

9-18-2018

The Future of Tort Litigation for Undocumented Immigrants in Donald Trump's "Great" America

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Dina L. Sarver, *The Future of Tort Litigation for Undocumented Immigrants in Donald Trump's "Great" America*, 8 U. Miami Race & Soc. Just. L. Rev. 83 (2018)

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The Future of Tort Litigation for Undocumented Immigrants in Donald Trump’s “Great” America

DINA LEXINE SARVER*

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I. INTRODUCTION

Natalie Jean–Pierre, a 54–year–old migrant farm worker, travels from Florida every summer to work on a large fruit orchard in New Jersey. During this time, Natalie leaves her six children behind in the care of her husband. Although the pay from the farm labor is not much, it covers the costs of back–to–school expenses and reduces the household financial burden on her husband, who already works two jobs.

After a long day of picking fruit, Natalie returns to the bunking house where she and other migrant workers reside during the picking season. As Natalie makes her way up the stairs to her living quarters on the second

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floor, she does her best to avoid the weak spots in the wooden staircase. The residents in the bunking house are long familiar with the faulty staircase, and numerous complaints to the orchard owner, who is also the landlord, have gone unheard.

Spots have been marked on the staircase, and Natalie steps lightly on each, assessing whether the step can support her weight before proceeding to the next. On this night, as Natalie nears the top, a weakening step gives under her weight and she falls through the staircase to the first story. After being transported to the hospital, Natalie finds out she has a fractured femur and dislocated hip. With her injuries making it impossible to work, Natalie returns to Florida for the remainder of the picking season. She then incurs out-of-pocket expenses for her subsequent care, including prescription medications and outpatient physical therapy sessions.

Natalie has at least one avenue under New Jersey law¹ in which she may be able to hold the landlord responsible for her injuries: premise liability, a tort claim based on negligence.² The landlord had a duty to repair or remove safety hazards in the bunking house, which included the faulty staircase. The landlord received actual notice of the staircase condition and breached his duty by failing to remedy the very thing that caused Natalie's injuries. If successful, Natalie could sue the landlord for her injuries, lost wages, medical bills, and for her pain and suffering. Natalie's case also has strong facts to establish grounds for punitive damages, which would punish the landlord for showing careless disregard for the safety of the workers living on his property, as evidenced by his failure to act on their numerous complaints about the staircase.³

¹ This lawsuit would most likely be litigated in New Jersey because Natalie was injured while working in New Jersey.

² A landlord has a duty to maintain the safe condition of its property for the protection of persons who lawfully enter the premises. *Rowe v. Mazel Thirty, LLC.*, 209 N.J. 35, 43–44 (2013). Therefore, premise liability imposes liability when a person has been injured because of a dangerous condition on the property. *Id.* In New Jersey, to establish a case for premise liability, the plaintiff must prove: (1) the tortfeasor had a duty of care; (2) the tortfeasor breached that duty; (3) the injuries were the actual and proximate cause of that breach; and (4) damages were incurred. *Jersey Cent. Power & Light Co. v. Melcar Util. Co.*, 212 N.J. 576, 594 (2013). When assessing whether a duty is imposed, courts will assess whether the plaintiff's injury was foreseeable. *Desir, Estate of ex rel. Estiverne v. Vertus*, 214 N.J. 303, 318 (2013) (noting that a duty of care is owed “if the source of the injury is a dangerous condition on the premises and if the injury is the result of a foreseeable risk to an identifiable person.”).

³ Living conditions such as these are not uncommon. A study conducted of North Carolina migrant farmworkers uncovered the substandard living conditions migrant workers are often subjected to while living in farmworker camps controlled by farmers or contractors in rural communities. Conditions included insufficient laundry facilities, cramped living spaces, rodent infestations, exposure to toxicants, crowded conditions, and electrical and structural hazards. Thomas A. Arcury & Sara A. Quandt, *Living and Working*

Unfortunately, Natalie does not wish to sue the landlord based on what she believes to be a disqualifying factor: she is an undocumented immigrant.⁴ As a result, Natalie never receives compensation for her injuries, lost wages, medical bills, or for her pain and suffering.⁵

At present, there are 43.2 million immigrants living in the United States.⁶ 11.1 million of them are undocumented.⁷ The purpose of this Note is to examine the current hurdles undocumented immigrants face when bringing tort claims and how tort litigation for undocumented immigrants will become more difficult in the future under the current administration. Part I will provide a brief history on the evolution of immigration and today's reality for immigrants. Part II will explain the development of tort law and its relation to undocumented immigrants and their tort claims. Part III will describe the barriers undocumented immigrants encounter while litigating their tort claims, including but not limited to juror bias, admissibility of their immigrant status during litigation, and the calculation of their damages. Finally, Part IV will look forward and analyze how these present hurdles will be exacerbated in the years to come under President Trump's administration, which has so far been notorious for promoting prejudice and discrimination toward undocumented people.

Safely: Challenges for Migrant and Seasonal Farmworkers (Dec. 23, 2012), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3529146/pdf/nihms429300.pdf>.

⁴ This story is based on the true story of an undocumented immigrant personally known to the author. Natalie's story inspired the author to write a Note on this topic. Natalie ultimately decided not to file a lawsuit as she was worried she would get deported if her undocumented status was discovered during litigation. If deported, Natalie would be forced to leave her six children, natural-born citizens, without a mother to care for them on a daily basis.

⁵ Natalie's injuries would not fall under workers' compensation because in New Jersey, workers' compensation provides "medical treatment, wage replacement and permanent disability compensation to employees who suffer *job related* injuries or illnesses, and death benefits to dependents of workers who have died as a result of their employment. State of New Jersey, Department of Labor and Workforce Development, *Workers' Compensation*, http://lwd.dol.state.nj.us/labor/wc/wc_index.html (last visited Feb. 14, 2018) (emphasis added). Because Natalie was not injured while working, she would not be entitled to these benefits.

⁶ Gustavo Lopez & Jynnah Radford, Pew Research Center, *Facts on U.S. Immigrants, 2015* (May 3, 2017), <http://www.pewhispanic.org/2017/05/03/facts-on-u-s-immigrants/>.

⁷ Jeffrey S. Passel & D'Vera Cohn, Pew Research Center, *Overall Number of U.S. Unauthorized Immigrants Holds Steady Since 2009* (Sept. 20, 2016), <http://www.pewhispanic.org/2016/09/20/overall-number-of-u-s-unauthorized-immigrants-holds-steady-since-2009/>.

II. IMMIGRATION AND TODAY'S REALITY

*“Give me your tired, give me your poor, your huddled masses yearning to breathe free, the wretched refuse of your teeming shore. Send these, the homeless, tempest-tossed to me, I lift my lamp beside the golden door.”*⁸

— Emma Lazarus

The United States of America, a country founded by immigrants, often forgets its roots and excludes the powerless as it bends to prevailing political winds just to appease the masses.⁹ Dating back to our Founding Fathers,¹⁰ immigrants were encouraged to migrate to the United States for promises of freedom.¹¹ Over time, however, this open-arms mentality was forgotten. Due to the constant changes in our nation, in 1881 immigration law transformed the system from being governed by state-based regulations to federally imposed regulations.¹² The federal government then established a uniform system that either accepted or denied the

⁸ Quoted from “The New Colossus” written by Emma Lazarus and published in 1916. “The New Colossus” is engraved in pedestal of the Statue of Liberty:

“The New Colossus” emerges at a pivotal moment in history. The year before Lazarus’s poem was read at the Bartholdi Pedestal Fund Art Loan Exhibition in New York, in 1883, the Chinese Exclusion Act became the first federal law that limited immigration from a particular group. Though set to last for 10 years, various extensions and additions made the law permanent until 1943. The year after Lazarus’s poem was read, the European countries met in Berlin to divide up the African continent into colonies. “The New Colossus” stands at the intersection of U.S. immigration policy and European colonialism, well before the physical Statue of Liberty was dedicated. The liberal sentiments of Lazarus’s sonnet cannot be separated from these developments in geopolitics and capitalism.

