

Enforcing Corporate Responsibility for Violations of Workplace Immigration Laws: The Case of Meatpacking

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Beginning in 1997, the Immigration and Naturalization Service (“INS”)¹ carried out a two-and-a-half-year undercover investigation of Tyson Foods, Inc., to gather evidence that the company was regularly hiring undocumented workers in violation of federal immigration laws. When the government filed a criminal suit against the company and six of its managers, the evidence included 422 undercover audiotapes, 36 videotapes, and 360,000 pages of documents subpoenaed from Tyson.² In December 2001, a grand jury issued a thirty-six-count indictment charging the defendants with conspiracy to smuggle illegal aliens into the United States, provide them with fraudulent work papers, and employ them unlawfully for the purpose of commercial advantage and private financial gain.³

No case of this magnitude had ever been brought by the government, despite its longstanding goals of sanctioning employers who hire illegal aliens and protecting the U.S. workforce.⁴ Federal laws call for civil and criminal penalties for employers who hire, recruit, refer, or continue to

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¹ On March 1, 2003, the Immigration and Naturalization Service was subsumed into the new Department of Homeland Security. See Homeland Security Act of 2002, Pub. L. No. 107-296, Title IV, 116 Stat. 2135 (2002) (amended 2003). Reference is made to the INS throughout this Article for the sake of consistency. Immigration benefits and enforcement duties are now shared by the Bureaus of Citizenship and Immigration Services, Immigration and Customs Enforcement, and Customs and Border Protection. For more information about the division of labor in the new Department of Homeland Security, see *infra* notes 38–45 and accompanying text.

² Bill Poovey, *Tyson Says it Didn't Smuggle Aliens*, ST. PAUL PIONEER PRESS, Jan. 25, 2002, at C3.

³ Indictment of Tyson Foods, Inc., U.S. v. Tyson Foods, Inc., No. 4:01-cr-061 (E.D. Tenn. Dec. 11, 2001) [hereinafter Indictment] (on file with Author).

⁴ The terms illegal alien, undocumented immigrant, undocumented worker, illegal worker, and others are often used to describe a person who is either in the United States illegally, or who is legally present but does not have authorization to work for a particular employer. Although the terms are generally used interchangeably in everyday conversation, they have different technical meanings. For a discussion of these terms and others, see VERNON M. BRIGGS, JR., IMMIGRATION POLICY AND THE AMERICAN LABOR FORCE 128–30 (1984).

employ aliens who are not authorized to work in the United States.⁵ However, federal agencies lack the resources needed to investigate and enforce these laws, and the statutes have typically been used to round up and deport illegal workers instead of punishing employers for violating the law.⁶ Penalties are often waived in exchange for the employers' cooperation in identifying illegal workers.⁷

However, when the government finally made good on its promise to go after major corporate offenders, it lost on every count. Three of the indicted managers were caught on tape and fired by Tyson. One of them committed suicide four months after the indictment; the other two pled guilty and received a one-year probation and fines of \$2,100 and \$3,100, respectively.⁸ The other three indicted managers and the company itself were ultimately acquitted by a jury on March 26, 2003.⁹

Hoping to nail a landmark case in immigration enforcement, the government spent six years investigating and prosecuting the Tyson case, but not one charge stood the test of the jury. What went wrong? How could 422 audiotapes, 36 videotapes, and 360,000 pages of documents not be enough to hold a company liable for its hiring practices when its managers violated federal laws and undermined human and workers' rights in the process?

In examining the outcome of the Tyson case, this Article takes a critical look at existing laws that purport to regulate the intersection of immigration and labor policy, and suggests that a new legal standard is needed to carry out their goals. Meatpacking provides an excellent case study because it is an industry that has shifted from a highly unionized industry to an unorganized one dominated by undocumented workers.¹⁰ This Article argues that weak corporate liability standards allow employers who violate immigration laws to easily evade liability.

Enforcing corporate responsibility is important because it will deter employers from making jobs available to illegal immigrants. This, in turn, will lessen the presence of illegal aliens in the U.S. workforce and the detrimental effects their presence has on the wages and working conditions of all employees.¹¹ This Article therefore argues that corporations must

⁵ See 8 U.S.C.A. § 1324a(a)(1)(A), (a)(2), (e)(4)–(5), (f) (2006).

⁶ See, e.g., JULIE R. WATTS, *IMMIGRATION POLICY AND THE CHALLENGE OF GLOBALIZATION: UNIONS AND EMPLOYERS IN UNLIKELY ALLIANCE* 151 (2002) (noting, for example, that in the name of workplace enforcement, the INS has carried out industry-wide raids of meatpacking plants in Nebraska (Operation Vanguard) and apple orchards in Washington. Between the two operations, 3000 immigrants lost their jobs and faced deportation.).

⁷ Lori A. Nessel, *Undocumented Immigrants in the Workplace: The Fallacy of Labor Protection and the Need for Reform*, 36 HARV. C.R.-C.L. L. REV. 345, 360 (2001).

⁸ See *infra* notes 119–121.

⁹ Docket, *U.S. v. Tyson Foods, Inc.*, No. 4:01-cr-061 (E.D. Tenn. 2003) [hereinafter Docket] (on file with author). See also *infra* text accompanying notes 116–121.

¹⁰ See discussion *infra* Part I.B.

¹¹ It must be noted that enforcing corporate responsibility for workplace immigration

be held strictly liable for the illegal actions of their employees with respect to smuggling and hiring illegal aliens. Without such a standard, laws prohibiting the employment of illegal aliens will continue to do little to deter corporate immigration violations. Furthermore, employers in “dirty” jobs will have little incentive to clean up and offer their employees decent pay and safe working conditions.

Part I provides background information regarding the meatpacking industry and immigrants’ place within it, the conflicting policy goals present in immigration and labor law, and the terms and enforcement of laws relating to undocumented workers. It shows how the contradictory goals inherent in immigration laws play out to encourage employers in the meatpacking industry to hire and exploit illegal immigrant workers. Part II describes the INS investigation and the case against Tyson Foods. Part III evaluates what went wrong in the Tyson case, critiques the existing corporate liability framework, and suggests that a new legal standard for corporate responsibility is needed to fulfill this country’s policy goals with respect to immigration, workers’ rights, and human rights. Specifically, it suggests that employers should be held strictly liable for the immigration-related violations carried out by their hiring managers.

violations is only one of many crucial steps needed to address illegal immigration in the United States. *See* HELENE HAYES, U.S. IMMIGRATION POLICY AND THE UNDOCUMENTED: AMBIVALENT LAWS, FURTIVE LIVES xxi (2001). The failure of current laws to decrease illegal immigration is due in part to the heavy focus on controlling the border by “turning off the job magnet or the ‘pull’ factor that draws the undocumented to this country,” without sufficiently addressing the “push” factors “in terms of the multiplicity of motivations for migration emanating from the home countries of the undocumented. Deteriorating economic, political, and social conditions in developing countries are and will remain the spur for migration to the United States and other developed countries, despite measures such as denying illegals basic human services, erecting fences, militarizing our borders, developing tamper-proof ID cards, or denying the undocumented the right to legitimate work or judicial review.” *Id.* In order to more effectively control, regulate, and monitor immigration, comprehensive immigration reform must be implemented. In addition to employer sanctions, changes must be made to laws regulating legal paths to border security, temporary and permanent immigration status, labor laws and human rights, and domestic and global economic development. For a discussion of issues concerning comprehensive immigration reform, see, for example, Walter A. Ewing, *From Denial to Acceptance: Effectively Regulating Immigration to the United States*, 16 STAN. L. & POL’Y REV. 445 (2005). “The most practical option is to bring U.S. immigration policy in line with the realities of the U.S. labor market and an increasingly global economy. Lawmakers should craft immigration policies that are as responsive to market forces as their economic policies, while implementing and enforcing tough labor laws to guarantee fair wages and good working conditions for all workers, be they natives or immigrants. They should establish a process by which undocumented immigrants already living and working in the United States can apply for legal status. And they should treat immigration as the transnational issue it truly is and negotiate migration agreements with other countries, particularly Mexico. By taking these steps, the U.S. government would be able to more effectively control, regulate, and monitor immigration, rather than consigning a large portion of it to a shadowy and insecure black market.” *Id.* at 446.

I. UNDOCUMENTED WORKERS AND THE MEATPACKING INDUSTRY

Undocumented workers inhabit a precarious position in U.S. society: by definition, their employment is unlawful, yet is often the only way to ensure that the most difficult and lowest-paid work gets done.¹² Because of this duality, American attitudes toward immigration are extremely conflicted and often hypocritical.¹³ When our economy is strong, we welcome immigrants and proudly tout our country's immigrant history; when times are tough, immigrants are easy scapegoats for high unemployment numbers and strained social services.¹⁴ Most Americans "look the other way when it comes to the legal status of immigrants whose work benefits their daily lives," while criticizing the government for not doing more to prevent illegal immigration across our borders.¹⁵

Immigration and labor laws in the United States are similarly at odds. Immigration laws seek to provide sufficient workers to meet business needs, while controlling the inflow of foreign workers to protect job availability and working conditions for U.S. workers.¹⁶ Labor laws seek to ensure decent conditions for and protect the rights of all workers. Because refusing to award labor protections to undocumented employees allows employers to exploit them with impunity and has a chilling effect upon the rights of all workers, many federal labor and employment protection statutes have been interpreted to apply equally to all workers, regardless of immigration status.¹⁷ Since Congress made it unlawful to employ ille-

¹² Nessel, *supra* note 7, at 347.

¹³ Sara E. Bollerup, *America's Scapegoats: The Undocumented Worker and Hoffman Plastic Compounds, Inc. v. National Labor Relations Board*, 38 NEW ENG. L. REV. 1009, 1009–10 (2004). See also HAYES, *supra* note 11, at 125–26 (arguing that our country has suffered from a "historic, xenophobic treatment of new immigrants laced together with an insatiable appetite for cheap labor;" the author explains that "Americans are quite ambivalent about our undocumented population. As consumers, we benefit from their presence, but as citizens we insist that they have no right to be here and that further, it is they who are robbing us of tax-based benefits."); IMMIGRATION: A CIVIL RIGHTS ISSUE FOR THE AMERICAS viii (Susanne Jonas & Suzanne Dod Thomas eds., 1999) (after examining the Immigration Reform and Control Act and the Illegal Immigration Reform and Immigrant Responsibility Act (*see infra* notes 18 and 34), the editors note that "Taken together, what the most recent Acts indicate is that the representatives of the American people want a low-paid, compliant and easily exploitable immigration labor force, with no basic democratic rights.").

¹⁴ Hayes, *supra* note 11, at 2–4.

¹⁵ Bollerup, *supra* note 13, at 1009–10.

¹⁶ "[The intent of the Immigration Reform and Control Act is] to limit the hiring of undocumented employees and the depressing effect on working conditions caused by their employment." The House Education and Labor Committee Report on the Immigration Reform and Control Act, H.R. REP. NO. 99-682(II), at 8 (1986), reprinted in 1986 U.S.C.C.A.N.

