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Reflections on Immigration Reform, the Workplace and the Family

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ARTICLE

REFLECTIONS ON IMMIGRATION REFORM,
THE WORKPLACE AND THE FAMILY

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The émigré Holy Family of Nazareth, fleeing into Egypt, is the archetype of every refugee family. Jesus, Mary, and Joseph, living in exile in Egypt to escape the fury of an evil king, are, for all times and all places, the models and protectors of every migrant, alien and refugee of whatever kind who, whether compelled by fear of persecution or by want, is forced to leave his native land, his beloved parents and relatives, his close friends, and to seek a foreign soil.¹

* Gene and Elaine Edwards Family Chair in Law, Professor of Law, and Associate Dean for Research, University of Oklahoma College of Law. I would like to thank Elizabeth Schiltz and the organizers, presenters, and other participants in the “Workplace Restructuring to Accommodate Family Life” symposium for a thought-provoking and enriching conference. I would also like to thank Caroline McClimon for her excellent work as a research assistant.

1. Pope Pius XII, *Apostolic Constitution Exsul Familia Nazarethana* (Aug. 1, 1952), available at <http://www.papalencyclicals.net/Pius12/p12exsul.htm>; see also Pontifical Council for the Pastoral Care of Migrants and Itinerant People, *Erga Migrantes Caritas Christi (The Love of Christ Toward Migrants)*, No. 15 (May 3, 2004), available at http://www.vatican.va/roman_curia/pontifical_councils/migrants/documents/rc_pc_migrants_doc_20040514_erga-migrantes-caritas-

I. INTRODUCTION

In 1986, Congress passed and the President signed into law comprehensive immigration reform known as the Immigration Reform and Control Act of 1986 (IRCA).² Key components of this reform package included increased border security in the form of employer sanctions for those who hire unauthorized aliens and amnesty for many of the estimated 3.2 million or so aliens residing in the United States illegally.³ Despite these and other efforts to stem the tide of illegal immigration, the House of Representatives' Judiciary Committee recently estimated that eleven million aliens reside in the country illegally with an inflow of approximately 500,000 new arrivals annually.⁴ The House Report estimates that unauthorized aliens comprise 4.3 percent of the overall workforce, seventeen percent of building cleaning and maintenance workforce, fourteen percent of those employed in private households, and ten percent of those employed in the construction industry and the food service industry.⁵ So now, a generation after the IRCA was supposed to solve our illegal immigration problem, Congress and the President once again contemplate border security, including beefed up employer sanctions, and some form of amnesty for those illegally present.⁶

christi_en.html ("In the foreigner a Christian sees not simply a neighbour, but the face of Christ Himself, who was born in a manger and fled into Egypt, where he was a foreigner, summing up and repeating in His own life the basic experience of His people."); U.S. Conf. of Catholic Bishops, *Strangers No Longer: Together on the Journey of Hope, A Pastoral Letter Concerning Migration from the Catholic Bishops of Mexico and the U.S.*, ¶ 26 (2003), available at <http://www.usccb.org/mrs/stranger.shtml> ("Recalling the migration of the Chosen People from Egypt, Jesus, Mary, and Joseph themselves were refugees in Egypt From this account the Holy Family has become a figure with whom Christian migrants and refugees throughout the ages can identify, giving them hope and courage in hard times.").

2. Immigration Reform and Control Act (IRCA) of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (1986) (codified as amended in scattered sections of 8 U.S.C.).

3. CRS REP. NO. RS21938, UNAUTHORIZED ALIENS IN THE UNITED STATES: ESTIMATES SINCE 1986, Ruth Ellen Wasem (2007); see also Karen A. Woodrow & Jeffrey S. Passel, *Post-IRCA Undocumented Immigration to the United States: An Assessment Based on the June 1988 CPS*, in UNDOCUMENTED MIGRATION TO THE UNITED STATES: IRCA AND THE EXPERIENCE OF THE 1980s, at 33, 34 (Frank D. Bean, Barry Edmonston & Jeffrey S. Passel eds., 1990).

4. H.R. REP. NO. 109-345(I), at 45 (2005) (citing STEVEN CAMAROTA, CENTER FOR IMMIGRATION STUDIES, IMMIGRANTS AT MID-DECADE: A SNAPSHOT OF AMERICA'S FOREIGN-BORN POPULATION IN 2005 (Dec. 2005), available at <http://judiciary.house.gov/media/pdfs/109345.pdf>).

5. *Id.* (citing JEFFREY S. PASSEL, PEW HISPANIC CENTER, ESTIMATES OF THE SIZE AND CHARACTERISTICS OF THE UNDOCUMENTED POPULATION, (Mar. 2005)), available at <http://judiciary.house.gov/media/pdfs/109345.pdf>.

6. See generally, Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005, H.R. 4437, 109th Cong. (1st Sess. 2005); Comprehensive Immigration Reform Act of 2006, S. 2611, 109th Cong. (2006); President George W. Bush, State of the Union Address (Jan. 23, 2007) (calling for Congress to pass a comprehensive immigration bill), available at <http://www.whitehouse.gov/news/releases/2007/01/20070123-2.html>; see also Gail Russell Chaddock, *Capitol Hill Closes in on Immigration Reform*, CHRISTIAN SCI. MONITOR, Mar. 13, 2007, available at <http://www.csmonitor.com/2007/0313/p01s01-uspo.html>. See *infra* text and accompanying notes 79-85, for why the presence of undocumented immigrants is problematic.

How did we get to this point? Where do we go from here? In this paper, I will outline Congress' failed efforts to eliminate the problem of unauthorized presence and discuss recent proposals. Using Catholic Social Thought as a foundation, I'll offer my version of a just resolution, which includes deploying effective means to eliminate future streams of undocumented immigrants, creation of a guest worker program, legalization for most of the undocumented aliens currently in the country, and the use of foreign development aid to reduce the economic disparity that pushes people to emigrate and pulls them toward the United States. I need to be upfront with you. I am skeptical; I doubt that we as a nation have the political will to create and implement any permanent solution, much less a just one. So, I fear that if and when we triage the current problem, the patient will still be in need of serious treatment a generation later.

II. FAILED EFFORTS

A. *Previous Immigration Reform Efforts*

IRCA employed a two-pronged approach to address the persistent problem of unauthorized presence of non-citizens in the United States.⁷ To alleviate the problem of several million aliens living in the United States without authorization, Congress provided a mechanism for amnesty—and a path to citizenship—to unauthorized aliens who could demonstrate that they had been in the United States since January 1, 1982.⁸ To stem the tide of further illegal immigration, Congress created a system of employment authorization verification and employer sanctions.⁹ When an employer hires a new employee, the employee must attest that she is authorized to work in the United States and the employer must verify the employee's identity and authorization to work.¹⁰ An employer can be sanctioned for hiring or con-

7. The presence might be unauthorized for one of three reasons: the alien entered the United States illegally, the alien entered the United States legally but has overstayed, or the alien has remained in the United States despite an order of deportation or removal.

8. Immigration Reform and Control Act (IRCA) of 1986, 8 U.S.C. § 1255(a) (2000) (amnesty granted under Immigration and Nationality Act (INA) § 245(a)).

