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AMERICA'S NEW IMMIGRATION LAW: ORIGINS, RATIONALES, AND POTENTIAL CONSEQUENCES

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EMPLOYER SANCTIONS: POLITICAL APPEAL, ADMINISTRATIVE DILEMMAS

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This essay[1] discusses the proposal that employers be penalized for hiring undocumented workers — the key feature of the immigration legislation introduced by Senator Alan K. Simpson and Representative Romano Mazzoli early in 1982. Although the 97th Congress adjourned without having passed the Simpson-Mazzoli Bill, similar legislation will likely pass, sooner or later. Thus, the question is no longer *whether* employer sanctions will become law, but what form they will take, how they will be administered, and with what consequences.

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1. For documentation supporting most of the ideas presented here, see Manuel García y Griego, "La Comisión Selecta, la Administración Reagan y la política norteamericana sobre indocumentados: un debate en transición," in *México-Estados Unidos 1982,* ed. Lorenzo Meyer (México, D.F.: El Colegio de México, forthcoming); Manuel García y Griego, "The Importation of Mexican Contract Laborers to the United States, 1942-1964: Antecedents, Operation, and Legacy," in *The Border That Joins: Mexican Migrants and U.S. Responsibility,* eds. Peter G. Brown and Henry Shue (Totowa, N.J.: Rowman and Littlefield, 1983); México, Centro Nacional de Información y Estadísticas del Trabajo (CENIET), *Los trabajadores mexicanos en Estados Unidos: resultados de la Encuesta Nacional de Emigración a la Frontera Norte del País y a los Estados Unidos* (México, D.F.: CENIET, 1982); Manuel García y Griego and Leobardo F. Estrada, "Research on the Magnitude of Mexican Undocumented Immigration to the U.S.: A Summary," in *Immigrant Workers in the United States,* ed. Antonio Ríos Bustamante (Los Angeles: UCLA Chicano Studies Research Center, 1981); and Manuel García y Griego and Carlos H. Zazueta, *Approaches to the Estimation of Deportable Mexicans in the United States: Conjecture or Empirical Measurement?* Monograph Series, 2 (La Jolla, Calif.: Center for U.S.-Mexican Studies, University of California, San Diego, forthcoming).

The effects of employer sanctions will depend enormously upon how the sanctions are designed and administered; they may represent substantial social costs for persons legally residing in the United States, be they U.S. citizens or legally resident immigrants. The employer sanctions measure constitutes the most serious proposal currently under discussion for reducing the population of aliens illegally living in the United States and for curbing future flows of such immigrants. Whether future immigration legislation actually hinders undocumented immigration is likely to rest upon whether the concept and specific design of employer sanctions will achieve such a result. And the answer to that question depends not only upon how the employer sanctions law is written, but on unknown factors, such as how it will be administered and how employers and migrants respond both to the law and to its administration. No empirical model now available can predict with a reasonable degree of certainty the probable nature of such responses. Thus, the imposition of employer sanctions will represent a politically motivated gamble.

The logic behind employer sanctions can be expressed in the form of a series of interconnected assumptions. First, the vast majority of undocumented persons emigrate to the U.S. for the purpose of securing employment; i.e., the presence of undocumented workers in the U.S. can be attributed to the demand for their labor. Second, if employers are penalized by law for hiring such workers, the vast majority will refrain from doing so. Third, if employers refuse to hire undocumented persons, almost all of those presently in the United States will leave, and those who might consider entering the U.S. illegally will not do so. This chain of logic includes a fourth major assumption which is usually not fully discussed in debates over the pros and cons of employer sanctions. The argument assumes that an employer sanctions law can be written and administered so as to achieve the desired outcome at a reasonably low political cost. By "cost" I mean both domestic opposition to the effects of such legislation and the intergovernmental conflict that could result

between the United States and the source countries of undocumented migration, such as Mexico.[2]

In order for employer sanctions to be successful from an administrative and technical point of view, the above four propositions must hold. Clearly, the first and third do. The presence of the vast majority of undocumented Mexicans in the U.S. depends on continued demand for their labor, and the refusal of employers to hire them would be sufficient to effect their return to Mexico. The debate over whether the employer sanctions concept will "work" revolves around the second proposition (that employers will refrain from hiring undocumented workers when faced with the threat of penalties) and around the actual effects, whether intended or not, of the specific forms that employer sanctions could take. But if the fourth proposition — that the law can be put into effect at a tolerable political cost — does not hold, then the proposal cannot succeed.