¹⁷ Nessel, *supra* note 7, at 347–48 (noting that undocumented workers are protected by the National Labor Relations Act (*Sure-Tan, Inc. v. Nat'l. Labor Relations Bd.*, 467 U.S. 883 (1984)); undocumented workers are included within the meaning of "employee" under Title VII of the Civil Rights Act of 1964 (*Espinoza v. Farah Mfg. Co.*, 414 U.S. 86 (1973)); and that undocumented workers are considered "employees" within the meaning of the Fair Labor Standards Act (*Patel v. Quality Inn South*, 846 F.2d 700 (11th Cir. 1988))).

gal aliens with the passage of the Immigration Reform and Control Act (IRCA) in 1986,¹⁸ courts have struggled to reconcile IRCA's application with U.S. labor and employment laws.¹⁹ Although Congress intended IRCA to complement labor and employment laws,²⁰ IRCA has instead undermined those very laws due to a lack of enforcement against employers and the government's continued focus on punishing aliens. The tension between the nation's broad labor goals and its restrictionist immigration policy is highlighted in the overlap of immigration and labor laws in the meatpacking industry.

Consumer and corporate policies add yet another facet to the tension. Outside of court, political pressures to satisfy the desires of many U.S. businesses have often resulted in a lack of enforcement altogether. For example, in a July 2003 interview, United States Commission on Civil Rights Regional Director John F. Dulles recounted pressures not to enforce laws which call for employer sanctions:

I recall a situation in Arizona in which I was talking to a high-level immigration enforcement officer. His team had discovered a forgery ring, which was producing counterfeit documents and selling them. It was a very lucrative business and he was preparing for a raid to arrest the ringleaders. But it turned out that a police action would have endangered the ability of the fruit and vegetable growers to harvest their crops. That fact percolated through influential politicians in Washington and in the end he was told not to make a move.²¹

¹⁸ Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (codified as amended primarily in scattered sections of 8 U.S.C.).

¹⁹ Bollerup, *supra* note 13, at 1020–24 (citing labor cases in some circuits that granted rights and remedies to undocumented workers and other cases from other circuits which denied employees the same rights, reasoning that IRCA invalidates the underlying employment relationship and precludes the award of remedies to undocumented workers).

²⁰ See generally H.R. REP. NO. 99-682(I), reprinted in 1986 U.S.C.C.A.N. 5649 and H.R. REP. NO. 99-682(II), *supra* note 16.

²¹ *Minority Report: Influx Vexes Colorado Civil Rights Chief Says Jury Still Out on State's Stance on Immigrants*, ROCKY MTN. NEWS, July 17, 2003, at 42A. Director Dulles's remarks are also quoted at *Employer Sanctions*, 9 RURAL MIGRATION NEWS (July 2003), available at http://migration.ucdavis.edu/rmn/more.php?id=737_0_4_0. To further illustrate the tensions that run deep between immigration and labor laws, consider the following two statements issued on the same day by the 1.4 million member United Food and Commercial Workers Union (UFCW), which represents about 10,000 Tyson workers at nineteen processing plants: (1) Before the union had specific knowledge of the charges against Tyson, UFCW spokesman Greg Denier stated that the union supported criminal penalties against companies that import workers with the intent of exploiting them: "We are glad INS is conducting investigations and bringing charges where there may be incidents of the importation of labor." Elizabeth Walpole-Hofmeister, *Immigration: Tyson Foods' Executives Charged with Conspiring to Hire Alien Workers*, 244 Daily Lab. Rep. (BNA) A-9 (Dec. 21, 2001). (2) Later that day, immediately following news of the indictment, the union issued a press release calling for a quick settlement in the case, fearing

This friction is mirrored in society. When it comes down to it, people worry that Americans will not do the “dirty” jobs. They wonder, “What will happen to the price of tomatoes?”

There are simple answers to these questions. Americans *will* do the jobs, but they will demand reasonable wages and up-to-par workplace conditions. Further, studies show that increasing wages will only raise the price of produce four to six percent during the first one to two years, with prices stabilizing after the transitional period at levels two to three percent higher.²² That equals about four cents per pound more for tomatoes. If we truly believe in the purposes of immigration and labor laws, then we as a society must be willing to pay an extra four cents per pound of tomatoes in exchange for corporate compliance with those federal laws. We must enforce both immigration and labor laws in order to deter illegal immigration and ensure that jobs like meatpacking meet the minimum standards for pay and conditions that our laws set forth.

A. Immigration and Labor Laws Affecting Employers of Undocumented Workers

The percentage of the U.S. population that is foreign-born has grown steadily in recent years, from 7.9% in 1990 to 11.7% in 2003.²³ The net

that the “potential fines against Tyson could compromise the financial viability of the company and lead to widespread job loss.” UFCW President Doug Dority stated that immigrant labor has always been the backbone of jobs in the poultry, packing, processing, and other manufacturing industries, and he urged legalization of the current workforce in order to prevent illegal importation and exploitation of workers. Arguing that the outcome should be remedial instead of merely punitive, he also proposed that remedies in the Tyson case should include funding provided by Tyson for joint labor-management committees to deal with national and local issues surrounding the employment of immigrant labor. Press Release, UFCW, Food and Commercial Workers Union Calls for Quick Settlement of Charges Against Tyson Foods—Union Wants Quick Action To Protect Industry From Potential Economic Disruption and Job Loss (Dec. 21, 2001), available at http://www.ufcw.org/press_room/press_releases_2001/tysonfoodcharges.cfm.

²² Mark Krikorian, *Illegal Workers Aren't Needed To Make Sure We Keep Eating Our Vegetables*, CHI. TRIB., Apr. 9, 1996, available at <http://www.cis.org/articles/1996/msk4-9-96.html> (explaining that removing illegal workers from agriculture would have no discernable impact on consumers, and would not lead to a surge in imports. “The only remaining rationale for a guest-worker program is that it would help maintain the profit margins and market shares of certain American corporations by expanding the supply of farm workers and thus keeping wages low. Whatever benefits might accrue to growers would have to be weighed against an unavoidable increase in illegal immigration, a reduction in the educational attainment of our workforce, the retardation of technological development in agriculture, the deterioration of wages and working conditions in agriculture as more workers chase fewer jobs, and ever-higher social welfare expenditures for the throngs of idle farm workers.”). See also Wallace Huffman & Alan McCunn, *How Much is that Tomato in the Window? Retail Produce Prices Without Illegal Farmworkers*, Center for Immigration Studies, Feb. 1996, <http://www.cis.org/articles/1996/back296.htm>.

²³ Migration Policy Institute, Migration Information Source, http://www.migrationinformation.org/GlobalData/countrydata/country.cfm?Country_1=US (follow “Stock of foreign-born population by country of birth, by year”; then follow “Estimates of the net number of migrants, by five year intervals, 1950 to 2000”; then follow “Submit” to view tables

number of migrants in the country has also been increasing, with some periods of accelerated growth. For example, 1.09 million people migrated to the United States from 1950 to 1955, 1.46 million from 1965 to 1970, 3.065 million from 1970 to 1975, 3.269 million from 1985 to 1990, 5.255 million from 1990 to 1995, and 6.25 million from 1995 to 2000.²⁴ A total of approximately 25 million foreign-born individuals are legally in the United States today, and another 11 million illegal immigrants are estimated to be in the country.²⁵ About 7 million illegal aliens hold jobs, making up about five percent of the U.S. workforce.²⁶ Almost all undocumented men are in the labor force (ninety-six percent, compared to only sixty-two percent of undocumented women), and undocumented workers earn considerably less than U.S. citizens.²⁷

Congress has long understood the connection between illegal immigration and employers' incentives to hire undocumented workers.²⁸ Recognizing that employers have the power to drive the market through their hiring practices, Congress determined that employer sanctions would be the most effective deterrent of future illegal immigration.²⁹ To this end, IRCA was passed in 1986, and it became unlawful to hire, recruit, refer, or continue to employ an alien who is unauthorized to work in the United States.³⁰ Prior to IRCA's enactment, employers bore no legal responsibility for the work authorization of their employees.

Congress enacted IRCA to control illegal immigration to the United States and establish civil and criminal penalties for employers who knowingly hire undocumented aliens.³¹ To meet employers' new need to verify the work authorization of all hires, IRCA established an employment verification system and Form I-9 was created for governmental use in the docu-

from which this information was gathered) (last visited Mar. 5, 2006).

²⁴ *Id.*

²⁵ JEFFREY S. PASSEL, PEW HISPANIC CENTER, ESTIMATES OF THE SIZE AND CHARACTERISTICS OF THE UNDOCUMENTED POPULATION (Mar. 2005), available at <http://pewhispanic.org/files/reports/44.pdf>. This Report was based on data from the March 2004 Current Population Survey conducted by the U.S. Census Bureau and the Department of Labor.

²⁶ *Id.*

²⁷ Jeffrey S. Passel et al., Urban Institute, *Undocumented Immigrants: Facts and Figures* 1-2 (2004), available at <http://www.urban.org/url.cfm?ID=1000587>. About two-thirds of undocumented workers earn less than twice the minimum wage, compared with only one-third of all workers.

²⁸ See H.R. REP. NO. 99-682(I), *supra* note 20, at 52. In the early 1970s, the 92nd Congress held extensive investigative and legislative hearings on the problem of undocumented aliens and concluded that the most reasonable way to prevent future undocumented immigration was to "make unlawful the 'knowing' employment of illegal aliens, thereby removing the economic incentive which draws such aliens to the United States as well as the incentive for employers to exploit this source of labor." These findings formed the basis for a series of bills prohibiting the knowing employment of undocumented aliens, and establishing administrative, civil, and criminal penalties for employers violating this prohibition, but none were ever passed into law until IRCA in 1986.

²⁹ *Id.*

³⁰ Immigration Reform and Control Act § 101.

³¹ H.R. REP. NO. 99-682(II), *supra* note 16, at 1-2.

ment-checking process.³² A series of sanctions was put in place to penalize noncompliance.³³

In recent years, a number of voluntary cooperation programs for employers involving electronic or telephonic verification of identity, status, and work authorization documents have been implemented.³⁴ While the concept may be commendable, participation in these programs is viewed by critics as a convenient mask for companies who want to avoid INS scrutiny. For example, Tyson's defense lawyers stressed its voluntary participation in such programs as demonstrative of their good faith efforts and corporate policy of abiding by immigration and labor laws.³⁵

In 1996, Congress created a "good faith" affirmative defense for employers who fail to properly verify the status of new hires in accordance with IRCA.³⁶ Under the exception, an entity is considered to have complied with employment restrictions notwithstanding a technical or procedural failure to meet the requirements if there was a "good faith" attempt to comply.³⁷

On March 1, 2003, the Department of Homeland Security (DHS) assumed responsibility for securing the country's borders and transportation systems and enforcing immigration laws.³⁸ Two new bureaus were formed within DHS to handle enforcement actions: the Bureau of Customs and Border Protection (CBP) and the Bureau of Immigration and Customs Enforcement (ICE).³⁹ Both Border Patrol agents and ICE Investigations Special Agents are responsible for locating and arresting aliens who are in the United States illegally.⁴⁰

The CBP division is responsible for the "twin goals" of anti-terrorism and facilitating legitimate trade and travel, and shares investigative duties with ICE.⁴¹ The mission of ICE is to "prevent acts of terrorism by targeting the people, money, and materials that support terrorist and criminal activities . . . [ICE] is responsible for identifying and shutting down vul-

³² Immigration Reform and Control Act § 101.

