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CALIFORNIA'S "EMPLOYER SANCTIONS": THE CASE OF THE DISAPPEARING LAW

by
Kitty Calavita

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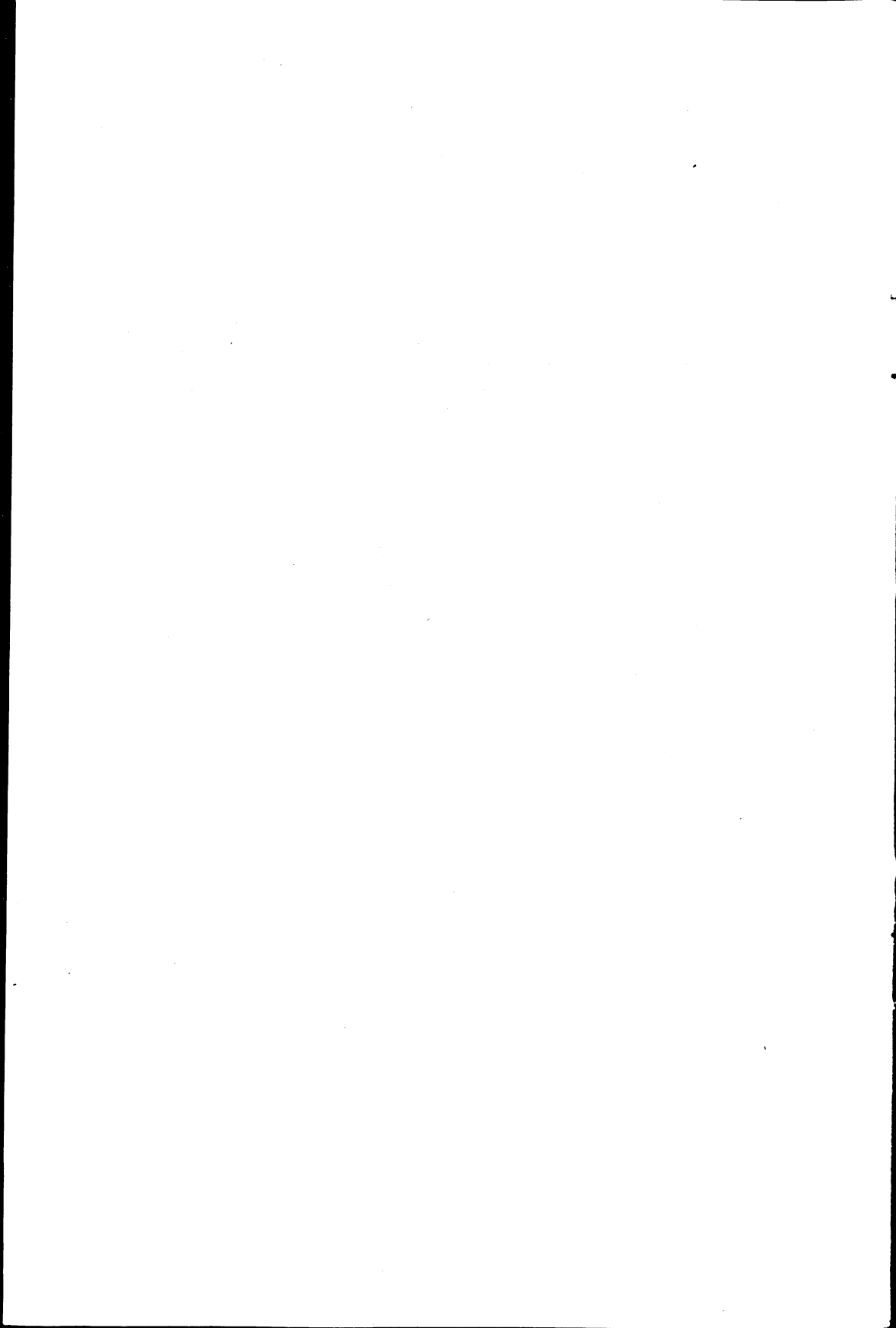
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INTRODUCTION*

On November 8, 1971, California Governor Ronald Reagan signed Assembly Bill #528 (hereinafter A.B. 528). This legislation -- also known as the Arnett Bill, after its author in the Assembly -- made it illegal to knowingly employ illegal aliens¹ in California if that employment has an adverse effect on resident workers. In its final form, it stated:

Section 2805 is added to the Labor Code to read:

2805.a. No employer shall knowingly employ an alien who is not entitled to lawful residence in the United States if such employment would have an adverse effect on lawful resident workers.

b. A person found guilty of a violation of subdivision (a) is punishable by a fine of not less than two hundred dollars (\$200) nor more than five hundred dollars (\$500) for each offense.

c. The foregoing provisions shall not be a bar to civil action against the employer based upon violation of subdivision (a).²

In enacting A.B.528, the California Legislature became the first legislative body at the local, state, or federal level to

*The author wishes to thank Ricardo Anzaldúa, María Patricia Fernández Kelly, and Manuel García y Griego for their helpful comments.

1. The terms "illegal alien" and "undocumented worker" will be used interchangeably here. Both terms refer to an alien who has either entered the country without documents or violated the terms of his or her entry permit. Neither term is completely satisfactory. "Illegal alien" connotes a presumption of guilt and implies that the *person*, not specific behavior, is illegal. "Undocumented worker" excludes those who, for whatever reason, are not "workers." Unfortunately, a more adequate term has not yet been coined.

2. California, Legislature, A.B. 528, *Legislative Bills: A.B. 451-575, 1971*, 'Regular Session (hereinafter cited as California, *Legislative Bills: A.B. 528*), as amended in Assembly, June 30, 1971.

establish what has become known as "employer sanctions" legislation.³ It quickly attracted attention at the federal level, where attempts had been made as early as 1952 to impose penalties on those who hired illegal aliens.⁴ When initiating federal employer sanctions legislation in 1971, Congressman Peter Rodino, Chair of the House Judiciary Committee, devoted two days of hearings to the Arnett Bill and the California experience with undocumented workers.⁵ In California, its proponents applauded the legislation as a major step in reducing unemployment and welfare costs and in improving the bargaining position of resident workers.

Despite its promise, no successful prosecution has ever been brought under this first employer sanctions law. In fact the Arnett Law, for all practical purposes, has been repealed. Asked about enforcement procedures, Gaylord S. Grove, the Deputy-in-charge at San Diego's Office of Labor Commissioner, put it succinctly: "Oh, we don't enforce that law....It's a dead law."⁶

The following investigation documents the rise and fall of A.B.528. It attempts to solve and to explain theoretically the mystery behind the effective "disappearance" of a law. Of more general importance, it provides a theoretical and historical context in which to view recent federal employer sanctions proposals. Recognizing that the phenomenon of immigration represents primarily the movement of a work force, federal proposals to reduce illegal migration center around the reduction of employment opportunities for the undocumented. In fact, the

3. Eleven other states and one city followed California's lead in adopting employer sanctions: Connecticut, Delaware, Florida, Kansas, Maine, Massachusetts, Montana, New Hampshire, New Jersey, Vermont, Virginia, and the city of Las Vegas, Nevada.

4. U.S., Congress, *Congressional Record*, Vol. 98, pt. 1 (82nd Congress, 2nd Session, 1952), pp. 802-813.

5. U.S., Congress, House of Representatives, *Illegal Aliens: Hearing before Subcommittee #1 of the Committee on the Judiciary*, 92nd Congress, 1st Session, June 19 and 21, 1971 (hereinafter cited as *Hearings: House Committee on the Judiciary*). Federal attempts to establish employer sanctions legislation include the first Rodino Bill in 1972 (HR-16188); the second Rodino Bill in 1975 (HR-8713); the Kennedy Bill in 1975 (S-561); the Eastland Bill in 1976 (S-3074); the Carter Proposal in 1978 (S-2252); the Reagan Plan in 1981; and the Simpson-Mazzoli Bill in 1982.

6. Telephone interview with Gaylord S. Grove, Jan. 5, 1982.

employer sanctions concept became a central component of Carter's 1977 proposal, the recommendations of the recent Select Commission on Immigration and Refugee Policy, President Reagan's immigration policy package, and the current Simpson-Mazzoli proposal.

As is so frequently the case, this central element of recent proposals is also one of the most complex and controversial, particularly with regard to its enforcement possibilities and potential impact. The proposal, given the myriad civil rights and justice dilemmas it raises, not only stimulates political controversy, but it adds to the enigmas that scholars face when they attempt to make theoretical sense out of the maze that is American immigration policy. It is hoped that this in-depth investigation of the California employer sanctions law may help to sort out some of those enigmas and generate specific questions to be asked with regard to the economic, ideological, and political origins of the current proposals.

This analysis of the evolution and demise of A.B. 528 moves from the theoretical to the historical to the descriptive and back. It begins with a brief theoretical discussion of the concept of symbolic legal action and law-making as a dialectical process. Following this theoretical framework are a discussion of the historic role of undocumented Mexican labor in California; an outline of the 1970-71 recession and the use of illegal aliens as political scapegoats; and finally, an overview of the organizing successes of the United Farm Workers in 1970-71. Once this theoretical and political-economic stage has been set, the story of A.B. 528 can be told.

I

SYMBOLIC LAW

Scholars who have utilized the concept of symbolic action come from a variety of traditions. Some, such as Kenneth Burke, have stressed the symbolic component of political language as a device with which to disguise politically distasteful but economically useful action. According to Burke, "It is the normally prayerful use of language to sharpen up the pointless and blunt the too sharply pointed."⁷ For Burke, symbolic action in the form of political rhetoric is used by political actors to placate given groups while engaging in substantive action quite incompatible with that rhetoric.