The Political Appeal of Employer Sanctions

In their administration, employer sanctions will pose some gnawing dilemmas, which this essay will explore later; but defending them as a policy proposal will prove irresistible. The political appeal of employer sanctions can be summarized in three broad arguments or observations. First, federal government bureaucrats at all levels share the general perception that undocumented migration is a serious problem that cannot be ignored. Sooner or later — and, according to this view, the sooner the better — it must be addressed. Second, the employer sanctions proposal represents the most logical and the only easily adopted measure that has not yet been explored. It is not a full-scale attack on the problem (it is less drastic, for example, than sending an armed force to the border to stop illegal entries); yet it represents more than repeating the measures of the past which have failed to control the phenomenon. Finally, employer sanctions can be designed in such a manner as to appear as a serious

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2. The concern of policymakers in the United States centers on whether employer sanctions will curb undocumented migration in general, not just of Mexicans. Nevertheless, this essay is limited to a discussion of the potential effects of employer sanctions upon Mexican migration.

attempt to solve the problem while allowing sufficient room in the area of administration for the containment of political opposition.

Defining the Problem

Public and official perceptions of Mexican migration to the United States, documented and undocumented, have a long history. The principal argument raised against illegal entries is that they violate the law. The argument conveniently ignores the fact that, historically, agents of the U.S. government have consciously observed this law only in the breach, but it is a powerful normative argument nonetheless. No one can realistically argue that a nation-state has no right to control the flow of persons across its borders;[3] but debatable issues do arise at a more specific level: How should the state exercise control over its borders? What problems arise when it does not exercise this control consistently? What moral obligations does it incur when the persons crossing its borders reside in a neighboring country with which it has a long history of complex and enduring ties?

During the 1970s the view that a large number of illegal entries by Mexicans constituted a serious problem did not find a receptive audience among the public in the United States. As the number of apprehended deportable aliens surpassed half a million per year, former Immigration and Naturalization Service (INS) Commissioner Leonard Chapman publicly dramatized the "illegal alien problem" in terms which evoked other views of immigration which also have a long history. Chapman's argument stressed that undocumented workers take jobs away from U.S. citizens; that they constitute a burden on the U.S. taxpayer as a consequence of their consumption of social services; that somewhere between four and twelve million undocumented persons were then residing in the United States; and that their numbers were increasing at a rate which varied between 500,000 and one million per year.

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3. For a discussion of this point, including its interpretation by the United States Supreme Court, see Gerald P. López, "Undocumented Mexican Migration: In Search of a Just Immigration Law and Policy," *UCLA Law Review* 28 (Apr., 1981): 615-714.

The arguments which characterized undocumented migration as a serious problem during the 1970s emphasized empirical issues: numbers, socioeconomic effects, etc. Public awareness of the violation of U.S. immigration laws did not by itself translate into public concern. To bring about public concern, analysts who saw undocumented migration as a problem argued that this phenomenon implied harm to U.S. citizens in terms of lost jobs and increased taxes. Framing the problem in these terms, however, had the effect of implying that it had an empirical definition, subject to verification or rebuttal by fact. Small wonder, then, that the problem attracted many social scientists who prepared and published a seemingly endless stream of studies and reports. Each of these reports sought in its own way to define the *research* problem in technical terms and to solve it by employing one or another methodology and set of evidence.

Judgments about the conclusiveness of these studies varied widely. The Select Commission on Immigration and Refugee Policy, which could have made an effort to obtain authoritative answers to the questions under study but did not, judged the studies inconclusive.[4] Other observers argued less equivocally that, from the point of view of the United States, the net socioeconomic effects of undocumented migration were probably positive.[5] Whether or not

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4. U.S. Select Commission on Immigration and Refugee Policy, *U.S. Immigration Policy and the National Interest: The Final Report and Recommendations of the Select Commission,* Joint Committee Print, Committees on the Judiciary, House of Representatives and Senate, August, 1981 (Washington, D.C.: U.S. Government Printing Office, 1981): 41. It is interesting to note that discourse in government circles and the predominant definition of the problem characterize the undocumented migration phenomenon as a national calamity, while efforts to study the phenomenon have not been proportional to this level of concern. See, for example, the arguments advanced by the Select Commission for *not* conducting a national survey of immigration or otherwise gathering data on a national scale that would yield scientifically acceptable answers to these questions: U.S. Select Commission on Immigration and Refugee Policy, *[First] Semiannual Report to Congress* (Washington, D.C.: U.S. Government Printing Office, 1980): 6-10. This failure to investigate notwithstanding, the limited research efforts stimulated by the deliberations of the Commission suggest that the empirically verifiable reality of undocumented migration will not support predominant perceptions.

