ILLEGAL IS NOT SIMPLY ILLEGAL: THE BROAD RAMIFICATIONS OF A PENNSYLVANIA TOWN’S ATTEMPT AT IMMIGRATION CONTROL, AND THE INHERENT PROBLEMS OF RACIAL DISCRIMINATION

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I. INTRODUCTION

In September, 2006, the Pennsylvania city of Hazleton passed the Hazleton Illegal Immigration Relief Act Ordinance1 (“Hazleton Ordinance”) designed to purge the city of crime stemming from the presence of illegal aliens2 and to make Hazleton “one of the most difficult places in the U.S. for illegal immigrants.”3 While the statute sought to assault employers who hire or landlords who house illegal immigrants in Hazleton, the reach of the vaguely worded4 statute will carry further than what is deemed as its supposedly limited scope. Even though the brakes

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1. HAZLETON, PA., ORDINANCE 2006-18 (2006). See generally Lozano v. City of Hazleton, 496 F. Supp. 2d 477, 484 (M.D. Pa. 2007) (holding large portions of Hazleton ordinance invalid). This Ordinance, against which the Lozano case would be brought, was an amended version of an earlier ordinance with the same name, which was passed in July of 2006. See HAZLETON, PA., ORDINANCE 2006-10 (2006).


4. The Ordinance contains references to identity information, for instance, although the documents needed for such “identity information” are never defined. Additionally, it fails to provide a definition for the term illegal alien; rather, it merely refers to a section of the Immigration Reform and Control Act of 1986 (IRCA) which has no such definition. HAZLETON, PA., ORDINANCE 2006-18 § 3; see Lozano, 496 F. Supp. 2d at 485, 545 (holding ordinance too vague with respect to documents needed for compliance).
were initially put on the ordinance’s implementation by a federal judge via a temporary injunction,⁵ and the statute was subsequently subjected to a permanent injunction on July 26, 2007,⁶ its effects had already been felt. As Lou Barletta, Mayor of Hazleton, stated: “I see illegal immigrants picking up and leaving—some Mexican restaurants say business is off 75 percent . . . . The message is out there.”⁷ Moreover, storeowners in the main shopping district of Hazleton claimed that business was down twenty to fifty percent.⁸

Hazleton is not the only city to have entertained the notion of implementing its own ordinances regarding illegal immigrants. Over thirty other cities across the United States have enacted legislation following in Hazleton’s footsteps, many modeling local legislation off of that passed in Hazleton.⁹ Even the state of Arizona has passed statewide legislation seeking to place limitations on the employment opportunities of illegal immigrants.¹⁰

Despite the clear statement of the Honorable James Munley in deciding to enjoin the Hazelton Ordinance, Mayor Barletta has promised to appeal the ruling. From a national vantage, other localities continue to pursue the course of Hazleton, seemingly undaunted, and perhaps more wisely, learning from the initial failures of the Hazelton Ordinance.¹¹ In the passage of each ordinance, a host of issues arise, ranging from whether or not there is federal preemption via the Supremacy Clause² in the field of immigration, to Fourteenth Amendment equal protection and due process issues, to Title VII employment discrimination claims.¹³

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5. City Codes on Illegal Immigrants Blocked, CHI. TRIB., Nov. 1, 2006, at C8 (describing a federal judge’s blocking of Hazleton from enforcing ordinance).


7. Powell & Garcia, supra note 2.


11. See Rona Marech, Rising Immigration Debate, Frederick Co. Official Proposes Denial of Services, BALTIMORE SUN, Sept. 23, 2007, at 1B (noting that Frederick County, Maryland, is debating a proposal based on limiting county services such as public schooling to immigrants); City Weighs Crackdown on Illegal Immigrants; Georgetown Explores ensuring contractors hire only legal residents, DALLAS MORNING NEWS, Jan. 9, 2008, at 3A (indicating Texas city of Georgetown’s contemplation of an illegal immigrant ordinance and noting Farmers Branch, Texas, as receiving a temporary restraining order against its renting ordinance).

12. U.S. CONST. art. VI, cl. 2.

13. Violations of 42 U.S.C. § 1981 (West 2008) may also be implicated, as indicated in the Lozano decision. See Lozano, 496 F. Supp. 2d at 546-48. As noted in this decision, §
Even if the proposed Hazleton ordinance and its kith and kin are able to survive the various legal battles which will inevitably be presented at every step of their incarnation, it is debatable whether or not the subsequent costs upon localities will outweigh the benefits derived from such ordinances. Riverside, New Jersey, ideologically contemporaneous to Hazleton, has recently repealed a similar law after its brief tenure saw economic and population decline, as residents—legal and otherwise—exited the city for grounds free of the potential harassment and bias fostered by such ordinances.\footnote{Belson & Capuzzo, supra note 9.}

This Comment will seek to analyze issues raised by the Hazleton Ordinance during its two weeks in court, as well as potential conflicts arising from implementation of like ordinances in the future. The results of this ordinance are not merely limited to adverse effects upon illegal immigrants who can no longer secure employment or a place to live. Adverse effects are also felt by legal immigrants, other individuals who are of a similar ethnic background to illegal immigrants, by employers, and also by the localities which seek to impose such ordinances.

II. BACKGROUND

Throughout much of 2006, an increased political and social emphasis fell upon illegal immigrants within the boundaries of the United States. Both the House of Representatives and the Senate proposed legislation (which subsequently failed) that provided for stiffer regulation of illegal immigration on the federal level, as well as the criminalization of the presence of illegal immigrants within the boundaries of the United States.\footnote{See, e.g., H.R. 4437, 109th Cong. § 706 (2d Sess. 2006) (demonstrating immigration reform legislation in 2006 failing to pass through both House and Senate); S. 2611, 109th Cong. § 832 (2d Sess. 2006) (showing Senate immigration reform failing to pass both House and Senate); see also John Broder, Immigration, from a Simmer to a Scream, N.Y. TIMES, May 21, 2006, § 4, at 1 (referencing attempts by House to criminalize mere status of individuals who are illegal).}

Rallies and protests were held across the nation in support and in protest of the proposed legislation.\footnote{See Jonathan Weisman, Congress Resumes Immigration Efforts, WASH. POST, Sept. 21, 2006, at A4 (protesting against Congressional legislation regarding immigration reform, "millions of immigrants [entered] into the streets" in protest).} Legislation was passed that would create a physical barrier along seven-hundred of the two-thousand plus miles of previously unencumbered border between Mexico and the United States.\footnote{Belson & Capuzzo, supra.}
Besides federally funded fencing, groups such as the Minutemen have taken it upon themselves to recruit volunteers and solicit funding to build portions of the fence between the two nations privately.\textsuperscript{18}

Much of the furor regarding illegal immigration that reared its ugly head in the summer of 2006 can be traced back to fears of lax borders and immigration policies leaving the United States vulnerable to future terrorist attacks.\textsuperscript{19} While political rhetoric focused primarily on the fears of future terrorism, it was clear that much more was at issue than national security.\textsuperscript{20} As protests raged across the country\textsuperscript{21} and efforts were undertaken to examine illegal immigrant populations within the United States, a clear emphasis was falling on that portion of the immigrant population present for the purpose of working, placing an onerous burden upon the illegal

\textsuperscript{A6} (explaining that a proposed House of Representatives bill "calls for a fence along the border [between Mexico and the United States] and makes illegal immigration a felony," although "it currently is a misdemeanor").

\textsuperscript{18}. See Minutemen Border Fence, http://www.minutemanborderfence.com (last visited April 11, 2008) (recruiting volunteers to aid in the creation of fence portions along the U.S.-Mexico border); see also Secure Fence Act of 2006, Pub. L. No. 109-367 (2006). The Secure Fence Act provided for double steel fencing in specified portions of the border between the United States and Mexico. The fencing accounted for 700 miles, or roughly thirty-three percent of the total border. The fencing operations were placed under the control of the Secretary of the Department of Homeland Security. \textit{Id.} at § 3. Despite placing control of the fence construction within the purview of the Department of Homeland Security, Representative Duncan Hunter, a principal sponsor of the Secure Fence Act, felt so uneasy as to the actual imminence of construction that he felt compelled to write to Secretary of Homeland Security Michael Chertoff to remind that the Secure Fence Act was a "mandate," and not merely a "recommendation." Chet Barfield, \textit{Border Fence \textquoteleft\textquoteleft will be built\textquoteright\textquoteright; Rep. Hunter calls Barrier a \textquoteleft\textquoteleft Mandate\textquoteright\textquoteright}, SAN DIEGO UNION-TRIB., Oct. 7, 2006, at B1. Despite this mandate, legislation passed and signed in the latter months of 2007 provided the Secretary of Homeland Security the discretion to create fencing where would be most prudent, and if the Secretary "determines that the use or placement of such resources is not the most appropriate means to achieve and maintain operational control over the international border at such location." H.R. 2764, 110th Cong. (1st Sess. 2007) (enacted).