9. See generally, 8 U.S.C. § 1324a(a) (2000).

10. *Id.* § 1324a(a)(1)(B) (employer sanctions for hiring an individual without properly verifying or documenting their identity and eligibility to work legally within the United States); Thomas C. Green & Ileana M. Ciobanu, *The State of Federal Prosecution: Deputizing—and then Prosecuting—America's Businesses in the Fight Against Illegal Immigration*, 43 AM. CRIM. L. REV. 1203, 1205–06 (2006):

The federal government's effort to deputize America's businesses in immigration matters began in 1986 Under the current form of the Act, businesses are required to examine certain types of identification documents to verify that each job applicant is eligible for employment in the [U.S.]. Employers are required to retain the "I-9" forms completed in the application process, and may elect to retain copies of the identification documents presented. Employing any individual without verifying the individual's identity and employment authorization can subject a business to civil penalties. The Act also makes it illegal, among other things, to knowingly hire an illegal alien, or to retain such an individual in employment after learning of his illegal status, and businesses in violation of these provisions can be subject to both civil and criminal sanctions. In passing

tinuing to employ an alien knowing that the alien is not authorized to work in this country or for failing to document the employer's verification of authorization.¹¹ The House Report explained Congress' rationale:

This legislation seeks to close the back door on illegal immigration so that the front door on legal immigration may remain open. The principal means of closing the back door, or curtailing future illegal immigration, is through employer sanctions. . . . Employment is the magnet that attracts aliens here illegally or, in the case of non-immigrants, leads them to accept employment in violation of their status. Employers will be deterred by the penalties in this legislation from hiring unauthorized aliens and this, in turn, will deter aliens from entering illegally or violating their status in search of employment.¹²

Employer sanctions did not have the anticipated impact, however, and a new round of illegal immigration followed. Congress followed with still more laws designed to curtail unauthorized entry or presence in the United States. Among these, two measures, a three-year and a ten-year bar, make aliens inadmissible to the United States for three or ten years if they have been in the United States illegally for more than six months or more than a year, respectively.¹³ For example, suppose that Alien "A" is in the queue to enter the United States legally in thirteen months, but instead of waiting she sneaks across the border now. In thirteen months, when she is entitled to legally enter, she will face a ten-year bar for line jumping. Despite these measures and others designed to eliminate unauthorized presence, several hundred thousand new cases of unauthorized presence arise each year. In other words, Congress' attempts to close the back door have failed miserably.

this legislation, Congress was clearly trying to curb the flow of undocumented aliens in the United States by deputizing corporate America to reduce job opportunities for unauthorized aliens.

Id.; see also Allen Thomas O'Rourke, *Good Samaritans, Beware: The Sensenbrenner-King Bill and Assistance to Undocumented Migrants*, 9 HARV. LATINO L. REV. 195 (2006) (describing the sanctions imposed on employers who do not comply with federal standards for employee document verification). Notably, Congress did recognize that the threat of employer sanctions might cause employers to discriminate, out of an abundance of caution or otherwise, against particular segments of the United States workforce. To counter this problem, IRCA adopted anti-discrimination provisions. See 8 U.S.C. § 1324b(a)(3)(B) (2000); but see U.S. GENERAL ACCOUNTING OFFICE, REPORT TO THE CONGRESS, IMMIGRATION REFORM: EMPLOYER SANCTIONS AND THE QUESTION OF DISCRIMINATION (1990) (contending that the sanctions have caused ten percent of employers to engage in illegal national origin discrimination); Michael Scaperlanda, *The Paradox of a Title: Discrimination within the Anti-Discrimination Provisions of the Immigration Reform and Control Act of 1986*, 1988 WIS. L. REV. 1043.

11. 8 U.S.C. § 1324a(a)(1)(A) (2000) (employer sanctions for the knowing hiring of persons unauthorized to work in the United States); *Id.* § 1324a(a)(2) (sanctions for employers who knowingly continue to employ illegal aliens after knowingly hiring them).

12. H.R. REP. NO. 99-682(I), at 46 (1986), as reprinted in 1986 U.S.C.C.A.N. 5649-50.

13. Illegal Immigration Reform & Immigration Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C., tit. III, 110 Stat. 3009 (1996).

B. Causes of Failure

From the United States side, one can attribute this failure to two factors: lack of enforcement and a confusing two-edged—we want you, we don't want you—message to would-be unauthorized immigrants. As the House Judiciary Committee's Report accompanying the Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005 said, "Enforcement of 'employer sanctions,' while always spotty, declined in the latter years of the Clinton Administration after a 1999 interior enforcement strategy delegated it to the lowest rung of priority. Enforcement has since plummeted still further."¹⁴ From 1997 to 2004, the number of hours spent by federal officials investigating employer sanctions cases fell eighty-one percent from 714,000 hours to 135,000.¹⁵ "The number of notices of intent to fine employers for violations fell from 1,461 in 1992 to 3 in 2004, a drop of 99 percent. The number of arrests of illegal alien employees fell from 17,552 in 1997 to 445 in 2003, a drop of 97 percent."¹⁶ Additionally, we send a mixed love/hate message to our unauthorized population. On the one hand, we send a loud and clear signal that the immigrant, especially the illegal immigrant, is unwanted. From Proposition 187,¹⁷ a decade ago, to the many state initiatives in the past couple of years, state governments are brightly flashing the "no vacancy" sign, or at least, the "we don't serve your kind" sign.¹⁸ At the same time, many in the business sectors have the "help

14. H.R. Rep. No. 109-345(1), at 45–46 n.8 (2005) (citing *Lack of Worksite Enforcement and Employer Sanctions: Hearing Before the Subcommittee on Immigration, Border Security and Claims of the House Comm. on the Judiciary*, 109th Cong. (2005)).

15. *Id.*

16. *Id.*

17. California Proposition 187 (1994) (ballot initiative, approved by the electors of California on Nov. 8, 1994, terminated government social and healthcare benefits for illegal immigrants); e.g., Ruben J. Garcia, Comment, *Critical Race Theory and Proposition 187: The Racial Politics of Immigration Law*, 17 CHICANO-LATINO L. REV. 118 (1995); see Linda S. Bosniak, *Opposing Prop. 187: Undocumented Immigrants and the National Imagination*, 28 CONN. L. REV. 555 (1996); see also Kevin Johnson, *An Essay on Immigration Politics, Popular Democracy, and California's Proposition 187: The Political Relevance and Legal Irrelevance of Race*, 70 WASH. L. REV. 629 (1995).

18. The Oklahoma Taxpayer and Citizen Protection Act of 2007 (H.B. No. 1804) denies illegal immigrants state identification, requires all state and local agencies to verify citizenship status of applicants before authorizing government benefits, mandates that public employers comply with the Status Verification System by July 2008 by entering job applicants into an electronic immigration database to verify legal status, and makes the concealment, transportation, and sheltering of an illegal alien from governmental detection a felony; The Georgia Security and Immigration Compliance Act (S.B. 529), enacted in April 2006, requires public employers to participate in the federal work authorization program by July 2007, increases penalties for human trafficking, and requires government effort to ascertain the nationality of every person charged with a felony crime or drunk driving offense. Other states have enacted legislation which grants government benefits to legal immigrants but prevents illegal immigrants from access to the state's public and healthcare benefits. See H.B. 2248, 47th Leg., 2nd Reg. Sess. (Ariz. 2006); S.B. 918, 2006, Reg. Sess. (Ill. 2006); H.B. 2157, 2006 Reg. Sess. (Kan. 2006); Legis. Doc. 1734, 123rd Leg., 1st Reg. Sess. (Me. 2006); H.B. 89, 2006 Reg. Sess. (Md. 2006); Legis. B. 1248, 99th Leg., 2nd Sess. (Neb. 2006). Additionally, states have enacted statutes that restrict employers from

wanted" sign in the window, illicitly beckoning the unauthorized alien to join the economic community.¹⁹