5. See, for example, Charles Keely, "Illegal Migration," *Scientific American* 246 (Mar., 1982): 31-37.

one agrees with such judgments, one point emerges clearly: the context of the empirical debate has changed since the mid-1970s, when Chapman made his allegations. Although some members of the press still assert that undocumented migrants constitute a drain upon the U.S. economy, most U.S. government officials have de-emphasized these empirical arguments.

Under these circumstances one might have expected that the definition of the problem might change, that the perceived threat of undocumented migration might attenuate, that the issue might have lost visibility rather than gained it. Following the deliberations of the Select Commission and the inauguration of Ronald Reagan, the implied definition of the problem *did* change, but not in the direction anticipated. The course which the debate has taken helps explain the durability of the perception in U.S. government circles that undocumented migration is a serious problem, the solution to which requires new measures — even if their enforcement involves some political and social cost.

The "new" definition of the problem and public attitudes based on the empirical assertion that undocumented migration harms the United States are mutually reinforcing, but the new definition no longer rests on those arguments. Rather, this new view emphasizes the normative components of the debate; it views the phenomenon as undesirable even if it does benefit the United States economically, because it is illegal or because it can be associated with vaguely defined social ills. The staff report of the Select Commission makes this point clearly:

> Now, in 1981, the United States finds itself in the ambiguous position of espousing respect for the law as a cornerstone of society, while refusing to make the enforcement of its immigration laws a priority. Until a more meaningful commitment to enforcement is made, illegal migration will continue to undermine the most valued ideals of this nation — the integrity of the law and the fundamental dignity of the individual. It is this undermining of national values that poses the greatest threat to U.S. society, not the displacement of U.S. workers or use of social services by undocumented workers. Jobs taken by undocumented workers sometimes do result in

> the displacement of American workers, and the presence of these aliens in the work force does have a depressing effect on U.S. labor standards and wages in some locales and some sections of the economy. While these conclusions of the Staff are disputed — at least as to emphasis — by some researchers, no one denies that national ideals are being compromised.[6]

This approach does not reject the thesis that some negative socioeconomic effects do result from undocumented migration; indeed, it finds the thesis reinforcing. But the argument rests on normative rather than empirical grounds.

Following the Select Commission report, the normative terms used to describe the phenomenon began to enjoy increasing popularity. Several political actors in highly visible forums have recently characterized the problem as one of reasserting national sovereignty.[7] Others have merely cast the problem in terms of reasserting control over the formulation and execution of immigration policy. Many persons within and outside the federal government perceive that "solving" the problem of undocumented migration has become a test of national will in an age when such will has diminished on many fronts.[8] Some individuals have gone beyond legal questions and focused

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6. U.S. Select Commission on Immigration and Refugee Policy, *U.S. Immigration Policy and the National Interest: Staff Report of the Select Commission on Immigration and Refugee Policy. Supplement to the Final Report and Recommendations of the Select Commission* (Washington, D.C.: U.S. Government Printing Office, 1981): 560-561.

7. See, for example, the testimony of Attorney General William French Smith in U.S. Congress, Joint Hearing before the House Committee on the Judiciary, Subcommittee on Immigration, Refugees, and International Law and the Senate Committee on the Judiciary, *Administration's Proposals on Immigration and Refugee Policy* (Washington, D.C., July 30, 1981); Sylvia Ann Hewlett, "Coping with Illegal Immigration," *Foreign Affairs* 60 (Winter, 1981-82); and Kevin F. McCarthy and David Ronfeldt, *U.S. Immigration Policy and Global Interdependence* (Santa Monica, Calif.: The Rand Corporation, 1982): 16.