\textsuperscript{19}. See Sean Holstege, \textit{House OKs Changes for Fence on Border}, ARIZ. REPUBLIC, Dec. 19, 2007, at 1 (demonstrating the local opinions on how to build the border fence). This increased discretion has led to pro-fencers to profess fears to suggest that the Secure Fence Act has been effectively gutted of its utility. \textit{See id.} (quoting Rep. Duncan) ("This action basically repeals the Secure Fence Act (of 2006) and undermines past efforts to secure our nation's borders.").

\textsuperscript{20}. See Kronholz, supra note 17 (describing a recent Republican ad claiming that accepting Mexican identification cards in the United States can threaten national security).

Hispanic communities within the United States.\textsuperscript{22}

In September of 2006, the City of Hazleton, Pennsylvania, passed its Hazleton Illegal Immigration Relief Act Ordinance.\textsuperscript{23} This legislation came in the midst of the push for illegal immigration reform, and in many ways exemplified the true xenophobic underpinnings\textsuperscript{24} of the push for immigration reform.\textsuperscript{25} Before the passage of the Hazleton Ordinance, Hazleton was a town of about 30,000 people, about one-third of whom were Hispanic.\textsuperscript{26} Mayor Barletta estimates that the number of Latinos who had left Hazleton by early November could be as high as 5,000.\textsuperscript{27} This estimate represents about one-half of its estimated Hispanic population before the passage of the regulation, but approximately one-sixth of the entire population of Hazleton.\textsuperscript{28}

The basis for the legislation was a perceived need to stem the rising tide of crime in Hazleton.\textsuperscript{29} The findings cited in the legislation make the

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  \item \textsuperscript{22} See Miriam Jordan, \textit{States and Towns Attempt to Draw the Line on Illegal Immigration}, WALL ST. J., July 12, 2006, at A1 (stating that officials who are pressing for local regulation of immigration claim concerns over stresses placed on schools and other public services, and therefore populations which are establishing themselves in communities, and not noting concerns regarding terrorism).
  \item \textsuperscript{23} \textsc{Hazleton, Pa., Ordinance} 2006-18 (2006) (criminalizing harboring and/or hiring illegal immigrants).
  \item \textsuperscript{24} As described by Pennsylvania Governor Ed Rendell, the Hazleton Ordinance is “mean-spirited” legislation acting to “feed off of hate and divisiveness.” \textit{Rendell Says Hazleton Ordinance Feeds Off Hatred}, SCRANTON TIMES, July 21, 2006, available at http://thetimes-tribune.com.
  \item \textsuperscript{25} When initially passed, the predecessor to the Hazleton Illegal Immigration Relief Act Ordinance called for establishing English as the official language of Hazleton, as well as calling for all official documents to be in English. \textit{See Hazleton, Pa., Ordinance} 2006-10 § 6 (2006) (“The City of Hazleton declares English is the official language of the City . . . [A]ll official city business, forms, documents, signage [sic] will be written in English.”). This section has been removed from the Hazleton Ordinance, likely because of the clear Civil Rights and Equal Protection violations that such a law would present.
  \item \textsuperscript{26} See Kwame Holman, \textit{Pennsylvania Town Passes Illegal Immigration Law}, transcript of radio program, available at http://www.pbs.org/newshour/bb/social_issues/july-dec06/immigration_09-01.html (originally aired Sept. 1, 2006) (stating that the entire population of Hazleton is roughly 30,000).
  \item \textsuperscript{27} See Barry, supra note 8 (citing Barletta’s estimate of the number of Latinos who had left Hazleton since the ordinance’s passage).
  \item \textsuperscript{28} See Holman, supra note 26 (“Hazleton’s Hispanic population . . . comprises almost a third of its 30,000 residents.”).
  \item \textsuperscript{29} As part of his analysis of the increasing crime rate necessitating the passage of the Hazleton Ordinance, Barletta indicated that there “might have had a murder once every seven years [in the past]—then like many other small cities, people would spend the next six years talking about it. But the [recent murder in Hazleton] was the second murder in the city within eight months.” Testimony of Mayor Louis Barletta, \textit{Field Hearing-Comprehensive Immigration Reform: Examining the need for a Guest Worker Program}, Senate Committee on the Judiciary, June 28, 2006, available at http://judiciary.senate.gov/hearing.cfm?id=1983. Note that a similar logic could be used to suggest that since both murders were committed by men, Hazleton would be just as well
factually unsupported claim that "[I]llegal immigration leads to higher crime rates, subjects our hospitals to fiscal hardship and legal residents to substandard quality of care, contributes to other burdens on public services . . . and diminishes our overall quality of life."\textsuperscript{30} As described by Mayor Barletta, the true impetus for the legislation came with two events: first, two individuals who were illegal immigrants allegedly killed a resident of Hazleton, and, second, illegal immigrants were involved in a drive-by shooting.\textsuperscript{31} The increase in the crime rate and its relationship to illegal immigrants is dubious in that the Hazleton Ordinance contains no factual evidence of any causal or corollary link. In fact, one statistical analysis indicated that the crime rate had risen at a rate which correlates with the increase in the size of the population.\textsuperscript{32} Despite assertions that the Hazleton Ordinance exists for the purpose of lessening crime in Hazleton, no evidence has been presented to suggest that it will serve to attain such a goal.

The importance of the Hazleton Ordinance lies in the fact that it is in no way an idiosyncratic situation; rather, the Hazleton Ordinance has become a sort of test case for a number of other cities and towns across the nation which are debating taking affirmative steps to regulate local immigration patterns. Currently, at least sixty other local governments have similar legislation waiting in the wings or are considering similar action.\textsuperscript{33} The Hazleton legislation has been used as model legislation for a number of these local ordinances.\textsuperscript{34}

The heart of the Hazleton Ordinance seeks to force illegal immigrants to leave Hazleton by punishing those individuals who either employ or

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\item 30. HAZLETON, PA., ORDINANCE 2006-18 § 2(C).
\item 31. \textit{60 Minutes: Welcome to Hazleton, One Mayor's Controversial Plan to Deal with Illegal Immigration} (CBS television broadcast Nov. 19, 2006) available at http://www.cbsnews.com/stories/2006/11/17/60minutes/main2195789.shtml (noting that the legislation's "catalyst was two violent crimes involving illegal immigrants; a May 10th murder by two Dominican men, and a drive by shooting").
\item 32. Powell & Garcia, \textit{supra} note 2 (finding that the "crime wave is hard to measure . . . [because] [c]rime is up 10 percent, but the population has risen just as fast.").
\item 33. \textit{See} Sean D. Hamill, \textit{Altoona, with no Immigrant Problem, Decides to Solve It}, N.Y. TIMES, Dec. 7, 2006, at A34 (noting that sixty local governments in twenty-one states have followed Hazleton's lead and are considering similar ordinances); \textit{see also} Miriam Jordan, \textit{States and Towns Attempt to Draw the Line on Illegal Immigration}, WALL ST. J., July 12, 2006, at A1 (indicating that Hazleton ordinance was inspired by similar San Bernardino ordinance); Kronholz, \textit{supra} note 17 (indicating other towns and cities within the United States considering similar legislation).
\item 34. \textit{See} Alex Kotlowitz, \textit{Our Town}, N.Y. TIMES, Aug. 5, 2007, § 6 (Magazine), at 30 ("[The Hazleton Ordinance] served as a model for many local officials across the country . . . .")
\end{itemize}
provide housing to illegal immigrants. The ordinance prescribes penalties for businesses that employ illegal workers that include both fines and a potential loss of business license, as well as prohibiting violating employers from obtaining city permits or contracts for up to five years. Despite federal law requiring only a reasonable inspection of documents authorizing work within the United States, the Hazleton Ordinance, as initially written, created a situation of essentially strict liability for an employer who employs an illegal worker. Similarly, landlords who knowingly or are "in reckless disregard" of a tenant's illegal immigration status are liable under the Act. Although penalties are imposed upon employers and landlords, the legislation's true intent remains to indirectly regulate illegal immigration at the local level.

Procedurally, with regards to employers, after the filing of a complaint by essentially any person, an employer must turn over "identity information" with regards to the questioned employee. The employer has three days to comply; a failure to do so results automatically in a suspension of the employer's business license, only to be restored with a signed affidavit indicating that the violation has ended. An employer with more than two violations is required to enroll in the federal Basic Pilot Program to electronically verify the authorization status of his employees. Note also that the statute provides the right to appeal to the Pennsylvania state courts.