³³ *Id.*

³⁴ The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, § 401, 110 Stat. 3009-655 (1996), established the Basic Pilot Program.

³⁵ Press Release, Tyson Foods, Inc., Tyson Foods' Statement on Opening Day of Immigration Trial (Feb. 5, 2003), available at <http://www.prnewswire.com/cgi-bin/stories.pl?ACCT=104&STORY=/www/story/02-05-2003/0001886019&EDATE>.

³⁶ Immigration Reform and Control Act § 411 (as codified in 8 U.S.C. 1324a(b)(6)).

³⁷ *Id.* The good faith defense is not available to entities that engage in a "pattern or practice" of violations of 8 U.S.C. 1324a(a)(1)(A) or (a)(2), and under 8 U.S.C. 1324a(b)(6)(B) does not apply if the company fails to correct the error after receiving notice.

³⁸ United States Department of Homeland Security, *Immigration and Borders*, http://www.dhs.gov/dhspublic/theme_home4.jsp (last visited Feb. 11, 2006).

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ United States Customs and Border Protection, *Protecting Our Borders Against Terrorism*, <http://www.cbp.gov/xp/cgov/toolbox/about/mission/cbp.xml> (last visited Feb. 22, 2006).

nerabilities in the nation's border, economic, transportation, and infrastructure security."⁴² ICE's interior enforcement strategy involves detaining and removing criminal aliens, dismantling and diminishing smuggling or trafficking of aliens, minimizing immigration benefits and document fraud, and blocking and removing employers' access to undocumented workers.⁴³

Investigations are composed of eight major categories: human trafficking, criminal investigations, work site enforcement, identity and benefit fraud, alien smuggling, compliance enforcement, immigration status violations, and the Joint Terrorism Task Force.⁴⁴ Employer cases involve criminal or administrative investigations as well as general inspections, and may also originate as referrals from the Department of Labor.⁴⁵

Since 1997, there have been significant drops in the numbers of completed employer investigations, employers fined for having undocumented workers, and unauthorized workers arrested each year.⁴⁶ Between 1998 and 2001, the number of cases completed declined eighty percent. In 1997, 7537 employer investigation cases were completed.⁴⁷ That number dropped to 3898 in 1999 and 1595 in 2001, before rising again to 2194 in 2003⁴⁸ and 3054 in 2004.⁴⁹ The number of employers fined for having undocumented workers fell from a high of 1023 in 1998 to 53 in 2002, before rising in 2003 to 162.⁵⁰ The number of workplace arrests increased 132% in the mid-1990s, from 7554 in 1994 to a high of 17,554 in 1997,⁵¹ and then declined sharply in the next six years, dropping to only 159 in 2004.⁵² While enforcement actions remain far less common than they were than a decade ago, their recent increase, coupled with a decrease in workplace ar-

⁴² United States Immigration and Customs Enforcement, *About ICE*, <http://www.ice.gov/graphics/about/index.htm> (last visited Feb. 11, 2006).

⁴³ United States Immigration and Customs, *Interior Enforcement*, <http://www.ice.gov/graphics/interior/index.htm> (last visited Feb. 11, 2006).

⁴⁴ MARY DOUGHERTY ET AL., IMMIGRATION ENFORCEMENT ACTIONS: 2004 4 (Annual Report of Department of Homeland Security, Office of Immigration Statistics Management Directorate, Nov. 2005), available at <http://www.uscis.gov/graphics/shared/statistics/publications/AnnualReportEnforcement2004.pdf>.

⁴⁵ *Id.*

⁴⁶ *Sanctions Enforcement*, 10 RURAL MIGRATION NEWS (Jan. 2004) [hereinafter *Sanctions Enforcement*], available at http://migration.ucdavis.edu/rmn/comments.php?id=825_0_4_0. See also OFFICE OF IMMIGRATION STATISTICS, U.S. DEP'T OF HOMELAND SEC., 2003 YEARBOOK OF IMMIGRATION STATISTICS 157 tbl.39 (2004) [hereinafter 2003 DHS YEARBOOK], available at <http://uscis.gov/graphics/shared/aboutus/statistics/2003Yearbook.pdf>. Annual statistics provided are for fiscal years.

⁴⁷ 2003 DHS YEARBOOK, *supra* note 46, at 157.

⁴⁸ *Id.*

⁴⁹ OFFICE OF IMMIGRATION STATISTICS, U.S. DEP'T OF HOMELAND SEC., 2004 YEARBOOK OF IMMIGRATION STATISTICS 158 tbl.39 (2005) [hereinafter 2004 DHS Yearbook], available at <http://uscis.gov/graphics/shared/statistics/yearbook/Yearbook2004.pdf>.

⁵⁰ 2003 DHS Yearbook, *supra* note 46, at 157. Statistics regarding employer fines for fiscal year 2004 are not available.

⁵¹ 2004 DHS YEARBOOK, *supra* note 49, at 158.

⁵² *Id.*

rests, may be evidence of a genuine trend toward holding employers responsible for IRCA violations.

A variety of labor laws also impose restrictions on employers and purport to protect immigrants in this country. For example, undocumented workers are included within the meaning of “employee” under Title VII of the Civil Rights Act of 1964⁵³ and considered “employees” within the meaning of the Fair Labor Standards Act (FLSA).⁵⁴ The Supreme Court held in 1984 that undocumented workers are protected by the National Labor Relations Act (NLRA),⁵⁵ but under a 2002 Supreme Court ruling, undocumented workers who are illegally fired for engaging in protected activity are not entitled to back pay for lost wages.⁵⁶ In addition, 1996 immigration reforms allowed RICO suits in connection with the hiring, smuggling or harboring of illegal migrants.⁵⁷

B. The Meatpacking Industry

Meatpacking is the most dangerous factory job in America.⁵⁸ Although injury and illness rates have declined over the last decade, those in meat and poultry plants continue to be among the highest of any industry.⁵⁹ In 1992, thirty out of every hundred workers in U.S. meatpacking facilities were being injured or sickened on the job.⁶⁰ By 2001, this number had dropped—but only to fourteen out of every hundred.⁶¹

Human Rights Watch recently reported that the increasing volume and speed of production coupled with close quarters, poor training, and insufficient safeguards can be blamed for making meat and poultry work so hazardous.⁶² They write that, “On each work shift, workers make up to 30,000 hard-cutting motions with sharp knives, causing massive repetitive motion injuries and frequent lacerations. Workers often do not receive

⁵³ *Espinoza*, 414 U.S. at 95.

⁵⁴ *Patel*, 846 F.2d at 705. For a discussion of an excellent array of cases on this subject, see Nessel, *supra* note 7.

⁵⁵ *Sure-Tan*, 467 U.S. 883 at 891–92.

⁵⁶ *Hoffman Plastic Compounds, Inc. v. Nat’l. Labor Relations Bd.*, 535 U.S. 137, 140 (2002).

⁵⁷ *Sanctions: INS v. Tyson*, 8 RURAL MIGRATION NEWS (July 2003), available at http://www.migration.ucdavis.edu/rmn/comments.php?id=601_0_4_0.

⁵⁸ Press Release, Human Rights Watch, Abuses Against Workers Taint U.S. Meat and Poultry (Jan. 25, 2005) [hereinafter Human Rights Watch: Abuses Against Workers], available at <http://hrw.org/english/docs/2005/01/25/usdom10052.htm>.

⁵⁹ U.S. GOV’T ACCOUNTABILITY OFF., WORKPLACE SAFETY AND HEALTH—SAFETY IN THE MEAT AND POULTRY INDUSTRY, WHILE IMPROVING, COULD BE FURTHER STRENGTHENED, GAO-05-96 at 26 (2005), available at <http://www.gao.gov/new.items/d0596.pdf>.

⁶⁰ *Id.*

⁶¹ *Id.* Compare with the incident rate across all United States manufacturing which dropped during the same period from 12.5 cases to 8.1 cases per 100 workers.

⁶² Press Release, Human Rights Watch, Blood, Sweat, and Fear: Workers’ Rights in U.S. Meat and Poultry Plants (Jan. 2005) [hereinafter Human Rights Watch: Blood, Sweat, and Fear], available at <http://www.hrw.org/reports/2005/usa0105/usa0105.pdf>; see also Human Rights Watch: Abuses Against Workers, *supra* note 58.

compensation for workplace injuries because companies fail to report injuries, delay and deny claims, and take reprisals against workers who file them.”⁶³ Moreover, aggressive and often unlawful company efforts to derail workers’ organizing efforts are common in the industry.⁶⁴

The meat and poultry packing and processing industry employed more than 520,000 workers in 2002, including 155,000 in meatpacking, 118,000 in meat processing, and 245,000 in poultry processing.⁶⁵ During the 1990s, poultry industry profits rose over 300% and worker productivity was at an all-time high, “yet real wages for poultry workers rose by less than one percent.”⁶⁶

Until fifteen or twenty years ago, the meatpacking workforce in the United States was unionized, virtually all white, and highly paid, earning about eighteen dollars an hour, adjusted for inflation.⁶⁷ During the Reagan era, following offers for millions of dollars in local tax subsidies, meatpacking companies moved away from big cities into the country.⁶⁸ Although the move put them closer to the animals and thus allowed them to save on transportation costs, labor was in short supply in the new rural locations.⁶⁹ By then, only a few companies dominated the field, and production lines were sped up to keep competition tight.⁷⁰ By 1992, average wages fell to twelve dollars an hour, and by 1995 unionization was half of what it was in 1963.⁷¹ Today, the processing and packing plants are largely staffed by low-paid, non-union workers, who are often paid only six dollars an hour.⁷² To staff the plants and fill the positions that result from the remarkably high turnover rate, many companies have actively recruited in areas of high unemployment, such as southern Texas, as well as in many Latin American countries, such as Mexico and Guatemala.⁷³

In this way, observers contend that the meatpacking industry has “re-invented” itself over the past twenty years.⁷⁴ Marc Cooper, acclaimed jour-

⁶³ Human Rights Watch: Blood, Sweat, and Fear, *supra* note 62, at 52–73.

⁶⁴ *Id.* at 75–101.

⁶⁵ American Meat Institute, Human Resources, <http://www.meatami.com/Template.cfm?Section=HumanResources&Template=/TaggedPage/TaggedPageDisplay.cfm&TPLID=2&ContentID=799> (last visited Mar. 2, 2006).

