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Abrazando Mexicanos:' The United States Should Recognize Mexican Workers' Contributions to its Economy by Allowing Them to Work Legally

Karen Fleshman

Abrazando Mexicanos:[1] The United States Should Recognize Mexican Workers' Contributions to its Economy by Allowing Them to Work Legally

> *The property which every man has in his own labor, as it is the original foundation of all other property, so it is the most sacred and invoidable. The patrimony of the poor man lies in the strength and dexterity of his own hands; and to hinder him from employing this strength and dexterity in what manner he thinks proper, without injury to his neighbor, is a plain violation of this most sacred property. It is a manifest encroachment upon the just liberty both of the workman and of those who might be disposed to employ him. As it hinders the one from working at what he thinks proper, so it hinders others from employing whom they think proper.*[2]

The United States and Mexico have become more than neighbors and free trade partners: they have evolved into a common labor market.[3] In many parts of the U.S., employers are unable to find sufficient workers for the most physically demanding and arduous jobs.[4] Meanwhile, Mexican workers are driven away from their own country by low wages: forty percent of workers in Mexico earn less than two dollars a day.[5] These factors have pulled and pushed

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[1] In English, the title means "Embracing Mexicans." The title of a past program establishing temporary work authorization for Mexicans in the United States, the *Bracero* program, meant "arms" in English, discussed *infra* in the text accompanying notes.

[2] ADAM SMITH, WEALTH OF NATIONS 1776 b. 1 Ch. 10 part 2.

[3] *See* Dianne Solis, *Filling a Need: U.S. Employer's Growing Reliance on Mexican Workers Forges Opportunities for Labor Contractors,* THE DALLAS MORNING NEWS, Sept. 22,1999, (stating that the labor market in the two nations is a "de facto, binational labor market."); Ginger Thompson, *Chasing Mexico's Dreams into Squalor,* N.Y. TIMES, Feb. 11, 2001 at A1, A6; Sam Dillon, *Profits Raise Pressures on U.S.-Owned Factories in Mexican Border Zone,* N.Y. TIMES, Feb. 15, 2001 at A16 (The binationalism of the U.S./ Mexican labor market extends into Mexico, where U.S. owned factories called *maquiladoras* employ Mexicans to manufacture goods.).

[4] *See* Anthony de Palma, *A Tyrannical Situation: Farmers Caught in Conflict Over Illegal Migrant Workers*, N.Y. TIMES, Oct. 3, 2000 at C1.

[5] *See* Jeff Faux, *Time for a New Deal With Mexico*, 11 THE AMERICAN PROSPECT 22 (Oct. 23, 2000), *at* http://www.prospect.org.

a large and growing population of Mexican immigrants to work in the U.S., both legally and without authorization.[6] Unlike the past, when Mexican immigrants worked primarily in Southwestern agriculture, today's immigrants live throughout the United States, and work in a wide variety of economic sectors, including hospitality, construction, manufacturing, meat processing, and clothing.[7]

The laws and strategies the United States has developed over the last 16 years to deter undocumented immigration are not effec-

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[6] *See Trabajadores temporales en Estados Unidos: cuantía, tiempo de estancia, ocupación y salarios,* BOLETÍN EDITADO POR EL CONSEJO NACIONAL DE POBLACIÓN, Año 2, nums. 5-6/ enero-abril, 1998/ ISSN 1405-5589, *available at* http://www.conapo.gob.mx/publicacioneslinea/boletines.boletines.html (stating that "the migration of Mexican workers to the United States has, among other determinants, the difference in salaries between the two countries, the dynamism of the demand for employment of Mexican nationals in the neighboring country, independently of its modality or migratory category- as well as the power of attraction exercised by the social networks constructed by immigrants over time. The intensification of the migratory labor flow has resulted in consolidating strong ties in the labor markets of Mexico and the United States, which have increasing importance in the economies of both nations, particularly in the sending and receiving areas, as well as a decisive impact on the incomes of families of Mexican immigrants.") (Translated by the author).

[7] Many newspaper articles from throughout the United States document the increasing importance of Mexican immigrant laborers to many industries. *See* Ricardo Alonso-Zaldivar, *Big Apple Takes On A Flavor of Mexico: As California Was Repelling its Border Neighbors, More Hospitable New York Saw Population Multiply, Despite Rough Going, Community Seems to be Taking Hold*, L.A. TIMES, Feb. 19, 1999, (New York City); *see also* Raju Chebium, *Baltimore INS Stepping Up Enforcement,* ASSOCIATED PRESS, May 5, 1998, (Maryland); *see also* Pat Butler, *Hispanics Add Another Thread to South Carolina's Cultural Fabric: Immigrant Population Outpaces State's General Growth,* THE STATE, April 18, 1998 available at Http://www.thestate.com/mex/ (South Carolina); *see also* Bill Hord, *Vanguard is Slowing Slaughter* OMAHA WORLD-HERALD May 11, 1999 (Nebraska) (For a comprehensive look at how Mexican migration is reshaping the United States, *see* http://www.dallasnews.com/specials/reshaping/, a six-part series of the DALLAS MORNING NEWS. For a description of the national meatpacking industry's dependence on Latino immigrant workers, *see* David Barboza, *Meatpackers' Profits Hinge on Pool of Immigrant Labor* N.Y. TIMES December 21, 2001. In particular, recent events have demonstrated the poultry industry's reliance on undocumented laborers. On December 19, 2001, a federal grand jury in the U.S. District Court for the Eastern District of Tennessee indicted Tyson Foods, Inc. and six of its current and former managers on 36 counts, including smuggling workers from Mexico and providing fraudulent documents to employees. *See* Jeffrey Gettleman, *Town Not Surprised By Tyson Smuggling Charges: In Alabama, the Recruitment of Illegal Immigrants Was An Open Secret, One Official Says* L.A. TIMES, December 21, 2001.).

tive and produce a wide variety of problems.[8] These laws are not deterring undocumented immigrants, evidenced by the growth of their population.[9] Because some sectors of the economy are virtually dependent on Mexican undocumented workers, they continue to move to and find work in the United States in large and growing numbers.[10] However, due to increasing enforcement along the U.S. Mexico border, a priority of the United States since 1994,[11] deaths of would-be migrants are increasing as they seek more isolated and dangerous, and therefore less patrolled, areas to cross.[12] Once here, immigrants toil in poor and often illegal working conditions to which they refuse to draw the authorities' attention for fear of deportation.[13] Recently enacted laws obstruct even those undocumented immigrants who would otherwise qualify for legal immigrant status- those with U.S. citizen and permanent resident immediate family or employer sponsors- from being able to become legal permanent residents.[14] There is tremendous need to order the flow of labor into this country so as to prevent unnecessary deaths and promote participation in U.S. communities, and the need to eliminate workers' fears of deportation so that they can advocate for appropriate working conditions and wages.[15] The current system of implicitly recognizing that employers have undocumented workers while placing insurmountable obstacles against the workers' ever becoming legal must end.[16]

This note discusses why the United States should allow Mexican undocumented workers to adjust their status to legal permanent residents and to work legally. Part I reviews past policies restraining the immigration of foreign laborers; and current policies designed to prevent undocumented low-skilled immigrants from working in the United States.[17] Part II describes the problems

8 *See* discussed *infra* text accompanying notes 20-183. This note defines "undocumented immigrant" as foreign nationals residing in the U.S. without express permission from the U.S. government to do so, including those who entered the country without the proper documents as well as those who remained after their authorizing documents expired.

9 *See infra* notes 125-32 and accompanying text.

10 *Id.*

11 *See infra* notes 97-101 and accompanying text.

12 *See infra* notes 139-41 and accompanying text.

13 *See infra* notes 158-174 and accompanying text.

14 *See infra* notes 112-124 and accompanying text.

15 *See infra* notes 124-183 and accompanying text.

16 *See infra* notes 204-212 and accompanying text.

17 *See infra* notes 20-124 and accompanying text.

created by these policies and discusses why it is not in the interest of the United States to continue to ignore the large and growing undocumented immigrant population.[18] Part III reviews proposals to allow Mexican immigrants to work legally in the United States, and analyzes how such a program should be structured.[19]

I. RESTRAINTS AGAINST LOW-SKILLED WORKERS IMMIGRATION TO THE UNITED STATES

A. Roots of Immigration Restraints for Low-Skilled Workers

The U.S. has historically exerted both tremendous demand for immigrant laborers to work the most physically demanding and lowest-paying jobs *and* ambivalence towards inviting poor newcomers.[20] Although the wide-scale practice of indentured servitude was largely abandoned by 1820, it remained a concern of the U.S. Congress.[21] The Anti-Peonage Act of 1867 made voluntary or involuntary servitude illegal throughout the U.S.[22] The Alien Contract Labor Law of 1885,[23] later incorporated into Sections 3 and 5 of the Immigration and Nationality Act of 1917,[24] prohibited employers from contracting aliens and prepaying their transportation to the U.S., or in any other way encouraging them to migrate to fulfill previously made contracts; voided any such existing contracts; made employers who violated the law punishable by a fine of $1000 per alien involved; and made ship captains who knowingly brought contracted laborers into the U.S. punishable by imprisonment.[25]

In 1943, Congress waived the bar on contracted laborers of the 1917 Immigration and Nationality Act for native-born residents of North, South, and Central America who wanted to work in U.S. agriculture during the War. Section 3 Proviso 9 of the Immigration

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18 *See infra* notes 125-183 and accompanying text.