Walter Hunter, *The Story Behind the Poem on the Statue of Liberty*, THE ATLANTIC (Jan. 16, 2018), <https://www.theatlantic.com/entertainment/archive/2018/01/the-story-behind-the-poem-on-the-statue-of-liberty/550553/>.

⁹ Wendy Andre, Note & Comment, *Undocumented Immigrants and Their Personal Injury Actions: Keeping Immigration Policy Out of Lost Wage Awards and Enforcing the Compensatory and Deterrent Functions of Tort Law*, 13 ROGER WILLIAMS. U. L. REV. 530, 535 (2008).

¹⁰ “The bosom of America is open to receive not only the Opulent and respected Stranger, but the oppressed and persecuted of all Nations and Religions; whom we shall welcome to a participation of all rights and privileges . . .” MICHAEL C. LEMAY, FROM OPEN DOOR TO DUTCH DOOR: AN ANALYSIS OF U.S. IMMIGRATION POLICY SINCE 1820 7 (1987) (quoting George Washington).

¹¹ Andre, *supra* note 9, at 535.

¹² *Id.* at 537.

entrance of immigrants after evaluating several factors, such as labor skills and medical diagnoses.¹³ At one point, regulations banned orphans from entering the country,¹⁴ and heightening the requirements further, in the early 1900s the United States adopted a literacy test and a quota system.¹⁵

In 1952, Congress passed the Immigration and Nationality Act (INA), which codified existing laws and made it easier in some instances for immigrants to migrate to the United States.¹⁶ Thirty years later, Congress enacted the Immigration Reform and Control Act of 1986 (IRCA), which sought to deter immigration by focusing on controlling the influx of illegal migration, sanctioning employers for hiring undocumented immigrants, and providing those who were already in the United States illegally with a path to citizenship.¹⁷ Although facially these procedures seemed somewhat adequate, reality proved otherwise. For example, in 1997, officials in Arizona were found to be randomly conducting immigration raids on Mexican Americans,¹⁸ one year after Congress replaced INA with two anti-immigration statutes.¹⁹ To further illustrate the United States' ever-evolving sentiments towards immigrants, in 2010 the Obama administration suspended the deportation of college students who entered the United States as undocumented children.²⁰ Former President Barack Obama reasoned that the bill would "lift the shadow of deportation from young people" while making immigration policy "more fair, more efficient, and more just."²¹

¹³ *Id.* at 536–37.

¹⁴ *Id.* at 537 (Initially, the purpose of such specific bans were only to allow those who were able-bodied to enter the United States. Over time, the list extended to those who were also poor).

¹⁵ *Id.* at 537–38 ("Literacy tests were initially discussed as early as 1912 and the quota system was implemented after World War I Veterans were concerned that immigrants would enter the United States and take their jobs. The Quota Law of 1921 limited the migration of immigrants to three percent of the number of foreign born people of the same nationality who were already living in the United States."). This Note does not examine all of the major moments in immigration history such as "Operation Wetback," which resulted in the deportation of more than one million Mexican migrants including those who were undocumented, legalized aliens or residents, and even those who were citizens by birth or naturalization.

¹⁶ *Id.* at 539.

¹⁷ *Id.* at 540–41.

¹⁸ Benny Augusto Jr. et al., *But Your Honor, He's An Illegal: The Admissibility of a Worker's Undocumented Immigration Status*, 42 *The Brief* 54, 57 (2013).

¹⁹ Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104–132, 110 Stat. 1214 (1996) and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104–208, 110 Stat. 3009 (1996).

²⁰ Julia Preston & John H. Cushman Jr., *Obama to Permit Young Migrants to Remain in U.S.*, N.Y. TIMES (June 15, 2015), <http://www.nytimes.com/2012/06/16/us/us-to-stop-deporting-some-illegal-immigrants.html>.

²¹ *Id.*

Because the United States is portrayed as the bright and shiny country on the hill where dreams come true and where everyone has a chance of obtaining the “American Dream,” most undocumented immigrants travel to the United States for employment²² with hopes that it will ultimately provide them with a better life. Immigrants also migrate to reunify their families, often waiting years until they are reunited with their loved ones.²³ Sadly, the possibility of this “American Dream” is foreclosed on undocumented immigrants.

“When Mexico sends its people, they’re not sending their best . . . they’re sending people that have lots of problems, and they’re bringing those problems with us [sic]. They’re bringing drugs. They’re bringing crime. They’re rapists. And some, I assume, are good people.”²⁴

— Donald J. Trump

The current climate in the United States favors anti-immigration sentiments. These current sentiments were exacerbated by President Trump’s propagation of fear throughout his presidential campaign, as he used undocumented immigrants as pawns to draw votes. Studies show that not some,—but most of the immigrants entering the United States are “good people.” In fact, immigrants are *less* likely to commit crimes than natural born citizens.²⁵ Furthermore, as of 2007, the number of incarcerated immigrants continued to decline compared to the previous three decades.²⁶

According to an original analysis of data from the 2010 American Community Survey (ACS) . . . roughly 1.6 percent of immigrant males ages 18–39 are incarcerated, compared to 3.3 percent of the native-born. This disparity in incarceration rates has existed for decades, as

²² Daniel Procaccini, Note, *First, Do No Harm: Tort Liability, Regulation and the Forced Repatriation of Undocumented Immigrants*, 30 B.C. THIRD WORLD L.J. 475, 480 (2010).

²³ Gisela Alouan Ades, Note, *Lawful Permanent Residents: The Forced Bachelors and Bachelorettes of America*, 40 U. MIAMI INTER-AM. L. REV. 521, 526–28 (2009).

²⁴ Michelle Ye Hee Lee, *Donald Trump’s False Comments Connecting Mexican Immigrants and Crime*, WASH. POST (July 8, 2015), https://www.washingtonpost.com/news/fact-checker/wp/2015/07/08/donald-trumps-false-comments-connecting-mexican-immigrants-and-crime/?utm_term=.708154f2b69c (quoting Donald J. Trump).

²⁵ See Kristin F. Butcher & Ann M. Phiel, *Why Are Immigrants’ Incarceration Rates So Low? Evidence on Selective Immigration, Deterrence, and Deportation* (National Bureau of Economic Research, Working Paper No. 13229, 2007), <http://www.nber.org/papers/w13229.pdf>.

²⁶ *Id.* at 2.

evidenced by data from the 1980, 1990, and 2000 decennial censuses. In each of those years, the incarceration rates of the native-born were anywhere from *two to five times higher* than that of immigrants.²⁷

Contrary to President Trump's propaganda, the type of immigrants who choose to migrate to the United States are not criminals, but rather less criminally active²⁸ than natural born citizens.

"For decades, open borders have allowed drugs and gangs to pour into our most vulnerable communities. They have allowed millions of low-wage workers to compete for jobs and wages against the poorest Americans."²⁹

— Donald J. Trump

In addition to a supposed influx of crime, there is a widespread belief that undocumented immigrants enter the United States and steal jobs from legal or natural born citizens. In reality, undocumented immigrants are usually employed in the jobs that we, Americans, do not want—"unpleasant, back-breaking jobs that native-born workers are not willing to do."³⁰ Such jobs are in areas of "agriculture, construction, manufacturing, hospitality, and in the seafood industry."³¹ For example, fish-cutting is a sector in the seafood industry that relies heavily on undocumented workers because there are not enough legal and natural-born citizens willing to do the unpleasant and dangerous job.³² The job entails "skinning, deboning, and cutting smelly," slimy, grimy, and cold fish.³³ Such tedious work causes the workers to rapidly develop carpal tunnel syndrome.³⁴ Additionally, "the risk of infections from cuts and the bloody water used to wash the fish is substantial,"³⁵ as the job also involves

²⁷ Walter A. Ewing, et al., *The Criminalization of Immigration in the United States*, American Immigration Council Special Report 1 (July 2015), https://www.americanimmigrationcouncil.org/sites/default/files/research/the_criminalization_of_immigration_in_the_united_states.pdf (emphasis added).

²⁸ Butcher, *supra* note 25, at 3.