Thurman Arnold, in *The Folklore of Capitalism*, noted the purely symbolic effect of much regulatory legislation. In a chapter entitled "The Effect of the Anti-Trust Laws in Encouraging Large Combinations," Arnold explained,

The effect of this statement of the ideal [the Anti-Trust Legislation] and its lack of enforcement was to convince reformers either that large combinations did not actually exist, or else that...they were about to be done away with....Historians now point out that Theodore Roosevelt never accomplished anything with his trustbusting. Of course he didn't. The crusade was not a "practical" one....Since the organizations were demanded, attempts to stop their growth became purely ceremonial. The anti-trust laws, being a preaching device, naturally performed only the functions of preaching.⁸

More recently, Murray Edelman has expanded on the concept of symbolic action. While his work fleshes out aspects of symbolic action only alluded to by Burke and Arnold,

7. Kenneth Burke, *A Grammar of Motives* (New York, 1954), p. 393.

8. Thurman Arnold, *The Folklore of Capitalism* (New Haven, 1937), pp. 208, 211-212.

Edelman's definition of what constitutes symbolic action varies from one context to the next. He occasionally suggests that all significant political action is symbolic: "Practically every political act that is controversial...is bound to serve in part as a condensation symbol. It evokes a quiescent or an aroused mass response because it symbolizes a threat or reassurance."⁹ More frequently, however, Edelman uses the term to connote political action which has little or no impact on objective conditions, but which serves the purpose of placating certain groups: "If the regulatory process is examined in terms of a divergence between political and legal promises on one hand and resource allocations on the other, the largely symbolic character of the entire process becomes apparent."¹⁰

None of these scholars grounds his intuitively appealing discussion of symbolic action in any consistent theoretical framework. Nor do these authors systematically address the issues of Why? and How? preferring instead to focus on descriptive analyses of the consequences of symbolic action -- analyses which frequently come dangerously close to implying purpose or cause.

Several sociologists of law have recently integrated the concept of symbolic legal action into a dialectical-structural framework, and in so doing they have avoided some of the theoretical ambiguities that flaw Edelman's work. William Chambliss, Allen Whitt, Lisa Stearns, myself, and others have suggested that the moving force behind significant legal developments frequently lies in fundamental and inherent contradictions in the political economy.¹¹ Law, from this perspective, represents the State's attempt to resolve the conflicts deriving from these contradictions. According to these authors, one such contradiction in Western capitalist democracies lies in

9. Murray Edelman, *The Symbolic Uses of Politics* (Chicago, 1964), p. 7.

10. Ibid., p. 22. See also Murray Edelman, *Political Language: Words That Succeed and Policies That Fail* (New York, 1977).

11. William Chambliss, "Contradictions and Conflicts in Law Creation," in S. Spitzer, ed., *Annual Review of the Sociology of Law* (Greenwich, Conn., 1979); Allen Whitt, "Toward a Class-Dialectical Model of Power," *American Sociological Review* 44 (Feb., 1979), pp. 81-99; Lisa Stearns, "Fact and Fiction of a Model Enforcement Bureaucracy: The Labor Inspectorate of Sweden," *British Journal of Law and Society* 6 (Summer, 1979), pp. 1-23; Kitty Calavita, "United States Immigration Law and the Control of American Labor," *Contemporary Crises* 5 (Fall, 1981), pp. 341-368.

the conflict between the requisites of capital accumulation and the requisites of political stability and State legitimation. On the one hand, the State must provide for and protect the conditions for capital accumulation; on the other, it must maintain the semblance of class neutrality.

At any particular point, the conflicts which arise from this contradiction present the State with a dilemma. Must the State promote the immediate interests of capital and jeopardize its own stability? Must it shore up the political status quo by interfering with the short-term interests of capital in the interests of long-term survival? Or does it have a third, less painful, option? Stearns, in her examination of occupational safety and health laws in Sweden, concludes that a third option frequently provides the best temporary solution to such dilemmas. Protests and political demands can often be placated through symbolic legislation which, either through non-enforcement or the incorporation of loopholes, does not significantly threaten even the short-term interests of the industries involved. Stearns found that the ideal solution to the conflict in Sweden -- between the need for uninterrupted capital accumulation and the need for the Social Democratic administration to show its concern for the working class -- lay in the creation of a large occupational safety and health bureaucracy. Its ostensible purpose is to ensure occupational safety and health, but in effect, it does little of the kind.¹² My own work suggests that in 1885 the U.S. Congress enacted the Anti-Alien Contract Labor Law in response to a similar dilemma. At the same time that the strength of organized labor in the United States made a continued influx of immigrant labor crucial to employers, that same strength required some response from Congress to workers' pleas for protection from that influx. The law of 1885 provided an ideal resolution to this dilemma between the requisites of capital accumulation and those of political stability. While addressing labor's grievances in page after page of pro-labor rhetoric, the legislation included ample loopholes, was followed by no enforcement provisions, and had no substantial impact.

In other words, symbolic law provides a temporary solution to the dilemmas which proceed from dialectical contradictions in the political economy. Faced with the need to provide for and protect the conditions necessary for continued capital

12. Stearns, "Fact and Fiction of a Modern Enforcement Bureaucracy."

accumulation as well as the need not to jeopardize the political status quo with class-biased action, lawmakers may enact legislation which is symbolic. Such symbolic legislation temporarily resolves the dilemma by appearing to address the grievance at hand (for example, the protests of American labor against the use of immigrant workers for strikebreaking purposes in 1885) without significantly altering the objective reality.¹³ A response to political pressures, symbolic law -- emasculated by vague terminology, non-enforcement, or loopholes -- serves only a political purpose.

While the dialectical-structural framework of these studies provides a clear indication of the function served by symbolic law in "resolving" certain contradictions, these works tend not to confront directly the issue of causality. They sometimes contain hints of a Marxist functionalism; more often, they imply an instrumentalist voluntarism: lawmakers, struck by the dilemma with which they find themselves grappling, deliberately and premeditatedly construct a legislative sop.

This case study of California's employer sanctions legislation follows in the dialectical-structural tradition, which sees conflicts and contradictions in the political economy as the impetus for legal change and symbolic legal action as the outcome of given types of conflicts. However, this work attempts to replace the previously voluntaristic approach with a more structural one. Occasionally, symbolic law may be conceived and delivered *in toto* by manipulative legislators. Yet it is probably far more common for a given legal response to be rendered symbolic in stages by the structural and ideological constraints within which it is hammered out. Furthermore, it will become clear that symbolic law is only one stage in a dialectical process, and it does not -- in fact, cannot -- truly resolve the contradictions at hand.

13. Calavita, "United States Immigration Law and the Control of American Labor."

II

HISTORICAL BACKGROUND

With the imposition of quota restrictions on European immigration to the United States in the 1920's, American employers increasingly turned to the "back door" as an alternative source of cheap labor. Employers soon saw Mexicans as an ideal substitute for the European immigrant worker. Above all, Mexican workers returned, or could be made to return, to Mexico during periods of depression or in the off-season. They constituted a source of labor power without the political and fiscal liabilities of a more permanent immigrant work force.¹⁴ As early as 1911, the Dillingham Commission reported on the advantages of Mexican immigration:

Because of their strong attachment to their native land...and the possibility of their residence here [*sic*] being discontinued, few become citizens of the U.S. The Mexican immigrants are providing a fairly adequate supply of labor....While the Mexicans are not easily assimilated, this is not of very great importance as long as most of them return to their native land...In the case of the Mexican he is less desirable as a citizen than as a laborer.¹⁵

As Mexican immigration to the United States increased after the quota restrictions on European immigration, there occurred a corresponding increase in illegal entrants. The difficulties of estimating the number of illegal entrants have

14. For a summary of those liabilities and the contradictions associated with unregulated, legal immigration of a permanent sort, see Calavita, "United States Immigration Law and the Control of American Labor."

15. U.S., Congress, Senate, *Reports of the Immigration Commission*, 61st Congress, 3rd Session, 1911, vol. 1, pp. 690-91; see also U.S., Congress, House, Committee on Immigration and Naturalization, *Prohibitions of Immigration: Hearings*, 65th Congress, 3rd Session, 1919, pp. 24-25.

been reported extensively in the literature.¹⁶ Nonetheless, since 1930 the number of apprehended Mexican illegal aliens has consistently surpassed the number of legal Mexican immigrants, indicating the relative proportions of the two flows.¹⁷

Several policy changes over the last decades have precipitated this increase in illegal immigration in rather predictable ways. In the first place, although numerical restrictions on Mexican immigration were not established until 1965, severe qualitative limitations were placed on aspiring Mexican migrants beginning with the depression of the 1930's, when U.S. consuls in Mexico were urged to interpret strictly the existing "public charge" clause. Not surprisingly, as documented immigration from Mexico was limited, the number of Mexicans who entered without papers rose.