19 *See infra* notes 184-203 and accompanying text.

20 *See generally*, SELECT COMM'N ON IMMIGRATION AND REFUGEE POLICY (SCIRP), U.S. IMMIGRATION POLICY AND THE NATIONAL INTEREST STAFF REPORT (1981).

21 ROBERT J. STEINFELD, THE INVENTION OF FREE LABOR 11 (1991).

22 Anti-Peonage Act of 1867 (repealed) (current provisions at 18 U.S.C. § 1581).

23 Alien Contract Labor Laws Act of February 26, 1885, ch. 164, 23 Stat. 332 (1885), 8 U.S.C. § 1552.

24 Immigration and Nationality Act of February 5, 1917, ch. 29 § 3, H.R. 10384 Pub. L. No. 301, 39 Stat. 874, 8 U.S.C. § 173 (repealed), now covered by 8 U.S.C. § 1101(a)(3), (10), (38), (b)(3), (d)(7).

25 *Id.*

and Nationality Law of 1917 allowed the Immigration Commissioner, with the Secretary of Labor's approval, to control and regulate the admission and return of contracted workers, or any other inadmissible immigrant, applying for temporary admission.[26]

B. 20th Century Immigration Policy Toward Low-Skilled Laborers: The Bracero Program: 1942-1960

During World War II, agricultural employers in the southwestern U.S., short of workers due to the war, asked U.S. administrative agencies to help them find sufficient labor.[27] The administrative agencies responded with the *Bracero* program, invoking the authority of Section 3 Proviso 9, by admitting Mexican laborers on short-term contracts timed to coincide with harvesting seasons. Under the *Bracero* program, between 1942 and 1964, federal administrative agencies assisted U.S. agricultural employers to hire 5 million Mexican workers.[28] While over time, the *Bracero* program underwent many manifestations, overall its outcome was very consistent. The U.S. and Mexican governments provided U.S. agricultural employers with Mexican laborers who had very little recourse to enforce the protections the law afforded them.[29]

Consequently, employers did not provide adequate working conditions or wage and hour protections. U.S. administrative agencies, including the INS, the U.S. Employment Service, and the Farm Security Administration, were delegated (and, initially without Congressional delegation, allocated to themselves) broad discretion to administer the program.[30] These agencies were beholden to employers' interests, and chose to look the other way when employers violated the terms of the workers contracts.[31]

Thus, while on paper, the *Bracero* program offered workers some protections, those protections were rarely enforced. *Bracero* workers who participated in the program were from rural undevel-

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[26] *Id.*

[27] KITTY CALAVITA, INSIDE THE STATE: THE BRACERO PROGRAM, IMMIGRATION, AND THE INS 19 (1992)

[28] *Id.* at 218.

[29] *See generally, id.*

[30] *See id.* at 20 (For example, Public Law 45, enacted in 1943, granted the Commissioner of the Immigration and Naturalization Service, with approval of the Attorney General, free rein to determine how, when and where *Bracero* workers were to enter, work in, and leave the U.S. by the Act of Apr. 29, 1943, ch. 82, H.J. Res. 96 Pub. L. No. 45 § 5(g).).

[31] *Id.*

oped areas of Mexico and had little education, making them scarcely able to enforce the terms of their contracts.[32] *Bracero* workers were contractually bound to their employers. If they encountered other employment opportunities or better working conditions, they were not allowed to pursue them. If they failed to maintain the condition of their admission by, for example, going to work for another employer, they were subject to apprehension and deportation.[33] At the end of their contract, they were also subject to deportation.[34]

C. H-2A Visas for Temporary Agricultural Workers

The 1952 Immigration and Nationality Act allowed temporary foreign workers to enter the U.S. on H-2A visas if there was a certified labor shortage, a provision that was updated by the Immigration Reform and Control Act of 1986.[35] Many agricultural laborers from the Caribbean have entered the U.S. on H-2A visas to work in Florida or the Northeastern U.S.[36] However, due to the bureaucratic hurdles involved for both employees and employers, relatively few choose to participate in the H-2A program.[37] Although the General Accounting Office estimates there are 600,000 undocumented farm workers in the U.S., during FY 1996, employers applied for only 15,000 H-2A visas for foreign agricultural workers, accounting for less than 1% of the of the U.S. farm workers.[38] In FY 1997, employers asked for 21,000 employees through the program, and H-2A workers made up slightly more than 1% of the agricultural workforce.[39]

The bureaucratic hurdles imposed by the H-2A program are viewed as a major deterrent to participation for both employers and employees.[40] First, employers must try recruiting domestic workers

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32 *Id.*

33 Act of Apr. 29, 1943, ch. 82, H.J. Res. 96 Pub. L. No. 45 § 5 (g).

34 *See* CALAVITA, *supra* note 27 at 22.

35 Immigration and Nationality Act § 101 (15) (H) (ii)(a).

36 *See* ALEC WILKINSON, BIG SUGAR: SEASONS IN THE CANE FIELDS OF FLORIDA (1989).

37 *See infra* notes 40-45 and accompanying text.

38 *See H-2A Agricultural Guestworker Program: Changes Could Improve Services to Employers and Better Protect Workers, Before the Subcomm. on Immigr., Senate Comm. on the Judiciary,* 105th Cong. GAO/HEHS-98-20 (1998) (Testimony of the United States General Accounting Office).

39 *Id.*

40 *Id.*

by placing newspaper advertisements.[41] If the employer is unable to find workers through recruitment, they ask their state employment service to certify that there is a shortage of agricultural laborers in their area.[42] Then the employer must apply to the Department of Labor for a certification that a labor shortage exists and that bringing in the foreign workers will not adversely affect the wages and working conditions of U.S. workers.[43] Although given the vagaries of farm work, such as weather, it is difficult to predict exactly when farm workers will be needed, employers requesting visas are required to apply 60 days before they are needed.[44] The Department of Labor has twenty days to make a decision.[45] The G.A.O. determined that in fiscal year 1996, the Department of Labor did not meet the twenty-day deadline in one third of the cases.[46] Employers also must demonstrate to the Department of Labor that the housing they will provide to the temporary workers meets health and safety requirements.[47] If the Labor Department grants certification, which, during a twenty-one month period from 1996 to 1997, they did in 99% of the cases, the employer then asks the INS for authorization to bring in the workers.[48] Only after the INS grants authorization will the State Department issue non-immigrant visas to the workers, which usually take three weeks to process.[49]

Some employers participating in the H-2A program use it to exert tremendous pressure on their workers. For example, corporations owning sugar cane plantations in South Florida have relied on H-2A workers from Caribbean islands to harvest cane since 1943.[50] A 1989 book described a system whereby plantation-owning corporations and Caribbean politicians who hand out H-2A visas as patronage agree that sixty percent of H-2A visas will go to experienced laborers and forty percent to novices.[51] Once in Flor-

41 Immigration and Nationality Act § 218(a)(1).
42 Immigration and Nationality Act § 218(b)(4), 20 C.F.R. § § 655.102(d), 655.103(d),(f), 655.105.
43 *Id.*
44 *Id.*
45 *Id.*
46 *See H-2A Agricultural Guestworker Program: Changes Could Improve Services to Employers and Better Protect Workers, supra* note 38.
47 *Id.*
48 *Id.*
49 *Id.*
50 *See* WILKINSON, *supra* note 36 at 6.
51 *See* WILKINSON, *supra* note 36 at 50-51.

ida, workers have eight days to demonstrate their cane-cutting ability at the start of the harvest. The plantation supervisors monitor the workers carefully during the trial period. If the supervisor finds the worker inefficient or sloppy during the trial period or the first half of the harvest season, the worker's contract is revoked, and he is fired and deported. He must pay his own fare to return to his island *and* reimburse the corporation for the expense of bringing him to Florida.[52] A 1983 report of the Congressional Subcommittee on Labor Standards, "Job Rights of Domestic Workers: The Florida Sugar Cane Industry" found that the Department of Labor district office in Atlanta whose district encompassed the Florida sugarcane plantations demonstrated "indifference, disdain, and apathy" toward investigating or challenging the labor practices of the industry.[53]

D. Workplace Enforcement

Recent efforts to prevent immigrants from working without authorization focus on making employers check workers' documents and preventing border crossing with military equipment.[54] The workplace enforcement strategy was developed in the Immigration Reform and Control Act of 1986 (IRCA).[55] Later, it was reinforced by the 1994 Attorney General's Strategy to Strengthen Enforcement of the Nation's Immigration Laws[56] and by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA).[57]

In 1986 Congress passed IRCA to achieve the goal of ending undocumented immigration to the U.S. through two means: first, by allowing undocumented immigrants to become legal permanent re-

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[52] *See* WILKINSON, *supra* note 36 at 51.

[53] *See* WILKINSON, *supra* note 36 at 243.

[54] The deportation of immigrants with criminal convictions is the highest enforcement priority but will not be discussed in this note as it does not pertain to immigrants in the workforce.

[55] Immigration Reform and Control Act § 101, 8 U.S.C. §1324 (1986) amending § 274A of the Immigration and Nationality Act.

