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Disentangling Immigration Policy From Tort Claims for Future Lost Wages

<https://doi.org/10.1515/jtl-2023-0024>

Received January 30, 2024; accepted January 30, 2024; published online February 28, 2024

Abstract: *While largely unknown, the Indiana Supreme Court’s 2017 opinion Escamilla v. Shiel Sexton Co. deserves to be canonized for closely examining – and, ultimately, rejecting – the incursion of federal immigration law and policy into state tort law. For over two decades, state and federal courts have relied on the United States Supreme Court’s 2002 ruling in Hoffman Plastic Compounds v. NLRB, to deny future lost wages awards to successful tort claimants who lack documentation. Escamilla reveals the faulty logic underlying this caselaw and provides a clear and straightforward framework for future courts to employ when faced with this issue. Ultimately, Escamilla demonstrates why plaintiffs’ undocumented status, alone, is insufficient to allow tortfeasors to escape paying tort victims what often amounts to substantial damages. In doing so, Escamilla fortifies the compensation and deterrence functions of tort law.*

Keywords: torts; damages; future lost wages; future lost earning capacity; immigration; immigrants

Distinguished Public Service Scholar and Associate Professor of Law, James E. Rogers College of Law. Many thanks to Ellen Bublick and Derek Bambauer for mentorship and detailed feedback, the participants of the 2023 Arizona Law, Harvard Law, Oxford Law Faculty, Freedom Center, American Law Institute, and Journal of Tort Law Symposium, Reinventing the Cannon: Great Torts Cases of the 21st Century, for their valuable insights, especially panel moderator Justice Thomas Balmer and co-panelists Jane Stapleton and Jonathan Cardi. Much gratitude to Bert Skye for formatting and footnoting magic, and to Sarah Gotschall, Cas Laskowski, and Allison Weber for invaluable research assistance.

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“[T]ort law is very much a creature of its time.”¹

1 Introduction

The history of common law torts is rife with attempts to limit damages available to plaintiffs who have successful tort claims.² For the past two decades, defendants have attempted to do just that with respect to a specific category of plaintiffs – immigrants and migrants (“im/migrants”)³ who lack documentation.⁴ Specifically, tort defendants who are liable for injuries to im/migrant plaintiffs routinely argue that a claimant’s undocumented status forecloses damages awards for future lost earnings and earning capacity (“future lost wages”).⁵ Although courts are divided on how to handle this issue,⁶ the draft *Restatement of the Law Third, Torts: Remedies* (“Draft Restatement”) objects to using immigration status evidence to limit damages in tort cases.⁷ The *Draft Restatement’s* reasoning substantially tracks the Indiana Supreme Court’s 2017 opinion in *Escamilla v. Shiel Sexton Co.*⁸

At first blush, *Escamilla* does not seem like a great tort case of the 21st century. What makes it a canonical decision, however, is its close examination – and, ultimately, rejection – of the incursion of federal immigration law and policy into state tort law. *Escamilla* demonstrates why plaintiffs’ undocumented status, alone, is insufficient to allow tortfeasors to escape paying successful tort claimants what often amounts to substantial damages. In doing so, *Escamilla* fortifies the deterrence and compensation functions of tort law.⁹

1 KENNETH S. ABRAHAM AND G. EDWARD WHITE, TORT LAW AND THE CONSTRUCTION OF CHANGE 4 (2022).

2 Wendy Andre, *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, 544–47 (2008).

3 Shefali Milczarek-Desai, *Opening the Pandemic Portal to Reimagine Paid Sick Leave for Immigrant Workers*, 111 CAL. L. REV. 1171, 1218 Appendix A (defining and describing the purpose behind the term “im/migrant”).

4 Andre, *supra* note 2 at 532–33.

5 Future lost earnings and future lost earning capacity are related but distinct concepts. The former refers to actual wages that will be lost in the future while the latter is based on future earning capacity. DAN B. DOBBS, PAUL T. HAYDEN, & ELLEN M. BUBBLICK, *Chapter 40: Damages, Basic Compensatory Damages for Personal Injury* in THE LAW OF TORTS § 479 (2d ed.) 2 (July 2022 Update).

6 *Id.*

7 The American Law Institute, *Restatement Law Third Torts: Remedies*, Tentative Draft No. 2, Ch. 1, “Compensatory Damages” § 18f (April 2023).

8 *Escamilla v. Shiel Sexton Company, Inc.*, 73 N.E.3d 663 (Ind. 2017).

9 David G. Owen, *Deterrence and Desert in Tort: A Comment*, 73 CAL. L. REV. 665, 667 (1985) (two main goals underlying tort law are to deter tortfeasors from harmful behavior and to compensate tort victims for injuries they suffer from such behavior).

The road that led to *Escamilla* began in 2002 with the U.S. Supreme Court's decision in *Hoffman Plastic Compounds v. NLRB*.¹⁰ *Hoffman* is not a tort case and instead, concerns federal labor law claims that permit workers to recover lost wages in the form of backpay when employers retaliate against them for exercising rights to organize under the National Labor Relations Act ("NLRA").¹¹ The worker whose rights had been violated in *Hoffman* was undocumented. Analyzing his claims for backpay against the background of the then-recently enacted Immigration Reform and Control Act ("IRCA"), the *Hoffman* Court held that undocumented workers who fraudulently obtained employment did not have the right to recover backpay under the NLRA.¹² The Court reasoned that since they lacked work authorization to lawfully work in the first place, they could not recover wages they would have been paid but for an employer's retaliatory actions in contravention of the NLRA.¹³

Importantly, *Hoffman* only addresses the issue of damages for undocumented workers under federal labor law, its holding is limited to backpay in the context of NLRA claims, and it does not consider damages for future lost wages arising from a tort action.¹⁴ Nonetheless, the opinion's sweeping language tying undocumented workers' ability to recover lost wages to the Court's interpretation of federal immigration policy,¹⁵ has opened the door for courts to limit damages for undocumented people in other types of cases, including state tort claims.¹⁶

Soon after *Hoffman*, defendants in a variety of cases – ranging from federal Fair Labor Standards Act (FLSA) and Equal Employment Opportunity Act (Title VII) claims,¹⁷ to state workers' compensation¹⁸ and wage theft claims,¹⁹ to state tort claims²⁰ – began to argue that *Hoffman*'s reasoning precluded victorious,

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

11 National Labor Relations Act ("NLRA"), 29 U.S.C. § 151 et seq.

12 *Hoffman*, *supra* note 10 at 140–41, 149–50.

13 *Id.* at 142–43.

14 *Id.*

15 See Milczarek-Desai, *supra* note 3 at 119–20 (discussing the conflict between the Court's interpretation and legislative intent).

16 Andre, *supra* note 2 at 551.

17 Michael Wishnie, *Emerging Issues for Undocumented Workers*, 6 U. PA. J. LAB. & EMP. L. 497, 509–511 (2004).

18 Most courts faced with this issue in workers' compensation claims reject *Hoffman* as controlling and permit workers' compensation claimants to recover future lost wages irrespective of their states. See e.g., *Kalyta v. Versa Prod., Inc.* No. CIV.A. 07–1333 MLC, 2011 WL 996168, at *4 (D.N.J. Mar. 17, 2011) (noting that workers' compensation claims schemes "supplant[] tort liability" for workers injured on the job); but see *Torres v. Precision Industries*, 995 F.3d 485, 488–89 (6th Cir. 2021) (precluding backpay damages under a state workers' compensation claim).

19 Wishnie, *supra* note 17 at 512–13.

20 See e.g., *Ayala v. Lee*, 81 A.3d 584, 590 (Md. Ct. Spec. App. 2013); *Rosa v. Partners in Progress, Inc.*, 868 A.2d 994, 996–97 (N.H. 2005); *Veliz v. Rental Corp., USA, Inc.*, 313 F. Supp. 2d 1317, 1335 (M.D. Fla.

undocumented plaintiffs from recovering all manner of damages. In the tort realm, defendants sought, and continue to seek, to bar undocumented plaintiffs' from recovering future lost wages even though these types of compensatory damages can constitute a substantial portion of successful tort claimants' awards.²¹ Tort defendants argue that, like the plaintiff in *Hoffman*, undocumented tort claimants should not be working in the country without work authorization and therefore, future lost wages violate immigration law and policy.²² As a result, defendants in tort actions routinely ask courts to deny undocumented plaintiffs' future lost wages claims.²³

The battle surrounding undocumented tort plaintiffs' ability to recover future lost wages has been fought on multiple fronts in both state and federal courts, many of which provide conflicting analyses and holdings. Some courts center their review on federal preemption doctrine to analyze whether *Hoffman* and IRCA preempt state law claims by undocumented plaintiffs for future lost wages.²⁴ Others focus on whether evidence of immigration status should be permitted under evidentiary rules of relevance.²⁵ Even when courts agree on issues of preemption and relevancy, they diverge with respect to what standard should be used to calculate future lost wages. Some permit weighing of immigration status when the plaintiff used fraudulent documentation to obtain past employment,²⁶ some limit awards to wage rates in a plaintiff's country of origin,²⁷ some require proof that a plaintiff is more likely than

2003); *Hernandez-Cortez v. Hernandez*, No. Civ. A. 01-1241-JTM, 2003 WL 22519678, at *1 (D. Kan. 2003); *Balbuena v. IDR Realty LLC*, 845 N.E.2d 1246, 1260 (N.Y. 2006); *Majlinger v. Cassino Contracting Corp.*, 802 N.Y.S.2d 56, 58 (App. Div. 2d Dept 2005); *Gonzalez v. Franklin*, 383 N.W.2d 907, 909 (Wis. 1986).