The bilateral Bracero Agreements of 1942-1964, through which Mexican contract laborers (braceros) were imported to the United States, further increased the number of illegals, because the number of aspiring braceros -- and the demand for them by U.S. farmers -- always far exceeded the allotment of contracts. Furthermore, formal and informal U.S. policies during the bracero period explicitly encouraged the illegal traffic. The Bracero Agreement of 1949, for example, provided that "such illegal workers, when they are located in the U.S., shall be given preference for employment under outstanding U.S. Employment Service certification."¹⁸ Illegals ("wetbacks," as they were called) were "dried out" (legalized) by the Border Patrol, who escorted them to the border, made them step sym-

16. See, for example, Wayne A. Cornelius, Leo R. Chávez, and Jorge Castro, "Mexican Immigrants and Southern California: A Summary of Current Knowledge," *Working Papers in U.S.-Mexican Studies* 36 (La Jolla, Ca., 1982); Manuel García y Griego and Leobardo F. Estrada, "Research on the Magnitude of Mexican Undocumented Immigration to the U.S.," in Antonio Ríos Bustamante, ed., *Immigrant Workers in the United States* (Los Angeles, 1981); and Select Commission on Immigration and Refugee Policy, *U.S. Immigration Policy and the National Interest* (Washington, D.C., 1981).

17. See F. Ray Marshall, "Economic Factors Influencing the International Migration of Workers," in Stanley Ross, ed., *Views Across the Border* (Albuquerque, 1978), pp. 166-67; and Michael S. Teitelbaum, "Right Versus Right: Immigration and Refugee Policy in the U.S.," *Foreign Affairs* 59 (Fall, 1980), pp. 24-25.

18. Quoted in Ernesto Galarza, *Merchants of Labor: The Mexican Bracero Story* (Santa Barbara, Ca., 1961), p. 63.

bolically to the other side, and brought them back as lawful braceros.

Before the first of two "El Paso Incidents," the Mexican government had excluded Texas from the bracero agreements as a result of the failure of Texas growers to end discrimination and to establish the working conditions mandated by the accords.¹⁹ In response, U.S. border officials opened the border at El Paso for a five-day period in October, 1948, letting in thousands of aspiring -- but undocumented -- braceros, "apprehending" them, and transporting them to the local cotton growers, to whom they were "paroled."

A second "El Paso Incident" apparently involved top officials from the United States Departments of Justice, State, and Labor, and even more dramatically testifies to the role of the de facto policies of the United States in encouraging undocumented Mexican migration. This incident occurred after Mexico and the U.S. failed to agree on the conditions of a new Bracero Agreement; the Eisenhower administration responded by announcing on January 15, 1954 that it would contract directly with Mexican braceros, bypassing the Mexican government. The Mexican government in turn denounced the Bracero Program, declared it illegal, and appealed to its citizens not to cross the border. The end of January saw U.S. border patrol officers attempting to help over the border the hundreds of undocumented migrants who had converged in the border towns, while Mexican police and border officials tugged from the other side.²⁰

In 1952, the McCarran-Walter Act made it illegal to "harbor, transport, or conceal illegal entrants, or directly or indirectly induce their entry into the U.S."²¹ However, the so-called "Texas Proviso," an amendment added to the 1952 act in response to pressure from Texas growers, explicitly excluded employment *per se* from the category of harboring, transporting, or concealing.²² While its author made it clear in

19. Sheldon Greene, "Public Agency Distortion of Congressional Will: Federal Policy Toward Non-Resident Alien Labor," *George Washington Law Review* 40 (Mar., 1972), p. 453.

20. Manuel García y Griego, "The Importation of Mexican Contract Laborers to the United States, 1942-1964: Antecedents, Operation, and Legacy," *Working Papers in U.S.-Mexican Studies* 11 (La Jolla, Ca., 1981), pp. 37-38.

21. U.S., *Statutes at Large*, vol. 66, p. 163.

22. *Ibid.*

Congressional debate that *knowing* employment would indeed constitute harboring,²³ the Immigration and Naturalization Service (INS) has interpreted the amendment to exclude employment entirely from the provisions of the statute.²⁴

It makes little sense to account for the increase in illegal immigration that has resulted from these formal and informal policies simply in terms of bureaucratic blunders, Congressional short-sightedness, or INS corruption. Rather, it is a highly predictable consequence of government policies since the introduction of quota restrictions. Those policies represent the responses of policy makers faced with myriad contradictions and dilemmas which constrain them to a juggling act on which the curtain never falls. And if temporary Mexican workers at first helped resolve the problem of the need for cheap labor without the political and fiscal burdens associated with massive permanent immigration, so the "illegalization" of this flow took the marginalization of the immigrant worker one step further. One scholar of Mexican immigration, summarizing the debate over possible restrictions on Mexican immigration in the 1920's, paraphrased Congress's antirestrictionist sentiment:

The Mexican, they pointed out, was a *vulnerable* alien living just a short distance from his homeland. In the event that he did create serious racial or social problems, he, unlike Puerto Ricans or Filipinos...could easily be deported. No safer or more economical unskilled labor force was imaginable [emphasis added].²⁵

Right in his logic, Reisler was empirically wrong: the *illegal* worker, who by definition is criminal, is safer and more economical yet.

Politically, the illegal must remain invisible and thus virtually immunizes the United States against the kind of guest-

23. U.S., Congress, *Congressional Record*, vol. 98, pt. 1 (82nd Congress, 2nd Session, 1952), p. 794.

24. For a discussion of the INS interpretation and its departure from Congressional intent, see Sheldon Greene, "Public Agency Distortion of Congressional Will."

25. Mark Reisler, *By the Sweat of Their Brow: Mexican Immigrant Labor in the United States, 1900-1940* (Westport, Conn., 1976), p. 181, paraphrasing Hearings of the House Committee on Immigration, 1929.

worker political movements that Western Europe has experienced.²⁶ Economically, the illegals are in some ways preferable to legal migrants because they normally dare not apply for cash assistance programs, thus resolving the old problem of supporting public charges.²⁷

Finally, it is hard to conjure up an arrangement more beneficial for the employer. Several studies suggest a negative relationship between wage levels in a given area and the numbers of illegals in that area.²⁸ Other studies document the systematic violation of protective labor laws by employers of large numbers of illegals.²⁹ The reasons are easy to understand: the enforcement of minimum wage and other labor laws depends on worker complaints, and undocumented workers who report such practices may be, and often are, deported. Robert Bach, summarizing the consequences of the immigration reforms of the 1960's, put it this way: "Mexican workers continued to enter the United States not only as an addition to the low-wage labor force, but as a fragment, that is, distinguish-

26. North American Congress on Latin America (hereinafter NACLA), "Undocumented: A Special Report," *NACLA Report on the Americas* 7 (Nov.-Dec., 1979), pp. 2-46; Jorge Bustamante, "The 'Wetback' as Deviant: An Application of Labeling Theory," *American Journal of Sociology* 77 (Jan., 1972), pp. 706-718.

27. David North and Marion Houstoun, "The Characteristics and Role of Illegal Aliens in the U.S. Labor Market: An Exploratory Study," (Washington, D.C., 1976); NACLA, "Undocumented: A Special Report," pp. 30-31; Select Commission on Immigration and Refugee Policy, "Background Paper: The Economic Impacts of Illegal Migrants," 1980.

28. See, for example, Arthur Corwin and Walter Fogel, "Shadow Labor Force: Mexican Workers in the American Economy," in Arthur Corwin, ed., *Immigrants -- and Immigrants* (Westport, Conn., 1978); Walter Fogel, *Mexican Illegal Alien Workers in the United States* (Los Angeles, 1979); NACLA, "Undocumented: A Special Report"; North and Houstoun, "The Characteristics and Role of Illegal Aliens in the U.S. Labor Market"; Wayne Cornelius, *Mexican Migration to the United States* (Cambridge, Mass., 1978); Maurice Van Arsdol, et.al., "Non-Apprehended and Apprehended Undocumented Residents in the Los Angeles Labor Market," report prepared for Employment and Training Administration of U.S. Department of Labor, 1979; and Barton Smith and Robert Newman, "Depressed Wages Along the U.S.-Mexican Border: An Empirical Analysis," *Economic Inquiry* 15 (Jan., 1977), pp. 51-66.

29. These studies include NACLA, "Undocumented: A Special Report;" Select Commission on Immigration and Refugee Policy, Briefing papers, Feb., 1980; and Sasha G. Lewis, *Slave Trade Today* (Boston, 1979).

able part, of the working class, defined by its special relations to the state as a politically defenseless group."³⁰

30. Robert Bach, "Mexican Immigration and U.S. Immigration Reforms in the 1960's," *Kapitalistate* 7 (1978), p. 75.

III

THE UNDOCUMENTED WORKER IN CALIFORNIA

In his study of the volume of the illegal Mexican migration to the United States, Manuel García y Griego estimated the number of undocumented Mexicans in the United States in January, 1972, at between 234,000 and 436,000, half of whom were in California.³¹ This seems to corroborate the impressionistic guess of the the California Department of Industrial Relations, that approximately 200,000 illegal entrants were working in California in 1971, the overwhelming majority of them from Mexico. The following sections present an overview of the major California industries in which these undocumented aliens constitute a significant component of the labor force.

Agriculture

In the early 1970's, California agriculture grossed over \$5 billion annually.³² Furthermore, it was, and still is, dominated by large conglomerates such as United Fruit, Del Monte, Purex and Tenneco, and by corporate giants such as the Bank of America, the Pacific Gas and Electric Company, and the Wells Fargo Bank. The U.S. Census of Agriculture in the late 1960's reported that 7% of California's farms comprised 75% of the farmland. In the San Joaquin Valley, America's vineyard, eleven corporations control over one million acres.

Abundant evidence suggests that California agribusiness in the early 1970's regularly reaped the benefits of a virtually unlimited supply of commuters³³ and undocumented workers

31. Manuel García y Griego, *El volumen de la migración de mexicanos no documentados a los Estados Unidos: Nuevas hipótesis* (México, D.F., 1980), pp. 442-443.