From the undocumented alien's perspective, there are powerful forces (many times economic) pushing him toward the decision to emigrate and pulling him towards the United States. These aliens make their way to the United States despite the hardship, often including the cost of hiring coyotes to bring them across the border; the risk of death, whether it be from suffocating inside an empty tanker or from dehydration or exposure in the desert; the possibility of apprehension and arrest at the border or any time after entry; language barriers; the possibility of exploitation in the workplace; and an unstable existence as a member of a shadow population.²⁰ As one commentator recently put it: "They have voted with their

hiring illegal immigrants and deny unemployment benefits to immigrants who have entered illegally into the United States. See H.B. 1343, 65th Gen. Assem., 2nd Reg. Sess. (Colo. 2006); H.B. 577, 48th Leg., 2nd Reg. Sess. (Idaho 2006); H.B. 649, 48th Leg., 2nd Reg. Sess. (Idaho 2006); S.B. 108, 81st Leg., Reg. Sess. (Kan. 2006); S.B. 753, 2006, Reg. Sess. (La. 2006); H.B. 1456, 93rd Gen. Assem., 2nd Reg. Sess. (Mo. 2006); S.B. 1401, 15th Leg., 2nd Reg. Sess. (Okla. 2006); S.B. 1634, 15th Leg., 2nd Reg. Sess. (Okla. 2006); H.B. 2319, 2005 Gen. Assem., Reg. Sess. (Pa. 2006); H.B. 111, 104th Gen. Assem., Reg. Sess. (Tenn. 2006); S.B. 6885, 59th Leg., Reg. Sess. (Wash. 2006); cf., San Francisco Mayor Gavin Newsom aims to keep the city a sanctuary for legal and illegal immigrants. "I will not allow any of my department heads or anyone associated with this city to cooperate in any way shape or form with these [ICE] raids." Peter Fimrite, *Newsom Pledges to Make SF a Sanctuary for Illegal Immigrants*, SAN FRANCISCO CHRON., Apr. 22, 2007, available at <http://sfgate.com/cgi-bin/article.cgi?file=/c/a/2007/04/22/BAGADPDGDNF18.DTL&type=printable>; several commentators have written on the varying societal views regarding immigration in America. See KEVIN R. JOHNSON, THE "HUDDLED MASSES" MYTH 1-2 (2004) (demonstrating the clear inconsistencies between the reprehensible treatment of "those categories of immigrants who share common characteristics with groups that are disfavored in this country," and the poem "The New Colossus," which is inscribed on the Statue of Liberty); see also Scaperlanda, *supra* note 10, at 1044:

United States immigration policy has had a long and illustrious past, marked by a continual thrust and parry of competing societal interests. At certain times and to certain peoples, the arms of lady liberty are held wide open. . . . At other times and with other peoples, the door to our borders is slammed shut.

Id.; Hiroshi Motomura, *Whose Alien Nation? Two Models of Constitutional Immigration Law*, 94 MICH. L. REV. 1927 (1996) ("We share a deeply rooted tradition of being a 'nation of immigrants' Despite this tradition of openness, a skeptical, restrictionist view of immigration has equally deep historical roots."); Dennis Cauchon, *States Weigh Immigration Controls: Congress Moving Too Slow for Some*, USA TODAY, Jan. 26, 2006, at A1 (observing that state legislatures, frustrated with Congressional inaction, considered proposals to increase border enforcement at their own expense).

19. "The immigrants that come to America have always played an important role in our history—strengthening our social capital, deepening our national patriotism, and expanding our general economy." Edwin Meese, III & Matthew Spalding, *Where We Stand: Essential Requirements for Immigration Reform*, HERITAGE FOUND. BACKGROUNDER NO. 2034, May 10, 2007, available at <http://www.heritage.org/Research/Immigration/bg2034.cfm>; see Howard F. Chang, *Immigration and the Workplace: Immigration Restrictions as Employment Discrimination*, 78 CHI.-KENT L. REV. 291, 305 (2003) (asserting that native workers of the host country benefit from the impact of immigrants in the labor market because the "loss for workers . . . is offset by an equal gain for those who employ labor, and ultimately for consumers, who obtain goods and services at lower cost").

20. "Smugglers, known as coyotes, have extorted fees ranging into hundreds and even thousands of dollars from those eager to make the crossing. . . . The smugglers arrange for trans-

feet. They have decided that the benefits available here are worth running the risks. . . [t]hat's a rational . . . choice."²¹

At this point, the reader might be wondering how this paper fits within the context of this symposium, "Workplace Restructuring to Accommodate Family Life." As Congress has recognized, most undocumented immigrants are drawn to the United States by employment opportunities. Economic migrants come to the United States because of a labor market imbalance between the United States and other countries. The United States provides much better opportunities despite the very high legal barrier to entry, which most non- or low-skilled workers will not be able to meet, and the myriad informal barriers to assimilation such as language, culture and absence of family support. The issues discussed by the other symposium contributors all apply to undocumented men and women who seek a work/life balance in the United States. The tenuousness of their presence in the United States only exacerbates the struggles encountered by the documented worker.

Fear of deportation hangs heavily over the undocumented worker. Fear of exposure may cause the worker to tolerate abuse and exploitation by an employer, to not seek needed health care, to not seek police protection, and to keep children home from school. Additionally, the threat of a workplace raid, arrest, and separation from family is ever-present. For example, Marta Escoto was "taken into custody [in New Bedford, Massachusetts on] March

port across the border and often abandon their unwary customers without adequate water, clothing or directions. Migrants may wander for days, running out of food and water, before collapsing in the heat or freezing weather or perishing in a desperate swim across the polluted and toxic All-American Canal. In the remote terrain, their bodies may not be discovered for weeks or months." Rosemary Johnston, *Mourning Deaths of Migrants: Deaths Increase in Border Crossings*, THE NAT'L CATH. REP., Apr. 27, 2001. In addition to paying great financial costs to be "smuggled" into the United States, illegal immigrants are faced with grueling working conditions and are often too afraid to become whistleblowers. For instance, Constantino Cruz and four other illegal migrant California-agricultural laborers died in 2005 from heat-stroke. Nevertheless, the illegal laborers continue to be "the unseen and unacknowledged force behind the wealth of California's agriculture." Dan Glaister, *Death in the Sun*, THE GUARDIAN, Aug. 5, 2005, available at <http://www.guardian.co.uk/elsewhere/journalist/story/0,,1543197,00.html>; see also Peter Kwong, FORBIDDEN WORKERS: ILLEGAL CHINESE IMMIGRANTS AND AMERICAN LABOR 106 (The New Press ed., 1997) ("[For] illegal workers . . . not being able to work is like death."). Additionally, several hundreds of potential illegal immigrants die from dehydration and/or exhaustion while crossing the border; see Colin Austin, *The Struggle for Health in Times of Plenty*, in THE HUMAN COST OF FOOD: FARMWORKERS' LIVES, LABOR AND ADVOCACY 202-04 (Charles D. Thompson, Jr. & Melinda F. Wiggins eds., 2002) (documenting the extensive reluctance of agricultural workers to report injuries); see also RAQUEL RUBIO-GOLDSMITH, M. MELISSA MCCORMICK, DANIEL MARTINEZ & INEZ MAGDALENA DUARTE, THE AM. IMMIGRATION L. FOUND., A HUMANITARIAN CRISIS AT THE BORDER: NEW ESTIMATES OF DEATHS AMONG UNAUTHORIZED IMMIGRANTS, (Feb. 2007), available at http://www.aifl.org/ipc/policybrief/policybrief_020607.shtml (providing statistics regarding the recent increase in deaths during border crossings).

21. See Andrew McCarthy, *Close the Immigration Vault with Employer Enforcement*, NAT'L REV. ONLINE, Mar. 5, 2007 (arguing against legalization for undocumented workers), available at <http://article.nationalreview.com/?q=ZGJjZDI0ZGIzNjAzMzZjYzFhYTlxYzZk0ZjU0NjI1NGU=>.

6 after a raid by federal agents on the Michael Bianco Inc. factory.”²² Among the 360 arrested in the raid, many “were women whose detention separated them from their children, some of whom were stranded at daycare centers, schools, or friends’ or relatives’ homes.”²³ According to the Washington Post report, “Escoto, like most of those detained, was flown to a holding center in Texas as deportation proceedings began. A single mother, she was separated from her two young children, who were born in the United States and are U.S. citizens.”²⁴ A breastfeeding baby of another detainee “was hospitalized for dehydration” after refusing to be fed by bottle.²⁵

Twenty-one years and 11 million new undocumented migrants later, we are back to where we were in 1986. This time, however, those who oppose legalization for some or all of the eleven million have the failed efforts of the past two decades as evidence that “amnesty” programs don’t work and in fact only encourage further undocumented immigration.²⁶ Where do we go from here? Given our past history, the presence of several million undocumented immigrants in the United States, the apparent unmet demand for immigrant labor, and the economic imbalances between the United States and the sending countries, what is a just and prudent resolution to the current situation?