[56] *See Illegal Immigration Southwest Border Strategy Results Inconclusive; More Evaluation Needed General Accounting Office Report to the Senate Comm. on the Judiciary, and the House Comm. on the Judiciary,* 105th Cong., December 11, 1997, (GAO/GGD-98-21).

[57] Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), Pub. L. No. 104-208, 110 Stat. 309 (enacted as Division C of the Omnibus Appropriations Act of 1996).

sidents of the U.S.,[58] and, second, by thereafter sanctioning employers for hiring undocumented workers.[59] IRCA allowed immigrants who had resided continuously in the U.S. since January 1, 1982, met educational and good moral character requirements, and registered by a certain deadline to become legal temporary and subsequently, permanent residents of the U.S.[60] Undocumented immigrants who worked in agriculture for at least ninety days in each year between 1983 and 1986 were also allowed to become legal permanent residents.[61] Lastly, those who could document continuous residency in the U.S. since prior to January 1, 1972 were allowed to register themselves as legal permanent residents, without facing a time limit in which to do so nor English proficiency requirements.[62]

IRCA's legalizing provisions were popularly known as "amnesty" for undocumented workers. Through the 1986 amnesty, 1.7 million people, including 1.1 million Mexican nationals, became legal immigrants.[63] After amnesty recipients became legal permanent residents and citizens, they applied for visas for their family members, thereby increasing the number of legal immigrants seeking admission to the U.S. from Mexico. For example, in 1995, 12.5% of immigrants legally admitted to the United States were from Mexico; in 1996, the figure rose to 17.9%, and in 1997, it rose to 18.4%.[64]

IRCA's other means for ending undocumented immigration focuses on employers. Because Congress was convinced that employment draws undocumented immigrants to the U.S., they sought to "de-magnetize the magnet" by moving enforcement to the workplace.[65] The authors of the law, Senator Alan Simpson (R-WY) and Representative Romano Mazzoli (D-KY), believed that "legislation containing employer sanctions is the most humane, credible,

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58 Immigration Reform and Control Act § 201, 8 U.S.C. § 1255a (1986).

59 Immigration Reform and Control Act § 101, 8 U.S.C. §1324a (1986).

60 Immigration Reform and Control Act § 201(a), 8 U.S.C. § 1255a (1986).

61 Immigration Reform and Control Act § 302, 8 U.S.C. § 1160 (1986).

62 Immigration Reform and Control Act § 203a, 8 U.S.C. § 1259 (1986).

63 *Immigration Reform and Control Act Report on the Legalized Alien Population* U.S. Department of Justice Immigration and Naturalization Service (1992) at 8.

64 U.S. Immigration and Naturalization Service, *Statistical Yearbook of the Immigration and Naturalization Service, 1997,* U.S. Government Printing Office: Washington, D.C., 1999 at 21.

65 NANCY HUMEL MONTWEILER, THE IMMIGRATION REFORM LAW OF 1986: ANALYSIS, TEXT, AND LEGISLATIVE HISTORY 31 (1987).

and effective way to respond to the large-scale influx of undocumented aliens."[66] However, because they did not want to place onerous burdens[67] on employers, legislators allowed employers exemption from sanctions if they could show a "good faith effort" to comply with the law. This good faith exemption was an implicit recognition that despite the law, many employers would continue to hire undocumented laborers, and that they should not face stiff penalties for doing so, unless they are pattern and practice violators.[68]

IRCA established an employment authorization verification procedure that all employers must follow when hiring new employees.[69] After hiring, employees must fill out an employment authorization verification form, known as an "I-9," attesting under penalty of perjury to their authorization to work legally in the U.S.[70] The employee then chooses documents from a government-issued list to provide their employer to demonstrate their legal work authorization.[71] Some documents, including alien registration cards and U.S. Passports, are sufficient to establish work authorization without supplements because they provide both a photo of their bearer and information about their bearer's employment authorization.[72] Other documents, such as Social Security Card and U.S. Birth Certificates, must be backed up with another document to establish identity.[73] The number of documents qualified to prove work authorization was reduced slightly by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996.[74]

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66 H.R. REP. No. 99-682, pt.1 at 46 (1986).

67 *See* MONTWEILER, *supra* note 65. Senator Simpson was particularly concerned that verification requirements not impinge too much on employers.

68 *Id.*

69 Immigration Reform and Control Act § 101-103, 8 U.S.C. § 1324a (1986).

70 Immigration Reform and Control Act § 101, 274a (a)(1)(B)-(D), 8 U.S.C. 1324a (1986).

71 *Id.*

72 *Id.*

73 Immigration Reform and Control Act § 101, 274a (a)(1)(B)-(D), 8 U.S.C. 1324a (1986).

74 The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, 110 Stat. 3009, (enacted as Division C of the Omnibus Consolidated Appropriations Act of 1996) removed U.S. naturalization and citizenship certificates from the list. However, as of this writing, the INS has not changed the I-9 form to reflect the change in the law.

The employer then must make a good faith effort to verify that the documents are valid.[75] The good faith effort serves as an affirmative defense against sanctions.[76] According to the law, "a person or entity has complied with the requirement of this paragraph with respect to examination of a document if the document reasonably appears on its face to be genuine . . . nothing in this paragraph shall be construed as requiring the person or entity to solicit the production of any other document or as requiring the individual to produce such a document."[77] Furthermore, although all employers are required to verify the work eligibility of all employees, the Congressional Conference Committee that drafted the final law asked the INS to consider the size of the employing entity when enforcing the law and to direct enforcement of the criminal provisions to repeat offenders.[78] The Committee did not want small-scale enterprises to be targeted for enforcement, another implicit recognition that employers would continue to hire undocumented employees.[79] The House Judiciary Committee directed INS officials to respond in a timely manner to requests from individuals to verify the authenticity of documents provided by their employees.[80]

Employees must make an attestation that they are authorized to work on the I-9 Form.[81] Employers must retain this form with a photocopy of the employees' work authorizing documents in the employee's file for three years after the employee is recruited, referred, or hired or one year after the employee's employment is terminated, whichever is later.[82] INS or Department of Labor in-

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75 Immigration Reform and Control Act § 101 § 274 A(b)(1), 8 U.S.C. § 1324a (1986) and *see infra* text accompanying notes 91-94 describing the weakening of employer sanctions under IIRIRA, *supra* note 57.

76 Immigration Reform and Control Act § 101 § 274 A(a)(3), 8 U.S.C. § 1324a(6) (1986).

77 Immigration Reform and Control Act § 101 §274a(b), 8 U.S.C. § 1324a(C)(A) (1986).

78 *See* JOINT EXPLANATORY STATEMENT OF THE COMMITTEE OF CONFERENCE, CONFERENCE REPORT NO. 99-1000 at 86 (1986).

79 *Id.*

80 *See* IMMIGRATION CONTROL AND LEGALIZATION AMENDMENTS ACT OF 1986, HOUSE JUD. COMM. REPT. 99-682 at 61 (1986).

81 Immigration Reform and Control Act § 101 §274a(b), 8 U.S.C. § 1324a(2) (1986).

82 Immigration Reform and Control Act § 101 §274a (b) 2-3, 8 U.S.C. § 1324a(3) (1986).

vestigators may inspect employers' I-9 files to see if they comply with the law.[83]

Under IRCA, employers receive sanctions for employing undocumented workers. Fines range from $250 per immigrant for a first offender to $10,000 per immigrant for third time offenders.[84] Pattern and practice violations are criminal offenses which can result in six month's imprisonment or up to a $3,000 fine.[85] Employers are subject to civil fines of $100-$1,000 for not complying with the record-keeping provisions of the law.[86]

Not surprisingly, after IRCA was enacted, the market for fraudulent employment-authorizing documents flourished. Legislators responded to the widespread use of fraudulent documents subsequent to IRCA by enacting the Immigration Act of 1990, adding § 274C to the Immigration and Nationality Act.[87] Section 274C increased the penalties for the "use, production, or receipt of fraudulent immigration documents." 'Receipt of" means using another's document to establish work eligibility, not the employer's "receipt of" the employee's documents to demonstrate work authorization. The penalties for immigrants caught using fraudulent documents are tough. They are subject to civil penalties and are also excludable[88] and deportable,[89] meaning that otherwise qualified immigrants caught using fraudulent documents cannot become legal permanent residents and all immigrants caught using fraudulent documents are deportable. However, while §274C focused penalties on employees for using fraudulent documents, it did not alter

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83 *Id.*

84 Immigration Reform and Control Act §101a §274(e)(4)(a), 8 U.S.C. § 1324 (3)(A)(4)) (1986).

85 Immigration Reform and Control Act §101a1 §274 (e)(4)(a) I-iii, 8 U.S.C. § 1324a (3)(f)(1) (1986).

86 Immigration Reform and Control Act §101a1 §274 (e)(5), 8 U.S.C. § 1324a (3)(A)(5) (1986).

87 Immigration Act of 1990, Pub. L. No. 101-649, § 274C, Stat. 104, 4978-3087 (1990).

88 Later, the IIRIRA, *supra* note 57 changed the concept of "excludable" to "inadmissible." *See* Enid Trucio-Haynes and Lois Gimpel Saukat, *Grounds of Inadmissibility Under the Illegal Immigration Reform and Immigrant Responsibility Act of 1996: Part One* 98-01 Immigr. Briefings (January 1998) and *Part Two* 98-02 Immigr. Briefings (February 1998).