21 Hugh Alexander Fuller, *Immigration, Compensation and Preemption: The Proper Measure of Lost Future Earning Capacity Damages after Hoffman Plastic Compounds, Inc. v. NLRB Notes and Comments*, 58 BAYLOR L. REV. 985, 986–87 (2006).

22 See e.g., *Escamilla*, *supra* note 8 at 670; *Rosa*, *supra* note 20 at 997; *Veliz*, *supra* note 20 at 1335; *Hernandez-Cortez*, *supra* note 20 at *1. In some cases, such as *Rosa v. Partners in Progress, Inc.*, defendants argue for limiting future lost earnings based on what plaintiffs would have earned in their country of origin. *Rosa*, *supra* note 20. Professor Michael Wishnie, however, has pointed out that this is tantamount to no recovery at all. Michael Wishnie, *Undocumented Workers: State Courts' Novel Wage Remedy for Workplace Injuries*, CCH LABOR LAW REPORTS INSIGHT, No. 896 150, 154 (2005).

23 Importantly, courts uniformly hold that a tortfeasor may be held liable to an undocumented plaintiff – the unresolved issue is whether tortfeasors must pay future lost wages damages to undocumented plaintiffs. See e.g., *Melendres v. Soales*, 306 N.W. 2d 399, 402 (Mich. App. 1981).

24 See e.g., *Martinez v. Cont'l Tire Americas, LLC*, 476 F. Supp. 3d 1137, 1143–45 (D. N.M. 2020); *Madeira v. Affordable Housing Foundations, Inc.*, 469 F.3d 219, 231–249 (2nd Cir. 2006).

25 See e.g., *Salas v. Hi-Tech Erectors*, 168 Wash. 2d 664, 669–72 (WA 2010).

26 See e.g., *Balbuena*, *supra* note 20 at 1260.

27 See e.g., *Garcia-Lopez v. Bellsouth Telecommunications, Inc.*, 2010 WL 1873042, *7 (S.D. Miss. 2010) (unreported); *Rosa*, *supra* note 20 at 997, 1000.

not to be deported before permitting immigration status evidence,²⁸ and some prohibit this evidence altogether.²⁹ To confuse matters further, many of these cases rely on earlier caselaw that does not sound in tort but rather, examines claims under state employment and labor laws.³⁰ This Article is the first to categorize the different strands of caselaw considering the issue of undocumented plaintiffs' access to future lost wages, delineate the myriad standards courts have created to answer this question, and recommend one court opinion – *Escamilla* – above the rest.

Escamilla makes several significant contributions to the tort law canon. First, it discusses how to evaluate the impact of *Hoffman* on state tort law claims. Second, it provides a legal framework for determining whether, and, if so, under what circumstances, immigration status should impact future lost wages. Third, it cautions against adjudicating tort law claims within a fraught, immigration context replete with passion, prejudice and obfuscation of tort law principles.³¹ Finally, its ultimate holding – that immigration law does not preempt future lost wages claims in tort cases and that immigration status should not deprive successful tort claimants of significant damages absent specific evidence of likely deportation – upholds tort law's twin goals of deterring risky behavior and fully compensating victims.

Understanding *Escamilla* and the surrounding caselaw is important in this post-pandemic moment when the country is deeply divided on immigration issues yet is home to between 10 and 11 million undocumented people who work and reside within its borders.³² Of these, millions work in low-wage, essential, and frontline industries, such as construction, meat-processing, and agriculture, that require intense, physical labor.³³ When these individuals are tortiously injured, as thousands are each year, the ability to recover future lost wages becomes paramount, especially for those severely injured, because they cannot return to the same labor-intensive jobs they once held.³⁴ Future lost wages are the only damages that have the potential

²⁸ *Escamilla*, *supra* note 8 at 676.

²⁹ *Salas*, *supra* note 25 at 673; *Martinez*, *supra* note 24 at 1148–49.

³⁰ *Madeira*, *supra* note 24 at 228–30; *Balbuena*, *supra* note 20 at 351.

³¹ *Escamilla*, *supra* note 8 at 365; *Salas*, *supra* note 23 at 586.

³² Miriam Jordan, *Many Undocumented Immigrants are Departing after Decades in the U.S.*, N.Y. TIMES (March 1, 2023), <https://www.nytimes.com/2023/03/01/us/undocumented-immigrants-exodus-us.html> (“The current undocumented population has stayed relatively constant at about 10.2 million over the past several years after peaking at nearly 12 million in 2008”); see also Dina Lexine 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) (putting the number of undocumented people in America at 11.1 million); Wishnie, *Emerging Issues*, note 17 (estimating the number of undocumented people in the United States at 11 million).

³³ Fuller, *supra* note 21.

³⁴ *Id.* at 987.

to “compensate for the reduction in [their] ability to earn income.”³⁵ Currently, an undocumented plaintiff’s ability to recover lost wages hinges on which standard among many a court will adopt to review arguments against such damages. This shifting and confusing legal landscape makes it difficult for parties to prepare tort claims and defenses in a thoughtful and competent manner.³⁶ Courts and litigants would benefit from a coherently articulated and uniform standard to abide by on this issue.

Part I describes the road that led to *Escamilla*. It provides a brief overview of the *Hoffman* decision and traces the state-based labor and tort cases that rely on it. This section details courts’ differing views on how to analyze and ultimately determine undocumented plaintiffs’ claims for future lost wages. It also discusses the tension between immigration law and tort law that arises from this caselaw.

Part II evaluates the *Escamilla* opinion and describes its framework for determining whether undocumented claimants should recover future lost wages. It details the three-prong structure of *Escamilla*’s inquiry, which considers: (1) whether *Hoffman* preempts state tort law claims for future lost wages; (2) whether immigration status evidence is relevant to tort law claims for future lost wages and if so, how to determine if its probative value is outweighed by other evidentiary concerns; and (3) whether immigration status evidence should be permitted in a given case. In analyzing these issues, *Escamilla* is the first court to comprehensively disentangle federal immigration law and policy from state tort law.

Part III recommends a path forward for courts consistent with *Escamilla* and the *Draft Restatement*, but with important caveats. Specifically, it argues that state courts should engage in a detailed preemption analysis that goes one step further than that conducted in *Escamilla* to consider whether *Hoffman* preempts common law tort claims. In doing so, courts should emphasize the distinction between immigration law concerns in the employment context and the purposes of tort law, which are to compensate individuals for injuries and deter tortfeasors from dangerous behavior. Courts should also employ *Escamilla*’s evidentiary framework to determine that immigration status evidence may only limit future lost wages claims when tortfeasors clearly establish that a tort claimant’s lack of documentation would, in fact, result in deportation that would compromise the ability to earn future wages in the United States. In doing so, courts can avoid wholesale elimination of an entire category of damages for an entire class of persons, which in turn preserves the animating purposes behind the common law of torts. The Article, then, concludes.

³⁵ *Id.*

³⁶ April Strahan, *Protecting Undocumented Clients*, 53 TRIAL 34, 38 (2017).

2 The Road to Escamilla

Hoffman's holding only applies to backpay awards under federal labor law. Backpay is the only monetary remedy under the NLRA, and it is calculated by looking to the amount of wages a worker would have earned from the date of unlawful termination to the date of the backpay award.³⁷ Future lost wages, on the other hand, is a tort law remedy that seeks to deter tortfeasors from future wrongdoing and compensate tort victims by providing damages corresponding to wages that could have been earned if not for the injury.³⁸ Although the two remedies – backpay in the labor law context and future lost wages in the tort context – are incongruent, *Hoffman* is the case tortfeasors rely on to argue against future lost wages awards in tort cases. For this reason, as a preliminary matter, it is important to understand what *Hoffman* says and does not say about undocumented plaintiffs' ability to recover damages.

2.1 Understanding Hoffman

Hoffman arose when an undocumented employee, Jose Castro, was unlawfully terminated by his employer for participating in union activity at his workplace.³⁹ Because the employer's actions violated the NLRA, the agency that enforces that law, the National Labor Relations Board ("NLRB"), brought an action against the employer.⁴⁰ Although the employer was found liable under the law, it argued that it did not owe Mr. Castro backpay because he was undocumented.⁴¹

The *Hoffman* Court centered its analysis on whether awarding backpay to undocumented workers contravened the then-recently passed IRCA. That Act sought to eliminate undocumented migration to the United States by making it unlawful for employers to hire workers who lacked work authorization.⁴² The Court opined that the purpose behind IRCA was to establish "a comprehensive scheme prohibiting the

³⁷ 29 U.S.C. § 160(c) (backpay awards require claimants to take mitigation measures – i.e., to actively seek other suitable employment – and are reduced accordingly).