²⁹ The White House, *President Donald J. Trump Wants Immigration That Makes America Stronger and Safer* (Jan. 30, 2018), <https://www.whitehouse.gov/briefings-statements/president-donald-j-trump-wants-immigration-makes-america-stronger-safer/> (quoting Donald J. Trump).

³⁰ Vanda Felbab-Brown, *The Wall: The Real Costs of the Barrier Between the United States and Mexico*, BROOKINGS (Aug. 2007), <https://www.brookings.edu/essay/the-wall-the-real-costs-of-a-barrier-between-the-united-states-and-mexico/>.

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

the use of knives to debone the fish and dangerous machinery to behead the fish. This often results in serious injuries, including amputated fingers.³⁶

Employers that typically hire undocumented immigrants have an idea of what it would look like if they were to replace undocumented workers with legal and natural-born citizens, and that vision is not good. In 2011, a year with high unemployment rates, a farmer in Colorado reduced the number of undocumented immigrants he had working on his farm with hopes of replacing them with legal and natural-born workers.³⁷ The farmer soon realized that he made a mistake after numerous employees did not return to work from their lunch breaks on the very first day.³⁸ Some of the legal and natural-born workers complained to the farmer that the work was too hard while others did not bother to give a reason for their failure to return.³⁹

Five years later, Vice News released a documentary examining the aftermath of Alabama's enactment of HB-56, a law "aimed to make life so miserable for illegal immigrants that they'd opt to leave the state on their own."⁴⁰ HB-56 "granted police unprecedented powers to arrest, question, and detain suspected illegal immigrants, and even criminalized citizens who provided undocumented workers with jobs, housing, and/or transportation."⁴¹ Like the farmer in Colorado, farmers in Alabama also recognized that HB-56 was a mistake and, six months later, lawmakers slowly began reversing portions of HB-56 because numerous employers complained that the legal and natural-born workers, even those from the local detention facilities, were either "lazy" or did not want to work for the low pay.⁴²

When watching the documentary, the difference between the two groups of workers becomes obvious. The undocumented workers established a system of working in unison by creating long lines where a plucked watermelon bounced between the undocumented workers until it reached its final destination. This was in stark contrast to the legal and natural-born workers who were less productive as evidenced by their numerous smoke breaks and blatant disregard for the tasks to which they

³⁶ *Id.*

³⁷ Kirk Johnson, *Hiring Locally for Farm Workers is No Cure-All*, N.Y. TIMES (Oct. 5, 2011), <http://www.nytimes.com/2011/10/05/us/farmers-strain-to-hire-american-workers-in-place-of-migrant-labor.html>.

³⁸ *Id.* ("It didn't take me six hours to realize I'd made a heck of a mistake.")

³⁹ *Id.*

⁴⁰ Vice Staff, *Alabama's Harsh Anti-Immigration Laws*, VICE NEWS (Jan. 20, 2016), https://www.vice.com/en_us/article/kwxkdn/watch-our-hbo-episode-about-alabamas-harsh-anti-immigration-laws.

⁴¹ *Id.*

⁴² *Id.*

were assigned. In sum, the “reality of undocumented workers in America stands in stark contrast to the fear endangered by their presence.”⁴³

*“It’s a national embarrassment that an illegal immigrant can walk across the border and receive free health care and one of our Veterans”*⁴⁴

— Donald J. Trump

In addition, President Trump would like this country to believe that undocumented immigrants are entering the country and consuming benefits that only legal⁴⁵ or natural born citizens are entitled to receive.⁴⁶ The current state of social welfare, however, belies his conclusion. Undocumented immigrants are not eligible for public benefits. They are not eligible for the Children’s Health Insurance Program (CHIP), Disability Income (SSI), Social Security, the Supplemental Nutrition Assistance Program (SNAP/Food Stamps), welfare, or health insurance benefits.⁴⁷ Undocumented immigrants are only entitled to public schooling, emergency care, and Special Supplemental Nutrition Program for Women, Infants, and Children (WIC).⁴⁸ And while they cannot use majority of the services our country offers, undocumented immigrants pay taxes that fuel social security, public schools, and many other governmental resources just like legal and natural born citizens.⁴⁹

Fears and prejudices based on misconceptions about the role undocumented immigrants play in this country result in greater harms. This is especially true when such stereotypes have no bearing on an

⁴³ Augusto, *supra* note 18, at 58.

⁴⁴ Robert Stribley, *No, Undocumented Immigrants Aren’t Stealing Your Benefits: But they DO help pay for yours*, HUFFINGTON POST (Nov. 21, 2017), https://www.huffingtonpost.com/entry/no-undocumented-immigrants-arent-stealing-your-benefits_us_5a144263e4b010527d6780b0 (describing how President Trump misrepresented the facts that immigrants are entitled to such benefits because they hadn’t been entitled to benefits such as free healthcare for decades). President Clinton signed into law the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) which not only prohibited undocumented immigrants from receiving benefits such as welfare but also precluded legal immigrants from receiving benefits until they had lived in the United States for at least five years. *Id.*

⁴⁵ *See id.* (discussing requirements legal immigrants must satisfy under IIRIRA before they are eligible for benefits); *see also* American Immigration Council, *Giving the Facts a Fighting Chance: Addressing Common Questions on Immigration* (Dec. 14, 2015), <https://www.americanimmigrationcouncil.org/research/addressing-common-questions-immigration>.

⁴⁶ Stribley, *supra* note 44.

⁴⁷ *Id.*; *see also* Tanya Broder, et al., *Overview of Immigrant Eligibility for Federal Programs* 1, 3, National Immigration Law Center (2015), <https://www.nilc.org/wp-content/uploads/2015/12/overview-immeligfedprograms-2015-12-09.pdf>.

⁴⁸ Stribley, *supra* note 44.

⁴⁹ *Id.*

undocumented immigrant's legal rights, such as the right to sue for harms suffered based on the negligence of another.

III. UNDOCUMENTED IMMIGRANTS AND THEIR TORT CLAIMS

Tort law is a body of law that “serves to protect the masses by holding those negligent accountable for their actions, and by allowing the injured to be compensated for injuries they have suffered.”⁵⁰ Tort law developed during the modernization of this country as the use of beneficial but dangerous machinery often had fatal consequences.⁵¹ “The resulting system for combating these newfound risks was one focused on negligence . . . and important policy . . . [of] compensating individuals for injuries sustained as a result of another person's faulty conduct.”⁵² Society favored this remedy because it not only allowed for the quicker, more efficient production of industries with the help of these dangerous machines, but also provided a compensatory system for the injured.⁵³ To shift the burden of responsibility solely from employers, tort law later attributed fault to employees who were negligent in the use of the machinery—comparative and contributory negligence.⁵⁴ The fate of these lawsuits was ultimately decided by a jury which awarded damages as it saw fit.⁵⁵ Throughout the development of tort law, deterrence of harmful conduct and providing an avenue of redress for a plaintiff's injuries remained the main focus of tort litigation.⁵⁶

Today, however, undocumented immigrants fail to hold their tortfeasors accountable for numerous reasons. One reason is that undocumented immigrants are not aware of their rights and remedies.⁵⁷ Many believe that their lack of financial resources would play a role in the litigation,⁵⁸ failing to realize that tort cases are usually litigated on a

⁵⁰ Andre, *supra* note 9, at 548; see also G. EDWARD WHITE, *TORT LAW IN AMERICA, AN INTELLECTUAL HISTORY* 15 (Oxford University Press 2003) (“Judges and juries prior to mid-nineteenth century, did not consider tort actions as a discrete, substantive category of claims. ‘Tort’ cases were actions in trespass, actions in case, and the like with their peculiar circumstances and their special considerations.”).

⁵¹ Andre, *supra* note 9, at 543.

⁵² *Id.*

⁵³ *Id.* at 543–44.

⁵⁴ *Id.* at 544.

⁵⁵ *Id.* at 545.

⁵⁶ *Id.* at 546.

⁵⁷ Lise Johnson, *You Can Violate the Rights of Undocumented Persons with Impunity: The Shocking Message Arizona's Constitution Sends and Its Inconsistency With International Law*, 13 J. GENDER RACE & JUST. 491, 492 (2010).