89 Immigration and Nationality Act § § 212(A)(6)(F), 241 (A)(3) (C), 8 U.S.C. § 1324c (1990).

employers' exemption from sanctions as long as they make good faith efforts to verify their employees' documents are valid.[90]

Continuing the trend of punishing undocumented immigrants harshly but not their employers, the 1996 Illegal Immigration Reform and Immigrant Responsibility Act strengthened the "good faith" exemption to employer sanctions while creating virtually insurmountable obstacles for undocumented immigrants seeking to become legal.[91] IIRIRA considers employers to have complied with their duty to verify their employee's work authorizing documents if they make a good faith attempt, notwithstanding a "technical or procedural failure" to actually verify the documents.[92] Under IIRIRA, INS investigators who encounter violations are to explain them to employers and allow the employers ten days to remedy the situation before sanctioning them. Employers who have a "pattern and practice" of employing undocumented immigrants do not qualify for the good faith exemption.[93]

A memorandum interpreting IIRIRA issued by then INS Acting Associate Commissioner Paul Virtue in 1997, told INS investigators to presume that an employer has in good faith complied with the law unless: 1) the totality of the circumstances shows an intent to avoid a requirement; 2) the employer failed to comply in know-

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[90] Immigration Act § 274C, 8 U.S.C. § 1324c (1990). INS application of § 274C without adequate due process protections was the basis for class action litigation against the INS, *Walters v. Reno*, No. 94-1204C (D. Wash. filed Aug. 17, 1994). Plaintiffs were immigrants who waived or failed to request hearings to contest the INS charges that they had used fraudulent immigration documents in violation of §274C. Plaintiffs alleged that the INS failed to provide adequate notice of the charges against them and of their right to challenge the INS' charges. The Federal District Court for the District of Washington granted a permanent injunction against this INS practice, which was upheld on appeal. A settlement agreement has been reached between the counsel for the plaintiffs, the National Immigration Law Center and the American Civil Liberties Union Immigrants Rights Project, and the Government, and provisionally approved by the Honorable John C. Coughenour of the United States District Court for the District of Washington. Among other provisions, the INS has agreed to stop using the forms they had previously used to advise 274C violators of their rights. They also agreed to vacate all § 274C final orders issued against class members who received the forms challenged in the lawsuit and who waived their right to contest the charges against them. *See* Notice of Hearing Regarding a Proposed Settlement of *Walters v. Reno at* http: www.ins.usdoj.gov.

[91] IIRIRA, *supra* note 57.

[92] Immigration and Nationality Act § 274A(b)(6), 8 U.S.C. § 1324a(b)(6), *as amended* by Illegal Immigration Reform and Immigrant Responsibility Act § 411.

[93] *Id.*

ing reliance on the exculpation provision; 3) when the employer corrected, or attempted to correct, the erroneously prepared I-9, he or she made misrepresentations for which he or she is responsible; 4) the I-9 preparer knew or recklessly disregarded the fact that it contained a false statement or had no basis in law; 5) INS or Department of Labor previously issued a warning about the employer's failure to comply.[94] The memorandum is yet another example of the U.S. government's implicit recognition that the employment of undocumented immigrants is widespread.

E. Border Enforcement

The harshness of these immigration laws did not deter undocumented immigrants from moving to and working in the U.S. However, their presence was increasingly politicized. In 1994, after a long campaign characterized by racial rhetoric, California voters passed Proposition 187,[95] a referendum that made undocumented immigrants ineligible for all public services offered by the State of California, including schools and hospitals. Although parts of Proposition 187 have since been ruled unconstitutional,[96] the campaign to pass the law garnered support for and made politicians aware of

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[94] *See* File No. HQIRT 50/5.12 (Mar. 4, 1997) *reprinted in* 2 Bender's Immigration Bulletin 430 (June 1, 1997).

[95] Proposition 187 was a ballot initiative supported by 59% of the California electorate.

[96] Proposition 187's provisions requiring social workers and teachers to report undocumented public benefits applicants and schoolchildren to the INS were held unconstitutional. Undocumented immigrant children have a Constitutional right to a public education, as established by the Supreme Court in *Plyler v. Doe.*, 457 U.S. 202, (1982). *See* League of United Latin American Citizens (LULAC) v. Davis (and related cases) Nos. 98-55671, 98-55681, 98-55682, 98-687, 98-55692 (9th Cir. July 29, 1999) (final settlement agreement). Then-Governor Pete Wilson appealed these decisions. Current California Governor Gray Davis, who campaigned against Proposition 187 when it was an initiative and was elected governor in 1998 promising to end divisiveness in California politics, chose not to withdraw Wilson's appeal, but to ask the appeals court to mediate a settlement between the State of California and the anti-Proposition 187 groups that originally sued to overturn it, including the League of United Latin American Citizens. *See* George Skelton *Missteps by Both Strain Ties Between Davis, Bustamante* L.A. TIMES, April 29, 1999,; *see California's Proposition 187 Rears its Head: Governor, Supporters at Odds*, INTERPRETER RELEASES, 76 No. 31 1233,1234. For a discussion of Proposition 187's parallels to previous laws designed to deter immigration in California, see Minty Siu Chung, Note, *Proposition 187: A Beginner's Tour Through a Recurring Nightmare,* 1 U.C. Davis Int'l L. & Pol'y 267.

the popularity of scapegoating undocumented immigrants, setting the stage for later enforcement legislation.

In February 1994, Janet Reno, then Attorney General, and Doris Meissner, then INS Commissioner, announced a new immigration enforcement strategic plan. The strategy identified five objectives: fortifying the border, increasing deportation of immigrants with criminal convictions, reforming the political asylum application process, increasing enforcement of immigration laws in the workplace, and encouraging legal immigrants to become naturalized citizens.[97] The strategy called for blocking undocumented immigrants' preferred routes of entry through San Diego, California and El Paso, Texas by intensifying enforcement manpower and technology in these areas.[98] The creators of the strategy believed that undocumented immigrants crossing the border would be diverted to areas with more difficult terrain, where the Attorney General thought INS had a tactical advantage.[99] The goal was to deter immigrants by making the journey to the U.S. much more difficult. Once El Paso and San Diego had been blocked off, the plan called for employing the same strategy in Tucson and South Texas, and finally, for all parts of the southwestern border.[100] After the southwestern border was sealed off, Border Patrol resources would be deployed to the northern border and the Pacific, Atlantic, and Gulf coasts.[101]

Congress, however, apparently did not think the Attorney General's plan was comprehensive enough. In 1996, they enacted the Illegal Immigration Reform and Immigrant Responsibility Act, which dramatically *increased* immigration enforcement.[102] IIRIRA tightened immigration enforcement activity on the borders, requiring the Border Patrol to hire and deploy 1,000 new agents and 300 new support personnel every fiscal year from 1997-2001.[103] The in-

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97 *See Illegal Immigration Southwest Border Strategy Results Inconclusive; More Evaluation Needed, supra* note 56, app. I at 64.

98 *See id.* Historically, 65% of immigrants seized at the southwestern border were apprehended in these two areas. However, it is unclear whether that was a function of greater illegal crossing activity in these areas or of greater Border Patrol deployment.

99 *Id.*

100 *Id.*

101 *Id.*

102 IIRIRA, *supra* note 57.

103 IIRIRA § 101, 8 U.S.C. § 1365a.

crease doubled the number of agents patrolling the borders.[104] New agents were to be deployed "along the border in proportion to the level of illegal crossing of the borders of the United States measured in each sector during the proceeding fiscal year and reasonably anticipated during the next fiscal year."[105] IIRIRA required existing agents be deployed in "areas of high illegal entry to the U.S. in order to provide a uniform and visible deterrent to illegal entry on a continuing basis."[106] IIRIRA mandates and provides funding for fences along the border, and waives provisions of the Endangered Species Act that would affect their construction.[107] IIRIRA authorized the Attorney General to request other Federal agencies to transfer military equipment to the INS for the Border Patrol to use, including aircraft, helicopters, vehicles, night vision goggles and scopes, and motion sensor units by the INS.[108]

IIRIRA expanded the enforcement of immigration law beyond the borders and increased controls on the people allowed to temporarily cross the borders. It authorized the Attorney General to enter into agreements with state and local law enforcement agencies she deems qualified to investigate, apprehend, or detain immigrants under her supervision and direction.[109] Although Congress ultimately rejected this idea, Section 110 of IIRIRA would have required that INS register all non-U.S. citizens crossing the border to keep track of how many legal immigrants of which nationalities depart the U.S. each year and who stays past the time they are allowed by their visa.[110] IIRIRA increased civil penalties for crossing the border illegally.[111]

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104 *See* Juan P. Osuna, *1999 Update on Selected Enforcement Provisions of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996*, 99-01 IMMIGRBRIEF 1 (1999).

105 IIRIRA, *supra* note 103.

106 IIRIRA, *supra* note 103.

107 IIRIRA §102, 8 U.S.C. § 1103(b) (1996).

108 IIRIRA §103, 8 U.S.C. § 1103 (1996).

109 IIRIRA §133, 8 U.S.C. § 1357(g) (1996).

110 IIRIRA §110, 8 U.S.C. §1365a (1996) (In October 1999, Congress passed a law to delay implementation of this section. However, after the September 11, 2001 attack, INS is under intense pressure to develop Congressionally-mandated entry and exit data collection. This was evident in an October 12, 2001 hearing of the House Immigration Subcommittee. *See Subcommittee Holds Hearing on Technology and Border Security,* AILA IMM. LAW TODAY, December 2001 at 590.).