8. See Wayne A. Cornelius, "America in the Era of Limits: Nativist Reactions to the 'New' Immigration," Research Report Series, 3 (La Jolla, Calif.: Center for U.S.-Mexican Studies, University of California, San Diego, 1982).

on the long-term consequences of current immigration trends and have concluded that the uncontrolled growth of the Mexican-origin population poses serious and unique problems for the nation's destiny. These predicted consequences range from social and ethnic conflict a generation hence to linguistic fragmentation and even a potential loss of territorial integrity.[9] As this summary suggests, the issue of undocumented migration has moved within the space of a few years from a question with tangible and potentially verifiable dimensions to one which has a symbolic and normative character.

These trends suggest that the debate on the socioeconomic effects of undocumented migration, though interesting in technical terms, is for the most part politically irrelevant. The government and the public will continue to perceive the phenomenon as a problem, no matter how analysts judge its benefits or detriments, until it encounters an "acceptable" political response, such as enactment of an employer sanctions law.

Why Employer Sanctions?

The authors of immigration reform proposals in 1982 had a number of alternatives for conceptualizing the phenomenon of undocumented migration:

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9. For examples of this fear that Mexican immigration could lead to separatism in the U.S. Southwest, see Richard Downes, "The Future Consequences of Illegal Immigration," *The Futurist* 11 (April, 1977): 125-127; and Arthur F. Corwin, "Epilogue: A Note on Acculturation," in *Immigrants — and Immigrants: Perspectives on Mexican Labor Migration to the United States,* ed. Arthur F. Corwin (Westport, Conn.: Greenwood Press, 1978): 353-354. Senator Alan Simpson's comments appended to the Select Commission's *Final Report* differ from the above in tone, but not in substance. "If immigration is continued at a high level and yet a substantial portion of the newcomers and their descendants do not assimilate," he noted, "they may create in America some of the same social, political, and economic problems which existed in the country which they have chosen to depart. Furthermore, as previously mentioned, a community with a large number of immigrants who do not assimilate will to some degree seem unfamiliar to longtime residents. Finally, if linguistic and cultural separatism rise above a certain level, the unity and political stability of the nation will in time be seriously eroded."

- First, they could have rejected the commonly accepted definition of the undocumented migration problem, both in terms of its putative seriousness and the specific consequences attributed to it. This alternative would probably have resulted in no legislative proposal at all in the area of undocumented migration control, although it might have been consistent with an increased allocation of resources to the INS. It also would have required the replacement of the existing definition of the problem with another.

- Second, they could have accepted the existing definition of the problem, which verges upon ascribing to it the character of a national calamity. This alternative would have resulted in proposed legislation which maximized the likelihood of success in reducing undocumented immigration by adopting a form of employer sanctions — coupled with other reinforcing measures — consistent with that objective.

- Third, they could have publicly accepted the existing definition of the problem, but privately conceded that passage of any legislation would require compromises with various interest groups, particularly employers. This alternative would have resulted in proposed legislation which maximized both the likelihood of passage and political benefits for its proponents without actually curbing undocumented migration.

The Simpson-Mazzoli Bill represents a package which traded off the kinds of considerations discussed in the second and third alternatives. Given that the authors of the bill accepted the existing definition of the problem — indeed, himself a member of the Select Commission, Simpson helped shape it — they would obviously see as necessary a substantive change in existing policy responses to undocumented migration. How, then, do employer sanctions fit into the context of available policy alternatives?

Without new legislation, the U.S. government would most likely respond to the undocumented migration phenomenon with a mass deportation campaign organized

and conducted by the INS. Such campaigns are hardly new in the history of Mexican migration to the U.S., but such an option is being ruled out for now,[10] mainly because INS enforcement has apparently not effectively deterred undocumented migration. The number of deportable aliens located each year, the vast majority of whom are detected shortly after crossing the land border with Mexico, runs close to a million. These numbers have no historical precedent with the exception of the years 1953-54. Moreover, the claim that the undocumented population in the United States is growing by leaps and bounds goes unchallenged within government circles. Thus, during a given year the INS apprehends nearly a million undocumented migrants and the undocumented population still grows by upwards of half a million;[11] the strategy, therefore, has obviously failed.