⁵⁸ *Id.*

contingency basis.⁵⁹ Undocumented immigrants also often believe that if they were to sue, they will later become victims of retaliation.⁶⁰ “Once immigration status is raised, a [potential plaintiff], injured through no fault of their own, is faced with either forgoing recovery for his injuries, or continuing with their case in fear of deportation.”⁶¹ As described in the personal story of Natalie, a mother of six, the risk of leaving behind her children if her undocumented status became part of the public record was a risk she was not willing to take. Instead, Natalie chose not to sue the landlord for failing to repair the staircase that caused her extensive injuries.

Public media has covered this issue in Florida regarding insurance companies who used Florida law to avoid compensating undocumented immigrants for their work-related injuries.⁶² The results of one study showed that some insurance companies reported injured, undocumented workers to immigration departments in order to recoup some of the benefits paid to the undocumented workers, or to avoid paying them for their injuries all together. For example, an undocumented man living in Florida soon discovered, after suffering a work-related injury, that a Florida law permitting undocumented immigrants to receive workers’

⁵⁹ Nora F. Engstrom, *Attorney Advertising and the Contingency Fee Cost Paradox*, 65 STAN. L. REV. 633, 667 (2013).

⁶⁰ Johnson, *supra* note 57, at 492.

⁶¹ *Id.*

⁶² To assess the impact of Florida’s law on undocumented workers, ProPublica and NPR analyzed 14 years of state insurance fraud data and thousands of pages of court records. We found nearly 800 cases statewide in which employees were arrested under the law, including at least 130 injured workers. An additional 125 workers were arrested after a workplace injury prompted the state to check the personnel records of other employees. Insurers have used the law to deny workers benefits after a litany of serious workplace injuries, from falls off roofs to severe electric shocks. A house painter was rejected after she was impaled on a wooden stake. Flagged by insurers or their private detectives, state fraud investigators have arrested injured workers at doctor’s appointments and at depositions in their workers’ comp cases. Some were taken into custody with their arms still in slings. At least 1 in 4 of those arrested was subsequently detained by ICE or deported.

Michael Grabell & Howard Berkes, *They Got Hurt at Work—Then They Got Deported*, NAT’L PUB. RADIO (Aug. 16, 2017), <https://www.npr.org/2017/08/16/543650270/they-got-hurt-at-work-then-they-got-deported>.

compensation benefits,⁶³ would not include him.⁶⁴ After it was discovered that the Florida man used the social security number of a deceased individual for his employment paperwork, an investigator hired by the employer's insurance company tipped off Florida's insurance fraud unit.⁶⁵ The man was subsequently deported after spending over a year and a half in immigration detention.⁶⁶ The man was also ordered to repay all of the benefits he received under workers' compensation back to his employer's insurance company.⁶⁷

In some instances, even when undocumented immigrants wish to sue their tortfeasors, there may be limited or no avenues by which to pursue a remedy for their injuries.⁶⁸ In some states, there are laws that preclude undocumented immigrants from receiving the same remedies as legal or natural born citizens. For example, in 2006, Arizona amended its state constitution to prohibit undocumented immigrants from seeking punitive damages in tort claims.⁶⁹ Several policy arguments in support of the change were raised.

First, supporters noted that the change "discouraged [undocumented immigrants] from suing American citizens with an expectation of receiving big rewards,"⁷⁰ which are usually associated with punitive damages. However, this argument completely ignores the goal of punitive

⁶³ For a work-related injury, workers' compensation law precludes an injured employee from suing their employer. Because the Florida man's injuries occurred at work, Florida law required him to seek workers' compensation benefits. Like other states, Florida law does permit a plaintiff to sue an employer outside of the workers' compensation system when the plaintiff can prove that the defendant employer had constructive knowledge of the condition that caused his or her injuries, or that the defendant employer's actions were intentional. FLA. STAT. § 440.11 (2017).

⁶⁴ Grabell, *supra* note 62 ("In 2003, Florida's lawmakers added a catch, making it a crime to file a workers' comp[ensation] claim using false identification. Since then, insurers have avoided paying for injured immigrant workers' lost wages and medical care by repeatedly turning them in to the state."); *see also* FLA. STAT. § 440.02 (2017) ("Employee' means any person who receives remuneration from an employer for the performance of any work or service while engaged in any employment under any appointment or contract for hire or apprenticeship, express or implied, oral or written, whether lawfully or unlawfully employed, and includes, but is not limited to, *aliens* and minors.") (emphasis added).

⁶⁵ Grabell, *supra* note 62.

⁶⁶ *Id.*

⁶⁷ *Id.* ("Stiles, the attorney who was the key architect of the law, said the state's construction industry was rife with fraud at the time and there was a lot of concern about illegal immigration. She said even immigrants who are 'truly injured' should be denied benefits if they're using illegal documents for their claim and they 'shouldn't be here in the first place.'").

⁶⁸ Johnson, *supra* note 57, at 506.

⁶⁹ *Id.* at 503-04.

⁷⁰ *Id.* at 505.

damages, which is “to affirm, reinforce, and reify the fundamental values of society’ by ‘teaching law-breakers that there are barriers to the acts they seek to commit,’ [discouraging] wrongful conduct, ‘educating the larger community about the immorality of the offense,’ and by ‘honoring the victim’s moral claims.”⁷¹ This argument also fails because statistics show that damages awarded for violations of the rights of minorities are often nominal.⁷² Otherwise, tortfeasors, like Natalie’s landlord, will have no incentive to ensure the safety of their patrons, patients, and the like when the individual is undocumented.

The second and third arguments work together and posit that undocumented immigrants should not be permitted to use a court’s valuable time and resources because lawbreakers should not be rewarded.⁷³ However, such reasoning renders undocumented plaintiffs “virtually defenseless against any abuse, exploitation or callous neglect to which the state or the state’s natural citizens and businesses may wish to subject them.”⁷⁴ An undocumented immigrant has the same right as any legal or natural born citizen to sue, be parties in litigation proceedings, and to present evidence.⁷⁵ A right to recovery is not limited solely to legal or natural born citizens; it is a right that everyone should recognize and acknowledge, and it extends to “immigrants regardless of whether or not they are appropriately documented.”⁷⁶

⁷¹ *Id.* at 498.

⁷² Andrew W. Bribriescio, Note, *As Iowa Goes, So Goes The Nation: Varnum V. Brien And Its Impact On Marriage Rights For Same-Sex Couples: Student Note: Latino/a Plaintiffs and the Intersection of Stereotypes, Unconscious Bias, Race-Neutral Policies, and Personal Injury*, 13 J. GENDER RACE & JUST. 373, 400–02 (2010).

⁷³ Johnson, *supra* note 57, at 505.

⁷⁴ *Id.* at 491 (quoting *Plyler v. Doe*, 47 U.S. 202, 219, n.18 (1982)).

⁷⁵ *Rosa v. Partners in Progress, Inc.*, 86 A.2d 994, 997 (N.H. 2005) (“[A] well established body of law holds that illegal aliens have rights of access to the courts and are eligible to sue therein to enforce contracts and redress civil wrongs such as negligently inflicted personal injuries.”); *see also Arteaga v. Literski*, 265 N.W.2d 148, 150 (Wis. 1978) (“There is no public policy that is served by refusing access to our courts to illegal aliens who are injured through the negligence of another.”); *Janusis v. Long*, 188 N.E. 228, 231–32 (Mass. 1933) (“In the light of all these principles judicially determined and established, we are of opinion that the violation of law involved in the original entrance of the plaintiff into the country does not so taint his subsequent otherwise lawful and peaceful presence as to preclude him from seeking redress in our courts for such injuries sustained by him as are shown on this record.”); *Mendoza v. Monmouth Recycling Corp.*, 672 A.2d 221, 225 (Super. Ct. App. Div. 1996) (“We also disagree with the compensation judge’s perception that workers’ compensation must be denied to an illegal alien because his contract of employment is illegal pursuant to federal law.”).

⁷⁶ *Andre*, *supra* note 9, at 559.

