C. §§1324a(e)(4)–(5) (1996), but are also subject to criminal penalties of up to $3,000 for each unauthorized alien so employed, imprisonment for a maximum of six months where such violations constitute a "pattern or practice," or both. See 8 U.S.C. § 1324a(f)(1) (1996).


\textsuperscript{187} See, e.g., id. § 1028(b) (2000 & Supp. 2003) (providing for increased criminal penalties for all uses of fraudulent government-issued papers).

\textsuperscript{188} See 8 U.S.C. § 1324c(a) (1996). Thus, the IRCA now prohibits aliens from using or attempting to use "any forged, counterfeit, altered, or falsely made document" or "any document lawfully issued to or with respect to a person other than the possessor" for purposes of obtaining employment in the United States. See 8 U.S.C. §§ 1324c(a)(1)–(3) (1996). Aliens who use or attempt to use such documents are subject to fines and criminal prosecution. See 18 U.S.C. § 1546(b) (2002). Supporters of the IRCA claim that the sanctions imposed should deter employers from hiring undocumented workers and, in turn, eliminate the workers' incentive to immigrate to the United States. See, e.g., William J. Murphy, Note, Immigration Reform Without Control: The Need for an Integrated Immigration-Labor Policy, 17 SUFFOLK TRANSNAT'L L. REV. 165 (1994). However, some argued that the passage of the IRCA would actually increase illegal immigration. See id. at 166. They were concerned that employers would be more likely to hire illegal aliens if the aliens did not have the protection of labor laws. See id.

\textsuperscript{189} 535 U.S. 137 (2002).

\textsuperscript{190} The circuit split centered on the Court's use in Sure-Tan of "unavailable for work" as a factor in determining whether an undocumented worker is entitled to backpay. See,
The Supreme Court in *Hoffman*, however, noted that the IRCA had changed the legal landscape surrounding the employment of undocumented workers in the United States. As a result, the Supreme Court instructed that the granting of backpay must take into account Congress's clear intent in the IRCA to prohibit an alien from using false documents to secure employment.

The facts in *Hoffman* were nothing out of the ordinary. In 1988 Hoffman Plastic hired Jose Castro. During the hiring process, Castro presented documents that appeared to verify his authorization to work in the United States. Several months later, Castro supported and participated in the organizing campaign of a union at Hoffman Plastic's production plant. In January 1989, Hoffman Plastic fired Castro and other employees who had participated in the union-organizing activities. In January 1992, the NLRB found that Hoffman Plastic fired these employees in retaliation for their union-organizing activities, thus violating § 8(a)(3) of the NLRA.

At the 1993 compliance hearing to determine the amount of backpay owed to the employees, Castro testified that he was born in Mexico and that he had never been legally authorized to work in the United States. Furthermore, Castro disclosed that he had used a friend's birth certificate to gain employment with Hoffman Plastic and to acquire a California driver's license, a Social Security card, and another job following his layoff. Relying on *Sure-Tan* and the IRCA, the administrative law judge (ALJ) found that the NLRB could not award backpay or reinstatement.

In 1998, the NLRB reversed part of the ALJ's decision and awarded Castro with backpay plus interest for the period from the illegal firing to the date Hoffman Plastic discovered that he was undocumented. Hoffman Plastic argued that undocumented workers could not be awarded backpay because it conflicted with immigration laws. The D.C. Circuit agreed with the decision of the NLRB to limit the backpay award to that window of time.

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192. *Id.* at 149.
193. *Id.* at 140.
194. *Id.*
195. *Id.*
196. *Id.*
197. *Id.*
198. *Id.* at 141.
199. *Id.*
200. *Id.*
201. *Id.* at 141-42
203. *Id.* at 242-43.
In March 2002, the U.S. Supreme Court reversed the D.C. Circuit’s affirmation of the NLRB limited backpay award.\textsuperscript{204} The Supreme Court held that undocumented workers are not entitled to backpay because such remedies conflict with the IRCA.\textsuperscript{205} Thus, the Court had “no reason to think that Congress nonetheless intended to permit backpay where but for an employer’s unfair labor practices, an alien-employee would have remained in the United States illegally...all the while successfully evading apprehension by immigration authorities.”\textsuperscript{206} In fact, awarding backpay to the undocumented worker would trivialize the IRCA and encourage future violations, as Castro’s ability to find another job in violation of that statute demonstrated.\textsuperscript{207}

D. The INS’s Enforcement of Immigration Laws in the United States

The Hoffman decision made it clear that the NLRB’s enforcement of the NLRA must take into account the immigration policies behind the IRCA and its amendments. However, the INS’s enforcement of the IRCA in the United States has been minimal because it has taken into account the employers’ need to employ undocumented workers. In fact, the IRCA has not met its goal of decreasing illegal immigration to the United States because there has been only sporadic enforcement of the sanctions and the imposition of only small fines relative to the financial benefits that employers realize.\textsuperscript{208}

The INS’s enforcement of immigration laws that regulate the U.S. labor market is often criticized for lacking uniformity and appearing regionally based.\textsuperscript{209} Among the most important factors militating against the uniform enforcement of the IRCA in the internal labor markets is the presence of political pressure groups that benefit from the employment of undocumented workers.\textsuperscript{210} For instance, agricultural producers in the United States fear that the effective regulation of illegal immigration will cripple the agricultural community by reducing the seasonal labor supply.\textsuperscript{211} Thus, the “[e]mployment of U.S. workers cannot be expanded to replace the alien labor force...at a cost that will enable the current level of U.S. agricultural production to be maintained in competitive world markets.”\textsuperscript{212} Simply put, “if the government was able to stop everybody at the border, there would be no agriculture. You wouldn’t be eating asparagus.”\textsuperscript{213}

\textsuperscript{205} See id.
\textsuperscript{206} Id. at 149
\textsuperscript{207} See id. at 150.
\textsuperscript{209} See Hanson et al., supra note 23, at 211.
\textsuperscript{210} See id. at 217.
\textsuperscript{211} See id.
Thus, American politicians inconsistently express their views on the enforcement of immigration laws. On one hand, politicians are happy to enforce external border controls to appease the concerns of a political constituency that expects the borders to be protected and non-porous. But on the other hand, they are cautious not to completely halt the flow of illegal immigration because they know that they "owe their seats to the patronage of right-wing manufacturing and agribusiness interests desirous of nothing so much as a low minimum wage and unfettered access to cheap, nonunion labor from the Third World." For instance, in 1998, after the INS raided onion fields in Georgia, state senators and congressional representatives publicly criticized the INS for injuring Georgia farmers. As a result, the INS agreed not to enforce immigration laws in the onion fields that season.

In light of the influence and strength of these political pressure groups, the INS's enforcement within the U.S. labor market of immigration laws such as the IRCA is rare and appears to have had little effect. For instance, from 1992 to 1998, the INS investigated an average of 5,000 to 8,000 employers. Of those, the agency only fined between 235 and 799 employers a year. This low number of fines, however, does not necessarily mean that the employers that the INS investigated strictly complied with immigration law. In fact, the INS strategy is to announce plant visits. This policy indirectly motivates illegal workers to quit, instead of leading to employer sanctions.

Thus, an immigration policy that truly succeeds at curbing the flow of illegal immigrants by influencing the demand for undocumented workers must account for and address the politics behind the employment of illegal immigrants. One way to deal with this problem is to have one agency, such as the INS, in charge of enforcing immigration laws. A single agency would allow every participant in the labor market to benefit equally from the uniform enforcement or non-enforcement of the relevant immigration laws and policies. A less effective approach in the United States would be to allow each state to independently enforce the national immigration laws. This is undesirable because different applications of immigration laws would result in some states being more lenient in their enforcement so as to reap the economic benefits of cheaper human capital. This, in turn, would place employers in other states at a competitive disadvantage and

217. Id.
218. See Hanson et al., supra note 23, at 219.
219. Id. at 219.
220. Id.
221. Id.
222. Id. at 219 n.23.
generate a race to the bottom in a reduction-of-costs warfare. Section III of this Note suggests that the EU is currently experiencing this very race.

