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# SAFEGUARDING EMPLOYMENT FOR U.S. WORKERS: DO UNDOCUMENTEDS TAKE AWAY JOBS?

BY STEPHEN A. ROSENBAUM\*

## I. INTRODUCTION

### A. *Immigration Reform*

September 1, 1988 marked the one-year anniversary of "employer sanctions" for the hiring of undocumented workers by United States employers.<sup>1</sup> Until passage of the Immigration Reform and Control Act of 1986 (IRCA),<sup>2</sup> regulating the employment of aliens was held to be only a "peripheral concern" of the federal immigration statute.<sup>3</sup>

It is now indisputable that Congress intends to use the immigration laws as a tool to protect American labor.<sup>4</sup> Under IRCA, it is unlawful to knowingly employ an alien who is not "lawfully admitted for permanent residence" or who is "unauthorized to be . . . employed."<sup>5</sup> Although the federal immigration statute now enshrines the principle that denying work opportunities to aliens protects jobs for Americans,<sup>6</sup> this seemingly common sense assumption

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1. Civil fines ranging from \$500 to \$10,000 per violation may be levied for hiring "unauthorized aliens." Immigration and Nationality Act (INA), as amended by the Immigration Reform and Control Act, § 274A(i)(2), 8 U.S.C. § 1324a(i)(2), 8 C.F.R. §§ 274a.9-274a.10. The sanctions went into effect on September 1, 1987.

2. Pub. L. No. 99-603, 100 Stat. 3359 (1986) (codified at 8 U.S.C. §§ 1160 *et seq.*) See § 274A, 8 U.S.C. § 1324a controlling the unlawful employment of aliens.

3. National Center for Immigrants' Rights, Inc. v. INS, 743 F.2d 1365, 1370 (9th Cir. 1984) [*hereinafter* NCIR, Inc. v. INS], citing *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 892 (1984). See *infra* text accompanying notes 20-28 for a description of the INA.

4. The so-called "employer sanctions" are a cornerstone of IRCA. See generally, § 274A. The chief congressional committee report accompanying IRCA notes, e.g., that "[e]mployment is the magnet that attracts aliens here illegally or, in the case of nonimmigrants, leads them to accept employment in violation of their status." H.R. REP. NO. 682, 99th Cong., 2d Sess., at 46, reprinted in 1986 U.S. CODE CONG. & ADMIN. NEWS 5650.

5. INA § 274A, 8 U.S.C. § 1324a. See *infra* text accompanying notes 23-27.

6. The Senate Committee on the Judiciary wrote about employer penalties: "As

obscures the complex relationship between immigrant and domestic labor.

### B. *The No-Work Rule*

For more than five years, the Immigration and Naturalization Service (hereinafter, INS) has been stymied in its efforts to implement a rule prohibiting aliens from working while out on bond pending deportation or exclusion. Like defendants awaiting trial in the criminal justice system, aliens charged with violating U.S. immigration laws are typically allowed to post bond pending a hearing on the merits.<sup>7</sup> The U.S. Attorney General has the authority to prescribe conditions governing an alien's release under bond,<sup>8</sup> a period that could take a year or more. From 1973 to 1983, INS regulations authorized District Directors, with approval from the Regional Commissioner, to bar employment as a condition of release under bond in individual cases.<sup>9</sup>

In November 1983, INS issued amended regulations discontinuing these individualized determinations of work prohibition.<sup>10</sup> The final regulations provide that:

Only those aliens who upon application . . . establish compelling reasons for granting employment authorization may be authorized to accept employment.<sup>11</sup>

No due process hearing is to be held in conjunction with such an application.<sup>12</sup> The application may be made to an INS district director,<sup>13</sup> whose discretion in granting employment authorization is to be guided by four factors, one of which is "safeguarding employment opportunities for United States citizens and lawful permanent resident aliens. . . ."<sup>14</sup>

The regulations were preliminarily enjoined in 1983 by a U.S. district court in a decision affirmed by the Ninth Circuit Court of

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long as greater job opportunities are available to foreign nationals who succeed in physically entering this country, intense illegal immigration pressure on the United States will continue." S. REP. NO. 132, 99th Cong., 1st Sess. 8. Its counterpart in the House stated that these sanctions "will deter aliens from entering illegally or violating their status in search of employment." H.R. REP. NO. 682 *supra* note 4.

7. 8 U.S.C. § 1252 (a).

8. Aliens are deportable from the United States for reasons set out at § 1251(a) or excludable under the terms of § 1182(a). Arrest, detention, and the posting of bond are provided under § 1252(a).

9. 8 C.F.R. § 103.6(a)(2)(ii) (1983).

10. 48 Fed. Reg. 51142-51144 (1983).

11. 8 C.F.R. § 103.6(a)(2)(iii).

12. The no-work condition may be reviewed in the context of a bond re-determination hearing. 8 C.F.R. § 242.2(c). *See also* § 274a.13, a new regulation which elaborates on the application procedure.

13. 8 C.F.R. § 109.1(b)(8) (1986). This section was subsequently renumbered and revised after passage of IRCA. It is now § 274a.12(c)(13).