IV. THE BARRIERS UNDOCUMENTED IMMIGRANTS MUST FACE WHEN LITIGATING A TORT CLAIM

Undocumented immigrants face other challenges when litigating their tort claims. Not only must undocumented immigrants overcome the basic notion that they are not entitled to a legal remedy simply because they are undocumented, but also, these immigrants must overcome juror bias, the admissibility of their immigrant status in their tort cases, and the improper calculation of their damages.

A. *Juror Bias*

Biases are triggered both consciously and subconsciously⁷⁷ and “race is the largest contributor to legal system bias.”⁷⁸ Although juries are thought to compensate similarly-injured plaintiffs the same,⁷⁹ race has an impact on an undocumented plaintiff’s recovery. Jurors form perceptions about a plaintiff based on a plaintiff’s name and the way he or she speaks, as well as a plaintiff’s physical features, especially when those features are distinguishable from the group from which juries are picked.⁸⁰

Some jurors presume that immigrants are criminals,⁸¹ even though statistics prove that this perception is unwarranted.⁸² Jurors also perceive Hispanics and African Americans to be less truthful, lazier, and less intelligent than Caucasians.⁸³ It has also been shown that jurors punish plaintiffs when English is not the plaintiff’s primary language.⁸⁴ For instance, in a study conducted in Texas from 1996 to 2007 that assessed the outcome of 223 tort lawsuits with Hispanic plaintiffs,⁸⁵ it was found that “non-English speaking Hispanic plaintiffs were fifteen percent *less*

⁷⁷ Bribiesco, *supra* note 72, at 373–74.

⁷⁸ *Id.*

⁷⁹ *Id.* at 373.

⁸⁰ *Id.* at 382.

⁸¹ *Id.* at 381 n.54.

⁸² See Butcher, *supra* note 25, at 2.

⁸³ Bribiesco, *supra* note 72, at 381.

⁸⁴ *Id.* at 385; see also David Holland & Gil Lenz, *Exposing Immigration Bias During Voir Dire*, 99 ILL. B.J. 82, 84–85 (2011) (quoting telephone interview with Marco D. Reyes, Attorney Supervisor with the Law Office of the Cook County Public Defender (Aug 27, 2010): “the use of translators in jury trials has never been viewed as a positive by jurors, who might feel that some of our clients not only do not bother to learn English but also are now in our country disobeying our laws.”).

⁸⁵ Bribiesco, *supra* note 72, at 385 (citing to Bradley T. Ewing et al., *Estimating the Effect of Non-English Speaking Hispanic on Personal Injury Jury Trial Outcomes* 10 (Aug. 2008) (unpublished manuscript, on file with the Rawls College of Business at Texas Tech University)).

likely than English speaking Hispanics to obtain a jury verdict that exceeded their last settlement offer.”⁸⁶

Because undocumented immigrants are not permitted to sit on juries, a jury of their peers never truly judges them. It would be ideal for an undocumented immigrant to file a lawsuit with the assurance that juror biases will not be a contributing factor to whether they receive just compensation for their injuries, however, juror bias is a reality that an undocumented plaintiff and his or her representing counsel must face whenever the outcome of their case is placed in the hands of a jury.⁸⁷

What is more, biases are not limited to the jury box. Judges also exhibit biases:⁸⁸

In a more recent study involving 133 judges from around the country, researchers used the race IAT and three hypothetical legal scenarios (two in which the race of the defendant was subliminally primed and one in which the defendant’s race was explicitly mentioned) to investigate the impact of implicit or unconscious racial bias on judicial outcomes. They concluded that judges, just like *adults in the general population*, showed a moderate-to-large degree of implicit racial bias and that without an awareness of the need to avoid racial bias in their decision-making, their decisions [could] produce racially disparate outcomes.⁸⁹

⁸⁶ Bribriescio, *supra* note 72, at 385 (emphasis added).

⁸⁷ *Id.* at 382–84.

⁸⁸ Ann T. Greeley, *Gender and Racial Bias in the Courtroom*, AMERICAN BAR ASSOCIATION, April 18–20, 2012, 1, 4, https://www.americanbar.org/content/dam/aba/administrative/litigation/materials/sac_2012/37-1_gender_racial_bias_in_the_courtroom.authcheckdam.pdf (last visited Feb. 20, 2018).

⁸⁹ *Id.* (internal citations omitted) (emphasis added) (citing to another bias-focused study of 167 federal magistrate judges:

The results of the study demonstrated that judges are just as susceptible to certain cognitive errors (including hindsight bias and egocentric bias) as were jurors. The good news is that these researchers also found that sufficient motivation to suppress racial bias produces fairer and more just outcomes. Biases of all kinds are so pervasive and powerful that it is impossible to eliminate them completely from cognitive processing, but with careful monitoring and accountability, jurors, judges, arbitrators, and mediators can limit the influence they have on the important decisions.).

A major issue arises when a judge permits his or her biases to influence the outcome of a case. In an undocumented plaintiff's tort case, the specific concern would be whether a judge's bias, coupled with the discriminatory agenda being pushed by our current administration, will influence the judge's decision in instances such as motions in limine,⁹⁰ which may ask the judge to determine the admissibility of the undocumented immigrant's status at the time of trial.⁹¹

B. *Admissibility of an Immigrant's Undocumented Status*

An undocumented immigrant's status in this country may not seem relevant to medical malpractice, negligence, or products liability cases because the focus should only be on the wrongful conduct of the defendant. However, depending on the jurisdiction, an undocumented immigrant's status may play a major role in several aspects of his or her case. The Supreme Court of the United States has not yet spoken on this issue, and lower courts are left to decide these matters on their own.⁹² This decision, to either admit or exclude an undocumented immigrant's status, usually falls under the rules of evidence applicable in a specific jurisdiction. The relevancy rule balances whether an undocumented plaintiff's status should be excluded if the prejudicial effect outweighs the probative value of such evidence,⁹³ and a significant number of courts have

⁹⁰ *Motion in Limine*, Bouvier Law Dictionary (Desk ed. 2012) ("A motion in limine is a motion filed with the court in advance of trial or raised at the commencement of a trial, in which the movant seeks rulings in advance on matters of evidence or procedure. The most common motions in limine are motions to suppress evidence or to bar witnesses from testimony on certain questions, but all forms of pre-trial motions can be made as motions in limine, including motions to strike claims, to dismiss a cause, or to grant judgment.").

⁹¹ See *Hernandez v. Paicius*, 134 Cal. Rptr. 2d 756, 761 (Cal. Ct. App. 2003) ("The trial court abused its discretion in not granting the motion in limine because admissibility of the patient's bad acts as an illegal alien had no bearing on the plaintiff's credibility regarding his medical malpractice injury.").

⁹² *Andre*, *supra* note 9, at n.158 ("However, the Supreme Court has addressed the issue of awarding lost wages to undocumented immigrants who were fired by their employers for participating in unions. The Court has held that awarding lost wages would be counter to federal immigration policy. *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 137 (2002); *Sure-Tan v. NLRB*, 467 U.S. 883, 891 (1984). While advocates of prohibiting lost wage awards argued that *Hoffman* and *Sure-Tan* apply to personal injury actions, the courts have overwhelmingly rejected the argument. See *Rosa*, 868 A. 2d at 1000; *Tyson Foods, Inc. v. Guzman*, 116 S.W.3d 233, 244 (Tex. 2003).").