If one accepts the above empirical and normative propositions, then the necessity for some kind of "controlling" legislation is obvious. The employer sanctions provision constitutes the only proposal on the current legislative agenda which lends itself well to this purpose: it can be designed within the highly visible arena of Congress and administered by the federal government alone. Many other proposed measures, such as increased policing of the northern border by the Mexican government or allocating some form of economic assistance to sending communities in order to "prevent" emigration, would involve bilateral or multilateral cooperation.

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10. This does not mean, of course, that the INS does not presently expel people from the interior of the United States on a routine basis, nor that it does not occasionally mount small deportation campaigns, usually accompanied by massive doses of publicity. "Operation Jobs," a series of raids mounted in the final days of April, 1982, represents such a campaign. But even in such instances the actual number of persons expelled is only slightly higher than the average for a similar period during "routine" operations. Thus, it appears that the publicity associated with these raids is the actual aim of such operations, not the mass expulsion of all undocumented persons residing in the United States. See *Los Angeles Times,* Apr. 27 to May 1, 1982.

11. Hewlett, "Coping with Illegal Immigration"; Michael S. Teitelbaum, "Right vs. Right: Immigration and Refugee Policy in the United States," *Foreign Affairs* 59 (Fall, 1980): 24-27.

Employer Sanctions: A Broad Concept

The extraordinary appeal of the employer sanctions proposal, therefore, rests primarily on the fact that it appears appropriate to the previously defined problem, and the concept is broad enough to suggest any number of alternative measures in practice. Thus, as the hearings on the Simpson-Mazzoli Bill demonstrate, it can be packaged in a way which is attractive to many groups within the United States, including employers, against whom the proposal is presumably directed.

Two other factors, moreover, contribute to the political appeal of the concept. First, employer sanctions can be justified with the argument that other countries — particularly in Western Europe — already have adopted such sanctions. Thus, the United States should accept the conventional wisdom and go along with the measures adopted by other countries in similar circumstances. This justification for the proposal ignores the fact that employer sanctions laws have not substantially reduced undocumented immigration in those countries that have employed the strategy.[12]

Secondly, the concept of employer sanctions appeals to a sense of equity: employer sanctions will, according to some of its proponents, redress an injustice in the law, which currently penalizes workers for illegally entering and working in the United States, but does nothing to their employers. The assumption implicit in this argument — that the administrators of the law will actually vigorously prosecute and penalize employers — merits skeptical examination. Arguments which question this assumption, however, will not detract from the political appeal of the employer sanctions concept.

Thus, proponents of employer sanctions can call upon any of several different arguments: "law and order," "conventional wisdom," "employer-employee equity." Under these banners, employer sanctions, as a concept, can and will be made palatable to groups with very

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12. See U.S. General Accounting Office, *Information on the Enforcement of Laws Regarding Employment of Aliens in Selected Countries* (Washington, D.C.: Aug. 31, 1982): 2. The fact that such laws have apparently failed in other countries does not mean, of course, that they would also fail in the United States, just as the fact that other countries have such laws does not mean that the U.S. should also have one.

different philosophies and political orientations: Adopting employer sanctions is a gamble and, in the view of some, an irrational and risky experiment; but to many within and outside the federal government, the proposal represents an eminently rational measure. Its consequences, though not entirely predictable (the effects of legislation never are), might be managed and perhaps contained among those ethnic and social groups least prepared to force the rest of society to suffer them. To this problem and the difficulties implicit in administering the employer sanctions proposal we will now turn.

The Dilemmas of Administration

In theory, employer sanctions provide an incentive for U.S. employers to probe into the immigration and citizenship status of each person hired and a disincentive to hire an undocumented alien. The concept thus allows the policymaker concerned with reducing the population of undocumented immigrants to reduce the problem to a technical question: under what conditions will these incentives and disincentives most likely discourage the hiring of undocumented workers in the United States? The answer to that question is threefold.

First, the vast majority of employers who presently hire or might be inclined to hire undocumented workers should perceive the disincentives to be real and significant. The penalties have to represent a deterrent, and the employer must perceive as substantial the risk of being caught and penalized. This situation can occur only if the employer sanctions law receives an adequate level of funding; its enforcement cannot simply be added to the list of duties already carried out by the investigative branch of the INS.

Second, those employers who presently rely to a significant degree on undocumented workers should be able to do without them. That is, such an employer must perceive that at least one of the following assertions about his business interests accurately describes his situation:

- The economic costs associated with going out of business and engaging in some other activity which does not rely upon undocumented labor would be tolerable.