III. Immigration and Illegal Employment in the EU: Borders, Labor Markets, and the Member States

Of course, the presence of pressure groups in the political landscape is not limited to the United States. In European countries, the agricultural industry has strong lobbying power that is based on both the farmers who work the land and the consumers who have attached a great sense of national pride to locally-grown produce.223 Perhaps a good example of the contribution that European agricultural products make to the consolidation of a national identity is an expression attributed to French President Charles de Gaulle: How can you be expected to govern a country that has 246 kinds of cheese?224

National pride aside, the agricultural industry in countries like Spain, France, and Italy are feeling the pressure to remain afloat in an increasingly competitive world market. Confronted with these conditions, the agricultural producers in these countries, like those in the United States, have tapped into the supply of illegal immigrants as a source of cheap labor force in order to keep production costs down.225 Needless to say, their constant need for this workforce contributes to the continuing flow of illegal immigrants into the EU and neighboring European states.226

Although Member States turned control of immigration policy over to the EU, in practice this transfer has focused on how to keep unwanted immigrants out of the EU, and has mostly ignored what to do once they have unlawfully penetrated those external barriers.227 Thus, unlike the United States, in the EU the regulation of illegal immigration in the workplace is still in the hands of the Member States.228 Nevertheless, the Euro-

223. See JOSÉ BOVÉ & FRANÇOIS DUFOUR, THE WORLD IS NOT FOR SALE: FARMERS AGAINST JUNK FOOD 3, 10-13 (Anna de Casparis trans., 2001) (describing negative public reaction to the imprisonment of José Bové after he, along with a group of farmers, ransacked a McDonald’s under construction in Millau, France, in protest of U.S. sanctions imposed in retaliation for the EU’s ban on import of hormone-treated beef); see also ‘McHero’ Cheered at Anti-Davos Meeting, BBC News (Jan. 30, 2001), at http://www.news.bbc.co.uk/1/hi/world/americas/1143931.stm (noting that José Bové has become a folk hero in France for his campaign against globalization and genetically-modified food, and has been compared to the French cartoon character, Astérix, who fights against the armies of the Roman Empire).


227. See discussion infra Part III.B.

pean Community’s abolition of internal borders, and the resulting free movement of people within the single market have added to the demand for a coordinated policy among EU countries. Many want to avoid a situation in which immigrants can search for the easiest point of entry into the EU and then relocate to the country where they can earn the highest wages. In other words, they fear the creation of havens for illegal immigrants and black market economies.

This section proposes that the implementation of a uniform body of law with regard to the exterior geographical boundaries of the EU should be complemented by the uniform application of immigration and employment laws among the Member States. Otherwise, illegal immigrants who successfully avoid border control will be able to engage in “labor-market shopping” and thrive in the economies of the Member States that have more lenient internal controls. This section also suggests that the “labor-market shopping” phenomenon will give the economies of those host Member States a competitive advantage vis-à-vis other Member States, creating a race to the bottom in which EU employers have greater incentives to hire illegal immigrants to reduce costs and remain competitive on the global market.

A. The EU’s Framework and Its Initial Attempts to Regulate Immigration

An understanding of the intricacies of the EU as it now exists requires a detailed analysis dating back to the visions of the first proponents of a united Europe. The paragraphs that follow, however, have the humble goal of presenting and analyzing only the component of EU law that deals with and addresses immigration within the Union. Therefore, the following discussion attempts to provide the reader with the tools necessary to understand how, and to what extent, the EU has addressed the problems of illegal immigration and the black market economy.

1. The EU’s Structure: A “Greek Temple”

The EU, which came into being on November 1, 1993, builds on a number of treaties. These treaties form what is generally known as the

230. See id.
232. For a discussion of the origins of the EU see Paolo Mengozzi, European Community Law from the Treaty of Rome to the Treaty of Amsterdam 1-9, (Patrick Del Duca trans., Kluwer Law International 2d ed. 1999). There are many books and articles written on the subject of EU law with equally numerous levels of complexity and detail. Nevertheless, for a basic introductory description of the EU and its inner workings see Klaus-Dieter Borchardt, The ABC of Community Law (4th ed. 1994). For a more comprehensive study of the institutions of the EU and the EU’s substantive law see Anthony Arnull et al., European Union Law (4th ed. 2000).
The two most important treaties of this acquis are the Treaty of the European Union (TEU), also known as the Maastricht Treaty, and the European Community Treaty (EC Treaty), also known as the Treaty of Rome. Article 1 of the TEU underscores the complex nature of the EU's political and legal structure. The EU is often analogized to a Greek temple sustained by three “pillars.” The first pillar, often called the European Community (EC), is composed of the three “European Communities” that predated the EU: the EC, the European Coal and Steel Community (ECSC), and the European Atomic Energy Community, (Euratom). Accordingly, the TEU states that the EU is “founded on the European Communities, supplemented by the policies and forms of cooperation” that the TEU establishes. As the word “founded” in Article 1 suggests, these communities and their corresponding treaties—especially the EC Treaty—form the most important component of the EU. In fact, the first pillar forms a supranational system of government in which the EC exercises independent authority over the Member States and their citizens. The other two pillars refer to the “policies and forms of cooperation” mentioned in Article 1. These are areas that the parties to the TEU could not agree to bring under the purview of the EC Treaty. As such, these two pillars established an intergovernmental relationship between the parties. The second pillar (Title V of the TEU) addresses the EU's “common foreign and security policy” (CFSP). Thus, the articles under Title V of the TEU address the political aspects of the EU's external relations. The third pillar (Title VI of the TEU), as originally drafted, dealt with the “co-operation in the fields of justice and home affairs” (JHA). Although the TEU did not expressly define the phrase “justice and home affairs,” it included matters of common interest such as asylum and immigration policy, control of the EU's external borders, and fighting drug addiction and interna-
tional fraud. In fact, before it was amended, Article K.1(3)(c) of the TEU specified as one of its goals "[c]ombating unauthorized immigration, residence and work by nationals of third countries on the territory of the Member States." The Treaty of Amsterdam (TA), which amended the TEU, has since altered the subject matter of the third pillar. In fact, the TA transferred all of the provisions dealing with the Member State's external borders and the treatment of third-country nationals from Title VI of the TEU to the first pillar under a new Title IV of the EC Treaty. The new Title VI of the TEU is devoted entirely to police and judicial cooperation in criminal matters (PJCCCM), while the new Title IV of the EC Treaty addresses visas, asylum, immigration, and other policies related to the free movement of people. The EU had previously implemented immigration policies under this third pillar as it was originally drafted under the TEU and has since taken some steps in this same area under the first pillar. Given that the TA placed the matters of "justice and home affairs" within the first pillar, this Note will briefly describe the differences between the three pillars but will focus on the basic inner workings of the first pillar.

(a) The Three Pillars

The competence of the Community—the first pillar—is supranational in nature. This is so because the Member States have surrendered their sovereignty in matters that are now under the Community's control. Some of the matters that are under this realm of the Community's control are the free movement of goods, the free movement of workers, the freedom of establishment, and the freedom to provide services. Although the purpose of the Community is primarily the economic integration of the national markets of all Member States, it has expanded to include noneconomic ones.

The EU's competence under the second and third pillars is intergov-
ernmental in nature. There is a difference because these pillars govern matters that the Member States were not willing to surrender to the Community's supranational structure. As will become clearer in the discussion of the "single institutional framework" that the TEU established, the institutions responsible for the EC's supranational legal structure may still act under these two pillars. Two facets of their powers under these pillars, however, curtail their sphere of action more than under the first: On one hand, they may act in cases where the intended objectives can be better attained at a Community level. On the other hand, they cannot act when the Member States acting individually can adequately achieve the stated goals.

(b) The Pediment

Part of the analogy comparing the EU to a Greek temple includes the concept of a roof, or pediment, that links the three pillars together. This so-called pediment is composed of a group of institutional frameworks and goals within which the EU's actions are framed. These are, first, a single institutional framework in which all the activities of the EU are conducted; second, a set of fundamental political and constitutional values and a procedure to ensure that the Member States uphold these values; third, a set of common objectives; and lastly, a set of common procedures that regulate possible amendments to the founding Treaties and the future accession to the EU of new Member States. Of particular importance for the purposes of this Note is the first component, listed above, of the pediment.

The idea of a single institutional framework that is common to all three pillars is found in Article 3 of the TEU. Article 7 of the EC, in turn, outlines this single institutional framework that is the engine behind both the EC's supranational and the EU's intergovernmental nature. It consists of the Council of the European Union (commonly known as the Council), the European Parliament, the Commission, the Court of Auditors, and the European Court of Justice.