⁹³ The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence. FED. R. EVID. 403. Although citing to a federal rule, state evidence rules often mirror the Federal Rules of Evidence.

correctly⁹⁴ held that revealing a plaintiff's undocumented status to a jury would pose a great risk to the plaintiff and the litigation at hand.⁹⁵

Although the undocumented immigrant in *TXI Transp. Co. v. Hughes*, 306 S.W.3d 230 (Tex. 2010), was not the injured party, the Supreme Court of Texas found that the undocumented status of a truck driver was not relevant in the case of a fatal accident in which the undocumented immigrant was driving. The truck driver's employer argued that the admissibility of the driver's immigrant status was irrelevant and prejudicial.⁹⁶ The court found that the driver's undocumented status was inadmissible because it was not a matter relevant to proving a material issue in the case—the plaintiffs did not need to prove the driver's undocumented status in order to prevail on their claims.⁹⁷ The court also relied on Texas Rules of Evidence to find the driver's undocumented status inadmissible on a second ground.⁹⁸ Even more assuring, in 2017, California added section 351.2 to the California Evidence Code which provides, “in a civil action for personal injury or wrongful death, evidence of a person's immigration status shall not be admitted into evidence, nor shall discovery into a person's immigration status be permitted.”⁹⁹

However, other courts have held that the admissibility of such information would not be unduly prejudicial.¹⁰⁰ In a personal injury case,

⁹⁴ Holland, *supra* note 84, at 82 (citing to *People v. Perez*, No. 1–07–3171, order at 2–4 (1st D. 2010) (unpublished decision pursuant to Illinois Supreme Court Rule 23), a first-degree murder trial of a Spanish-speaking immigrant, defense counsel asked the venire if someone's status as an illegal immigrant might affect their ability to be impartial. Five members of the venire raised their hands, and one potential juror stated, “Well, I would hope that everyone was a U.S. citizen and . . . people that are here illegally, I think it would probably affect what I think.”)

⁹⁵ *Berdejo v. Ideal Sys., Inc.*, No. 3:09–CV–0509, 2012 WL 3260422 (M.D. Pa. Aug. 8, 2012) (worker's undocumented immigrant status was irrelevant and such information was to be excluded at trial as prejudicial); *Maldonado v. Allstate Ins. Co.*, 789 So.2d 464 (Fla 2d DCA 2001)(an undocumented immigrant's status in a lawsuit against his insurer to recover personal injury protection benefits was prejudicial because the plaintiff's illegal status became the focus of the jury's attention).

⁹⁶ *TXI Transp. Co. v. Hughes*, 306 S.W.3d 230, 240 (Tex. 2010).

⁹⁷ *Id.* at 241.

⁹⁸ *Id.*; see also *Mischalski v. Ford Motor Co.*, 935 F. Supp. 203, 207–08 (E.D.N.Y.1996) (“Ford has cited no authority, and the court is aware of none, to support the conclusion that the status of being an illegal alien impugns one's credibility. Thus, by itself, such evidence is not admissible for impeachment purposes.”); *First Am. Bank v. W. DuPage Landscaping, Inc.*, No. 00–C–4026, 2005 WL 2284265, at *1 (N.D. Ill. Sept.19, 2005) (“[T]he court will not allow impeachment of witnesses on the basis of a witness's undocumented status.”); *Castro–Carvache v. I.N.S.*, 911 F. Supp. 843, 852 (E.D.Pa.1995) (“[A]n individual's status as an alien, legal or otherwise, however, does not entitle the Board to brand him a liar.”).

⁹⁹ CAL. EVID. CODE § 351.2 (2018).

¹⁰⁰ *Melenderes v. Soales*, 306 N.W.2d 399 (Mich. Ct. App. 1981) (immigrants' status was not relevant to liability, but was relevant to damages); *Rosa v. Partners in Progress*,

the Court of Special Appeals of Maryland found the status of two undocumented immigrants to be relevant in establishing their credibility.¹⁰¹ Because the plaintiffs had mentioned earlier in the case that they were permitted to work in the United States, when it was later discovered that they submitted documents seeking asylum because of their undocumented status, the court found that the defendant was permitted to use that evidence to impeach the plaintiffs.¹⁰²

These cases are not isolated; defendants frequently seek to admit the status of an undocumented plaintiff under the pretext that the information is relevant to the calculation of damages,¹⁰³ particularly, lost wages.¹⁰⁴

C. Calculation of Damages

The final stages of litigation involve the jury reaching a verdict and deciding how much damages, if any, to award a plaintiff. Determining the amount an undocumented plaintiff is entitled to recover is not as simple as retrieving paycheck stubs, tax returns, and calculating the amount of time the plaintiff was out of work.

There are two main types of damages a plaintiff can seek in a tort case: compensatory and punitive damages. Compensatory damages seek to make the plaintiff “whole” again by compensating for the entire injury and loss.¹⁰⁵ Compensatory damages also encompass economic and non-economic damages.¹⁰⁶ Economic damages may include “loss of income—and potential income—in a personal injury case, loss of the value or use of

Inc., 86 A.2d 994 (N.H. 2005) (an undocumented alien may not recover lost U.S. earnings, so status relevant to loss of earning calculations).

¹⁰¹ *Ayala v. Lee*, 81 A.3d 584, 599 (Md. Ct. Spec. App. 2013).

¹⁰² *Id.*

¹⁰³ This strategy is also deployed when calculating the future medical expenses an undocumented immigrant may incur after suffering an injury:

[Defendants] [l]everage the fear of deportation against undocumented plaintiffs in order to reduce or even eliminate claims for future lost income and, increasingly, to limit future medical damages to what the injured person would expect to pay for medical care in the plaintiff’s country of origin, rather than in the U.S. where he or she lives but where medical costs are typically much higher.

Robert Vaage, *Immigration Status No Longer Admissible in California Injury Suits*, LAW OFFICE OF ROBERT VAAGE BLOG (Dec. 26, 2016), <https://www.vaagelaw.com/Blog/2016/December/Immigration-Status-No-Longer-Admissible-in-Calif.aspx>.

¹⁰⁴ Andre, *supra* note 9, at 548–50.

¹⁰⁵ Stephen J. Shapiro, *Overcoming Under-Compensation and Under-Deterrence in Intentional Tort Cases: Are Statutory Multiple Damages the Best Remedy?*, 62 MERCER L. REV. 449, 453 (2011).

¹⁰⁶ *Id.*

property in a conversion or trespass case, or the loss of work opportunities in a libel case.”¹⁰⁷ Non-economic compensatory damages can be in the form of “pain and suffering in a personal injury case, damage to reputation in a libel case, or emotional suffering in a case of negligent infliction of emotional distress.”¹⁰⁸ A plaintiff is also entitled to punitive damages, which are typically larger awards designed to deter and punish wrongful conduct.¹⁰⁹ “Punitive damages are not awarded for all intentional misconduct; only when the tortfeasor has engaged in truly reprehensible conduct ‘that constitutes an extreme departure from lawful conduct.’”¹¹⁰ Such instances are where the tortfeasor exhibits “malice, intent to injure, or other evil motive[s].”¹¹¹

There are four approaches used to calculate an undocumented immigrant’s lost wages. Depending on the jurisdiction, an undocumented immigrant may or may not be entitled to recover for lost wages, and, in some instances, any amount collected would be very little. While some courts correctly calculate lost wages based on the undocumented immigrant’s earnings and work history in the United States,¹¹² other courts do not permit an undocumented immigrant to recover lost wages whatsoever.¹¹³ Because lost wages take into account past and future earnings, defendants in these cases usually argue that adequate lost wages cannot be calculated because it is not known how much longer the undocumented plaintiff will be working in the United States.¹¹⁴ Other courts go as far as calculating lost wages based on the income the undocumented plaintiff would have earned in his or her home country.¹¹⁵ Finally, some jurisdictions leave this decision up to the jury.¹¹⁶

Such stark contrasts in lost wage calculations communicate to tortfeasors that they are permitted to violate the rights of an undocumented plaintiff with impunity.¹¹⁷ This is especially so when defendants strategically raise the issue when the undocumented plaintiff is from a country whose wages are much lower than those in the United States.¹¹⁸ In the employment sector, this only incentivizes tortfeasors to employ

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 459.

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² Andre, *supra* note 9, at 548.

¹¹³ *Id.* at 549.

¹¹⁴ See generally *Majlinger v. Cassino Contracting Corp.*, 802 N.Y.S.2d 56 (N.Y. App. Div. 2005).

¹¹⁵ Andre, *supra* note 9, at 549.

¹¹⁶ *Id.*

¹¹⁷ Johnson, *supra* note 57, at 493.