111 IIRIRA §105, 8 U.S.C. §1325(a)(b) (1996).

F. Legal Obstacles Preventing Undocumented Immigrants from Becoming Legal Permanent Residents

In addition to lightening employers' burden and increasing enforcement along the borders, IIRIRA rewrote immigration law, making it much more difficult for low-income undocumented immigrants to legally immigrate to the U.S. and very arduous for undocumented immigrants to become Legal Permanent Residents even with family member sponsorship.[112]

Prior to IIRIRA, would-be immigrants likely to become "public charges"- dependent on public benefits- were not allowed to become legal permanent residents.[113] IIRIRA made family sponsors legally liable for any public benefits received by the immigrants they sponsor.[114] This responsibility extends until the sponsored immigrant becomes a U.S. citizen through naturalization; works at least 10 years (forty qualifying quarters) in the U.S.; leaves the U.S. permanently; or dies.[115] In order for their family members to become legal permanent residents, sponsors must show that their income, including the family member sponsored and all other family members, is over 125% of the poverty level. Sponsors who cannot meet the income requirement can ask others to co-sponsor; however, cosponsors are also legally liable for the sponsored immigrants' use of public benefits.[116] Sponsored immigrants have legally cognizable causes of action against sponsors who fail to maintain them at 125% of the poverty level.[117] Becoming a public charge within five years of arriving in the U.S. is a deportable offense.[118]

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[112] *See infra* notes 113-124 and accompanying text for a description of the obstacles to legal immigration for low income undocumented immigrants imposed by IIRIRA.

[113] Immigration and Nationality Act § 212 (a)(4), 8 U.S.C. § 1182(a)(4).

[114] IIRIRA § 551, 8 U.S.C. 1183A (1997) created a new, legally enforceable affidavit of support. On May 25, 1999, then Vice President Albert Gore announced a clarification that only those immigrants who relied on public cash benefits for income maintenance or who are institutionalized for long-term care can be considered public charges. INS officers should assess the "totality of the alien's circumstances" when making the public charge determination.

[115] Immigration and Nationality Act § 213 A(a)(2), (3), 8 U.S.C. § 1183a(a)(2), (3), 8 C.F.R. § 213a.2.(e).

[116] Immigration and Nationality Act § 213 A, 8 C.F.R. § 213a.2c(2)(iv)(B).

[117] Immigration and Nationality Act § 213A(e), 8 U.S.C. § 1183a(e), 8 C.F.R. § 213a.2(d).

[118] Immigration and Nationality Act § 237(a)(5). To deport an immigrant for becoming a public charge, the INS must first determine whether the immigrant became a public charge within the first five years after admission to the U.S. If so,

Thus, many low income people are unable to meet these requirements, and therefore cannot sponsor their family members.

In addition to the income barriers to family sponsorship, Congress made it extremely difficult for undocumented immigrants living in the U.S. to become legal permanent residents, even if they have eligible family sponsors. In 1997, Congress allowed Section 245(i) of the Immigration and Nationality Act to expire.[119] Under this section, immigrants who entered the U.S. illegally were allowed to become legal permanent residents within the U.S., subject to a thousand dollar fine, if they had a U.S. citizen or legal permanent resident family sponsor or employer sponsor.[120] Immigrants who entered the U.S. illegally, for whom sponsors filed petitions after January 15, 1998, are no longer allowed to finish processing their paperwork within the U.S.[121] Because §245(i) was allowed to expire, the only option for immigrants who entered the U.S. illegally but who have family or employer sponsors is to go to the U.S. Consulates in their countries of origin to process their paperwork.[122] However, IIRIRA contains a harsh punishment for immigrants who

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the immigrant may try to prove that the circumstances which caused her or him to become deportable arose after he or she was admitted to the U.S. Only those who fail to prove to the INS' satisfaction that their dependence on public benefits is due to circumstances that arose after they were admitted are deportable.

[119] Immigration and Nationality Act § 245(i), 8 U.S.C. § 1255(i), *added by,* Pub. L. No. 103-317 § 506(b), 108 Stat. 17824 (1994), *and amended by*, Pub. L. No. 105-19 § 111 (Nov. 26, 1997).

[120] Immigration and Nationality Act § 245(i), 8 U.S.C. § 1255(i) *added by* Pub. L. No. 103-317 § 506(b), 108 Stat. 1724 (1994), and *amended by* the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), Pub. L. No. 104-208 § 376 (a), (b).

[121] This deadline was later revived to April 30, 2001 by the Legal Immigrant Family Equity (LIFE) Act, *enacted* December 21, 2000, *codified at* Title XI of H.R. 5548 enacted by reference in H.R. 4942 (Pub. L. No. 106-553; 114 Stat. 2762), H. Rep. No. 106-1005. (The LIFE Act amendments are codified at Title XV, Division B, of H.R. 5666, enacted by reference in H.R. 4577 (Pub. L. No. 106-554; 114 Stat. 2763), H. Rep. No. 106-1033. *See* President Signs Watered Down Immigration Measure, Advocates Express Disappointment, 78 No. 1 INTERPRETER RELEASES. Although both the House and Senate enacted separate measures to re-establish Section 245(i) with some limitations in the spring and summer of 2001, as of this writing, legislation reestablishing 245(i) has not been enacted. Some within the immigrant advocacy community are hopeful that Congress will re-extend 245(i) in early 2002. *See* Suzanne Gamboa, *House Kills Chance for Immigrants* THE ASSOCIATED PRESS, December 20, 2001, available at http://www.washingtonpost.com/wp-dyn/articles/A8386-2001Dec20.html.).

[122] *Id.*

have been unlawfully present in the U.S. Upon leaving the U.S., they may not return for three years if they have been unlawfully present in the U.S. for six months to a year, or for ten years if they have been unlawfully present for one year or more.[123] Thus, undocumented immigrants who the United States previously allowed to become legal permanent residents-those with U.S. citizen or permanent resident family members or employer sponsors- now face government-enforced separation from their family or employment if they try to become legal permanent residents, a strong deterrent.[124] These laws have created a virtually insurmountable obstacle to undocumented immigrants ever becoming legal.

II. PROBLEMS CREATED BY THESE POLICIES AND WHY THEY SHOULD BE RECONSIDERED

A. The Undocumented Mexican Immigrant Population is Growing

Despite lawmakers repeated attempts to repress them, undocumented Mexican immigrants are not deterred. In 1996, the U.S. Immigration and Naturalization Service (INS) estimated that there were five million undocumented immigrants living in the U.S.[125] The INS estimated that about 275,000 undocumented immigrants moved to the U.S. each year between 1992 and 1996.[126] Data derived from the 2000 Census reveal that the U.S. has a larger undocumented immigrant population than analysts previously thought— possibly eight million or more.[127] Meanwhile, the Na-

123 Immigration and Nationality Act § 212(a)(9)(B), 8 U.S.C. 1182 (1996). *See* State Department Cable (98-State-060539) for detailed information about how the period of unlawful presence is calculated.

124 Immigration and Nationality Act § 212(a)(9)(B), 8 U.S.C. 1182 (1996).

125 U.S. GOVERNMENT PRINTING OFFICE: WASHINGTON D.C., STATISTICAL YEARBOOK OF THE IMMIGRATION AND NATURALIZATION SERVICES, 1997 *at* 200 (1999).

126 *Id.*

127 *See* Aaron Zitner, *Immigrant Tally Doubles in Census*, L.A. TIMES, March 10, 2001 at A1. This estimate of the nation's undocumented immigrant population was developed through different methodologies. Prior to conducting the Census, the Census Bureau estimated there were 275 million people living in the U.S., utilizing birth, death, and official immigration records. The actual count was 281.4 million. When the Census Bureau applied sampling to adjust for people they may have missed, they arrived at 285 million, a dramatic increase from their prior estimate. The Census Bureau believes that they previously underestimated the undocumented immigrant population, and that the real number is 5.5 million. Paul

tional Population Council of Mexico (*Consejo Nacional de Población*) predicts that, based on current patterns, between 400,000 and 500,000 Mexicans will migrate to the United States each year for the next 30 years.[128] The National Population Council of Mexico estimates that of the eight million Mexicans who live in the United States, three million are undocumented.[129]

These estimates are borne out by local statistics. For example, the New York City Planning Department has documented the tremendous growth in the population of Mexican undocumented immigrants living in NYC.[130] The Planning Department's most recent analysis of immigration to New York City, based on INS, Census Bureau, and City records, found that Mexican nationals constituted a marginal amount of the legal immigrants settling in NYC between 1990 and 1996- less than 700 a year. Yet, Mexican mothers, from whom no immigration status information was recorded, gave birth to 29,000 babies during those years, more than 3% of all the babies born in NYC between 1990 and 1996.[131] New York City does not seem to be the only part of the nation impacted by growing Mexican undocumented population. Recent newspaper articles have cited employers from South Carolina, Maryland, Nebraska, Texas, Washington, Arizona and other regions stating that their current labor force for arduous, physically demanding is largely composed of undocumented Mexican immigrants.[132]

Harrington and Andrew M. Sum, demographers at Northeastern University, looked at data the Department of Labor collects monthly on the number of Americans who are working and the number of people employers report they employ. The difference between the two numbers suggest an undocumented immigrant population of 15 million. The Census Bureau's estimate of the undocumented immigrant population can be found in Appendix A of Report 1 at http://www.census.gov/dmd/www/ReportRec2.htm.

