NEW MEXICO LAW REVIEW

Volume 45
Issue 3 *Summer*

Summer 2015

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Nicholas T. Davis

F. Michael Hart

A QUESTION OF EXCLUDING IMMIGRATION STATUS IN CIVIL COURT: WHY *TORRES* GOT IT RIGHT

Nicholas T. Davis,[+] F. Michael Hart[++] and George (Tex) Quesada[+++]

INTRODUCTION

New Mexico's connection with immigrants is written in its history, constitution, and case law. The state has long accepted the reality that persons of all types pass through, live in, and make large contributions to this land. Based on these social and economic connections, it is apparent that evidence regarding a party's immigration status should be excluded by New Mexico courts in civil cases as prejudicial and irrelevant. The New Mexico Supreme Court addressed the issue of immigration status in civil cases in *Torres v. Sierra* and concluded that immigration status was not a relevant factor in calculating damages for purposes of New Mexico's Wrongful Death Act.[1] This Article argues that the holding of *Torres* should be extended to all situations in which a party wishes to introduce evidence regarding an individual's immigration status and that such a framework of exclusion works equally well within the federal immigration debate and can be a model of policy in other jurisdictions.

This Article addresses the issue of New Mexico's treatment of immigration status in four parts. Part I explores the history of New Mexico. From its earliest days New Mexico demonstrated an acceptance of immigrants into society. Many New Mexico laws grant rights to residents of the state regardless of immigration status, and as a result, undocumented immigrants have become large contributors to the state's economy. Part II discusses New Mexico's approach to issues involving a party's immigration status. Although New Mexico has not explicitly prohibited the introduction of a party's immigration status, case law suggests New Mexico courts would deny such evidence on the basis of prejudice or lack of rele-

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[+] Nicholas T. Davis is a graduate of the University of New Mexico School of Law and a practicing attorney in Albuquerque, NM.

[++] F. Michael Hart is a graduate of the University of New Mexico School of Law and a practicing attorney in Albuquerque, NM.

[+++] Mr. Quesada is a graduate of Baylor University School of Law and a practicing attorney in Dallas, TX. Special thanks to Hailey Fox for her assistance.

1. Torres v. Sierra, 1976-NMCA-064, ¶ 24, 89 N.M. 441.

vancy. Part III introduces precedent and arguments from other jurisdictions throughout the United States. Finally, Part IV explains why New Mexico's current approach to immigration status is correct and argues that the prejudicial effect of a party's immigration status outweighs its probative value. Part IV also suggests that New Mexico courts should either exclude evidence of immigration status on the basis of prejudice or lack of relevancy or follow the restrictive approaches of other jurisdictions that require defendants to prove the probability of a plaintiff's deportation before they may introduce evidence of the plaintiff's immigration status.

I. HISTORY OF NEW MEXICO: TIES TO IMMIGRATION AND ACCEPTANCE OF IMMIGRANTS

A. The Origins of New Mexico

Present day New Mexico draws its roots from Spanish, Mexican and American influences.[2] Spanish conquistador Francisco Vásquez de Coronado led the first explorations by Europeans of the land that would become the state of New Mexico in 1540. Despite claims by explorer Álvar Núñez Cabeza de Vaca that the state contained the mythical Seven Cities of Cíbola (fabled cities of splendor and riches), Coronado and his men found no such cities and returned to New Spain (present day Mexico).[3] Several decades later, Spanish explorers returned to New Mexico and established the first permanent settlements.[4] In these colonial settlements, the Spanish settlers constructed missions, built churches, and developed artwork, establishing the State's aesthetics. Spanish rule was finally solidified in 1706, after centuries of settlement efforts, and the cities of Albuquerque and Santa Fe became focal points of the state.

Despite the area's population increase under Spanish reign, settlers in New Mexico suffered several invasions due to the lack of Spanish protection. The settlers encountered intrusions by French traders, attacks by Apache and Comanche tribes, and invasions by United States citizens. Of these invasions, United States Army Lieutenant Zebulon Montgomery Pike's expedition in 1807 was the most significant. Even though Spanish officials detained Pike, they failed to suppress the migration that followed

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2. *See* Robert Torrez, *Early Spanish Explorers of the Southwest*, NEWMEXICOHISTORY.ORG, http://www.newmexicohistory.org/people/early-spanish-explorers-of-the-southwest (last visited May 4, 2015).

3. *Id.*; *see also Seven Cities of Cíbola*, ENCYCLOPEDIABRITANNICA.COM, http://www.britannica.com/EBchecked/topic/117524/Seven-Cities-of-Cibola (last visited May 4, 2015).

4. Torrez, *supra* note 2.

his departure. Pike wrote about the state's promising economy, and in turn, these writings attracted American fur trappers and traders to the state. To accommodate the increasing trade activity, New Mexican settlers established the Santa Fe Trail for international trade.

While New Mexico grew economically, tensions developed in Mexico.[5] Seeking to end Spain's 300-year rule, Mexican-born Spaniards, Mestizos and Mexican Natives declared war against Spain. In 1821, after a two-decade war, Mexico obtained independence from Spain. Along with its independence, Mexico also gained power over territories formerly controlled by Spain, including New Mexico.[6] The new nation continued to develop New Mexico's economy through trade and land grants, but Mexico's authority over New Mexico was short-lived.

With the increasing presence of United States citizens in Mexican territory and the United States' annexation of Texas, conflict soon developed between the United States and the Mexican Republic.[7] Finally, on May 13, 1846, the United States declared war on Mexico. On August 18, 1846, United States General Stephen Watts Kearny reached New Mexico and declared the United States' dominion over the state. In front of residents of Santa Fe, he announced:

> We come as friends to better your condition and make you part of the Republic of the United States. We mean not to murder you or rob you of your property. Your families shall be free of molestation; your women secure from violence. My soldiers shall take nothing from you but what they pay for. . . . [W]e do not mean to take away . . . your religion. . . . I do hereby proclaim that . . . [y]ou are no longer Mexican subjects; you are now American citizens . . . .[8]

Notwithstanding such promises, some New Mexicans refused to accept the United States' takeover. They initiated insurrections and riots in parts of the state, but found their protests quickly extinguished by the United States military. Meanwhile, the Mexican Republic continued to lose control of its territories. Seeking to avoid further loss, it decided to enter into negotiations with the United States. Finally, in 1848, these negotiations lead to the signing of the Treaty of Guadalupe Hidalgo. The Treaty docu-

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5. *Struggle for Mexican Independence*, HISTORY.COM, http://www.history.com/topics/mexico/struggle-for-mexican-independence (last visited May 4, 2015).

6. *Id.*

7. *Mexican Period*, NEWMEXICOHISTORY.ORG, http://newmexicohistory.org/historical-events-and-timeline/mexican (last visited May 4, 2015).

8. RALPH EMERSON TWITCHELL, OLD SANTA FE: THE STORY OF NEW MEXICO'S ANCIENT CAPITAL 264–65 (Sunstone Press 2007) (1925).

mented Mexico's cession of New Mexico to the United States and guaranteed that New Mexicans retained their existing property. Despite the treaty, the political stability in New Mexico was tenuous at best.[9] Tensions with the high-sighted Territory of Texas, who wished to annex most of now-New Mexico, helped develop cohesion within the new territory.[10]

In 1912, New Mexico became an official state of the United States. New Mexico was one of the last states accepted into the Union, and had nearly three-quarters of a century to consider the language of the federal and other state constitutions. More than a century has passed since the United States' annexation of New Mexico, but New Mexicans continue to maintain the many traditions and influences of Spanish culture. This embrace of New Mexico's diverse history is reflected by the state's acceptance of immigrants in society and particular choice of language regarding citizens in its own constitution.

B. Person vs. Citizen: The Language of New Mexico's Constitution

More than sixty years passed from the time that New Mexico became a territory of the United States until it passed a constitution and became a state. In those 60 years, the Civil War erupted, the first railway crossed the country, and sixteen other states joined the union. New Mexico had time to study the language of constitutions.[11] New Mexico's adoption of the term "person" throughout its constitution, instead of "citizen," is informative. The difference in language is specific, intentional, and key in understanding the framers' choice to depart from the language used by other states and in the U.S. Constitution, in order to demonstrate broader acceptance of non-citizens in New Mexico.

The New Mexico Bill of Rights uses the term "citizen" exactly, and only twice. According to the New Mexico Constitution, only citizens have the right to bear arms and the right to serve on a grand jury.[12] Curiously, the term is absent from the federal counterparts.[13] In fact, the federal Bill of Rights does not use the term "citizen" at all.[14] This fact, in and of itself, may not reveal a great deal, but when it is coupled with other significant differences between the two documents, the word choices show that the adoption of the New Mexico Constitution was not merely an adoption of

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9. *See generally* FURGUS M. BORDEWICH, AMERICA'S GREAT DEBATE (2012).
10. *Id.* at 40.
11. *See generally* ROBERT W. LARSON, NEW MEXICO'S QUEST FOR STATEHOOD 1846-1912 (1968).
12. N.M. Const. art. II, §§ 6, 14.
13. *See* U.S. CONST. amends. II, V.
14. *See* U.S. CONST. amends. I–X.

the U.S. Constitution, and the two documents should be interpreted differently.

The fact that both "person" and "citizen" are used in New Mexico's Bill of Rights shows that the frequent use of the terms "person" or "people" is purposeful. The framers of the New Mexico Constitution obviously knew how to narrow the application of specific provisions. Again, this is evidenced by the narrowed application of the right to bear arms, as it only applies to citizens. The absence of such narrowing of other provisions suggests a much broader application of those other provisions.

Further, the fact that both terms are used shows that they have, and are meant to have, quite different meanings. This is most evident in the grand jury provision of the New Mexico Constitution.[15] The grand jury clause uses both terms. The provision requires persons to be indicted by grand juries but limits participation on them to citizens.[16] This shows that the two different terms have intentionally distinct meanings within the New Mexico Constitution. The specificity of the use of each term also shows that the term person or people is meant to be a broader term, with broader application than "citizen". The requirement that one must be indicted by a grand jury is a protection from the arbitrary abuses of government. All people are afforded this protection regardless of their citizenship status. In contrast, the right to serve on a grand jury is a right to participate in the mechanics of government. Under no circumstances in a representative democracy would the right to participate in government be available to more people than the right to be protected from that government. Therefore, the term person is shown to have broader application than the term citizen.

The grand jury provision is evidence that the framers of the New Mexico Constitution knew the word "citizen," sought a specific usage of that word, and deliberately chose not to use it through most of the document. As noted above, New Mexicans were initially reluctant to be claimed by the United States, and acceptance came with a refusal to relinquish old traditions. When looked at through the lens of its historical con-

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15. N.M. Const. art. II, § 14.

16. *Id.* ("No person shall be held to answer for a capital, felonious or infamous crime unless on a presentment or indictment of a grand jury or information filed by a district attorney or attorney general or their deputies, except in cases arising in the militia when in actual service in time of war or public danger. No person shall be so held on information without having had a preliminary examination before an examining magistrate, or having waived such preliminary examination. A grand jury shall be composed of such number, not less than twelve, as may be prescribed by law. Citizens only, residing in the county for which a grand jury may be convened and qualified as prescribed by law, may serve on a grand jury.").

text, one realizes that not only did the framers of the New Mexico Constitution want a greater application of that constitution; a greater application was necessary for the continued peace and prosperity of this new state.

The refusal to relinquish old traditions as New Mexico's orbit drew toward that of the United States started with the signing of the Treaty of Guadalupe-Hidalgo in 1848. The treaty ended the Mexican-American War and resulted in the annexation of most of what is now the modern day state of New Mexico to the United States. Out of concern for its now-former citizens, the Mexican negotiators inserted provisions ensuring that all of the rights, liberties, and property gained under the Mexican government would be maintained once the now-conquered people were assimilated into the United States.[17]

The territorial courts of the newly formed New Mexico Territory quickly recognized those provisions the Mexican negotiators had secured. In *United States v. Lucero*,[18] the territorial supreme court became the first court in the United States to recognize "Indians" as United States citizens. The court's decision was entirely based on the treaty and the fact that the Mexican government had recognized the Pueblo peoples of New Mexico as citizens. Since the treaty required the recognition of all rights provided under the Mexican government, not just rights acquired by those of European descent, the court was required to recognize the citizenship of the Pueblo people.