⁶⁶ United Food and Commercial Workers, *Injury and Injustice—America’s Poultry Industry*, http://www.ufcw.org/press_room/fact_sheets_and_backgrounder/poultryindustry_cfm (last visited Feb. 11, 2006). In addition, seventy-one percent of contract poultry growers earn below poverty level wages, and “[w]ages for chicken catchers have fallen in the past decade, with catchers earning about \$92 per day of work, down from \$107.70, despite working daily twelve-hour shifts.” *Id.*

⁶⁷ David Barboza, *Meatpackers’ Profits Hinge on Pool of Immigrant Labor*, N.Y. TIMES, Dec. 21, 2001, at A26; Marc Cooper, *The Heartland’s Raw Deal: How Meatpacking is Creating a New Immigrant Underclass*, NATION, Feb. 3, 1997, at 11.

⁶⁸ Cooper, *supra* note 67, at 16.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² Barboza, *supra* note 67.

⁷³ Cooper, *supra* note 67, at 15.

⁷⁴ A twenty-nine-year-old personnel director at a meatpacking company in Minnesota

nalist and host and executive producer of RadioNation, claims that the beef, pork, and poultry packers have been aggressively recruiting the most vulnerable of foreign workers so that the country's most dangerous industry now thrives on a "docile, disempowered work force with an astronomical turnover."⁷⁵ According to Cooper, "the arrival of these workers en masse is neither serendipitous nor the product of cunning smugglers. Rather, it is the direct result of a conscious survival strategy undertaken by a key United States industry, a plan developed and fully implemented only in the past [ten] years."⁷⁶

Increasing numbers of immigrant workers in the meatpacking industry are undocumented and often deported by the INS or forced to leave their jobs before an INS inspector arrives. The INS estimates that twenty-five percent of Midwestern meatpacking workers are not authorized to work in this country.⁷⁷ However, according to the assistant commissioner in charge of investigations at INS, before committing its limited enforcement resources, the agency considers whether the employment of illegal migrants is depressing wages and whether employers are "conspiring and working with organized criminals [or] putting people at risk in terms of their lives or their health and safety."⁷⁸

When the government does go forward with enforcement actions, investigators are often met with hostility, even when the companies are eventually excused of liability. For example, when the government did deport illegal workers following meatpacking plant raids, "it outraged food companies, who complained of disruptions Midwestern politicians sometimes complained that slowing down the work at meatpacking plants increased the supply of livestock and thereby harmed hog and cattle farmers, who had already been suffering from low prices for their goods."⁷⁹

Further, replacing illegal workers with lawful ones is not an easy job in today's meatpacking industry. Commenting on the crippling effect that a major effort to crack down on the hiring of illegal workers would have on the nation's food industry, William Heffernan, professor of rural sociology at the University of Missouri, says "[i]n the communities where these plants are located there isn't an alternative work force. They'd have to raise wages and improve the conditions."⁸⁰

described an incident at his plant to demonstrate the new personality of the industry: "A few years back there was a misunderstanding in our plant over rest periods and there was a Somali strike," [he said] with a chuckle. "The first in the U.S. We fired them all. About eighty workers. Let me tell you, the word got out on the Somali grapevine fast. And now when they come to work here they understand what American work standards are. No labor trouble since then." *Id.* at 16.

⁷⁵ *Id.* at 12.

⁷⁶ *Id.*

⁷⁷ *Tyson Indicted*, 8 RURAL MIGRATION NEWS (Jan. 2002), available at http://migration.ucdavis.edu/rmn/more.php?id=562_0_4_0.

⁷⁸ *Id.*

⁷⁹ Barboza, *supra* note 67.

⁸⁰ *Id.*

Those who are employed illegally rarely report injuries out of fear of retaliation or loss of employment if they are injured and cannot perform their work.⁸¹ Unions have a difficult time organizing the workers because labor turnover in the plants is so high, at times exceeding 100% in a year as workers move to other employers or return to their native countries.⁸² The continued availability of illegal workers allows employers to keep wages depressed and otherwise exploit them through their fear of losing work and being deported. In the case against Tyson, one indicted manager even testified that the company's refusal to raise wages put him in a position where his only option for filling hundreds of jobs was to seek illegal laborers.⁸³

The meatpacking industry is a frequent target of INS raids and investigations because of the large percentage of immigrant workers who work in the processing plants. While ostensibly attacking employment practices, INS officials often find their hands tied by the conflicting laws that govern their jobs, and it is the workers who are penalized instead of the employers. For example, in December 2000, the INS raided a Nebraska Beef plant, detained hundreds of illegal aliens, and removed most of them from the United States within two days.⁸⁴ In April 2002, a federal judge dismissed the criminal indictments against the employer, finding that the U.S. government acted in "bad faith" when it removed the undocumented workers promptly, thereby denying defendants material and favorable evidence.⁸⁵

Despite the attention given to the meatpacking industry in general by immigration investigation teams, the government's decision to carry out a two-and-a-half-year undercover investigation of Tyson's hiring practices and the fact that the prosecution of the company went all the way to a jury was unprecedented. When Michael Chertoff, then-assistant attorney general for the criminal division, announced that a thirty-six-count indictment against Tyson and its managers had been issued, he proclaimed, "The Department of Justice is committed to vigorously investigating and prosecuting companies or individuals who exploit immigrants and violate our nation's immigration laws. The bottom line on the corporate balance sheet is no excuse for criminal conduct."⁸⁶ Then-INS Commissioner James Ziglar stated,

⁸¹ Human Rights Watch: Blood, Sweat, and Fear *supra* note 62, at 103.

⁸² *Id.* at 118.

⁸³ Donald L. Bartlett & James B. Steele, *Who Left the Door Open? Despite All the Talk of Homeland Security, Sneaking Into the U.S. is Scandalously Easy—and on the Rise. Millions of Illegal Aliens Will Pour Across the U.S.-Mexican Border This Year, Many from Countries Hostile to America.* *TIME* Looks at the Damage, the Dangers and the Reasons the U.S. Fails to Protect Itself, *TIME* MAG., Sept. 20, 2004, at 51.

⁸⁴ *U.S. v. Nebraska Beef, Ltd.*, 194 F. Supp. 2d 949, 951–52 (D. Neb. 2002).

⁸⁵ *Id.* at 950.

⁸⁶ Press Release, Department of Justice, INS Investigation of Tyson Foods, Inc. Leads to 36 Count Indictment for Conspiracy to Smuggle Illegal Aliens for Corporate Profit (Dec. 19, 2001), available at http://www.usdoj.gov/opa/pr/2001/December/01_crm_654.htm.

“[The case against Tyson] represents the first time INS has taken action against a company of Tyson’s magnitude. INS means business, and companies, regardless of size, are on notice that INS is committed to enforcing compliance with immigration laws and protecting America’s workforce.”⁸⁷

C. *Tyson Foods, Inc.*

Tyson is the world’s largest processor and marketer of poultry products and the supplier of about a fourth of the chicken bought in the United States.⁸⁸ Tyson also controls nineteen percent of the pork market⁸⁹ and twenty-six percent of the U.S. beef market,⁹⁰ having purchased IBP, the nation’s largest beef supplier, in 2001.⁹¹ The company runs operations in twenty-nine states and nineteen countries, and markets its products in more than eighty countries around the world.⁹²

Tyson made \$26 billion in sales in 2005 and put out average weekly production quantities of 42.5 million chickens, 170,938 head of beef, and 347,891 head of pork.⁹³ Among Tyson’s facilities are 141 processing plants, forty feed mills, sixty-five cold storage warehouses, ten forward warehousing and distribution centers, and sixty-four hatcheries.⁹⁴ In addition to its chicken, beef, and pork operations, Tyson produces and markets a broad variety of protein-based and prepared foods, and is the second-largest food company in the *Fortune 500*.⁹⁵

The company employs 114,000 workers and over 6700 contract poultry growers, and it owns eighty-four chicken grower operations.⁹⁶ In May 2002, Tyson estimated that its workforce was 43% Caucasian, 28% African American, 25% Hispanic, 2% Asian, and 2% Native American, although those numbers are not representative of each processing plant.⁹⁷ For example, in

⁸⁷ *Id.* The INS proclamation that their role includes “protecting America’s workforce” exemplifies the overlap and tension between the immigration and labor laws.

⁸⁸ TYSON FOODS, INC., TYSON FOODS, INC. 2005-2006 INVESTOR FACT BOOK 3-5 (2005), available at http://media.corporate-ir.net/media_files/irol/65/65476/reports/04_05_factbook.pdf.

⁸⁹ *Id.* at 12.

⁹⁰ *Id.* at 8.

⁹¹ *Id.* at 23.

⁹² TYSON FOODS, INC., 2005 ANNUAL REPORT 35 (2005), available at http://library.corporate-ir.net/library/65/654/65476/items/177728/2005_AR.pdf.

⁹³ TYSON FOODS, INC., *supra* note 88, at 2.

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ Press Release, Tyson Foods, Inc., Statement of Tyson Foods, Inc. in Response to Charges Filed Today By the U.S. Department of Labor in Alabama (May 9, 2002), available at <http://www.prnewswire.com/cgi-bin/stories.pl?ACCT=104&STORY=/www/story/05-09-2002/0001725014&EDATE>.

May 2004, over 80% of the nearly 1300 employees at Tyson's facility near Columbus Junction, Iowa were Hispanic.⁹⁸

In 2003, at a time when the company was slashing the wages and benefits of impoverished meatpacking workers, the annual salary of company chairman John Tyson was nearly tripled to \$20.9 million.⁹⁹ While the company has enjoyed great economic success, the wealth has not been shared with its processing plant workers, and Tyson is widely criticized for a multitude of labor-related violations. Although the government and other sources say the average wage at Tyson is less than \$7.00 an hour, Tyson claims its average wage is \$8.63 plus full benefits.¹⁰⁰ Estimates of the company's annual turnover rate range from 75 to 200%.¹⁰¹ A 1995 General Accounting Office report on federal contractors and violations of labor law highlighted Tyson as one of fifteen companies with numerous serious violations of labor laws.¹⁰² For example, Tyson's 2005 Annual Report alone lists five suits brought against Tyson alleging violations of the FLSA.¹⁰³ In addition, at the time of the Tyson indictment in December 2001, the corporation was on criminal probation after pleading guilty to felonious bribery of former U.S. Secretary of Agriculture Mike Espy, a crime for which Tyson was fined \$4 million and paid \$2 million in court costs.¹⁰⁴

II. CASE STUDY OF ENFORCEMENT

As noted above, the massive enforcement action brought against Tyson was the first time the INS focused its efforts exclusively on prosecuting a corporate violator instead of individual aliens. The Tyson case was about getting to the heart of the matter and sending a message to major U.S. employers that they are not above the law. For that reason, the investigation did not proceed like the common INS meatpacking plant raid.