32. United California Bank, *Forecast: The Outlook for California -- Its Major Industries and Its Areas* (Los Angeles, 1973), p. 54.

33. In 1969, according to the INS, there were 50,202 daily and seasonal commuters from Mexico to the United States. (Commuters are Mexican nationals

from Mexico.³⁴ While a Manpower Administration Survey in 1976 concluded that nationally, only 19% of undocumented workers were employed in agriculture, one study of almost 700 undocumented Mexican workers in California reported that fully 40% had worked as farm laborers.³⁵

Arduous, seasonal, unpredictable, and hazardous, farm labor is "acceptable" only to those who have little choice. Recent illegal aliens -- saddled with both economic desperation and an outlaw status -- are uniquely qualified. As summarized by ex-Secretary of Labor Marshall, "Illegal aliens are preferred...because they tend to work 'scared and hard'."³⁶ Studies on the wage levels of undocumented farm laborers in California are inconclusive.³⁷ Even assuming, however, that most undocumented workers in agriculture receive the legal minimum wage, it is easy to understand the growers' enthusiasm for this work force.

who reside in Mexico but who are allowed by the INS to cross the border to work on the basis of their having acquired a Form I-151, or so-called "green card.") Sheldon Greene (former general counsel of California Rural Legal Assistance, Inc.), in his article "Public Agency Distortion of Congressional Will," has noted that there is no legislative basis for this practice. In fact, according to Greene's interpretation, the practice violates the Congressional intent behind amendments to the 1965 Immigration and Nationality Act (*United States Code*, vol. 8, sec. 1182, a, 14) which expressly restricts such entry to those "green carders" who are returning from a temporary visit abroad.

34. See *Hearings: House Committee on the Judiciary; California Legislature, Assembly, Committee on Labor Relations, Illegal Aliens and Strikebreaker Legislation: Hearings* (Los Angeles, Jan. 7, 1972), Regular Session (hereinafter cited as *Assembly Committee on Labor Relations, Strikebreaker Legislation: Hearings*); idem, *Illegal Aliens and Anti-Strikebreaking Legislation: Hearings* (Sacramento, Feb. 1, 1972), Regular Session (hereinafter cited as *Assembly Committee on Labor Relations, Anti-Strikebreaking Legislation Hearings*); Alejandro Portes, "Labor Functions of Illegal Aliens," *Society* 14 (Sept.-Oct., 1977), pp. 31-37.

35. Southwest Border Regional Commission, "Border Area Development Study: Profile of Undocumented Migration to the California Border Region" (Sacramento, 1978), pp. 24-25.

36. Marshall, "Economic Factors Influencing the International Migration of Workers," p. 169.

37. Cornelius, Chávez, and Castro, "Mexican Immigrants and Southern California"; Select Commission on Immigration and Refugee Policy, *U.S. Immigration Policy and the National Interest*; Stanley Ross, ed., *Views Across the Border*.

The Garment Industry

The California garment industry, concentrated in the Los Angeles and San Francisco-Oakland areas, is another large source of employment for illegal aliens. Danny Perez, chief organizer of the International Ladies' Garment Workers' Union, estimated in 1975 that 90% of the workers in the Los Angeles garment shops were undocumented.³⁸ A recent study by Sheldon Maram concludes that 62% of the total Los Angeles garment industry work force is undocumented.³⁹

The reasons for this preponderance of undocumented workers are not hard to understand. Highly competitive and labor-intensive, the garment industry operates on the contracting system. The garment manufacturer cuts the garments and contracts the work of assembly to small sewing shops where the undocumented workers are concentrated. Because such sewing shops require little capital and few technical skills, they are in chronic over-supply and compete intensely for contracting bids. The system has changed little since Meiklejohn described it in 1938:

His [the contractor's] labor costs are approximately 75% of the price he gets and the difference of a penny a garment on a large order may spell success or failure. Low costs for contractors mean, therefore, low labor costs, and over the years the contractor who could sweat his labor most effectively has been the survivor. However much he may have desired to deal fairly and squarely with labor, the competitive stress has driven him inexorably to a hard bargain.⁴⁰

This "hard bargain" commonly includes violations of wage, hour, and working condition standards. In 1973, the California

38. *Los Angeles Times*, Jan. 30, 1975, Part II, p. 1. The percentage of undocumented workers is probably not so high in the San Francisco area, where the majority of sweatshop workers are Asian immigrants.

39. Sheldon Maram, "Hispanic Workers in the Garment and Restaurant Industries in Los Angeles County," *Working Papers in U.S.-Mexican Studies* 12 (La Jolla, Ca., 1980).

40. Helen Meiklejohn, "Dresses -- The Impact of Fashion on a Business," in Walton Hamilton, ed., *Price and Price Policies* (New York, 1938), p. 347.

Division of Industrial Welfare investigated seventy garment shops in the Los Angeles area and found 536 wage and hour violations, with no establishment completely innocent.⁴¹ A similar investigation of the San Francisco-Oakland area found 601 such violations.⁴² Government officials on a Human Rights Commission in 1969 reported that in these California sweatshops, "wages may range down to 40, 50, or 70 cents an hour...A true record of employees' hours is not being kept..."⁴³ According to one 1980 study, 41% of the undocumented Mexicans working in the Los Angeles garment industry reported receiving less than the legal minimum wage.⁴⁴

Given the structural pressures of the garment contracting system, sweatshop owners have come to depend on the desperation of their employees. Dygert and Shibata, in their excellent article on Chinatown sweatshops in San Francisco, outlined the various components of this desperation, the immigrant worker's consequent dependence on her employer, and thus her unwillingness to report violations. While "many workers are afraid of being deported if they testify or otherwise bring attention to themselves," others "fear that the pressure which wage suits create may force the manufacturer from Chinatown....Finally, the garment worker fears reprisal firing and blacklisting for involvement in any legal action."⁴⁵ The Human Rights Commission in San Francisco discovered evidence of the scope and intensity of these fears at one establishment in which workers had gone for eight months without pay and had not lodged a single complaint.⁴⁶

41. California Division of Industrial Welfare (hereinafter CDIW), press release, Aug. 9, 1973.

42. CDIW, press release, Aug. 9, 1973.

43. Human Rights Commission of San Francisco (hereinafter HRC), minutes of meeting #4 (Oct. 9, 1969), cited in Harold Paul Dygert III and David Shibata, "Chinatown Sweatshops: Wage Law Violations in the Garment Industry," *University of California, Davis Law Review* 8 (1975), p. 66.

44. Maram, "Hispanic Workers in the Garment and Restaurant Industries in Los Angeles County," pp. 31-32.

45. Dygert and Shibata, "Chinatown Sweatshops," pp. 69-70.

46. HRC, minutes of meeting #1 (Dec. 11, 1969), cited in Dygert and Shibata, "Chinatown Sweatshops."

These same fears have made sweatshop owners virtually immune to the unionization of their work force. A representative of the International Ladies' Garment Workers' Union estimated in 1971 that of 55,000 workers in the Los Angeles area, only 6,000 were union members.⁴⁷ The savings in labor costs are substantial, as the union contract in 1971 stipulated a \$2.35 hourly wage, medical care, retirement benefits, and a paid vacation, at a time when most sweatshop employees received no fringe benefits and less than one-third of the union wage.

United California Bank's publication *Forecast: The Apparel Industry in California* estimated that in 1970, the value added by apparel manufacturers in the state was \$561 million.⁴⁸ The California industry employed 74,800 workers in 1971; by 1974, it employed 92,500.⁴⁹ Of course, a relatively small portion of these were employed in the contracting shops. Nonetheless, these sweatshop workers constitute an integral component in the structure of one of the largest industries in the state. It is the vulnerability of these female, often illegal immigrant workers which determines their pivotal place in this competitive, labor-intensive industry. Their vulnerability is comprised of economic desperation and often of illegal status as well.

Restaurants and Hotels-Motels

The California restaurant and hotel-motel industries constitute a third major area of employment for undocumented Mexican workers. Maram's study of the Los Angeles area found that the lowest-paid, unskilled jobs in these industries are disproportionately filled by recent undocumented immigrants. Eighty-six percent of the busboys and dishwashers in this study were undocumented, and 21% of these undocumented workers reported receiving less than the legal minimum wage.⁵⁰

47. *Los Angeles Times*, Sept. 14, 1971, p. 15.

48. United California Bank, *Forecast: The Apparel Industry in California* (Los Angeles, 1971).

49. California Employment Development Department (hereinafter EDD), *California Labor Market Bulletin: Statistical Supplement 3* (Los Angeles, 1974).

50. Maram, "Hispanic Workers in the Garment and Restaurant Industries in Los Angeles County," p. 92. The types of jobs which undocumented workers fill are of course varied. See, for example, Cornelius, Chávez, and Castro, "Mexican Immigrants and Southern California," pp. 25-30, and Alejandro Portes, "Illegal Immigration and the International System: Lessons from Recent

Putting aside for now the question of whether or not undocumented workers flood the labor market, depress wage rates, or displace resident workers, as has frequently been alleged, it can nonetheless be concluded from this brief overview that undocumented workers are pivotal to employers within certain California industries. So profitable is this source of cheap, vulnerable labor that the Chambers of Commerce in American border cities of the Southwest apparently advertised its availability in the early 1970's in an attempt to lure industries to the area.⁵¹

Legal Mexican Immigrants to the United States," *Social Problems* 26 (Apr., 1979), p. 431. The industries mentioned here are notable in that they are among the state's major industries *and* they depend on a substantial portion of undocumented workers for their work force.