(c) The Institutions

Although these institutions serve all three pillars, they do not have the

258. See BORCHARDT, supra note 232, at 15.
259. See ARNULL ET AL., supra note 232, at 15.
260. See id. at 177-180.
261. See BORCHARDT, supra note 232, at 10.
262. See id.
263. See id.
264. See ARNULL ET AL., supra note 232, at 177.
265. See id.
266. Id.
267. See TEU art. 3. This Article states that "[t]he Union shall be served by a single institutional framework which shall ensure the consistency and the continuity of the activities carried out in order to attain its objectives while respecting and building upon the acquis communautaire." Id.
268. See EC TREATY art. 7.
269. Id.
same powers under each.270 A good way of understanding this is to think of institutions as wearing different hats, depending on what they have been called upon to do.271 That is, the institutions named in Article 7 of the EC wear an "EC hat" when addressing issues under the first pillar, a "CFSP hat" when addressing issues under second pillar, and a "PJCCM hat" (or a "JHA hat" before the TA) when dealing with issues under the third pillar.272 The difference in "hats" reflects the degree to which the Member States have surrendered their sovereign power under each pillar.273 As so happens, the Member States have surrendered less of their sovereignty under the provisions of the second and third pillar than under the first pillar.274 Furthermore, the issues not addressed under the three pillars remain strictly within each Member State's sovereign power.

Under the first pillar, at the Community level, the Council, the Commission, and the European Parliament are responsible for making and administering Community law at the European level.275 The Council of the European Union is composed of a ministerial representative of each Member State who is authorized to commit the Member State's government.276 Although the Council shares some of its legislative functions with the European Parliament, it is still the main legislative body of the EU.277 The European Parliament, which has 626 seats, consists of "representatives of the peoples of the States brought together in the Community."278 Although its participation in the legislative process is limited, the Parliament may participate in four ways: assent, codecision, cooperation, and consultation.279 In addition, the Parliament may "request the Commission to submit any appropriate proposal matters on which it considers that a Community act is required for the purpose of implementing the Treaty."280 The Commission is composed of 20 Commissioners: two for each of the major Member States—Germany, France, Italy, Spain, and the UK—and one for each of the other Member States.281 The Commission is often considered the executive branch of the Community.282 It formulates legislative programs, initiates the legislative process by drafting specific pieces of legislation, exercises powers delegated to it by the Council, makes decisions and carries out administrative tasks which the Council has assigned to it, and oversees compliance with the law.283 The Court of Justice is the

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270. See Arnell et al., supra note 232, at 169.
271. See id.
272. See id. at 169-77
273. See id.
274. See id. at 15.
275. See Raworth, supra note 233, at 62.
276. EC Treaty art. 203.
277. Raworth, supra note 233, at 65.
278. EC Treaty art. 189.
279. For a discussion of these four ways, see Mengozzi, supra note 232, at 44-49, and Vincenzi, supra note 244, at 79-85.
280. EC Treaty art. 192.
281. Mengozzi, supra note 232, at 53; Raworth, supra note 233, at 71.
283. See EC Treaty art. 211; Mengozzi, supra note 232, at 53-59.
judicial arm of the Community.\textsuperscript{284}

2. \textit{General Sources of Law in the EU}

One of the most marked differences between the first pillar and the TEU's other two pillars is that the EC Treaty and subsequent secondary legislation constitute supreme law.\textsuperscript{285} As such, they lie above the laws, constitutional or otherwise, of the individual Member States.\textsuperscript{286} Noncompliance with this law may give rise to an action before the Court of Justice at the request of either the Commission or another Member State.\textsuperscript{287}

The sources of this secondary legislation are regulations, directives, and decisions.\textsuperscript{288} Article 249 of the EC Treaty states that a regulation shall have general application and be "binding in its entirety and directly applicable in all Member States."\textsuperscript{289} That is, regulations automatically apply to Member States without requiring national legislation to implement them.\textsuperscript{290} A unique feature of regulations is that they may have horizontal and vertical direct effect.\textsuperscript{291} Horizontal direct effect means that a right is vested in an individual that can be relied upon against another individual.\textsuperscript{292} Vertical direct effect means that a right is conferred upon the individual that can be relied upon against the state.\textsuperscript{293}

Directives are binding upon Member States only as to their intended effect.\textsuperscript{294} Here, Article 249 instructs that "[a] directive shall be binding as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods."\textsuperscript{295} Thus, contrary to regulations, directives do require Member States to implement national legislation that accomplishes that desired

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\textsuperscript{284} See EC Treaty art. 220.
\textsuperscript{285} See Arnulf \textit{et al.}, \textit{supra} note 232, at 65–68.
\textsuperscript{286} See id.; see also Case 124/86, Commission v. Italy, 1987 E.C.R. 4661 (1987) (warning that Member States may not use conflict with domestic law as an excuse for noncompliance with EC law); Case 106/77 Amministrazione delle Finanze dello Stato v. Simmenthal S.p.A., 1978 E.C.R. 629, 3 C.M.L.R. 263 (1978) (defining it as the duty of the national judiciary to give precedence to EC law over national law); Case 77/69, Commission v. Belgium, 1970 E.C.R. 237, 1 C.M.L.R. 203 (1974) (announcing the supremacy of EC law even if it is in conflict with the constitutional framework of a Member State); Case 48/71, Commission v. Italy, 1972 E.C.R. 527, 1 C.M.L.R. 699 (1972) (declaring the supremacy of EC law over domestic law of the Member States); Case 6/64, Costa v. ENEL, 1964 E.C.R. 585, 1 C.M.L.R. 425 (1964) (acknowledging the transfer of sovereignty by Member States to the EC); Case 26/62, N.V. Algemene Transporten Expeditie Onderneming van Gend & Loos v. Nederlandse Administratie der Belastingen, 1963 E.C.R. 3, 1 C.M.L.R. 105 (1963) (explaining that the direct effect of treaty articles and regulation and directive provisions is to bestow rights that are enforceable in the courts of the Member States directly onto individuals).
\textsuperscript{287} See EC Treaty arts. 226–27.
\textsuperscript{288} See id. at art. 249 (explaining the legal force of these sources).
\textsuperscript{289} \textit{Id.}
\textsuperscript{290} See Vincenzi, \textit{supra} note 244, at 37; Mengozzi, \textit{supra} note 232, at 123.
\textsuperscript{291} See Arnulf \textit{et al.}, \textit{supra} note 232, at 88–89.
\textsuperscript{292} See id.; Cairns, \textit{supra} note 234, at 103.
\textsuperscript{293} See Cairns, \textit{supra} note 234, at 103.
\textsuperscript{294} See Vincenzi, \textit{supra} note 244, at 37.
\textsuperscript{295} See EC Treaty art. 249.
effect. Another difference between directives and regulations is that the former may address a particular Member State, whereas the latter are always of general application. Like regulations, directives can also have vertical direct effect; but unlike regulations, directives may not have horizontal direct effect.

The Community also relies on sources of law, such as recommendations, that lack binding effect. Although these sources lack the legal force of regulations or directives, they are nevertheless important because Member States are expected to voluntarily comply with them. As such, recommendations carry persuasive authority. For instance, national courts must take recommendations into account when interpreting a national law that was adopted to comply with Community law.

3. Soft Laws and Early Efforts to Sanction Employers

Even before the creation of the third pillar, the Member States of the EU recognized the importance of regulating immigration flows through the labor markets. In the 1992 Recommendation Regarding Practices Followed by Member States on Expulsion, the Commission advanced the idea of imposing sanctions on employers who hired illegal immigrants. Specifically, the Recommendation proposed the following:

Insofar as legislation does not already exist, Member States should consider the introduction of laws which would provide for the prosecution of people who knowingly facilitate or attempt to facilitate the entry or transit of illegal entrants, and, subject to appropriate safeguards, of those who knowingly harbour those who have entered or remained unlawfully. . . . It is also recommended that appropriate measures should be taken to combat the employment of those known to have entered or remained in breach of the immigration or aliens provisions or who are not authorised to work under immigration/aliens or related provisions.

Unfortunately, this recommendation failed to specify the exact measures that would be appropriate to combat the employment of illegal immigrants. A few years would pass before more detailed measures were recommended.