⁹⁸ Louisa Development Group, *Economic Development*, COUNTY CLIPS COLUMN, May 25, 2004, http://www.louisadevelopmentgroup.org/CountyClips/county_clips_2004.htm. In general, the number of Hispanic workers in the meat processing industry has been rising, from fifteen percent in 1990 to thirty-five percent in 2000. *Meat and Migrants*, 11 RURAL MIGRATION NEWS (Oct. 2005), available at http://migration.ucdavis.edu/rmn/more.php?id=1057_0_2_0.

⁹⁹ Eric Schlosser, *Tyson's Moral Anchor*, NATION, July 12, 2004, at 6.

¹⁰⁰ See Press Release, Tyson Foods, Inc., *supra* note 97.

¹⁰¹ Sherri Day, *Jury Clears Tyson Foods in Use of Illegal Immigrants*, N.Y. TIMES, Mar. 27, 2003, at A14. See also Louisa Development Group, *supra* note 98 (noting that the turnover rate at Tyson's plant near Columbus Junction, Iowa, climbed above 200% a few years ago, then improved to 46% by May 2004 after a consulting firm helped Tyson make changes such as expanding new employee orientation to four days).

¹⁰² U.S. GEN. ACCOUNTING OFFICE, REPORT TO THE HONORABLE PAUL SIMON, U.S. SENATE, WORKER PROTECTION—FEDERAL CONTRACTORS AND VIOLATIONS OF LABOR LAW, GAO/HEHS-96-8 (Oct. 24, 1995), available at <http://www.gao.gov/archive/1996/he96008/pdf>.

¹⁰³ TYSON FOODS, INC., *supra* note 92, at 55–57.

¹⁰⁴ *Chattanooga Grand Jury Indicts Tyson Foods*, CHATTANOOGAN.COM, Dec. 19, 2001, http://www.chattanooga.com/articles/article_16052.asp; Francis X. Clines, *Tyson's Guilty Plea Adds Drama to Espy Trial*, N.Y. TIMES, Dec. 31, 1997, at A12.

There was no I-9 audit conducted and no individual illegal workers were corralled for deportation. Instead, the government brought the case against Tyson to trial on the theory of corporate liability, which imposes criminal liability on a corporation when agents of the company have (1) committed a crime (2) within the scope of their employment (3) with the intent to benefit the corporation.¹⁰⁵

A. *The Case Against Tyson*

Beginning in 1997, the INS investigated Tyson for two and one-half years, using undercover agents posing as labor recruiters to track the company's employment practices.¹⁰⁶ Members of the United States Attorney's Office for the Eastern District of Tennessee, the Federal Bureau of Investigation, the Internal Revenue Service, the Department of Agriculture, the Department of Labor, the Social Security Administration, the Bedford County Tennessee Sheriff's Department, the Shelbyville Tennessee Police Department, and the Highway Patrol also participated in the investigation.¹⁰⁷

The government's case against Tyson relied heavily on taped conversations in which Tyson managers allegedly arranged for transportation and false papers for illegal aliens to work at the company's processing plants.¹⁰⁸ An undercover agent testified that Tyson "solicited and accepted twenty-six deliveries of illegal immigrant workers in the two-and-a-half years the undercover investigation was taking place."¹⁰⁹ As the plans were carried out, Tyson managers paid INS agents posing as smugglers \$100 to \$200 for each worker brought from the border.¹¹⁰ The fees were paid in the form of official Tyson corporate checks that fraudulently represented such payments as legitimate "recruitment" expenses.¹¹¹

In seeking to hold the corporation liable, the government argued that Tyson's top management knew what the plant managers were doing; in its defense, Tyson maintained that the plant managers were breaking company rules and acting on their own outside of the scope of their employment.¹¹² The lead prosecutor, Assistant United States Attorney John P. Mac-

¹⁰⁵ V. S. Khanna, *Corporate Liability Standards: When Should Corporations Be Held Criminally Liable?*, 37 AM. CRIM. L. REV. 1239, 1242-43 (2000).

¹⁰⁶ Day, *supra* note 101. See also Press Release, Dep't of Justice, *supra* note 86.

¹⁰⁷ Press Release, Dep't of Justice, *supra* note 86.

¹⁰⁸ Ken Ellingwood, *Tyson Smuggled Help for Years, U.S. Alleges; Prosecution Charges "Corporate Greed" as it Opens the Trial of the Poultry Giant, Charged with Conspiracy to Hire Undocumented Workers*, L.A. TIMES, Feb. 6, 2003, at 19. See generally Indictment, *supra* note 3.

¹⁰⁹ Bill Poovey, *Tyson Says Top Bosses Didn't Know*, CBSNEWS.COM, Feb. 7, 2003, <http://www.cbsnews.com/stories/2003/02/05/national/main539521.shtml?CMP+ILC-SearchStories>.

¹¹⁰ Indictment, *supra* note 3, at 20-23, 26, 32, 35-36, 38.

¹¹¹ *Id.* at 6.

¹¹² *Sanctions: Tyson Acquitted*, 9 RURAL MIGRATION NEWS (Apr. 2003) [hereinafter

Coon, argued that Tyson officials had strategically imported and hired undocumented workers to keep up with rapid turnover at its poultry plants without having to raise pay. “This trial is about corporate greed,” he stated. “It’s about what happens when a corrupt corporate culture makes the bottom line the all-consuming priority.”¹¹³

In December 2001, a federal grand jury in Chattanooga, Tennessee returned a thirty-six count indictment against Tyson and the six managers for conspiracy to smuggle illegal alien workers from the Southwest border to Tyson’s processing plants in the United States for profit.¹¹⁴ Fifteen Tyson plants in nine states were implicated in the conspiracy.¹¹⁵ The individuals charged included the complex manager at Tyson’s plant in Noel, Missouri;¹¹⁶ Tyson’s retail fresh division vice president;¹¹⁷ former human resources manager in the retail fresh division;¹¹⁸ former complex manager at the Tyson plant in Shelbyville, Tennessee;¹¹⁹ former plant manager at the Tyson plant in Shelbyville, Tennessee;¹²⁰ and former complex personnel manager at the Shelbyville plant.¹²¹

The indictment makes the following charges:¹²²

- Conspiracy charges:

Conspiracy to Violate Immigration and Other Laws (18 U.S.C. § 371), and

Conspiracy to Defraud and Obstruct INS Enforcement of Law (18 U.S.C. § 371)

- Smuggling charges:

Seven counts of *Causing Illegal Aliens to Be Brought into the United States* for the purpose of commercial advantage and pri-

Sanctions: Tyson Acquitted], available at http://migration.ucdavis.edu/rmn/comments.php?id=12_0_4_0.

¹¹³ Ellingwood, *supra* note 108.

¹¹⁴ Press Release, Dep’t of Justice, *supra* note 86.

¹¹⁵ *Id.*

¹¹⁶ Defendant Keith Snyder was acquitted by the jury (*see* Docket, *supra* note 9; *see also* Indictment, *supra* note 3, at 4, for the charges against him).

¹¹⁷ Defendant Robert Hash was acquitted by the jury (*see* Docket, *supra* note 9; *see also* Indictment, *supra* note 3, at 3, for the charges against him).

¹¹⁸ Defendant Gerald Lankford was acquitted by the jury (*see* Docket, *supra* note 9; *see also* Indictment, *supra* note 3, at 3, for the charges against him).

¹¹⁹ Defendant Truley Ponder pled guilty and was fired by Tyson (*see* Docket, *supra* note 9; *see also* Indictment, *supra* note 3, at 4, for the charges against him; Sherri Day, *Prosecutors in Smuggling Case Against Tyson Contend Trial is about “Corporate Greed,”* N.Y. TIMES, Feb. 6, 2003, at A26 (reporting that the defendants who pled guilty were fired by Tyson).

¹²⁰ Defendant Spencer Mabe pled guilty and was fired by Tyson (*see* Docket, *supra* note 9; *see also* Indictment, *supra* note 3, at 4, for the charges against him; Day, *supra* note 119).

¹²¹ Defendant Jimmy Rowland was fired by Tyson, then committed suicide in April 2002 (*see* Indictment, *supra* note 3, at 4, for the charges against him; Day, *supra* note 119).

¹²² The following charges were included in the Indictment, *supra* note 3.

vate financial gain of the defendants (8 U.S.C. § 1324(a)(2)(B)(ii) and 18 U.S.C. § 2), and

Ten counts of *Causing Illegal Aliens to Be Transported* into the United States for the purpose of commercial advantage and private financial gain of the defendants (8 U.S.C. § 1324(a)(1)(A)(ii) and 8 U.S.C. § 1324(a)(1)(B)(i) and 18 U.S.C. § 2)

- Document fraud charges:

Eight counts of *Causing the Possession of Fraudulent Documents by Illegal Aliens* (18 U.S.C. §§ 1546(a) and 2), and

Nine counts of *Causing the Use of Illegal Documents* (i.e., Social Security Cards) for the purpose of satisfying a requirement of Section 274A(b) of the INA (18 U.S.C. §§ 1546(b) and 2)

The indictment describes a scheme by which the defendants requested delivery of illegal aliens to Tyson plants in the United States and in which they aided and abetted the illegal workers in obtaining fake documents so they could work for the company under the false pretense of being authorized to work.¹²³ The government alleged that each of the defendants was acting within the scope of his corporate management duties and that by participating in the conspiracy, the defendants sought to further both the company's financial interests and their own.¹²⁴ The government also alleged that Tyson cultivated a corporate culture which condoned the hiring of illegal alien workers in order to meet production goals and cut costs to maximize profits, thereby facilitating the conspiracy.¹²⁵

The government further alleged in the Indictment that Tyson's participation in the EVP and Basic Pilot Programs (voluntary employment eligibility screening programs) was intended to foster the appearance of compliance with the law and keep INS from conducting raids to identify illegal aliens working at the poultry processing plants, and that Tyson in fact evaded the EVP and Basic Pilot Programs by hiring illegal workers through temporary employment contractors.¹²⁶

The Indictment accused Tyson and its co-defendants of preferring to hire undocumented aliens to work at poultry processing plants because those workers, due to their illegal status and vulnerability as a result of their fear of being arrested and deported, were: (a) frequently forced to be more productive than legal workers, by methods such as subjecting them to faster moving conveyor belts; (b) frequently subjected to less humane working conditions than legal workers, such as fewer bathroom breaks;

¹²³ *Id.*

¹²⁴ *Id.* at 10.