51. Jorge Bustamante, "Commodity Migrants: Structural Analysis of Mexican Immigration to the U.S.," in Stanley Ross, ed., *Views Across the Border*, p. 187.

IV

ECONOMIC AND POLITICAL CONTEXT

Recession, Inflation, and Unemployment

The year 1970 bore all the signs of a long-lasting recession in the United States. The real GNP declined for the first time since 1958, corporate profits nose-dived, and industrial production and capacity utilization fell, while unemployment hit a seven-year high. In California, unemployment rates rose steadily from 4.4% in 1969 to 7.4% in 1971, their highest level since 1958, and higher than the average for the nation.

Many scholars have observed that during periods of economic downturn, anti-immigrant rhetoric tends to increase.⁵² Celestino Fernandez has documented a positive correlation between media coverage of the illegal alien and recessionary trends in the American economy over the last decade.⁵³ With the 1970-71 recession, illegal immigration became a major subject of concern both in the media and in statements by public officials. On September 29, 1971, the front headline of the *Wall Street Journal* warned of a "Leaky Border." Subheadings urged that "Illegal Immigrants....Pose Economic Threat....At Home, Idleness and Poverty" and "The 'Wetback's' Impact on the U.S. Economy is Sizeable." The front page of the *Los Angeles Times* of October 22, 1971 carried a similar warning: "Illegal Alien: Growing Peril to U.S. Worker." The *San Francisco Examiner* echoed their messages: "Illegals Pour into the U.S." and "Tide of Illegals Rising....Hurts California Farm Workers."⁵⁴

52. Barbara Koepfel, "The New Sweatshops," *Progressive* 42 (Nov., 1978), pp. 22-26; Michael Omi, "New Wave Dread: Immigration and Intra-Third World Conflict," *Socialist Review* 11 (Nov. - Dec., 1981), pp. 77-87; Portes, "Labor Functions of Illegal Aliens;" Bach, "Mexican Immigration and U.S. Immigration Reforms in the 1960's."

53. Celestino Fernandez, "Undocumented Mexican Migration: Three Perspectives," lecture delivered at San Diego State University, Latin American Lecture Series (Oct. 9, 1981).

54. *San Francisco Examiner*, Aug. 23, 1971 and Aug. 25, 1971.

Senator Walter Mondale, in undisguised repugnance, called illegal Mexican immigration "a hemorrhage along the Mexican border," and added for emphasis that "it's the ugliest phenomenon in the United States today."⁵⁵ California Assemblyman Ray Seeley expressed concern that illegal Mexican immigrants might damage the American economy "beyond repair."⁵⁶

Many have noted that this focus on the immigrant during periods of high unemployment constitutes scapegoating and has the consequence of deflecting attention away from broader, structural causes of the crisis, which exist within the economic system.⁵⁷ Alejandro Portes similarly underscores this function of the "denunciations of illegal immigration by the press and public officials."⁵⁸ Bach has noted that "if the state must confront Mexican immigrant labor as a constitutive part of more generalized working class conditions, rather than the cause of these conditions, then...a strategic weapon of the state in defusing working-class struggles would thus be lost and the political problem would fall heavily into the laps of current state managers."⁵⁹ Whether deliberate or not, this political-ideological use of the immigrant parallels, and occurs simultaneously with, their economic function as described above. The paradox inherent in this situation, i.e. that the immigrants' economic function is paralleled by their political utility as scapegoats, will

55. Quoted in the *Long Beach Press* (Apr. 15, 1970).

56. Ray Seeley, press release, Oct. 21, 1971. Abundant evidence now indicates that 1) the job displacement of resident workers by undocumented workers is much smaller than previously believed, given a two-tiered occupational system in which most undocumented workers fill jobs for which resident workers generally do not apply, and 2) the undocumented workers in fact pay more in taxes than they receive in benefits, and thus constitute not a tax burden as California legislators suggested in 1971, but a source of net revenue. See Koeppl, "The New Sweatshops"; North and Houstoun, "The Characteristics and Role of Illegal Aliens in the U.S. Labor Market"; Cornelius, Chávez, and Castro, "Mexican Immigrants and Southern California"; and James Cockroft, "Mexican Migration, Crisis and the Internationalization of Labor Struggle," *Contemporary Marxism* 5 (July, 1982), in press.

57. David Gordon, quoted in Koeppl, "The New Sweatshops," p. 26.

58. Portes, "Labor Functions of Illegal Aliens," p. 36.

59. Bach, "Mexican Immigration and U.S. Immigration Reforms in the 1960's," p. 77.

form a crucial component in our understanding of California's 1971 legislation.

The United Farm Workers, Strikes, and Boycotts

Significant and rapid change occurred in the farm labor movement between 1965 and 1970. Describing the change that began in 1965 and culminated in the summer and fall of 1970, Cesar Chavez, head of what was then called the United Farm Workers Organizing Committee (UFWOC), AFL-CIO, noted that "before the strike started, we had to work ten days in order to get ten people together for a meeting. Now we can get a thousand people to a meeting in only a few hours....We are now in the midst of the biggest revolution this country has ever known."⁶⁰

Chavez had good reason for his optimism. Launching a strike in 1965 against the large vineyard corporations in the San Joaquin Valley, the UFWOC centered their demands on the signing of collective bargaining contracts. Winning increasing support in the summer of 1967, the strike extended to a national boycott of all California-grown table grapes. It was to become one of the most publicized and well-documented labor struggles in American history. In 1969 farm workers, joined by students, housewives, and other workers, marched from Coachella to the Mexican border at Calexico; they were met by busloads of TV cameramen, Hollywood entertainers, and Senators Walter Mondale, Ralph Yarborough, and Edward Kennedy of the Senate Committee on Migratory Labor. By the end of 1969, California farm workers had won national support for their boycott. Even dockers and transport workers in England and Scandinavia endorsed the boycott by refusing to unload and transport California grapes.

In the early summer of 1969, the *California Farmer* recorded the first significant price drop in grapes, and in June the first group of growers negotiated a contract with the UFWOC.⁶¹ Contract after contract was signed in the spring and summer of 1970 between these largest growers in the United States and what had been two years earlier only a handful of

60. Cesar Chavez, "Introduction," in Mark Day, *Forty Acres: Cesar Chavez and the Farm Workers* (New York, 1971), pp. 9-12.

61. *Ibid.*, p. 91.

determined farm laborers. Underscoring the success of the boycott, the United California Bank lamented, "The grape growers signed up with the UFWOC because they had virtually no alternative."⁶² Television networks carried the news nationally, announcing that "Chavez and the Delano growers sign[ed] one of the most significant collective bargaining contracts in U.S. history."⁶³ By the fall of 1970, the 40,000 member UFWOC had negotiated contracts with the largest grape, citrus, melon, and lettuce growers in the United States.

In five years, Chavez and the farm workers had not only achieved collective bargaining contracts; they had fought and won an ideological war as well. California growers had spent approximately \$7-10 million on counter-publicity campaigns; Governor Reagan had called the farm workers "barbarians" and labeled the strike "scandalous and illegal."⁶⁴ Chavez was jailed for contempt of court for not calling off the lettuce boycott. Nonetheless, the farm workers had won -- they had won the contracts, they had won a measure of support from the American consumer, and they had won the fear of California growers.

62. United California Bank, *Forecast: The Outlook for California -- Its Major Industries and Its Areas* (Los Angeles, 1971), p. 20.

63. Day, *Forty Acres*, p. 49.

64. Jan Young, *The Migrant Workers and Cesar Chavez* (New York, 1974), p. 160.

V

*IDEOLOGY, ECONOMIC STRUCTURE,
AND SYMBOLISM*

In 1970, the nation was in the midst of a long-lasting recession, the symptoms of which had not been seen since 1958, and unemployment levels in California surpassed even the national rate; illegal immigrants, comprising an important source of labor for a number of major California industries, were blamed for the rising unemployment rate; organized labor had achieved one of its most dramatic victories in recent history. In this context A.B. 528 was formulated.

Its sponsors in the Assembly and the press introduced A.B. 528 as a labor law designed to reduce illegal immigration. Arguing that "unemployment and welfare problems are increasing due to the hiring of illegal entrants," Assemblyman Dixon Arnett reasoned that his bill "[would] make thousands of jobs available to the unemployed....A positive vote on A.B. 528 is for the principle that with soaring welfare rolls and costs, coupled with chronic unemployment, the Legislature cannot tolerate...the employment of an illegal work force."⁶⁵

Assemblyman Seeley, a rancher from the Imperial Valley - Riverside district, even more emphatically warned that illegal aliens were "milking the California taxpayers, loading the welfare rolls, and displacing resident workers."⁶⁶ Assemblyman Pete Chacon, a prominent member of the Assembly Committee on Labor Relations, addressed the workers' plight: "...for too many years the illegal entrant has been the tool of unscrupulous employers who capitalize on his willingness to work long hours for minimum wages. The widespread use of illegal entrant workers...deprives unskilled and semi-skilled Mexican-Americans, citizens and aliens alike, black and white workers, of decent employment."⁶⁷

65. Dixon Arnett, "Fact Sheet A.B. 528" (1971), from personal files, which Mr. Arnett generously shared with me (hereinafter cited as Arnett File).