296. See VINCENZI, supra note 244, at 36-38.
297. Id. at 37.
298. See MARGOT HORSPOOL ET AL., EUROPEAN UNION LAW 152-54 (2d ed. 2000).
299. EC TREATY art. 249. Sources of law that are not binding in nature are called soft laws. Other examples of soft law in the EU are opinions (which are expressly recognized in Article 249), communications, conclusions, and actions programs. See JO SHAW, LAW OF THE EUROPEAN UNION 202-03 (2d ed. 1996).
300. See SHAW, supra note 299, at 202.
301. See EC TREATY art. 249; VINCENZI, supra note 244, at 39.
302. VINCENZI, supra note 244, at 39.
304. See id. at 223.
305. Id. (emphasis added).
306. See id.
The idea of imposing sanctions on employers, however, did not fall on deaf ears. In fact, under the intergovernmental structure of the third pillar, the EU adopted some recommendations regarding employer sanctions. For example, the Council Recommendation of 22 December 1995 on Harmonizing Means of Combating Illegal Immigration and Illegal Employment and Improving the Relevant Means of Control\(^\text{307}\) advocated that employers should be subject to appropriate penalties for employing a foreign national without authorization.\(^\text{308}\) Similarly, the Council Recommendation of 27 September 1996 on Combating the Illegal Employment of Third-Country Nationals\(^\text{309}\) stated in its list of findings that illegal employment may distort the conditions of free competition in the internal market “by reducing social costs or giving employers other advantages and by lowering levels of social protection.”\(^\text{310}\) As such, the Council recommended that Member States prohibit the employment of illegal immigrants and impose criminal or administrative penalties on employers who violate this prohibition.\(^\text{311}\) Thus, the Recommendation urged “the application of penalties which are effective, dissuasive, appropriate and proportionate to the seriousness of the offences committed,” and permitted “the elimination of added profits or other advantages obtained by employers as a result of the offences committed in particular as regards the wages and charges imposed by the relevant provisions in each Member State.”\(^\text{312}\)

B. EU Regulation of Illegal Employment Under the TA

The entry into force of the TA created new competences through the inclusion of the new Title IV in the EC Treaty.\(^\text{313}\) For instance, Article 62 of the EC Treaty now provides the basis for regulations relating to border control and visa policy.\(^\text{314}\) Similarly, paragraph 3 of Article 63 of the EC Treaty refers explicitly to measures on illegal immigration and illegal residence, including repatriation of illegal residents.\(^\text{315}\) In fact, Article 63 calls for a common immigration policy at the EU level.\(^\text{316}\) Other post-TA developments are especially relevant to an analysis of immigration law in the EU.

1. The Schengen Agreement

One of the TA's amendments to the TEU that is important to the field of immigration is the incorporation of the Schengen acquis into the EU framework through a Protocol annexed to both the TEU and the EC

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\(^{307}\) 1996 O.J. (C 5) 1 [hereinafter Recommendation of 1995].

\(^{308}\) See id.

\(^{309}\) 1996 O.J. (C 304) 1 [hereinafter Recommendation of 1996].

\(^{310}\) Id. at 1.

\(^{311}\) Id. at 2.

\(^{312}\) Id.

\(^{313}\) See discussion supra Part III.A.1.

\(^{314}\) See EC TREATY art. 62.

\(^{315}\) Id. at art. 63(3).

\(^{316}\) See id. at art. 63.
The acquis is composed of a body of law derived from the Schengen Agreement of 1985. Originally, this agreement was purely intergovernmental in nature. In fact, the original signatories were the Federal Republic of Germany, France, Belgium, Luxembourg, and the Netherlands. However, by the time of the TA, all of the EU’s Member States, except the UK and Ireland, had become signatories. The Schengen Agreement aimed to establish a common travel area without internal borders and with common external borders. It laid out a series of minimum parameters regarding entries, stays, refugee status, asylum claims, and visas that the parties to the agreement needed to adopt.

As a result of the abolition of internal borders and the creation of a common external border, the EU has been dubbed "fortress Europe." Some measures that the Member States have taken to protect the external borders of the EU support this analogy. In Calais, France, the terminus of the rail line under the English Channel is covered with barbed wire fences and high-wattage klieg lights. Geography has also served to keep away some immigrants. For instance, immigrants attempting to reach the EU face certain death along Italy's Adriatic coast. In fact, an officer of Italy's Guardia di Finanza naval section in Otranto has compared the Adriatic to a cemetery. According to this officer, at "[t]he bottom of the sea out here, you can see a lot of bones down there, hands, body parts, everything." Nevertheless, comparing the EU to a fortress is misleading because it gives the impression of impenetrability. This could not be further from the truth. In spite of the difficulty of entering "fortress Europe," many continue to attempt to gain entry, and at least some succeed. As with the

317. See ARNULL ET AL., supra note 232, at 165.
318. Id.
319. See id.
320. Id.
321. See id.; RAWORTH, supra note 233, at 59.
322. See RAWORTH, supra note 233, at 59.
324. See, e.g., Johnson, supra note 226 (examining whether Kurdish immigration led to the penetration of what the author referred to as "Fortress Europe"); Rod Nordland, Storming Fortress Europe: The Desire to Weed out the Illegal and Unskilled Has Turned Immigrant Smuggling into a Deadly Enterprise, NEWSWEEK (Int'l ed.), Aug. 13, 2001, at 34 (highlighting the plight of immigrants who will use any means possible to break through the "barricades" of "Fortress Europe").
325. See Nordland, supra note 324, at 34.
326. See id.
327. Id.
328. Id.
329. See Kay Hailbronner, Temporary and Local Responses to Forced Migrations: A Comment, 35 VA. J. INT’L L. 81, 81 (“The 'fortress Europe' slogan, though a popular term among refugee advocate circles, has remained basically a myth.”).
330. See Nordland, supra note 324, at 34 (noting that, even though people die trying to immigrate to EU countries, those left behind continue to find and exploit entry points, despite the risks).
United States, once the illegal immigrants enter, they are free to travel across state lines without fear of intrastate border control. Furthermore, once the illegal immigrants have acquired unlawful entry to the EU, they naturally become active participants in the underground economy of their host Member State. This Note argues that the creation of an area without internal borders and the unavoidable presence of illegal immigrants within this area calls for the creation of a common system of internal regulation of immigration through the labor market to supplement the control of illegal immigration across the EU’s borders.

2. The Work Program and Immigration Flows

Since the adoption of the TA, the EU has outlined, in two important policy documents, a work program on the measures it intends to take to implement provisions in the area of freedom, security, and justice. The first of these documents, the Vienna Action Plan, was the result of the European Council’s meeting in Vienna on December 1998. The second, commonly known as Tampere Conclusions, resulted from the European Council’s meeting in Tampere, Finland. Both the Vienna Action Plan and the Tampere Conclusions support policies to regulate the external (push) factors of immigration through stricter border control and informational campaigns in the host country. However, neither document confronted the regulation of the internal (pull) factors of illegal immigration, such as the demand for illegal immigrants in the host country’s labor market.

(a) Vienna Action Plan

In December 1998, the JHA Council adopted the Action Plan of the Council and the Commission on How Best to Implement the Provisions of the Treaty of Amsterdam on an Area of Freedom, Security, and Justice. Although the Vienna Action Plan noted that an impressive amount of work had been carried out in the field of immigration, it also noted that the pre-Amsterdam initiatives to curb illegal immigration had two essential weaknesses: the lack of legally binding effect and the absence of adequate monitoring arrangements.

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331. See discussion infra Part III.B.
332. These two policy documents form the basis of a work program for the Commission and Member States that is being made operational in a “scoreboard” that keeps track of the goals and accomplishments of the EU in the field of immigration. See Communication from the Commission to the Council and the European Parliament: Scoreboard to Review Progress on the Creation of an Area of “Freedom, Security and Justice” in the European Union, COM(OO) 167 final.
333. See discussion infra Part III.B.2(a).
334. See discussion infra Part III.B.2(b).
335. See discussion supra Part I.A.
336. See discussion supra Part III.B.
337. See discussion supra Part I.D.
338. See discussion supra Part III.B.
340. Id. at 3.
Confronting these weaknesses, the Vienna Action Plan underscored the need to more effectively combat illegal immigration. To accomplish this goal, the Vienna Action Plan established deadlines of two and five years in which to meet several measures in the field of immigration. These measures, however, focused only on the control of external borders of push factors in an immigrant’s home country. For instance, some of the measures that the Vienna Action Plan scheduled to be undertaken within two years included a definition of the rules on a uniform visa (Article 62(iv) of the TEC), “information campaigns in transit countries and in the countries of origin,” and further harmonization of Member States’ laws on carriers’ liability. Consequently, during these first two years, the Vienna Action Plan did not recommend the control of illegal immigration within the Member States’ labor market. Perhaps not surprisingly, the measures to be taken within the first five years also disregarded this point. These measures included the diligent expulsion of people who had been refused the right to stay, the preparation of regulations regarding entry and residency, and the extension of the Schengen representation mechanism with regard to a uniform format for visas.