III. REFORM PROPOSALS: COMPREHENSIVE REFORM OR INCREASED ENFORCEMENT ONLY

As the immigration issue has taken center stage in American politics, two models of reform have emerged. First, a comprehensive model attempts to address enforcement, the need for foreign workers, and the humanitarian treatment of the undocumented population in the United States in one bill. Last year, the Senate passed the Comprehensive Immigration Reform Act of 2006, which adopted this approach.²⁷ Additionally, the President continues to favor this approach, calling for this three-pronged approach in his 2007 State of the Union Address.²⁸ Second, an enforcement-only or enforcement-first model would enhance border security, enhance the penalties bestowed on employers hiring undocumented workers, and enhance the

22. Robin Shulman, *Immigration Raid Rips Families*, WASH. POST, Mar. 18, 2007, at A06, available at <http://www.washingtonpost.com/wp-dyn/content/article/2007/03/17/AR2007031701113.html>.

23. *Id.*

24. *Id.*

25. *Id.* (“Under public pressure, immigration officials began to send single parents home, or if they had arrested both parents, to release one.”).

26. See, e.g., John Cornyn, *Immigration Reform: Back to the Future*, 115 YALE L.J. POCKET PART 112 (2006), available at <http://www.the-pocketpart.org/2006/05/cornyn.html>.

27. Comprehensive Immigration Reform Act of 2006 (CIRA), S. 2611, 109th Cong. (1st Sess. 2006).

28. George W. Bush, State of the Union Address (Jan. 23, 2007) available at <http://www.whitehouse.gov/news/releases/2007/01/20070123-2.html>.

penalties for unlawful presence in the United States. This approach defers the status of those unlawfully present in the United States to a future date despite recognition by some advocating this approach that “[t]here is an unavoidable human aspect to this. The equities are such that compelling some illegal aliens to leave at this point would be unduly harsh.”²⁹ The Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005, which passed the House in the last congressional session, took this approach.³⁰

As part of the first model, The Immigrant Accountability Act of 2006, embedded within the Senate’s Comprehensive Immigration Reform Act of 2006, would have provided a path to legalization for aliens unlawfully present for two or more years.³¹ Under this bill, those unlawfully present for five or more years and who have worked for at least three of those five years, could apply to adjust their status to that of a permanent resident alien.³² To prevent “line cutting,” they would not be eligible for adjustment to permanent resident status “until the Secretary determines that the priority dates have become current for the class of aliens whose family-based or employment-based petitions for permanent residence were pending on the date of the enactment of the Comprehensive Immigration Reform Act of 2006.”³³ In the interim, such aliens could stay and work without restriction in the United States.³⁴ Spouses and children of such aliens could also adjust their status to one who is legally present in the United States.³⁵ And, none of these adjustments would count against the numerical limits for family-based or employment-based immigration, meaning these aliens are not competing for valuable immigration spots with others seeking to immigrate to the United States.³⁶

Those present for two or more years but who do not meet the other requirements (work or five-year length of stay) would be eligible under the Senate’s bill for “Deferred Mandatory Departure.”³⁷ This status allows the

29. See McCarthy, *supra* note 21 (acknowledging that “many have been here for a decade or more, have strong community ties, and no longer have any meaningful connection to their native lands.” This proponent of the enforcement-first model concludes “[t]here is no good reason to target such people at this point beyond the happenstance that, like everyone else working illegally, they would stand to lose their jobs if and when employer enforcement becomes serious and sustained.”).

30. H.R. 4437, *supra* note 6.

31. Comprehensive Immigration Reform Act of 2006 (CIRA), S. 2611, 109th Cong. § 601 (1st Sess. 2006).

32. *Id.* The description of the bills in this section of the essay is skeletal. In other words, I have not pointed out conditions, exceptions, waivers, and other nuances. For those, I refer the reader to the bills.

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.* § 501(a).

37. Comprehensive Immigration Reform Act of 2006 (CIRA), S. 2611, 109th Cong. § 601 (1st Sess. 2006).

alien to stay in the United States and work legally for a period of up to three years before departing. At any time, aliens granted Deferred Mandatory Departure may apply for immigrant or non-immigrant status, although as with those aliens described in the previous paragraph, they have to go to the "end" of the immigrant line.³⁸ The law imposes various fees and penalties on those seeking either of these two forms of immigration relief.³⁹

The Senate's bill would have created a new non-immigrant category for guest workers.⁴⁰ The bill would protect the United States labor market by requiring potential employers to attempt to recruit United States workers⁴¹ and to attest that hiring the guest worker will not adversely affect wages and working conditions in the United States.⁴² The bill would have required guest workers to be paid the prevailing wage.⁴³ To minimize the possibility of employers abusing guest workers,⁴⁴ the bill included various employee protection measures.⁴⁵ The H-2C guest worker visa would be portable, meaning the non-immigrant employee could change jobs during the three years the alien is authorized to be in the United States.⁴⁶ An H-2C visa holder could not adjust status to another visa during their stay but could seek a one-time three-year extension.⁴⁷

38. *Id.* Without being subject to numerical limitations, the alien granted Deferred Mandatory Departure (DMD) can return to the United States in a non-immigrant category for which she is eligible. The alien can also return to the U.S. as an immigrant or adjust status to that of a permanent resident alien after all immigrant applications for immigrant visas filed before the Act have been adjudicated or after eight years, whichever is earlier.

39. *Id.* There is a DMD application fee of \$1,000 (\$500 spouse/child fee) in addition to a \$750 state impact assistance fee (\$100 spouse/child fee).

40. *Id.* § 402.

41. *Id.* § 404 (requiring an employer to file an H-2C petition with the Department of Labor (DOL) attesting that: (1) specified efforts to recruit and employ U.S. workers have been made; (2) the hiring will not adversely affect wages and working conditions of similarly-employed U.S. workers, nor that the hiring has caused the separation of a U.S. employee of such employer within the 180-day period beginning 90 days before petition filing; (3) the H-2C will be paid wages and be provided with working conditions and benefits (including insurance if not otherwise covered by state workers' compensation law) as are provided to similarly-employed U.S. workers; (4) there is no ongoing strike or labor dispute; (5) notice of the petition has been provided to the employees' bargaining representative or if there is no bargaining unit, conspicuous notice has been posted or electronically disseminated; (6) except where there is a shortage of U.S. workers, there are insufficient qualified workers; (7) the employer is not ineligible to employ H-2Cs; and (8) there is a bona fide employment offer).

42. *Id.* § 404.

43. Comprehensive Immigration Reform Act of 2006 (CIRA), S. 2611, 109th Cong. § 407 (1st Sess. 2006).

44. *Id.* § 404; *see* H.R. REP. NO. 99-682(I), *supra* note 12, at 47 ("The worker is consciously aware that he/she has no protection because of illegal status and will accept 'starvation' wages to be employed in the United States.").

45. *Id.* § 404 (stating that an H-2C employee shall: (1) be covered by federal, state, or local employment laws as applicable to similarly employed U.S. workers; (2) comply with federal, state, and local tax laws; and (3) have whistleblower protections).

46. *Id.*

47. *Id.* § 403.

Both models—comprehensive and enforcement only—attempt to prevent future illegal migration, deploying several strategies aimed at employer, employee, and border security. Titles I through V of the Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005 addressed border security, including technological improvements, increased numbers of border personnel, provided for border security cooperation, stepped up measures to discourage and punish those who smuggle aliens, provided funding for increased detention space, and broadened the category of aliens to be placed in mandatory detention.⁴⁸ Title VI continued a twenty-year trend to expand the group of persons removable as terrorist or criminal aliens.⁴⁹ Title VII addressed the employment question. This bill would require the Secretary of Homeland Security to undertake the massive task of verifying the employment eligibility of every employee in the United States who has not attested United States citizenship.⁵⁰ For new employees, this verification must occur within a three-to-ten-day window after the hiring.⁵¹ Verification of employment eligibility for existing employees would be phased-in over a longer period.⁵² An employer who failed to seek verification or who continued to employ an alien after non-verification would be subject to civil money penalties, which are greatly increased over those imposed as employer sanctions under IRCA.⁵³ As with the IRCA, a person or entity could receive a criminal penalty for engaging “in a pattern or practice” of employing unauthorized aliens.⁵⁴

IV. MY ASSESSMENT

What is a just solution to our current immigration system? Does either model—enforcement only or comprehensive reform—offer a just answer to

48. See generally H.R. 4437, *supra* note 6.

49. *Id.* § 601; see O'Rourke, *supra* note 10, at 199 (addressing expansion of terrorist removal grounds). Under the bill, aliens receiving a third drunk driving conviction would be labeled and deported as aggravated felons. For an examination of the expansion of the grounds for criminal alien deportation, see Michael Scaperlanda, *Immigration Law: A Catholic Christian Perspective on Immigration Justice*, in *RECOVERING SELF-EVIDENT TRUTHS: CATHOLIC PERSPECTIVES ON AMERICAN LAW* 292, 312–16 (Michael Scaperlanda & Teresa Stanton Collett eds., 2007); see generally Brent K. Newcombe, Comment, *Immigration Law and the Criminal Alien: A Comparison of Policies for Arbitrary Deportations of Legal Permanent Residents Convicted of Aggravated Felonies*, 51 OKLA. L. REV. 697 (1998) (provides a brief history of congressional action since 1988).