66. Seeley, press release, Oct. 21, 1971, Arnett File.

67. *Hearings: House Committee on the Judiciary* (June 21, 1971), p. 255.

The expressed purpose of A.B. 528, then, was to reduce the unemployment and welfare costs to which illegals purportedly contributed, and to protect resident workers from employers' "unscrupulous" use of illegals. The bill appealed simultaneously to conservative, tax-conscious Republicans and liberal supporters of organized labor. Arnett commented on this "strangest coalition of political bedfellows," as he remembered the bill's early days: "The AFL-CIO was *wildly* confused that it should be introduced by me, a moderate Republican."⁶⁸

The angle from which A.B. 528 approached the problem suggests -- and its legislative history confirms -- that this bill cannot be adequately explained simply as a straightforward effort to eliminate an "evil system."⁶⁹ It will become increasingly clear that this employer sanctions legislation must be viewed within the context of a series of contradictory demands, a context within which the parameters are fixed and the options are few. Two specific contradictions (the nature of which help explain the bipartisan appeal of A.B. 528) lay at the center of this history and provided what Chambliss has called the "engine of social change."⁷⁰ The first had to do with the simultaneous use of illegals as a pivotal component in California's economic structure and as scapegoats for the 1970-71 recessionary indicators. As the immigrant-as-scapegoat ideology ran full force into the reality of the economic structure, California legislators wrestled with a dilemma to which there could be no final solution. A second contradiction, involving the political need to address the grievances of organized California farm labor, compounded the lawmakers' difficulties.

Ideology Versus Structure

As has been noted, undocumented workers were used in California's economy as a major component in industry, while at the same time they were used ideologically, suffering the blame for the ills of the system under which they labored. As unemployment and welfare costs rose with the recession of the early 1970's, illegal aliens were spotlighted in California as the

68. Personal interview with Dixon Arnett (Jan. 28, 1972).

69. Dixon Arnett, press release, Nov. 9, 1971, Arnett File.

70. William Chambliss, "On Lawmaking," *British Journal of Law and Society* 6 (Winter, 1979), p. 169.

prime cause. This immigrant scapegoating ideology tends to shift attention away from the structural sources of economic downturns and insulates the system itself from responsibility. The contradiction inherent in this situation is that once such an ideology has taken hold, it generates demands that something be done to limit the flow of illegal aliens, which in turn would cut off a vital supply of surplus labor.

As John Mollenkopf notes of the interplay between culture and ideology on the one hand and economic interests on the other:

Culture cannot successfully be construed as a mere "superstructure" which mechanically "reflects" the ideas or needs of the capitalist class. Instead, it mediates between interest and action, and can shape the capitalist class action as much as these actions in turn shape mass attitudes.⁷¹

Others have similarly noted the way in which certain ideologies, once promoted by economically dominant groups, may ultimately limit them. For example, Amy Bridges has observed that "the promotion of tax consciousness among citizens may serve as a defense for the state against the financial demands of state workers," but such a tax consciousness eventually may threaten to cripple the state financially.⁷²

In a similar way, while the ideology of immigrant scapegoating did serve to explain the symptoms of the 1970-71 recession, it simultaneously generated demands that something be done about illegal immigration. In other words, while undocumented workers formed an integral part of the economic structure in California, the ideology which linked them to the deepening recession generated political demands that the state act to eliminate this cheap and flexible labor supply. A.B. 528 was in part the outcome of this contradiction between the economic and the ideological -- in this case an ideology which resolved certain legitimization problems, but which now comprised an element of the dilemma to be resolved.

71. John Mollenkopf, "Theories of the State and Power Structure Research," *The Insurgent Sociologist* 5 (Spring, 1975), p. 255.

72. Amy Beth Bridges, "Nicos Poulantzas and the Marxist Theory of the State," *Politics and Society* 4 (Winter, 1974), p. 185.

Organized Labor and Legitimation

At the same time that this economic and ideological use of immigrants precipitated one set of contradictory demands, another contradiction emerged. As farm labor actively and successfully organized, employers' access to undocumented workers and "commuters" became increasingly crucial as a way to attempt to circumvent union demands. Simultaneously, the increased visibility of the California farm workers' movement put pressure on California policy-makers to respond in some way to their grievances. Just as the farm labor movement enhanced the utility for California growers of the recent immigrant, the solidarity and national prominence of that movement made it difficult for the California Legislature to seem unresponsive to the farm worker's grievances.

The workers to whose needs A.B. 528 purportedly responded had never placed the issues of wages, working conditions, and unemployment in an "immigrant-as-enemy" framework. In the two-year period preceding the introduction of the bill, *El Malcriado* (the UFWOC newspaper) frequently commented on the need for specific labor legislation, but never demanded the elimination of illegal immigration. Instead, its writers focused on the problems of occupational safety and health, strikebreaking, and the need to extend the protections of the National Labor Relations Act to farm workers.⁷³ Neither did the California Federation of Labor of the AFL-CIO consider the barring of illegals a legislative priority. At their 8th and 9th Annual Conventions in 1970 and 1972, the California Federation of Labor voted on hundreds of resolutions on issues concerning wages, working conditions, and unemployment. At no time did they mention the issue of undocumented foreign workers.

Although A.B. 528 was introduced and publicized as legislation aimed at improving the working conditions and rectifying the unemployment problems of resident workers, its focus on particular kinds of workers, rather than on the conditions them-

73. *El Malcriado*, Jan. 1, 1970, Apr. 15, 1969, and Sept. 1, 1970. Interestingly enough, the Agricultural Labor Relations Act of 1971, which would have extended collective bargaining rights to farm workers, "went out without a whimper." *Pacific Business* (magazine of the California Chamber of Commerce) 61 (Nov.-Dec., 1971), p. 27.

selves, rechanneled the issues.⁷⁴ Not coincidentally, this redefinition of the problem in terms of the social and legal attributes of undocumented workers and away from the conditions of employment was eminently compatible with the ideology of immigrant scapegoatism.

Although organized labor had applied no direct pressure for a bill of this kind, important sectors of the labor movement ultimately supported it. The California Teamsters were particularly enthusiastic; they proclaimed, "The bill will go a long way toward solving some of the unemployment problems in Southern California."⁷⁵ The California Federation of Labor (AFL-CIO), urging that there should be "serious consideration given to a budget augmentation" for enforcement purposes, similarly applauded A.B. 528,⁷⁶ as did all those representatives of organized labor who testified before the House Subcommittee on Immigration and Naturalization in June, 1971.⁷⁷ The UFWOC, represented by its Vice-President Dolores Huerta, maintained frequent contact with Arnett, and although not enthusiastic over the bill's approach, lent the legislation a measure of support.⁷⁸ At the core of the bill's support network was California Rural Legal Assistance, Inc. (CRLA), a state agency representing primarily rural farm workers and headed by Sheldon Greene.

From its initial formulation and focus, A.B. 528 carried a double symbolic message. Not only did it derive directly from an ideology that had been used to explain high unemployment rates, but the bill itself carried a symbolic message with regard to responsibility. As Edelman has noted with regard to the

74. Delfino Varela, a representative of the Mexican-American Political Association, was one of the first to recognize and protest this rechanneling of the issues. Testifying before the House Subcommittee on Immigration and Naturalization, he observed: "I think that the problem is easily solved by enforcing and by creating laws that would increase minimum wages...by taking farmwork out of its privileged category, extending collective bargaining rights to farmworkers, and by applying minimal wages....I think that the problems are in the economic legislation." *Hearings, House Committee on the Judiciary* (June 21, 1971), p. 218.

75. "Teamstergram" (Nov., 1971), Arnett File.

76. *Hearings: House Committee on the Judiciary* (June 21, 1971), p. 209.

77. *Ibid.*

78. Personal interview with Arnett, Jan. 28, 1982; telephone interview with Huerta, Jan. 5, 1982.

symbolic impact of certain types of government programs,

A reference in an authoritative public statement or in a social security law to "training programs" for the unemployed is a metonymic evocation of a larger structure of beliefs that job training is efficacious in solving the unemployment problem, that workers are unemployed because they lack necessary skills, that jobs are available for those trained to take them.⁷⁹

Similarly,

Campaigns urging car owners to drive safely...focus attention on the driver as the cause of accidents: on his negligent or risky habits and his failure to keep his car in good working order....Whether or not a "drive safely" campaign makes drivers more careful, it creates an assumption about what the problem is and who is responsible.⁸⁰

In exactly the same way, a law which addresses unemployment and working conditions by focusing on the employment of the illegal alien metonymically generates a whole set of political beliefs with regard to responsibility and blame.

Secondly, this bill was symbolic in that at the same time that it ascribed blame, it publicly announced that the California Legislature was sensitive to the concerns of the California worker, in particular the farm worker, who was most often cited as the chief beneficiary of the bill.⁸¹

79. Edelman, *The Symbolic Uses of Politics*, p. 16.

80. *Ibid.*, p. 36.

81. See, for example, *Hearings: House Committee on the Judiciary: Assembly Committee on the Judiciary, Strikebreaker Legislation Hearings*; and *idem, Anti-Strikebreaking Legislation Hearings*.

VI

THE AMENDMENT PROCESS

It is clear from an examination of the amendment process through which A.B. 528 was maneuvered that its sponsors -- far from pursuing a pre-conceived program with which to placate the public -- were laboring for a solution to the various dilemmas which confronted them. Although the statute that emerged was, as we will see, without substance and unenforceable, that outcome does not imply legislative hypocrisy so much as it reflects the nature of the contradictions with which these lawmakers wrestled.