(b) Tampere Conclusions

Almost a year after the Vienna Action Plan, the European Council continued to disregard the labor market as an internal element that could be used to fight against illegal immigration. In October 1999, the European Council adopted Presidency Conclusions at its special summit on asylum and immigration held in Tampere, Finland. In it, the European Council emphasized the need to more efficiently manage immigration flows at each stage.

Like the Vienna Action Plan, however, the Tampere Conclusions failed to address at least one stage of immigration flows—the labor market and

341. See id. at 3, 7-10.
342. See id. at 7-10.
343. See id.
344. See id. at 8-9.
345. See id.
346. See id.
347. See id. at 9-10.
348. The European Council should not be confused with the Council of the European Union, which forms part of the single institutional framework discussed above. The European Council is composed of the heads of state of the EU Member State governments, and the President of the Council of the European Union. The role of the European Council is defined in Article 4 of the TEU, which states that “[t]he European Council shall provide the Union with the necessary impetus for its development and shall define the general political guidelines thereof.” The guidelines and declarations of the European Council are not legally binding. See ARNULL ET AL., supra note 232, at 22-23
350. See id. at para. 22
the underground economy in the receiving Member States. In fact, the Tampere Conclusions focused solely on the external factors that cause illegal immigration and the external means to control the flow of illegal immigrants. For instance, the Tampere Conclusions called for the development of a common active policy on visas and false documents, as well as closer cooperation and assistance between Member States’ border control services. Similarly, the Council proposed the development of information campaigns aimed at informing potential immigrants of the actual possibilities for legal immigration. In the hopes of addressing the problem of immigration at its “source,” the European Council showed its willingness to complement informational campaigns with a hard stance against those who engaged in human trafficking and the economic exploitation of immigrants. Accordingly, it urged the adoption of legislation that would severely sanction this crime.

3. Recent Developments in the EU’s Attempts to Regulate Illegal Immigration

In the years that followed the Vienna Action Plan and the Tampere Conclusions, the EU continued to struggle with the problem of illegal immigration. In its Communication from the Commission to the Council and the European Parliament on a Community Immigration Policy adopted in November 2000, the Commission emphasized the need for a comprehensive common immigration policy. In particular, the Commission noted that “to reduce illegal immigration, the EU needs to adopt a coordinated approach which takes into account all the various interlinked aspects of the migratory system[.]” In fact, the Commission referred to the tragedy in Dover, England and acknowledged the “existence of a demand for clandestine manpower and . . . the exploitation of such undocumented migrants.” From this premise, the Commission recommended the development of an immigration policy that takes into account the demands of the labor market. Such a strategy, however, focused on the creation of national admissions programs tailored to the particular needs of each

351. See id. at paras. 22-27.
352. See id. at paras. 22-25
353. Id. at para. 24.
354. Id. at para. 22.
355. Id. at para. 23.
356. Id.
357. COM(00)757 final [hereinafter Communication on a Community Immigration Policy 2000].
358. See id.
359. Id. at 13-14.
360. On June 19, 2000 the dead bodies of fifty-eight Chinese nationals were found inside an airtight container transporting cartons of tomatoes that was headed to Dover, England. See Roger Cohen, Crossing Borders: The Trade in Humans: Europe Tries to Turn a Tide of Migrants Chasing Dreams, N.Y. TIMES, July 2, 2000, at 1.
362. Id. at 13, 15.
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Member State for unskilled workers or seasonal labor.\textsuperscript{363} According to the Commission, this would help combat organized traffickers and unscrupulous employers who benefit from illegal immigration.\textsuperscript{364} Although the Commission was well aware that the demand for illegal immigrants in the labor market had a pull effect,\textsuperscript{365} it paid scant attention to its regulation as a way to tackle all the interlinked phases of the illegal immigration problem.\textsuperscript{366}

In confronting a common immigration policy that aims to attack all phases of illegal immigration, the absence of a plan that tackles the problem of the unlawful employment of illegal immigrants would render the immigration policy incomplete. As such, in 2001 the Commission in its \textit{Communication on a Common Policy on Illegal Immigration}\textsuperscript{367} reminded the Council and Parliament that in order to comprehensively address the problem of illegal immigration, the illegal employment of illegal residents should be put back on the political agenda.\textsuperscript{368} More specifically, the Commission stated as follows:

Employers of illegal workers create the demand for illegal labour migration. The pull factor to immigrate illegally would be questioned if it is difficult to find a job and to earn money. This causal link justifies taking effective measures with considerable financial consequences. Such measures would also contribute to avoid unfair competition.\textsuperscript{369}

As a way to reduce this demand, the Commission proposed that sanctions against illegal employment be harmonized at the EU level.\textsuperscript{370} The Commission also suggested ways in which employers could be penalized for hiring illegal immigrants.\textsuperscript{371} For instance, the Commission found that

\textsuperscript{363} \textit{Id.} at 15. A year later, the Commission further elaborated on the need for an admission policy for economic immigrants. Alluding to proposed legislation that would regulate the admission of third-country nationals for the purpose of paid employment, however, the Commission noted the following:

While this legislation sets out procedures and the conditions by which third country nationals should be admitted to the labour market it does not include quantitative targets or quotas. Member States continue to be responsible for the selection of economic migrants and for deciding how many are needed to meet national requirements.

Communication from the Commission to the Council and the European Parliament on an Open Method of Coordination for the Community Immigration Policy, COM(01)387 final at 9.

\textsuperscript{364} \textit{Communication on a Community Immigration Policy 2000, supra} note 357, at 14.

\textsuperscript{365} See \textit{id.} at 6.

\textsuperscript{366} See \textit{id.} ("The benefits of a more open and transparent policy on migration movements, together with the co-ordination of policies designed to reduce push factors in countries of origin and greater efforts to enforce labour legislation in the Member States, could also help reduce illegal immigration . . . ") (emphasis added). \textit{Id.} at 14.


\textsuperscript{368} See \textit{id.} at 23.

\textsuperscript{369} \textit{Id.}

\textsuperscript{370} See \textit{id.}

\textsuperscript{371} See \textit{id.}
financial sanctions could be assessed according to an estimate of the savings an employer derives from using illegal workers. In addition, the Commission suggested holding employers of illegal workers liable for the cost of returning their illegal workers, including the costs of their stay until return, which are usually covered by social welfare or other public means.

The Commission’s advice was heeded. In the years that have followed the Communication on a Common Policy on Illegal Immigration, the EU started to address the pull effect that the demand for illegal immigrant has on immigration flows. For example, in 2002 the Commission issued a Proposal for a Comprehensive Plan to Combat Illegal Immigration and Trafficking of Human Beings in the European Union, which stated that one of the measures to be taken in the “medium-term” was the preparation of a “proposal for harmonising the way in which illegal employment is dealt with at the European level.”

Finally, on November 28, 2002, the Council adopted a directive that could potentially change the terms of the debate concerning the employment of illegal immigrants at the EU level. Article 1(b) of this directive states that each Member State must adopt sanctions against “any person who for financial gain, intentionally assists a person who is not a national of a Member State to reside within the territory of a Member State in breach of the laws of the State concerned on the residence of aliens.” The phrase “financial gain” probably resulted from Parliament’s suggested amendments to the Initiative of the French Republic on View to the Adoption of a Council Directive Defining the Facilitation of Unauthorized Entry, Movement and Residence. Parliament’s amendment was specifically drafted with the intention of including the financial gains derived from the employment of illegal immigrants. In fact, Parliament had even suggested an article that read as follows: “Each Member State shall adopt the measures necessary to ensure that effective, proportionate and dissuasive administrative and/or criminal penalties are imposed on any employer who employs illegal workers and any person who, for financial gain, facilitates illegal employment or illegal trafficking in labour.” Although the French initiative was eventually rejected, and Parliament’s suggested changes were

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372. Id.
373. Id.
374. 2002 OJ. (C 142) 2.
375. Id. at 36.
377. Id.
378. 2000 OJ. (C 253) 1.
380. See id. at 9.
consequently never adopted, in light of their proposals the phrase "financial gain" in the Directive of November 28, 2002 will likely be construed to ban the employment of illegal immigrants at the EU level.