14. 8 C.F.R. § 103.6(a)(2)(iii)(A) (1984). This factor was deleted from § 274a.12(c)(13), the parallel regulation promulgated in 1987.

Appeals.<sup>15</sup> The same district court ruled two years later on a motion for summary judgment that the regulations exceeded the authority of the Attorney General under the immigration statute. That order was upheld by the Court of Appeals,<sup>16</sup> but vacated by the Supreme Court which remanded the case for further consideration in light of IRCA.<sup>17</sup> In December 1987, the district court held that IRCA does not expand the Attorney General's authority to set bond conditions as provided in the challenged regulations.<sup>18</sup>

As this article demonstrates, the no-work rule is founded on a faulty hypothesis: illegal workers displace legal workers. While this may be the case in very limited circumstances, it by no means explains why United States laborers suffer unemployment, substandard working conditions, and low wages. For that reason alone, the rule makes for poor public policy, and should be permanently enjoined.

### C. *Who Is Affected?*

The aliens potentially affected by these regulations are those who 1) are not authorized to be in the United States and/or 2) are not authorized to accept employment here. Those aliens who meet the first or both of these conditions are commonly known as illegal or undocumented aliens.<sup>19</sup>

The Immigration and Nationality Act of 1952 (INA), as amended,<sup>20</sup> is a comprehensive scheme which covers all aspects of admission of aliens to the United States, whether for business or pleasure, or to obtain permanent resident status.<sup>21</sup> The Act divides aliens into two classes. The first class, nonimmigrant aliens, is established by 8 U.S.C. § 1101 (a) (15) (A) – (M), which creates thir-

15. *NCIR, Inc. v. INS*, 743 F.2d 1365, *supra* note 3, upholding Order of Dec. 16, 1983 (U.S. Dist. Ct., C.D. Calif., No. Civ. 83-7297 KN).

16. *NCIR, Inc. v. INS*, 791 F.2d 1351 (9th Cir. 1986), upholding Order of Mar. 7, 1985 (U.S. Dist. Ct., C.D. Calif., No. Civ. 83-7297 KN)..

17. —U.S.—, 107 S.Ct. 1881 (mem.) (1987). The Ninth Circuit Court of Appeals in turn remanded the case to the district court. *NCIR, Inc. v. INS*, (Order of May 19, 1987, No. Civ. 85-6131).

18. Order of Dec. 31, 1987. (U.S. Dist. Ct., C.D. Calif., No. Civ. 83-7297 KN).

19. The terms illegal and undocumented are often used interchangeably to denote an alien (immigrant or nonimmigrant) whose presence in the United States is in violation of U.S. immigration laws. Such a person may have entered the country clandestinely or may have entered by presenting fraudulent documents, with a valid temporary entry permit, (the terms of which were violated by overstaying the allotted period), and/or by accepting unauthorized employment. Many undocumented persons are actually documentable. See Cornelius, *The Future of Mexican Immigration in California: A New Perspective for Public Policy*, WORKING PAPERS IN U.S.-MEXICAN STUDIES, Center for U.S.-Mexican Studies, University of California, n.1 (1981); and V. BRIGGS, IMMIGRATION POLICY AND THE AMERICAN LABOR FORCE 129-30 (1984) [hereinafter, IMMIGRATION POLICY] for a discussion of the political and academic utility of these terms.

20. 8 U.S.C. §§ 1101 *et seq.*

21. See H.R. Doc. No. 1365, 82d Cong., 2d Sess.

teen categories of aliens who may come to the United States temporarily without being subject to numerical limitations or quotas.<sup>22</sup> The second class, immigrant aliens, includes every alien who does not fall into one of the categories of nonimmigrants.

With exceptions, as noted below, each alien admitted for permanent residence or who later becomes eligible for permanent residence is chargeable against an annual quota.<sup>23</sup>

The vast majority of incoming immigrants are granted visas with no consideration of the impact their employment will have on U.S. workers or the economy. The alien spouse, parent or child of a U.S. citizen who receives a visa to enter the United States falls within this category. These immigrants are not subject to annual quotas<sup>24</sup> and comprise the largest group of incoming immigrants.

Likewise, lawful permanent resident aliens returning from abroad, religious ministers, certain doctors, certain former U.S. government employees and other categories of special immigrants<sup>25</sup> may enter the U.S. as non-quota immigrants without reference to possible employment. Aside from the third and sixth preference categories,<sup>26</sup> all other quota immigrants, who may obtain 80% of quota visas each year, are statutorily permitted to enter the country without any inquiry as to the displacement they might cause U.S. workers.<sup>27</sup>

Until passage of IRCA the INA's only concern with protecting domestic labor was found in the section which denied admission to persons who lacked work authorization.<sup>28</sup> This was not, however, a prohibition on employment of undocumented.

## II. TWO THEORIES OF JOB DISPLACEMENT

Mass migration to the United States is most often explained by the *push-pull* theory, whereby workers are pushed from their coun-

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22. *Elkins v. Moreno*, 435 U.S. 647, 665 (1978). Congress defined nonimmigrant classes to provide for the needs of international diplomacy, tourism, and commerce, each of which requires that aliens be admitted to the United States from time to time on a temporary basis, and all of which would be hampered if every alien entering the United States were subject to the numerical limitations and stricter entry conditions placed on immigrant aliens.