As introduced by Arnett in the Assembly and referred to the Committee on Labor Relations on February 16, 1971, A.B. 528 provided:

that no employer [should] knowingly employ an alien who [was] not entitled to lawful residence in the United States or, directly or through an agent, employ a person who by reasonable inquiry would have been found to be without indicia of lawful United States residence status other than a social security registration card. [It] further prohibit[ed] any person acting as an agent, broker, or employment agency for an employer or employee from providing to an employer for employment any person who by reasonable inquiry would have been found to be without indicia of lawful United States resident status other than a social security registration card. [It] specific[d] penalties for violation of such provisions, and specific[d] that such provisions [would] not be a bar to civil action against the employer or the person acting as an agent, broker, or employment agency based upon violation of such prohibition.⁸²

82. California, *Legislative Bills: A.B. 528*.

A flurry of opposition immediately ensued. The *California Conference of Employers Association (CCEA) Newsletter* of March 18 included an extensive analysis of the bill and concluded, "It should not be the burden of the farmer to make an extensive investigation in regard to the background of persons who seek employment. The CCEA is not aware of any evidence which shows any serious problem in this field which would warrant legislation." On March 22, an official of the CCEA wrote Arnett: "This is to advise you that we have studied your A.B. 528 and find that we will be in opposition to the measure..."⁸³ A representative of the Del Monte Corporation wrote a similar letter, enclosing the CCEA analysis.⁸⁴ The Nurserymen's Exchange urged, "Your consideration of not introducing legislation which would eliminate non-resident labor in the state would be appreciated."⁸⁵ On April 20, 1971, the California Farm Bureau Federation, the largest and most influential organization of California growers, issued a three-page analysis of the bill -- more precisely, a summary of its disadvantages.⁸⁶ Even William Hern, Director of the California Department of Industrial Relations, which would be responsible for the enforcement of the law, communicated to Arnett his opposition to the measure, noting that "a substantial increase in the Department's budget would be required."⁸⁷

The bill was amended for the first time on April 22, 1971 so as to exempt "an employer of an alien who is permitted by the U.S. Immigration Service to perform labor or services temporarily in the U.S."⁸⁸ Referred to the Assembly Committee on Labor Relations, the measure lost the committee vote due to opposition to the clause requiring indicia of legal residence "other than a social security registration card."⁸⁹ This defeat gave the first clear indication of legislators' concern not to

83. CCEA to Arnett, Mar. 22, 1971, Arnett File.

84. Alan Caldwell to Arnett, Apr. 5, 1971, Arnett File.

85. Nurserymen's Exchange to Arnett, Apr. 6, 1971, Arnett File.

86. California Farm Bureau Federation, "Assembly Bill No. 528, Arnett, Employment of Aliens," Apr. 20, 1971, Arnett File.

87. Hern to Arnett, Apr. 1, 1971, Arnett File.

88. California, *Legislative Bills: A.B. 528*, Apr. 22, 1971.

89. Personal interview with Arnett, Jan. 28, 1982.

"harass" employers who relied on undocumented workers.⁹⁰ Most interested parties recognized that, aside from the ease with which they may be counterfeited, social security cards provided no positive proof of legal status, as the Social Security Administration required no information on immigration status in issuing them. Nonetheless, the majority of Committee members objected to this exclusion of social security cards as evidence of employees' legal status. In his testimony before the House Subcommittee on Immigration and Naturalization, Arnett explained: "Because of my concern that social security cards are so freely issued, easily forged, and too convenient, therefore, to be used as bogus indication of lawful entry, I excluded social security cards as lawful indicia of residence. But, the employers' associations wanted to make it easy for themselves; they opposed the measure with that exclusion, and I lost my bill in committee by one vote. Reluctantly, I agreed to amend my measure to remove the exclusion of social security cards."⁹¹

Less than three weeks after the striking on May 19 of the social security card clause, the bill was amended for the third time, this time to specify what would constitute "reasonable inquiry" by the employer. Section 3 was added as follows:

- (3) A person shall be deemed to have made a reasonable inquiry and shall not be liable under the provisions of this section if he shall have requested, obtained from such person, and inspected for purposes of verifying that such person is legally within the United States, any of the following: (i) Birth certificate. (ii) Document issued by the United States Immigration and Naturalization Service. (iii) Sworn statement of lawful United States residence. (iv) Registration certificate issued by the Selective Service System. (v) Social security registration card.

90. As Arnett explained to the House Subcommittee on Immigration and Naturalization, "There are those who say that employer participation and responsibility constitutes, to some degree, harassment of the employer simply because he would be required to insure that those whom he is hiring are legally residents. They say that such harassment increases the cost of doing business and puts our employers at a competitive disadvantage." *Hearings: House Committee on the Judiciary* (June 21, 1971), p. 152.

91. *Ibid.*

(vi) Any other evidence of lawful United States residence status.⁹²

Arnett called the sworn statement and social security card inclusions "amendments that I had to swallow"; the "any other evidence" of legal immigration status was "a catch-all." "Right now, it's an open end. It is anybody's ball game," he lamented, referring to the ease with which employers could immunize themselves against prosecution under these amendments.⁹³ In a letter to Senator George Moscone, who had authored S.B. 531 (a similar bill introduced in the Senate in 1970 and 1971), Sheldon Greene of the CRLA referred to this amendment as the "hotel owners' amendment," claiming that California hotel owners had written and promoted it. The letter explained that the "hotel owners' bill was too open-ended and that it had the danger of institutionalizing wetbacks rather than eliminating them. Nevertheless, Arnett was eager to go forward with the bill. Reasoning that with the broad amendment it might still reach the major violators, he put the bill through the committee with the amendment..."⁹⁴ In spite of this open-endedness, employers continued to oppose the measure. The California Agricultural Producers Labor Committee, representing 12,000 citrus and avocado growers, and the larger National Council of Agricultural Employers voiced their opposition to any such legislation before the House Subcommittee on Immigration and Naturalization.⁹⁵

Thurman Arnold, in describing the origins of the Sherman Anti-Trust Laws, observed that the ideal of competition and an anti-bigness ideology ran head on into the economic pressures toward monopolization. As a result,

in order to reconcile the ideal with the practical necessity, it became necessary to develop a procedure which constantly attacked bigness on rational/legal and economic grounds, and at the same time never really interfered with

92. California, *Legislative Bills: A.B. 528*, June 7, 1971.

93. *Hearings: House Committee on the Judiciary* (June 21, 1971), pp. 158-159.

94. Greene to Moscone, June 3, 1971, Arnett File.

95. *Hearings: House Committee on the Judiciary*, (June 21, 1971), p. 248.

combination....Granted an insistent demand, which opposes a deeply felt ideal, and a conflict of this kind between two institutions, [the result] is as inevitable as the reaction of a man sitting on a hot stove....In various ways the actual enforcement of the anti-trust laws was completely emasculated...because such a process is inevitable when an ideal meets in head-on collision with a practical need.⁹⁶

The final amendments to A.B. 528 on June 30, 1971, resembled "the reaction of a man sitting on a hot stove." In several crucial respects, they radically altered the bill, simultaneously making it more palatable to those who were hesitant to "harass" employers and propelling it deeper into forthcoming legal troubles. The amendments eliminated the clause which read "who by reasonable inquiry would have been found to be without indicia of lawful residence"; the clause including "agent, broker, or employment agency"; any reference to those with temporary INS work permits who are not necessarily lawful residents; and the list of what would constitute reasonable inquiry. More importantly, to the phrase "No employer shall knowingly employ an alien who is not entitled to lawful residence in the United States, it *added* the qualification "if such employment would have an adverse effect on lawful resident workers."⁹⁷

These changes had two major ramifications. By deleting the provision requiring reasonable inquiry and by striking the list of what would constitute sufficient evidence of inquiry, the amendments eliminated any specific mandate that employers seek evidence of the legal status of their employees. The bill in this form specified only that employers must not *know* that their employees are illegal, not that they need ask. As the *California Farm Bureau Monthly* put it, "An employer should not have much difficulty in protecting himself under the new law....There is nothing in the new law that requires the employer to interrogate a man about his background. Thus, in most cases, an employer will honestly have no knowledge about the origin of the man he hires."⁹⁸

96. Arnold, *The Folklore of Capitalism*, pp. 207-213.

97. California, *Legislative Bills: A.B. 528*, June 30, 1971.

98. *California Farm Bureau Monthly* 52 (Dec., 1971).

Secondly, the addition of the "adverse effect" qualification significantly restricted the scope of the bill. It no longer applied to the employment of illegals *per se*; now it made such employment illegal only under certain conditions. What those conditions *were* was left ambiguous. Asked whether there had been objections to this ambiguity, Arnett replied, "The amendment process was the process by which ambiguity was arrived at." In fact, he said that this was "the most significant amendment," and that "the ambiguity of the adverse effect clause was what passed the law."⁹⁹ The bill in this form was passed in the Assembly by a vote of 55 to 8.¹⁰⁰ In September, 1971, the Senate Industrial Relations Committee approved it without dissent, and one month later the Senate passed it by a vote of 22 to 11.¹⁰¹

The process by which legislators maneuvered this bill into an acceptable form via the amendment process constituted an important stage in its evolution towards symbolic law. The process was fired by a struggle between economic constraints and ideological-political demands which had been generated from the immigrant-as-scapegoat explanation of the ongoing economic downturn. The explanation of unemployment, high welfare costs, and poor working conditions in terms of the employment of illegals indicates the nature of the economic and ideological constraints under which the legislators operated. The amendment process made the statute steadily more ambiguous, less enforceable, more easily circumvented, and hence more acceptable, thus reconfirming the rigidity of those constraints. While the ideological impetus for a statute of this kind was strong, the economic reality of the immigrant's role in California industries mandated that the outcome consist of little more than a symbol, a monument to that ideology.