C. Immigration, Illegal Employment, and the National Laws of Member States

While the EU has yet to harmonize how it deals with the unlawful employment of illegal immigrants, various Member States have already taken independent steps to combat this problem. However, laws that regulate illegal immigration through the labor market vary among the Member States. Additionally, disparities in the enforcement of these same laws add to the lack of uniformity. After all, as the discussion of the U.S. immigration laws made clear, it is one thing to have laws and another to enforce them uniformly.

In general, many EU Member States consider it entirely reasonable to control illegal immigration through governmental intervention in the labor markets.\textsuperscript{382} Governmental action in this area ranges from civil or criminal penalties against employers who hire illegal immigrants to penalties on illegal immigrant workers themselves. Almost paradoxically, some countries like France, Spain, and Germany think it reasonable to fine an illegal immigrant, but at the same time recognize their right to remuneration for the work performed during their illegal employment.\textsuperscript{383}

As the next paragraphs show, some Member States have attacked the interrelation of illegal immigration and the black market economy in creative ways. Their approaches may help undermine the leverage of political pressure groups that benefit from the presence of undocumented workers in the labor market and that impede the proper enforcement of immigration and labor laws in their respective Member States. Of course, the progress of these Member States will only be felt in the EU as a whole if community-wide measures are adopted, perhaps using the practices analyzed below as a guide.

1. France and Spain: Controlling the Labor Markets and the Concept of Deputization

Both France and Spain have laws that prohibit the employment of illegal immigrants. The French Labor Code, for example, prohibits employers from hiring foreign workers who do not have proper work permits.\textsuperscript{384} Spain attacks the problem of illegal immigration from both the employer's

\textsuperscript{382} See Ghosh, supra note 7, at 155-56.

\textsuperscript{383} See infra Part III.C.1-2.

\textsuperscript{384} CODE DU TRAVAIL, [C. TRAV.] [LABOR CODE] art. L. 341-6 (Fr.). Art. L. 341-2 specifically mentions that, in order for foreigners to work in France in return for monetary compensation, an immigrant has to show the documents and visas required by the regulations that are in place at the time of the employment, a contract of employment issued by an administrative authority, or a work permit along with a medical certificate. C. TRAV. art. L. 341-2. The laws also sanctions employers who hire workers without this required documentation. C. TRAV. art. L. 341-6.
and employee’s perspectives: it is unlawful for an illegal immigrant to work in Spain without the proper documentation\textsuperscript{385} and for an employer to hire such a worker.\textsuperscript{386} Illegal immigrant employees may be fined for 301 to 6,000 Euros, while fines for employers range from 6,001 to 60,000 Euros.\textsuperscript{387}

Although illegal immigrants are not permitted to participate in the labor market, France and Spain provide illegal immigrant workers with remedies when their employer violates labor laws or breaches the employment contract. For instance, the French Labor Code states that an illegal immigrant worker has the right to the amount of money that he would have received had he been legally employed and, in the case of a breach of contract, to liquidated damages equal to at least one month’s salary.\textsuperscript{388} Furthermore, an immigrant who is illegally employed has, starting from the date of his recruitment, the same rights under the labor and agricultural laws and regulations as a documented employee.\textsuperscript{389} Similarly, the Spanish counterpart to this provision states that an employee’s undocumented status does not render the employer’s contractual obligations to the employee void.\textsuperscript{390}

More importantly, both French and Spanish law deputize third parties with the enforcement of illegal immigration laws through the labor markets. As such, the French Labor Code allows unions to execute the rights and claims of an illegal immigrant worker against their respective employers if the illegal immigrant does not object.\textsuperscript{391} By the same token, Spanish law provides that the hiring of immigrants without proper documentation is a form of unfair competition.\textsuperscript{392}

2. Germany: Focusing on the Employers

France and Spain are not the only EU Member States that have had to address the influx of illegal immigrants within their borders. Between World War II and the end of the twentieth century, Germany has also focused a large part of its regulatory efforts on controlling the immigrant tides that swamped its borders. In addition, control of the labor markets has dominated Germany’s attempts to stem these tides.

In the second half of the twentieth century, Germany, one of the major destinations for foreign workers, relied on guest workers to fuel the labor

\textsuperscript{385} Art. 53(b), Infracciones graves [Serious Offenses], (B.O.E., 2000, 307) at 45,517 (formerly art. 52).
\textsuperscript{386} Art. 54(1)(d), Infracciones muy graves [Very Serious Offenses], (B.O.E., 2000, 307) at 45,517 (formerly art. 53).
\textsuperscript{387} Art. 5, (B.O.E., 2003, 279) at 41,199.
\textsuperscript{388} C. TRAV. art. L. 341-6-1.
\textsuperscript{389} Id.
\textsuperscript{390} (B.O.E., 2003, 279) at 41,197.
\textsuperscript{391} C. TRAV. art. L. 341-6-2.
\textsuperscript{392} (B.O.E., 2003, 279) at 41,204.
markets of the World War II and post-World War II economies. However, it had invited those nonnationals into the country to work on the theory that they would leave when there were no longer jobs. When the immigrant workers overstayed that implicit welcome, however, Germany cracked down. It began a sweeping reform of its laws on the treatment of alien workers, and in 1972, it enacted sanctions for employers violating those laws. In 1973, it repealed its guest worker statutes, and in 1975 it declared that "anyone who recruited aliens for employment purposes outside of the official Labour Department recruitment procedures was liable for fines up to DM 50,000 and prison terms of up to three years." Beyond those who recruited illegal workers, Germany also targeted those who employed them, authorizing fines of up to 50,000 Deutschmarks to be levied against employers who either negligently or intentionally hired undocumented workers Over time, these fines and prison terms increased.

Besides its focus on employer sanctions, the German enforcement mechanisms had another component: the establishment of national enforcement agencies to oversee the implementation of these recruitment and employment laws. In particular, the Federal Ministry for Labor and Social Affairs spearheaded these efforts from its base in Nuremberg. In addition, in 1976 Germany established the Central Agency to Combat the Illegal Entry of Foreigners. By 1982, there were twenty-five offices working to combat underground economies and illegal employment.

Perhaps the most remarkable aspect of these agencies is the amount of money Germany poured into this system to endow it with great power, efficiency, and control. For example, in addition to the INS-like enforcement agencies, Germany also used labor market inspectors to enforce its immigration laws and regulations. In 2000, they employed approximately 1,500 of them, at an annual cost of roughly 10,000 Deutschmarks

394. See id.
395. See id. at 20.
396. Id.
397. See id.
398. See id. More specifically, fines and prison terms increased as follows: In 1998, the maximum fine for employing illegal alien workers was DM 100,000 ($60,000). However, if the employer exploit[ed] the foreign workers by putting them in worse conditions than similar German workers, or employ[ed] five or more foreign workers without permits for 30 days or more, or employ[ed] foreign workers without permits for a second or third time, then the employer [could] be charged with criminal violations, and be sentenced to 3 to 5 years in jail. Foreign workers employed illegally [could] be fined up to DM 1,000.
399. See id.
400. See id.
401. See id.
402. See id.
403. See id. at 22.
($70,000) per inspector. Working in cooperation with the police and other agencies, the inspectors were permitted to inspect worksites, as well as surround them to prevent workers from running away before being questioned. All told, Germany spent more than any other country, including the United States, on the prevention of the illegal employment of foreign workers.

D. Back to the United States: A Proxy on Deputization

As seen in the discussion above, one aspect of the French and Spanish mechanisms for enforcing immigration laws is the right of private plaintiffs, such as unions or third parties in unfair competition suits, to bring a claim alleging a violation of the immigration and labor statutes. Recently, the United States has adopted a similar strategy of deputization. This section will address the development of its statutory and case law in order to flesh out this idea and give it some contour. This undertaking is made with the ultimate goal of using the U.S. model as a backdrop against which this Note’s argument for the EU’s harmonization of its immigration laws and enforcement patterns can be viewed.

1. RICO and the Private Plaintiff

In 1996, Congress supplemented the Racketeer Influenced and Corruption Organizations Act (RICO) by including violations of federal immigration law within its scope. This shift in legislative policy could dramatically alter the patterns of immigration law enforcement in the United States, as some see Congress’s move as a signal that civil litigators can become private prosecutors, statutorily deputized to supplement the government’s efforts at catching employers who hire illegal workers. Indeed, evidence of the general legislative intent behind RICO shows that it was meant to afford private citizens with a remedy for illegal conduct when the officials traditionally responsible for such enforcement become “deregling in their duties.” By making federal immigration law, in particular, predicate acts for RICO violations, Congress demonstrated its desire to provide the private citizen with “recourse in the face of widespread disregard for immigration laws.”