23. 8 U.S.C. § 1151(a). Immigrants exempted from the numerical limitations are immediate relatives of United States citizens, certain defined special immigrants, and aliens who are admitted or granted asylum under 8 U.S.C. § 1157 or 1158. The category of special immigrants includes lawful permanent resident aliens returning from temporary visits abroad, certain former citizens, former U.S. Government employees, and certain medical doctors and religious ministers. 8 U.S.C. § 1101(a)(27).

24. 8 U.S.C. § 1151(a).

25. *See supra* note 22.

26. These preference or quota categories are allotted to skilled professionals and unskilled laborers, respectively. *See* 8 U.S.C. § 1153(a)(3), (6).

27. 8 U.S.C. § 1152(e).

28. 8 U.S.C. § 1152(a)(14).

try of origin by marginal living conditions and pulled to the U.S. by the promise of better jobs and a higher standard of living.<sup>29</sup> Scholars have posited two general theories to describe the effect of these immigrant workers on the domestic work force: the Direct and Indirect Displacement Theories.<sup>30</sup>

A. *Unauthorized Laborers Do Not Directly Displace American Workers*

The most elementary is the so-called direct or one-to-one displacement theory, which took root during the last decade. It says that for every undocumented alien expelled, a job would open up for an unemployed American. In other words, legals and illegals are competing for the same jobs with the same firms. One-to-one displacement analysis follows the classical law of supply and demand: The increasing supply of immigrant laborers cuts the price (wage) of laborers. As overall wages decrease, so does the attractiveness of these jobs for U.S. workers.<sup>31</sup>

Writing about the large-scale, forced repatriation of Mexicans during the 1930's Depression and the 1950's Operation Wetback, Law Professor Gerald López notes that:

Despite scant supporting evidence, the one-to-one displacement theory became part of the national mentality. Dormant in good times, the theory [is] resurrected at times of high unemployment.<sup>32</sup>

A modern supporter of this theory, Ex-INS Commissioner General Leonard F. Chapman, has been accused by some scholars as propagating a "simple-minded assumption. . . that every illegal employed in this country is taking a job that would otherwise be held by a legal resident."<sup>33</sup> Under Chapman's command during the mid-1970's, the INS was accused of "present[ing] hypothetical — really

29. See, e.g., Ravenstein, *The Laws of Migration*, 52 J. ROYAL STATISTICAL SOC'Y 241-301 (1889), and the more contemporary Lee, *A Theory of Migration*, 3 DEMOGRAPHY 47 (1966). For a critique of the push-pull theory, see López, *Undocumented Mexican Migration: In Search of a Just Immigration Law and Policy*, 28 UCLA L. REV. 615 (1981).

30. These two theories represent opposite ends of the spectrum. Somewhere in the middle is the "triage" theory described by Agricultural Economist Philip Martin. See Martin, *Illegal Immigration and the Colonization of the American Labor Market* 13-14 (1986) (unpublished paper for Center for Immigration Studies).

31. Flores, *The Impact of Undocumented Migration on the United States Labor Market*, 5 HOUSTON J. INT'L L. 287 (1983) (citing congressional testimony of Labor Economist Vernon Briggs, Jr.). See also, Briggs, *Labor Market Aspects of Mexican Immigration to the United States in the 1970's*, in VIEWS ACROSS THE BORDER 204-05 (Ross, ed. 1978).

32. López, *supra* note 29, at 633.

33. P. ERLICH, L. BILDERBACK & A. ERLICH, *THE GOLDEN DOOR: INTERNATIONAL MIGRATION, MEXICO AND THE UNITED STATES* 192 (1979) [hereinafter P. ERLICH].

*invented*—figures [on the number of unauthorized aliens] as fact.”<sup>34</sup>

Since the recent wave of immigration began, scholars and policy makers have spent much time analyzing the displacement concept. The staff of the Select Commission on Immigration and Refugee Policy, whose voluminous report set the stage for the recent national debate on immigration law reform, noted two competing hypotheses on whether undocumented immigrants displace U.S. workers: (1) That such workers take jobs away from young unskilled U.S. workers; and (2) that such workers take jobs that U.S. workers don't want. Their report concludes that “[t]here is no strong evidence to support either hypothesis. . .”<sup>35</sup> One problem with almost all analyses is the lack of data—or reliable data—on the total number<sup>36</sup> of undocumented aliens<sup>37</sup> and where they work.<sup>38</sup> The fact remains that the displacement, or dislocation, of U.S. workers is unproven. As Anthropologist and U.S.-Mexico Specialist Leo R. Chávez stated:

There is not one study I know of, and we have done an exhaustive search, that can state emphatically that this type of dislocation occurs a great deal.<sup>39</sup>

One measure of displacement is the number of jobs actually filled by domestics after the removal of undocumented aliens. In its 1986 survey of the existing literature, the U.S. General Accounting Office was unable to make any inferences about this form of dis-

34. *Id.* at 178.