³⁸ DOBBS, HAYDEN & BUBBLICK, *supra* note 5.

³⁹ *Hoffman*, *supra* note 10 at 140.

⁴⁰ *Id.* at 142.

⁴¹ *Id.* at 147.

⁴² Immigration Reform and Control Act of 1986 (IRCA), Pub. L. No. 99–603, § 101, 100 Stat. 3359 (codified at 8 U.S.C. § 1324a); see Milczarek-Desai, *supra* note 3 at 149–150 (explaining the different types of immigration statuses and their implications for work authorization).

employment of illegal aliens in the United States.”⁴³ Specifically, the Court pointed out that IRCA “mandates that employers verify the identity and eligibility of all new hires by examining specified documents before they begin work. If an alien applicant is unable to present the required documentation, the unauthorized alien cannot be hired.”⁴⁴ The Court went on to state that IRCA also subjects workers who present fraudulent work authorization documents to criminal liability.⁴⁵ The Court emphasized that IRCA makes it “impossible for an undocumented alien to obtain employment in the United States without some party directly contravening explicit congressional policies.”⁴⁶ Thus, *Hoffman* is primarily concerned with upholding immigration law and policy prohibiting employment of individuals who lack work authorization documentation. Backpay damages are predicated upon the assumption that a worker would have continued working but for an employer’s unlawful actions.⁴⁷ For this reason, the Court held that “awarding backpay to illegal aliens runs counter to policies underlying IRCA” and that “allowing the Board to award backpay to illegal aliens would unduly entrench upon explicit prohibitions critical to federal immigration policy, as expressed in IRCA.”⁴⁸ The Court also stated that permitting backpay awards to undocumented workers would encourage unlawful migration and undocumented labor.⁴⁹

Hoffman’s focus is on resolving a seeming conflict between two federal statutes – the NLRA and IRCA.⁵⁰ This conflict arises because the NLRA authorizes backpay

43 *Hoffman*, *supra* note 10. Throughout its opinion, the Court uses the term “illegal alien” to describe workers who lack work authorization; this Article employs the term “undocumented person” or “undocumented worker” both because it is more precise and because “illegal alien” has a pejorative connotation. Milczarek-Desai, *supra* note 3 at 149.

44 Milczarek-Desai, *supra* note 3 at 148 (citation omitted).

45 *Id.*

46 *Id.* (“Either the undocumented alien tenders fraudulent identification, which subverts the cornerstone of IRCA’s enforcement mechanism, or the employer knowingly hires the undocumented alien in direct contradiction of its IRCA obligations.”).

47 See *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 197–98 (1941) (discussing calculation of backpay awards under the NLRA).

48 *Hoffman*, *supra* note 10 at 149, 151. The Court’s opinion wholly ignores the on-the-ground reality that undocumented workers can and do obtain employment given the reality of the American labor market. *Key Findings About U.S. Immigrants* PEW RESEARCH CENTER, (August 20, 2020), <https://www.pewresearch.org/fact-tank/2020/08/20/key-findings-about-u-s-immigrants/> (stating that there are 7.6 million unauthorized workers in the United States).

49 *Hoffman*, *supra* note 10 at 151 (the Court did not cite to any data to support this argument). In dissent, Justice Breyer, joined by Justices Stevens, Souter, and Ginsburg, argued that the opposite was true. By failing to award backpay to an undocumented worker whose NLRA rights had been violated, the Court was actually encouraging employers to violate IRCA by hiring undocumented workers who would “lower[] the cost to the employer of an initial labor law violation.” *Id.* at 155.

50 *Hoffman*, *supra* note 10 at 149.

awards to all workers who have been terminated in violation of its anti-retaliation provisions, which assumes an employee would be working but for an employer's bad actions. IRCA, on the other hand, prohibits employment of undocumented workers, thereby allegedly contradicting the necessary assumption baked into the definition of backpay. *Hoffman* addresses only this conundrum between these two federal laws.⁵¹

Despite the narrowness of *Hoffman*'s actual holding, tort defendants view it as opening the door, however slightly, to analogize backpay in NLRA cases to future lost wages in tort claims. Tortfeasors facing liability for bodily injury and harm to undocumented plaintiffs have argued that, based on *Hoffman*, IRCA prohibits future lost wages damages in state law actions where the plaintiff is undocumented.⁵² Because *Hoffman* does not address this issue,⁵³ courts have struggled to enunciate a uniform standard regarding undocumented claimants' ability to recover future lost wages in tort cases.⁵⁴ This, in turn, has resulted in a wide range of opinions – both in terms of analyses and holdings – that are not easily reconcilable with one another.

2.2 Hoffman's Progeny

The cases discussed in this section arise from state law claims, both in the employment and tort context, made by undocumented plaintiffs.⁵⁵ The cases generally divide into two broad categories: those that focus on the question of whether IRCA/*Hoffman* preempts state law claims for future lost wages, and those that focus on whether documentation status is relevant to the determination of a future lost wages award.⁵⁶ For the most part, the federal courts tend to be preoccupied with the former and the state courts with the latter.

51 *Id.* (Indeed, the Court's narrow holding only requires that IRCA trump the NLRA's backpay provisions when an undocumented worker who tendered fraudulent documents to obtain employment is terminated in violation of the NLRA).

52 *Infra* Part II.

53 Wishnie, *Emerging Issues*, *supra* note 17 at 509.

54 A lack of consensus over how to treat undocumented persons' claims for lost wages in both the employment and tort context existed even before *Hoffman*. See *Rodriguez v. Kline*, 186 Cal.App.3d 1145, 232 Cal.Rptr. 157, 158 (1986) (relying upon IRCA to rule that an illegal alien may only recover lost United States earnings when he can "demonstrate to the court's satisfaction that he has taken steps that will correct his deportable condition"); *but see Hernandez v. M/V Rajaan*, 848 F.2d 498, 500 (5th Cir. 1988) (per curiam), (ruling that if an undocumented plaintiff who was injured on the job has "prove[n] his prior wages in the United States," he is eligible to recover future lost wages unless his employer shows he is in risk of imminent deportation).

55 *Infra* Part II.

56 *Supra* Part I.A.

2.2.1 Federal Courts Consider Whether IRCA/*Hoffman* Preempts State Law Claims for Future Lost Wages

The Second Circuit Court of Appeals is the highest court⁵⁷ to have addressed whether IRCA/*Hoffman* precludes undocumented plaintiffs from recovering future lost wages damages in a 2006 case titled *Madeira v. Affordable Housing Foundation, Inc.*⁵⁸ That case arose not in the torts context, but under a provision of New York's Labor Law that was an extension of New York's workers' compensation scheme.⁵⁹ Importantly, the *Madeira* Court pointed out that the future lost wages damages in that case were compensatory in nature and therefore akin to those permitted under personal injury actions.⁶⁰ Perhaps for this reason, several tort cases deciding this issue rely on *Madeira's* detailed, preemption analysis.⁶¹

Jose Madeira was seriously injured when he fell from the top of a building while working at a development site.⁶² After four surgeries and more than 3 months in the hospital, Mr. Madeira "was still substantially disabled" when his case came to trial.⁶³ The jury found the defendants⁶⁴ liable for Mr. Madeira's injuries and, among other damages, awarded him compensatory damages for future lost earnings.⁶⁵ The defendants appealed arguing that IRCA/*Hoffman* "precluded any damages award under New York law that compensated an undocumented worker for lost earnings, at least to the extent such earnings were based on pay rates in the United States rather than in the worker's native country."⁶⁶

57 See *Kalyta*, *supra* note 18 at *3 (D.N.J. Mar. 17, 2011) (stating that *Madeira* is "[t]he highest federal court addressing this situation").

58 *Madeira*, *supra* note 24.

59 *Id.* at 229–30.

60 *Id.* (indeed, as the Court pointed out, New York's workers' compensation scheme, like that of many other states, permits workers to be compensated for work-related injuries by removing their ability to bring a common law tort action).

61 *Martinez*, *supra* note 24 at 1146; *Berdejo v. Exclusive Builders, Inc.*, 865 F. Supp. 2d 617, 625 (M.D. Pa. 2011); *Hocza v. City of New York*, 2009 WL 124701 *3–4 (S.D.N.Y. 2009) (unreported).

62 *Madeira*, *supra* note 24 at 224.

63 *Id.* at 224.

64 Another parallel between *Madeira* and cases adjudicating undocumented plaintiffs' tort claims is that the defendants in *Madeira* were not the plaintiffs' employers just as a tortfeasor defendant is typically not a tort plaintiff's employer. *Madeira*, *supra* note 24 at 224.

65 *Madeira*, *supra* note 24 at 222.