¹²⁵ *Id.*

¹²⁶ *Id.* at 11.

and (c) less likely than legal workers to complain to Tyson management, to file a grievance with governmental agencies, to seek workers' compensation benefits, and to be absent from work.¹²⁷

The indictment then alleged fifty-eight overt acts that the defendants and their coconspirators (both named and unnamed) committed in furtherance of the conspiracy.¹²⁸ This section describes conversations that took place between the undercover agents and Tyson managers over a seven-year period, as well as actions carried out by Tyson managers to facilitate delivery of illegal workers during the same time. Examples of such actions include:

- At a meeting at Tyson headquarters, Tyson human resources supervisors and managers were directed by a human services manager: "Never, ever, admit hiring illegals," as reflected in written minutes of that meeting.¹²⁹
- Conversations in which Tyson managers discuss their need to hire undocumented workers and evade the I-9 requirements because the company is requiring them to keep wages low.¹³⁰
- Tyson managers requested the delivery of 50 to as many as 2000 illegal workers in person and on the telephone.¹³¹
- On several occasions, Tyson managers met with undercover agents and smugglers in conference rooms at Tyson facilities to request delivery of illegal workers and to discuss not only the need to evade the EVP/Basic Pilot Program, but also the exact process by which illegal aliens would be smuggled across the Mexican border, supplied with false documents for identity and employment authorization, and transported to Tyson plants for employment.¹³²
- Tyson managers agreed to contribute money toward the purchase of Social Security cards with fraudulent numbers.¹³³

¹²⁷ Indictment, *supra* note 3, at 12. Because immigrant workers such as those at Tyson do not have work authorization documents, they are often afraid to file for workers' compensation when they are hurt on the job, to report safety violations, or to effectively complain about their working conditions. In such situations, there are higher incidents of injury, high turnover, and hence a constant need for the company to bring in more workers. See Walpole-Hofmeister, *supra* note 21.

¹²⁸ *Id.* at 12–43.

¹²⁹ *Id.* at 13.

¹³⁰ *Id.* at 12–43.

¹³¹ *Id.*

¹³² Indictment, *supra* note 3, at 12–43.

¹³³ *Id.* at 20.

- Upon delivery of illegal workers, Tyson paid smugglers with corporate checks labeled “recruitment” for \$100 to \$200 per worker.¹³⁴
- Tyson managers requested a guarantee from smugglers that the illegal workers would stay for at least six months.¹³⁵
- The complex manager of the Noel, Missouri, plant stated that the EVP/Basic Pilot program “was a voluntary program that we put in to try and keep INS out of the place.”¹³⁶

Demonstrating how seriously the government took this prosecution effort, they sought to employ a rarely used forfeiture claim to recover more than \$100 million of the profits that the company earned during the time the incidents were said to have occurred.¹³⁷ The company also stood to lose its government contracts.¹³⁸ Each individual defendant faced a maximum sentence of five years in prison and a \$250,000 fine if convicted,¹³⁹ but the two managers who pled guilty received only a one-year probation and fines of \$2,100 and \$3,100, respectively, in exchange for testifying at trial.¹⁴⁰

Tyson denied all of the charges, insisting that it had consistently cooperated with the INS in its investigation and claiming that the few company officials involved were operating on their own authority in violation of company policy.¹⁴¹ Tyson cited a history of cooperation with the INS and maintained that company policies demonstrated a commitment to abide by the law,¹⁴² pointing out that in 1998, Tyson became one of the first and largest participants in the INS’s voluntary Basic Pilot Program

¹³⁴ *Id.* at 12–43.

¹³⁵ *Id.* at 35.

¹³⁶ *Id.* at 36.

¹³⁷ *U.S. v. Tyson Foods, Inc.*, 258 F. Supp. 2d 809 (E.D. Tenn. Jan. 14, 2003) [hereinafter Order of Jan. 14, 2003] (order granting in part and denying in part the defendants’ motion to dismiss the charges). *See also* Indictment, *supra* note 3, at 57 (including Forfeiture Allegations: 18 U.S.C. § 982, 18 U.S.C. §§ 371 and 1546—“As a result of committing the conspiracy offense to violate immigration laws of the United States as alleged in Count One of this Indictment, defendants . . . shall forfeit to the United States pursuant to Title 18, United States Code, Section 982, any property constituting or derived from proceeds obtained directly or indirectly as a result of the Count One conspiracy offense, that is, the financial gain derived from the offense alleged in Count One of the indictment, for which the defendants are jointly and severally liable; all in violation of Title 18, United States Code, Sections 371, 982, and 1546 (a) and (b).”).

¹³⁸ *Sanctions Enforcement*, *supra* note 46.

¹³⁹ Bill Poovey, *Charges Trimmed for 2 Tyson Managers*, ASSOCIATED PRESS, Mar. 23, 2003, available at http://www.tennessean.com/local/archives/03/03/30593360.shtml?Element_ID=30593360.

¹⁴⁰ *See* Docket, *supra* note 9.

¹⁴¹ *Immigration: Accused Smuggler of Alien Tyson Workers Pleads Guilty to Immigration Wrongdoing*, 06 Daily Lab. Rep. (BNA) A-7 (Jan. 9, 2002).

¹⁴² Press Release, Tyson Foods, Inc., *supra* note 35.

for electronic verification of applicants' employment eligibility.¹⁴³ In a press release issued on the opening day of trial, Tyson's spokesman Gary Mickelson stated: "Our success depends upon the people who work for us, and we work hard to ensure they are treated with dignity and respect."¹⁴⁴ Tyson claimed its hiring policies were clear and consistently enforced, and that any violations carried out by hiring managers fell outside the scope of their employment, were contrary to Tyson's good faith policies, and were not undertaken for the benefit of Tyson.¹⁴⁵

In the same press release, Mickelson went on to say:

Tyson Foods has always had a firm company policy prohibiting the hiring of undocumented workers. In fact, in November 1998 and again in March 1999, Tyson Foods voluntarily self-reported to the federal government possible immigration violations at company facilities. In April 1999, in response to concerns about possible violations of the Basic Pilot Program, Tyson Foods reiterated its "zero tolerance policy" for noncompliance with laws or company policy.¹⁴⁶

Mickelson also stated that the tapes made it clear that the individuals involved "went to great lengths to make sure that no one at corporate headquarters knew what was going on. The company has very strict hiring policies. When the company did find out about the violations of company policy, the employees involved were dismissed."¹⁴⁷

The company also raised the seemingly contradictory fact that while the undercover investigation was going on, Tyson was being investigated by civil rights officials from the Justice Department for allegedly scrutinizing Latino applicants too aggressively.¹⁴⁸ Because IRCA also makes it illegal to discriminate in hiring on the basis of national origin, employers may be subject to penalties if they treat job applicants differently because of how they look or sound.¹⁴⁹

In response to the lawsuit, Tyson fired the managers who pled guilty and claimed to redouble its efforts to avoid hiring undocumented workers by auditing the employment authorization documents of all employees and terminating anyone whose papers were found to be questionable.¹⁵⁰ In addition, Tyson advertised that they had devoted more resources to

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ Charge to the Jury, *U.S. v. Tyson Foods, Inc.*, No. 4:01-cr-061 (E.D. Tenn. 2003), issued Mar. 23, 2003, at 16 [hereinafter Jury Instructions], available at <http://www.tned.uscourts.gov/opinions/edgar/jrcr104937620010719.pdf>.

¹⁴⁶ Press Release, Tyson Foods, Inc., *supra* note 35.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ See 8 U.S.C.A. § 1324b (2006).

¹⁵⁰ Press Release, Tyson Foods, Inc., *supra* note 35.

training human resources personnel in methods for detecting improper work authorization documents, and that they were no longer using outside temporary agencies to fill positions in the company's processing plants.¹⁵¹

B. *The Trial*

The trial lasted seven weeks and included about sixty witnesses in addition to the tapes and volumes of documentary evidence.¹⁵² The two managers who reached plea agreements with the government testified against Tyson, stating that by facilitating the hiring of illegal immigrants to work at the Shelbyville plant, they were doing what the company demanded.¹⁵³ A former personnel manager at Tyson's Glen Allen, Virginia, plant testified that the starting hourly wage in 2000, seven dollars an hour, was too low to attract legal workers, especially because Tyson did not normally give pay increases until a worker completed three years.¹⁵⁴ An undercover United States Border Patrol Agent testified he and other undercover agents who posed as smugglers delivered 136 illegal immigrants to Tyson plants in six states.¹⁵⁵ Federal prosecutors presented jurors with hundreds of secretly recorded conversations in which undercover agents and managers of Tyson poultry plants arranged for illegal immigrant workers.¹⁵⁶

Despite the government's voluminous evidence, all three of the individual defendants testified that they were unaware that illegal immigrants were being hired.¹⁵⁷ Tyson's attorney, Thomas C. Green of the Washington law firm Sidley, Austin, Brown & Wood, complained to the jury that the company, which hired about 200,000 low-skilled workers during the three years of the government investigation, had done the best it could to hire only legal workers.¹⁵⁸ He told the jury it was not Tyson's fault "that there are approximately eight million undocumented workers in the United States . . . [or] that the systems that the government has set up for hiring employees are not perfect. If the prosecutors and the government want a perfect system, the government ought to be designing it."¹⁵⁹ Arguing against corporate liability for immigration violations, he further stated, "If the government wants to eliminate all undocumented workers it has to take

¹⁵¹ *Id.*

¹⁵² Brian Lazenby, *Tyson Foods, Managers Acquitted on All Charges*, CHATTANOOGA TIMES FREE PRESS, Mar. 17, 2003, at A1.

¹⁵³ Bill Poovey, *Tyson Found Not Guilty of Illegal Hiring*, LEXINGTON HERALD LEADER, Mar. 23, 2003, at C1.

¹⁵⁴ *Sanctions: Tyson Acquitted*, *supra* note 112.

¹⁵⁵ Poovey, *supra* note 109.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ Scott Kilman, *Jury Acquits Tyson, Managers of Plan to Hire Illegal Workers*, WALL ST. J., Mar. 27, 2003, available at <http://are.berkeley.edu/APMP/pubs/i9news/tysonacquitted032703.html>.

¹⁵⁹ *Id.*

companies such as Tyson Foods out of this business of figuring out who can work.”¹⁶⁰

C. Counts Dismissed

Twenty-four counts were dismissed. Nine counts alleging violations relating to Social Security cards were dismissed on the defendants’ motion due to the court’s refusal to interpret “identification document” as listed in 18 U.S.C. § 1546(b) to include Social Security cards.¹⁶¹ Fifteen other counts were dismissed, including all of the seven related to bringing illegal aliens to the United States for the purpose of commercial advantage and private financial gain,¹⁶² seven of the ten counts related to transporting illegal aliens for the purpose of commercial advantage and private financial gain,¹⁶³ and one of the eight counts of causing, inducing, aiding and abetting illegal aliens to possess counterfeit immigration and work authorization documents.¹⁶⁴

D. The Jury Acquittal

Only twelve of the original thirty-six counts remained when it was time for the jury to deliberate. After seven weeks of trial, the jury deliberated for less than one day and brought back a verdict of “not guilty” on all counts.¹⁶⁵ The company and other defendants were acquitted of all remaining charges, which had alleged that they conspired to recruit and smuggle unauthorized workers to work in poultry processing plants.¹⁶⁶ No fines were imposed and no one went to jail.