35. *Background Paper: The Economic Impacts of Illegal Migrants*, SELECT COMMISSION ON IMMIGRATION AND REFUGEE POLICY 1 (1980) (unpublished report edited by staff) [hereinafter, *Economic Impacts*].

36. Jeffery S. Passel of the U.S. Bureau of the Census has suggested that there were 2,057,000 undocumented aliens living in the U.S. in 1980, half of whom were living in California. Passel, *Immigration to the United States* 12 (1985) (unpublished paper); see also, Passel and Woodrow, *Geographic Distribution of Undocumented Immigrants: Estimates of Undocumented Aliens Counted in the 1980 Census by State*, 18 INT'L MIGRATION REV. 642 (1984). The President's Council of Economic Advisors has noted that estimates of the undocumented population range from 2 to 15 million, but relied in its analysis on the Bureau of the Census' estimate of 4 to 6 million for 1985. Report of the President's Council of Economic Advisors 219 (1986).

37. In general, the research on the question of worker displacement compares legal with illegal labor. The former includes citizens, lawful permanent resident aliens and other immigrants legally residing in the United States. In this article they are referred to as citizens and legal residents or domestic or U.S. labor. The latter term, illegal, is reserved for that group of aliens described *supra* note 19. Occasionally, the displacement literature compares domestic with immigrant labor. See, e.g., K. McCarthy and R. Burciaga Valdez, *Current and Future Effects of Mexican Immigration in California* (Executive Summary) (Rand Publication No. R-3365/1-CR 1985). Although this nomenclature obscures the distinction just stated, studies using these terms may be the best available for comparing legal and illegal work forces.

38. Briggs, *Methods of Analysis of Illegal Immigration into the United States*, 18 INT'L MIGRATION REV. 623, 634 (1984).

39. Hearing for Preliminary Injunction, Reporter's Transcript at 82 (1983), *NCIR, Inc. v. INS*, (No. Civ. 83-7927 KN) [hereinafter Hearing].

placement, owing to the lack of data.<sup>40</sup>

### B. *Displacement, If Any, Is Limited To Certain Markets*

The theory of indirect displacement states that U.S. Workers are being driven out of certain jobs or industries because of the influx of undocumented immigrant laborers. It is not at the aggregate or macro level of the economy, but at the selective or labor market level, that their impact may be keenly felt.<sup>41</sup> Economists have identified three labor markets in this analysis: the substandard, secondary, and primary.<sup>42</sup>

The substandard market is one where unlawful wages and working conditions persist despite legislation to the contrary. This market is dominated almost exclusively by undocumented workers as they are the most easily exploitable. It is unlikely that jobs in this sector would otherwise be held by domestic workers.<sup>43</sup>

At the other extreme is the primary market with high-paying jobs, substantial fringe benefits and desirable working conditions. Undocumented workers employed in this market, such as manufacturing and construction laborers, may displace domestic workers who are readily available.<sup>44</sup> Undocumented workers may be preferred in this market because they are less likely to unionize, to complain about safety violations, or to file complaints based on sex or national origin discrimination.<sup>45</sup> In addition, undocumented laborers have lower rates of absenteeism than citizens and lawful residents.<sup>46</sup> Although the number of undocumented workers in this sector is very small, they have not

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40. U.S. General Accounting Office, *Illegal Aliens: Limited Research Suggests Illegal Aliens May Displace Native Workers*, 9 GAO/PEMD-86-9 BR (1986) [hereinafter GAO 1986]. Two years later, the GAO issued its findings on the related question of whether undocumented workers depress wages and worsen working conditions for U.S. workers. The answer was a very qualified yes: In some cases these workers "exert downward pressure on wages and working conditions within low-wage, low-skilled jobs in certain labor markets," but illegal status is only *one* factor which may depress wages and conditions. U.S. General Accounting Office, *Illegal Aliens: Influence of Illegal Workers on Wages and Working Conditions of Legal Workers*, 1-2 GAO/PEMD-88-13 BR (1988) [hereinafter GAO 1988]. The report stressed the incomplete and uneven data contained in the underlying studies and the need for longitudinal wage data. *Id.* at 1, 16, 22.

41. See, e.g., M. PIRE, *BIRDS OF PASSAGE: MIGRANT LABOR AND INDUSTRIAL SOCIETIES* (1979), and North and Houstoun, *The Characteristics and Role of Illegal Aliens in the U.S. Labor Market: An Exploratory Study* (1976) reprinted in SELECT COMMISSION ON IMMIGRATION AND REFUGEE POLICY, U.S. IMMIGRATION POLICY AND THE NATIONAL INTEREST, [hereinafter, SELECT COMMISSION] App. E.: Papers on Illegal Migration to the United States (1981). Professor López refers to this as the sophisticated version of displacement. López, *supra* note 29 at 634.

42. See BRIGGS, IMMIGRATION POLICY, *supra* note 19, at 160-65.

43. *Id.* at 161.

44. *Id.* at 165.