50. H.R. 4437, *supra* note 6, § 701.

51. *Id.* § 702.

52. *Id.* § 703.

53. *Id.* § 706; see O'Rourke, *supra* note 10, at 199–200:

Increasing civil penalties for failure to use the verification system, section 706 requires that violators pay at least \$5,000 for each unlawfully employed migrant and that repeat violators pay at least \$25,000 for each unlawfully employed migrant. Increasing criminal penalties for employers with an unlawful employment pattern or practice, section 706 increases the maximum fine from \$3,000 to \$50,000 and makes the minimum imprisonment period one year; current law makes the maximum period six months.

54. H.R. 4437, *supra* note 6, § 706.

the unauthorized immigration problem? I'll offer a four point solution rooted in my understanding of Catholic Social Thought: (1) effectively close the back door; (2) open the front door wide enough to allow those compelled by economic or political conditions to migrate while protecting the domestic labor force, especially the most vulnerable segments of that workforce; (3) create some type of path to legalization for much of the current undocumented population; and (4) devote human and capital resources to assisting economic development and political stability in sending countries, easing the pressure on the border.

A. *Catholic Social Thought*

This four-point solution, which rejects the Border Enforcement only model, emanates from my understanding of an abiding truth about the human person. This truth, expressed in our Declaration of Independence and declared in international human rights documents, is that the person has inherent dignity by reason of being a human being.⁵⁵ Philosophically, we can come to this truth, which our forebears called self-evident, because of the human being's unique quality as a rational, and, therefore, an interior and spiritual creature. "Hence Boethius's famous definition of a person as an individual being of a rational nature (*individua substantia rationalis naturae*). This differentiates a person from the whole world of objective entities, this determines the distinctive character of a person."⁵⁶ From a theological perspective, scripture reveals that we—each member of the human race—possess dignity because we are created by God and in His image. In his apostolic exhortation, *Ecclesia in America*, John Paul the Great⁵⁷ said:

[T]he foundation on which all human rights rest is the dignity of the person. God's masterpiece, man, is made in the divine image and likeness. Jesus took on our human nature, except for sin; he advanced and defended the dignity of every human person, without exception; he died that all might be free. The Gospel shows us how Christ insisted on the centrality of the human person in the natural order and in the social and religious orders . . . defending men, women and even children, who in his time and culture occupied an inferior place in society. The human being's dignity as a child of God is the source of human rights and of corresponding

55. For a call to put the concept of human dignity on a concrete foundation, see Mary Ann Glendon, *Foundations of Human Rights: The Unfinished Business*, in RECOVERING SELF-EVIDENT TRUTHS: CATHOLIC PERSPECTIVES ON AMERICAN LAW, *supra* note 49, at 317.

56. KAROL WOJTYLA, LOVE AND RESPONSIBILITY 22 (H. T. Willetts trans., 1981) ("The term 'person' has been coined to signify that a man cannot be wholly contained within the concept 'individual member of the species,' but that there is something more to him, a particular richness and perfection in the manner of his being . . .").

57. Several places throughout his first encyclical, *Deus Caritas Est*, Pope Benedict XVI refers to Pope John Paul II as his "great predecessor." Pope Benedict XVI, *Deus Caritas Est*, (Dec. 25, 2005), available at http://www.vatican.va/holy_father/benedict_xvi/encyclicals/documents/hf_ben-xvi_enc_20051225_deus-caritas-est_en.html.

duties. . . . This dignity is common to all, without exception, since all have been created in the image of God. Jesus' answer to the question "Who is my neighbor?" demands of each individual an attitude of respect for the dignity of others and of real concern for them, even if they are strangers or enemies.⁵⁸

From a Catholic perspective, our creatureliness suggests that all that we are and all that we have is a gift from Another—the Creator.⁵⁹ This understanding of the human person leads, for our purposes, to the development of two key principles in Catholic Social Thought: solidarity and the universal destination of goods. Solidarity suggests that, in some sense, we are our brother's keeper. "*Solidarity is . . . an authentic moral virtue*, not a 'feeling of vague compassion or shallow distress at the misfortunes of so many people, both near and far. On the contrary, it is a *firm and persevering determination* to commit oneself to the *common good*. That is to say to the good of all and of each individual, because we are all really responsible *for all*.'"⁶⁰ Justice, therefore, requires that we recognize the inherent dignity of each and every person, documented or undocumented, whether in the United States or in the remotest village high up in the Andes mountains.⁶¹

Life as gift and the inherent dignity of each person lead the Church to conclude that all goods are for the good of all. "God gave the earth to the whole human race for the sustenance of all its members, without excluding

58. Pope John Paul II, *Ecclesia in America*, No. 57 (Jan. 22, 1999), available at http://www.vatican.va/holy_father/john_paul_ii/apost_exhortations/documents/hf_jp-ii_exh_22011999_ecclesia-in-america_en.html (citations omitted); see also Vatican II, *Gaudium et Spes*, No. 22 (Dec. 7, 1965) available at http://www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat-ii_cons_19651207_gaudium-et-spes_en.html:

The truth is that only in the mystery of the incarnate Word does the mystery of man take on light. For Adam, the first man, was a figure of Him Who was to come, namely Christ the Lord. Christ, the final Adam, by the revelation of the mystery of the Father and His love, fully reveals man to man himself and makes his supreme calling clear.

59. Pontifical Council for Justice and Peace, *Compendium of the Social Doctrine of the Church*, No. 20 (June 29, 2004), available at http://www.vatican.va/roman_curia/pontifical_councils/justpeace/documents/rc_pc_justpeace_doc_20060526_compendio-dott-soc_en.html [hereinafter *Compendium*]

In every religious experience . . . importance attaches to the dimension of *gift and gratuitousness*, which is seen as an underlying element of the experience that the human beings have of their existence together with others in the world, as well as to the repercussions of this dimension on the human conscience, which senses that it is called to manage *responsibly and together with others* the gift received.

Id.

60. *Id.* at No. 164 ("[T]he *common good* indicates 'the sum total of social conditions which allow people, either as groups or as individuals, to reach their fulfilment [sic] more fully and more easily.'").

61. *Cf. id.* at No. 196:

In the light of faith, solidarity seeks to go beyond itself, to take on the *specifically Christian* dimensions of total gratuity, forgiveness and reconciliation. One's neighbour is then not only a human being with his or her own rights and a fundamental equality with everyone else, but becomes the *living image* of God the Father, redeemed by the blood of Jesus Christ and placed under the permanent action of the Holy Spirit.