The RICO statute allows “[a]ny person injured in his business or property by reason of a violation of section 1962 of this chapter . . . [to] sue

404. Id.
405. See id.
406. See id. at 21.
408. See Elizabeth Amon, New RICO Target: Hiring Illegal Aliens, NAT’L L.J. 1-2 (Nov. 27, 2001) (quoting G. Robert Blakely, a professor at Notre Dame Law School, who views decisions upholding suits against employers under RICO as a statement that “people who are competitively injured by the abuse of the immigration system . . . have a remedy under RICO. Before, they didn’t have a remedy at all.”).
410. Id.
therefore in any appropriate United States district court" for civil damages.\textsuperscript{411} There are three basic components to a claim under this section: a violation of section 1962, an injury to either the plaintiff's property or business, and causation.\textsuperscript{412} More specifically, the first prong requires the plaintiff to plead and prove that the defendant has committed a predicate offense—a pattern of criminal acts defined under RICO as racketeering activity.\textsuperscript{413} A plaintiff can establish this so-called "pattern" of racketeering activity by proving that the defendant engaged in at least two acts of the alleged activity.\textsuperscript{414}

Congress's 1996 expansion of RICO most affected this first prong by making violations of the INA qualify as requisite predicate offenses.\textsuperscript{415} For example, the INA makes it unlawful to encourage illegal immigration or employ illegal aliens,\textsuperscript{416} and today an employer who does either not only violates the INA, but also commits a predicate offense and could therefore be liable under RICO. Other INA prohibitions that have become predicate acts under RICO include smuggling, transporting, and harboring illegal aliens.\textsuperscript{417} Of special importance to the pleading of the predicate offense, the plaintiff must plead that the defendant had knowledge that the people it hired or encouraged were illegal aliens.\textsuperscript{418}

In addition to the predicate offense requirement, a plaintiff must also establish his injury.\textsuperscript{419} Courts have held that this injury requirement is satisfied if the plaintiff can show that he suffered from depressed wages or lost contracts. One commentator has proposed that the competitor of a financial corporation that accepts foreign-issued identification from an illegal alien who wants to open a bank account would suffer a decrease in competitive advantage, for it would not have the additional resources to invest in loans.\textsuperscript{420} The law-abiding bank would in turn lose loan customers because the bank acting unlawfully would be able to provide better loan terms.\textsuperscript{421} This scenario, he asserts, would be an equally compelling allegation of injury under RICO.\textsuperscript{422}

Finally, the causation component of a RICO claim has been the most difficult for a plaintiff to prove.\textsuperscript{423} The Supreme Court, in Holmes v. Securi-
ties Investor Protection Corp., defined this prong as requiring a "direct relation between the injury asserted and the injurious conduct alleged." Although the Court carefully avoided a mechanical test, it did lay out three policy considerations courts should recognize when undertaking its proximate cause analysis: whether there are more direct victims of the alleged violation who will vindicate the law, whether it will be difficult to ascertain damages, and whether it would be difficult to apportion any recovery among the plaintiffs given their various levels of injury.

Beyond these statutory standing requirements that a plaintiff must meet in order to bring a successful RICO claim, a litigant in the United States must also meet the constitutional standing requirements when he invokes federal jurisdiction. At a minimum, a putative plaintiff must show injury in fact, causation, and redressability. Essentially, the plaintiff must allege the invasion of a legal interest that is fairly traceable to the defendant’s conduct and is likely to be restored by a favorable decision from the court.

2. RICO at Work

To see how these provisions, both statutory and constitutional, interact to allow a private plaintiff to bring a suit aiming at vindication of federal immigration laws, one need only look to recent litigation. In 2000, Howard Foster became the first attorney to bring a RICO claim to trial with this very claim. This ground-breaking case, Commercial Cleaning Services v. Colin Service Systems, was a class action involving Commercial Cleaning Services, L.L.C. (Commercial) and Colin Service Systems, Inc. (Colin), competing companies that provided janitorial services for commercial buildings. Commercial alleged that Colin used an "illegal immigrant hiring scheme" that allowed it to obtain a business advantage over other firms in the cleaning services industry because it could hire more workers at less cost than its lawfully operating competitors. Commercial accused Colin of paying undocumented workers wages that were below the minimum wage, while simultaneously avoiding federal and state payroll taxes and workers’ compensation insurance fees. Commercial brought suit after it lost a "lucrative cleaning contract to Colin."

Fitting these allegations into the statutory framework, Commercial asserted that Colin’s participation in the illegal immigrant hiring scheme

425. Id. at 268.
426. See id. at 269-73.
428. See id.
429. See id.
430. See King, supra note 407, at 1.
431. 271 F.3d 374 (2d Cir. 2001).
432. See id. at 378.
433. See id. at 378-79.
434. See id. at 379.
435. Id.
violated the INA's prohibition of hiring undocumented aliens, which is a predicate offense for RICO purposes if it was done for financial gain.436 At the district court level, Commercial could not convince the court that Colin's racketeering activity actually caused its injury.437 However, the Second Circuit disagreed and held that "by illegally hiring undocumented alien labor, Colin was able to hire cheaper labor and compete unfairly. The violation . . . alleged by the complaint was a proximate cause of Colin's ability to underbid the plaintiffs and take business from them."438 Resolving each of the Holmes policy considerations in favor of the plaintiffs, the Second Circuit held that Commercial had standing under RICO and remanded the case.439 The parties then settled the case in Commercial's favor.440

After this success, Mr. Foster brought Mendoza v. Zirkle Fruit Co.,441 another class action instituted by groups of employees who claimed that their wages were depressed because their employers hired illegal aliens.442 Olivia Mendoza and the employees who comprised the purported plaintiff class were legal agricultural laborers in the Eastern Washington fruit industry.443 Their complaint alleged that Zirkle Fruit Company (Zirkle) and Matson Fruit Company (Matson), operators of fruit orchards and packing houses, knowingly hired illegal Mexican nationals to work for them in order to lower their labor costs.444 Additionally, they argued that Zirkle and Matson facilitated their illegal hiring scheme by working with Selective Employment Agency, Inc., a separate company that actually hired the illegal workers and then "loaned" them to Zirkle and Matson.445 It was this hiring conspiracy, asserted the plaintiffs, which resulted in substantially lower wages than those found in a labor market comprised only of legal workers.446

Again, a district court dismissed this case on the pleadings, and again, the grounds for this dismissal were concerns about the causation component of the RICO claim.447 However, the Ninth Circuit reversed the district court on those grounds, finding that the Holmes factors mitigated in favor

436. See id.
437. See id.
438. Id. at 383.
439. See id. at 387. As part of its remand order, the Second Circuit instructed the district court that Commercial should be allowed to plead again its allegations regarding Colin's predicate offense because Commercial did not allege "that Colin had actual knowledge that the illegal aliens it hired were brought into the country in violation of the statute." Id.
440. See King, supra note 407, at 1.
441. 301 F.3d 1163 (9th Cir. 2002). Mr. Foster also brought Trollinger v. Tyson Foods, 214 F.Supp.2d 840 (E.D. Tenn. 2002). At the time of this writing, the case is pending appeal before the Fifth Circuit after the United States District Court for the Eastern District of Tennessee dismissed the case. See King, supra note 407, at 1-2.
442. Mendoza, 301 F.3d at 1166.
443. See id.
444. See id.
445. See id. at 1167.
446. See id. at 1166-67.
447. See id. at 1168.
of allowing the plaintiffs to proceed with their suit. First, the plaintiffs' claim stated that they were the direct victims of the illegal hiring scheme because the scheme resulted in the depressed wages Zirkle and Matson paid them. Second, the Ninth Circuit acknowledged that factors other than the scheme, such as the wages other orchards in the area paid and the skills of each plaintiff, could account for the plaintiffs' wages; however, it held that the plaintiffs must be allowed to prove their case with evidence "including experts who will testify about the labor market, the geographic market, and the effects of the illegal scheme." Finally, the court explained that there was no risk of multiple recoveries or difficulties in apportioning damages. The Mendoza court also found that the RICO plaintiffs in this context met the constitutional standing requirements. Therefore, the court reinstated the case against Zirkle Fruit.