66 *Id.* at 223. Professor Michael Wishnie has argued that limiting an undocumented plaintiff's recovery to that of "the prevailing wage rate in the [plaintiff's] native country ... is essentially no recovery ... calculation of wages the [plaintiff] could have earned in his home country alone will exceed the amount of the recovery." CCH LABOR REPORTS INSIGHT, No. 896 150, Interviewing Professor Michael Wishnie at 154.

Madeira first reflects on the fact that IRCA's primary task was to dissuade employers from hiring undocumented workers by imposing civil and criminal sanctions on employers who knowingly hired such workers.⁶⁷ The court emphasized that IRCA did not make it unlawful for undocumented persons to accept employment in the United States; rather, undocumented workers were only subject to sanctions if they tendered fraudulent documents in order to obtain employment.⁶⁸ It then distinguished the facts and law at issue in *Hoffman* by stating that the undocumented plaintiff in *Hoffman* was injured as a result of termination from employment while Mr. Madeira was injured due to a fall that caused severe and debilitating bodily injuries.⁶⁹ "The distinction is significant," noted the court, because while IRCA requires employers to terminate undocumented employees if they are found to lack work authorization documents, nothing in IRCA requires employers to injure undocumented employees.⁷⁰

Madeira explains that the two cases are also legally inapposite because *Hoffman* "sought to reconcile two federal statutes to ensure that one did not trench on the other ... [i]n this case, however, appellants urge us to hold that immigration law stands as an absolute bar to well-established state law relating to compensable damages for personal injury."⁷¹ Because *Hoffman* did not address the alleged preemption of state law by IRCA/*Hoffman* at issue in *Madeira*, the Second Circuit cautioned that it must tread carefully given strong federalism principles that disfavor federal preemption of state law.⁷²

Next, *Madeira* employed traditional preemption doctrine to analyze whether IRCA, as interpreted by *Hoffman*, preempted state law claims for future lost wages.⁷³ The court began by stating that because the state law at issue involves "the historic state police power over public safety," the court would "start with the assumption that these powers" could not be abrogated absent a "*clear and manifest* purpose of Congress."⁷⁴ Looking first at the issue of express preemption, the court reviewed IRCA's preemption clause, which preempts states and localities from "imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ ... unauthorized aliens."⁷⁵ Based on this plain language, the court found

67 *Madeira*, *supra* note 24 at 231 (citing to IRCA, 8 U.S.C. §1324a(a)).

68 *Id.*

69 *Id.* at 236.

70 *Id.*

71 *Id.* at 237 (emphasis in original).

72 *Id.* at 237–38 (*Madeira* emphasizes and reiterates the age-old principle that courts will not find preemption of state law – especially state laws that pertain to powers traditionally held by states – "in the absence of compelling congressional direction").

73 *Id.* at 238.

74 *Id.* (internal quotations and citations omitted, emphasis in original).

75 *Id.* at 231–32

that IRCA “is silent as to its preemptive effect on any other state or local laws” and that, therefore, no express conflict exists.⁷⁶

Turning to the doctrine of implicit field preemption,⁷⁷ the court concluded that even though “immigration is plainly a field in which the federal interest is dominant ... [s]tate tort and labor laws occupy an entirely different field.”⁷⁸ Moreover, nothing in the record shows that “Congress, by enacting IRCA, demonstrated a clear and manifest intent to supersede – at least where illegal aliens are concerned – traditional state tort or labor laws determining the compensatory damages recoverable for personal injuries.”⁷⁹ As a result, the court held that there was no implicit field preemption of Mr. Madeira’s award of future lost wages.⁸⁰

The court also considered the possibility of implicit conflict preemption, which requires a determination of “whether a compensatory award of lost earnings to an injured undocumented worker so conflicts with IRCA policy prohibiting the hiring of such an alien as to warrant an inference of federal preemption.”⁸¹ Specifically, the court asked whether it would be physically impossible for an employer to comply with both New York’s labor law and IRCA.⁸² The court concluded that it was possible for an employer to comply with both because an employer’s duties under New York’s state law – to ensure a safe working environment – were wholly separate and unrelated to duties under federal immigration law.⁸³

Through this analysis, the *Madeira* Court concluded that Congress did not provide a “clear and manifest” intent to preempt lost future wages damages under New

⁷⁶ *Id.* at 232

⁷⁷ *Id.* at 240 (Congress’ preemption of state law may be implied “where it has designed a pervasive scheme of regulation that leaves no room for the state to supplement, or where it legislates in ‘a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state law on the same subject.’”).

⁷⁸ *Id.*

⁷⁹ *Id.* at 240–241.

⁸⁰ *Id.*

⁸¹ *Id.* at 241.

⁸² *Id.*

⁸³ *Id.* at 242 (internal citations omitted). The *Madeira* Court also noted that “both before and after *Hoffman* ... state courts have almost uniformly held that workers’ compensation awards are not an obstacle to the accomplishment and execution of the policy and purposes of IRCA. Rather, courts have generally concluded that uniform application of workers’ compensation laws best serves the interests of both federal and state law.” This is because allowing employers to shirk their duties to undocumented plaintiffs under workers’ compensation would “contravene the purpose of the Immigration Reform Act by creating a financial incentive for unscrupulous employers to hire undocumented workers.” *Id.* at 244–45.

York's Labor law.⁸⁴ Several lower federal courts have disagreed with *Madeira's* holding and rely on *IRCA/Hoffman* to deny undocumented plaintiffs recovery of future lost wages under state law claims.⁸⁵ None of these cases, however, engages in any preemption analysis.⁸⁶ Several other lower federal courts come to the same conclusion as *Madeira* but they, too, do not discuss preemption.⁸⁷ Only a handful of lower federal courts conduct a preemption analysis, and those, like *Madeira*, hold that *IRCA/Hoffman* does not preempt an undocumented plaintiff from recovering future lost wages.⁸⁸

⁸⁴ *Id.* at 249 (the court added that “[o]f course, if Congress thinks it necessary in furtherance of federal immigration policy to preclude state law compensatory damage awards such as the one in this case, it may certainly do so, but it must manifest that intent clearly”).

⁸⁵ *Garcia-Lopez*, *supra* note 27, at *7 (unreported) (holding without any preemption analysis that undocumented plaintiffs’ future lost wages claims are barred by *IRCA* and *Hoffman*); *Romero v. Reiman Corp.*, No. 11-CV-216-F, 2011 WL 11037890, at *7 (D. Wyo. Dec. 21, 2011) (unreported) (striking undocumented plaintiff’s claim for future lost wages based on *Hoffman* without any preemption analysis). At least two decisions prior to *Madeira* arrived at similar results. *See Veliz*, *supra* note 20 (holding without any preemption analysis that *Hoffman* precludes an undocumented plaintiff cannot recover future lost wages in a tort action); *Hernandez-Cortez*, *supra* note 20 (holding without any preemption analysis that based on *Hoffman*, an undocumented plaintiff’s status precludes an award of future lost wages).

⁸⁶ *Garcia-Lopez*, *supra* note 27 at *7, *Romero*, *supra* note 85 at *7, *Veliz*, *supra* note 20 at 1335, *Hernandez-Cortez*, *supra* note 20 at *1.

⁸⁷ *See Hocza*, *supra* note 61 at *2 (unreported) (citing *Madeira* and holding that plaintiff’s undocumented status “cannot be used to rebut a claim for future lost earnings” but without any preemption analysis); *Berdejo*, *supra* note 61 (citing *Madeira* and denying summary judgment for undocumented plaintiffs’ future lost earnings claim but without any preemption analysis); *Ortiz v. Cooper Tire & Rubber Co.*, No. CIV-13-32-D, 2015 WL 1498713, at *6 (W.D. Okla. Mar. 31, 2015) (citing *Madeira* and others and declining to bar an undocumented plaintiff from future lost wages in a tort action under state law but without any preemption analysis.)