128 See Mark Stevenson *Report: Mexican Migration to U.S. Will Continue,* THE ASSOCIATED PRESS December 5, 2001.

129 *Id.*

130 DEP'T OF CITY PLANNING, CITY OF NEW YORK: THE NEWEST NEW YORKERS 1995-6 (1999).

131 *Id.* at 25.

132 *See* Tim Steller, *Immigration's Tough Riddle: With Pressure for Reform Now Mounting, Ideas Range from More Enforcement to Throwing the Border Open, but the Riddle Won't Be Solved Easily*, ARIZ. DAILY STAR, July 30, 2000, at A1. *See* also Ginger Thompson and Steven Greenhouse, *Mexican "Guest Workers": A Project Worth a Try* N.Y. TIMES, April 3, 2001 at A4. *See* also Solis *supra* note 3; de Palma *supra* note 4; Alonso-Zaldivar *supra* note 7; Chebium *supra* note 7; Butler *supra* note 7; Hord *supra* note 7; Barboza *supra* note 7.

B. *Ineffectiveness of Border Enforcement*

The growth of the U.S. undocumented immigrant population is testament to the inadequacy of its immigration enforcement strategy.[133] Despite clear indicators that their efforts are not working, U.S. immigration policymakers have continued trying to deter the flow of these workers by militarizing the U.S.-Mexico border and sanctioning their employers.[134] The U.S. currently spends $1 billion on border enforcement annually.[135] In the past five years, the United States has vastly increased policing of its southern border, without having a real impact in the number of people crossing it surreptitiously.[136] Yet, as the Federal Government itself concedes, neither strategy seems to have a measurable effect on deterring undocumented immigration.[137] Neither does the GAO find evidence that the vastly increased resources the U.S. expends at the borders are having a measurable impact. The GAO's third report on the effectiveness of the Attorney General's 1994 strategic plan and the increased enforcement called for by IIRIRA says that "available information on the interim results of the strategy does not provide answers to the most fundamental questions surrounding INS' enforcement strategy along the southwest border. That is, given the billions of dollars that INS has invested in implementing the strategy, how effective has the strategy been in preventing and deterring aliens from illegally crossing the border?"[138]

The only clear impact augmented border enforcement appears to have had is increased deaths among immigrants.[139] As would-be laborers are pushed to more difficult and dangerous places to cross, reported deaths along the Arizona border have increased from twelve in 1995 to fifty-nine in the first seven months of 2000.[140]

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133 *See infra* notes 54-111 and accompanying text0.

134 *See Steller, supra* note 132.

135 *See id.*

136 *See id.*

137 *See* generally *Illegal Aliens: Fraudulent Documents Undermining the Effectiveness of the Employment Verification System, Before the Subcomm. of Immigr. and Claims, House Comm. on the Judiciary*, 106th Cong., GAO/T-GGD/HEHS-99-175 (1999) (statement of Richard M. Stana, Associate Director, Administration of Justice Issues General Government Division, General Accounting Office).

138 *Evaluation of Southwest Border Strategy* General Accounting Office, GAO-GGD-99-44 (1999) at 3.

139 *See* De Palma, *supra* note 4 .

140 *See Steller, supra* note 134.

More that 300 immigrants died crossing the U.S./Mexico border in 2000.[141]

C. *Ineffectiveness of Workplace Enforcement*

Neither are employer sanctions deterring undocumented immigrants.[142] Employers, who need these workers and want to employ them, are faced with a quandary:[143] hire unauthorized workers pretending their work authorization documents are authentic, and (maybe) face sanctions if caught; or have insufficient employees, and reduce production.[144] Employers avoid the penalties the law imposes by claiming that they did not know the documents were fake, which is sufficient to establish a "good faith effort" they are required to make to escape punishment.[145] Because many documents can prove employment authorization, some employers honestly do not know that their workers' documents are fraudulent.[146] For example, between October 1996 and May 1998, INS exempted 2,100 employers from sanctions because they determined the employers unknowingly hired undocumented immigrants.[147]

Enforcement of immigration law in the workplace is easily thwarted by employers and immigrants alike, although immigrants face much stricter penalties if caught.[148] Employees easily circumvent the requirements of the Immigration Reform and Control Act of 1986 (IRCA) by providing false documents to their employers.[149] According to the General Accounting Office (GAO), "Significant

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141 *See Thompson and Greenhouse, supra* note 132.

142 *See supra* notes 65-94 and accompanying text for a discussion of employer sanctions.

143 *See* De Palma, *supra* note 4.

144 *Id.*

145 *See supra* notes 75-80 and 91-94 and accompanying text (describing good faith exemption to employer sanctions).

146 *See supra* notes 71-74 (describing documents that can be used to establish employment authorization).

147 *See Illegal Aliens: Fraudulent Documents Undermining the Effectiveness of the Employment Verification System, supra* note 137 at 2.

148 *See* notes 87-90 and accompanying text (describing punishment of immigrants caught using fraudulent documents).

149 *See A Giant Sucking Sound: Mexicans Working in the United States*, THE ECONOMIST, June 5, 1993 at 28 (explaining that employer sanctions do not effectively deter undocumented immigration due to the variety of documents that can be used to establish employment authorization, coupled with employers' strong disincentive to scrutinize their employees' documents thoroughly. By claiming that they thought their employees' documents were valid, employers avoid sanctions.). *See also* the Immigration Reform and Control Act of 1986 (Pub. L. No. 99-603).

numbers of unauthorized aliens can still obtain employment authorization because IRCA's employment verification process can easily be thwarted by fraud."[150] Not surprisingly, after employer sanctions were put into practice in 1986, the market for fraudulent immigration documents flourished.[151] In one month in 1998, INS investigators in Los Angeles seized almost 2 million fraudulent work authorization documents.[152] INS detected around 50,000 undocumented immigrants who had produced 78,000 fraudulent documents to their employers between October 1996 and May 1998 nationwide.[153]

D. Current H-2A Program an Ineffective Alternative for Both Undocumented Workers and Employers

Agricultural employers and immigrants who wish to comply with the law are deterred from participating in the current H-2A visa process because it is confusing, redundant, and slow.[154] The relatively few farm workers who participate in the H-2A program do not understand the protections it affords them or how to enforce them.[155] Despite all the hurdles employers must go through to receive workers, Department of Labor officials complain that the way the program is structured makes it difficult for them to ensure abusive employers do not participate.[156] Little monitoring of the actual labor conditions of H-2A workers occurs.[157] Thus, the current opportunity the United States offers to Mexican undocumented work-

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150 *See H-2A Agricultural Guestworker Program: Changes Could Improve Services to Employers and Better Protect Workers, supra* note 38 (stating that "the Immigration and Nationality Act allows employers to rely on documentation that reasonably appears on its face to be genuine. Thus, 600,000 illegal aliens could be working in agriculture without any agricultural employers' violating the law with respect to their responsibilities under Federal law.").

151 *See Illegal Aliens: Fraudulent Documents Undermining the Effectiveness of the Employment Verification System, supra* note 137.

152 *See Illegal Aliens: Fraudulent Documents Undermining the Effectiveness of the Employment Verification System, supra* note 137 at 2.

153 *See Illegal Aliens: Fraudulent Documents Undermining the Effectiveness of the Employment Verification System, supra* note 137 at 2.

154 *See H-2A Agricultural Guestworker Program: Changes Could Improve Services to Employers and Better Protect Workers, supra* note 38.

155 *See H-2A Agricultural Guestworker Program: Changes Could Improve Services to Employers and Better Protect Workers, supra* note 38.

156 *See H-2A Agricultural Guestworker Program: Changes Could Improve Services to Employers and Better Protect Workers, supra* note 38.

157 *See* WILKINSON, *supra* note 36.

ers to work legally is inadequate, and only covers the agricultural sector, anyway.

E. Undocumented Immigrants' Impact on the Workplace

As the authors of IRCA recognized, work attracts undocumented immigrants to the U.S.[158] Although statistically, INS workplace enforcement varies from year to year, the threat of workplace enforcement remains consistently real in the minds of undocumented immigrants.[159] Knowing that their employers could report them to INS deters undocumented immigrants from reporting working conditions and wage and hours practices that violate the law.[160] The system promotes the "worst scenario possible: laborers risking their lives in cross-border journeys, then becoming uninvolved residents and unprotected workers who drive down wages."[161]

The construction industry in Houston, Texas offers one example of the demographic shift of the current labor force. During the 1970s construction boom in Houston, organized labor grew and prospered. Seventy percent of construction workers in the 1970s

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158 *See* MONTWEILER, *supra* note 65. This belief was borne out by the study on immigrants who became legal, permanent residents under the amnesty. *See Immigration Reform and Control Act Report on the Legalized Alien Population*, *supra* note 63, at 14, 30. Economic reasons made 94% of the immigrants who became legal permanent residents under the amnesty move to the U.S. A higher proportion of men who became legal permanent residents under the amnesty reported participating in the labor force than of U.S. men generally: 94 versus 88 percent. *Id.*

159 *See Statistical Yearbook of the Immigration and Naturalization Service, 1997, supra* note 64, at 165 ("Total worksite cases completed dropped annually from 7,403 cases in FY 1991 to 5,283 in 1995, and 5,149 cases in 1996, then rose to a high of 7,537 in 1997. The number of arrests rose significantly from 7,554 in FY 1994 to 17,553 in 1997, an increase of 132 percent.").

