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CAN THE INJURED MIGRANT WORKER'S ALIEN STATUS BE INTRODUCED AT TRIAL?

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I. INTRODUCTION

In 2000, it was estimated that 7 million illegal immigrants were living in the United States.¹ This figure grew by approximately 350,000 persons each year.² Presently, the number of illegal immigrants living in the United States is between 9 and 12 million. Illegal immigrants from Mexico account for about 5.3 million of the total illegal immigrants living in the United States³, with an additional 170,000 legally entering this country each year.⁴ These numbers are the spark that has produced a firestorm of controversy.

We should not be content with laws that punish hardworking people who want only to provide for their families It is time for an immigration policy that permits temporary guest workers to fill jobs Americans will not take, that rejects amnesty, that tells us who is entering and leaving our country, and that closes the border to drug dealers and terrorists.—President George W. Bush⁵

“The proposal is wrongheaded It offers amnesty to 12 million to 15 million illegal aliens in our country, about 75 percent of them Mexican. This won’t solve our illegal alien crisis [it] benefits only Mexico, not the United States.”—Rep. Tom Tancredo⁶

This paper will first examine the immigration crisis confronting the United States and how Americans’ perceptions of what it means to be an illegal immigrant impacts upon American Jurisprudence. The paper will then address what procedural safeguards an attorney representing an injured illegal immigrant needs to employ to ensure that his or her client receives a fair trial, and what arguments can be expected in response.

1. Estimates of the Unauthorized Immigrant Population Residing in the United States: 1990 to 2000, Office of Policy and Planning U.S. Immigration and Naturalization Service, 1. See also Todd Dayton, *The New World, America’s Borders in an Age of Terrorism*, <http://journalism.berkeley.edu/ngno/reports/newworld/immignumbers.html>.

2. *Id.*

3. Jeffrey S. Passel, Randy Capps, & Michael Fix, *Undocumented Immigrants: Facts and Figures* (Jan. 12, 2004).

4. From 1999 to 2003, the U.S. government legally admitted an average of 172,632 immigrants per year. U.S. Citizenship & Immigration Services, <http://uscis.gov/graphics/shared/aboutus/statistics/IMM03yrbk/IMMExcel/Table03D.xls>.

5. Daniel Borunda, *Immigrant Policy Mentioned: Bush Too Vague Some Say*, EL PASO TIMES, February 3, 2005, at 2A.

6. E. Thomas McClanahan, *Immigrant Plan Helps U.S.*, THE TIME UNION (Albany New York), March 31, 2005, at A10.

II. THE IMMIGRATION CRISIS

President Bush's comments, quoted above, reflect the important role illegal immigrants are currently playing in the United States' economy. The average illegal immigrant family pays more than \$4,200 in annual federal taxes⁷ while earning less than the average annual salary of \$36,700.00.⁸ Fifty to eighty-five percent of the country's 1.6 million farm workers are illegal immigrants.⁹ Immigrant workers play a critical service in keeping hotels operating affordably by taking jobs American-born workers don't want.¹⁰ Of the 12 million food service workers in the United States, 1.4 million are believed to be immigrants, with 500,000 of them from Mexico.¹¹ Forty percent of the workers in the New York restaurant industry are undocumented.¹² Illegal immigrants from Mexico tend to be young, predominately male, struggling with the English language and employed in construction, manufacturing and the hospitality industry.¹³ The reality of illegal immigrants in America stands in stark contrast to the fears engendered by their presence.

In the debate over national security, there is the association of illegal immigration with the threat of terrorists and weapons of mass destruction entering the United States.¹⁴ Recently, a group called the Minuteman Project was created whereby private citizens patrol sections of the border between the United States and Mexico.¹⁵ The Minuteman Project accuses the federal

7. Staff Editorial, *Higher Education for All*, CAVALIER DAILY via U-Wire, February 16, 2005.

8. Dave Montgomery, *Mexican Immigrants Open to Guest-Worker Program, Survey Finds*, FORT WORTH STAR-TELEGRAM, March 3, 2005.