What makes the *Lucero* decision so remarkable is how progressive it was for its time. Indians all over the country were still being forced onto reservations, with the rounding up and forced removal still firmly the U.S. government policy toward those who had inhabited the continent for millennia before the Europeans. The *Lucero* decision was only a generation removed from the infamous Trail of Tears, where thousands of peaceful American Indians living in the eastern United States were forced to march from their ancestral homeland to what is now modern day Oklahoma. In fact, no U.S. court had even recognized Indians as people, let alone citizens. It was not until the case of *United States ex rel Standing Bear v. Crook*[19] in 1879 that Indians were first recognized as people outside of New Mexico.

The moral victory that *Lucero* signaled for those considered different by many in the rest of the country was short-lived. Just seven years

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17. Treaty of Peace, Friendship, Limits, and Settlement, U.S.-Mex., art. VIII–IX, Feb. 2–July 4, 1848, 9 Stat. 922.

18. 1869-NMSC-003, ¶ 16, 1 N.M. 422.

19. F.Cas. 695, 697 (C.C.D.Neb. 1879) (holding that Indians are "persons" with a right to "sue out and maintain a writ of habeus corpus").

later in *United States v. Joseph*, the United States Supreme Court refused to recognize the ruling of the New Mexico Territorial Supreme Court.[20] While not explicitly overruling *Lucero*, the United States Supreme Court made it clear that the issue was not resolved, and certainly did not endorse the view taken by the territorial court. The issue continued in limbo until the Indian Citizenship Act of 1924.[21]

This lays the historical and legal foundation for the adoption of the New Mexico Constitution in 1911. At that time 8,000 Pueblo Indians resided in New Mexico, and their status was wholly unknown. Those within New Mexico knew that Indian people (they had at least status as "people" by this point) posed no threat and deserved the full rights and benefits of citizenship.[22] However, Pueblo Indians had no real, definitive legal status. They were no longer "Indians" according to *United States v. Joseph*[23] and *United States v. Sandoval*,[24] but they weren't citizens either. It was against this backdrop that the framers carefully crafted the state constitution of New Mexico.

In the period between becoming a territory and entering as a state with its own constitution, New Mexico witnessed the Civil War on its own soil, survived an annexation attempt by Texas, and attempted to define the status rights of its own inhabitants before being rebuffed by the United States Supreme Court. The use of the word "person" is significant in the New Mexico Constitution. The word "person" was used in order to ensure that the New Mexico Constitution would apply to those who had no other legal status —– to every human being living in New Mexico.

C. New Mexico's Laws: Access to Rights Regardless of Immigration Status

Although some states implement policies that target undocumented immigrants or deny state benefits for these persons, New Mexico takes an opposite approach.[25] New Mexico grants rights to all of its residents, re-

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20. 94 U.S. 614, 618 (1876).

21. *See* U.S. v. Sandoval, 231 U.S. 28, 39 (1913) (stating "it remains an open question whether they have become citizens of the United States").

22. *See* C.M. CHASE, THE EDITOR'S RUN IN NEW MEXICO AND COLORADO 76 (1882).

23. 94 U.S. 614, 616–17 (1877) (holding that Pueblo Indians had obtained a level of civilization above that of other Indians, and thus hold land rights in a different way than other Indians).

24. 231 U.S. 38 (1913). Though decided after adoption of the New Mexico Constitution, the Court looks generaly at the history and status of Pueblo Indians as different than that of other Indians.

25. *See, e.g.*, NMSA 1978, § 21-1-4.6 (2005); NMSA 1978, § 30-52-2 (2013); NMSA 1978, § 66-5-9 (2011).

gardless of their immigration status. This is demonstrated in several New Mexico statutes, which explicitly order that a person's immigration status not be considered when determining benefit eligibility. One example is Section 21-1-4.6 which governs post-secondary education institutions.[26] The act requires a non-discriminatory policy for admission to any qualifying institution, stating "[a] public post-secondary educational institution shall *not deny admission to a student on account of the student's immigration status*."[27] It also proscribes discrimination in determining a student's eligibility for educational benefits and the granting of an in-state tuition rate and state-funded financial aid to all New Mexico residents "*regardless of immigration status*, [provided that they have] attended a secondary educational institution in New Mexico for at least one year and have either graduated from a New Mexico high school or received a general educational development certificate in New Mexico."[28]

New Mexico also refuses to consider a person's immigration status with respect to crime victims. For example, New Mexico offers services and benefits to victims of human trafficking.[29] Section 30-52-2 states that "[b]enefits and services shall be provided to eligible human trafficking victims . . . *regardless of immigration status*."[30] Of the many benefits given to the undocumented crime victims, this section also allows these victims to obtain health care, job placement assistance and post-employment ser-

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26. NMSA 1978, § 21-1-4.6(A), (B) (2005).

27. NMSA 1978, § 21-1-4.6(A) (2005) (emphasis added) ("A public post-secondary educational institution shall not deny admission to a student on account of the student's immigration status.").

28. NMSA 1978, § 21-1-4.6(B) (2005) (emphasis added) ("Any tuition rate or state-funded financial aid that is granted to residents of New Mexico shall also be granted on the same terms to all persons, regardless of immigration status, who have attended a secondary educational institution in New Mexico for at least one year and who have either graduated from a New Mexico high school or received a general educational development certificate in New Mexico.").

29. NMSA 1978, § 30-52-2(A) (2013) ("Human trafficking victims found in the state shall be eligible for benefits and services from the state until the victim qualifies for benefits and services authorized by the federal Victims of Trafficking and Violence Protection Act of 2000; provided that the victim cooperates in the investigation or prosecution of the person charged with the crime of human trafficking. Benefits and services shall be provided to eligible human trafficking victims regardless of immigration status and may include: (1) case management; (2) emergency temporary housing; (3) health care; (4) mental health counseling; (5) drug addiction screening and treatment; (6) language interpretation, translation services and English language instruction; (7) job training, job placement assistance and post-employment services for job retention; . . . (12) services to assist the victim and the victim's family members; and (13) other general assistance services and benefits as determined by the children, youth and families department or the human services department.").

30. *Id.* (emphasis added).

vices for job retention.[31] Although the statute requires that undocumented victims qualify for benefits and services authorized by the federal Victims of Trafficking and Violence Protection Act of 2000, the New Mexico statute departs from the approach taken by many other states that refuse services to unauthorized immigrants.[32]

Of the New Mexico statutes which explicitly reject consideration of a person's immigration status, the New Mexico's Operators' and Chauffeurs' License statute has sparked the most controversy.[33] This statute allows a foreign national to obtain a driver's license regardless of immigration status, provided that the applicant provides an individual taxpayer identification number as a substitute for a social security number.[34] The statute also authorizes the Secretary "to establish by regulation other documents that may be accepted as a substitute for a social security number."[35] Efforts to repeal the statute gained momentum after a bill was introduced in the House of Representatives that attempted to revoke the law.[36] The sponsoring representative gained the support of New Mexico Governor Susana Martinez who called for the revocation of the statute, claiming that "'New Mexico [was] becoming a magnet for those who want to receive a valid United States ID and travel freely around the

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31. *Id.*

32. *Id.*

33. *See* Stephanie Simon, *Driver's License Fight to Be Renewed*, WALL ST. J., June 6, 2011, http://online.wsj.com/article/SB10001424052702304563104576355672309458308.html?mod=WSJ_Election_LEFTSecondStories; *see also* NMSA 1978, § 66-5-9 (2011).

34. NMSA 1978, § 66-5-9(B) ("An application shall contain the full name, social security number or individual tax identification number, date of birth, sex and New Mexico residence address of the applicant and briefly describe the applicant and indicate whether the applicant has previously been licensed as a driver and, if so, when and by what state or country and whether any such license has ever been suspended or revoked or whether an application has ever been refused and, if so, the date of and reason for the suspension, revocation or refusal. For foreign nationals applying for driver's licenses the secretary shall accept the individual taxpayer identification number as a substitute for a social security number regardless of immigration status. The secretary is authorized to establish by regulation other documents that may be accepted as a substitute for a social security number or an individual tax identification number.").

35. *Id.*

36. Matthew Reichbach, *Martinez vows to push on in driver's license battle*, THE NEW MEXICO INDEPENDENT, Mar. 23, 2011, http://web.archive.org/web/20110325233000/http://newmexicoindependent.com/69338/martinez-vows-to-push-on-in-drivers-license-battle ("Rep. Andy Nuñez, I-Hatch, carried the legislation supported by Martinez in the House but it was substantially changed in the Senate. The two chambers were unable to come up with compromise legislation before the legislative session ended Saturday.").

country.'"[37] The State Senate, lead by a Democratic Party majority, amended the bill to include language allowing undocumented immigrants to receive driver's licenses, but with stricter requirements.[38] In response, the State House voted against the Senate's amendment.[39] Since the State Senate refused to withdraw its changes and a conference committee failed to reach a compromise on the bill's language, the bill died. Ultimately, Democratic legislators' view that the bill fostered anti-immigration sentiment contributed to the bill's failure.[40] The legislators recognized that the issue of immigration is a difficult and divisive one.[41] Despite significant surges of anti-immigration hysteria,[42] all subsequent bills introduced to overturn and modify the statute have died.[43]

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37. Simon, *supra* note 33.

38. Matthew Reichbach, *Senate passes immigrant driver's license bill*, THE NEW MEXICO INDEPENDENT, Mar. 10, 2011, http://web.archive.org/web/20111105223329/http://newmexicoindependent.com/69223/senates-passes-immigrant-drivers-license-bill ("The New Mexico Senate passed a bill Wednesday night that would still allow undocumented immigrants to receive driver's licenses, but stiffened some restrictions on provisions made by the Senate Judiciary Committee. . . . Sen. Tim Jennings, D-Roswell, had three amendments clear the Senate. One was to make sure that undocumented immigrants serving in the military would still be able to get driver's licenses in New Mexico. The other would change the time required to be in the state to receive a driver's license from three months to six months. The third amendment would require foreign nationals to be fingerprinted to receive a license.").

39. Matthew Reichbach, *Time runs out on legislation*, THE NEW MEXICO INDEPENDENT, March 21, 2011, http://web.archive.org/web/20110322175302/http://newmexicoindependent.com/69315/time-runs-out-on-legislation ("After the House voted against concurring with the Senate's changes, and when the Senate did not recede from its amendments, the bill went to conference committee. The committee, which featured three legislators from each chamber, failed to come up with a compromise in the dying hours of the legislative session.").

40. Simon, *supra* note 33 ("Supporters of the current system argue—without providing specific numbers—that most illegal immigrants who seek licenses are longtime residents of New Mexico, who need to drive to work and school. Denying them driver's licenses would condemn families to 'life in the shadows, where they can be exploited . . . .'").

41. Reichbach, *supra* note 38 ("'My amendments were offered in good faith in addressing concerns about security issues,' said [Democratic Representive] Jennings in a statement. 'On an issue as difficult, emotional, and divisive as this one is it is important to keep our minds open to compromise.'").

42. Simon, *supra* note 33 ("'We should not allow ourselves to be caught up in the hysteria,' said state Rep. Eleanor Chavez.").

43. *See* H.B. 103, 50th Leg., 2d Sess. (N.M. 2012); H.B. 171, 50th Leg., 2d Sess. (N.M. 2012); H.B. 244, 50th Leg. 2d Sess. (N.M. 2012); S.B. 235, 50th Leg., 2d Sess. (N.M. 2012); H.B. 132, 51st Leg., 1st Sess. (N.M. 2013), S.B. 521, 51st Leg., 1st Sess. (N.M. 2013); H.B. 127, 51st Leg., 2d Sess. (N.M. 2014); H.B. 32, 52d Leg., 1st Sess. (N.M. 2015); S.B. 653, 52d Leg., 1st Sess. (N.M. 2015).