⁸⁸ *See Kalyta*, *supra* note 18 at *4, *6–7 (D.N.J. Mar. 17, 2011) (unreported) (borrowing from *Madeira's* preemption analysis, resolving the conflict between *Madeira*, *Veliz*, and *Hernandez-Cortez* in favor of *Madeira*, and concluding that “neither *IRCA* nor New Jersey law prohibits lost wages damages for undocumented workers in the personal injury tort context, and thus the Court will not bar [the undocumented plaintiff] from pursuing” future lost wages under a worker’s compensation claim, which the court views as having supplanted tort liability); *Vargas v. Kiewit Louisiana Co.*, No. CIV.A. H-09-2521, 2012 WL 2952171, at *2–5 (S.D. Tex. July 18, 2012) (unreported) (citing *Madeira's* preemption analysis and concluding that *IRCA/Hoffman* does not preempt the undocumented plaintiff’s state tort claim for future lost wages); *Martinez*, *supra* note 24 at 1147 (citing *Madeira* and engaging in its own preemption analysis to conclude that “[t]here is no conflict here between the *IRCA* and the compensatory remedies [including future lost wages] under New Mexico tort law” because “it is not impossible for a tortfeasor to pay compensatory damages and comply with the *IRCA*, given that the Defendant is not the decedent’s employer. Moreover, New Mexico tort law is not an obstacle to the accomplishment of the *IRCA*. The parties are not in an employment relationship. Therefore, compensatory damages here are not impeding on Congress’s decision to regulate the employment

2.2.2 State Courts Consider Whether a Plaintiff's Undocumented Status is Relevant in Determining Future Lost Wages

In contrast to federal cases, nearly all state courts look not to whether IRCA/*Hoffman* preempts state law, but to whether evidence of the plaintiff's undocumented status should be considered when awarding future lost wages.⁸⁹ These cases provide a dizzying spectrum of ways to analyze this issue but can be loosely categorized as follows: those that hold undocumented status evidence, without more, is relevant to the issue of future lost wages,⁹⁰ those that hold it is never relevant,⁹¹ and those that find relevance but determine that the probative value of this evidence substantially outweighs the risk of unfair prejudice to the plaintiff.⁹²

In the first category is an often-cited opinion, *Rosa v. Partners in Progress, Inc.*, decided in 2005 by the New Hampshire Supreme Court.⁹³ The case arose from an employment relationship, but it concerns a tort claim.⁹⁴ The *Rosa* Court presumed *Hoffman* was not controlling but nonetheless considers the policy goals underlying IRCA to pronounce that, “generally an illegal alien may not recover lost United States earnings, because such earnings may be realized only if that illegal alien engages in unlawful employment.”⁹⁵ In the next breath, however, it states that “tort deterrence principles provide a compelling reason to allow an award of such damages against a person responsible for an illegal alien’s employment when that person knew or

relationships of undocumented immigrants. Nothing in the IRCA demands, or even implies, that tortfeasors should not be held liable for their negligence if the person whom they harm is working in this country illegally or has violated the IRCA.”).

⁸⁹ *Rosa* and several other state court decisions consider the preemption question – and conclude that IRCA/*Hoffman* does not preclude state law claims for future lost wages – but their holdings are based on whether evidence of undocumented status is admissible on the issue of future lost wages. *Rosa*, *supra* note 20 at 1000–01; *see also Balbuena*, *supra* note 20 at 363 (2006) (“[I]n the absence of proof that plaintiffs tendered false work authorization documents to obtain employment, that IRCA does not bar maintenance of a claim for lost wages by an undocumented alien”); *Grocers Supply, Inc. v. Cabello*, 390 S.W.3d 707 (Tex. App. 2012) (“We have found no evidence Congress intended IRCA to combat illegal immigration by encroaching into the States’ authority to regulate health and safety matters, [nor is there] any evidence that damage awards in tort actions have any impact on the employment opportunities available to undocumented aliens. Any link between tort awards and job opportunities is thus speculative at best, and a speculative link will not support a preemption defense.”).

⁹⁰ *See e.g., Rosa*, *supra* note 20 at 1000–01, *Balbuena*, *supra* note 20 at 363.

⁹¹ *See e.g., Tyson Foods, Inc. v. Guzman*, 116 S.W. 3d 233, 244 (Tex. App. 2003).

⁹² *See e.g., Martinez*, *supra* note 24 at 1148–49; *Salas*, *supra* note 25 at 586–87.

⁹³ *Rosa*, *supra* note 20.

⁹⁴ *Id.*

⁹⁵ *Id.* at 1000.

should have known of that illegal alien's status."⁹⁶ The case finally holds that if tort defendants who are responsible for an undocumented plaintiff's employment knew or should have known of the plaintiff's undocumented status, they may not argue against an award of future lost wages.⁹⁷

The *Rosa* opinion also opines on the issue of whether a tortfeasor may introduce evidence of an undocumented plaintiff's status in order to reduce an award of future lost wages.⁹⁸ The defendants argued that an undocumented plaintiff may be deported or unable to secure employment, thereby reducing or eliminating a claim to future lost wages, especially if such wages are calculated in U.S. dollars.⁹⁹ The *Rosa* Court decided that the plaintiff's undocumented status could be introduced as evidence because it "is relevant to the issue of lost earnings" and "[t]hough evidence of his status may well be prejudicial, such evidence ... is essential should [plaintiff] wish to pursue a claim for lost earning capacity measured at United States wage levels."¹⁰⁰ Thus, according to *Rosa*, a plaintiff's undocumented status, without more, is relevant to the amount of future lost wages the plaintiff should be awarded.

Several state court opinions, both those arising from employment claims as well as the tort claims, align with some version of *Rosa*'s holding. For example, the Louisiana Court of Appeals held that an undocumented plaintiff's status is relevant and admissible on the issue of future lost wages because, in its view, an undocumented plaintiff is "subject to deportation at any time."¹⁰¹ Putting a slightly different twist on the issue, the Colorado Court of Appeals held that an undocumented plaintiff's status was relevant if a defendant tortfeasor could establish that the plaintiff obtained employment, even if wholly unrelated to the tort claim, "by violating the law ... related to such employment."¹⁰² The court reasoned that this was relevant to future lost wages because it would indicate whether a "plaintiff is unlikely to remain in this country throughout the period of claimed lost future income."¹⁰³ State courts in New York, Florida, and Michigan also have held that

96 *Id.* at 1000–01 (even though the plaintiff and defendants in this action were not in an employment relationship, because the defendant tortfeasors were general contractors who hired a subcontractor under whom the undocumented plaintiff worked, the court imputed knowledge of the undocumented plaintiff's status to the defendant tortfeasors in the same manner as if they had been plaintiff's employers).

97 *Id.* at 1001.

98 *Id.* at 1002.

99 Wishnie, *Undocumented Workers*, *supra* note 22 at 154.

100 *Rosa*, *supra* note 20 at 1002.

101 *Maldonado v. Kiewit Louisiana*, 152 So. 3d 909 (Ct. App. La. 2014) (the court failed to provide any support for its assertion that an undocumented plaintiff is, in fact, subject to deportation at any time).

102 *Silva v. Wilcox*, 223 P.3d 127, 133 (Colo. App. 2009).

103 *Id.* at 133.

undocumented status is relevant to future lost wages, although none of these cases engage in balancing probative value with prejudicial effect.¹⁰⁴

On the flip side, several other state courts have rejected the idea that evidence of undocumented status, alone, is relevant to the issue of future lost damages. Chief among them is the Washington Supreme Court's decision in *Salas v. Hi-Tech Erectors*, which arose from a tort claim for future lost wages.¹⁰⁵ There, Mr. Salas, who was badly injured when he fell more than 20 feet from a slippery ladder, argued that evidence of his undocumented status should not be permitted because the risk of prejudice far outweighed its probative value.¹⁰⁶ In considering this argument, the *Salas* Court began by noting the following:

Salas' immigration status is the only evidence in the record that suggests he may be deported. Salas has resided in the United States since 1989 and has lived without a visa since 1994. He has worked, purchased a home, and had three children in the United States. The record furnishes no evidence of pending removal proceedings or a deportation order. Based solely on his immigration status, the risk of Salas being deported is exceptionally low.¹⁰⁷

The court next engaged in a thorough review of current U.S. immigration policy concerning removal of undocumented persons using then-current statistics from the Department of Homeland Security.¹⁰⁸ Demonstrating a sophisticated understanding of the complexities in how U.S. immigration laws are enforced, the court explained that

less than one percent of the unauthorized immigrant population was apprehended in 2008. Even if an undocumented immigrant is apprehended, removal from the United States is not a foregone conclusion. The immigrant still faces removal proceedings in front of an immigration judge. 8 U.S.C. §§ 1229, 1229a. Even if an immigrant is deportable, removal can still be canceled in some cases. *Id.* § 1229b.¹⁰⁹

Based on this data, the court refuted *Rosa's* holding and concluded that "immigration status alone is not a reliable indicator of whether someone will be deported."¹¹⁰

Nevertheless, because relevance is a low bar, the *Salas* Court recognized that undocumented status evidence is relevant to the issue of future lost wages.¹¹¹ The

¹⁰⁴ *Balbuena*, *supra* note 20; *Villasenor v. Martinez*, 991 So.2d 433, 436–37 (Fla. 5th DCA 2008); *Melendres*, *supra* note 23.

¹⁰⁵ *Salas*, *supra* note 25.

¹⁰⁶ *Id.* at 668.

¹⁰⁷ *Id.* at 669.

¹⁰⁸ *Id.* at 670–71.

¹⁰⁹ *Id.* at 671.

¹¹⁰ *Id.* at 670.