After the passage of the Hazleton Ordinance in July of 2006, the City of Hazleton was met with opposition from a group of legal and illegal

36. Id. at § 4 (describing penalties businesses violating the ordinance may face).
37. See Collins Food Int'l, Inc. v. INS, 948 F.2d 549, 554 (9th Cir. 1991) (indicating that a reasonable inspection of work authorization documents is sufficient to avoid liability under the Immigration Reform and Control Act).
38. See Hazelton, PA., Ordinance 2006-10 §§ 4, 5 (2006) (indicating that "any entity that employs . . . an illegal aliens . . . whether directly or by . . . means, no matter how indirect" shall be liable under the Ordinance). The Ordinance provides neither an exception or "knowing" standard by which employers who are unaware of an individual's status might avoid liability.
40. Id. at § 4(B)(6). The Ordinance also indicates that an individual who participates in the Basic Pilot Program, a voluntary federal program by which employers may electronically check the work authorization status of their employees, may avoid such a suspension. Id. at § 4(B)(5).
41. Id. at § 4(B)(6)(b).
42. Hazelton, PA., Ordinance 2006-40, § 7(F) (2006) (amending the previous statute to "clarify the intent of . . . Ordinance 2006-18"). The section adds a right of appeal for landlords and employers to the Magisterial District Court for the City of Hazelton, "subject to the right of appeal to the Luzerne County Court of Common Pleas." Id.
residents,\textsuperscript{43} the American Civil Liberties Union (ACLU), the Puerto Rican Legal Defense and Education Fund (PRLDEF), and other interest groups.\textsuperscript{44} A complaint was initially filed in federal court in August, 2006; the plaintiffs reached a settlement with the City of Hazleton at this time, whereby implementation of the Ordinance would be delayed and could only be enacted with twenty days notice provided to the plaintiffs.\textsuperscript{45} The City of Hazleton subsequently retooled the ordinance into what is now the Hazleton Illegal Immigration Relief Act Ordinance. Afterward, the plaintiffs brought action in federal court and were granted a temporary restraining order prohibiting the legislation from being enacted until after proceedings challenging its validity and constitutionality were concluded.\textsuperscript{46}

Proceedings to permanently enjoin the ordinance were brought before Judge James Munley in the Middle District of Pennsylvania, with oral arguments running from March 12 until March 22, 2007.\textsuperscript{47} Plaintiffs, presenting an assortment of federal and state claims, had focused primarily on arguments that states were preempted by federal law from regulating illegal immigration, as well as arguing that the Ordinance violated the Fourteenth Amendment's Equal Protection and Due Process clauses.\textsuperscript{48} In July of 2007, Judge Munley announced his decision. While finding no equal protection violation, Judge Munley nonetheless found immigration regulation to be the express province and the implicit province of the federal government. He therefore found both a conflict and field preemption.\textsuperscript{49} Furthermore, he noted that the Ordinance was rife with due process violations because (1) it did not provide adequate notice, the "cornerstone" of due process, and (2) it did not provide for adequate mechanisms for appeal.\textsuperscript{50} The end result: a permanent injunction against

\textsuperscript{43} Residents who were either illegal or were unsure of their legal status were permitted to participate in this action as Jane or John Does. \textit{See Lozano}, 496 F. Supp. 2d at 515 (proceeding with Doe plaintiffs "provid[es] them an opportunity to secure the rights guaranteed them by the Constitution of the United States").

\textsuperscript{44} \textit{See Lozano v. City of Hazleton}, 496 F. Supp. 2d 477 (M.D. Pa. 2007) (indicating, in counsel roster, attorneys from the ACLU and PRLDEF among others).


\textsuperscript{47} \textit{Lozano}, 496 F. Supp. 2d at 487.

\textsuperscript{48} Plaintiffs brought a smorgasbord of complaints, alleging violations of "the Supremacy Clause, the Due Process Clause and the Equal Protection Clause of the Constitution of the United States." \textit{Id.} at 485. Plaintiffs also claimed that the ordinances violated 42 U.S.C. § 1981, the Fair Housing Act, landlord privacy rights, Pennsylvania's Home Rule Charter Law, the Landlord and Tenant Act and its police powers. \textit{Id.}

\textsuperscript{49} \textit{See Lozano}, 496 F. Supp. 2d at 521-33 (discussing both conflict and field preemption of the Ordinance).

\textsuperscript{50} \textit{Id.} at 534-37.
Hazleton from enforcing the Ordinance as drafted.\textsuperscript{51}

\textbf{A. \textit{Illegal Immigrant Workers within the United States}}

The Pew Hispanic Center estimates that there are currently 11.5 to 12 million illegal immigrants residing within the United States.\textsuperscript{52} About 7.4 million of these individuals are members of the workforce, which accounts for 4.9 percent of the civilian labor force.\textsuperscript{53} Of this 11.5 to 12 million individuals, 6.2 million (fifty-six percent) are from Mexico; 2.5 million more come from Latin America.\textsuperscript{54} In total, seventy-eight percent of the illegal population within the United States is of Hispanic descent.\textsuperscript{55}

The primary concentrations of illegal immigrants are in the states of California, Texas, Florida, and New York. California's estimated illegal immigrant population stands between 2.5 and 2.75 million; this is nearly fifty percent more than the illegal immigrant population in Texas, the state with the next highest population.\textsuperscript{56} Pennsylvania is ranked at sixteenth in the nation with an estimated population of between 125,000 and 175,000 illegal immigrants.\textsuperscript{57}

\textbf{III. EXAMINATION OF POTENTIAL LEGAL RAMIFICATIONS OF THE HAZLETON ORDINANCE}

The Hazleton Ordinance acts to deter the presence of illegal immigrants within Hazleton by prosecuting landlords who harbor and employers who employ illegal immigrants. This Comment will focus primarily on the legality of the employer-related provisions.

\textbf{A. \textit{The Immigration Reform and Control Act of 1986}}

1. Background

Prior to the current sweep of immigration regulations, the Immigration Reform and Control Act of 1986 (IRCA) served many of the same

\textsuperscript{51} Id. at 555.
\textsuperscript{53} Id. at 9.
\textsuperscript{54} Id. at 4.
\textsuperscript{55} Id.
\textsuperscript{57} Id.
purposes as the Hazleton Ordinance on a federal level.\textsuperscript{58} As the House Committee on the Judiciary explained in a report attached to the IRCA, “Employment is the magnet that attracts aliens here illegally . . . . Employers will be deterred by the penalties in this legislation from hiring unauthorized aliens and this, in turn, will deter aliens from entering illegally or violating their status in search of employment.”\textsuperscript{59} The courts have echoed the proposition that the IRCA “intended to remove an economic incentive for illegal entry . . . and to correct a policy in the past of allowing illegal aliens the full protection of all laws designed to protect workers legally within this country.”\textsuperscript{60}

Before the passage of the IRCA, the Immigration and Nationality Act (INA)\textsuperscript{61} prescribed penalties against individuals illegally within the United States, but it did not seek to impose any action against employers who hired illegal immigrants.\textsuperscript{62} As the Supreme Court noted, the INA has a “central concern . . . with the terms and conditions of admission to the country and subsequent treatment . . . .”\textsuperscript{63} The INA is “at best evidence of a peripheral concern with employment of illegal entrants”\textsuperscript{64}; the INA did not “mak[e] it unlawful for an employer to hire an alien who is present or working in the United States without appropriate authorization.”\textsuperscript{65} While the INA sought to penalize individuals who immigrated illegally into the United States, it did not take proactive measures of deterrence, as employers could freely hire workers without fear of redress. If the “magnet” for illegal immigrants was employment, the INA did little to counteract the pull of employment. Unlike the Hazleton Ordinance, it provided no employer disincentives from hiring illegal immigrants, and illegal immigrants were not dissuaded from entrance on the grounds that employment would be difficult to attain.

With the passage of the IRCA, the government finally created a deterrent for employers from hiring illegal immigrants. The IRCA provides that it is illegal for an employer to “hire . . . for employment in the United States an alien[,] knowing the alien is an unauthorized alien.”\textsuperscript{66} The IRCA provides for increasing monetary penalties for a violating employer, with the potential for criminal sanctions for engaging in a “pattern or

\begin{align*}
\text{58.} & \quad 8 \text{U.S.C.A.} \text{§ 1324a (2008).} \\
\text{59.} & \quad \text{H.R. Rep. No. 99-682(I), at 45, 46th (1986).} \\
\text{60.} & \quad \text{Patel v. Quality Inn South, 846 F.2d 700, 701 (11th Cir. 1988).} \\
\text{61.} & \quad 8 \text{U.S.C.S.} \text{§ 1101 \textit{et seq.} (West 2008).} \\
\text{62.} & \quad \text{See id. (indicating that penalties in the INA are prescribed solely to illegal immigrants).} \\
\text{63.} & \quad \text{De Canas v. Bica, 424 U.S. 351, 359 (1976).} \\
\text{64.} & \quad \text{Id. at 360.} \\
\text{65.} & \quad \text{Sure-Tan, Inc. v. NLRB, 467 U.S. 883, 892-93 (1984).} \\
\text{66.} & \quad 8 \text{U.S.C.S.} \text{§ 1324a(a)(2).}
\end{align*}
practice" of violation. Further, if an employer becomes aware of an employee’s status as illegal, the employer cannot “continue to employ the alien . . . knowing the alien is . . . an unauthorized alien with respect to employment.”