Consistent with the legislature's equal treatment of all immigrants, the state's courts have also found that several statutes implicitly disregard consideration of a person's immigration status. For instance, in *Perez v. Health & Social Services*, the New Mexico Court of Appeals held that the state extended special medical benefits to all residents, regardless of immigration status.[44] In that case, Rio Arriba County denied Ruben Perez, an undocumented immigrant, benefits under New Mexico's Special Needs Act because of his immigration status.[45] After the Executive Director of the Health and Social Services Department denied Perez's claim, Perez appealed to the New Mexico Court of Appeals.[46]

The court of appeals found citizenship was not a requirement to receive benefits under the Special Needs Act.[47] The Special Needs Act granted medical care to any "person" who was a "resident" of New Mexico.[48] The person had to be "*physically present in New Mexico* on the date of application or final determination of eligibility [for benefits] and have demonstrated [an] *intent to remain in the State*."[49] The court reasoned "the word 'person' in [other statutes] included a non-resident alien who was present illegally in the state."[50] The court further reasoned that previous legislation defined the term "resident" as including undocumented immigrants and the term "residence" as meaning any place where one actually lives.[51] The court held that New Mexico "assumed the responsibility of financing health care for illegal aliens" and Perez qualified for medical care under the Special Needs Act.[52] Although the legislature replaced the Special Needs Act[53] with the Special Medical Needs Act,[54] *Perez*'s holding applies to the current statute. Under the Special Medical Needs Act, a *person* may qualify for medical care if the applicant proves that she or he is a *resident* of New Mexico.[55] The New Mexico legislature added no lan-

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44. Perez v. Health & Social Servs., 1977-NMCA-140, ¶ 20, 91 N.M. 334.
45. *Id.* ¶ 2.
46. *Id.*
47. *Id.* ¶ 16.
48. *Id.* ¶¶ 4–5.
49. *Id.* ¶ 4 (emphasis added).
50. *Id.* ¶ 7.
51. *Id.* ¶ 10.
52. *Id.* ¶ 20.
53. NMSA 1978, §§ 13-15-1 to -5 (repealed 1973).
54. NMSA 1978, §§ 27-4-1 to -5 (1973).
55. NMSA 1978, § 27-4-5 (1975) (emphasis added) ("A *person* is eligible for medical care under the Special Medical Needs Act if: A. pursuant to Section 27-4-4 NMSA 1978, the total amount of his nonexempt income is less than the applicable standard of need; and B. nonexempt specific and total resources are less than the level of maximum permissible resources established by the board; and C. he meets all qualifications for persons with special needs, pursuant to Section 27-4-3 NMSA 1978; and

guage in the new statute to overrule *Perez*'s holding, and as such, implicitly upheld the conclusion that undocumented immigrants may seek medical services under the Special Medical Needs Act.[56]

Courts also found undocumented immigrants eligible for benefits under New Mexico's Workers' Compensation Act.[57] In *Gonzalez v. Performance Painting, Inc.*, Jesus Gonzalez, an undocumented immigrant, was injured while working for Performance Painting, Inc.[58] After one-and-a-half years, Gonzalez returned to his employment and worked in a modified capacity. He eventually left Performance Painting, Inc. due to his inability to perform certain tasks and filed a complaint seeking workers' compensation. Following Gonzalez's departure, Performance Painting, Inc. sent a return to work letter to Gonzalez offering him a position. Despite the letter, Performance Painting, Inc. personnel advised Gonzalez that there were no available positions. Gonzalez decided to fill out an employment application anyway and was asked for his social security and driver's license. Having initially given a false social security number, Gonzalez left. Gonzalez then filed another complaint seeking modifier benefits pursuant to Section 52-1-26 of New Mexico's Workers' Compensation Act. Gonzalez claimed that Performance Painting, Inc. refused to rehire him.[59] After a workers' compensation judge found Gonzalez ineligible for modifier benefits, Gonzalez appealed to the New Mexico Court of Appeals. The court reversed, holding that the statute denied modifier

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D. within two years immediately prior to the filing of an application for assistance, he has not made an assignment or transfer of real property unless he has received a reasonable return for the real property; or, if he has not received such reasonable return, he is willing to attempt to obtain such return and, if such attempt proves futile, he is willing to attempt to regain title to the property; and E. he is not an inmate of any public nonmedical institution at the time of receiving assistance; and F. he is a *resident* of New Mexico.").

56. *See id.*

57. *See* Gonzalez v. Performance Painting, Inc., 2011-NMCA-025, 150 N.M. 306, *rev'd*, 2013-NMSC-021, 303 P.3d 802.

58. *Id.* ¶ 27.

59. *See id.* ¶ 6; *see also* NMSA 1978, § 52-1-26(C), (D) (1990) ("C. Permanent partial disability shall be determined by calculating the worker's impairment as modified by his age, education and physical capacity, pursuant to Sections 52-1-26.1 through 52-1-26.4 NMSA 1978; provided that, regardless of the actual calculation of impairment as modified by the worker's age, education and physical capacity, the percentage of disability awarded shall not exceed ninety-nine percent. D. If, on or after the date of maximum medical improvement, an injured worker returns to work at a wage equal to or greater than the worker's pre-injury wage, the worker's permanent partial disability rating shall be equal to his impairment and shall not be subject to the modifications calculated pursuant to Sections 52-1-26.1 through 52-1-26.4 NMSA 1978.").

benefits to an undocumented worker, but allowed Gonzalez to claim disability payments.[60] The court reasoned that federal laws forbid employers from hiring undocumented persons. As such, the court concluded that it was not the legislature's intent to extend modifier benefits to undocumented persons; and therefore, Gonzalez was precluded from receiving modified benefits.[61] However, the court noted that nothing in the Workers' Compensation Act "prohibit[ed] or exclude[d] undocumented workers from receiving benefits."[62] Comparable to New Mexico's Special Needs Act, the Workers' Compensation Act allowed benefits to "*any person* who has entered into the employment of or work[ed] under contract . . . ."[63] The court found that the legislature deleted language that prevented undocumented persons from recovering disability benefits under the Workers' Compensation Act in 1984.[64] Accordingly, New Mexico law allowed Gonzalez's disability payments.

Courts have also disregarded a person's immigration status in the granting of workers' compensation benefits in other contexts. For example, in *Gallup American Coal Co. v. Lira*, J. Trinidad Lira's widow and minor child sought to recover workers' compensation benefits after her husband's work related death.[65] Although Mrs. Lira once resided in the

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60. *Gonzalez*, 2011-NMCA-025, ¶ 9. The New Mexico Supreme Court later reversed the New Mexico Court of Appeals' holding that modifier benefits were not available to undocumented workers. Gonzalez v. Performance Painting, Inc., 2013-NMSC-021, ¶¶ 20–22, 303 P.3d 802.

61. *Id.* ¶ 15.

62. *Id.*; *see* NMSA 1978, § 52-1-9 (1973) (emphasis added) ("The right to the compensation provided for in this act, in lieu of any other liability whatsoever, to any and *all persons* whomsoever, for any personal injury accidentally sustained or death resulting therefrom, shall obtain in all cases where the following conditions occur: A. at the time of the accident, the employer has complied with the provisions thereof regarding insurance; B. at the time of the accident, the employee is performing service arising out of and in the course of his employment; and C. the injury or death is proximately caused by accident arising out of and in the course of his employment and is not intentionally self-inflicted."); NMSA 1978, § 52-1-16(A) (1989) (emphasis added) ("As used in the Workers' Compensation Act, unless the context otherwise requires, 'worker' means *any person* who has entered into the employment of or works under contract of service or apprenticeship with an employer, except a person whose employment is purely casual and not for the purpose of the employer's trade or business.").

63. *Gonzalez*, 2011-NMCA-025, ¶ 15 (emphasis added).

64. *Id.*; *see* NMSA 1978, § 52-1-52 (1989) ("Compensation benefits shall be exempt from claims of creditors and from any attachment, garnishment or execution and shall be paid only to such worker or his personal representative or such other persons as the court may, under the terms hereof, appoint to receive or collect compensation benefits.").

65. Gallup Am. Coal Co. v. Lira, 1935-NMSC-071, ¶ 1, 39 N.M. 496.

United States with her husband, at the time of his death, Mrs. Lira was living in Mexico. Gallup American Coal Company claimed that Mrs. Lira was ineligible for benefits under the act because she was not a United States resident at the time of her husband's death. Despite Ms. Lira's status, the lower court held that she and her children were residents and were entitled to receive the benefits. The New Mexico Court of Appeals affirmed.[66]

The New Mexico Supreme Court also affirmed, despite the statute which stated that "[n]o claim or judgment for compensation . . . shall accrue to or be recovered by relatives or dependents not residents of the United States at the time of the injury of such workman."[67] The court concluded that the terms "residence" and "resident" embodied various interpretations. Regarding relatives of undocumented workers, the court reasoned that "[t]he Legislature evidently intended that dependents of alien laborers who had never lived in the United States or, who having been domiciled here, had permanently left this country, should not be beneficiaries under this act;[68] but those dependents who are domiciled in the United States should be beneficiaries thereunder" because they are considered residents under the act.[69] As such, dependents of alien laborers, who leave the United States with no intent of terminating their domicile in the United States, remained residents for purposes of the Workers' Compensation Act. In Mrs. Lira's case, the court found that she never established residency in Mexico, but only lived there temporarily while caring for a relative. Mrs. Lira had planned to return to the United States upon her husband's request. The court held that Mrs. Lira was a resident under the Workers' Compensation Act, and she qualified for the act's benefits.[70] Section 52-1-52 of the Workers' Compensation Act replaced the statute relied upon in *Gallup American Coal Co.*, but it includes no language to overrule *Gallup*'s holding.[71] New Mexico's approach of granting people rights, despite their immigration status, demonstrates its history of integrating these persons into greater society.

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66. *Id.* ¶ 3.

67. *Id.*

68. *Id.* ¶ 18; *See also* Kent Nowlin Constr. Co. v. Gutierrez, 1982-NMSC-123, ¶ 20, 99 N.M. 389 (finding that relatives of undocumented workers residing outside of the United States at the time of the accident are barred recovery to worker's compensation).

69. *Gallup*, 1935-NMSC-071, ¶ 18.

70. *Id.* ¶¶ 19, 23.

71. *See* NMSA 1978, § 52-1-52 (1989).

D. Undocumented Immigrants as Contributors to the Country's and New Mexico's Growth

As of 2012, approximately 11.4 million unauthorized immigrants reside in the United States.[72] Although undocumented immigrants live in all parts of this nation, the South and SOUTHWEST regions of the United States are home to many of these immigrants.[73] For instance, in 2012, the Department of Homeland Security found that about 2.8 million undocumented persons lived in California, 1.8 million lived in Texas, and 730,000 lived in Florida.[74] With such large populations, undocumented immigrants have made their presence felt within these states and other border states. The Pew Hispanic Center found that, as of March 2010, an estimated 8 million undocumented immigrants partook in the nation's labor force.[75] Of these workers, 1.85 million worked in California, 1.1 million were employed in Texas, and 600,000 worked in Florida.[76] Consequently, these states, and the United States as a whole, have benefited from their work. A study done by The Perryman Group found that removing undocumented immigrants from the nation's labor force would result in an immediate loss of $1.757 trillion in annual spending, $651.511 billion in annual output, and 8.1 million jobs.[77]

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72. BRYAN BAKER & NANCY RYTINA, U.S. DEP'T OF HOMELAND SEC., OFFICE OF IMMIGRATION STATISTICS, ESTIMATES OF THE UNAUTHORIZED IMMIGRANT POPULATION RESIDING IN THE UNITED STATES: JANUARY 2012 1 (2012), *available at* http://www.dhs.gov/sites/default/files/publications/ois_ill_pe_2012_2.pdf.

73. *See id.* at 5 (listing the ten states with the largest unauthorized immigrant population in 2012); *see also* PEW HISPANIC CTR., UNAUTHORIZED IMMIGRATION POPULATION: NATIONAL AND STATE TRENDS, 2010 14 (2011), *available at* http://pewhispanic.org/files/reports/133.pdf (providing similar data for 2010). The Pew Hispanic Center is a nonpartisan organization, which provides information about the United States Hispanic population.

74. BAKER & RYTINA, *supra* note 72, at 5; *cf.* PEW HISPANIC CTR., *supra* note 73, at 14 (finding that 2.5 million undocumented persons lived in California, 1.65 million resided in Texas and 825,000 lived in Florida in 2010).