¹¹⁸ Vaage, *supra* note 104.

undocumented immigrants, “secure in the knowledge that such employees would have no recourse in pursuing proper wages” for their injuries.¹¹⁹

Considering the obstacles she faced to receiving fair treatment, Natalie’s choice not to sue the landlord may have been the best choice in the end. As an undocumented immigrant, bringing forth her tort claim would have been an uphill battle that would have required an emotional commitment along with great risks. Natalie and her lawyers would have had to take into account the fact that she was an African American Haitian immigrant, who spoke very little English, whose annual income did not exceed \$10,000, and whose legal documents reflected the name of her cousin, an American citizen. After factoring in juror biases, the possibility of retaliation from the landlord, and the various ways to calculate Natalie’s lost wages, Natalie may have never received a judgment in her favor due to factors wholly unrelated to the negligent conduct of the landlord.

V. TRUMPS “GREAT” AMERICA AND ITS IMPACT ON UNDOCUMENTED IMMIGRANTS IN TORT LITIGATION

*“I would build a great wall, and nobody builds walls better than me, believe me, and I’ll build them very inexpensively. I will build a great, great wall on our southern border. And I will have Mexico pay for that wall. Mark my words.”*¹²⁰

— Donald J. Trump

This quote, and its various renditions, is what President Trump incorporated into his political campaign and which arguably assisted him in becoming the 45th President of the United States. It would be hard to argue that those who voted for President Trump were uncomfortable with his views that undocumented immigrants are not welcomed in the United States. While this Note is titled *The Future of Tort Litigation for an Undocumented Immigrant in Donald Trump’s “Great” America*, it is highly debatable whether we are headed towards a “great” America under President Trump or whether, in fact, the United States is just more unapologetically vocal about how it has felt toward undocumented immigrants all along.

¹¹⁹ *Majlinger v. Cassino Contracting Corp.*, 802 N.Y.S.2d 56, 66 (N.Y. App. Div. 2005).

¹²⁰ S.V. Date, *No, Mexico Is Not Paying For Trump’s Wall—You Are*, HUFFINGTON POST (Jan. 23, 2018), https://www.huffingtonpost.com/entry/trump-wall-taxpayers_us_5a676f92e4b0022830072ccf (quoting Donald J. Trump).

*“Why are we having all of these people from shithole countries come here? Why do we need more Haitians? Take them out.”*¹²¹

— Donald J. Trump

It is quite conceivable that since President Trump ran for office and ultimately became president, many individuals feel emboldened to step out from the shadows and publicly voice anti-immigrant views on the platform President Trump provided. Although there are jurisdictions that find the admissibility of an undocumented immigrant’s status to be highly prejudicial, or the calculation of lost wages based on earnings in the plaintiff’s home country to be inadequate, this is not enough. Immigrants who look to the current political climate, which aims to send them back to their “shithole countries,” will not be convinced that: (1) judges will examine motions in limine to exclude their immigrant status fairly, or (2) that jurors will render a verdict on their tort claims solely based on the facts of the case.

A president who demeans immigrants simply because they are born in another country will have a profound effect on tort litigation, particularly for undocumented immigrants. “Anti-immigrant sentiment weakens an undocumented person’s defense against abuse, facilitat[es] their continued victimization and prevent[s] them from recovering remedies for harms they suffer.”¹²² This is evident when looking at the area of crime. In 2017, the Houston Police Department noticed a troubling trend: fewer Hispanics were reporting crimes.¹²³ The police department compared reporting data from January through March of 2016 to data from January through March

¹²¹ Josh Dawsey, *Trump Derides Protections for Immigrants from Shithole’ Countries*, WASH. POST (Jan. 12, 2018), https://www.washingtonpost.com/politics/trump-attacks-protections-for-immigrants-from-shithole-countries-in-oval-office-meeting/2018/01/11/bfc0725c-f711-11e7-91af-31ac729add94_story.html?utm_term=.9058612f8414 (quoting Donald J. Trump).

¹²² Johnson, *supra* note 57, at 492.

¹²³ John Burnett, *New Immigration Crackdowns Creating ‘Chilling’ Effect’ on Crime Reporting*, NAT’L PUB. RADIO (May 25, 2017), <https://www.npr.org/2017/05/25/529513771/new-immigration-crackdowns-creating-chilling-effect-on-crime-reporting> (Police Chief, Art Acevedo: “What we’ve created is a chilling effect that we’re already starting to see the beginning of. They’re afraid that we’re more interested in a society deporting them than we are in bringing justice to the victims of crime.”); *see also* James Queally, *Latinos are reporting fewer sexual assaults amid a climate of fear in immigrant communities, LAPD says*, L.A. TIMES (Mar. 21, 2017), <http://www.latimes.com/local/lanow/la-me-ln-immigrant-crime-reporting-drops-20170321-story.html> (preliminary data in California has shown a drop in the reporting of certain crimes and suspect that it may be related to the anti-immigration sentiments. Los Angeles Police Chief Charlie Beck expressed his concerns in the following statement: “Imagine, a young woman, imagine your daughter, your sister, your mother . . . not reporting a sexual assault, because they are afraid that their family will be torn apart.”).

of 2017, and found that there was a 42.8 percent decrease in reports of rape and a 12 percent decrease of robbery reports in the Hispanic community.¹²⁴ The Police Chief, Art Acevedo, feared the decline was due to the immigration crackdown under President Trump's administration.¹²⁵

Undocumented immigrants are even afraid of seeking medical care.¹²⁶ Dr. Elisabeth Poorman, an internist, discussed the difference she noticed in her practice after President Trump signed an executive order in early 2017, broadening the types of immigrants who could be deported:

On a day-to-day level, I have people who need to be on Coumadin¹²⁷ and aren't coming in. I have people who have diabetes, who need insulin, who aren't getting it. I have people who have bad asthma . . . so they'll stay out for a while, but they're going to get sicker and end up in the hospital.¹²⁸

Although today there is no data available to show a decline in undocumented immigrants filing tort lawsuits, when an undocumented immigrant would rather live with his or her abuser than to have that abuser incarcerated, or would rather risk the possibility of succumbing to serious illnesses than to seek medical treatment, it follows that undocumented immigrants will file fewer lawsuits against: (1) companies who sell dangerous products and medications; (2) employers who subject them to hazardous conditions; (3) physicians who make careless mistakes that cost them or their loved ones their lives; (4) businesses who fail to protect their patrons; and (5) drivers who act negligently.

A decline in lawsuits filed by undocumented plaintiffs undermines the sole purpose of tort law: deterring wrongful conduct. Creating separate standards for undocumented immigrants in tort litigation contradicts precedent where courts have held that even an undocumented immigrant can seek refuge in a court of law.¹²⁹ Fewer lawsuits being filed by terrified, undocumented plaintiffs would also result in a windfall to tortfeasors, especially in jurisdictions where tortfeasors already receive an advantage when lost wages are calculated based on the income an undocumented

¹²⁴ Burnett, *supra* note 123.

¹²⁵ *Id.*

¹²⁶ Ike Swetlitz, *Immigrants, Fearing Trump's Deportation Policies, Avoid Doctor Visits*, PBS NEWSHOUR (Feb. 25, 2017), <https://www.google.com/amp/s/www.pbs.org/newshour/amp/health/immigrants-trump-deportation-doctor>.

¹²⁷ Coumadin, WEBMD, <https://www.webmd.com/drugs/2/drug-4069/coumadin-oral/details> (last visited Feb. 12, 2018) ("Medication used to treat blood clots and/or to prevent new clots from forming . . .").

¹²⁸ Swetlitz, *supra* note 126.

¹²⁹ Johnson, *supra* note 57, at 505.

immigrant would have received in his or her home country. These tortfeasors will obviously receive an even greater benefit when an injured plaintiff, like Natalie, declines to sue at all, based on fear of retaliation. Tortfeasors of undocumented immigrants should be held to the same standard as a tortfeasor who injures a legal, or natural born citizen. The focus of tort litigation should never shift from the harm committed.