¹¹¹ *Id.* at 670 ("With regard to Salas' future earning power, one consequential fact will be the market in which he sells his labor. Salas' immigration status creates a greater likelihood that his labor market

court went on to state, however, that “[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. When evidence is likely to stimulate an emotional response rather than a rational decision, a danger of unfair prejudice exists.”¹¹² Observing that immigration “is a politically sensitive issue ... [that] can inspire passionate responses that carry a significant danger of interfering with the fact finder’s duty to engage in reasoned deliberation,” and the low probability of correlation between undocumented status and future lost wages, the court ultimately held that “the probative value of a plaintiff’s undocumented status, by itself, is substantially outweighed by the danger of unfair prejudice.”¹¹³ Several state courts agree with *Salas* or have held that undocumented status is not relevant at all.¹¹⁴

3 The *Escamilla* Opinion

The Indiana Supreme Court’s decision in *Escamilla v. Shiel Sexton* synthesizes much of the caselaw set forth above and in doing so, is the first case to provide a comprehensive framework for evaluating the issue of whether undocumented persons who are successful in their tort claims may recover future lost wages.¹¹⁵ First, it evaluates an undocumented plaintiff’s claim for future lost wages by analyzing both preemption issues as well as relevance under rules of evidence. Second, it weighs relevance against competing evidentiary concerns, and rejects the assumption that a tort victim’s immigration status will always impact that person’s

will not be the United States than if *Salas* legally resided here. Even though his immigration status increases this risk by only a minimal amount, minimal relevancy is all that ER 402 requires.”).

¹¹² *Id.* at 671.

¹¹³ *Id.* at 672.

¹¹⁴ *Ayala*, *supra* note 20 (“[C]ourts that have balanced the relevance and prejudice inquiries have frequently come down on the side of ‘prejudicial’ because of the low probative value of evidence of immigration status.”); *Gonzalez v. City of Franklin*, 137 Wis.2d 109, 403 N.W.2d 747, 760 (1987) (weighing the “speculative or conjectural” relevance of immigration status evidence against its “obvious prejudicial effect”); *Republic Waste Services, Ltd. v. Martinez*, 335 S.W.3d 401, 409 (Tex. App. 2011) (concluding that while immigration status can be a relevant consideration in determining future earning capacity, the probative value of such evidence is outweighed by its prejudicial effect without a showing that plaintiff will likely be deported in his working lifetime); *Grocers*, *supra* note 89 at 724 (citing *Republic Waste* for the proposition that evidence of undocumented status, without more such as a showing that deportation was likely was not permissible); California and Virginia have held that immigration status evidence is not relevant at all to the issue of future lost wages. *Clemente v. California*, 40 Cal.3d 202, 219 Cal.Rptr. 445, 707 P.2d 818, 829 (1985); *Peterson v. Neme*, 222 Va. 477, 281 S.E.2d 869, 872 (1981).

¹¹⁵ *Escamilla*, *supra* note 8.

future lost wages. Third, it pursues a middle path to determine admissibility of immigration status evidence that refutes the all-or-nothing conflict between *Rosa* and *Salas* and the many cases consistent with each of those holdings. Finally, by permitting undocumented tort victims to claim future lost wages, it supports tort law's goals of compensation and deterrence.

The story behind *Escamilla* began when plaintiff Noe Escamilla came to the United States from Mexico as a teenager with his parents.¹¹⁶ Several years later, working as a masonry laborer on the Wabash College's baseball stadium, Mr. Escamilla suffered a serious fall that left him permanently disabled and unable to perform masonry work.¹¹⁷ Prior to his injury, Mr. Escamilla's labor, which was performed without work authorization, supported his wife and three young children, all of whom were U.S. citizens.¹¹⁸ When Mr. Escamilla sued the general contractor on the project, Shiel Sexton, under Indiana's common law of negligence, Shiel Sexton argued that: "(1) Escamilla's immigration status should bar him from recovering his decreased earning capacity; [and] (2) Escamilla's immigration status should be admissible because ... he could be deported at any time."¹¹⁹

The *Escamilla* Court initially addressed "the threshold issue of whether unauthorized immigrants can pursue a tort claim for decreased earning capacity damages."¹²⁰ This led the court to a two-step process – pinpointing the state law at issue and then analyzing whether IRCA/*Hoffman* preempted it.¹²¹ The court determined that Mr. Escamilla had a right to claim future lost wages in a negligence action pursuant to the Open Courts Clause of Indiana's Constitution.¹²² That clause, which is similar to others in state constitutions nationwide, "guarantees access to the courts to redress injuries to the extent the substantive law recognizes an actionable wrong."¹²³

Having identified the state law at issue, *Escamilla* next analyzes whether IRCA/*Hoffman* preempts it. Like *Madeira*, the *Escamilla* Court immediately focused on the fact that, "[c]ritically ... *Hoffman*'s issue – whether federal immigration law under IRCA limited remedies for [NLRA] violations – was only about reconciling two *federal* statutes."¹²⁴ Because *Hoffman* did not determine whether IRCA and federal

¹¹⁶ *Id.* at 665.

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.* at 666.

¹²¹ *Id.* at 666–67.

¹²² *Id.* at 666.

¹²³ *Id.* at 666–67 (finding that undocumented plaintiffs fit within the "every person" language of the Open Courts Clause, which is "rooted in the Open Courts Clause's history – going back to Chapter 40 of [the] Magna Carta").

¹²⁴ *Id.* at 668 (emphasis in original) (internal quotations and citations omitted).

immigration policy preempts *state* tort law, *Escamilla* characterizes *Hoffman* as a narrow decision that does not touch on state common law.¹²⁵ It also points out that *Hoffman* – because it resolved a conflict between federal immigration law and policy and federal labor law – “simply does not affect the recovery of decreased earning capacity damages, which are common-law damages under state tort law.”¹²⁶ Importantly, *Escamilla* rejects the conflation of backpay damages under the NLRB, in which a plaintiff’s injury is made possible only because of the worker’s employment, with future lost wages under tort law, in which a plaintiff’s injury is due to personal harm inflicted by the intentional or negligent actions of a tortfeasor.¹²⁷

After its federal preemption inquiry, the *Escamilla* Court asked “whether unauthorized immigration status is admissible evidence for decreased earning capacity calculations.”¹²⁸ Here, the opinion looks to Indiana’s evidentiary rules, which, like most states’ rules, deem evidence relevant when it “has any tendency to make a [consequential] fact more or less probable than without the evidence” but excludes relevant evidence when “its probative value is substantially outweighed by the danger of ... unfair prejudice, confusing the issues, [or] misleading the jury.”¹²⁹

Determining relevance first, the court held that documentation status evidence meets the “liberal standard for relevancy” because a plaintiff’s “immigration status affects his chances of deportation and ability to work in the United States over the course of his career. A jury could factor in the probability that his immigration status would lead to deportation or an inability to work and reduce damages proportionally.”¹³⁰

Next, the court evaluated whether the relevance of undocumented status is outweighed by other considerations. Specifically, it asked whether introducing undocumented status evidence in a tort case would “[grow] so intricate that the disentanglement of it becomes difficult or becoming such a mass of confused data ... the jury loses sight of the main issue.”¹³¹ This is where *Escamilla* is most striking because it approaches the issue in a manner unlike any other court before it – by examining the labyrinth that is current-day immigration law and policy.¹³²

125 *Id.*

126 *Id.*

127 *Id.*

128 *Id.*

129 *Id.* (internal quotations and citations omitted).

130 *Id.* at 670 (citing 22 Am. Jur. 2d Damages § 159 (2013) for the proposition that “a jury should take into account ‘contingencies to which [the plaintiff’s income is] liable’”).

131 *Id.* at 670 (internal quotations and citations omitted).

132 *Id.* at 671–73.

Escamilla details why immigration policy in the United States should be viewed not as a monolithic construct, but as a constantly shifting landscape based on “multiple potentially competing sources.”¹³³ Recognizing that “the Executive branch enjoys broad discretion in terms of who to admit into the country and who to remove from it,”¹³⁴ the court observed “that some [immigration] policies last for decades while others change as fast as – or faster than – presidential administrations.”¹³⁵ For instance, in 2015, the executive branch mainly prioritized for removal only those person who were convicted of crime or apprehended at the border resulting in “over 94 percent of those removed” being in one of these two categories.¹³⁶ When a new administration took over in 2017, however, the priorities shifted wildly and significantly expanded those targeted for removal.¹³⁷ The case also points out that executive changes to immigration policy are exacerbated by congressional sharing of federal immigration power. When there is a disagreement between them, federal courts weigh in too.¹³⁸ This means that certain immigration policies may or may not provide people with opportunities to obtain documentation depending on which executive, congressional, or judicial decision is in place at any given time.¹³⁹

The court also observed that even when routes to documentation are relatively stable, determining whether a given plaintiff could obtain documentation is challenging due to “our complex and infinitely variable immigration system.”¹⁴⁰ For example, Mr. *Escamilla* might “have a specific path to lawful permanent residency” because his immediate relatives are U.S. citizens but “even these immigration status adjustments are never simple ... they are partially dependent on whether a person is ‘admissible,’ [which] ... is also complex, often turning on exceptions and nuances that complicate any admissibility determination.”¹⁴¹

For the *Escamilla* Court, the unpredictability of U.S. immigration policy renders undocumented status evidence confusing, especially when it pertains to a tort

¹³³ *Id.* at 671.

¹³⁴ *Id.* at 672. Noting that “[i]n 2014, the federal government removed [only] 414,481 unauthorized immigrants out of an estimated 11.1 million.”