75. PEW HISPANIC CTR., *supra* note 73, at 17.

76. *Id.* at 21.

77. THE PERRYMAN GROUP, AN ESSENTIAL RESOURCE: AN ANALYSIS OF THE ECONOMIC IMPACT OF UNDOCUMENTED WORKERS ON BUSINESS ACTIVITY IN THE US WITH ESTIMATED EFFECTS BY STATE AND BY INDUSTRY 40 (2008), *available at* http://www.immigrationresearch-info.org/report/perryman-group/essential-resource-analysis-economic-impact-undocumented-workers-business-acti (finding a loss of spending, output, and income to border states if undocumented immigrants are removed from the market). The Perryman Group is an economic and financial analysis firm. The firm prepared this report for Americans for Immigration Reform. The report assessed the impact of undocumented immigrants on the labor force, as well as the nation's economy.

Despite these immigrants' contributions, there exists fear and animosity toward undocumented persons. The phrase "illegal alien" alone can invoke certain emotions and mental images for the listener.[78] For that reason, state courts have questioned whether to allow evidence of a party's unauthorized status in a civil case. Even though New Mexico's neighboring states have confronted this issue, New Mexico has yet to tackle this question directly in the civil context. Still, New Mexico has acknowledged unauthorized immigrants within its jurisdiction and their rights in personal injury cases. In *Torres v. Sierra*, the New Mexico Court of Appeals found that an undocumented immigrant held the right to pursue a personal injury claim and recover damages.[79] The court reasoned that unauthorized immigrants are human beings and they should be able to seek relief and recover damages to compensate their injuries caused by others. As such, the court found that "[a]n illegal alien in the United States is entitled to the same rights to damages that a citizen has under the tort laws of the state and federal government."[80]

Even though New Mexico's history may contribute to its desire to integrate and involve undocumented immigrants in the State's society, the continuation of this integration may be fiscally necessary for New Mexico. Data from 2010 indicate that 85,000 undocumented immigrants live in New Mexico.[81] Of those 85,000, an estimated 50,000 partook in New Mexico's labor force, making New Mexico among those states with the largest share of unauthorized immigrants in the labor force.[82] As a result, New Mexico depends on the income and the tax revenue that undocumented immigrants contribute to the State. The Immigration Policy Center found that, in 2010, undocumented immigrants in New Mexico contributed approximately $86.7 million in sales, income, and property taxes.[83] The Perryman Group further found that if undocumented immigrants are removed from the state New Mexico would suffer a loss of $1.8 billion in economic activity, $809.1 million in gross state product, and lose more than twelve thousand jobs.[84] As such, New Mexico and this country

78. Kevin R. Johnson, "*Aliens" and The U.S. Immigration Laws: The Social and Legal Construction of Nonpersons*, 28 U. MIAMI INTER-AM. L. REV. 263, 267 (1996–97) (noting that the term "alien" has negative connotation).

79. Torres v. Sierra, 1976-NMCA-064, ¶ 14, 89 N.M. 441.

80. *Id.* ¶ 24.

81. PEW HISPANIC CTR., *supra* note 73, at 15.

82. *Id.* at 21.

83. IMMIGRATION POLICY CENTER, NEW AMERICANS IN NEW MEXICO: THE POLITICAL AND ECONOMIC POWER OF IMMIGRANTS, LATINOS, AND ASIANS IN THE LAND OF ENCHANTMENT STATE 2 (2013), *available at* http://www.immigrationpolicy.org/sites/default/files/docs/new_americans_in_new_mexico_2013_3.pdf.

84. THE PERRYMAN GROUP, *supra* note 77, at 67.

rely on undocumented immigrants and can ill-afford to alienate such critical contributors.[85]

II. NEW MEXICO'S APPROACH TO IMMIGRATION STATUS IN CIVIL AND CRIMINAL CASES

A. What is at Stake? The Consequences of Trial Evidence of Immigration Status

The authors assert, for purposes of this paper, that bias and prejudice regarding a litigant's immigration status exists in America and affects jurors' decisions at trials. This presumption –– that the presence of undocumented immigrants will likely impact some jurors in their contemplation of the facts, and determinations of fairness, flows from numerous scholarly works and research efforts of many sociologists, psychologists, and others who have addressed the issue since long before enactment of the Civil Rights Act of 1875.[86] Scholars and jurists addressing the issue have uniformly and overwhelmingly recognized that such prejudice and discrimination about immigration status in the courtroom challenges fundamental concepts of freedom and liberty, as it flows from powerful perceptions of whether undocumented immigrants should be entitled to the benefits of an unbiased legal system in a country where they have illegally lived and worked.[87] Accordingly, whether the court allows the information to be considered in a trial is a decision likely to have a significant impact on the trial outcome.[88]

B. New Mexico's Consideration of Immigration Status in the Civil Context: Torres v. Sierra

In 1976, the New Mexico Court of Appeals in *Torres v. Sierra* considered immigration status when calculating damages.[89] Ignacio Torres, an undocumented immigrant and national of Mexico, died after his car col-

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85. IMMIGRATION POLICY CENTER, *supra* note 83, at 1.

86. *See, e.g.*, Judge Mark W. Bennett, *Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problems of Judge-Dominated Voir Dire, the Failed Promise of* Batson*, and Proposed Solutions*, 4 HARV. L. & POL'Y REV. 149 (2010).

87. *See, e.g.*, Benny Agusto, Jr. et al., *"But Your Honor, He's an Illegal!"––Ruled Inadmissible and Prejudicial[:] Can the Undocumented Worker's Alien Status Be Introduced at Trial?*, 17 TEX. HISP. J. L. & POL'Y 27 (2011); Elizabeth L. Earle, *Banishing the Thirteenth Juror: An Approach to the Identification of Prosecutorial Racism*, 92 COLUM. L. REV 1212 (1992).

88. Benny Agusto Jr. & Jason B. Ostrom, *Can the Injured Migrant Worker's Alien Status Be Introduced at Trial?*, 30 T. MARSHALL L. REV 383 (2005).

89. *See* Torres v. Sierra, 1976-NMCA-064, ¶ 10, 89 N.M. 441.

lided with John Owens' vehicle. Torres' father brought a suit pursuant to New Mexico's Wrongful Death Act against Sierra, the administrator of Owens' estate. After the trial court entered a verdict in favor of Torres, Sierra appealed the decision to the New Mexico Court of Appeals. Sierra claimed that he was entitled to judgment because Torres was an undocumented immigrant at the time of the accident, and as such, Torres did not have a claim.[90] Sierra also argued that, even if Torres held a personal injury claim as an undocumented immigrant, the court erred in allowing Torres' expert witness to measure damages for future lost wages based upon a work life expectancy in the United States.[91]

The New Mexico Court of Appeals affirmed the trial court's holding. The court reasoned that New Mexico's Wrongful Death Act defined liability for damages in a very broad manner and did not limit recovery to only United States citizens.[92] The court found that, when the legislature wanted to restrict certain benefits to undocumented immigrants, it made clear its intention.[93] In the case of the Wrongful Death Act, the court noted that the legislature made no such restriction, and instead, allowed recovery to all persons, regardless of immigration status.[94] The court further reasoned that, as a matter of New Mexico's public policy, the word "person" in the Wrongful Death Act necessarily included unauthorized immigrants.[95] Torres was allowed to pursue a suit under New Mexico's Wrongful Death Act.

Further, the court held that an undocumented immigrant could recover the same elements of damages as United States citizens. The court concluded that "[a]n illegal alien in the United States is *entitled to the same rights to damages* that a citizen has under the tort laws of the state and federal government."[96] As such, Torres had the right to seek wrongful death damages. With the right to seek damages, the Wrongful Death Act also granted the right to an instruction on damages comparable to any other plaintiff. Torres could recover damages based upon an "American working a lifetime."[97]

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90. *Id.* ¶ 8.
91. *Id.* ¶ 24.
92. *Id.* ¶¶ 10–11.
93. *Id.* ¶ 11 (finding that previous New Mexico statutes limited alcoholic licenses to United States citizen's only and required undocumented immigrants to reside in the state for at least 90 days before becoming eligible for a hunting and fishing license).
94. *Id.* ¶ 12.
95. *Id.*
96. *Id.* ¶ 24 (emphasis added).
97. *Id.*

Although New Mexico's Wrongful Death Act has changed from Section 22-20-1 to Section 42-2-1 since the *Torres* holding, the language remains the same.[98] The Act states that "[w]henever the death of *a person* shall be caused by the wrongful act, neglect or default of another, . . . and the act, or neglect, or default, is such as would, *if death had not ensued*, have entitled the party injured to maintain an action and recover damages in respect thereof, then, and in every such case, the person who . . . would have been liable, if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured."[99] The New Mexico legislature had the opportunity to restrict benefits from undocumented immigrants following the *Torres* holding, but instead it preserved the language of the statute as analyzed by *Torres*.

Along with the ability to restrict the type of persons who may recover under the statute, the New Mexico legislature also had the chance to limit the amount a person may recover pursuant to a wrongful death claim. In other words, the legislature could have stated that damages for an undocumented immigrant would be calculated based on the working lifetime of a person living in the immigrant's native country. Nonetheless, the legislature took no such steps.

The legislature's decision to maintain the statute's same language years after the *Torres* holding is significant. Even though the *Torres* decision may mirror that of *Gallup American Coal Co.* concerning the Workers' Compensation Act, *Torres* went beyond acknowledging unauthorized immigrants' rights under New Mexico's Wrongful Death Act. The *Torres* court specifically ruled that "*[a]n illegal alien in the United States is entitled to the same rights to damages that a citizen has under the tort laws of the state and federal government.*"[100] As such, the legislature's decision to use the identical language in subsequent Wrongful Death Acts lends support to the conclusion that the legislature agreed with *Torres*' holding. In turn, the legislature's implicit support of *Torres* provides a platform from which to advocate the exclusion of a party's immigration status in a civil proceeding.

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98. *See* NMSA 1978, § 41-2-1 (1978) ("Whenever the death of a person shall be caused by the wrongful act, neglect or default of another, although such death shall have been caused under such circumstances as amount in law to a felony, and the act, or neglect, or default, is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then, and in every such case, the person who, or the corporation which, would have been liable, if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured.").

99. *Id.* (emphasis added).

100. *Torres*, 1976-NMCA-064, ¶ 24 (emphasis added).

C. Introduction of Immigration Status in New Mexico Criminal Cases: State v. Williams

While New Mexico has not explicitly prohibited the introduction of someone's immigration status in a civil proceeding, the courts have touched on the issue in the criminal context. In *State v. Williams*, Phillip Williams was convicted of second-degree murder and tampering with evidence after stabbing Josephine Chacon.[101] On appeal, Williams alleged that the lower court erred in preventing him from cross-examining the State's witness, Javier Espinoza, regarding his immigration status.[102] Williams alleged that the witness lied about his status in a pretrial interview.[103] Williams reasoned that Espinoza's immigration status was relevant to his showing that Espinoza lacked credibility.[104]

The New Mexico Court of Appeals disagreed with Williams. The court found that, before trial, Williams requested the lower court to allow the introduction of evidence concerning Espinoza's immigration status. Williams made the request because Espinoza stated that he resided in the United States on a work permit, but failed to pay taxes. The lower court denied Williams' request and found the evidence irrelevant to the case.[105] The New Mexico Court of Appeals agreed with this reasoning.[106] The court found no evidence to support the conclusion that Espinoza lied about his status and that Espinoza's failure to pay taxes was not conclusive evidence of his immigration status.[107] The court held that Espinoza's immigration status was irrelevant. Although the New Mexico Court of Appeals did not entirely reject the introduction of immigration status in criminal proceedings, the court did place a burden to demonstrate relevance on the party seeking to introduce this evidence. Other state courts recognize that "[t]he only context in which courts have widely accepted using [evidence of immigration status] for impeachment is in criminal trials where a government witness's immigration status may indicate bias."[108]

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101. State v. Williams, No. 28,131, 2010 N.M. App. Unpub. LEXIS 51, at *1–3 (N.M. Ct. App. Jan. 13, 2010).
102. *Id.* at *27.
103. *Id.*
104. *Id.*
105. *Id.* at *28.
106. *Id.*
107. *Id.*
108. TXI Transportation Co. v. Hughes, 306 S.W.3d. 230, 244 (Tex. 2010).