The primary pressure of the IRCA upon all employers is the mandatory verification of prospective employees’ status as authorized to work within the United States. With the advent of the IRCA came the I-9 Form, which employees are required to fill out upon being hired, and an accompanying set of documents used to verify worker authorization. Within three days of being hired, employees are required to provide verifiable documentation from a specified set of documents which indicate worker authorization. The employer is also required to keep documentation of worker verification for a specified period of time to demonstrate that the employer has taken steps to determine the authorization status of an employee. If an individual is a foreign national who is on a temporary work permit, a burden is placed upon the employer to periodically re-verify that employee’s work-eligibility status. While the IRCA does prohibit an employer from hiring an unauthorized worker, it also prohibits employers from discriminating against foreign nationals who are authorized to work within the United States.

While demanding employer action in the identification of illegal immigrants applying for employment, the Courts have nonetheless read the IRCA’s “knowing” intent requirement rather narrowly. While “knowing” can apply to actual knowledge or even constructive knowledge, the courts have found that an employer might discharge this requirement rather easily. Actual knowledge refers to knowledge held by the employer that the employee is unauthorized to work within the United States, whereas constructive knowledge may be discharged merely through a good faith

67. Id.
68. Id.
69. Id. at § 1324a(b).
71. Id.
72. Id. at § 274a.2(b)(2).
73. Id. at § 274a.2(b)(1)(vii).
74. Concerned that employers would discriminate against foreign workers who were authorized to work in the United States, Congress passed legislation to provide such injured individuals with a remedy. This was expanded to protect such employees from an employer seeking documents in excess of what the IRCA requires and other discriminatory acts. See Anne Marie Gallagher, 3 IMMIGRATION L. SERVICES 2D § 12:1 (noting impetus for legal remedy provided to foreign persons who suffer from employment discrimination); see also 8 U.S.C. § 1324b (establishing that it is an illegal employment to discriminate against an authorized worker as a result of their national origin or citizenship status).
75. See generally Collins Food Int’l, Inc. v. INS, 948 F.2d 549 (9th Cir. 1991).
76. Id. at 552 (referencing “knowing” requirement in IRCA).
inspection of an employee's verification documents and subsequent proper record keeping.\textsuperscript{77} While this standard is sufficient for liability under the IRCA, courts have warned that it must be applied "sparingly" so as "[t]o preserve Congress' intent."\textsuperscript{78}

In \textit{Collins Foods International v. INS},\textsuperscript{79} the Ninth Circuit found that the employer had not knowingly hired an unauthorized worker despite the fact that the employee's surname was spelled differently on his driver's license as compared to his social security card, both of which were presented to the employer for authorization verification.\textsuperscript{80} Furthermore, the court held that a failure of an employer to cross-reference the back of a social security card with an INS handbook did not qualify as "constructive knowledge" regarding the falsity of the employee's documents.\textsuperscript{81} In the end, the \textit{Collins} court establishes a "reasonable man" standard with regard to the review of verification documents by an employer.\textsuperscript{82}

2. Hazleton Ordinance and the IRCA

A number of questions arise when examining the Hazleton Ordinance in light of the IRCA. Is there general field preemption in the area of immigration law which would prohibit a locality such as Hazleton from legislating in that realm? Does the Ordinance hinder or interfere with an overarching federal scheme? If so, how might the Ordinance be written so as not to interfere with or frustrate the purpose of federal regulation? Further, how might such legislation be amended to fit within the larger federal regulatory scheme regarding immigration?

\textit{i. Preemption}

When examining the validity of state immigration legislation, one must consider whether it runs afoul of the Supremacy Clause by expanding in the realm of pre-existing federal regulation.\textsuperscript{83} Traditionally, the federal

\textsuperscript{77} Id. at 554 ("Congress did not intend the statute to cause employers to become experts in identifying and examining a prospective employee's employment authorization documents.").

\textsuperscript{78} Id. at 555.

\textsuperscript{79} Id.

\textsuperscript{80} Id. at 553.

\textsuperscript{81} Id.

\textsuperscript{82} Id. at 554 (quoting H.R. REP. No. 99-682, pt. 1 (July 16, 1986), \textit{reprinted in} 1986 \textit{U.S.C.C.A.N.} 5649, 5681 (noting that the reasonable man standard should be used to determine compliance with the IRCA); see also \textit{Etuk v. Slattery}, 803 F. Supp. 644, 645 (E.D.N.Y. 1992) (defining constructive knowledge as "what a reasonable and prudent employer should know")).

\textsuperscript{83} \textit{U.S. CONST.} art. VI, cl. 2.
government has regulated immigration in the United States. As stated in *Gonzales v. City of Peoria*: “the regulation of immigration is unquestionably an exclusive federal power.” As such, the exclusivity of control over immigration regulation falls to the federal government. However, the question of what might be considered a “regulation of immigration” is paramount to the discussion of whether or not the Hazleton Ordinance is preempted by the IRCA.

The validity of the Hazleton Ordinance and other state or local ordinances hinges on whether they are expressly preempted by the IRCA. The IRCA expressly “preempt[s] any State or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens.” In *Lozano*, Judge Munley found this clause sufficient to establish an express preemption against state or local laws such as the Hazleton Ordinance. Noting the caveat provided in the IRCA for state or local laws which provide sanctions regarding licensing, Judge Munley rejected Hazleton’s argument that this exception carved a niche for local legislation such as the Ordinance; rather, Judge Munley indicated that permission of the Hazleton Ordinance, with its ability to revoke business licenses, would provide for more stringent penalties than those provided by the IRCA, and thus is “counterintuitive” with a reasonable reading of the preemption clause. Additionally, the *Lozano* court found that the penalties imposed by the Ordinance for individuals found to be violating its terms were preempted by the IRCA, which permits state sanctions only where an employer has violated the IRCA.

It is noteworthy, however, that Judge Munley references no case law in his preemption clause analysis; rather, he only cites to the IRCA and a Report by the House Committee on the Judiciary. Nevertheless, this decision was made at the district court level, which might explain the lack of case law to support or injure suppositions. While Judge Munley may read the law as providing an express preemption, an ambitious and conservative jurist could arguably find that this caveat provided an

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84. 722 F.2d 468, 474 (9th Cir. 1983). The *Gonzales* court did acknowledge that federal immigration regulation “does not preempt every state activity affecting aliens.” *Id.*
85. 8 U.S.C. § 1324a(h)(2).
87. *Id.* at 519.
88. *Id.* at 519-20.
89. *Id.* (citing H.R. REP. NO. 99-682, pt. 1 (July 16, 1986), *reprinted in* 1986 U.S.C.C.A.N. 5649, 5662 (“The penalties contained in this legislation are intended to specifically preempt any state or local laws . . . . They are not intended to preempt or prevent lawful state or local processes concerning the suspension . . . [of a] license to any person who has . . . violated [the IRCA].”)).
exception to express preemption.\textsuperscript{90}

Therefore, the question that follows is whether or not the federal regulatory system established by the INA and IRCA preempts state action by comprising a system “so pervasive that no opportunity for state activity remains.”\textsuperscript{91} Prior to the enactment of the IRCA, the Supreme Court found that state regulation of the employment of illegal immigrants was outside the scope of immigration and not touched by the field preemption of immigration laid out by the INA.\textsuperscript{92} As a basis for these holdings, the Court maintained that simply because state regulation has features which serve to regulate aliens does not automatically indicate that such regulation is state regulation of immigration.\textsuperscript{93} Mayor Barletta’s contention that “[W]e’re not doing anything to the illegal alien. We’re simply punishing businesses that hire them and landlords who rent to them”\textsuperscript{94} is much in line with the notion that regulating employment of immigrants is not actually regulation of immigration.

Despite Mayor Barletta’s assertion that Hazleton’s legislation does not seek to regulate immigration, the Supreme Court recently found that the IRCA “forcefully” made combating the employment of illegal aliens central to “[t]he policy of immigration law.”\textsuperscript{95} While before the passage of the IRCA, the Court indicated that employment of immigrants was outside the scope of exclusive Federal regulation, the assertion dictated in \textit{Hoffman Plastics} indicates that the IRCA, and as such the regulation of employment of immigrants, has become such an essential part of regulating illegal immigrants that it is “central” to federal policy.\textsuperscript{96} Further, the IRCA explicitly preempts a state or locality from imposing civil or criminal penalties regarding this issue.\textsuperscript{97} While permitting some action by states, the IRCA explicitly forbids state or local “civil or criminal sanctions” on

\textsuperscript{90} In fact, the recent holding in \textit{Arizona Contractors Assoc., Inc. v. Candelaria}, the District Court case in Arizona, has found this caveat to provide for federal authorization of state and local legislation. 2008 WL 9362, *19-21 (D. Az. Feb. 7, 2008).

\textsuperscript{91} See Gonzales v. City of Peoria, 722 F.2d 468, 474 (9th Cir. 1983).

\textsuperscript{92} See \textit{De Canas v. Bica}, 424 U.S. 351, 358 (1976) (stating that there is no specific indication that “Congress intended to preclude even harmonious state regulation touching on aliens in general...” in enacting the ICA).