After the verdict, jurors said prosecutors were unconvincing.¹⁶⁷ “We felt like the government didn’t properly present its case. There were a lot of loopholes,” said one forty-three-year-old female juror.¹⁶⁸ Another juror,

¹⁶⁰ Kilman, *supra* note 158.

¹⁶¹ Order of Jan. 14, 2003, 258 F. Supp. 2d at 812.

¹⁶² These counts alleged violations of 8 U.S.C. § 1324(a)(2)(B)(ii) and 18 U.S.C. § 2 (see Indictment, *supra* note 3, at 48, 51 (Counts 3–7 and 14–15)). These counts were dismissed on March 21, 2003 (see Docket, *supra* note 9).

¹⁶³ These counts alleged violations of 8 U.S.C. § 1324(a)(1)(A)(ii), 1324(a)(1)(B)(i) and 18 U.S.C. § 2. See Indictment, *supra* note 3, at 49, 52 (Counts 8–12 and 19–20). These counts were dismissed on March 21, 2003, and Tyson was ultimately acquitted of the remaining three Counts (16–18) charging violations of 8 U.S.C. § 1324(a)(1)(A)(ii), 1324(a)(1)(B)(i), and 18 U.S.C. § 2 on Mar. 27, 2003 (see Docket, *supra* note 9).

¹⁶⁴ This count alleged violations of 18 U.S.C. § 1546(a) and § 2. See Indictment, *supra* note 3, at 53 (Count 23). This count was dismissed on March 21, 2003, and Tyson was ultimately acquitted of the remaining seven Counts (21–22 and 27–31) charging violations of 18 U.S.C. § 1546(a) and § 2 (see Docket, *supra* note 9).

¹⁶⁵ Bill Poovey, *Jury Acquits Tyson, Managers*, ASSOCIATED PRESS, Mar. 26, 2003, available at <http://www.couriernews.com/archivedstory.asp?ID=1866360>.

¹⁶⁶ *Id.* See also *supra* notes 163–164. Tyson was also acquitted of Conspiracy Counts 1 and 2 (see Docket, *supra* note 9).

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

a forty-six-year-old female, opined that the government did not prove that any Tyson managers other than those who pled guilty were involved. She explained her reasoning: “Nobody ever mentioned [the defendants’] names. They were never recorded, they were not on any tapes . . . I didn’t believe Ponder and Mabe.”¹⁶⁹

In response to the jury’s acquittal, Greg Lee, Tyson chief administrative officer and international president, stated, “While we’re pleased with today’s verdict, it’s unfortunate that Tyson Foods and our team members were needlessly subjected to this ordeal.”¹⁷⁰ He noted further that “the government’s concerns easily could have been addressed with a simple phone call to the company. This would have spared taxpayers the expense of a multi-million-dollar undercover investigation against a company that had always been willing to cooperate voluntarily.”¹⁷¹

Analyzing the verdict, Tyson attorney Mark D. Hopson of Sidley, Austin, Brown & Wood, explained that the jury found it hard to reconcile Tyson’s voluntary cooperation with federal authorities on the INS pilot programs with the top-down conspiracy alleged by the government.¹⁷² According to Hopson, the verdict shows that whether a company has firm and effective policies will be an integral part of a jury’s determination of whether the company itself, as opposed to individual employees, should be held liable.¹⁷³

III. EVALUATION AND CRITIQUE

In theory, employer sanctions and corporate criminal liability are crucial pieces of this country’s legal scheme to prevent illegal immigration. However, the standard for corporate liability applied in the Tyson case allowed the company to evade criminal liability despite the tremendous evidence presented against them. Permitting persistent violations of immigration laws directly impacts workplace conditions in the meatpacking industry and contributes to its further deterioration by allowing employers to exploit an undocumented workforce.¹⁷⁴ The standard for holding corporations criminally liable must be changed to strict vicarious liability if the prohibitions against smuggling and hiring illegal aliens are to be enforced.

¹⁶⁹ *Id.* Truley Ponder and Spencer Mabe are the two Tyson managers who pled guilty, *see supra* notes 119–120.

¹⁷⁰ Press Release, Tyson Foods, Inc., Statement of Tyson Foods, Inc. Upon Being Exonerated in Immigration Matter (Mar. 26, 2003), *available at* <http://www.prnewswire.com/cgi-bin/stories.pl?ACCT=104&STORY=/www/story/03-26-2003/0001914912&EDATE>.

¹⁷¹ *Id.*

¹⁷² Andrew M. Ballard, *Immigration: Tyson Foods, Managers Acquitted in Illegal Alien Hiring Conspiracy*, 59 Daily Lab. Rpt. (BNA) A-13 (Mar. 27, 2003).

¹⁷³ *Id.*

¹⁷⁴ *See infra* Part III.B.

A. *The Purpose of Corporate Criminal Liability for Immigration Violations*

Few people would argue against Congress's finding that the chance to work is the primary draw to the United States, and that the presence of undocumented workers coupled with corporate drive to maximize profits creates a cyclical incentive for employers to exploit the labor force. Efforts at the border to stop the inflow of illegal aliens have failed, as evidenced by the increasing number of illegal aliens in the United States each year since IRCA was enacted.¹⁷⁵ From the perspective of a potential immigrant, this cycle will only be broken when jobs are no longer available for undocumented workers. However, to extinguish job opportunities, employers must no longer have an incentive to make those positions available. IRCA embodies the Congressional effort to eliminate this incentive by punishing employers who hire undocumented workers instead of targeting the immigrants.¹⁷⁶

In deciding that employer sanctions would be the most effective mechanism for eliminating the availability of jobs,¹⁷⁷ Congress borrowed from the long-standing doctrine of corporate liability as a means for deterring corporate and agent wrongdoing. Corporate liability is a special kind of vicarious liability in which a corporation is held liable for the illegal actions of its agents, usually through the application of the *respondeat superior* doctrine.¹⁷⁸ In order to impose liability on a corporation, a corporate agent must have: (1) committed a crime (2) within the scope of his employment (3) with the intent to benefit the corporation.¹⁷⁹ The goal of such liability is to deter the unlawful acts of a corporation's agents by placing corporate assets at risk, thereby forcing the corporation to internalize the total costs of wrongdoing.¹⁸⁰

By making the *hiring* of illegal aliens unlawful, Congress intended to eliminate the availability of jobs by making it a sanctionable crime for corporations to allow the illegal employment relationship to exist, thereby removing the economic incentive that draws such illegal aliens to the United

¹⁷⁵ The estimated total unauthorized resident population increased from 3.5 million in January 1990 to about 7 million in January 2000. OFFICE OF POLICY AND PLANNING, U.S. IMMIGRATION AND NATURALIZATION SERVICES, ESTIMATES OF THE UNAUTHORIZED IMMIGRANT POPULATION RESIDING IN THE UNITED STATES: 1990 TO 2000 6 (Jan. 2003), available at <http://uscis.gov/graphiscs/shared/statistics/publications/index.htm>.

¹⁷⁶ See Bollerup, *supra* note 13, at 1019.

¹⁷⁷ See *supra* note 16.

¹⁷⁸ Khanna, *supra* note 105, at 1242.

¹⁷⁹ *Id.* at 1242–43.

¹⁸⁰ *Id.* at 1243–45 (noting failures of individual liability to deter illegal behavior, and listing reasons why corporate liability improves deterrence by enlisting the corporation as a monitor of its agents' behavior); see also V.S. Khanna, *Corporate Criminal Liability: What Purpose Does It Serve?*, 109 HARV. L. REV. 1477, 1494–95 (1996) (explaining how corporate liability functions indirectly by inducing shareholders to influence the behavior of corporate managers and employees in response to decreases in net worth that result from corporate sanctions).

States.¹⁸¹ The theory of corporate liability supports this chain of logic, but only if sanctions are enforced consistently and penalties are costly enough to counter the incentive.¹⁸² Without strict enforcement, IRCA fails to deter corporate violations because when prosecution is unlikely, the laws impose no actual risk on companies or corporate agents. Thus, there is no incentive to internalize the costs and self-monitor for wrongdoing. Further, even if IRCA were enforced, the minor penalties it prescribes are insufficient to deter corporate violations.

The Tyson case is an excellent example of IRCA's failure. Tyson employs over 114,000 workers and made over \$26 billion in 2005.¹⁸³ As a result of the enforcement action, only \$5,200 was collected from two individual defendants who pled guilty and no longer work for the company.¹⁸⁴ With the exception of legal fees and any damage to their public image that may have ensued, the Tyson corporation was not significantly penalized. As the company's attorney said, the message from this case is that if a company has policies in place, a jury will excuse a company for the illegal acts of its employees.¹⁸⁵ The problem is that there is no way for the jury to know whether the policies are truly representative of the corporate culture in which the criminal acts take place.

The Tyson case shows that the government was ready to follow through on its promise to prosecute companies for immigration violations. Unfortunately, an examination of the corporate liability standard applied by the District Court shows that without strict vicarious liability, it was possible for the jury to acquit Tyson despite the admissions of company managers and the pervasive nature of the violations.

¹⁸¹ See H.R. REP. NO. 99-682(I), *supra* note 20.

¹⁸² Khanna, *supra* note 105, at 1244, showing the need for steep sanctions (explaining that optimal deterrence is achieved only when sanctions equal the societal harm caused divided by the probability of being held liable for causing that harm, thus causing the wrongdoer to bear the full social costs of all illegal activities even if not caught most of the time); see also Jennifer Arlen & Reinier Kraakman, *Controlling Corporate Misconduct: An Analysis of Corporate Liability Regimes*, 72 N.Y.U. L. REV. 687, 696 n.23 (1997), showing the need for consistent enforcement (noting that "individuals are deterred more by a high probability of paying a relatively low fine than the relatively low probability of paying a high fine").

¹⁸³ TYSON FOODS, INC., *supra* note 93.

¹⁸⁴ See Docket, *supra* note 9 (recording the fines and Special Assessments of \$100 charged to each defendant who pled guilty). See also Bill Poovey, *No Jail Time for Ex-Tyson Workers: Former Managers Testified Against Firm in Immigrant Labor Case*, CHARLOTTE OBSERVER, May 13, 2003, at 3D (describing how after cooperating with prosecutors in the case against Tyson, former Tyson managers Truley Ponder and Spencer Mabe were given a year's probation and fined \$3,000 and \$2,000, respectively. The two men, who had pleaded guilty to conspiring to hire illegal immigrants, could have gotten five years in prison and a \$250,000 fine).

¹⁸⁵ Press Release, Tyson Foods, Inc., *supra* note 170.

B. The Standard for Corporate Criminal Liability Applied in the Tyson Case Was Insufficient

A variety of standards for corporate liability have been articulated by federal courts.¹⁸⁶ Generally, for a corporation to be liable for criminal offenses committed by its agents (including officers, employees, and other agents), the government must prove beyond a reasonable doubt that the criminal acts were committed within the course and scope of the person's employment and were intended to benefit the company.¹⁸⁷ Courts across the country have expanded on this rule in various ways, articulating further what is meant by "within the course and scope" of employment, and providing exceptions under which companies can avoid liability.