45. *Id.*

46. Martin, *supra* note 30, at 22. See D. HUDDLE, A. CORWIN & G. MACDONALD, *ILLEGAL IMMIGRATION: JOB DISPLACEMENT AND SOCIAL COSTS*, American Immigration Control Foundation, 16 (1985) [hereinafter, D. HUDDLE], for additional



escaped the attention of the INS. It is precisely because there is little debate about the effects of job displacement that the INS has concentrated its enforcement activities here.<sup>47</sup>

Labor Economist Richard Mines observes that the INS erroneously "target[s] high wage job sites on the assumption that, if they get rid of highly paid undocumented workers, then domestics can take their places." This practice, he reasons, ignores the process by which employers use undocumented workers or recent immigrants to degrade their labor markets.<sup>48</sup> Rather than deter the employment of unauthorized workers, these periodic raids may actually increase reliance on an undocumented work force; it allows employers to weed out those who are not afraid of asserting their work place rights and to selectively re-hire the apprehended aliens once they return after deportation or voluntary departure.<sup>49</sup>

It is in the secondary market where most undocumented workers may be employed.<sup>50</sup> This is where wages are low, albeit in compliance with minimum wage laws, and working conditions and benefits are marginal. These are jobs which are physically demanding and may require work at night or on weekends. Farm workers, restaurant employees, maintenance workers and other manual laborers compose the secondary work force. Typically, citizens and lawful resident workers do not last long in these occupations. A hotel, light manufacturer, or landscaper may have to hire up to 30 U.S. employees a year just to keep ten job slots filled.<sup>51</sup>

Some scholars have theorized that there is no way to reduce the demand for illegal laborers in this market to attract a legal work force, short of raising the minimum wage, or rigorously enforcing labor standards and encouraging the unionization of the dominant industries.<sup>52</sup> Others suggest that even these changes might not be enough because they fail to account for the push factors in illegal immigration: undocumented workers will continue to cross the border and compete for these jobs as long as the economic, social and political

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employer preferences, such as undocumented workers work harder and cost employers less in wages and benefits.

47. BRIGGS, IMMIGRATION POLICY, *supra* note 19, at 165.

48. Mines, Employers' Use of Low-Wage Immigrants in California: A Dilemma for Liberals 24 (1985) (unpublished paper). Degradation may take the form of depressed wages or poorer working conditions. See *infra* text accompanying notes 66-67; see also V. BRIGGS, IMMIGRATION POLICY, *supra* note 19, at 165; *infra* text accompanying note 59.

49. P. Martin, *supra*, note 30, at 22.

50. V. BRIGGS, IMMIGRATION POLICY, *supra* note 19, at 162 (citing P. DOERING AND M. PIORE, INTERNAL LABOR MARKETS AND MANPOWER ANALYSIS (1971)).

51. P. Martin, *supra* note 30, at 14.

52. See e.g., Mines, *supra* note 48, at 27-28; Cornelius, *Mexican Migration to the United States: The Limits of Government Intervention*, WORKING PAPERS IN U.S.-MEXICAN STUDIES 10 (1981) [hereinafter, *Limits of Government Intervention*].

conditions in their native countries remain bleak.<sup>53</sup> Push factors notwithstanding, the immigrant network recruitment practices, discussed below, may also continue to make the secondary market the domain of recent immigrants.

### III. U.S. BORN MINORITIES AND UNDOCUMENTEDS DO NOT COMPETE FOR THE SAME JOBS.

#### A. *There is No Correlation Between Minority Unemployment and Employment of Undocumented.*

Some proponents of the displacement theory claim that job loss is experienced most profoundly by U.S. minority workers, a close substitute for undocumented in terms of skills, age, formal education, and prior experience.<sup>54</sup> However, there is no proven correlation between minority unemployment and the employment of undocumented aliens.

In congressional testimony, the United States Chamber of Commerce has claimed that in cities where the unemployment rate was low, there was actually a high concentration of undocumented workers and vice-versa. Cities having a black unemployment rate of 10.7%, according to the Chamber, had large concentrations of undocumented, whereas cities with a higher black unemployment rate had even smaller numbers of undocumented workers.<sup>55</sup> The General Accounting Office has attempted to compare overall unemployment levels with immigration rates. Their only data base was composed of studies of legal immigrants. Their review of the literature suggested a possible interaction between general labor market conditions and the effect of immigration on job displacement, i.e. when employment opportunities are relatively few, increased immigration increases unemployment while the opposite occurs in periods with many employment opportunities. Nonetheless, G.A.O. concluded that the "analysis [of previous studies] does not *prove* such a relationship."<sup>56</sup>

An Urban Institute study of California's recent immigrants asserts that the influx of immigrants in that state did not discourage

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53. V. BRIGGS, IMMIGRATION POLICY, *supra* note 19, at 163.

54. *See, e.g.*, V. BRIGGS, IMMIGRATION POLICY, *supra*, note 19, at 249; North & Houston, *supra* note 41, at 229, 231; D. HUDDLE, *supra* note 46, at 11.

55. Immigration Reform and Control Act of 1982: Hearings on S. 997 Before the Subcomm. on Immigration and Refugee Policy, 97th Cong., 1st Sess. (1981) (statement of Robert Thompson).