9. Sergio Bustos, *Bill Would Give Legal Status to Undocumented Farm Workers*, GANNETT NEWS SERVICE, February 11, 2005.

10. John P. Walsh, *Labor Pains: Immigration Reform Could Ease Employment Strain*, HOTEL & MOTEL MANAGEMENT, February 6, 2004, at No. 3, Vol. 219, pg. 1.

11. Milford Prewitt, *Immigration Reform Push Offers Relief for Job Woes; Legislative Agendas Revived Despite Lingering Terrorism Worry*, NATION'S RESTAURANT NEWS, August 16, 2004, at No. 33, Vol. 38, pg. 1.

12. *Id.*

13. Dave Montgomery, *Mexican Immigrants Open to Guest-Worker Program, Survey Finds*, FORT WORTH STAR-TELEGRAM, March 3, 2005.

14. Lisa Friedman, *License Ban Tacked on Bill*, Inland Valley Daily Bulletin (Ontario, CA), March 19, 2005 ("Advocates of the license ban, sponsored by Rep. James Sensenbrenner, R-Wis., maintain that keeping legal identification documents away from those in the United States illegally is a border-control measure that will thwart terrorists from entering the country."); *See also*, National Journal Group Inc., *SECURITY: Border-patrol Strategy Encompasses 'Full-Court Press'*, National Journal's Technology Daily, April 6, 2005.

15. David Solana, *American Revelation*, DAILY ILLINI via U-Wire, March 31, 2005; *See also*, Pete Prince, *Bush Gets it Right with Immigration Policy*, UNIVERSITY DAILY KANSAN via

government of sleeping on the job and handing America to the law-breakers.¹⁶ Identifying illegal aliens as law beakers seems to justify, for some, the denial of basic benefits. Currently pending before the Virginia General Assembly are bills that would: (i) deny the children of undocumented immigrants the opportunity to attend state community and four-year colleges; (ii) require citizens and non-citizens to prove that they are lawfully present in the United States before receiving Medicaid or social security benefits; and (iii) deny workers' compensation benefits to anyone who is not in the country legally at the time of the workplace injury or death.¹⁷

The fear associated with illegal immigrants is not new. Courts throughout this nation have examined, and attempted to insulate against, the prejudices that a plaintiff, who is an injured illegal immigrant, encounters in trying to obtain a fair trial. The debate over illegal immigration, however, is currently at the forefront of policy in the United States, and attorneys who represent injured illegal immigrants must be acutely cognizant of the prejudices that the American people are exposed to during this debate.

III. EVIDENCE OF AN INDIVIDUAL'S ALIEN STATUS IN THE COURTS

In the course of a hotly contested trial, lawyers often "pull off the gloves."¹⁸ Professional and ethical conduct, however, requires that there be limitations on the extent to which counsel may go into prejudicial and inadmissible matters.¹⁹ Rule 403 of the Texas Rules of Civil Evidence requires that the trial court balance the danger of unfair prejudice against the probative value of the evidence seeking to be admitted.²⁰ In *McLellan v. Benson*, the court determined that "the trial court is to admit relevant evidence unless the probative value of that extraneous evidence is substantially outweighed by the danger of unfair prejudice."²¹

U-Wire, January 24, 2005.

16. *Id.*

17. Editorial, *Poised to Slight Immigrants*, THE WASHINGTON POST, February 16, 2005, at A18.

18. Texas Employers' Ins. Ass'n v. Guerrero, 800 S.W.2d 859, 868 (Tex. App.—San Antonio 1990, writ denied).

19. *Id.*

20. TEX. R. CIV. P. 403 (Vernon 2005); Porter v. Nemir, 900 S.W.2d 376 (Tex. App.—Austin 1995, no writ).

21. *McLellan v. Benson*, 877 S.W.2d 454, 456 (Tex. App.—Houston [1st Dist.] 1994, no writ).

A. *Evidence Used to Inflamm the Jury*

i. *Texas Decisions*

“Cases ought to be tried in a court of justice upon the facts provided; and whether a party be a Jew or gentile, white or black, is a matter of indifference.”²² During the last hundred years, the Texas appellate courts have uniformly condemned arguments that invoked prejudice based on race, ethnicity, religion, or national origin.²³ This condemnation extends to arguments that seek to highlight or give weight to a person’s alien status.²⁴ Although the manner in which the prejudicial appeal is presented has varied over the years and from case to case, the response thereto has remained relatively unchanged.