In the Tyson case, Judge R. Allen Edgar issued instructions to the jury on March 25, 2003 which articulated very narrow requirements for holding a corporation criminally responsible for the illegal acts of its agents.¹⁸⁸ The standard applied limited the scope of employment by providing two major escape clauses.

¹⁸⁶ See KEVIN F. O'MALLEY, JAY E. GRENIG & HON. WILLIAM C. LEE, FEDERAL JURY PRACTICE AND INSTRUCTIONS: CRIMINAL § 18.05, 721–34 (5th Ed. 2006) (describing variations on the standard used across the various federal circuit courts).

¹⁸⁷ *Id.* See also discussion of corporate liability doctrine *supra* Part III.A.

¹⁸⁸ Jury Instructions, *supra* note 145, at 17. The jury instructions included the following instruction regarding "Criminal Responsibility of a Corporation" (*italics* indicate language included by Judge Edgar that was not in the proposed jury instructions submitted by the prosecution):

Tyson is a corporation. I will now explain the law that applies to a corporation being responsible for criminal offenses which are committed on the corporation's behalf by its officers, employees, and agents.

A corporation can act only through its agents. The agents of a corporation are its officers, directors, employees, and other persons who are authorized by the corporation to act for it.

Tyson is entitled to be the same individual and impartial consideration of the evidence that the jury gives to a personal defendant. A corporation may be found guilty or be found not guilty of the offense charged under the same instructions that apply to a personal defendant.

For you to find Tyson guilty on a specific charge in the indictment, the government must prove beyond a reasonable doubt:

First, that each essential element of the crime charged against Tyson was committed by one or more of its agents;

Second, that in committing those acts Tyson's agent intended, at least in part, to benefit Tyson; and

Third, that each act committed by Tyson's agent was within the *course and scope* of that agent's employment by Tyson.

For an act to be within the course and scope of an agent's employment, the act must relate directly to the general duties that the agent was *expected to perform* for Tyson. It is not necessary for the government to prove that the act was authorized by Tyson *formally or in writing*.

An agent is not acting within the course and scope of his or her employment, if

1. *Only Duties the Agent Was “Expected to Perform” Fell Within the Scope of Employment*

In addition to requiring that the criminal act relate directly to the agent’s general duties, the District Court added language requiring that the general duties be ones that the agent was “expected to perform” for Tyson.¹⁸⁹ This phrase invites companies to argue, for example, that although the agent was charged with general hiring duties, he was not “expected” to engage in hiring practices involving the importation of illegal workers. This qualification leaves too much room for companies to avoid responsibility and should not be included in the standard for corporate vicarious liability for immigration violations in the workplace.

2. *“Good Faith” Efforts Absolved Liability*

The biggest escape clause present in the standard articulated in the jury instructions is the forgiveness granted to corporations that somehow tell their employees not to commit illegal acts.¹⁹⁰ This standard provides a catch-all affirmative defense for the corporate defendant by specifying that an act is not considered “within the course and scope” of an agent’s employment if the company has, “in good faith,” forbidden its agents to perform such an act.¹⁹¹ If, however, the corporate policy or work instructions are “merely a sham or pretense giving a false impression of compli-

that agent performs an act which Tyson has, in good faith, forbidden its agents to perform. In other words, Tyson is not responsible for acts committed by its employees and agents if Tyson, in good faith, ordered or instructed its employees and agents not to commit such acts. A corporation may not be found liable for acts which it genuinely tries to prevent.

On the other hand, Tyson may not avoid responsibility for its actions by meaningless or purely self-serving pronouncements. If Tyson has a specific corporate policy or issued work instructions prohibiting and forbidding its employees and agents from committing certain acts, but the corporate policy or work instructions were merely a sham or pretense giving a false impression of compliance with the law, then acts committed by its employees and agents contrary to the meaningless corporate policy or work instructions would be within the scope of their employment. In this regard, you should consider the extent to which Tyson took steps to notify its employees and agents of the corporate policy or work instructions, and also the extent to which Tyson actually implemented and enforced its corporate policy or work instructions.

If you find that the act of an agent was not committed within the *course and scope* of that agent’s employment or not committed with any intent to benefit Tyson, than you must consider whether Tyson later approved the act. An act is approved by a corporation if, after it is performed, another agent of the corporation having full knowledge of the act and acting within the scope of his employment with the intent to benefit the corporation, approves the act by his words or conduct. *A corporation is responsible for acts approved by its agents.*

¹⁸⁹ Jury Instructions, *supra* note 145, at 17.

¹⁹⁰ *Id.*

¹⁹¹ *Id.* at 17–18.

ance with the law, then acts committed by its [agents] contrary to the meaningless corporate policy or work instructions would be within the scope of their employment.”¹⁹² In sum, the jury instructions provided that “[a] corporation may not be found liable for acts which it genuinely tries to prevent.”¹⁹³

According to ICE spokesman Bill Strassberger, the dilemma is figuring out whether or not the company truly made a good faith effort.¹⁹⁴ He says the problem is that there are “some employers who will make a good faith effort with a wink and nod so they can hire necessary workers to staff up whatever their business is.”¹⁹⁵ Indeed, it will often be very difficult to distinguish between a “good faith” effort and a mere “sham or pretense.” For example, even if corporate policies prohibiting the hiring of illegal workers are distributed in print, posted on every wall, or expressed at every management meeting, these may all be mere charades, especially where there is no requirement for ongoing monitoring of staff compliance. Employers are likely to use such tactics to avoid liability, particularly when they know that the good faith exception will be available if an enforcement action is brought against them. The distinction is too precarious and the potential for abuse is far too great to hinge liability on this kind of exception.

In what was likely a response to this concern, Judge Allen included in his instruction that the jury could consider the “extent to which Tyson took steps to notify its [agents] of the corporate policy or work instructions, and also the extent to which Tyson actually implemented and enforced its corporate policy or work instructions.”¹⁹⁶ However, allowing the jury this wiggle room leaves the process vulnerable to confusion and outside sympathies. By allowing jurors to consider the existence of corporate instructions and policies against the illegal acts committed by agents, the court gave jurors permission to assign those policies whatever weight they see fit. In doing so, jurors bring in their own life experiences and general opinions about the broader issue. In the Tyson case, this allowance may have been a green light to jurors who felt the illegal hiring practices were unavoidable.

C. *Strict Vicarious Liability Is Needed*

A strict vicarious liability standard would result in the needed enforcement where the current standard failed because it would impose liability on the corporation whenever its agents performed an illegal act. Un-

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ Bill Poovey, *Tyson Just the Beginning? Cases Involving Immigration Laws Likely to Grow*, SAN JOSE MERCURY NEWS, Apr. 2, 2003, at 5C.

¹⁹⁵ *Id.*

¹⁹⁶ Jury Instructions, *supra* note 145, at 18.

der this standard, liability attaches regardless of any underlying expectations or company policies that may be in place as a facade. If an employee is involved in hiring an undocumented worker, the hiring activity is deemed to be performed as part of his duties for the company. Under a strict liability standard, it is irrelevant whether the company expected the agent to hire a legal or illegal worker, nor is it relevant whether an employee handbook forbids the hiring of illegal workers—a prohibited activity has occurred and the corporation will be held liable for it.¹⁹⁷ This is important because, as discussed above, a relaxed standard allows corporations to easily evade liability for immigration violations and thus no deterrent effect is realized.

Another rationale for imposing strict vicarious liability is that a corporation may be able to identify and sanction its agents much more effectively and more cheaply than the government.¹⁹⁸ It is clear that the government does not have enough resources to investigate and prosecute all of the companies it suspects may be violating immigration laws. The government should therefore encourage corporations to self-monitor and ensure internal compliance. A real threat of strict criminal liability, accompanied by penalties in excess of the costs avoided by hiring illegal workers, will induce corporations to abide by the federal laws and issue unambiguous directives to their workers to ensure compliance.

Of course, imposing strict corporate liability for immigration violations is subject to some strong criticism. While I argue that it is necessary to eliminate the good faith exemption in the context of enforcing immigration laws, it is generally thought that “[u]nless a corporation is relieved of criminal liability for acts committed against genuine corporate policy and directives, there is absolutely no compelling reason for a corporation to either direct its agents to conform to the criminal law or to police such policies or, for that matter, to police its employees.”¹⁹⁹ I believe the opposite to be true in this context. The willingness of illegal immigrants to live in undesirable regions of the country and work at depressed wage levels in substandard conditions sets off a ripple effect allowing the businesses to continue this cycle. Corporate executives currently have no reason to monitor the hiring practices of their plant managers and human resources personnel because, to date, employers have not been held liable for their actions.

In industries like meatpacking, the pressure to hire illegal workers comes from above—headquarters sets production goals and plant budgets; hiring managers are then left to figure out how to achieve them. As alleged by the government in the Tyson case, this is where the corporate

¹⁹⁷ For a discussion of the significance of a strict liability standard in the corporate context, see Khanna, *supra* note 105, at 1246.

¹⁹⁸ *Id.* at 1262.

¹⁹⁹ O'MALLEY, GRENIG & LEE, *supra* note 186, at 720.

culture develops, and courts must reverse that pressure—instead of allowing company brass to pressure hiring managers to meet corporate projections through whatever means necessary, courts have the power to induce executives to change the dynamics from the top down. Only when the corporate liability standard is revised to guarantee stiff sanctions against companies that violate immigration laws will executives have the incentives necessary to implement genuine policies against illegal hiring, actively monitor adherence, and make budget and pricing changes internally if necessary. Through strong enforcement measures, meatpacking companies will be forced to recruit, train, and hire authorized workers with legal protections, and in doing so, executives will be required to participate in real market cost-benefit analyses with respect to their hiring practices, workplace conditions and facility locations.

IV. CONCLUSION

The purpose of IRCA's employer sanctions provision is to reduce the incentive people have to immigrate illegally to the United States by reducing the number of jobs available to illegal workers. Laws regulating labor standards aim to ensure a minimum level of pay, safety, and work conditions for all employees. Because of the meatpacking industry's extreme characteristics—low-skill, dangerous, low-wage jobs that Americans are not eager to fill—the industry is a magnifying glass through which we can evaluate the dynamics of employer sanctions and labor standards. Without the guarantee of enforcement, we have seen that the mere threat of employer sanctions alone will not deter employers from hiring illegal workers. Nevertheless, that does not disprove sanctions' worth. Strictly enforced employer sanctions have the power to transform the meatpacking industry into one where executives take an active role in ensuring that legal hiring practices are carried out. In order to attract a legal workforce, the jobs will also have to be safer, pay more, and treat workers with dignity. If strict liability for immigration violations is imposed on employers in the meatpacking industry, the undercurrent of illegal hiring practices and its resultant depressed wages and dangerous conditions could be cleansed from within.