160 *See* T. Alexander Aleinikoff, *Illegal Employers*, THE AMERICAN PROSPECT, Vol. 11 No. 25, December 4, 2000, *available at* http://www.prospect.org.

161 *See* de Palma, *supra* note 4 (saying that current immigration law enforcement detrimentally focuses on border enforcement without acknowledging immigrants' contributions to the economy, creating the "worst scenario possible: laborers risking their lives in cross-border journeys, then becoming uninvolved residents and unprotected workers who drive down wages."). *Compare* AFL-CIO EXECUTIVE COUNCIL STATEMENT ON IMMIGRATION (2000) (stating that "current enforcement efforts have failed to stop undocumented people from entering the U.S.; encourage discrimination and the exploitation of undocumented workers; and leave all workers' labor rights vulnerable.").

were union members.[162] But when the oil boom ended in the early 1980s devastating the Texas real estate market, the few contractors who could find work could no longer afford to hire union members, and instead turned to immigrants.[163] Now, undocumented laborers have become the backbone of the Houston construction industry.[164] Union leaders, who were once so incensed by the undocumented laborers that they brought a video of them working on the George R. Brown Convention Center to the Texas Congressional delegation, have realized that they must recruit immigrants if unions are to survive.[165] Richard Shaw, Secretary General of the AFL-CIO says, "If you want to increase you numbers, you have to organize the workers who are out there. I've got to ask myself, at the end of my term, do we turn out the lights, or do we find a new way to build?"[166]

The impact of fearful undocumented workers on the workplace extends to all workers. This has forced the U.S. labor unions, long opposed to liberalizing immigration laws, to do an about face as they confront the challenges of organizing largely immigrant workplaces.[167] They are pushing for the legalization of undocumented workers present in the U.S. The AFL-CIO has recognized that undocumented immigrants have become such a critical part of the U.S. labor force that they have reversed their previous support of employer sanctions and are calling for workplace protections for undocumented immigrants.[168] Kent Wong, director of the U.C.L.A.

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162 *See* Edward Hegstrom, *Once-Fearful Organized Labor Now Sees Immigrants as Future,* HOUSTON CHRON. Aug. 22, 2000 at A1.

163 *Id.*

164 *Id.*

165 *Id.*

166 *Id.*

167 *See id* and *see infra* text accompanying notes 168-174. The ongoing support for legalization for undocumented laborers after the September 11, 2001 attack is demonstrated by the AFL-CIO's December 4, 2001 vote to support amnesty for undocumented laborers. A large majority of almost one thousand delegates from the 66 unions that compose the AFL-CIO voted in favor of the proposal, which said in part "we remain committed to pursuing an agenda that seeks legal status, opportunity for citizenship, protection of workplace rights, deterrence of employer abuse, and opportunities for full civic participation for hard-working immigrant workers and their families." *See* Tom Ramstack, *AFL-CIO Adopts Amnesty Proposal* THE WASH. TIMES December 5, 2001 at C6.

168 *See* AFL-CIO EXECUTIVE COUNCIL STATEMENT ON IMMIGRATION *supra* note 161, and see Ramstack, *supra* note 167 (describing the AFL-CIO's December 4, 2001 vote to support amnesty for undocumented workers).

Center for Labor Research and Education says "there has been a complete, 180 degree shift in the way the AFL-CIO and other unions treat immigrants."[169] The AFL-CIO Executive Council Statement on Immigration calls for permanent legal status for undocumented workers via a new amnesty program; preferring regulated legal immigration over unregulated illegal immigration; protecting immigrant workers' rights for both their own interest and to ensure the labor rights of all American workers; working together with business to satisfy their needs for more employees while safeguarding employees already present; cooperating with business to increase professional development for all workers; and criminally penalizing employers who exploit undocumented workers.[170] The Statement calls for refocusing immigration enforcement on employers, ending temporary worker programs, replacing the I-9 system for enforcement of immigration laws with new enforcement strategies that render employers criminally liable for violating workers' rights and recruiting undocumented workers, educating immigrant and U.S. born workers about the role of immigrants in U.S. society and workers rights, and restoring safety not benefits taken from immigrants by the 1996 Personal Responsibility and Work Opportunity Reconciliation Act.[171]

The AFL-CIO was motivated to change its stance because the current immigration enforcement system increasingly thwarts labor organizers' efforts.[172] For example, after undocumented workers at a Holiday Inn Express in Minneapolis, Minnesota voted to join Local 17 of the Hotel Employees and Restaurant Employees International Union in 1999, their employer called in the Immigration and Naturalization Service to review their work authorization documents, resulting in deportation proceedings for 8 of the workers.[173] While some of those workers have obtained temporary visas that will allow them to testify in the subsequent lawsuit they filed alleging unfair tampering with their right to organize, once the lawsuit is over, they will face deportation to Mexico. Union organizing ef-

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169 *See* Hegstrom, *supra* note 162.

170 *See* AFL-CIO EXECUTIVE COUNCIL STATEMENT ON IMMIGRATION, *supra* note161.

171 *See* AFL-CIO EXECUTIVE COUNCIL STATEMENT ON IMMIGRATION, *supra* note161.

172 *See* AFL-CIO EXECUTIVE COUNCIL STATEMENT ON IMMIGRATION, *supra* note161.

173 *See* Aleinikoff, *supra* note 160.

forts are increasingly thwarted by the lack of protection afforded undocumented workers.[174]

Even employers are concerned. The national organizations of the hospitality, construction, and meatpacking industries are also pushing for laws that reflect the reality that their workforce in these industries is largely composed of undocumented immigrants.[175]

F. Undocumented Immigrants' Contributions to the U.S. Economy

While opponents of increasing immigration claim low-skilled American workers' wages are reduced due to the presence of low-skilled foreign workers, other experts' views contradict those findings.[176] Harvard Professor of Public Policy George Borjas says that "the economic impact of immigration is essentially a distributional impact" that accelerates division between upper and lower classes.[177] On the other hand, Federal Reserve Board Chairman Alan Greenspan testified before the House Banking Committee that the unemployment rate for those with less than a high-school education declined by four percent between 1994 and 1999, twice the rate of decline in overall unemployment.[178] The decline in low-skilled workers' unemployment concurrent with the influx of undocumented laborers shows that even if low-skilled workers compete with immigrants, they are able to find jobs at wages for which they are willing to work.[179] Stephen Moore of the Cato Institute contended in 2000 that "twenty years ago, (nativists) said that (increas-

174 *See* de Palma *supra* note 4 (citing the AFL-CIO's support for amnesty for undocumented workers was founded in labor's difficulty organizing undocumented workers).

175 *See* Aleinikoff, *supra* note 160.

176 *See* De Palma, *supra* note 4.

177 GEORGE J. BORJAS HEAVEN'S DOOR: IMMIGRATION POLICY AND THE AMERICAN ECONOMY 103 (1999).

178 *See The Federal Reserve Board's Semiannual Report on Monetary Policy Before the House Comm. on Banking and Fin. Serv.*, July 22, 1999 (Testimony of Federal Reserve Board Chairman Alan Greenspan) (stating that the unemployment rate for those with less than a high-school education declined by 4% between 1994 and 1999, twice the rate of decline in overall unemployment); *see* John Mickelwaith *"Who Gains? Not Only the Immigrants, but America, Too,"* THE ECONOMIST, March 11, 2000 (interviewing Stephen Moore of the Cato Institute "Twenty years ago, (nativists) said that (increasing immigration) would cause unemployment. We have let in another 15 million people, and we have the lowest unemployment in history.").

179 *See* Mickelwaith, *supra* note 178.

ing immigration) would cause unemployment. We have let in another 15 million people, and we have the lowest unemployment in history."[180]

In sum, the United States' current strategy for deterring undocumented immigration is not working.[181] By enacting the laws discussed in Part I, the United States has cut off every avenue for the undocumented to become legal, even as the size of the undocumented population grows.[182] It is long overdue to recast the way the United States approaches undocumented immigration. Instead of viewing undocumented immigrants as a burden, it is time to recognize what Adam Smith called the most sacred and invoidable property, each man's own labor, by allowing Mexican immigrants to become legal permanent residents and to work legally.[183]

III. HOW SHOULD SUCH A PROGRAM BE DESIGNED?

A. Political Will for Change

For the reasons discussed in Part II, leaders in both Mexico City and Washington D.C. believe the time has come to rethink the U.S. approach to immigration enforcement and consider new proposals. Mexican President Vicente Fox and U.S. President George Bush have warmed relations between the two nations setting the stage for meaningful policy changes that address the needs of the economy and people of both countries.[184] The leaders are moti-

180 *See* Mickelwaith, *supra* note 178.

181 *See supra* notes 125-180 and accompanying text.

182 *See supra* notes 112-124 and accompanying text (concerning the obstacles to legal immigration for undocumented immigrants).