- The business can substitute U.S. citizens, legal immigrants, and/or capital for undocumented workers, either directly or by restructuring jobs, yet maintain its competitiveness in the same activity.

- The business can replace undocumented workers with foreign workers legally admitted as temporary laborers, much as they presently are admitted through the so-called H-2 program, or as they were through the Bracero Program (1942-1964).

Although a bureaucratic-conservative approach would minimize the conflict implicit in these alternatives, they clearly pose some dilemmas. Undocumented workers serve an economic function in the United States, and doing away with them will imply fundamental issues of survival and change for many of the industries and activities dependent upon such labor. Thus, finding an acceptable alternative will often be necessary to bring about the required cooperation by employers.

Third, the U.S. government must perceive as tolerable the immediate political and social costs of imposing employer sanctions. (Although the long-term costs may be high, they will not likely influence the short-term politics of employer sanctions.) At first, this argument may appear to have little direct bearing on the issue of creating disincentives for hiring undocumented migrants. However, if the perceived costs of employer sanctions become intolerable, the legislation will not be enforced — and little disincentive for hiring undocumented aliens will remain. The "costs" will find political expression both as explicit lobbying to abandon the enforcement of such sanctions, and as unfavorable court rulings resulting from suits brought against their administration.[13]

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13. The discussion thus far has treated the issue in purely technical-administrative terms and has not considered any moral issues, such as whether or not the employer sanctions provision will have "unjust" effects. Yet opponents of the measure often argue that the members of certain oppressed minority groups are the ones most likely to suffer from the adoption of such a measure because of the employment discrimination that it will cause. In terms of political considerations, however, these social costs figure in the equation only if they are both immediate and significant at the national level.

An employer sanctions law designed and administered so as to achieve its expressed purpose can thus be expected to encounter dilemmas in its administration. The attractiveness of the concept aside, a serious effort to implement it is likely to prove impractical. A scenario in which an employer sanctions law is written and enforced in such a way as to reduce undocumented migration substantially — without backsliding on the part of the INS and without a significant substitution of legally admitted foreign workers for the undocumented — is unlikely. Two other scenarios appear more probable.

A Symbolic Law

The history of U.S. immigration legislation is replete with examples of symbolic laws, including the contract-labor law of the past century and the "harboring an alien" clause first introduced in 1917 and then modified in the 1952 Immigration and Nationality Act. Thus, the Simpson-Mazzoli Bill would not be the first unenforceable or ineffective legislation passed by the U.S. Congress in the area of immigration. Such legislation serves a symbolic purpose — an expression of political ideals without political will; but it nevertheless serves as an objective indicator that something has been done about the "problem."[14]

Avoiding the introduction of significant loopholes into the legislation will not be easy. The Senate testimony on the Simpson Bill and the report of the staff of the Select Commission on Immigration and Refugee Policy reveal that Congress is sensitive to the concerns of employers. Businessmen feel that the Congress should minimize the recordkeeping requirements of any employer responsibility law and that the law's design should permit employers an affirmative defense against penalties, even under circumstances in which they actually hire an undocumented alien. Finally, Congress will not find it easy to add personnel and resources to a new regulatory activity as many

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14. For further discussion of the political utility of symbolic laws, particularly regarding the employer sanctions concept, see Kitty Calavita, "California's 'Employer Sanctions': The Case of the Disappearing Law," Research Report Series, 39 (La Jolla, Calif.: Center for U.S.-Mexican Studies, University of California, San Diego, 1982).

areas of government shrink and agencies increasingly compete for the federal dollar.

A symbolic law would not change the size of the undocumented population nor the volume of new flows. Employer and migrant behavior may take new forms in order to address the potential risk of sanctions, but the hiring of undocumented workers would continue. The law could thus easily result in a negative-sum situation, wherein the hiring of undocumented persons remains largely unaffected, but the social costs, in terms of employment discrimination against ethnic groups lawfully in the United States, increase. Although the effort to impose employer sanctions will most likely result in a symbolic law, another scenario is also possible.