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.* at 671 (defining DACA and DAPA and stating that “[w]hile the Executive enjoys ‘broad discretion’ in many immigration contexts, executive actions are barred if ‘foreclosed by’ and ‘manifestly contrary to’ Congressional pronouncement” as determined by the courts).

¹³⁹ *Id.* at 673 (“these programs can be blocked in the courts or rescinded – or even ignored by the Executive. Deferred deportation is, after all, a matter of prosecutorial discretion even for those accepted into the programs”).

¹⁴⁰ *Id.* at 672.

¹⁴¹ *Id.* at 673.

plaintiff's claim for future lost wages. Asking juries to apply ever-changing and intricate immigration policies to specific plaintiffs would require "pinning down past, present, and future immigration statuses" in a climate where "[t]oday's statistics and policies simply cannot reveal what tomorrow holds – a truth particularly relevant in the immigration context."¹⁴² Moreover, due to "shifting government priorities and policies," it would be nearly impossible for a jury to determine whether and when an undocumented plaintiff in a tort case might obtain documentation to legally continue work in the United States or be deported from it in a manner sufficient to calculate future lost wages.¹⁴³

Even if juries could sort through immigration laws, policies, and evidence to pinpoint how immigration status might affect a given individual plaintiff's future lost wages, the court worried that requiring juries "to apply nuanced statistics and answer highly debatable and uncertain questions," would result in a "collateral immigration mini-trial [that would] ... invade *Escamilla's* tort case" as it has "invaded this opinion."¹⁴⁴ Based on this analysis, the court declared that "flood[ing] the courtroom" with immigration-based arguments, which would necessarily include evidence of "[c]ongressional action, executive action, executive repeal, executive discretion, executive priorities, and judicial review," would "present[] a significant risk of confusing the issues," especially when "immigration is a tangential issue" to a case that sounds in tort.¹⁴⁵

Even though jury confusion was the *Escamilla* Court's primary concern, it also considered whether undocumented status evidence would result in unfair prejudice to the plaintiff. The court observed that "[i]mmigration status does, of course, carry some risk of unfair prejudice – as courts across this country have realized ... because immigration status introduces a factor into the case that might encourage the jury to dislike or disapprove of [a party] independent of the merits."¹⁴⁶ This is especially true "because illegal immigration is, for many, a sensitive issue – personally, ethically, and politically [and] can inspire passionate responses that carry a significant danger

¹⁴² *Id.* at 673–74 (adding that "[a]s Shiel Sexton understates, *Escamilla's* immigration status has been something of a moving target").

¹⁴³ *Id.* at 671, 673 ("Because decreased earning capacity is based on a plaintiff's entire working life, many changes – favorable and unfavorable to each side – can occur"). One recent example of a shifting executive policy is the newly enacted Labor-Based Deferred Action program, which authorizes the Department of Homeland Security, working in conjunction with federal and state employment and labor agencies, to provide work authorization for certain undocumented workers involved in labor disputes. Department of Homeland Security, *DHS Support of the Enforcement of Labor and Employment Laws*, DHS.GOV (Last Updated Feb. 3, 2023), <https://www.dhs.gov/enforcement-labor-and-employment-laws>.

¹⁴⁴ *Id.* at 674.

¹⁴⁵ *Id.* at 672.

¹⁴⁶ *Id.* at 675.

of interfering with the fact finder's duty to engage in reasoned deliberation."¹⁴⁷ Based on these concerns, the court held that undocumented status evidence in tort cases also carries a high risk of unfair prejudice against the plaintiff.

Having concluded that the probative value of undocumented status evidence was outweighed by the risk of confusion and unfair prejudice, *Escamilla* could have issued a blanket prohibition on such evidence as many courts before it had done.¹⁴⁸ Instead, it forges an alternative path between cases like *Rosa* that always permit evidence of undocumented status, and cases like *Salas* that always prohibit it.¹⁴⁹ Specifically, the court held that "[a] plaintiff's unauthorized immigration status is inadmissible unless the preponderance of the evidence shows that the plaintiff will be deported."¹⁵⁰ In doing so, the court reasoned that defendants should be allowed to introduce evidence that would, in fact, impact the calculation of an undocumented plaintiff's future lost wages.¹⁵¹ The court cautioned, however, that there was a high bar for such evidence in order to avoid a windfall to tortfeasors in situations where the undocumented plaintiff would have continued earning U.S. wages but for the tortfeasors' bad actions.¹⁵² Ultimately, *Escamilla* holds that a defendant may not introduce evidence of a plaintiff's undocumented status without "establish[ing] that the plaintiff will more likely than not be deported."¹⁵³

Escamilla's analytical framework is instructive. First, it distinguishes labor cases, in which a plaintiff seeks redress for injury due to termination of employment,

¹⁴⁷ *Id.* at 675 (internal quotations and citations omitted).

¹⁴⁸ *Martinez, supra* note 24 at 1148–49; *Salas, supra* note 25 at 586–87.

¹⁴⁹ *Escamilla, supra* note 8 at 675–76. Before doing so, the court engaged in a brief interlude to respond to defendant's argument that it should look to *Rosa's* formulation that a plaintiff can only recover future lost wages if the plaintiff's employer knew or should have known about the plaintiff's lack of work authorization. *Escamilla, supra* note 8 at 674–75. *Escamilla* expressly rejects this test, stating that this "approach illustrates an additional layer of confusion that immigration status would inject into tort cases like this one" because it requires a jury to "hear evidence about whether and how, such as through the federal E-Verify system, an employer investigated an employee's immigration status before hiring." *Escamilla, supra* note 8 at 674. Moreover, in tort cases where plaintiffs and tortfeasors are unlikely to be in an employment relationship with one another, this evidence is even more far afield from the tort issue at hand.

¹⁵⁰ *Id.* at 675.

¹⁵¹ *Id.* at 675–76 (other reasons for this rule were removing incentives for employers to hire undocumented workers who they could pay less to in injury actions when the plaintiff and defendant were in an employment relationship, and not requiring the plaintiff to prove a negative – i.e., that they were not at risk of deportation).

¹⁵² *Id.* at 675–76 ("While the combined risks of confusing the issues and unfair prejudice are consistently high, immigration status's relevance waxes and wanes with the chances of deportation ... [in *Escamilla's* case] the chances have historically been quite small – perhaps as high as three percent.").

¹⁵³ *Id.* at 676.

from tort cases, in which a plaintiff is injured because of a defendant's wrongdoing. The distinction is critical because the former is governed by *Hoffman*'s interpretation of federal immigration law, but no such federal law exists with respect to the latter. Having determined that undocumented plaintiffs can claim lost wages under state tort law, it then pivots to evidentiary standards to state that documentation status can, but need not, be relevant when determining future lost wages claims.

Underlying *Escamilla*'s reasoning and holding are the principles of deterrence and compensation that animate tort law. Permitting undocumented tort claimants to claim future lost wages discourages dangerous conduct and allows for full compensation when injury does occur. Barring undocumented tort victims' future lost wages claims, on the other hand, carries the risk of sanctioning behavior that may harm undocumented individuals who cannot seek full recovery for their injuries under tort law. Weighing these outcomes, *Escamilla* concludes that "Indiana's tort trials should be about making injured parties whole – not about federal immigration policies and laws."¹⁵⁴

4 The Road Ahead for Determining Undocumented Tort Plaintiffs' Future Lost Wages Claims

Judges, lawyers, and legal scholars should follow the *Draft Restatement*'s lead in looking to *Escamilla* when evaluating the issue of whether to award future lost wages damage to undocumented tort plaintiffs for several reasons. Before turning to them, however, it is important to consider *Escamilla*'s shortcomings.

Escamilla could have benefitted from a more detailed preemption analysis, especially because it properly views preemption as the necessary, preliminary inquiry in its framework. For the second part of its preemption inquiry – whether IRCA/*Hoffman* preempted plaintiff's claim for future lost wages – *Escamilla* could have relied on several previous opinions.¹⁵⁵ It is the first part of the preemption inquiry, however, that would have rendered *Escamilla* of even greater significance to the tort law cannon. This portion of the preemption inquiry requires a court to determine which state law is in danger of being preempted by IRCA/*Hoffman* if an undocumented plaintiff is denied future lost wages. *Escamilla* chose to center its analysis on the Indiana Constitution's Open Courts Clause. While this was one implicated state law, *Escamilla* does not explain why the

¹⁵⁴ *Id.* at 664.

¹⁵⁵ *Supra* Part I.

state's common law of torts is not also at issue in the case. Because not all state constitutions contain an Open Courts Clause,¹⁵⁶ *Escamilla* is not as broadly applicable as it might have been had it also discussed IRCA/*Hoffman* preemption of state tort law.