III. INTRODUCTION OF A PARTY'S IMMIGRATION STATUS IN OTHER JURISDICTIONS

A. South/Southwest Region

Other states have also considered whether or not to allow evidence of a party's immigration status in civil cases. As a general rule, some other border states[109] allow the introduction of such evidence in civil proceedings, but require the moving party to first demonstrate the immigrant's deportability. Further, such courts typically limit the information for the purposes of determining future lost wages.

1. California

In *Rodriguez v. Kline*, Jesus Rodriguez, an undocumented immigrant and Mexican national, sued Samuel Kline for injuries sustained in a motor vehicle collision.[110] During the trial, the lower court allowed information regarding Rodriguez's immigration status and projected earnings in Mexico. The trial court charged the jury that Kline bore a burden of showing both the possibility and probability of Rodriguez's deportation, instructing if they found "'that [Rodriguez] *is subjected to deportation*, [they] *may* find that any future loss of earning must be governed by those earnings he could be capable of earning in the country of his origin.'"[111] Following this instruction, the jury returned a verdict in favor of Rodriguez for $99,000.

The court of appeals reversed, reasoning that questions of citizenship or lawful residence are legal issues to be decided exclusively by a court outside the presence of a jury.[112] The court concluded that, "whenever a plaintiff whose citizenship is challenged seeks to recover for loss of future earnings," a court must conduct a preliminary factual hearing to determine the plaintiff's citizenship.[113] During the hearing, the defendant must establish that the plaintiff is in fact an alien subject to deportation.[114] Upon this showing, the court then shifts the burden to the plaintiff to prove that he or she has taken steps to alter his or her immigration status.[115] If the judge finds that the plaintiff met this burden, the judge should exclude all evidence regarding the plaintiff's immigration status.

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109. The term "border state," as used in this article, refers to the United States/Mexico border.

110. Rodriguez v. Kline, 186 Cal. App. 3d 1145, 1147–48 (1986).

111. *Id.* at 1149–50.

112. *Id.* at 1148.

113. *Id.* at 1149.

114. *Id.*

115. *Id.*

Further, the jury should calculate the plaintiff's future earnings based on projected income within the United States. Conversely, if the judge finds that the plaintiff failed to meet the burden, the jury should determine future earnings based on the plaintiff's earning potential in the country of origin. Even with proof that Rodriguez resided in the United States without authorization, the court found that he might have met his burden of proof had the court conducted the proper inquiry.[116] For instance, Rodriguez demonstrated that he lived in the United States for 20 years, was hard working, and was of high moral character. Further, Rodriguez paid his income taxes and once owned a business (until his accident with Kline). All these attributes might have made him eligible for suspension of deportation. Concluding that the lower court erred in its instructions to the jury, the appellate court reversed and remanded for further proceedings.[117]

After this holding, the California Court of Appeals clarified the rule set out in *Rodriguez*. In *Hernandez v. Paicius*, Miguel Hernandez sustained an on-the-job injury that required him to undergo two surgeries.[118] Following his surgeries, Hernandez experienced pain and sleep disturbances. To aid him with the pain, Hernandez's physician referred him to an anesthesiologist who administered injections on Hernandez's throat near his larynx. Subsequently, Hernandez's voice became hoarse, and Hernandez sued the physician for negligence. Hernandez alleged that the anesthesiologist caused laryngeal nerve damage, administered injections without informed consent, and further deviated from the requisite standard of care. Prior to trial, Hernandez requested the court to exclude evidence relating to his immigration status.[119] Hernandez alleged that his immigration status was irrelevant and was highly prejudicial because he did not seek future lost wages.[120] The lower court agreed that evidence of Hernandez's immigration status was prejudicial, but stated:

> There's a lot of jurors unfortunately . . . as you may find out sadly at the end of this trial, [who] feel that anyone that comes into this fine country illegally, even for the motive of working, to come in illegally and then try to take advantage of our system for legal setup for legal resident, that we all pay money to support, pay their salaries, pay the buildings, yada, yada. If those people come in illegally, get caught up in the system, and then go through the

116. *Id.*

117. *Id.* at 1150.

118. Hernandez v. Paicius, 109 Cal. App. 4th 452, 455–59 (2003), *overruled on other grounds by* People v. Freeman 47 Cal. 4th 993 (2010).

119. *Id.* at 456–57.

120. *Id.* at 457.

> system as if they are legal by phoneying up an I.D. or social security number, lying and getting treatment here, getting education here, whatever it is, here illegally, it's like forfeited *ab initio*. It's just without any claims, without any pity. It's too bad this poor gentleman hurt his foot, hand, whatever, but he came here to work illegally. So he's running the risk of getting injuries. He's running a risk of getting injured on any job if he is injured and outside the system. Tough. That's your problem. . . . So if this jury is going to hear a story about a guy who's been damaged, can't work, and they're going to have to believe him about — and I noticed he dropped some of the claims so he might have been fudging on those — faking it as it were, that if he's here claiming this hoarseness has impacted his life so much he's entitled [to] a ton of money from this good doctor they have to believe him. If they don't believe him he gets nada.[121]

Despite Hernandez's assertion that California's Evidence Code prohibited evidence regarding a character trait based on prior bad acts, the court found the evidence admissible. Upon hearing all the evidence, including the immigration status, the jury found against Hernandez.

The California Court of Appeals reversed the judgment. The court found that the plaintiff's immigration status was irrelevant because of the refusal to seek future lost wages[122] and held that the lower court "absolutely should have granted [Hernandez's] motion to exclude reference to his residency status."[123] Furthermore, the court found that the mention of Hernandez's immigration status at trial was highly inflammatory.[124] Although the lower court allowed the prejudicial evidence on the basis that "bad actions" may be introduced, the court found that such evidence was inadmissible.[125] Finally, the court reasoned that the judge's comments, which "condemn[ed] and impugn[ed] the character of undocumented immigrants, including [Hernandez]," sufficed to show clear judicial bias and unfairness.[126] The case was remanded for a new trial.[127]

On January 30, 2015, the court of appeals decided *Velasquez v. Centrome*.[128] In that case, the plaintiff was alleging injury from inhaling chemicals while working for a food-flavoring company. He sued a variety of the companies in the supply chain under a negligence theory.

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121. *Id.* at 457–58.
122. *Id.* at 460.
123. *Id.*
124. *Id.*
125. *Id.* at 460–61.
126. *Id.* at 461–63.
127. *Id.* at 463.
128. Velasquez v. Centrome, Inc., 233 Cal. App. 4th 1191 (2015).

Before trial, the plaintiff filed a motion in limine to exclude any and all testimony about his immigration status. Defendant responded that plaintiff's immigration status was relevant in that it was used to calculate the possibility of seeking a lung transplant in the future, a damage that the plaintiff was seeking. The trial court held off on a ruling until after voir dire of the medical experts that were going to testify. Following the questioning, the trial court judge denied the motion and let the evidence in.

The court of appeals reversed the judgment. The court cited to *Rodriguez*, stating, "[w]hen an undocumented immigrant plaintiff files a personal injury action, but does not claim damages for lost earnings capacity, evidence of his or her immigration status is irrelevant."[129] The court went on to further hold that immigration status is irrelevant to the determination of past special damages, liability, general damages, and credibility.[130] However, this ruling left open the possibility of immigration status as being relevant to the future special damages at issue. Looking at the record of the voir dire of the medical experts, the court found that immigration was not shown to be a factor in determining the likelihood of a person receiving a lung transplant. In fact, the medical expert specifically stated that immigration status cannot be considered.

This case seems to solidify the general rule from *Rodriguez* that immigration status is irrelevant to much of the civil case. Admission of immigration status, it could be argued, has been foreclosed for purposes of showing past special damages, liability, general damages, or credibility. The court holds open the possibility that immigration status may be relevant for proving future special damages. However, it seems to be the burden of party advocating for admission to show the relevance to rebut a presumption of inadmissibility.

2. Texas

In *TXI Transportation Company v. Hughes*, members of the Hughes family died after colliding with a gravel truck driven by Ricardo Rodriguez, an undocumented employee of a trucking company.[131] The family sued the driver's employer, TXI Transportation Company ("TXI") on a negligent entrustment theory, asserting wrongful death and survival damages.[132] During trial, TXI objected to the admission of evidence concerning Rodriguez's immigration status as irrelevant and unduly prejudicial.[133]

129. *Id.* at 1212.
130. *Id.*
131. 306 S.W.3d 230, 233–34 (Tex. 2010).
132. *Id.* at 233.
133. *Id.* at 234.

The lower court overruled the objection and allowed evidence of the driver's status. The jury heard of Rodriguez's previous deportation and misrepresentations regarding his immigration status.[134] The jury also heard mention of Rodriguez's immigration status no fewer than forty times—thirty-five of which referred to him as an "illegal immigrant."[135] At the end of the trial, the jury found that Rodriguez's and TXI's negligence proximately caused the collision. TXI appealed, but the court of appeals affirmed the lower court's holding.[136] As such, TXI petitioned the Texas Supreme Court and argued that the trial court erred in allowing evidence of Rodriguez's immigration status and misrepresentations. TXI claimed that the admission of this evidence prejudiced its defense and denied it a fair trial. The court agreed.

After examining the record, the court found that Rodriguez's status "did not cause the collision, and was not relevant to the negligent entrustment or hiring claims . . . ."[137] The court reasoned that, in a negligent hiring claim, a party must demonstrate that the negligent hiring proximately caused the injuries.[138] Since Rodriguez's hiring was not the proximate cause of the accident, the court concluded that Rodriguez's immigrant status and misrepresentations served no probative value.[139] The court also found that the Hughes family's constant reference to Rodriguez's immigration status served only to draw attention away from any weakness in the case. The court reasoned that "[s]uch appeals to racial and ethnic prejudices, whether 'explicit and brazen' or 'veiled and subtle,' cannot be tolerated because they undermine the very basis of our judicial process."[140] Since it found the evidence prejudicial and irrelevant, the court reversed the lower court's holding and remanded the case for a new trial.[141]

Following *TXI Transportation Company*, the Texas Court of Appeals expanded the supreme court's ruling. In *Republic Waste Services v. Martinez*, Elida Martinez sued Republic Waste Services Company ("Republic") after its employee ran over her husband, Alfredo Gomez.[142] Before trial, Martinez filed a motion in limine requesting the judge to

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134. *Id.* at 243.
135. *Id.*
136. *Id.* at 234.
137. *Id.* at 241.
138. *Id.*
139. *Id.*
140. *Id.* at 245.
141. *Id.*
142. Republic Waste Servs. v. Martinez, 335 S.W.3d 401, 401–04 (Tex. Ct. App. 2011).

exclude any evidence regarding Gomez's undocumented status.[143] In her motion, Martinez claimed that Gomez's status lacked relevance to the case and was highly prejudicial. Republic disagreed, alleging that the evidence was relevant to Martinez's claim for future lost financial support from her husband.[144] Republic planned to introduce evidence showing that immigration officials had conducted raids at its facilities. The raids occurred only a few weeks after Gomez's death and resulted in the arrest of other undocumented workers.[145] As such, Republic alleged that immigration officials would have arrested Gomez, as well. According to Republic, Gomez's potential earning capacity in his native El Salvador was only $1,000 per year.[146] Despite Republic's claims, the trial court found that the contentions regarding Gomez's deportability constituted "gross speculation" and granted Martinez's motion in limine.[147] At the conclusion of the trial, the court rendered a judgment in favor of Martinez.

