Foreword

Dangerous Intersection

By GERALD L. NEUMAN*

IN FEBRUARY 2009, the University of San Francisco Law Review convened a Symposium for the purpose of investigating *The Evolving Definition of the Immigrant Worker: The Intersection Between Employment, Labor, and Human Rights Law.* On the eve of the Symposium, the theme was introduced by the delivery of the Jack Pemberton Lecture by Professor Juan F. Perea, and an ensuing conversation. This Symposium Issue provides a selection of the intellectually rich interaction among the participants in that multi-faceted discussion.

It is sobering to conclude that a key term in the emerging definition is *vulnerability.* The Symposium left no doubt that, in the first decade of the twenty-first century, immigrant workers face many threats to their rights and interests and lack sufficient means of defense. Those threats vary with matters of status, gender, ethnicity, and other characteristics, separately and in combination, but the differences are matters of degree. The threat of deportation, of themselves or family members, reinforces the other threats that confront all noncitizens and many citizens in the workplace. The articles published here seek to diagnose these threats and their causes, both proximate and historical, and to identify legal strategies for more effective protection.

Professor Perea's Jack Pemberton Lecture inaugurates the inquiry by exploring its historical context.[1] He shows how U.S. law has accommodated the desire of some employers for a dependent workforce, from the original compromise with slavery to modern exclusions from basic labor protections. Those exclusions have sometimes been racially motivated and, at other times, have disproportionately affected members of racial minorities. Today La-

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1. Juan F. Perea, *Destined for Servitude*, 44 U.S.F. L. REV. 245 (2009).

tina and Latino workers inherit legal disabilities that were imposed earlier on African Americans.

EEOC Regional Attorney William R. Tamayo provides a more detailed view of some of the legacies of slavery and the efforts of the Equal Employment Opportunity Commission ("EEOC") to combat them.[2] He gives examples of remedies the EEOC has obtained for racial and religious discrimination, sexual exploitation of workers, and human trafficking. He emphasizes the agency's determination to protect both lawful and undocumented immigrants, as well as citizens, against these injuries.

In *Slavery as Immigration?*, Professor Rhonda V. Magee discusses the need to incorporate the experience of transatlantic slavery into the historical narrative of U.S. immigration law.[3] She analyzes the advantages and risks of this perspective, including a concern about minimizing the singular horrors of that regime of official hereditary servitude. She shows how recognizing the connections between transatlantic slavery and modern forms of forced migration and labor exploitation could produce better understandings of both history and migration policy, and increase solidarity among minority communities.

Professor Bill Ong Hing's Article moves from Immigration and Customs Enforcement ("ICE") raids to a broader examination of historical racism, institutional racism, and the need for immigration reform.[4] The shocking details of particular recent raids become a window into the systemic injustice of immigration enforcement tactics and the current immigration framework, in view of its discriminatory history and present effects. Employer sanctions, he concludes, are not a neutral tool, but a final step in the process of dehumanizing undocumented workers. They should be abandoned, not re-engineered. Immigration reform should aim at accommodating visa demand and reversing the disadvantages that Latin and Asian countries have suffered.

The category of lawful temporary workers provides the subject of Professor Sharmila Rudrappa's Essay, particularly the group she calls "techno-braceros."[5] Although they are high-skilled employees, the de-

2. William R. Tamayo, *The EEOC and Immigrant Workers*, 44 U.S.F. L. REV. 253 (2009).

3. Rhonda V. Magee, *Slavery as Immigration?*, 44 U.S.F. L. REV. 273 (2009).

4. Bill Ong Hing, *Institutional Racism, ICE Raids, and Immigration Reform*, 44 U.S.F. L. REV. 307 (2009).

5. Sharmila Rudrappa, *Cyber-Coolies and Techno-Braceros: Race and Commodification of Indian Information Technology Guest Workers in the United States*, 44 U.S.F. L. REV. 353 (2009).

pendence of these workers on employers for their continuing presence in the United States renders them vulnerable to exploitation. She finds that the heavy concentration of Indian nationals among the H-1B employees produces a de facto racialized program. Moreover, it lengthens their waiting time for achieving the more secure status of permanent residence, because of statutory country quotas. The attendant commodification of their labor deprives them of citizenship and denies their humanity.

Professor Lorraine Schmall returns us to the subject of unauthorized workers, undertaking an empirical inquiry into the pattern of federal worksite enforcement actions.[6] She pulls together the sporadically reported data on ICE raids, particularly in the period 2007–2008, and compares the government's actual behavior with its rhetoric. She finds little evidence that the raids served their ostensible national security function, and she shows that sanctions were imposed primarily on employees, not on employers. She also questions why the arrests of employers that did occur appeared to disproportionately involve members of minority groups. Ultimately, she concludes that a large gap separates the government's asserted goals and its accomplishments in that period.

The final two articles address the workplace rights of undocumented immigrants, particularly in the wake of the Supreme Court's *Hoffman Plastics*[7] decision, which forbade the National Labor Relations Board ("NLRB") to award back pay remedies to undocumented immigrant workers dismissed in retaliation for supporting a union. That five-to-four decision is widely regarded as depriving the NLRB of its only effective means of protecting the organizational rights of undocumented workers.

Professor Ellen Dannin's ironically titled analysis offers evidence that the victims were vulnerable primarily as undocumented immigrant *workers*.[8] She shows that the weakness of federal labor law generally, and the ability of retaliating employers to shield themselves by identifying wrongful acts of their employees, often undermines the NLRB's protective efforts. She explains this ineffectiveness as resulting from a preponderant tradition of judicial hostility to labor law enforcement, rather than congressional direction. Given the tendency of

6. Lorraine Schmall, *ICE Effects: Federal Worksite Non-Enforcement of U.S. Immigration Laws, 2007–2008*, 44 U.S.F. L. REV. 373 (2009).

7. Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137 (2002).

8. Ellen Dannin, Hoffman Plastics *as Labor Law—Equality at Last for Immigrant Workers?*, 44 U.S.F. L. REV. 393 (2009).

judicial interpretation to divert legislative reforms, she argues that only a broad strategy including both litigation and public advocacy can establish and maintain a more just order.

Does international law offer a better vision for *immigrant* workers, documented and undocumented? Professor Christopher David Ruiz Cameron shows that *Hoffman Plastics* contrasts with a variety of international legal regimes that contemplate greater equality of workplace rights for immigrant workers.[9] He identifies global human rights instruments, conventions sponsored by the International Labour Organization, regional human rights instruments, U.S. free trade agreements, and European Union instruments, that either expressly or by interpretation provide inclusive treatment for various categories of immigrant workers. He argues that trade unions provide the most viable means for protecting workers' rights, and calls for greater respect for international standards guaranteeing access to the institutions of collective bargaining without regard to national borders.

From the transatlantic slave trade through the fields of Salinas to the global human rights movement, these articles illuminate the evolving definition of the immigrant worker.

9. Christopher David Ruiz Cameron, *The Borders of Collective Representation: Comparing the Rights of Undocumented Workers to Organize Under United States and International Labor Standards*, 44 U.S.F. L. REV. 431 (2009).