\textsuperscript{93} \textit{Id.} at 355 (“[T]he Court has never held that every state enactment which in any way deals with aliens is a regulation of immigration and thus per se pre-empted by this constitutional power.”).

\textsuperscript{94} See \textit{60 Minutes}, supra note 31.


\textsuperscript{96} \textit{Id.} at 147.

\textsuperscript{97} See 38 U.S.C. § 1324a(h)(2) (2000) (noting “imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens”).
employers who employ unauthorized workers.  

While criminal and civil penalties may be preempted by the IRCA, the next question is whether or not the licensing penalties imposed by the Hazleton Ordinance fit within the IRCA exemption. States and localities have traditionally been permitted to pass legislation which would permit local law enforcement officials to make arrests based upon violations of federal law, including violations of immigration law under the INA.  

However, the issue presented by the Hazleton Ordinance is not one of merely authorizing local authorities to enforce federal regulations. The Hazleton Ordinance strikes at employers more broadly than the IRCA: while the IRCA requires either knowledge or constructive knowledge of employment of an unauthorized worker by an employer, the Hazleton Ordinance includes wide-sweeping language that holds employers strictly liable for merely employing an illegal immigrant, regardless of the care which the employer undertook to inspect an employee’s documents.  

Besides the potentially discriminatory results that would impact authorized workers resulting from the Hazleton Ordinance, the broad scope of the ordinance compared to the IRCA would seem to compromise the legislative scheme developed by the IRCA. Whereas the IRCA seeks to discourage illegal immigration by providing employers with a disincentive for lax hiring practices, the Hazleton Ordinance would penalize even the most prudent of employers.

At the start of the Lozano trial on March 12, the Hazleton Ordinance read: “It is unlawful for any business entity to recruit, hire for employment, or continue to employ . . . any person who is an unlawful worker to perform work in whole or part within the City [of Hazleton].” In Crosby v. National Foreign Trade Council, the Supreme Court stated that “even if Congress has not occupied the field, state law is naturally preempted to the extent of any conflict with a federal statute.” The Court continued: “We will find preemption where it is impossible for a private

98. Id. Despite the fact that the IRCA permits states and localities to create certain laws regarding immigration, Pennsylvania Governor Ed Rendell recently expressed his feelings on the subject, stating that “[E]ffective immigration law is best made at the federal level—not state by state or municipality by municipality.” Jeff Gingerich, Politics in Pennsylvania 2006: The Governors Race—Swann and Rendell: Where They Stand, PENNSYLVANIA LAW., 19, 24 Sept.-Oct., 2006.

99. See United States v. Vasquez-Alvarez, 176 F.3d 1294, 1296 (10th Cir. 1999) (asserting that an arrest made by a state or local officer is permissible if state or local regulations have thus authorized).


101. See generally HAZLETON, PA., ORDINANCE 2006-18 § 4(a) (failing to provide for a “knowing” standard to avoid liability for employers who employ unauthorized workers).

102. Id.


104. Id. at 372.
party to comply with both state and federal law." As originally written, the Hazleton Ordinance would effectively create an inherent conflict between the federal statute and the local ordinance: an employer could have reasonably examined work authorization documents, satisfying the IRCA standard, and yet could be prosecuted under the Ordinance if such documents turned out to be falsified. With the introduction of a "knowing" standard, the Ordinance seemingly sets a higher level of cognizance than its de facto standard of strict liability; an employer could now conceivably comply with both standards. However, introduction of such legislation that appears to mirror the standard of the IRCA would suggest the Hazleton Ordinance to be duplicitous. Such mimicry would seem to emphasize the notion that this is in fact a field in which federal standards control. The federal coverage in turn invokes a general field preemption from local or state involvement in such legislation.

The Crosby Court proceeds to explain that if such a conflict exists and is an "obstacle to the accomplishment and execution of the full purposes and objectives of Congress" such law will be void. The question must be thus raised as to whether or not the Hazleton Ordinance would act as an "obstacle" to the "objectives of Congress." As noted above, the intent behind the IRCA was to limit the employment opportunities to illegal immigrants within the United States so as to provide a disincentive for illegal entrance.

The Hazleton Ordinance frustrates the purpose of the IRCA because it goes beyond merely creating a landscape for deterrence of illegal immigrants. Whereas the Congress, as interpreted by the Supreme Court, has taken pains to indicate the high level of proof needed to support a finding of constructive knowledge as intended by the IRCA, the Hazleton Ordinance would effectively eliminate that standard and replace it with something closer to strict liability. Such liability as proposed by the Hazleton Ordinance clearly runs afoul of the intent behind the IRCA which the Court determined in Collins Foods and conflicts with the Ninth Circuit’s statement that "the legislative history of § 1324a indicates that Congress intended to minimize the burden and the risk placed on the employer." With this interpretation of the IRCA, it seems apparent that the Hazleton Ordinance both conflicts with IRCA and contravenes the

105. Id.
106. Id. at 373 (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941)).
108. See Collins Foods International v. INS, 948 F.2d 549, 554 (9th Cir. 1991) ("Congress did not intend the [IRCA] to cause employers to become experts in identifying and examining a prospective employee’s employment authorization documents.").
109. Id.
Congressional purpose behind the IRCA. As noted in Judge Munley’s decision, local ordinances such as the Hazleton Ordinance may also frustrate federal purposes with regards to international diplomacy. In fact, recent local actions taken in Texas have drawn the ire of Mexican diplomats, which gives credence to the theory that such local ordinances in fact may potentially conflict with or frustrate the purposes of the federal scheme.

ii. Due Process Concerns Imbedded in the Hazleton Ordinance

Aside from being an improper state intrusion into a federally preempted area, Judge Munley also found that the Hazleton Ordinance violated the basic precepts of due process as required under the Fourteenth Amendment. Initially, he indicated that both employers and employees had a Fourteenth Amendment property and liberty interest, which would thereby implicate the Due Process Clause. In further analysis, Judge Munley described the procedures mandated by the Ordinance to be insufficient to meet the minimum requirements of Due Process.

According to the Lozano opinion, “[t]he fundamental requirements of due process are notice and a meaningful opportunity to be heard.” As the “cornerstone of due process,” notice is an essential element of a statute’s validity. However, the Hazleton Ordinance does not adhere to this proposition: regarding employees, it requires no notice that such a complaint has been filed against them. While the employer is required to then request “identity information,” a term left vaguely undefined in the Ordinance, that same employer may merely terminate that employee so as not to be exposed to potential liability.

110. Lozano v. City of Hazleton, 496 F. Supp. 2d 477, 528 (M.D. Pa. 2007) (“Excessive enforcement jeopardizes our alliances and cooperation with regard to matters such as immigration enforcement, drug interdiction and counter-terrorism investigations.”).
111. See Alfredo Corchado, Mexico to bolster immigrant defense Anti-defamation league weighed as consulates in U.S. go on offensive, DALLAS MORNING NEWS, Oct. 4, 2007, at A1 (indicating negative responses from Mexican consuls and government officials in response to local and national immigration reform efforts).
112. Lozano, 496 F. Supp. 2d at 537 (The Hazleton Ordinance “violates the due process rights of both the employers and employees and is thus unconstitutional.”).
113. Id. at 533-34.
114. Id. at 534-37.
115. Lozano, 496 F. Supp. 2d at 534 (quoting Harris v. City of Philadelphia, 47 F.3d 1333, 1338 (3d Cir. 1994)).
116. Id. at 536.
117. See id. (“IIRA fails to require that anyone provide notice to an employee when a complaint is filed or at any time during the proceedings.”).
118. Id. at 535 (“The term ‘identity information’ is not defined in the Ordinance.”).
119. Id. at 536 (“[W]hen a complaint is filed, the employer could merely fire the employee and avoid the hassle of determining the employees [sic] immigration status.”).
The potential for termination is only exacerbated by the fact that the employer's business license is subject to a suspension for a failure to produce the employee's "identity information" within three days. This suspension is automatic and does not hinge upon the actual work authorization of the employee. Regarding "identity information," the court indicated that without further definition, the statute facially fails to define what information an employer might need to gather for the subsequent hearing; this ambiguity thereby fails to satisfy the essential notice element of due process. The court further notes that while the employer may seek re-verification of the employee's work status, the employee is granted no such right, a shortcoming which further fails the notice requirement. The court also found that the Ordinance, in only permitting appeal in the Pennsylvania state court system, inadequately provides for appeal opportunities because work authorization status may only be determined by a federal immigration judge.

iii. Amended Hazleton Ordinance as Satisfying Equal Protection Concerns

The crux of plaintiffs' Equal Protection argument relied on a provision within the Ordinance which indicated that no complaint regarding tenancy or employment of an unauthorized immigrant would be deemed valid if "alleg[ing] a violation solely or primarily on the basis of national origin, ethnicity, or race." The plaintiffs argued that such a standard for determining the validity of a complaint permitted consideration of a protected class (i.e., national origin, ethnicity, or race), and thus was an invalid consideration. On March 15, in the midst of the trial, the City of Hazleton passed an amendment to the Ordinance eliminating the words "solely or primarily" from this standard. Judge Munley determined the previous version of that statute to be moot, and as such did not hear any arguments with regard to the use of "solely or primarily" in the Ordinance. As the new version did not permit a complaint filed with an impermissible motive to be deemed as valid, the Judge found no Equal