IV. They're Coming: Regulate Effectively or Start Embracing Someone Else's "Tired, Poor, Huddled Masses"

As this Note has discussed, the underground economy results from the interrelation of different interest groups that directly or indirectly benefit from its presence within a given country. Illegal immigrants become active participants in this type of economy for understandable reasons: they are there unlawfully, they fear deportation to their home country, and—like any other member of the host country—they want to work and earn a decent wage. Given their unlawful status within a country, the underground economy is all that welcomes them.

The presence of underground economies that reap the benefits of illegal immigrants in the workforce highlights the tension between a host country's labor and immigration laws. Of course, it is clear that countries want to tailor these laws so that they complement each other. That is, the interpretation of labor laws ideally would further the policies behind immigration laws, and vice versa. Unfortunately, that is not always possible. And, as the Hoffman case in the United States shows, there is no easy way to strike a balance. On one hand, granting illegal immigrants the same rights as other employees may provide incentives for more illegal immigrants to come and benefit from that protection. On the other hand, not granting illegal immigrants those same rights motivates employers to engage in this kind of unlawful activity. Each side has a reasonable argument, and it is not clear which option could more efficiently reconcile the policies behind these two areas of laws.

448. See id. at 1169-72.
449. See id. at 1170.
450. Id. at 1171.
451. See id. at 1171-72.
452. See id. at 1172.
453. See id. at 1175.
454. See discussion supra Part II.D.
455. See discussion supra Part II.A-C.
The problem in both the United States and the EU is not the absence of laws that regulate illegal immigration through the labor market. In fact, in the United States the employment of illegal immigrants is prohibited at the federal level. Similarly, many EU Member States consider it entirely legitimate to prohibit the employment of illegal immigrants. Furthermore, it seems that the EU is moving forward with an attempt to harmonize the regulation and measures that prohibit underground economies at the supranational level. However, the enactment of laws that prohibit the employment of illegal immigrants is the easy part; with their enactment only half of the battle is won.

The real problem is the absence of measures to guarantee that these laws are applied evenly and indiscriminately across the board. Here again, the situation in the United States provides a helpful reference point. The key players that perpetuate the inefficient regulation of illegal immigration through the labor market are politicians. As elected representatives, they have to represent the interests of a political constituency that is composed, at least in part, of both the employers who want the presence of a cheap workforce, and average citizens who, for whatever reason, would prefer not to see new immigrants (legal or illegal) "invade" their town, city, state, or country. The result is that politicians try to please both sides. This translates into an immigration system that de jure prohibits the presence and employment of illegal immigrants but de facto reaps the benefits of their contribution to the underground economy and encourages more immigrants to cross the border illegally.

Clearly, the politics behind illegal immigration are an intrinsic component of immigration policies in any given country. In light of this fact, a truly effective immigration policy cannot rely on the same pressure groups that benefit from the presence of illegal immigrants within the labor market to enforce immigration and labor laws. A policy that does otherwise would be based on political naïveté and wishful thinking, or cold and calculated political hiding-of-the-ball. Stated in more colloquial terms, it would be like asking the wolves to take care of the sheep. It does not work. And, if it does, it only perpetuates the status quo of a system that wants to regulate immigration—just not very well.

In theory, a good way to regulate the employment of illegal immigrants is to have a national agency (such as the INS in the United States) in charge of the enforcement of immigration laws. In a country with common internal borders where illegal immigrants can freely cross state lines, this may be a workable solution because all of the states are affected equally by the enforcement—or unenforcement—of immigration laws. Nevertheless, an INS-like national agency is also vulnerable to political pressure groups. The result is a system that "welcomes" as many illegal immigrants as politically plausible and does not completely do away with the problem.

456. See discussion supra Part II.D.
457. See discussion supra Part II.
458. See id.
In the case of the EU the problem is more acute and the need for a solution more pressing. Although the EU has already taken steps toward harmonizing the laws that regulate the employment of illegal immigrants among the Member States, it has not taken steps to assure that they are enforced equally. Without the supervision of a supranational agency in charge of overlooking the enforcement of immigration and labor laws, EU Member States are left to their own devices to curb immigration flows within their countries. This means that pressure groups within each Member States will determine, to a large extent, how the EU immigration regulations and directives are enforced in their respective countries. In the end, the EU will have harmonized the law, but not its application.

Ultimately, this juxtaposition will create havens of illegal immigrants and the strengthening of the underground economy in those Member States in which the contributions of illegal immigrants are thought to outweigh their burdens. However, the real problem will not be the lack of laws that prohibit this kind of relationship between employers and illegal immigrants, but the lack of motivation and political leverage to enforce them. And given the perceived and real contributions of the underground economy to the national GDP of these countries, it is likely that the status quo will remain in spite of a change in the laws.

Perhaps the solution to this problem lies in depoliticizing immigration control. And, the most efficient avenue for accomplishing this goal is through privatization of the enforcement of immigration and labor laws. Essentially, this would mean granting private parties the right to sue those who breach national laws. The intended consequence of such a move is to empower those who are affected by the employment of illegal immigrants but who otherwise do not have the lobbying power to effectuate the change in immigration policies. This, in turn, will reduce the profits of the underground economy, and ultimately the demand for illegal immigrants in a given country's workforce.

Privatizing the enforcement of immigration laws at the EU level, through a regulation or directive, would also change the terms of the debate at a national level. Given that Member States must comply with regulations and directives, politicians at the national level would immediately be worthless, politically, to employers and other participants of the underground economy who would prefer to see the perpetuation of the status quo. As such, by immunizing the enforcement of immigration laws from political tampering, private parties will be able to chip away at the very foundations of the underground economy.

The United States is not the only country that is coming to terms with the efficiency behind privatizing the enforcement of labor laws. In fact, as seen in the previous section, France and Spain both use schemes that allow private parties to sue those who are in breach of immigration or

459. See discussion supra Part III.
460. See id.
461. See id.
462. See discussion supra Parts III.C-D.
labor laws. These are examples that other countries in the EU should emulate if they have not yet done so. And, given that at least some countries, such as France and Spain, have already taken these measures, it should not be difficult for similar measures to be enacted at the EU level.

At the same time, this scheme will also take the regulation of illegal immigrants out of the hands of national governments, as citizens of one Member States will be able to sue employers of illegal immigrants in another Member State. As such, those citizens will act as external checks, guaranteeing the enforcement of EU immigration laws in Member States where the populace has grown accustomed and acquiescent to the presence of an underground economy and is thus unlikely to look for ways to enforce its private rights.

In the end, a system that guarantees the efficient enforcement of immigration laws will send an unequivocal message to illegal immigrants that they are not welcomed. The importance of this message should not be undermined. Illegal immigrants tend to transmit information to their counterparts regarding work availability. As such, in a system that regulates illegal immigration through the labor market that actually works, warnings of the restrictions and difficulties in finding work in potential destination countries will be passed along to those contemplating leaving their home country.

Of course, controlling the labor market is only one piece of the puzzle. Other areas that are related to illegal immigration flows also need to be targeted and addressed systematically. Illegal immigration is a problem that cannot be eradicated completely. As such, the best any country can do is to try to regulate illegal immigration, and the most logical way to do that is to put enforcement powers in the hands of those individuals most affected by labor and immigration law violations—legal workers suffering from depressed wages or unsafe working conditions because of their employer's concurrent practice of hiring illegal workers to keep production costs down. The EU has only to look to the U.S.'s use of the RICO scheme to effect this very deputization as a model and should do so before it is too late.

Conclusion

As long as there are laws that regulate the entrance of immigrants within a given country, there will continue to be illegal immigrants. As such, these laws should make it difficult for an illegal immigrant not only to enter a country, but also to stay there. The best way to do this is to tackle illegal immigrants' sources of income once they have entered the country unlawfully. Regulation of the labor market through the destruction of black market economies is an imperative precondition to the attainment of this goal.

463. See discussion supra Part I.D.
464. See id.
The uniform application of laws that regulate illegal immigration through the labor market is of particular importance to the EU. The EU needs to create measures that will guarantee that the laws are enforced uniformly among the Member States. The EU would be well-advised not to leave this enforcement solely in the hands of Member States, entities that are easily swayed by pressure groups within their borders. Instead, they should allow private citizens, deputized by the law, to commandeer the enforcement process. Otherwise, the result would be the selective application of immigration laws and the consolidation of havens of illegal immigrants and black market economies. Perhaps this tale should end with a simple warning: deputize or learn to embrace the tired, poor, huddled masses that wash upon your shores.