56. U.S. G.A.O. (1986), *supra* note 40, at 14-16 (discussing study by Simon and Moore, The Effect of Immigration Upon Unemployment: An Across-City Estimation (1984) (unpublished paper)). The second GAO report examined wage data in communities that differed on the presence of immigrant workers, both documented and undocumented, but was unable to conclude that a wage difference associated with these workers' presence reflects a downward pressure on U.S. employees' wages. U.S. GAO (1988), *supra* note 40, at 24, 26-27.

people from seeking employment. Despite mass immigration into Southern California, unemployment rates in the 1970's rose *less rapidly* there than in the rest of the nation. This trend was found to be consistent with prior immigration waves.<sup>57</sup>

With regard to minority unemployment, the Urban Institute reports that there was no statistical relationship, nationally, between the size of the Hispanic population (legal and undocumented) and black unemployment figures. In fact, in the southwest metropolitan areas, a negative relationship was said to exist between the black unemployment rate and the size of the Mexican immigrant population. Black teenage unemployment, typically high in urban areas, was substantially lower in Southern California—with its estimated 1.3 million immigrants—than in the nation at large.<sup>58</sup>

In a study of Southern California, the Center for U.S.-Mexican Studies challenges the assumption that employers prefer undocumented or legal immigrants to U.S. minorities because the former are willing to accept lower wages, poorer conditions and more discipline. The Center's employer survey indicates that domestic minority workers rarely apply for the lowest-paid, manual entry positions or only stay at such jobs a short time.<sup>59</sup>

The staff of the Select Commission on Immigration and Refugee Policy bemoaned the fact that there was not "much insight into the causes of [U.S.] minority unemployment" and that there were [n]o satisfactory explanations for the rise in black youth unemployment. . . ."<sup>60</sup> Studies that have been done conclude that a number of factors, *other* than immigrant or undocumented labor, contribute to minority unemployment. These factors range from poor schooling, inadequate training and racial discrimination, to change in the organization and production methods of industry.<sup>61</sup>

#### B. *Industries Become Immigrant Dominated Through Exclusionary Practices.*

Another phenomenon explains why U.S. minorities and immigrants do not necessarily compete for the same jobs. Certain firms and industries historically have been immigrant dominated.<sup>62</sup> Eth-

57. T. MULLER, *THE FOURTH WAVE: CALIFORNIA'S NEWEST IMMIGRANTS* 101 (1984). See also M. VILLAPANDO, *A STUDY OF THE SOCIOECONOMIC IMPACT OF ILLEGAL ALIENS ON THE COUNTY OF SAN DIEGO*, 62 (1977).

58. T. MULLER, *supra* note 57, at 96-97.

59. W. CORNELIUS, L. CHAVEZ, & J. CASTRO, *MEXICAN IMMIGRANTS AND SOUTHERN CALIFORNIA: A SUMMARY OF CURRENT KNOWLEDGE*, 38 (1982) [hereinafter W. CORNELIUS, *MEXICAN IMMIGRANTS*].

60. *Economic Impacts*, *supra* note 35, at 1.

61. See Flores, *supra* note 31, at 302; see also W. CORNELIUS, *MEXICAN IMMIGRANTS*, *supra* note 59, at 39-41.

62. See, e.g., S. Maram, *Hispanic Workers in the Garment and Restaurant Industries in Los Angeles County*, *WORKING PAPERS IN U.S.-MEXICAN STUDIES*, 7, 66

nic or national kinship networks are often responsible for channeling new immigrants into certain job categories where the same ethnic group or nationality already predominates. This referral process, whereby vacancies are filled by relatives or friends of current employees, tends to offset the argument that U.S. born workers and immigrants compete for the same jobs.<sup>63</sup>

Sometimes these "ethnic enclave" firms have been started by second-generation entrepreneurs who continue to "hire their own" in the lower-echelon positions.<sup>64</sup> Sometimes the networks are encouraged through "lead people" or recruiters who are oriented to particular immigrant employee pools. Economist Mines, who has looked closely at Hispanic network practices, reports that at many firms these "entrenched...networks have made life uncomfortable for newcomers of other ethnic groups."<sup>65</sup>

The process is not totally benign. Often, the result is to weaken unionized industries which slowly degrade labor markets to the point domestic workers will not seek jobs in them. One tactic is for unionized firms to tap into recent immigrant networks and form new firms to underbid the offer of their own sister firms. This so-called "double-breasting" tactic is complemented by INS raids at job sites with high pay scales, unions, and mainly legal crews. The disruption in work and harassment of employees coupled with underbidding from non-union competitor firms does not free up any new jobs for domestic workers. In fact, it leads to further job opportunities for undocumented immigrants in the poorer sister firms. A second tactic is to move from master contracts negotiated between several firms and one union to individual collective bargaining agreements between each firm and the union. A third tactic is to increase employee turnover by taking advantage of the more than adequate supply of immigrant labor.<sup>66</sup>

Once a firm has established a reputation for excluding domestic workers, these workers tend to stay away because the firm's exclusionary practices and lower wages and work standards cannot compete with the relatively greater number of job options available to them.<sup>67</sup> However, it is questionable whether the elimination of

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(1980). See also Mines, California's Farm Workers: Survey Results of the Univ. of California-Employment Development Dept. Survey of 1983, 67-68 (1985) (unpublished paper).