On appeal, Republic claimed that the trial court erred in excluding evidence concerning Gomez's immigration status. The court of appeals agreed that a claimant's immigration status was potentially relevant in calculating future lost wages.[148] Nevertheless, citing *TXI Transportation Company*, the court found that the evidence's prejudicial effect outweighed its probative value and upheld the exclusion.[149] In order to use the evidence of immigration status, the defendant must demonstrate the *likelihood* of the plaintiff's deportation, or else the jury would be forced "to engage in conjecture and speculation regarding whether [plaintiff] will be deported, when he will be deported, and, if deported, whether he will return to the United States to work."[150] In this case, the court concluded that Republic's evidence about the raids failed to establish the likelihood of Gomez's deportation.[151] Based on all the findings, the court concluded that "the probative value of the ICE raid, as well Gomez's illegal immigrant status, was slight given the . . . ample evidence that was admitted about Gomez's immigration status."[152] The appeals court held that the trial court correctly excluded the evidence.[153]

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143. *Id.* at 403.
144. *Id.*
145. *Id.*
146. *Id.* at 404.
147. *Id.*
148. *Id.* at 408.
149. *See id.* at 408–09.
150. *Id.* at 409.
151. *Id.* at 410.
152. *Id.* at 411. "ICE" is an acronym for United States Immigration and Customs Enforcement.
153. *Id.*

3. Florida

In *O'Neil v. Gilbert*, Jasmine Gilbert sued Synergy Gas Corporation ("Synergy") and her landlord, Michael O'Neil, for negligence after she sustained burns from an explosion caused by a defective stove in her apartment.[154] During the trial, Gilbert introduced extensive evidence regarding the immigration status of Synergy's witness. Among the evidence introduced was testimony by an immigration attorney who suggested that the witness was undocumented and made misrepresentations to officials to obtain permanent residency. Gilbert argued that the evidence showed the witness's bias in favor of Synergy's positions.[155] Specifically, Gilbert claimed that the witness's status influenced her decision to testify out of fear that Synergy would report her to immigration authorities. The jury returned a verdict for Gilbert, and Synergy appealed.[156]

The Florida Court of Appeals (3d District) reversed and remanded for a new trial.[157] While there was evidence of Synergy's liability, the court held it was improper to allow admission of the witness's immigration status for impeachment.[158] The court found no evidence to suggest that Synergy knew about the witness's status or that it would report the witness if she refused to testify. As such, the evidence proved no bias on the witness's part and served only to disparage her character.[159] The court concluded that, "[w]hile evidence of a witness's bias or prejudice is of course pertinent and admissible as reflecting upon his credibility in a particular case, . . . [an] immigration issue does not qualify under this rule."[160]

In 2006, the Florida Court of Appeals (4th District) distinguished *O'Neil v. Gilbert* in *Liotta v. State*.[161] In *Liotta*, the prosecution cross-examined defendant Ralph Liotta's witness about his immigration status and argued that Liotta's status as the witness's visa sponsor should be admitted as evidence of the witness's bias.[162] The court found this proper because the close relationship between the witness and Liotta, including

154. O'Neil v. Gilbert, 625 So. 2d 982, 982–83 (Fla. Dist. Ct. App. 1993).
155. *Id.* at 983.
156. *Id.* at 982.
157. *Id.*
158. *Id.*
159. *Id.* at 983.
160. *Id.* (internal citation omitted).
161. 939 So. 2d 333 (Fla. Dist. Ct. App. 2006). The *O'Neil* court found that immigration status was improperly admitted because there were no facts that linked the immigration issue to the witness's credibility. This seems to be consistent with California's findings that immigration status is irrelevant to credibility.
162. *Id.* at 334.

the visa sponsorship, went to show a possible bias and did not call into question the witness's credibility.[163] This criminal case should be viewed as a limited departure from the traditional rule that immigration status should not be admitted.

In *Maldonado v. Allstate Insurance Company*, the Florida Court of Appeals (2d District) concluded that an undocumented immigrant may recover damages pursuant to Florida's Motor Vehicle No-Fault Law.[164] Vicente Maldonado, an undocumented immigrant and Mexican national, was struck by a motorist insured by Allstate Insurance Company ("Allstate"). Maldonado sued Allstate for injuries he sustained and sought benefits under the Allstate policy. At trial, Allstate presented evidence regarding Maldonado's immigration status and stated that Maldonado "'crossed over the river [illegally] between Mexico and the United States.'"[165] Allstate also cross-examined Maldonado about his use of a false social security number and his intent to work in Florida without authorization. During closing arguments, Allstate framed the question to the jury: "'[C]an a person be subject to deportation and be a resident of the State of Florida? Can a resident be deported?'"[166] Although the trial court sustained Maldonado's objections to such rhetoric, the court allowed the evidence of his immigration status for the purpose of determining whether Maldonado was a resident of Florida.[167] The jury found that Maldonado failed to maintain residency in Florida at the time of the accident, and therefore, he could not obtain Personal Injury Protection ("PIP") benefits under Florida's Motor Vehicle No-Fault Law. Maldonado appealed.

Florida's No-Fault Law required insurance companies to provide PIP benefits to "'persons struck by such [insured] motor vehicle.'"[168] The court of appeals held that the person seeking the benefits must establish that he or she was a Florida resident at the time of the incident or was an occupant of a Florida vehicle.[169] The court concluded that the "residency" requirement demanded "pure" residency, not domicile or citizenship.[170] As such, an undocumented immigrant may obtain PIP benefits upon

163. *Id.* at 334–35 (distinguishing the *O'Neil* holding that a witnesses immigration status was irrelevant).

164. Maldonado v. Allstate Ins. Co., 789 So. 2d 464, 464–66 (Fla. Dist. Ct. App. 2001).

165. *Id.* at 466.

166. *Id.*

167. *See id.* at 466–67.

168. *Id.* at 468.

169. *Id.* at 469.

170. *Id.* at 470.

showing that he established residency in Florida. In Maldonado's case, the court concluded that the claimant demonstrated that he intended to stay in Florida. There was no evidence that "Maldonado was an itinerant bicyclist yearning to return to his Mexican homeland."[171] Furthermore, the court concluded that the evidence was "unfairly prejudicial because it made Mr. Maldonado's alien status, rather than his residency, the focus of the jury's attention."[172] As the prejudice Maldonado faced outweighed any probative value held by evidence of his immigration status, the court reversed the trial court's holding and remanded the case with instructions to provide the jury with an accurate definition of the term "resident."[173]

4. Arizona

Although it addressed the issue in the context of a criminal proceeding, Arizona courts hold that the prejudicial impact of introducing a witness's immigration status outweighs its relevancy. In *State v. Abdi*, Abdulkadri Abdi was arrested and charged with aggravated assault against victim L.[174] On cross-examination, Abdi questioned L. about his immigration status, but the state objected on the basis of relevance. In response, Abdi's counsel asserted that L. was in fact the aggressor, but he claimed to be the victim because his immigration status would be in jeopardy.[175] The trial court rejected Abdi's arguments and sustained the state's objection. The jury ultimately found Abdi guilty and sentenced him to 9.5 years incarceration.

On appeal, Abdi argued that the trial court erred in prohibiting the introduction of L.'s immigration status. Abdi claimed that L.'s immigration status remained relevant to his showing that L. had a motive to accuse Abdi of stabbing him.[176] Abdi also argued that the trial court's denial violated his constitutional due process "'right to present a complete defense.'"[177] The Arizona Court of Appeals disagreed with Abdi, finding nothing to suggest that L.'s immigration status was in jeopardy. The court further concluded that the status constituted a collateral issue which may potentially confuse the jury.[178] Finally, the court reasoned that the jury heard enough testimony to conclude that "L. may have had a motive to

171. *Id.*
172. *Id.*
173. *Id.*
174. State v. Abdi, 248 P.3d 209, 211 (Ariz. Ct. App. 2011).
175. *Id.* at 214–215.
176. *Id.* at 214.
177. *Id.* at 215.
178. *Id.*

be untruthful."[179] Since any reference to L.'s immigration status would have been cumulative, the lower court's ruling was upheld.[180]

Following *Abdi*, the court continued to deny admission of immigration status as overly prejudicial. In *State v. Buccheri-Bianca*, the defendant lived in the same apartment as a family with five minor children.[181] Three of the children testified that they had been molested. The defendant attempted to introduce the immigration status of the family during trial to show a motive for fabricating the story. The victims had applied for U-visas after the charges were filed, and the defendant argued that the charges were fabricated to qualify for the U-visa.[182]

The Arizona Court of Appeals ruled that it was proper to "preclude evidence of immigration status if it is 'collateral to the issues at trial and would potentially confuse the jury.'"[183] However, the court did look to the record to see if there was any merit to the defendant's claims. No evidence was shown that the family knew about U-visas until after the charges were filed.[184] The court also noted that U-visas do not require an unauthorized immigration status for application, so it was ultimately irrelevant.[185]

Using the language and ideas set forth in *Abdi*, the court held that a "trial court could implicitly conclude, as argued by the state, that any probative value would have been outweighed by the risk of unfair prejudice and confusion of the issues stemming from a collateral mini-trial on the victims' immigration status."[186]

B. Non-Border States

1. New York

Like states within the South/Southwest Region of the United States, other states whose undocumented populations rank among the largest in the nation[187] also exclude evidence regarding immigration status when future lost wages are not sought. States with smaller unauthorized popula-

179. *Id.*
180. *Id.*
181. State v. Buccheri-Bianca, 312 P.3d 123, 126 (Ariz. Ct. App. 2013).
182. *Id.* at 127.
183. *Id.* (citing *Abdi*, 248 P.3d at 215).
184. *Id.*
185. *Id.*
186. *Id.*
187. In 2010 the Pew Hispanic Center found that 625,000 undocumented immigrants lived in New York, 525,000 lived in Illinois, and 230,000 lived in Washington. PEW HISPANIC CTR., *supra* note 73, at 23.

tions[188] tend to allow this evidence at trial more liberally. However, all states require the moving party to prove the immigrant's deportability.

In *Klapa v. O & Y Liberty Plaza Co.*, a district court decision, a worker was injured in a fall from scaffolding while working on a construction site owned by O & Y Liberty Plaza Company.[189] The injured worker, Janusz Klapa, brought suit against the defendants, and as part of his claim for damages, sought future lost wages. Klapa filed a motion in limine asking the court to prevent O & Y Liberty Plaza Company from referring to his immigration status, arguing that his status was irrelevant to his claim for future lost wages.[190] Further, Klapa claimed that admitting evidence of his status would be highly prejudicial to his case. In response, the defendants claimed that New York case law permitted the introduction of a plaintiff's immigration status when the plaintiff sought future lost wages.[191] The defendants alleged that the evidence allowed the jury to determine Klapa's deportability, and as such, limit the amount of future wages recoverable.

After examining the record, the court granted Klapa's motion. The court found that a plaintiff's undocumented status, "in and of itself, cannot be used to rebut a claim for future lost wages.[192] The court reasoned that "[w]hatever probative value illegal alien status may have is far outweighed by its prejudicial impact."[193] As such, the court concluded that the defendant must first present enough evidence proving the likelihood of the plaintiff's deportability.[194] Because the court found that the defendants failed to demonstrate Klapa's deportability, the court granted the motion and precluded the defendants from presenting evidence regarding Klapa's immigration status.[195]

2. Colorado

Silva v. Wilcox arose out of a motor vehicle collision.[196] Plaintiff Luis Silva sued for damages related to his injuries sustained in the wreck and filed a motion in limine to exclude information regarding his immigration status and any reference to his Mexican driver's license.[197] Silva alleged

188. In 2010, the Pew Hispanic Center found that 180,000 undocumented immigrants lived in Colorado, and 15,000 lived in New Hampshire. *Id.*
189. Klapa v. O & Y Liberty Plaza Co., 645 N.Y.S.2d 281, 281 (N.Y. Sup. Ct. 1996).
190. *Id.*
191. *Id.* at 281–82.
192. *Id.* at 282.
193. *Id.*
194. *Id.*
195. *Id.* at 283.
196. Silva v. Wilcox, 223 P.3d 127, 130 (Colo. Ct. App. 2009).
197. *Id.* at 131.

that the evidence only served to create prejudice against him and such prejudice outweighed any probative value. Without conducting an evidentiary hearing, the lower court granted the motion and excluded the evidence. After two trials, the jury returned a verdict in favor of Silva and awarded him economic damages, including future lost wages. The defendant appealed and argued that the court's refusal to allow evidence regarding Silva's immigration status was an error because the claim was for future lost wages.[198]

The Colorado Court of Appeals agreed that where a claimant seeks to recover lost future wages as damages, "the inquiry into his right as an immigrant to earn such wages is relevant."[199] The defendant's burden is to show that that the plaintiff resides in the United States illegally and that he or she is *unlikely to continue residing in the United States during the time for which future lost earnings are sought*.[200] Only then may the defendant present evidence regarding the plaintiff's immigration status to the jury to consider in determining future lost wages.[201] The court remanded the case with instructions to conduct a hearing to determine Silva's immigration status and the likelihood of Silva remaining in the United States throughout the period of claimed lost future wages.[202]

3. Illinois

In *Diaz v. Archer Daniels Midland Co.*, an undocumented immigrant employed by Archer Daniels Midland Company ("ADM") died after an explosion caused him to be burned over 90 percent of his body.[203] Laura Diaz, administrator of the decedent's estate, brought a wrongful death and survival suit against ADM.[204] Before the start of the trial, Diaz sought to exclude any evidence regarding the decedent's immigration status.[205] The trial court granted the motion to exclude, and the jury returned a verdict in favor of Diaz.