120. HAZLETON, PA., ORDINANCE 2006-18 § 4(B)(4).
121. Lozano, 496 F. Supp. 2d at 536 (stating that because the IHRA does not "specify the nature of [identity] information," employers "are left not knowing what documents they need for the 'hearing'").
122. Id.
123. Id. at 537 (holding that "[t]o refer those affected by the IIRA to a court that cannot hear their claim is a violation of due process").
125. Lozano, 496 F. Supp. 2d at 539.
126. Id. at 515.
127. Id. at 538-42.
B. **Discrimination Issues Arising Under the Hazleton Ordinance**

During an interview in the summer of 2006, Mayor Barletta poignantly defended the Hazleton Ordinance against claims that its effect would negatively impact legal immigrants, stating: "[A]s I've said many times, illegal doesn't have a race." Mayor Barletta may be correct in his assertion that "illegal" does not have race of its own. However, he misses the point that even though "illegal" does not have a race or other protected class of its own, regulating in such areas may lead to disparate treatment of members of a certain race or other protected class, or a disparate impact upon a specific group as a whole. A more apt description is provided by Dr. Agapito Lopez, a Hispanic resident of Hazleton, whose experience has shown him that the effect of the Hazleton Ordinance will be felt beyond simply the unauthorized population, "because everybody would look at us as if we're undocumented immigrants, because there's no way that they can tell if we're documented or not."

The Hazleton Ordinance, and others of its sort which seek to impose such a high burden on employers, may not be facially invalid by violating Title VII, but nevertheless may promote a form of de jure discrimination throughout Hazleton. The Hazleton Ordinance creates an incentive for employers to discriminate in their hiring practices, placing employers in a catch-22 regarding their hiring and firing procedures. The Hazleton Ordinance also appears to run afoul of Section 1981, which protects the legal rights of "[a]ll persons within the jurisdiction of the United States."

Title VII of the Civil Rights Act, initially passed in 1964, asserts that it shall be "an unlawful employment practice for an employer . . . to discriminate against any individual . . . because of such individual's race, color, religion, sex, or national origin." The protections from 128. _Id._
130. See Espinoza v. Farah Mfg. Corp., 414 U.S. 86, 88 (1973) (holding that under Title VII, the term national origin does not refer to citizenship).
131. Holman, _supra_ note 26. During the course of the trial, the Lechugas, two legal, Latino business owners in Hazleton, described the rapid decline in their business after passage of the act, because patrons, legal or otherwise, were afraid to solicit Latino businesses for fear of being profiled or harassed by police. _Lozano_, 496 F. Supp. 2d at 490. Mrs. Lechuga also told how a police car would park outside her restaurant, raising fears among her patrons: "people began to comment that the police [were] there to take the clients away when they came to eat." _Id._
133. _Id._ § 1981(a).
discrimination provided for in Title VII have been read by the Courts to extend not only to citizens of the United States, but also to illegal immigrants. The Supreme Court has interpreted the use of the terminology "any individual" to expand beyond the scope of United States citizenship and to include any person within the boundaries of the United States.\(^{135}\) However, while Title VII protections have been afforded to illegal immigrants, the protections do not cover discrimination by an employer on the basis of citizenship.\(^{136}\) Facially, this does not create a problem for an employer in the sense that he can freely discriminate against illegal aliens on the basis of their citizenship if the employer has knowledge that the individual is a not United States citizen and is not authorized to work within the United States.

The flip-side, however, is that employers will be placed in a difficult position when making hiring decisions in a town with an ordinance such as Hazleton's. When confronted by a prospective employee about whose work authorization the employer has doubts, such an ordinance threatens the employer with a revocation of his business license merely for a failure to produce the identity information of the individual whose work authorization is challenged, regardless of whether that individual is or is not authorized to work. Even though the Hazleton Ordinance places such a burden upon employers, it nonetheless fails to train employers in recognizing or identifying legitimate "identity information." Such a policy places the employer in the undesirable position of having to make determinations about an employee's status without training to make that determination, all while standing under the Sword of Damocles: a loss of a business license.\(^{137}\) In a town such as Hazleton, where one-third of its thirty thousand residents are of Hispanic descent, and with a population that has been estimated to include upwards of five thousand illegal immigrants,\(^{138}\) Hispanic individuals who are authorized to work, aside from those who are not, are also likely to feel the sting of a strict liability ordinance.

The Pew Hispanic Center estimates that nearly seventy-eight percent of illegal immigrants are of Hispanic descent.\(^{139}\) With such a disproportionately high percentage of Hispanic illegal immigrants, the prudent employer attempting to avoid liability under a local ordinance

\(^{135}\) See Farah, 414 U.S. at 95 ("Title VII was clearly intended to apply with respect to the employment of aliens inside any State.").

\(^{136}\) See id. at 88 (holding that under Title VII, protection for national origin does not equate to protection from discrimination on the basis of citizenship).

\(^{137}\) See Lozano, 496 F. Supp. 2d at 493 (revealing that one plaintiff's complaint indicated that despite requirement to check "identity information," he lacked "training in evaluating a person's immigration status or their documents").

\(^{138}\) Holman, supra note 26.

\(^{139}\) Passel, supra note 52, at 9.
based on strict liability would be discouraged from hiring any individual of Hispanic descent. When confronted with two individuals of similar qualifications, one Hispanic, the other Caucasian, an employer who is aware that one sixth of his town’s population is of illegal status, and further that over seventy-five percent of that one sixth is Hispanic, an employer trying to avoid liability under a local ordinance imposing strict liability for the employment of illegal immigrants has the incentive to avoid hiring the Hispanic applicant, even if both applicants appear to have proper work authorization. Assuming the Hispanic worker is actually legal and that his work authorization is valid, the employer runs into the catch-22: while he may have managed to insulate himself from the teeth of the local ordinance, he has potentially opened himself up to action under Title VII or an equivalent state law.\footnote{See, e.g., Pa. Human Relations Act, 43 P.S. §§ 951-63 (establishing a state level Civil Rights act substantially equivalent to the federal Civil Rights Act).}

The Hazleton Ordinance effectively sets the stage for employers to be subjected to a disparate treatment claim of either racial discrimination or a discrimination claim based on national origin. A disparate treatment claim follows the tripartite test as laid out in \textit{McDonnell Douglas Corp. v. Green.}\footnote{411 U.S. 792 (1973).} Initially, the McDonnell Douglas test demands that the plaintiff carry the burden of establishing a prima facie case of discrimination, which entails showing: (1) plaintiff is a member of a protected class; (2) plaintiff applied for and was qualified for a job; (3) plaintiff was rejected; and (4) the “position remained open and the employer continued to seek applicants.”\footnote{See id. at 802 (establishing the \textit{McDonnell Douglas} Test, articulated by Justice Powell).} The burden then shifts to the employer to establish a legitimate, non-discriminatory reason as to why the plaintiff was not hired.\footnote{Id. at 802-03.} If the employer meets this relatively low burden, the burden once again shifts back to the plaintiff to demonstrate that the employer’s proffered non-discriminatory reason is pretextual.\footnote{Id. at 804.} Intent may be inferred by use of circumstantial evidence, or may be demonstrated via use of direct evidence of discriminatory intent.\footnote{Cf. Internat'l Brotherhood of Teamsters v. United States, 431 U.S. 324, 358 n.44 (1977) (“[T]he \textit{McDonnell Douglas} formula does not require direct proof of discrimination.”).}

Establishing a prima facie case, as indicated above, is not difficult. The plaintiff’s burden is not onerous, and while the presumption of discrimination formed under the prima facie case is rebuttable through the showing of a legitimate, non-discriminatory reason, it nonetheless places the employer in a position of potential legal peril. Under Texas
Department of Community Affairs v. Burdine, the defendant’s burden of persuasion is not high because he is not required to persuade the court that his proffered reason was in fact truthful. All the plaintiff needs to do is to refute the defendant’s non-discriminatory reason and further demonstrate an intent to discriminate (which can be inferred from circumstantial evidence) to find liability—in this case demonstrating intent to discriminate “because of . . . national origin.” An employer is thus placed in the difficult position of balancing the risk of strict liability under the Hazleton Ordinance, if an individual whom he hires turns out to be unauthorized, with the threat of a Title VII dispute in front of the Equal Employment Opportunities Commission, if the employer has acted to avoid liability under the Hazleton Ordinance by failing to hire individuals whom the employer fears might be unauthorized workers.

The question also arises as to whether or not the plaintiff could use the Hazleton Ordinance as evidence to demonstrate a discriminatory intent by the employer. Considering its strict liability nature, it would not seem far-fetched that a plaintiff could use the presence of such an ordinance to both refute the defendant’s non-discriminatory reason and to establish a basis for intent to discriminate. If it can be raised, the employer is further limited in his ability to protect himself from liability. While an employer who discriminates is deserving of liability, it is unfair and confusing to subject an employer to potential liability for both his action and inaction.