Legal Disincentives for the Employment of Undocumented Workers

Assuming that the Congress can meet the conditions desired by bureaucratic conservatives — a law with no significant loopholes, effectively administered throughout the United States — employers will perceive strong disincentives regarding the hiring of undocumented workers. Will such a regime successfully modify employer and migrant behavior to achieve the desired outcome? The continued presence of undocumented workers requires the participation of both sets of actors; the elimination of one of these could obliterate the economic basis for the phenomenon. The employer sanctions concept assumes that if the knowing employment of undocumented workers stops as a result of a change in employer behavior, then Mexican undocumented migration will virtually come to an end. Is this assumption correct?

The answer to this question is a qualified "yes." While the employer-employee relationship does require the participation of both, the former dictates to a far greater degree than the latter the terms of that relationship. Although employee motivation, attitudes and behavior are not unimportant in determining the course and character of that relationship, the perceptions and behavior of employers — and the logic of profitable enterprise — are crucial to its definition.

Events during and following "Operation Wetback," the mass deportation campaign of 1954 aimed primarily at Mexicans, bear out this proposition. The campaign,

conducted at a time when Mexican workers could enter the United States legally with a labor contract to work in agriculture, resulted in a massive substitution of contract laborers for "wetbacks." After 1954 the number of deportable Mexicans located by the INS dropped precipitously, and at the same time the number of contracts issued to Mexican workers rose sharply to the peak number recorded during the twenty-two years of the contract-labor program.[15] These events represent the single instance in the history of Mexican migration to the United States when administrative measures taken by the U.S. government decisively reversed the flow of undocumented migration.

Various factors account for the "success" of Operation Wetback in achieving its technical-administrative goal, but the most important among them is that the operation did not simply round up and expel Mexicans of questionable immigration status. (Had it done only that, we should appropriately question why similar efforts before and since did not accomplish the same objective.) Rather, Operation Wetback comprised a combined strategy of rewards and punishments. Directed mostly at employers, this strategy included convincing employers that they faced an increased risk of having the INS interrupt their use of undocumented labor, facilitating their access to contract labor, and "streamlining" the contract-labor program by eliminating those provisions to which employers objected most strenuously.

Operation Wetback also had social and political costs. The campaign involved the wholesale violation of the rights of Mexicans (of both Mexican and U.S. citizenship) in the U.S. and the dilution, with the acquiescence of the Mexican government, of the safeguards for workers in the Bracero Program. In fact, these safeguards deteriorated to the point that contract workers and "wetbacks" differed principally in that the former had a document stating that he was "legal," while the latter enjoyed somewhat greater freedom. The deterioration of worker safeguards and the massive noncompliance by employers with the terms of labor contracts led to the widespread

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15. In 1953 the INS had performed 865,000 apprehensions of deportable Mexicans, and about 200,000 contract workers entered legally; in 1955 the number of such apprehensions dropped to 243,000, while almost 400,000 contract workers entered legally.

perception that the Bracero Program had adversely affected the U.S. farm labor market. This development eventually led to significant opposition to the program in the United States, and in 1964 the U.S. government unilaterally cancelled the program.

Employer responses to the termination of the Bracero Program in 1964 varied enormously, depending upon the industry and activity. Some crops dependent on *braceros* disappeared; the growers of others substituted legal immigrants for contract workers; some employers used the H-2 provisions of the 1952 Immigration Act to hire temporary foreign workers, who helped ease the transition; still others reorganized their labor activities so as to reduce their labor requirements;[16] and a large but unknown number of farm activities became dependent on undocumented laborers. Thus, to some extent, employers created the "problem" of undocumented labor migration since 1964 as their solution to another problem — the unavailability of contract workers after that year.

This short history supports the view that employer perceptions and responses to government measures aimed at controlling labor migration are a crucial variable in determining the continued presence of Mexican workers in the United States. First, in order to "control" the illegal entry of Mexican workers, the U.S. government adopted measures which changed employer behavior by making the contracting of these workers more attractive. This resulted in a substitution of contract laborers for "wetbacks" in 1954-55. Second, in order to eliminate perceived adverse effects upon U.S. domestic workers, the government terminated the program in 1964, necessitating another change in employer (and employee) behavior.