183 A successful program allowing Mexican immigrants to work legally and to become legal permanent residents can serve as a model for extending similar benefits to nationals of other countries. Accepting that undocumented immigrants will continue to find ways to immigrate to the United States no matter what barriers are erected is the first step toward better managing their migration.

184 *See* William Safire, *Fox, Bush, and Helms,* N.Y. TIMES, April 2, 2001, at A15 (describing the warming relations between Mexico and the U.S.). President Bush's first foreign trip as President in February 2001 was to visit Mr. Fox on his ranch. Mr. Fox visited California in March 2001 to draw support for his migration proposals. Both Presidents have nominated top level officials, U.S. Secretary of State Colin Powell and Attorney General John Ashcroft, Mexican Foreign Secretary Jorge Casteñeda, to a binational working group on immigration. Most interestingly, Senator Jesse Helms (R-NC), chair of the Senate Foreign Relations committee and a long time foe of previous Mexican administrations, decided that the Committee should travel to Mexico to meet with the Senate Foreign Relations Committee of Mexico. *Id.*

vated by more than good will towards immigrants. Even after the attack on America of September 11, 2001, the economic conditions in both countries require focus on Mexican undocumented immigration.[185] And politicians, who in 1996 enacted draconian laws to combat undocumented immigration, are now courting the growing numbers of Latino and Asian American voters.[186] According to Senator Sam Brownback (R-KS), "the President's goal is to eliminate to a great extent the black market in labor that currently exists. That can save lives and improve the marketplace by providing legal and orderly mechanisms for U.S. employers to hire available workers."[187] Meanwhile, Vicente Fox, the first Mexican president in seventy-one years who was not a member of the *Partido Revolucianario Institucional,* made campaign pledges that he would pressure the U.S. to recognize the rights of Mexican nationals working in the U.S.[188]

B. Legalization and Employment Authorization Proposals Under Consideration

Mexican President Vicente Fox, elected in July 2000, has circulated his own proposal for employment authorization and legalization of Mexican workers in the U.S. As the former governor of Guanajuato, one of Mexico's biggest immigrant-sending states, Fox is well aware of and deeply committed to improving the situation of Mexican workers in the U.S.[189] While discussions continue between the United States and Mexico about legalizing the status of Mexican workers, an early version of Fox' proposal asked the U.S. to grant Mexicans 250,000 work visas a year.[190] In return, the Mexican government would create incentives for would be-immigrants to stay home, including loans for micro-enterprises and scholarships for children.[191] The Mexican government would also deter future

185 *See* Aleinikoff, *supra* note 160.
186 *See* Aleinikoff, *supra* note 160.
187 Eric Schmitt, *Bush Panel Backs Legalizing Status of Some Migrants,* N.Y. TIMES July 24, 2001 at A14.
188 *See* Jose de Cordoba and Joel Millman, *Mexico Charts Shifts in Relations with the U.S.: Big Increase in Visas is Sought in Return for Border Control,* WALL ST. J. July 7, 2000 at A8.
189 *See* Thomas B. Edsall and Cheryl W. Thompson, *Alliance Forms on Immigrant Policies: Business, Church, Labor Groups Unite on Liberalization,* WASH. POST Aug. 7, 2001 at A1.
190 *See* de Cordoba and Millman, *supra* note 188.
191 *See* de Cordoba and Millman, *supra* note 188.

immigration by taking undocumented immigrants' communal land rights away and making their family members ineligible for social welfare programs.[192]

On July 20, 2001, a cabinet-level working group appointed by President George W. Bush and President Vicente Fox recommended that the United States allow undocumented Mexican immigrants who met certain qualifications to become legal permanent residents of the United States.[193] Although they have not finalized their plan, the working group is considering length of presence in the United States and employment history as criteria for determining who will be allowed to become legal permanent residents.[194] The plan also includes allowing Mexican immigrants to work legally in the United States on a temporary basis in a wide variety of industries, including health care and meat processing.[195] Although the details have not been resolved, the working group is considering labor and wage protections for the Mexican workers.[196]

C. Proposals to Reform Current H-2A Program

Legislators are also considering reforming the current system for allowing temporary agricultural workers into the U.S. Senator Gordon Smith (R-OR) has tried for several years to garner support for changing the H-2A system.[197] S 2337 would establish a registry of temporary agricultural workers to provide for a sufficient supply of such workers and amend the Immigration and Nationality Act to streamline procedures for the admission and extension of stay of non-immigrant agricultural workers, and for other purposes.[198]

These proposals have met with resounding criticism from farm worker advocates and the Mexican government. For example, Raul Yzaguirre, the President of the Latino civil rights organization National Council of La Raza, wrote a letter to Senator Bob Graham, (R-FL) one of the sponsors of S 2337,[199] laying out the objectives of immigrant and farmworker advocates for pro-worker reforms of the

192 *See* de Cordoba and Millman, *supra* note 188.
193 *See Schmitt, supra* note 187.
194 *See Schmitt, supra* note 187.
195 *See Schmitt, supra* note 187.
196 *See Schmitt, supra* note 187, at A14.
197 S. 2337, 105th Cong. (1998).
198 *Id.*
199 Letter from Raul Yzaguirre, President, National Council of La Raza, to Honorable Bob Graham, U.S. Senator, September 27, 1999.

current farmworker system. Mr. Yzaguirre asked legislators to prioritize the following: extend existing labor law protections to farmworkers, enforce protections effectively and improve access to the justice system, allow farmworkers to work for the employer they choose, increase wages and living conditions for farmworkers to encourage productivity and reduce poverty.[200] Mr. Yzaguirre summed up with "Unfortunately, the current proposals, focussed exclusively or primarily on expanded use of the H-2A program or "legalization," do nothing to advance these priorities."[201]

Heeding in part to Mr. Yzaguirre's suggestions, Senator Smith and Representative Howard Berman (D-CA) proposed legislation that would streamline the application process for U.S. agricultural employers to demonstrate that they have a need for foreign workers, allow employers to provide housing vouchers to their employees instead of actual housing, and allow immigrant workers who have been employed in U.S. agriculture for at least 360 days in the past six years to apply for Legal Permanent Residence in the U.S.[202]

D. Considerations for Future Programs

Any future temporary visa program for Mexican workers in the U.S. must not repeat the mistakes of the *Bracero* program. The U.S. government should guarantee Mexican workers the same minimum wage, working conditions, and collective bargaining rights as U.S. workers. Mexican workers should be allowed to work for whomever they choose and their legal presence in the U.S. should not be revoked if they switch employers. The U.S. and Mexican governments should agree to establish a bilateral agency similar to the Equal Employment Opportunity Commission whose mission it is to orient workers about how to exert their rights in the U.S. workplace and to provide access to real enforcement in case their rights are infringed. Most importantly, Mexican immigrants who so desire should be given the option of becoming legal permanent residents of the United States.[203]

Any future employment authorization for Mexican workers in the U.S. must not repeat the mistakes of the current H-2A program.

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200 *Id.*

201 *Id.*

202 *See* Thompson and Greenhouse, *supra* note 132, at A14.

203 The best way to ensure that immigrants can enforce their rights is to allow them to enter the path toward U.S. citizenship.

Instead of multiple agencies overseeing the program, one agency should be given responsibility for administering the whole program, including enforcement of workers rights. Instead of making the application process so burdensome, opaque, and confusing that few participate, the application process should be easy, transparent and well-explained. Emphasis should be placed on ensuring that all participants, employers *and* employees, know what the law requires of them and that it is enforced. Protections for workers on the books have no impact unless they make it into the workplace.

IV. CONCLUSION

Many factors make the enactment of temporary work authorization and adjustment of status for Mexican workers desirable, including the growth of the undocumented immigrant population,[204] the virtual dependence of some sectors of the economy on Mexican undocumented workers,[205] the need to order the flow of labor into this country so as to prevent unnecessary deaths and promote participation in U.S. communities,[206] and the need to eliminate workers' fears of deportation so that they can advocate for appropriate working conditions and wages.[207] The time has come for the United States to recognize what Smith called the "most sacred and invoidable" property.[208] As the U.S. labor movement has recognized, allowing undocumented workers to become legal permanent residents and to work legally in the United States is critical to improving working conditions and wages for all workers.[209] Continuing the current system of implicitly recognizing that employers have undocumented workers while placing insurmountable obstacles against the workers' ever becoming legal is not wise.[210] It promotes lawlessness, including illegal working conditions and violence along the border.[211] However, in changing its policy toward these workers, the United States must be careful to avoid problems of the past by ensuring that the program enacted is not heavily biased in favor

204 *See supra* notes 125-132 and accompanying text.
205 *See supra* note 132 and accompanying text.
206 *See supra* notes 125-183 and accompanying text.
207 *See supra* notes 158-174 and accompanying text.
208 SMITH, *supra* note 2.
209 *See supra* notes 158-174 and accompanying text.
210 *See supra* notes 54-124 and accompanying text.
211 *See supra* notes 125-153 and accompanying text.

of employers.[212] By ensuring that workers are fully aware of and capable of exercising their rights, by *abrazando Mexicanos* instead of treating them merely as *braceros*, the United States can address the needs of its economy, promote prosperity and the formation of stable and safe communities.

Karen Fleshman

[212] *See supra* notes 27-34 and 202-203 and accompanying text.