As if presenting a motivation to discriminate was not bitter enough, the Hazleton Ordinance as written would actively promote employer discrimination against individuals whom the employer held any fear of maintaining illegal status. Whereas Title VII threatens only monetary damages (except for individuals who pervasively discriminate), the Hazleton Ordinance threatens greater penalties in that it permits the city to revoke both business permits and potential future city grants. By establishing a higher standard of strict liability, the Hazleton Ordinance forces the employer to veer away from certain job applicants. As mentioned above, an employer is placed in the unenviable position of choosing between potential liability under Title VII or under the local Ordinance. Because penalties are greater under the Hazleton Ordinance, employers would likely be motivated to choose the risk of liability under Title VII and subsequently discriminate against individuals on the basis of race or national origin to avoid losing their business licenses. The Hazleton Ordinance is thus acting to promote discrimination.

147. Id. at 254 (“The defendant need not persuade the court that it was actually motivated by proffered reasons. It is sufficient that the defendant’s evidence raises a genuine issue of fact . . . .”).
By creating more taxing ramifications than federal law, the Hazleton Ordinance forces employers to make a cost-benefit analysis between facing potential liability under either Title VII or the Hazleton Ordinance. Title VII is largely focused on remedial damages and, while punitive damages are available, they are not necessarily part of a remedy. An employer thus must make the choice between remedial damages under Title VII (merely hiring the individual or remitting back-pay) or losing a business license under the Hazleton Ordinance. Harsher penalties under the Hazleton Ordinance would thus incentivize discrimination, as discrimination based on national origin could help to indemnify the employer against liability which would result in the loss of the employer’s business license. With such an absurd result, the Hazelton Ordinance would likely be juxtaposed to the purpose of Title VII and could be determined to frustrate its purpose, therefore being preempted.

VI. PRAGMATIC CONCERNS OF THE HAZLETON ORDINANCE

The problems resulting from the Hazleton Ordinance are manifold and serve to create a system that is amicable to neither employers nor employees. Beside the simple question of whether or not the Ordinance as written is preempted by the IRCA and possibly by Title VII, the Ordinance places employers in the uncomfortable position of having to determine a job applicant’s employment eligibility on the basis of race or national origin. The irony of the Hazleton Ordinance is that it effectively damages the community in a number of ways, yet offers only a questionable upside. While evidence does indicate that crime has risen in recent years in Hazleton, examination of this rise has indicated that it is roughly proportional with the general increase in population, and not increasing disproportionately as a result of an increased presence of illegal workers.\(^{149}\)

Before the passage of the Ordinance, the town was experiencing a revival of sorts, with an increase in the number of local businesses.\(^{150}\) However, since the passage of the Hazleton Ordinance, there has been a clear decline in the number of businesses. Large numbers of individuals have left—not only illegal immigrants, but also authorized individuals who had either lost significant business or were fearful of discriminatory treatment as a result of the passage of the Ordinance.\(^{151}\) The town boasts a

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149. Powell & Garcia, supra note 2 (indicating that the increase in crime in Hazleton is roughly proportional to increase in population).

150. See Barry, supra note 8 ("[B]y 2000, [Hazleton's] population had declined to 23,000 . . . . The Latino arrivals—many of them from New York and New Jersey—opened 50 businesses downtown and boosted property values.").

151. See 60 Minutes, supra note 31 (relating statements made by an authorized Hispanic storekeeper whose business declined an estimated fifty percent, and who has been repeatedly asked when she will leave town).
mayor who is excited by the prospect of business being down in certain Hispanic stores\textsuperscript{152} and who states that other stores are likely to go under as an indication of the Ordinance’s success.\textsuperscript{153} Farmers complain that they no longer have individuals able to work their lands, and as such will have difficulty sustaining their farms.\textsuperscript{154} The Ordinance has probably created an atmosphere that promotes discrimination and xenophobia within the population. The raving reviews of the Ordinance by white power groups excited by the prospect of the “First Nazi City in [the United States]” are also a potential reason for suspicion.\textsuperscript{155} The sentiment of xenophobia is increasingly highlighted by Hazleton’s decision to concurrently pass an ordinance that mandated English as the official language for all local government actions and business along with the Hazleton Ordinance.\textsuperscript{156} This simultaneous passage of an official language ordinance undercut the argument that the Hazleton Ordinance was merely to promote legal citizenry, and instead suggests that there is a wider scope of intent to exorcise the demon of illegal immigrants without concern to individuals whose primary language or cultural heritage is other than English. While the employment and tenancy ordinances may have the greatest pragmatic impact upon the daily lives of residents of Hazleton, the Official English Ordinance does little more than magnify the intention of the acts overall: that these acts are not designed for the purpose of correcting the problem of illegal immigration per se. Rather, there appears to be deliberate intent to create an environment that is both hostile and difficult to navigate for

\textsuperscript{152} See Powell & Garcia, supra note 2 (quoting Mayor Barletta as asserting that the fact that some Mexican restaurants reported a decline in business of seventy-five percent since passage of the Hazleton Ordinance as evidence that “The message is out there.”).

\textsuperscript{153} See Barry, supra note 8 (referencing the statement by Mayor Barletta that despite a potential decrease in business, “one step backward” may be necessary to “move one step forward”).

\textsuperscript{154} See id. (describing a farmer who, unable to find workers after passage of Hazleton Ordinance, notes that “[m]ost people couldn’t last one day” doing the farm work immigrants had previously done on his farm).


individuals who fail to use English as their primary language.

Policy reasons indicate that discrimination against illegal immigrants may actually prove damaging to state economies. Despite fears that illegal immigrants actually hurt the greater economy, recent analysis of the impact of illegal immigrants upon statewide economies suggests the contrary. A recent report by the Texas Comptroller found that the overall effects of illegal immigrants within the state of Texas actually proved beneficial to the state economy. Utilizing estimates of state money used to provide services for illegal immigrants as opposed to the estimated amount paid in taxes by immigrants, the state actually improved financially. It is worth noting that Texas does not have a personal income tax, which may create a result which differs from states which do have such an income tax. Regarding economic factors, illegal immigration will have a positive impact in certain areas while simultaneously having a negative impact in others. In the words of one professional, however, "the overall consensus in the economics profession is that immigration—whether legal or illegal—is a net plus for the economy." It is unclear what effect illegal immigration has on the overall job market. While some economists contend that illegal immigration drives down wages, by just how much is undetermined. As suggested by the Texas report, illegal immigration may actually act to keep wages competitive.

A locality which undertakes an ordinance such as the Hazleton Ordinance is likely to place itself in financial danger, and Hazleton is already seeing such effects. Because of the litigation mounting against the City, Mayor Barletta and the City of Hazleton have found themselves soliciting donations to help pay for the legal costs which will be incurred.

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157. See Carole Keeton Strayhorn, Texas Comptroller, Special Report of the Office of the Comptroller: Undocumented Immigrants in Texas: A Financial Analysis of the Impact to the State Budget and Economy, Dec., 2006, at 3, 17 (indicating that the presence of unauthorized workers in Texas helps to keep wage prices competitive and to defeat labor shortages which would drive down the values of exports, as well as providing an overall benefit to the state economy when compared to the costs incurred as a result of unauthorized workers).

158. Id.

159. Id.

160. Bob Moos, The Right Move: Remember Tax Man When Choosing Next Nest, THE DALLAS MORNING NEWS, Mar. 3, 2008, at 1D ("Texas is one of seven states without personal income taxes.").


162. Id. (citing varying estimates as to the effect of illegal workers on authorized wages).

163. See Strayhorn, supra note 157, at 17 (suggesting that illegal immigrants help to keep the wages of authorized Texans competitive).

For a city with a budget of merely 7.5 million dollars, the legal fees could demand a monumental cut-back in services rendered, and Hazleton is already having trouble "paying for services like hiring an adequate number of police officers." 165 Besides the extensive litigation costs which Hazleton will incur—and Mayor Barletta promises to take any litigation all the way to the Supreme Court 166—localities also may find themselves exposed to financial risks. Insurance companies, wary of the vast array of claims to which the locality is opening itself up to, will refuse their services, or at the least tend to charge higher rates. 167 Severe financial losses may likely also be incurred from the array of discrimination claims that are likely to arise from such ordinances. The costs of litigation and damages against a small town unable to purchase insurance because of such an ordinance would prove highly damaging to its limited budget.