63. W. CORNELIUS, *supra* note 59, at 36-37. See also, Martin, *supra* note 30, at 15-18, discussing ethnic recruitment networks.

64. Cornelius, The Role of Mexican Labor in the U.S. Economy: Two Generations of Research 8-9 (1984) (unpublished paper) [hereinafter Cornelius, Two Generations].

65. Mines, *supra* note 48, at 13.

66. *Id.* at 22-25. See also Cornelius, Two Generations, *supra* note 64, at 11.

67. Cornelius, Two Generations, *supra* note 64, at 13-14. See also D. HUDDLE, *supra* note 46, at 12.

these sources of employment for undocumented workers will lead to more jobs for U.S. workers.

#### IV. REMOVAL OF UNDOCUMENTED LABOR COULD MEAN JOBS GOING TO MACHINES AND OVERSEAS WORKERS

There is an assumption by displacement adherents that if employers did not have an available supply of undocumented aliens, wages would simply be bid up and work conditions improved to a level acceptable enough to attract domestic workers.<sup>68</sup>

##### A. *Mechanization, Relocation Or Closure Could Result From Departure of Undocumented Workers.*

In fact, the removal of undocumented laborers does not necessarily translate into more jobs for U.S. employees. Their removal might mean mechanization, automation or going out of business.<sup>69</sup> Relocation outside the country is another option.<sup>70</sup>

Some firms employ undocumented workers because it is the only way they can keep an edge on foreign or other domestic competition. Reducing costs and increasing productivity is their key to survival.<sup>71</sup> Economist Martin has noted that the availability of cheap immigrant labor preserves many establishments and jobs which might otherwise vanish in the face of competition from more efficiently-run rivals.<sup>72</sup>

The Urban Institute made the same observation in studying one local economy. The study concluded that had there been no immigration from Mexico during the 1970's, the next decade would have seen a reduction of 36,000 jobs in Los Angeles in such industries as furniture, apparel, textiles and leather.<sup>73</sup> "Smaller, less-efficient establishments and illegal alien workers tend to go together."<sup>74</sup>

The internationalization of labor markets cannot be ignored as wage scales in the U.S. become increasingly sensitized to wage

68. See, e.g., V. BRIGGS, *IMMIGRATION POLICY*, *supra* note 19, at 163-65; Wachter, *The Labor Market and Illegal Immigration: The Outlook for the 1980's*, 33 *INDUS. LAB. REL. REV.* 350 (1980).

69. Bracamonte, *The National Labor Relations Act and Undocumented Workers: The DeAlienation of American Labor*, 21 *SAN DIEGO L. REV.* 38 (1983).

70. Piore, "The Illegal Aliens" Debate Misses the Boat, *Working Papers for a New Society* (1978), cited in SELECT COMMISSION, *supra* note 41, at 512 (1981). See also, P. ERLICH, *supra* note 33, at 195. A case in point is the rapidly growing twin-plant or *maquiladora* program: Raw goods from the U.S. are shipped to Mexico where they are manufactured in low wage plants owned by the "who's who of corporate America" and exported back to the U.S. under reduced tariffs. *N.Y. Times*, Dec. 29, 1986 at 1, col.2.

71. Cornelius, *Two Generations*, *supra* note 64, at 11.

72. Martin, *The Future of International Labor Migration*, reprinted in SELECT COMMISSION, *supra* note 41, App. B: Papers on International Migration 327 (1981).

73. T. MULLER, *supra* note 57, at 148.

74. Martin, *supra* note 72, at 327.

scales elsewhere in the world.<sup>75</sup> In short, the goods might still be produced, but the jobs might go to machines or workers in other countries—rather than Americans.

#### B. *Employment of Undocumented Aliens May Even Create Jobs*

In some instances, the employment of undocumented workers may actually lead to job creation. Ironically, writes Professor José Bracamonte, the removal of undocumented foreign workers may mean loss of employment for native workers.<sup>76</sup>

A Wall Street Journal editorial of the last decade commented on the positive impact of undocumented laborers in New York: “. . . the illegal may well be providing the margin for survival for entire sections of the economy. . . .”<sup>77</sup> A more recent Rand Corporation report made similar findings about immigration in California. Mexican immigrants “may actually have stimulated manufacturing employment by keeping wages competitive.”<sup>78</sup>

Immigrants create jobs in several ways. The unskilled, who count most of the undocumented among them, provide opportunities higher on the job ladder for native-born, English-speaking workers to improve their work status. Immigrants also create additional jobs by spending dollars on goods and services in a particular area.<sup>79</sup> The ethnic entrepreneurs may do particularly well owing to the employment of cheap undocumented workers and the ethnic-specific consumer demand which generates these businesses.<sup>80</sup>

### V. THE NO-WORK RULE SHOULD BE WITHDRAWN FOR OTHER REASONS

#### A. *Bonded-Out Aliens Applying for Work Authorization Are Few in Number.*

The denial of work permits warrants re-examination, if for no other reason than the small number of persons potentially affected by the contested regulations. Only an estimated 41,712 aliens in the entire country were released on bond or own recognizance pending deportation hearings during fiscal year 1986.<sup>81</sup> The number of

75. Cornelius, *Limits of Government Intervention*, *supra* note 52, at 7.

76. Bracamonte, *supra* note 69, at 38.

77. Wall St. J., June 21, 1977, at 8, col. 1.

78. See McCarthy and Burciaga Valdez, *supra* note 37 at 20. See also comments of former Secretary of Labor Ray Marshall in *Immigration: An International Perspective*, 18 INT'L MIGRATION REV. 593, 597 (1984); and, T. MULLER, *supra* note 57, at 149.