On appeal, ADM claimed that the trial court erred in prohibiting evidence regarding the decedent's immigration status. The company alleged that the evidence was relevant to Diaz's claims for damages. ADM

198. *Id.*
199. *Id.* at 131–32.
200. *Id.* at 132 (emphasis added).
201. *Id.* at 133.
202. *Id.* at 133–34.
203. Diaz v. Archer Daniels Midland Co., No. 4-10-0028, 2011 Ill. App. Unpub. LEXIS 1543, at *3–4 (Ill. App. Ct. June 28, 2011).
204. *See* 740 ILL. COMP. STAT. 180/1 (1995) (emphasis added) (providing without reference to immigration status that a cause of action arises "[w]henever the death of a *person* shall be caused by wrongful act . . . ").
205. *See Diaz*, 2011 Ill. App. Unpub. LEXIS 1543, at *5.

further alleged that the evidence served to establish the decedent's character traits and family relationship. Despite ADM's contentions, the court of appeals affirmed the trial court's decision to exclude the evidence.[206] While agreeing that a plaintiff's immigration status may be admissible, the court found that ADM failed to provide information that established the decedent's status.[207] ADM presented no evidence demonstrating that the decedent was under investigation or at risk of deportation. Moreover, the court found that Diaz never requested damages for future lost wages.[208] As such, the court concluded that "[t]he suggestion [that the] decedent was an illegal immigrant would have been extremely prejudicial . . . [and t]he prejudice resulting from such a suggestion far outweighed its limited relevance."[209]

4. New Hampshire

In *Rosa v. Partners in Progress*, Wudson Rosa, a Brazilian citizen and employee of one of the defendants, suffered an injury while at work.[210] Rosa sued for damages and lost earning capacity. The defendants requested that the court to dismiss or limit Rosa's claims for future wage loss. Rosa sought to exclude evidence regarding his immigration status on the grounds that its probative value was outweighed by prejudicial effect.

On interlocutory appeal, the New Hampshire Supreme Court concluded that a plaintiff's immigration status was irrelevant to the issue of liability.[211] The court reasoned that refusing recovery against employers would provide incentive to hire more undocumented persons and exploit them.[212] However, the court found the evidence relevant in cases in which a plaintiff sought future lost United States earnings[213] despite its prejudice. The court held that an employer may be liable for the lost United States earnings if the employer "knew or should have known of

206. *Id.* at *8.
207. *Id.* at *8–9.
208. *Id.* at *11.
209. *Id.* at *10–11.
210. Rosa v. Partners in Progress, Inc., 868 A.2d 994, 996 (N.H. 2005).
211. *Id.* at 1002.
212. *See id.* at 1000 ("To refuse to allow recovery against a person responsible for an illegal alien's employment who knew or should have known of the illegal alien's status would provide an incentive for such persons to target illegal aliens for employment in the most dangerous jobs or to provide illegal aliens with substandard working conditions. It would allow such persons to treat illegal aliens as disposable commodities who may be replaced the moment they are damaged. Such a result is incompatible with tort deterrence principles.").
213. "United States earnings" are calculated at the rate earned by the employee in the United States.

that illegal alien's status."[214] The case was remanded to determine whether the defendant knew or should have known plaintiff was undocumented.[215]

5. Washington

In *Salas v. Hi-Tech Erectors*, Alex Salas slipped from a ladder erected by Hi-Tech Erectors, severely injuring himself.[216] Salas brought suit against Hi-Tech Erectors for negligence. After Salas' undocumented status was revealed, he filed a motion in limine to exclude all evidence referring to his immigration status. The trial judge allowed the evidence despite his fear "that some jurors might be 'so hung up on the immigration issue that they would really take it out on him.'"[217] The evidence was allowed because it was relevant to Salas' claim for future lost wages.[218] The trial returned a verdict in favor of Hi-Tech Erectors. The Washington Court of Appeals affirmed the trial court's rules, and Salas appealed to the state supreme court.

The Washington Supreme Court reversed and remanded the case,[219] finding that there was no evidence showing that Salas was subject to deportation.[220] The court recognized that authorities fail to apprehend most undocumented immigrants, and those apprehended may find ways to avoid deportation.[221] As such, the court concluded that a plaintiff's immigration status fails as a reliable indicator of deportability. Furthermore, the court found that the prejudicial effect of introducing the plaintiff's

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214. *See Rosa*, 868 A.2d at 1000.

215. *Id.* at 1002. *See also* Affordable Hous. Found., Inc. v. Silva, 469 F.3d 219, 248 (2006) (internal citations and quotation marks omitted) (citing *Rosa*) ("[W]hen, as in this case, both the illegal employment relationship and the personal injury are attributable to the wrongful conduct of persons other than the undocumented worker, a denial of lost earnings compensation, like a denial of workers' compensation is more apt to subvert both federal and state law than a grant of such compensation is apt to place the two in direct and positive conflict with one another. As the New Hampshire Court of Appeals observed in recently rejecting a *Hoffman Plastic*-based challenge to its state law allowing an undocumented worker to recover lost United States earnings for workplace injuries: To refuse to allow recovery against a person responsible for an illegal alien's employment who knew or should have known of the illegal alien's status would provide an incentive for such persons to target illegal aliens for employment in the most dangerous jobs or to provide illegal aliens with substandard working conditions.").

216. Salas v. Hi-Tech Erectors, 230 P.3d 583, 584 (Wash. 2010).

217. *Id.*

218. *Id.* at 585.

219. *Id.* at 587.

220. *Id.* at 585.

221. *Id.*

immigration status outweighed its minimal relevancy. The court reasoned that "[i]ssues involving immigration can inspire passionate responses that carry a significant danger of interfering with the fact finder's duty to engage in reasoned deliberation."[222] The court held that Salas was entitled to a new trial that excluded reference to his status.[223]

6. Maryland

Finally, in *Ayala v. Lee*, evidence of immigration status was introduced in the context of lost future wages.[224] Defendants argued that, if deported, the plaintiff would have much lower earnings in their native country, and therefore, the jury should award a lower sum. The question was posed to the appellate court for consideration before trial.

The Maryland Court of Appeals noted that the chance of prejudice often far outweighs the minimal legitimate value that was gained and that the mere chance of deportation is rarely sufficient for introduction of immigration-related evidence.[225] It was up to the defendant to show a likelihood of deportation. Ultimately the court ruled that the trial judge should watch closely and monitor the testimony given to ensure that any questions regarding the future income do not become too prejudicial.[226]

IV. WHY NEW MEXICO SHOULD CONTINUE ITS CURRENT PATH

A. The National Debate Indicates Bias Against Immigrants

Immigration is a highly charged and emotional issue throughout our country as demonstrated by the passage of, and subsequent litigation related to, Arizona Senate Bill 1070.[227] Alabama, Georgia, South Carolina, Tennessee and Florida all considered or passed similar legislation, imposing criminal penalties on illegal immigrants and those who employ or aid

222. *Id.* at 586.
223. *Id.* at 587.
224. Ayala v. Lee, 81 A.3d 584 (Md. Ct. Spec. App. 2012).
225. *Id.* at 597–98.
226. *Id.* at 599.
227. Named the "Support Our Law Enforcement and Safe Neighborhoods Act," SB 1070 made it a crime for "illegal" immigrants to be in the state without papers, allowed local law enforcement to enforce federal immigration law, and targeted those interacting with immigrants. *See generally* 2010 Ariz. Legis. Serv. ch. 113 (West). Passage of the bill brought debates ranging from safety to racial profiling. In *Arizona v. United States*, 132 S. Ct. 2492 (2012), the Court upheld the provision allowing law enforcement to pursue federal immigration law and struck down all others as unconstitutional.

them.[228] A 2013 Gallup poll found 35 percent of Americans believed immigration levels should be decreased, while 40 percent were satisfied with the current levels.[229] The most recent iteration of the poll shows movement indicating negative sentiment about immigration.[230] Truly, immigration is a fractured issue in America. A significant piece of legislation aimed at education and helping youth, despite their immigration status, the Development, Relief, and Education for Minors Act (DREAM Act), stalled out in a Senate filibuster and has not been seriously debated since.[231]

On November 20, 2014, President Obama announced sweeping executive action on immigration.[232] The Order, among other issues, revised removal priorities for adults and children, expanded waivers for spouses and children of lawful permanent residents and extended deferment actions to parents of Americans and lawful permanent residents.[233] The measures would have extended work permits and legal protections to hundreds of thousands of undocumented immigrants,[234] but before the measures were implemented, twenty-six states sued to halt enforcement of the executive order.[235] Two days before it would take effect, a United States District Judge ruled that President Obama had overstepped his authority and ordered the executive action stayed.[236] Executive action in the face of congressional inaction, as well as subsequent state reaction, indicate that the national debate related to immigration rages on.[237] More

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228. *See* Danielle Renwick & Brianna Lee, *The U.S. Immigration Debate*, COUNCIL ON FOREIGN RELATIONS (Feb. 26, 2015) http://www.cfr.org/immigration/us-immigration-debate/p11149#p2.

229. *Immigration*, GALLUP, http://www.gallup.com/poll/1660/Immigration.aspx (last visited May 6, 2015).

230. *Id.* The most recent poll conducted in June of 2014 shows 41 percent in favor of decreasing immigration levels and 33 percent satisfied with the current level.

231. Renwick & Lee, *supra* note 228.

232. *Executive Actions on Immigration*, U.S. DEPARTMENT OF HOMELAND SECURITY, U.S. CITIZENSHIP AND IMMIGRATION SERVICES (Apr. 15, 2015), http://www.uscis.gov/immigrationaction.

233. *Id.*

234. Michael D. Shear & Julia Preston, *Dealt Setback, Obama Puts Off Immigrant Plan*, N.Y. TIMES (Feb. 17, 2015), http://www.nytimes.com/2015/02/18/us/obama-immigration-policy-halted-by-federal-judge-in-texas.html?_r=0.

235. *Id.*

236. *Id.*

237. A February 12-15, 2015, CNN/ORC poll taken of 1,027 adults nationwide, the response was split 49%/49% as to whether immigration should be handled with paths to legal residency for immigrants who are already employed, or stopping immigration and deporting immigrants already here. *Immigration*, POLLINGREPORT.COM, http://www.pollingreport.com/immigration.htm (last visited May 6, 2015).

importantly (for the purposes of this Article), the tone of the national debate indicates a substantial percentage of the population harbors strong bias against the immigrant population and that introduction of evidence related to immigration status at trial would likely impact the administration of justice in our court system.

B. Prejudicial Effect Outweighs Any Probative Value

While border states and others with large undocumented populations agree that evidence of a party's immigration status may be relevant, these states also recognize that this evidence carries with it a highly prejudicial impact. For instance, the California Court of Appeals in *Rodriguez* found that "evidence relating to citizenship and liability to deportation almost surely would be prejudicial to the party whose status was in question."[238] Agreeing with *Rodriguez*, the *Hernandez* court also found that the introduction of a party's immigration status is highly inflammatory.[239]

Texas courts follow a similar reasoning. The Texas Supreme Court in *TXI Transportation Company* held that the potential prejudice resulting from a party's immigration status substantially outweighs its relevance.[240] The court found that "[e]ven in instances where immigration status may have limited probative value as to credibility, courts have held that such evidence is properly excluded for undue prejudice under Rule 403" of the Texas Evidence Code.[241] Similarly, the *Republic Waste Services* court held that, pursuant to Rule 403 of the Texas Evidence Code, relevant evidence may be excluded if the prejudicial effect outweighs its probative value.[242] In the context of immigration status, the court found that "the issue of immigration is a highly charged area of political debate. . . . [T]he probative value of evidence concerning a plaintiff's illegal immigrant status is low, while the prejudicial effect of this evidence is high."[243]

Comparably, the Florida Court of Appeals held in *O'Neil* that Section 90.403 of the Florida Evidence Statute may bar admission of evidence of a witness's bias if it is unfairly prejudicial.[244] The court may exclude evidence of a witness's immigration status if the court concludes

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238. Rodriguez v. Kline, 186 Cal. App. 3d 1145, 1148 (Cal. Ct. App. 1986).