Surprisingly, very few courts that have conducted a preemption analysis on this issue look to state tort law and of them, only one does so in a rigorous manner – *Grocers Supply Inc. v. Cabello*, decided by the Texas Court of Appeals in 2012.¹⁵⁷ That case's entire preemption analysis concerns whether IRCA/*Hoffman* preempts the tort common law in Texas.¹⁵⁸

After applying the well-recognized presumption against federal preemption of state law, the *Grocers* Court looked initially at field preemption, a subspecies of implied preemption. It found that although Congress has occupied the field as to immigration law, "immigration is a distinct and separate field from state tort law," tort law has "traditionally been left to the states to regulate" and "Texas tort law does not attempt to supplement the immigration ... field."¹⁵⁹ Moreover, in response to the defendant's argument that "IRCA preempted the field of regulation of employment," the court retorted, "[t]his case does not involve the regulation of the Cabellos' or Grocers' employment. Rather, it involves the Cabellos recovery of damages as the result of being injured in [an] accident not involving their employment or their employer."¹⁶⁰ In this way, *Grocers* draws a bright line between the regulation of immigration and employment of undocumented workers, which is IRCA's domain, and state tort law, which addresses personal injury.

The court next turned to conflict preemption, another subspecies of implied preemption, which has two prongs: impossibility and obstacle to a federal purpose. Addressing impossibility, the court found that "providing damages for lost wages and loss of earning capacity and complying with IRCA are not physically impossible" because an undocumented plaintiff's tort claim "does not arise out of or relate in any way to Grocers' employment of [undocumented] workers."¹⁶¹ Looking to the second prong, the court found that Texas tort law does not stand as

¹⁵⁶ Some states without an Open Courts Clause, however, may still have a similar clause in their constitutions that might allow an analogous holding to *Escamilla*. See e.g., Arizona Constitution Art. 2 Sec. 31, Damages for Death or Personal Injury (stating that the law may not limit damages for causing injury or death to any person).

¹⁵⁷ *Grocers*, *supra* note 89.

¹⁵⁸ *Id.* at 715 ("[Preemption] analysis requires that we consider express and implicit methods of preemption ... and remain mindful that the ultimate goal of our search is to determine if Congress intended to preempt state tort law when it enacted IRCA.").

¹⁵⁹ *Id.* at 717 (citations omitted).

¹⁶⁰ *Id.* at 717 (internal quotations and citations omitted).

¹⁶¹ *Id.* at 718 (citations omitted).

an obstacle to IRCA's purpose in combatting unlawful migration because "[d] amages awards to tort victims in Texas ... do not implicate the number of job opportunities available to undocumented aliens and neither increase nor decrease the opportunities for undocumented aliens to find employment in the United States."¹⁶² This is a critical part of *Grocers'* holding because it separates undocumented plaintiffs' future lost wages claims from the promotion of unlawful migration, which was at the crux of *Hoffman's* interpretation of IRCA. As *Grocers* points out, there is no evidence that permitting undocumented plaintiffs to recover future lost wages in tort cases encourages undocumented labor or migration in any way.¹⁶³

Grocers concludes its preemption analysis by finding that IRCA does not intend to "encroach[] into the State's authority to regulate health and safety matters," and that a plaintiff's documentation status should not affect a tortfeasor's "duty of care or the damages resulting from its negligence."¹⁶⁴ Thus, *Grocers* highlights the twin purposes underlying tort law – compensating individuals for injuries and deterring tortfeasors from dangerous behavior. Any future opinion addressing an undocumented tort plaintiff's recovery of future lost wages should include this analysis.

Although *Escamilla* does not more thoroughly address preemption and connect it to state tort law, it remains the most instructive case on this issue in many ways. First, it provides a clear and straightforward legal framework for evaluating this issue, which is no small feat given the myriad of conflicting opinions on the topic.¹⁶⁵

Second, as the *Draft Restatement* points out, immigration status evidence is like race and gender evidence that treats individuals "as merely the average of a racial or sexual group."¹⁶⁶ The *Draft Restatement* states that this not only "violates fundamental principles of nondiscrimination," but "perpetuates existing socioeconomic disparities by incorporating those disparities into disparate damage awards."¹⁶⁷

¹⁶² *Id.* at 718.

¹⁶³ *Id.* at 718 (in fact, the court went on to state that "If anything, it could be argued employers might have a higher incentive for hiring illegal aliens if Congress superseded liability for those individuals' injuries"). *Grocers* went on to state that "[a]ny link between tort awards and job opportunities is thus speculative at best, and a speculative link will not support a preemption defense" and that "[g]iven that IRCA sought to limit job opportunities for illegal aliens, a preemption defense is especially attenuated where, as here, the party arguing preemption is not an employer or possible employer, but a third-party tortfeasor." *Grocers*, *supra* note 89 at 719.

¹⁶⁴ *Id.* at 719–20.

¹⁶⁵ See Strahan, *supra* note 36, (observing that there is no uniform approach to determining the issue of whether undocumented tort claimants are eligible for future lost wages awards).

¹⁶⁶ The American Law Institute, *supra* note 7 at § 18e.

¹⁶⁷ *Id.*

Escamilla makes a similar argument when weighing the probative value of immigration status evidence against the likelihood of unfair prejudice.¹⁶⁸

Third, *Escamilla* unveils earlier caselaw's problematic assumptions about U.S. immigration law and policy by demonstrating that documentation status, alone, often does not result in deportation. This is of paramount importance because all cases that either bar undocumented plaintiffs from recovering future lost wages or admit undocumented status into evidence, without more, rely on the mistaken assumption that undocumented status is strongly correlated with deportation.¹⁶⁹ Without recognizing the force of *Escamilla*'s opinion in this regard, future caselaw and legal scholars risk basing their arguments on an assumption that has no basis in law or fact.¹⁷⁰

Finally, *Escamilla* fashions a compromise position between never and always providing future lost wages to undocumented plaintiffs. Because all future lost wages presume a plaintiff could work in the United States but for the injury, recognizing that immigration law might prevent an undocumented plaintiff from working in the country could be relevant depending on the facts of a particular case.¹⁷¹ The key here, however, is that relevance cannot be assumed due to the complex and multi-faceted nature of U.S. immigration law and policy, as *Escamilla* painstakingly details.¹⁷² Thus,

168 *Supra* Part II.

169 See e.g., Veliz, *supra* note 20; Hernandez-Cortez, *supra* note 20; Rosa, *supra* note 20; Balbuena, *supra* note 20.

170 To date, the only law review articles considering this issue are student notes. Two were written prior to *Escamilla*. See Fuller, *supra* note 21 (arguing that a mix of factors including whether an undocumented plaintiff fraudulently obtained employment should be relevant to future lost wages); Andre, *supra* note 2 at 558–60 (arguing that future lost wages for undocumented plaintiffs should be based on U.S. wage rates). Two were written after *Escamilla*. Of these, one fails to discuss *Escamilla* entirely. See Sarver, *supra* 32 (often echoing the points made in an earlier student note written by Wendy Andre). The other casually dismisses *Escamilla* and relies on earlier caselaw for its mistaken assumption that there is a direct nexus between undocumented status and future lost wages that would favor the admissibility of immigration status evidence. See Zachary Clausen, *Examining the Admissibility of an Undocumented Worker's Status in Iowa Tort and Workers' Compensation Cases*, 66 DRAKE L. REV. 203, 212–214 (2018). Additionally, at least one torts casebook mistakenly states that an undocumented plaintiff “would have no legal right to future wages because federal law requires employers to verify the worker’s status and to refuse to hire undocumented workers.” DOBBS, HAYDEN & BUBLICK, *supra* note 5.

171 One potential danger of this formulation, however, is that defendant tortfeasors might alert immigration authorities to an undocumented plaintiff’s status in the hopes that the plaintiff might be apprehended in order to reduce or eliminate future lost wages damages. To date there are no tort cases where this has occurred.

172 Indeed, the data show that lack of documentation does not, in fact, prevent millions of undocumented people from working in America. See Nicole Prchal Svajlenka, *Protecting Undocumented Workers on the Pandemic's Front Lines*, CENTER FOR AMERICAN PROGRESS (Dec. 2, 2020), <https://www.>

it is reasonable to allow undocumented status evidence, but only if there is evidence that a given plaintiff's undocumented status will impact that individual's ability to earn future lost wages.¹⁷³

5 Conclusions

Escamilla is not perfect. An ideal case on the issue of future lost wages for undocumented tort plaintiffs would, like a chimera, be part *Madeira's* robust preemption analysis and part *Grocers'* invocation of tort law theory while retaining *Escamilla's* unabashed look at the complexities and empirics underlying immigration law and policy. Nonetheless, *Escamilla* is among the great tort cases of the 21st century because it resists transmuting Hoffman's narrow holding into a shield for tortious conduct and provides a clear path forward to preserve tort law's deterrent and compensation functions in the face of increasing hostility towards undocumented plaintiffs.

americanprogress.org/article/protecting-undocumented-workers-pandemics-front-lines-2/
("Undocumented immigrants make up approximately 3.2 percent of the U.S. population, but 4.4 percent of the country's workforce. There are more than 7 million undocumented immigrants working in the United States.").

¹⁷³ As *Escamilla* concedes, providing evidence of this nexus may be challenging for a defendant. *Escamilla*, *supra* note 8 at 676.