79. See T. MULLER, *supra* note 57, at 102, 149.

80. Cárdenas, *The Impact of Immigration in the Ethnic Enterprise* (1983) (unpublished paper), cited in Flores, *supra* note 31, at 9.

81. Letter from INS Director of Congressional and Public Affairs to Representative Howard Berman (Sept. 30, 1987). The estimate is based on “G-23 figures” for 1985 and 1986.

bonded-out aliens represents a small percentage of job-holders or job-seekers when compared to an estimated national work force of almost 112.5 million.<sup>82</sup> These individuals tend to be stable and active members of their communities, a number of whom have American citizen children.<sup>83</sup> These family ties make many such persons documentable. Applicants for employment authorization, therefore, are a small group, whether compared to other aliens or to U.S. workers.

*B. INS Is Not Expert in Consideration of Labor Implications.*

In its response to public comment, INS has already conceded that it lacks the expertise to define and quantify undocumented aliens' impact upon the dislocation of American workers. Under the proposed rule, this was one of the factors to be considered in authorizing employment,<sup>84</sup> but it was deleted from the final rule.<sup>85</sup> Similarly, INS withdrew a proposed factor which would have required the agency to consider the number of aliens involved in unauthorized employment before granting work permission to new applicants. INS felt that these factors were more appropriately a function of the Department of Labor than the Immigration and Naturalization Service or its parent agency, the Department of Justice.<sup>86</sup>

Given the agency's own admission of inadequacy in measuring the degree of dislocation or unauthorized labor, INS's insistence that it is capable of "safeguarding employment opportunities" and that its district directors are the authorities "best able" to act on employment applications, is troubling.<sup>87</sup> Labor Economist Vernon Briggs, who does not dismiss the need for regulating undocumented workers, writes that the immigration laws enacted since World War II "manifest [ ] a complete disregard on the part of policy makers in the labor force implications of the legislation."<sup>88</sup> He notes that the disinterest was apparent since 1940 when responsibility for immigration matters was shifted from the Department of Labor to the Justice Department.<sup>89</sup> Briggs charges that:

[t]he former agency gives priority to the employment and income implications of the statutes it administers and it has traditionally

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82. Bureau of Labor Statistics, U.S. Department of Labor, States: Employment Status of the Experienced Civilian Labor Force. . . , Table 16 (1984).

83. Hearing *supra* note 39 at 85. Some of these aliens may even be eligible for legalization or Special Agricultural Worker status under § 245A and § 210 of the INA, as amended by IRCA. § 1255a and § 1160.

84. 48 Fed.Reg. 8821 (1983).

85. 48 Fed.Reg. 51144 (1983).

86. *Id.*

87. *Id.* at 51143.

88. V. BRIGGS, IMMIGRATION POLICY, *supra* note 19, at 258.

89. *Id.*

relied on a trained bureaucracy to resolve difficult and contested issues. The latter agency has neither the expertise nor the desire to give priority to labor market considerations of the nation's immigration statutes. . . .<sup>90</sup>

The Board of Immigration Appeals has also recognized the key role played by the Labor Department in administering portions of the Immigration and Nationality Act and the importance of paying close attention to the Act's labor aspects at the micro level. In *Matter of Vea*, the Board deferred to findings made by the Secretary of Labor, in connection with labor certification proceedings, that employment of certain aliens might be "detrimental to the United States labor market. . . ."<sup>91</sup> It was unwilling to give unbridled authority to INS to make the same determination.<sup>92</sup>

Thus, even if employment of undocumented aliens *does* harm the interests of domestic employees, the agency designated to implement the regulations lacks the requisite expertise.

## VI. CONCLUSION

The so-called "second generation of research"<sup>93</sup> concludes that removal of undocumented aliens is not necessarily the answer to U.S. unemployment, depressed wages, and deteriorating work conditions. A whole host of factors is responsible for these conditions, only one of which may in certain circumstances be the presence of undocumented workers.

Given the limited understanding of labor's ills, the lack of consistent and reliable data, the *de minimis* numbers of aliens seeking authorization to work pending an immigration hearing, and INS's lack of expertise, the government would be acting hastily and unwisely in implementing the cure called for by the INS. Imposing a no-work restriction on alien bonds would have no relation to the protection of American workers and would further prejudice the already limited due process which is accorded aliens facing deportation or exclusion.

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90. *Id.*

91. 18 I.&N. Dec. 171, 175 (B.I.A.) (1981).

92. *Id.*

93. Cornelius, *Two Generations*, *supra* note 64, at 4-5.