In 1939, defense counsel in *Basanez v. Union Bus Line* brought out plaintiff’s alien status in a manner that can hardly be characterized as subtle:

I don’t know about Dr. Basanez; he has been here for eighteen years and has not taken out any of his first papers yet. I don’t know who he is, I don’t know whether he waded that river or swam. But, I say, Gentlemen of the Jury, when you gentlemen bring in this verdict he will swim that river again, because, I say to you, I think he is all wet in this law suit.²⁵

The basis for the suit in which this speech was made was an injury suffered by Dr. Basanez’s wife while she was a passenger on a bus operated by an employee of defendant, Union Bus Line.²⁶ Despite the fact that Dr. Basanez’s involvement was only by virtue of his wife’s injury and his alien status was seemingly irrelevant, the court disagreed with Dr. and Mrs. Basanez’s argument that the alien status reference amounted to misconduct of counsel

22. *Moss v. Sanger*, 75 Tex. 321, 12 S.W. 619 (1889). In *Moss*, an attorney in closing arguments used the following language:

This entire business is a concocted scheme from beginning to end; a deliberate scheme to swindle and defraud, gotten up by a Jew, a Dutchman, and a lawyer. Who are the parties in interest? A. Moss; his wife, Rose Moss; his mother, Mary Moss; his clerk, D. Golden; and then B. Frieberg, the old he-Jew of all, who no doubt planned the whole thing. All Jews, or Dutch Jews, and that is worse . . .

Id. at 618.

23. *See Texas Employers’ Ins. Ass’n v. Guerrero*, 800 S.W.2d 859 (Tex. App. — San Antonio 1990, writ denied).

24. *See Hinojosa v. Jones*, 154 S.W.2d 275 (Tex. 1941).

25. *Basanez v. Union Bus Line*, 132 S.W.2d 432 (Tex. Civ. App. — San Antonio 1939, no writ).

26. *Id.*

and that the verdict favorable to defendants was against the overwhelming weight and preponderance of the evidence.²⁷ The trial court overruled plaintiffs' motion for a new trial, and plaintiffs subsequently appealed.²⁸ The court of appeals agreed with plaintiffs' contention and characterized defendant's argument as inflammatory and prejudicial, and tending to create a racial prejudice in the minds of the jury as between the alien appellant and the citizen appellee.²⁹ The court determined the argument of defense counsel sought a verdict upon the premise that appellants were not citizens.³⁰ The court of appeals concluded that the trial court should have set aside the verdict and granted a new trial, and thus reversed the judgment of the trial court and remanded for a new trial.³¹

Whether the remarks made in *Hinojosa v. Jones* are more subtle than those in *Basanez* is debatable, but subtlety aside, the references to plaintiff's alien status were condemned by the court.³² Plaintiff, Manuel Garcia Hinojosa, brought suit against defendant, W.W. Jones, for assault and battery after defendant struck plaintiff with a walking cane, spit tobacco juice on him, and verbally abused plaintiff in the presence and hearing of other people.³³ At trial, defense counsel made the following argument to the jury:

According to Mr. Jones' testimony, he is eighty odd years old, a pioneer of this country, a man that has given his best efforts for the building up of this great Southwest. On the other hand, we have a man that says he has been in this country practically all his life and he has never learned to speak the English language. He has never thought enough of this country to become naturalized.³⁴

Despite plaintiff's objection to the prejudicial nature of the remarks, the jury was not instructed to disregard defense counsel's statements.³⁵ The jury found for defendant on all issues submitted to it, and a take-nothing judgment was rendered against plaintiff.³⁶ Plaintiff thereafter appealed, contending that the argument constituted a highly inflammatory and prejudicial appeal to the

27. *Id.*

28. *Id.*

29. *Id.* at 433.

30. *Basanez*, 132 S.W.2d at 433.

31. *Id.*

32. *Hinojosa v. Jones*, 154 S.W.2d 275 (Tex. Civ. App. — San Antonio 1941, rehearing denied).

33. *Id.*

34. *Id.* at 276.

35. *Id.*

36. *Id.* at 275.