Id.; see also Michael Scaperlanda, *Who is My Neighbor?: An Essay on Immigrants, Welfare Reform, and the Constitution*, 29 CONN. L. REV. 1587 (1997).

or favoring anyone. This is *the foundation of the universal destination of the earth's goods*.⁶² Therefore, although private property is a good in itself and often necessary for human development and flourishing,⁶³ it cannot be viewed in purely individualistic terms.⁶⁴ "Individual persons may not use their resources without considering the effects that this use will have, rather they must act in a way that benefits not only themselves and their family but also the common good."⁶⁵

Rejecting ideologies that view the human being as an isolated individual who only comes into community grudgingly out of need or necessity, the Catholic Church recognizes that human beings are made for and flourish in community—in communion with others. Philosopher Jacques Maritain says that a person seeks community "first, because of its [the person's] very perfections, as person."⁶⁶ The human person has an "inner urge to the communications of knowledge and love which require relationship with other persons. In its radical generosity, the human person tends to overflow into social communications in response to the law of superabundance inscribed in the depths of our being, life, intelligence, and love."⁶⁷ Our natural state is community, not the mythical state of nature of the philosophers. And, we might identify four basic communities in society: the family, the Church, the civil society, and the state.⁶⁸

62. *Compendium, supra* note 59, at No. 171 ("The human person cannot do without the material goods that correspond to his primary needs and constitute the basic conditions for his existence; these goods are absolutely indispensable if he is to feed himself, grow, communicate, associate with others, and attain the highest purposes to which he is called.").

63. *E.g.*, Pope John Paul II, *Centesimus Annus*, No. 30 (May 1, 1991) (In *Rerum novarum*, Leo XIII strongly affirmed the natural character of the right to private property, using various arguments against the socialism of his time. This right, which is fundamental for the autonomy and development of the person, has always been defended by the Church up to our own day."), available at http://www.vatican.va/edocs/ENG0214/_P6.HTM.

64. *E.g.*, *Compendium, supra* note 59, at No. 178 ("*The universal destination of goods entails obligations on how goods are to be used by their legitimate owners.*").

65. *Id.*

66. Jacques Maritain, *The Person and the Common Good*, in 8 *THE REV. OF POL.* 419, 435 (1946).

67. *Id.* at 436 ("It does so secondly because of its needs or deficiencies, which derive from its material individuality. In this respect, unless it is integrated in a body of social communications, it cannot attain the fullness of its life and accomplishment.").

68. *Cf. Poe v. Ullman*, 367 U.S. 497 (1961). Dissenting, Justice Douglas states,

One of the earmarks of the totalitarian understanding of society is that it seeks to make all subcommunities—family, school, business, press, church—completely subject to control by the State. The State then is not one vital institution among others: a policeman, a referee, and a source of initiative for the common good. Instead, it seeks to be coextensive with family and school, press, business community, and the Church, so that all of these component interest groups are, in principle, reduced to organs and agencies of the State. In a democratic political order, this megatherian concept is expressly rejected as out of accord with the democratic understanding of social good, and with the actual make-up of the human community.

(quoting Calhoun, *Democracy and Natural Law*, 5 *NAT. L. F.* 31, 36 (1960)).

Human dignity is inherent and universal, but it is realized in the particular.⁶⁹ As embodied beings, the person develops within a particular community, in a particular culture, at a particular point in history, and in a particular place.⁷⁰ Human reality necessitates some form of political authority to rule over a given place at a given time. “[N]o society can hold together unless some one be over all, directing all to strive earnestly for the common good.”⁷¹ The Church has long taught that the political authority of a sovereign nation has a right to control immigration.⁷² This right is qualified, however.⁷³ “More powerful economic nations, which have the ability to protect and feed their residents, have a stronger obligation to accommodate migration flows.”⁷⁴ In other words, the common good requires the political community to take care of its own. But, just as the private citizen who has an abundance of material goods must use his wealth and resources for the good of those beyond his family and his land, the political community has an obligation to recognize the universal destination of goods and stand in solidarity with those who possess less of the world’s resources.⁷⁵ Where does this leave us with respect to immigration reform?

69. E.g., Pope John XXIII, *Pacem in Terris* (Apr. 11, 1963), available at http://www.vatican.va/holy_father/john_xxiii/encyclicals/documents/hf_j-xxiii_enc_11041963_pacem_en.html.

70. See, e.g., Michael Scaperlanda, *Immigration and Evil: The Religious Challenge*, 83 U. DET. MERCY L. REV. 835, 838 (2006).

71. *Compendium*, *supra* note 59, at No. 393.

72. “The Church recognizes the right of sovereign nations to control their territories but rejects such control when it is exerted merely for the purpose of acquiring additional wealth.” U.S. Conf. of Catholic Bishops, *Strangers No Longer: Together on the Journey of Hope, A Pastoral Letter Concerning Migration from the Catholic Bishops of Mex. and the U.S.*, ¶ 36 (2003), available at <http://www.usccb.org/mrs/stranger.shtml>.

73. Scholars of the Law of Nations have similarly recognized a *qualified* right to control immigration. For an overview, see Michael Scaperlanda, *Polishing the Tarnished Golden Door*, 1993 WIS. L. REV. 965; James A.R. Nafziger, *The General Admission of Aliens Under International Law*, 77 AM. J. INT’L L. 804 (1983) (challenging the “inherent power” grounds for the exclusionary proposition and demonstrating the lack of an absolute right to border control). From the beginning of the Supreme Court’s immigration jurisprudence, it has misconstrued these authors. See, e.g., *Fong Yue Ting v. United States*, 149 U.S. 698 (1893) (extending the foreign policy rationale to the deportation of Chinese resident aliens); *Chae Chan Ping v. United States*, 130 U.S. 581 (1889) (supporting the right of exclusion as grounded in the law of nations and an inherent power necessary for the self-preservation of the state).

74. U.S. Conf. of Catholic Bishops, *supra* note 72, ¶ 36.

75. The *Compendium* says:

The principle of the universal destination of goods requires that the poor, the marginalized and in all cases those whose living conditions interfere with their proper growth should be the focus of particular concern. To this end, the preferential option for the poor should be reaffirmed in all its force. . . . [This option] applies . . . to our social responsibilities and hence to our manner of living, and to the logical decisions to be made concerning the ownership and use of goods.

Compendium, *supra* note 59, at No. 182.

B. Plan for Change

1. Close the Back Door

Although states have a qualified right to restrict immigration,⁷⁶ persons possess a qualified right to emigrate.

When there are just reasons in favor of it, [a person] must be permitted to emigrate to other countries and take up residence there. The fact that he is a citizen of a particular State does not deprive him of membership in the human family, nor of citizenship in that universal society, the common, world-wide fellowship of men.⁷⁷

The question of “*emigration in search of work . . . is an age-old phenomenon*” and provides one of the justifications for the decision to emigrate.⁷⁸

For several reasons, the e/immigration phenomenon should be handled in an orderly and legal manner. As the United States contemplates immigration reform, it must be committed to eliminating or at least greatly reducing the inflow of undocumented migrants. When Congress debated amnesty in the mid-1980s, Fr. Theodore Hesburgh, then President of the University of Notre Dame and Chair of the Select Commission on Immigration and Refugee Policy, testified before Congress that the Select Commission’s recommendation favoring amnesty was predicated “on one condition: that somehow the sieve that we call a border could be tightened up, that somehow we would bring our illegal immigration under control.”⁷⁹ In other words, the United States must get the problem of illegal immigration under control for at least three reasons.

Politics demand it. The public is not likely to accept the promise of a “one-time only” amnesty program every twenty years.⁸⁰ Congress created

76. See U.S. Conf. of Catholic Bishops, *supra* note 72, at ¶ 26.

77. Pope John XXIII, *supra* note 69, at No. 25; see also Scaperlanda, *supra* note 70, at 843.

78. Pope John Paul II, *Laborem Exercens*, No. 23 (Sept. 14, 1981), available at http://www.vatican.va/edocs/ENG0217/___PO.HTM (“Man has the right to leave his native land for various motives—and also the right to return—in order to seek better conditions of life in another country.”).

79. *Immigration Reform and Control Act of 1985: Hearings Before the S. Subcomm. on Immigration and Refugee Policy of the S. Comm. on the Judiciary*, 99th Cong. 7 (1985) (statement of Rev. Theodore Hesburgh, Chairman of the Select Commission on Immigration and Refugee Policy).