While economic reasons are valid to dismiss an ordinance such as Hazleton’s, the far-reaching discriminatory impact that such ordinances will have is an even greater reason to discourage this practice by localities. Mayor Barletta proudly touts his desire to make his city one of the “toughest” in the United States when it comes to dealing with illegal immigrants, 168 but the question must be raised as to whether this is a sound public policy. The effects that such tough regulation will have places the true burden on those individuals who are legally within the boundaries of the United States yet will be discriminated against in employment and in their daily interactions if they are wrongly perceived as illegal. Title VII of the Civil Rights Act proscribes "not only overt discrimination but also practices that are fair in form, but discriminatory in operation." 169 While it promotes a facially neutral policy related to discrimination, in operation the Hazleton Ordinance promotes and condones using discriminatory action. The effects of the Hazleton Ordinance reach beyond the scope of mere immigration policy into areas of xenophobia by promoting the isolation of one cultural community for the comfort of another.

rfi=6 (indicating a redoubled effort to raise money for legal defenses by Hazleton).

165. Id.

166. See Erika Hayasaki, Pennsylvania city immigration law is in judge's hands: His ruling on Hazleton may have repercussions across the country, L.A. TIMES, Mar. 23, 2007, at A24 (noting that Barletta “is prepared to take the fight to the Supreme Court.”).


168. See Barry, supra note 8 (quoting Mayor Barletta’s desire to make Hazleton “one of the toughest cities in America for illegal aliens”).

V. ORDINANCES CURRENTLY ARISING IN OTHER STATES AND TOWNS

The Hazleton Ordinance is in many ways a test case for a much larger phenomenon and may be seen as a microcosm of a wider trend of local and state government attempts to regulate immigration, or at the very least to more strictly control immigrants within their boundaries. On January 1, 2008, the Legal Arizona Workers Act came in to effect—this legislation provides for the loss of business licenses for the knowing or intentional employment of unauthorized workers, and places an affirmative burden upon employers to utilize the Basic Pilot Program—an online work-authorization verification program. While Hazleton was a local ordinance, it was met with at least some degree of reticent apprehension at the state level; Arizona’s program has been passed with the full authority of the state. Further, this statute has already survived an action seeking to place a temporary restraining order upon its enforcement upon initial challenge in a District Court. Trial for a permanent injunction was held on January 16, 2008 and, unlike the result in Hazleton, Arizona’s law was upheld by Judge Neil Wake. Whereas Judge Munley found the Hazleton Ordinance to be clearly preempted, Judge Wake offered a starkly differing opinion, holding not only that Arizona’s Act was not preempted, but that it was expressly authorized by the IRCA. These two interpretations stand in direct contradiction with each other, and with both being appealed to their respective circuits, resolution on the matter—or further confusion—appears to be forthcoming.

In 2006, Arizona also passed a referendum denying in-state benefits to students unable to prove their in-state residency. Besides problems that this may cause to individual students regarding their immediate plans post-graduation in June and an already declining college enrollment, such

170. H.R. 2779, § 23-214 (Ariz. 2007) ("Every employer . . . shall verify the employment eligibility of the employee through the Basic Pilot Program . . . .")
171. See, e.g., Rendell Says Hazleton Ordinance Feeds Off Hatred, supra note 24 (quoting Governor Rendell as calling the Hazleton Ordinance “mean-spirited”).
172. See Arizona Contractors Assoc., Inc. v. Napolitano, 526 F. Supp. 2d 968 (D.C. Ariz. 2008) (dismissing an action for temporary restraining order because the Court found that there was no case or controversy, as plaintiffs were not injured and defendants were improperly named); see also Robert Robb, Sanctions Reality Check, ARIZ. REPUBLIC, at 7.
173. See generally Arizona Contractors Assoc., Inc. v. Candelaria, 2008 U.S. Dist. LEXIS 9362 (D.C. Ariz. 2008); See also Randal C. Archibold, Arizona Seeing Signs of Flight by Immigrants, N. Y. TIMES, Feb. 12, 2008, at A13 (indicating that appeal after a ruling upholding the Arizona law, petitioners are appealing to the Ninth Circuit).
175. The text of the passed Proposition 300 reads “A person who is not a citizen of the United States . . . is not entitled to tuition waivers, fee waivers, grants, scholarship assistance, financial aid . . . .” A.R.S. § 15-825(b) (2008).
176. See Jesse McKinley, Arizona Law Takes a Toll on Nonresident Students, N.Y.
legislation seems disastrously short-sighted, essentially guaranteeing Arizona a generation of young adults who are under-educated in relation to their abilities. Further, Proposition 300, as this referendum is known, will lead to increased litigation for improperly denied benefits, or potentially discriminatory acts. As these complaints mount and the cost of under-educated adults mount, whatever state finances might be saved through the exhaustion of such benefits will become more and more dubious.

California has taken a different approach to that of Arizona by creating legislation that prohibits discrimination while leasing apartments to unauthorized workers.\(^{177}\) This action was largely in response to local legislation passed in Escondido that reflected the anti-tenancy provisions of the Hazleton Ordinance.\(^{178}\)

At a more local level, some towns have taken it upon themselves to draft varying creative legislature to further the assault upon unauthorized workers. Certain towns have proceeded with legislation similar to Hazleton's, while others, such as Irving, Texas, have authorized their police forces to engage in the Criminal Alien Program (CAP)—a program whereby local authorities may contact federal authorities at any time to determine whether an individual who has been arrested is also an unauthorized worker.\(^{179}\) It seems fair to say that such a program can easily promote racial or ethnic profiling regarding the choice of prisoner whose authorization is to be examined (leading to vast litigation and damage costs for the locality), unless local authorities invoke this power for each individual arrested (which, in turn, would suggest great waste and drain upon state and federal resources).

Rather than seek a frontal assault on immigrants through employment and housing, Frederick County, Maryland is toying with a set of backdoor prohibitions which would remove from unauthorized workers benefits that are generally available.\(^{180}\) At the same time, Riverside, New Jersey, an early anti-immigrant proponent with legislation similar to Hazleton's, repealed its local ordinance when it witnessed a decline in its economic

\(^{177}\) Times, Jan. 27, 2008, at A14 (indicating that by December, after passage of the referendum Proposition 300, 1,700 students at "Maricopa colleges" had been denied benefits).

\(^{178}\) See Cal. Civil Code § 1940.3 (West 2008) (implementing legislation that prohibits cities and counties from mandating that landlords seek nationalization documentation from tenants).

\(^{179}\) See Randal C. Archibold, State Strikes Balance on Immigration, N.Y. Times, Oct. 14, 2007, at A27 (indicating that bill was passed in part as a response to political pressure created by the previous Escondido legislature).

\(^{180}\) Brandon Formby, Numerous Arrests Thrust City into National Spotlight; Mayor Calls it 'Example' for Others; Opponents See Racial Profiling, Dallas Morning News, Oct. 13, 2007, at lB.
welfare and population, both of legal and illegal immigrants.¹⁸¹

VI. CONCLUSION

The result of creating immigration laws on various governmental levels is a quagmire of federal, state, and local legislation which creates an inconsistent patchwork of legality—an array of hoops for employers and employees to jump through just so that they might garner financial security. The common battle cry for proponents of the recent anti-immigrant legislation has been that the federal government has not fulfilled its side of the bargain by essentially failing to enforce current anti-immigration bills as they are written, and therefore forcing the hand of localities. No matter one’s position on the permissibility of legal or illegal immigrants, it seems undeniable that local legislation on an international affair sets the stage for ever greater confusion in enforcement and establishes what will be an unavoidable collision of legislation. The result will essentially force employers to discriminate on the basis of ethnic origin, nationality, or race, merely so that they might preserve their right to own and operate their businesses. Such an effect would seem clearly counter-productive to the desired results of passing such immigration reform. It would also seem inevitable that this issue will only grow, as localities and states devise more ornate and clandestine mechanisms by which to affect the status of unauthorized workers within the United States. While Hazleton may have been a violation of preemption under Judge Munley’s analysis, most of the due process concerns appeared as a result of poor drafting which could easily be remedied when creating future litigation. Only time will determine the future efficacy of such legislation.

In an interview with CNN news anchor Lou Dobbs, Mayor Barletta was asked about the efficacy of the Hazleton Ordinance. In his response, Mayor Barletta stated:

It was amazing, Lou. Immediately after we passed the ordinance, we witnessed many people leaving in the middle of the night, actually packing up their belongings and leaving. So, you know, we would—it would be fair to assume that those that left so quickly were illegal aliens who were just fleeing to another city.¹⁸²

¹⁸¹. See generally Belson & Capuzzo, supra note 9 (noting that one town’s anti-immigrant legislation caused many local businesses to close, particularly in the service industry).

Much like the failure to present any evidentiary based findings of fact in the Ordinance, Mayor Barletta failed to produce any evidence beyond his bold assumption that the people leaving—the ones affected—were illegal immigrants. Whether individuals left because of their legal status, or merely because they feared discrimination because employers, landlords and police might discriminate against them is a matter for speculation. But the effects levied upon individuals of minority status in Hazleton—merely from the accounts of the authorized and legal plaintiffs in Lozano—would seem sufficient to indicate that the final impact was far greater than merely on “illegal aliens.” Indeed, such local ordinances which purport a facially neutral standard do little more than create a status quo of discriminatory treatment against individuals based on their ethnicity, not merely their legal status, and also generate a bevy of financial burdens for small localities to bear through a variety of increased costs.