*“I think there is blame on both sides. You had a group on one side that was bad. You had a group on the other side that was also very violent. Nobody wants to say that. I’ll say it right now.”*¹³⁰

— Donald J. Trump

Recent events provide a strong context of the impact our current administration will have on tort litigation. President Trump made the statement above in response to a rally in Charlottesville, Virginia, where a white nationalist¹³¹ group protested the removal of a Robert E. Lee statue.¹³² That day, while white supremacists and neo-Nazis¹³³ protested the removal of the statue, anti-fascist groups counter-protested.¹³⁴ A young woman was killed when a white nationalist drove his car into a crowd of counter-protesters.¹³⁴ President Trump’s response has been seen as all but endorsing the stance of the white supremacists.

Individuals who are still comfortable with supporting a president who can take a neutral stance on a protest where one side advocated for a pure race, while the other side urged for peace, love, and acceptance, is very troubling. There was never a neutral stance to take on the issue. Whether President Trump serves one term or two consecutive terms, supporters will not simply become un-discriminatory or non-prejudicial once he leaves

¹³⁰ Michael D. Shear & Maggie Haberman, *Donald Trump Defends Initial Remarks on Charlottesville: Again Blames Both Sides*, N. Y. TIMES (Aug. 15, 2017), <https://www.nytimes.com/2017/08/15/us/politics/trump-press-conference-charlottesville.html> (quoting Donald J. Trump).

¹³¹ *White Nationalist*, SOUTHERN POVERTY LAW CENTER, <https://www.splcenter.org/fighting-hate/extremist-files/ideology/white-nationalist> (last visited March 1, 2018) (“White nationalist groups espouse white supremacist or white separatist ideologies, often focusing on the alleged inferiority of non-whites. Groups listed in a variety of other categories – Ku Klux Klan, neo-Confederate, neo-Nazi, racist skinhead, and Christian Identity – could also be fairly described as ‘white nationalist.’”).

¹³² Jacey Fortin, *The Statue at the Center of Charlottesville Storm*, N.Y. TIMES (Aug. 13, 2017), <https://www.nytimes.com/2017/08/13/us/charlottesville-rally-protest-statue.html>.

¹³³ Hawes Spencer, *A Far-Right Gathering Bursts Into Brawls*, N.Y. TIMES (Aug. 13, 2017), <https://www.nytimes.com/2017/08/13/us/charlottesville-protests-unite-the-right.html>.

¹³⁴ Maggie Astor et. al., *A Guide to the Charlottesville Aftermath*, N.Y. TIMES (Aug. 13, 2017), <https://www.nytimes.com/2017/08/13/us/charlottesville-virginia-overview.html>.

office. Our current administration has developed a clamorous, anti-immigration culture that will have lasting effects for years to come.

Another example of the current climate toward undocumented immigrants propagated by President Trump happened in 2015 as two men were headed home after watching a baseball game.¹³⁵ Upon coming across a homeless Mexican immigrant sleeping near a rail station, the two men “beat him with a metal pipe, punched him repeatedly, urinated on him and called him a ‘wetback.’”¹³⁶ Feeling accomplished after the beating, the two men high-fived each other while leaving the homeless immigrant with several injuries.¹³⁷ When asked later about the assault, the two men informed arresting officers that, “Donald Trump was right . . . these illegals need to be deported.”¹³⁸

These two incidents are only two of many instances where supporters of President Trump used his messages to target minorities and immigrants,¹³⁹ and these incidents are a small part of a much larger picture. Stories like these are more concerning when protestors who attend rallies like the one in Charlottesville, or individuals who commit offenses like the two men walking home, are the same individuals who have the privilege of sitting in a jury box. These individuals could have the responsibility of determining whether an undocumented plaintiff receives compensation for their injuries. It is difficult to believe that an honest verdict could ever be reached solely based on the merits of the case when some of these jurors support laws and policies that seek to eradicate the very presence of an undocumented immigrant in the United States, and in some instances, as an entire race.

“Under the current broken system, a single immigrant can bring in virtually unlimited numbers of distant relatives. Under our plan, we focus on the immediate family by limiting sponsorships to spouses and minor children. This

¹³⁵ Mark Potok, *The Campaign Language of the Man Who Would Become President Sparks Hate Violence, Bullying, Before and After the Election*, SOUTHERN POVERTY LAW CENTER (Feb. 2017), <https://www.splcenter.org/fighting-hate/intelligence-report/2017/trump-effect>.

¹³⁶ *Id.*

¹³⁷ *Id.* (“Guillermo Rodriguez suffered broken ribs, broken fingers, and other injuries”).

¹³⁸ *Id.*

¹³⁹ See *Nwanguma v. Trump*, 273 F. Supp.3d 719 (W.D. Ky. 2017) (In an action alleging that protestors were attacked at a campaign rally, the First Amendment did not protect Donald Trump’s statement “get ‘em out of here” for purposes of an incitement to riot claim; accepting as true the allegations, including that violence actually resulted, it was plausible that the imperative statement advocated the use of force and was both intended and likely to result in violence; the complaint did not support that the protestors were trespassers. The court also declined to strike paragraphs discussing a supporter’s association with a white nationalist group).

vital reform is necessary, not just for our economy, but for our security and our future.”¹⁴⁰

— Donald J. Trump

The impact of the “Trump effect”¹⁴¹ will not stop with the consequences already realized. There will be future implications. Recently, President Trump falsely depicted the immigration system when he described that immigrants are entitled to sponsor an unlimited number of family members to migrate to the United States.¹⁴² President Trump’s inaccurate¹⁴³ characterization of current immigration policy provides voters, turned jurors, a false perception of immigrants with whom they may have no other experience with. Comments such as these not only reinforce the harms done to undocumented immigrants, but also broaden their impact to affect immigrants who are not undocumented, but who are living in the United States *legally*. With such conflicting information, individuals who are unable to separate President Trump’s fact from President Trump’s fiction will categorize all immigrants, legal or undocumented, under the same umbrella, which is unjust.

VI. CONCLUSION

*“When will our consciences grow so tender that we will act to prevent human misery rather than avenge it?”*¹⁴⁴

— Eleanor Roosevelt

After quoting numerous statements from President Trump that were filled with hatred, the author thought it would be important to end with a historical question that triggers self-reflection. Unfortunately, in President

¹⁴⁰ Philip Bump, *Chain Migration Is Not Bringing Floods of Terrorists to America*, WASH. POST (Feb. 6, 2018), https://www.washingtonpost.com/news/politics/wp/2018/02/06/chain-migration-is-not-bringing-floods-of-terrorists-to-america/?utm_term=.c819524582ea (quoting Donald J. Trump).

¹⁴¹ Jawee Kalee, *‘There’s a Virus in Our Country’: The ‘Trump Effect’ and Rise of Hate Groups, Explained*, L.A. TIMES (May 31, 2017), <http://www.latimes.com/nation/la-na-southern-poverty-law-center-05312017-htmistory.html>.

¹⁴² Bump, *supra* note 140.

¹⁴³ Linda Qui, *‘Chain Migration’ Has Become a Weaponized Phrase. Here Are the Facts Behind It* N.Y. TIMES (Jan. 26, 2018), <https://www.nytimes.com/2018/01/26/us/politics/the-facts-behind-the-weaponized-phrase-chain-migration.html>.

¹⁴⁴ Eleanor Roosevelt, *Eleanor’s Visit to the Displaced Persons Camp*, (Feb. 1946), FACING HISTORY AND OURSELVES, <https://www.facinghistory.org/universal-declaration-human-rights/eleanor-visits-displaced-persons-camps> (last visited Feb 28, 2018).

Trump's "great" America, many people and institutions will suffer. In a tort case, an undocumented immigrant must overcome juror biases, the admissibility of their undocumented status, and the various ways to calculate lost wages. An undocumented plaintiff sitting in a witness box seeks to communicate to a jury the impact a tortfeasor's conduct had on their lives, such as the inability to work, walk, or speak again. But today, in Donald Trump's "great" America, it is going to be very difficult for jurors to drown out the discriminatory and prejudicial messages being reported by and depicted in our news outlets, slowly creating a culture in which this way of thinking is the new norm. An undocumented plaintiff waiting for a verdict should never have to accept that some jurors will incorporate the inaccurate views our current administration holds of undocumented immigrants into the outcome of their case. The two principles of tort law, deterrence of wrongful conduct and redress for a plaintiff's injuries, should be the only factors that govern a jury's decision.