80. See *Case Closed: Illegal Immigration Is a Threat to Homeland Security*; and *Case Closed: Amnesty Would Pose an Even Greater Threat to Homeland Security*, FEDERATION FOR AMERICAN IMMIGRATION REFORM (FAIR), May 8, 2007, available at http://www.fairus.org/site/PageServer?pagename=media_release582007?&printer_friendly=1:

[W]e found out once again that our failure to control illegal immigration and our inability to manage the current caseload of people applying for immigration benefits poses a lethal risk to the nation. . . . An amnesty or a ‘pathway to legalization’ program would add tens of millions more applicants to the queue. If they can’t pick out a terrorist now, how are they going to protect this nation when a flood of new applications hit their desks?

amnesty twenty years ago with the unfulfilled promise that it would control the problem prospectively. Part of the public outcry today, a part that I am not overly sympathetic with, is that illegal migration breeds disrespect for the Rule of Law.⁸¹ Most undocumented non-citizens, however, are “lawless” only in the sense that they are evading a broken federal-immigration system, risking life and what little money they have in order to provide for family. They are lawless in the way that Jean Valjean was lawless in “Les Misérables,” stealing bread to feed his family.⁸² I would hope that as a nation we would model the bishop who responded with mercy and love when Valjean was first released from prison. But there are many who model Inspector Javert, preferring to use their resources and creative energy in pursuit of modern day bread thieves.⁸³ Whatever the merits of the anti-immigrant sentiment, it seems unwise to fan the xenophobic flames further by once again promising and failing to deliver a resolution to the problem of illegal migration.

In addition to the political realities, there are at least two important reasons for solving the illegal alien problem permanently. First, the fragility of the undocumented individual’s place in American society makes her extremely vulnerable to exploitation by an employer (and others) in the community. The unauthorized employee is not in a very good position to report illegally low wages, unsafe working conditions, or unlawful behavior such

Id. (quoting FAIR President Dan Stein); Phyllis Schlafly, *Guest Worker/Amnesty Is Immoral*, PHYLLIS SCHLAFLY REP. (Jan. 2006) available at <http://www.eagleforum.org/psr/2006/jan06/psrjan06.pdf> (arguing that any guest-worker or amnesty program would continue to perpetuate Mexico’s corrupt economic system that only has a few immensely wealthy people while most Mexicans live in abject poverty).

81. For example, the Oklahoma legislature’s intent behind Oklahoma House Bill 1804 is based on the finding

that illegal immigration is causing economic hardship and lawlessness in [Oklahoma] and that illegal immigration is encouraged by public agencies within [Oklahoma] that provide public benefits without verifying immigration status. . . . [And that illegal immigrants are] encouraged to reside in this state through the issuance of identification cards that are issued without verifying immigration status, and that these practices impede and obstruct the enforcement of federal immigration law, undermine the security of our borders, and impermissibly restrict the privileges and immunities of the citizens of Oklahoma.

H.R. 1804, 51st Leg., 1st Sess. (Okla. 2007).

82. *Cf.*, THOMAS AQUINAS, *SUMMA THEOLOGICA*, *Third Part*, q. 40 a. 4 (Fathers of the English Dominican Province trans., Benzinger Bros. 1947), available at <http://www.ccel.org/a/aquinas/summa/TP.html>.

83. This is taken from Michael Scaperlanda, *Confused in the Heartland*, OKLAHOMAN, Apr. 1, 2006; but see Schlafly, *supra* note 80

Guest-worker/amnesty would reward lawbreakers. The guest-workers would be exempted from punishment for breaking our laws in entering our country illegally and then using fraudulent documents, and employers would be exempted from punishment for hiring them. The employers commit a double offense if they pay the illegal workers with cash in order to evade paying payroll taxes and providing benefits to the workers.

Id.

as sexual harassment.⁸⁴ In large measure, the undocumented also constitute a shadow population, living tenuously on the margins of society, which is healthy neither for the aliens nor for society.⁸⁵ Second, the presence of a large undocumented population potentially serves to marginalize further the most vulnerable segments of the authorized workforce. Does the presence of millions of unauthorized workers decrease employment opportunities for the most at-risk segments of the authorized workforce? Does the presence of millions of unauthorized workers adversely affect the wages and working conditions in the United States labor market? These are debated questions. The only way to ensure that the most vulnerable segments of our own labor force are not put at risk by the influx of large numbers of low-skilled laborers is to test the labor market to ensure that there are no authorized workers willing and able to do the job at the prevailing wage and under the prevailing conditions.

To effectively close the border to those who seek to enter illegally in search of work, the federal government must provide a tamper-proof system to verify the employment eligibility of potential hires. Along with a tamper-proof verification system, the federal government must also devote significant resources to enforcement and be able and willing to impose penalties on employers significant enough to dissuade employers from hiring unauthorized workers. If employers can plausibly deny that they knowingly hired unauthorized workers, if the employers can escape detection, or if the penalties are too slight to effectively deter, the system collapses.

The cost of implementing such a system also includes the possibility of discrimination—the possibility that an employer will not take the “risk” of hiring someone who “looks” or “sounds” foreign. Therefore, closing the back door requires a vigilant check on employer discrimination against members of the authorized workforce.⁸⁶ Additionally, a system as massive as a nationwide employment verification system is bound to have at least a nominal failure rate. Provisions should be in place to provide the employer and prospective employee a safe harbor that is large enough to provide protection in case of federal government error.

84. See Beth Lyon, *When More “Security” Equals Less Workplace Safety: Reconsidering U.S. Laws that Disadvantage Unauthorized Workers*, 6 U. PA. J. LAB. & EMP. L. 571, 595–96 (2004) (“Fear is a constant in the employee rights context, because workers who complain fear losing their job . . . [or] deportation if they assert their rights . . . [and] the threat of retaliatory violence if they assert their labor and employment rights.”); Kwong, *supra* note 20 (stating that many unauthorized workers do not have the option to protest the denial of employment rights because they are literally the prisoner of their employers who are repaying their debt, which was obtained in gaining passage to the United States).

85. See, e.g., “Excluding unauthorized workers from workers’ compensation coverage makes all workers more vulnerable to workplace injury and fatalities.” Lyon, *supra* note 84, at 605.

86. See 8 U.S.C. § 1324b(a)(3)(B) (2000); see also U.S. GEN. ACCOUNTING OFFICE, *IMMIGRATION REFORM: EMPLOYER SANCTIONS AND THE QUESTION OF DISCRIMINATION* (1990); Scaperlanda, *supra* note 10.

2. *Opening the Front Door to Guest Workers*

The United States has a need for foreign workers who will provide unskilled and low-skilled labor.⁸⁷ We must open the door wide enough to meet the demand for this type of labor and ease some of the pressure on those desiring to immigrate.⁸⁸

[A]n alternative to undocumented migration, an efficient legal pathway must be established that protects the basic labor rights of foreign-born workers. In order to prevent future abuse of workers, any new temporary worker program must afford Mexican and other foreign workers wage levels and employment benefits that are sufficient to support a family in dignity; must include worker protections and job portability that U.S. workers have; must allow for family unity; must employ labor-market tests to ensure that U.S. workers are protected; and must grant workers the ability to move easily and securely between the United States and their homelands. It must employ strong enforcement mechanisms to protect workers' rights and give workers the option to become lawful permanent residents after a specific amount of time. In addition, the United States and Mexico should conclude a Social Security agreement that allows workers to accrue benefits for work performed during participation in the program.⁸⁹

As the bishops of the United States and Mexico suggest, a labor market test must accompany any guest worker program in order to protect workers already authorized to work in the United States and the guest workers themselves so that they do not fall victim to low wages, poor working conditions, and other forms of abuse.

3. *Legalization*

A just reform must include some form of legalization and path to regular status—permanent residence with the opportunity, after an appropriate waiting period, to secure citizenship. The United States lacks the will and the resources to deport eleven million people.⁹⁰ A border security only

87. See Chang, *supra* note 19.

88. See U.S. Conf. of Catholic Bishops, *supra* note 72, at ¶ 72 (“The U.S. employment-based immigration system should be reformed to feature both *permanent* and, with appropriate protections, *temporary* visa programs for laborers. A system that is transparent and that protects the rights of workers should be formulated.”).

89. *Id.* at ¶ 75.