239. Hernandez v. Paicius, 109 Cal. App. 4th 452, 460 (2003), *overruled on other grounds by* People v. Freeman 47 Cal. 4th 993 (2010).

240. TXI Transp. Co. v. Hughes, 306 S.W.3d 230, 244 (Tex. 2010).

241. *Id.*

242. Republic Waste Servs. Ltd. v. Martinez, 335 S.W.3d 401, 409–10 (Tex. Ct. App. 2011).

243. *Id.* at 409.

244. O'Neil v. Gilbert, 625 So. 2d 982, 983 (Fla. Dist. Ct. App. 1993).

that information creates a bias disparaging the witness's character.[245] The Florida Court of Appeals in *Maldonado* ruled that it also may exclude a party's immigration status (under Section 90.403) from a civil proceeding when its limited probative value is outweighed by its prejudicial effect.[246]

Other states join border states in this view. For example, in *Klapa*, the court concluded that "whatever probative value illegal alien status may have is far outweighed by its prejudicial impact."[247] The Illinois Court of Appeals in *Diaz* also found that "[t]he prejudice resulting from such a suggestion far outweighed its limited relevance."[248] Finally, the Washington Supreme Court found that "immigration is a politically sensitive issue. . . . In light of the low probative value of immigration status with regard to lost future earnings, the risk of unfair prejudice brought about by the admission of a plaintiff's immigration status is too great."[249]

C. Probability or Possibility of Deportation: The Standard Required in Order to Introduce a Party's Immigration Status

Recognizing the highly prejudicial effect of a party's immigration status, most states require not only actual proof of the individual's immigration status, but the likelihood that the party will be deported. For instance, in *Klapa*, the court found that a defendant may rebut a plaintiff's claim for future lost wages by introducing evidence establishing the plaintiff's deportability.[250] Nonetheless, the court reasoned that the defendant "must be prepared to demonstrate something more than just the mere fact that the plaintiff resides in the United States illegally."[251] Ultimately, the defendant failed to meet its burden and offered no evidence indicating that immigration officials placed Klapa in deportation proceedings or that those officials even contemplated proceedings.[252] Accordingly, the court barred the defendant from introducing evidence of immigration status.[253]

Similarly, Texas courts hold that a defendant must provide evidence supporting the contention that a plaintiff is deportable.[254] In *Republic*

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245. *See id.*

246. Maldonado v. Allstate Ins. Co., 789 So. 2d 464, 470 (Fla. Dist. Ct. App. 2001).

247. Klapa v. O & Y Liberty Plaza Co., 645 N.Y.S.2d 281, 282 (N.Y. Sup. Ct. 1996).

248. Diaz v. Archer Daniels Midland Co., No. 4-10-0028, 2011 Ill. App. Unpub. LEXIS 1543, at *11 (Ill. App. Ct. June 28, 2011).

249. Salas v. Hi-Tech Erectors, 230 P.3d 583, 586–87 (Wash. 2010).

250. *Klapa*, 645 N.Y.S.2d at 282.

251. *Id.*

252. *Id.*

253. *Id.* at 283.

254. Republic Waste Servs. Ltd. v. Martinez, 335 S.W.3d 401, 409–10 (Tex. Ct. App. 2011).

Waste Services, the Texas Court of Appeals found that immigration raids at the defendant's facilities constituted no more than speculative evidence.[255] The court held:

> [T]estimony that 50 to 55 employees were detained by federal authorities, due to 'mismatched' paperwork, offers little to guide the jury to find that, had he lived, Gomez also would have been detained. . . . [H]ad evidence been presented at trial showing that Gomez was the subject of a deportation proceeding or had been detected by federal immigration authorities, the probative value of the illegal status evidence may have outweighed its prejudicial effect.[256]

Specific, predictive evidence about Gomez's immigration future is required. Proof that some of the employer's other workers were deported is not sufficient. Due to the defendant's inability to demonstrate some concrete evidence proving Gomez's deportability, the court excluded any reference to Gomez's immigration status.[257]

The Illinois Court of Appeals agrees. In *Diaz*, the court found that defendant provided nothing more than speculative evidence,[258] because it "presented no evidence [showing that the] decedent was under investigation by immigration officials or was at risk for deportation in the future."[259] Again, specific evidence about the claimant's probability of deportation is necessary.

The Washington appellate courts take a similar stance. In *Salas*, the Washington Court of Appeals noted that the Department of Homeland Security found an estimated 11.6 million undocumented immigrants resided in the United States.[260] Despite these large numbers, the court recognized that immigration officials apprehended less than one percent of these undocumented immigrants.[261] Further, the court found that, even if officials apprehend an undocumented person, the immigrant may suspend deportation proceedings. As the defendant only presented evidence of Salas' immigration status and "no evidence of pending removal proceedings or a deportation order," the court held that the lower court abused its discretion in allowing evidence of Salas' immigration status.[262]

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255. *Id.* at 410.
256. *Id.*
257. *Id.*
258. Diaz v. Archer Daniels Midland Co., No. 4-10-0028, 2011 Ill. App. Unpub. LEXIS 1543, at *11 (Ill. App. Ct. June 28, 2011).
259. *Id.*
260. Salas v. Hi-Tech Erectors, 230 P.3d 583, 585 (Wash. 2010).
261. *Id.*
262. *Id.* at 585, 587.

Even Colorado has required that a defendant prove the probability of a plaintiff's deportation.[263] The state requires the defendant to demonstrate the plaintiff is undocumented, but is *unlikely* to remain in the country during the period for which future lost wages are sought. In other words, the defendant must prove the plaintiff will *likely* be deported.[264]

In each of the cases discussed above, the party attempting to admit the evidence must prove more than the mere possibility of deportation. These courts ask the moving party to not only present evidence establishing the immigration status, but to couple such evidence with proof of removal proceedings or immigration investigations. These cases thus demonstrate that the defendant would bear the burden of establishing the *probability* of deportation before she or he may present evidence regarding the plaintiff's immigration status.[265]

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263. Silva v. Wilcox, 223 P.3d 127, 131–32 (Colo. Ct. App. 2009).

264. "Likely" means "having a *high probability* of occurring or being true." MERRIAM-WEBSTER DICTIONARY, *available at* http://www.merriam-webster.com/dictionary/likely (last visited May 6, 2015) (emphasis added).

265. On June 17, 2011, the Department of Homeland Security released a memorandum to all of its field office directors, special agents, and chief counsels, issuing guidance on how immigration officials should exercise their prosecutorial discretion. *See* Memorandum from John Morton, Director, U.S. Immigration and Customs Enforcement, Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens (June 17, 2011) (unpublished memorandum), *available at* http://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf. The memorandum instructs immigration officials to review immigration charges, detention and deportations on a case-by-case basis. It an attempt to prioritize, it also identifies certain classes of individuals that warrant positive care (such as aliens with long-term residency, those who have been present since childhood, veterans, and victims of crimes) and certain classes of persons who should likely be prosecuted (individuals who pose a clear risk to national security, serious criminals, known gang members who pose a clear danger to society, and individuals with an egregious record of immigration violations). Most notably, the memorandum states that "it is generally preferable to exercise such discretion as early in the case or proceeding as possible in order to preserve government resources that would otherwise be expended . . . ." *Id.* at 5. The memorandum is insignificant in a civil proceeding where a defendant moves to admit evidence regarding a plaintiff's immigration status. If the defendant is required to prove the probability of a plaintiff's deportation, the defendant would need to demonstrate that the plaintiff is amongst those persons likely to be prosecuted by immigration officials. Even if the defendant presents evidence that the plaintiff is in deportation proceedings, the plaintiff may be able to rebut this by showing evidence that immigration officials may dismiss proceedings because of his or her positive attributes.

D. Proposed Approach for New Mexico

Torres v. Silva recognized that New Mexico law entitles undocumented immigrants to the same rights to recover damages that United States citizens hold under its tort laws, including the right to future lost wages. Forty years have passed since *Torres*, but this decision remains good law. Although *Torres* may appear to be a sharp departure from other states' holdings, a New Mexico court, following *Torres*' reasoning, need go no further than our Rules of Evidence to exclude evidence of immigration status. New Mexico Rule of Evidence 11-401 states that evidence is relevant if it has the "tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."[266] Rule 11-402 allows courts to find all evidence not falling within this meaning irrelevant and inadmissible in trial.[267] *Torres* allows an undocumented immigrant the same recovery opportunities as a United States citizen, without reduction to future lost earnings. A party's immigration status should be of no consequence to the fact finder's determination, and the evidence is irrelevant to any fact at issue. Based upon the intersection of *Torres* and the New Mexico Rules of Evidence, our courts should exclude this evidence for lack of relevancy.

Even if future New Mexico courts find this evidence could be relevant outside the context of damages, courts should, nonetheless, exclude the evidence. As recognized by the above-mentioned states, immigration is a highly charged political and social issue in our community[268] that triggers a wide range of deeply held emotions among persons, including jurors. Regrettably, some jurors may be as powerless to check these emotions at the courthouse door as other deeply held beliefs, and as a result may allow their prejudices against immigrants to influence their decisions. Many states, especially those along the border, recognize that this possibility is a genuine concern to a judicial system seeking fairness in the courtroom, and exclude this evidence altogether because its prejudi-

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266. Rule 11-401 NMRA.

267. Rule 11-402 NMRA ("Relevant evidence is admissible unless any of the following provides otherwise: the United States or New Mexico constitution, a statute, these rules, or other rules prescribed by the Court. Irrelevant evidence is not admissible.").

268. Immigration reform was a central theme in President Obama's 2012 inaugural address, and candidates likely to run for president in 2016 have identified the political rift immigration debate causes in the electorate as a primary issue to be exploited in during the campaign. *See* Jonathan Easley, *Likely 2016 GOP hopefuls recast immigration views*, THE HILL (Mar. 5, 2015), http://thehill.com/homenews/campaign/234678-likely-2016-gop-hopefuls-recast-immigration-views.

cial effect outweighs its probative value. Rule 11-403 of New Mexico's Rules of Evidence permits New Mexico to do the same. Rule 11-403 states that "[t]he 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."[269] The scenario to be avoided is this: a court allows the introduction of evidence related to immigration status for purposes not related to damages, and the jury then uses that information to reduce the party's recovery. This outcome is contrary to the spirit of the *Torres* holding. To maintain the integrity of *Torres*, and more importantly, to maintain New Mexico's long recognition that immigration status should never be used to stigmatize or devalue any person's status before the law, the court should exclude this evidence under Rule 11-403. As a matter of law, and as a matter of sound public policy, the courts should recognize that the prejudicial effect of such evidence outweighs its relevancy.

Finally, if New Mexico decides to allow evidence regarding a party's immigration status, its courts should take a restrictive approach. Like other state courts, New Mexico courts should grant preliminary hearings before a trial to determine a party's immigration status if, and only when, the immigrant requests future lost wages. At the preliminary hearings, the courts should also require defendants to prove the probability of the plaintiff's deportation. By following this approach, courts avoid undue prejudice against unauthorized immigrant parties.

CONCLUSION

Although these procedural steps are feasible, as evidenced by other courts, they should not be necessary. *Torres* remains good law, and courts may enforce *Torres* by using our Rules of Evidence in the same manner as other courts have. Therefore, when confronted with the issue of whether or not to allow evidence concerning a party's immigration status, New Mexico has nothing more to do, but to continue on its current path.

269. Rule 11-403 NMRA.