The central assumption behind the bureaucratic-conservative view of employer sanctions — that influencing the behavior of employers is the key to controlling the employer-worker relationship — thus has empirical support. Nevertheless, we should underscore that the worker responses are even less predictable, particularly in the present context, in which the employer-

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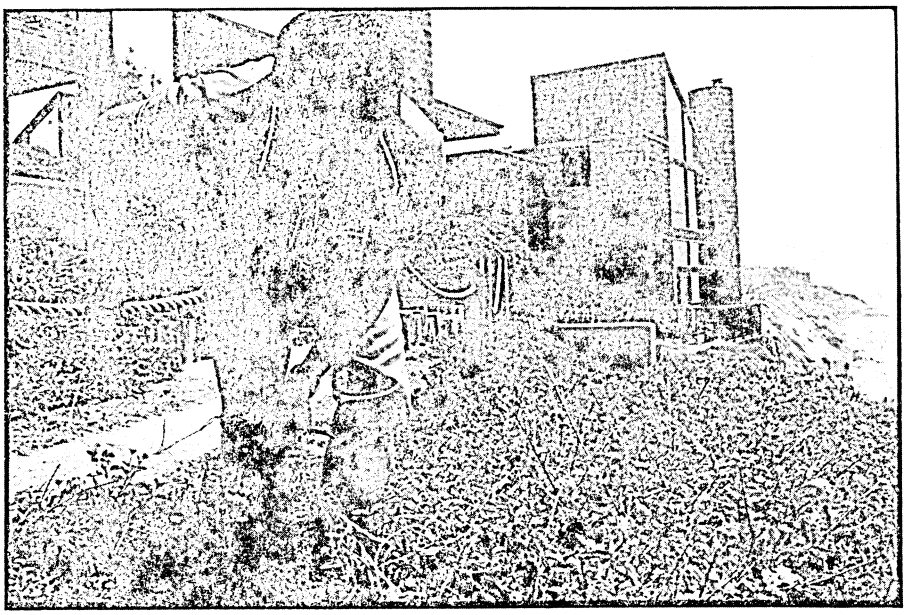
16. David Runsten and Phillip LeVeen, *Mechanization and Mexican Labor in California Agriculture,* Monograph Series, 6 (La Jolla, Calif.: Center for U.S.-Mexican Studies, University of California, San Diego, 1981).

worker relationship has different modalities and the policy proposal offers no alternative means of legal entry. We should recall in this regard that the measures taken in 1954 *regularized* the flow, and the action taken in 1964 ultimately caused it to go underground; in neither case did policy actions arrest the flow of Mexican migration.

The implications of this fact merit examination. In the case of agriculture, growers have actively recruited Mexican labor and continue to do so; they are aware of their workers' legal status and sometimes assist the network of labor smugglers who bring them across the border. Employers in other industries who employ undocumented workers, however, are not always aware of the legal status of each individual whom they hire; others may suspect that their employees lack legal-residence documents but prefer to remain ignorant of the precise circumstances of each individual. Thus, in nonagricultural industries the employer — to a degree — passively receives available undocumented labor, and the attractiveness of such labor to the employer less explicitly relates to the undocumented status of the worker. Put in other terms, the labor characteristics sought by such employers coincide with many of those of undocumented workers, but they do not specifically require such labor. (Mexican workers in such industries usually earn minimum wage or better.) Under these circumstances, employer sanctions will act largely as an incentive for employers to probe into the citizenship and immigration status of each prospective employee; it will less likely serve as a disincentive for employing undocumented workers, since employers have a qualified interest in employing undocumented workers as such.

To the extent that the above argument holds, worker responses to the probing by employers regarding their backgrounds and documentation will be the more important effect of employer sanctions. For decades now, undocumented workers have trafficked extensively in birth certificates, "green cards," and other documents used to establish authentic identification for legal entry and residence in the United States. The adoption of employer sanctions, from the point of view of the worker motivated to enter the U.S., will unavoidably provide incentives for further trafficking in such documents.

The second scenario, an "effective" employer sanctions law, would probably provoke strong responses from both employers and workers seeking to maintain the

status quo. Those employers who perceive a specific need for undocumented Mexican workers will follow the path of least resistance in securing a substitute: they will advocate a "streamlined" H-2 program. And they are likely to exact such a response, either through legislation or executive regulation, as the price of their support for employer sanctions. The behavior of other employers is less predictable, but that of their workers is not: they will seek, by every means available, the documentation necessary to provide their employers with an "affirmative defense" against employer sanctions. What is now being sold as a measure to punish employers will very likely end up punishing workers instead.