90. From fiscal years 1892–2004, the total number of aliens expelled from the United States was 3,345,365. See U.S. DEP’T OF HOMELAND SEC., 2004 Y.B. IMMIGR. STAT. tbl. 40, available at <http://www.dhs.gov/ximgtn/statistics/publications/YrBk04En.shtm>. The Center for American Progress’ study, “Deporting the Undocumented: A Cost Assessment,” estimates that the cost to arrest, detain, prosecute, and remove the eleven million illegal immigrants present in the United States would cost \$41 billion per year, amounting to a total cost of \$206–\$230 billion over five years. RAJEEV GOYLE & DAVID A. JAEGER, CTR. FOR AM. PROGRESS, DEPORTING THE UNDOCUMENTED: A COST ASSESSMENT 1 (2005), available at http://www.americanprogress.org/kf/deporting_the_undocumented.pdf.

solution without a legalization component would breed further abuse by employers and others as the undocumented population is driven further into the shadows. Even if the United States could deport eleven million people, such a move would be unjust, especially for those persons who have been in the United States long-term and have established ties to the community.⁹¹ If amnesty—straight-up mercy—is not politically viable, then a process by which these undocumented persons can “earn” a place in our society through an affordable “fine” or fee and a probationary period before receiving permanent residence might provide a just resolution. For the sake of family unity and stability, the legalization program should provide benefits for the spouses and children⁹² of the primary beneficiary.

4. *Foreign Development*

[Emigration] generally constitutes a loss for the country which is left behind. It is the departure of a person who is also a member of a great community united by history, tradition and culture; and that person must begin life in the midst of another society united by a different culture and very often by a different language. In this case, it is the loss of a *subject of work*, whose efforts of mind and body could contribute to the common good of his own country, but these efforts, this contribution, are instead offered to another society which in a sense has less right to them than the person's country of origin.⁹³

91. This point is conceded by some advocates of an enforcement only or enforcement first policy. See McCarthy, *supra* note 21

To be clear, no one should say the status of illegal immigrants should be off the table. There is an unavoidable human aspect to this. The equities are such that compelling some illegal aliens to leave at this point would be unduly harsh—many have been here for a decade or more, have strong community ties, and no longer have any meaningful connection to their native lands. There is no good reason to target such people at this point

Id.

92. For immigration purposes, a “child” is an unmarried son or daughter under twenty-one years of age. 8 U.S.C. § 1101(b)(1) (2006). Including these family members in the legalization process will increase the potential number of beneficiaries in two ways. First, it will allow family members currently residing abroad to enter the country. Second, equity—and the goal of family unity and stability—might lead to Congress erasing the backlog of similarly situated family members of permanent resident aliens who are waiting to enter the United States. See generally H.R. 4437, *supra* note 6, § 501; compare Steven A. Camarota, CTR. FOR IMMIGRATION STUDIES, AMNESTY UNDER HAGEL-MARTINEZ, AN ESTIMATE OF HOW MANY WILL LEGALIZE IF S. 2611 BECOMES LAW (2006) (stating that 7.4 million of the 10.2 million illegals eligible for amnesty under the Hagel-Martinez bill will receive amnesty legitimately, while nearly 2.6 million additional illegals will legalize fraudulently, for a total of 9.9 million. Additionally, an estimated 4.5 million spouses and minor children currently living abroad will join their newly legalized relatives for a total of 14.4 million people who will benefit from the bill's amnesty provisions), available at <http://www.cis.org/articles/2006/back606.pdf>. As of May 2007, the backlog for spouses and children of permanent resident aliens was over five years. See BUREAU OF CONSULAR AFFAIRS, U.S. DEP'T OF STATE, PUBL'N NO. 105, VISA BULL. (May 2007), available at http://travel.state.gov/visa/frvi/bulletin/bulletin_3219.html.

93. Pope John Paul II, *supra* note 78.

Therefore, e/immigration policy ought to start with the root causes—the push factors—behind the decision to emigrate.⁹⁴

In their recent joint pastoral letter, the bishops of the United States and Mexico addressed the core problem.

Only a long-term effort that adjusts economic inequalities between the United States and Mexico will provide Mexican workers with employment opportunities that will allow them to remain at home and to support themselves and their families. . . . The implementation of economic policies in Mexico that create living-wage jobs is vital, especially for Mexican citizens without advanced skills. Targeted development projects in Mexican municipalities and rural areas that traditionally have had the highest rates of emigration are necessary. Projects and resources particularly should be targeted to the Mexican agricultural sector and small businesses.⁹⁵

These same principles apply to the other sending countries as well. The responsibility for developing and implementing policies to lessen income inequality and to provide a living wage should fall primarily to the people of the sending countries, working through their institutions, including the government and the Church.

Given the wealth of the United States and its peoples' self-understanding that all persons are created equal and endowed by their creator with certain unalienable rights,⁹⁶ the United States should take up its obligation to stand in solidarity with the people of these sending countries. In other words, the United States ought to provide assistance in the development process.

V. CONCLUSION

The Senate's comprehensive immigration reform proposals go a long way toward creating a more just immigration policy⁹⁷ by creating new

94. See Scaperlanda, *supra* note 49; Scaperlanda, *supra* note 70, at 844–45.

95. U.S. Conf. of Catholic Bishops, *supra* note 72, ¶¶ 60–61.

96. RECOVERING SELF-EVIDENT TRUTHS: CATHOLIC PERSPECTIVES ON AMERICAN LAW, *supra* note 49, at 1–2.

'I think the authors of that notable instrument intended to include *all*. . . . They did not mean to assert the obvious untruth, that all were then actually enjoying that equality. . . . They meant simply to declare the *right*, so that the *enforcement* of it might follow as fast as circumstances should permit. They meant to set up a standard maxim for free society, which should be familiar to all, and revered by all; constantly looked to, constantly labored for, and even though never perfectly attained, constantly approximated, and thereby constantly spreading and deepening its influence, and augmenting the happiness and value of life to all people of all colors everywhere.'

Id. (quoting Abraham Lincoln, Speech at Springfield, Ill. (June 26, 1857)).

97. Many areas of injustice remain in our immigration policy. See, e.g., Scaperlanda, *supra* note 61 (discussing discrimination against permanent resident aliens in public assistance); Scaperlanda, *supra* note 49 (discussing the expansion of the "aggravated felon" removal category); Bill Ong Hing, *Don't Give Me Your Tired, Your Poor: Conflicted Immigrant Stories and Welfare Reform*, 33 HARV. C.R.-C.L. L. REV. 159 (1998); Kevin R. Johnson, *The Antiterrorism Act, the*

mechanisms to close the back door, opening the front door by creating a new guest worker program with protection for both the domestic laborer and the guest worker, and by creating a process to legalize a large segment of the undocumented population. The Senate's proposal is deficient in that it does not address income inequality, which lies at the root of the illegal migration problem.

Creating a just policy is one thing. Implementing it is quite another. It is here that I am skeptical at a number of levels. Will we have the will and the resources to enforce our immigration laws prospectively? Will the guest worker program safeguard the dignity of the worker or will it, like its predecessor, the Bracero program, produce widespread abuse and exploitation by employers? Will the sending countries have the wisdom, integrity, and resources to improve the living conditions at home? Will the United States and other receiving nations provide adequate and reasonable assistance to the sending countries to aid in the reduction of income inequality? Comprehensive immigration reform is a necessary step, but it is only one part of a much larger equation.

Immigration Reform Act, and Ideological Regulation in the Immigration Laws: Important Lessons for Citizens and Noncitizens, 28 ST. MARY'S L.J. 833 (1997) (tracing the history of political discrimination against immigrants from the early Alien and Sedition Acts to contemporary immigration reform efforts); Paul Meehan, *Combatting Restrictions on Immigrant Access to Public Benefits: A Human Rights Perspective*, 11 GEO. IMMIGR. L.J. 389 (1997) (arguing that international human rights principles are essential to productive and successful immigration reform debates); Kevin R. Johnson, *Fear of an "Alien Nation:" Race, Immigration, and Immigrants*, 7 STAN. L. & POL'Y REV 111 (1996) (arguing that the immigration reform debate centers on both race relations and immigration). These injustices are beyond the scope of this essay.