It was occasionally suggested that the bill would probably not have a major impact. The District Director of the INS in California agreed with the *Los Angeles Times* that "the proposed law does have some loopholes" and added, "my enthusiasm for the measure is restrained because of its wording."¹⁰² Hern of

99. Personal interview with Arnett, Jan. 28, 1982.

100. California Legislature, Assembly, *Journal of the Assembly* (July 29, 1971), p. 7760.

101. California Legislature, Senate, *Journal of the Senate* (Oct. 18, 1971), p. 7732.

102. *Los Angeles Times*, Oct. 22, 1971, p. 22.

the Department of Industrial Relations similarly criticized the "vagueness" of the wording.¹⁰³ Salvador Alvarez, representing the Spanish-speaking Division in the Western Regional Office of the United States Catholic Conference, testified before the Assembly Committee on Labor Relations that "That bill is so weak that...it is really not the kind of bill that even Dixon Arnett wanted to see out. I think he himself in his testimony here clearly indicated that the fines were not stiff enough....that the employers really were not going to be put under the gun."¹⁰⁴ Marilyn Shinderman, Senior Legislative Counsel for the Department of Industrial Relations, was more specific: "Frankly, I think it would be better to eliminate the [adverse effect] provision entirely since it seems strange that the State of California would condone the use of illegal aliens where their being in the country is in violation of federal law."¹⁰⁵ Sheldon Greene called it a "somewhat bland measure."¹⁰⁶ Assemblyman William Ketchum, a staunch opponent of the bill, said simply, "This bill is totally unenforceable."¹⁰⁷

It is clear that the essentially symbolic nature of the law allowed it to pass the legislature. Sheldon Greene later noted,

The problem that was experienced in the legislature this year is a good illustration [of the influence of economic interests]....It reflects how much pressure on public officials is being applied by powerful agricultural interests. Because the backbone of the lobbying against Mr. Arnett's bill and Senator Moscone's bill [S.B. 531] was the Farm Bureau Federation [*sic*]. It was on behalf of the 10% of California farmers who control 70% of the land. Farmers like Del Monte, one of the largest packing operations and growing operations in the U.S., who own and control land, and who, according to

103. Hern to Ronald Youngren, Sept. 10, 1971, Arnett File.

104. Assembly Committee on Labor Relations, *Anti-Strikebreaking Legislation Hearings*, p. 4.

105. Shinderman, memorandum to Albert Reyff, Assistant Labor Commissioner of California, Feb. 28, 1971, Arnett File.

106. Quoted in *Los Angeles Times*, May 25, 1972.

107. Quoted in *Los Banos Enterprise*, Dec. 20, 1981.

investigations that have been undertaken also hire illegal entrants [*sic*]."108

Republican Senator Howard Way explained to the Central California Farmers Association that the law was "innocuous," and pointing out the potential loopholes told the farmers they had "nothing to fear."109

By the end of the amendment process, even the toughest foes of A.B. 528 were neutral on the bill. Subsequent to the final round of amendments on June 30, Arnett received notifications of neutrality from the Nurserymen's Exchange, the California Conference of Employers Association, the Irrigation District Association of California, the Del Monte Corporation, the California Farm Bureau Federation, and the Hotel and Motel Association. In fact, as Arnett wrote to Governor Reagan, "All prior opposition to Assembly Bill 528 is now regarded as 'neutral'."110

The *California Farm Bureau Monthly* explained the shift: "...due to Farm Bureau efforts, the unreasonable provisions contained in the initial proposals did not come out in the final legislation adopted." More precisely,

the Moscone bill was strongly opposed by two organizations -- the California Farm Bureau Federation and the Restaurant and Hotel Owners Associations. This opposition resulted in the bill not being passed [*sic*] by the Senate. In the Assembly, Arnett was carrying A.B. 528. His original bill was similar to the Moscone approach, providing that employers could not knowingly hire illegal aliens and that employers must make a "reasonable inquiry" about the status of applicants. Employers who did not check closely enough would have been liable to fines. Again, the California Farm Bureau Federation and the Restaurant and Hotel Owners Association opposed the measure. The Assembly Labor Relations Committee, to which the bill was assigned, held several hearings on it at which Farm Bureau

108. *Hearings: House Committee on the Judiciary* (June 21, 1971), p. 173.

109. Quoted in the *Fresno Bee*, Nov. 20, 1971.

110. Arnett to Governor Reagan, Oct. 26, 1971, Arnett File.

[sic] presented evidence opposing various provisions. As a result, the bill was amended considerably by the Committee before it was passed out. Even then, the bill faced severe challenges on the floor of the Assembly which caused it to be sent back to the Labor Relations Committee for further amendments before the Assembly adopted it.¹¹¹

The *Farm Employers Newsletter* was more concise: "The worst provisions of the bill were deleted in the legislative process."¹¹²

The outcome of this "legislative process" -- a symbolic law with little potential impact -- was not simply a victory for powerful interest groups. Rather, both proponents and foes of the bill proclaimed victory. In fact, both elements of the contradiction temporarily "won": the ideological impetus resulted in a purely ideological victory, while the economic reality remained intact.

111. *California Farm Bureau Monthly* 52 (Dec., 1971).

112. *Farm Employers Newsletter* 2 (Nov. 12, 1971), p. 1.

VII

ENFORCEMENT PROVISIONS

A.B. 528 (Section 2805 of the California Labor Code, hereinafter referred to as Section 2805) was to be enforced by the Division of Labor Law Enforcement in the California Department of Industrial Relations. In spite of the repeated advice of the Director of that department that its enforcement would require additional funds, the bill included no provision for appropriations.¹¹³ In January, 1972, George Milias, the California Labor Commissioner, testified before the Assembly Committee on Labor Relations that enforcement of the Arnett Law would require more staffing (he estimated fifty people) and more money.¹¹⁴ In the 1972 Budget, the Division instead lost funding for 86 positions.¹¹⁵ Its staff of field investigators was reduced from 20 to 6, and the nine counties of Central California -- the heart of California agriculture -- were rendered the exclusive province of a single investigator.¹¹⁶ Referred to as "The Lone Ranger," he was responsible for the enforcement of not only the Arnett measure, but also laws regulating child labor and farm labor contractors.¹¹⁷

113. Greene to Reyff, May 27, 1970, and Hern to Arnett, Apr. 1, 1971, Arnett File. The proponents of the bill had understood that to pass a statute with appropriations provisions attached would require a 2/3 majority, while one with no such provisions required only a simple majority. Arnett, when asked how he reconciled the need for enforcement appropriations with the political advantage obtained by requiring only a simple majority vote, smiled: "I told Hern that he would not really need any more personnel, no new pencils, no paper..." He added, looking at the interviewer, "Look at my face...I say this with a smile, and I said it [to Hern] with a smile..." (personal interview with Arnett, Jan. 28, 1982).

114. Assembly Committee on Labor Relations, *Strikebreaker Legislation Hearings*, pp. 16-17.

115. California, Legislative Analyst, *Final Summary of Legislative Action on Budget Bill* (Sacramento, 1972), p. 79.

116. *Fresno Bee*, Nov. 16, 1971.

117. *Fresno Bee*, Nov. 29, 1971.

So blatant were its enforcement problems that two legislators, arguing *against* efforts to repeal the law in 1972, pointed out that critics of the law "assumed a high degree of compliance with the Labor Code by the businesses involved, and/or tough enforcement by the Department of the Labor Code [Division of Labor Law Enforcement]. We doubt," they went on, "whether either of these is a safe assumption."¹¹⁸ The evolution of the legislation toward symbolic law was now complete.

Edelman has observed of regulatory laws that "the laws may be repealed in effect by administrative policy, budgetary starvation, or other little publicized means; but the laws themselves must stand because they satisfy interests that are strong indeed."¹¹⁹ Ultimately, Section 2805 of the California Labor Code would not stand even as a symbol.

118. Pete Chacon and Alex Garcia, memorandum to Democratic Assemblymen, Feb. 16, 1972, Arnett File. In spite of these crippling weaknesses, legislation to clarify the bill by amending it (A.B. 2363, introduced May 10, 1972) and a bill to repeal the measure altogether (A.B. 315, introduced Feb. 3, 1972) both met with staunch opposition and were allowed to die in committee.

119. Edelman, *The Symbolic Uses of Politics*, p. 37.

VIII

COURT CASES

In order to account for the eventual de facto repeal and "disappearance" of the California employer sanctions law, we must analyze two more developments. The first involved a series of court cases that culminated at the U.S. Supreme Court; the second concerns increasingly negative reactions to the law on the part of organized labor and the Mexican-American community in Southern California.

In 1970, a year before the Arnett measure was passed, two California farm workers who had been laid off by the Kay-Dix Ranch sought an injunction prohibiting their former employers from employing illegal aliens. Represented by the CRLA, the plaintiffs claimed that the Kay-Dix Ranch had systematically violated the state's unfair competition statute (California Civil Code, Section 3369) by preferring undocumented workers to legal residents. The trial court dismissed the case. In July, 1970, the Sacramento Court of Appeals affirmed that judgment on the paradoxical grounds that the state should not intervene since the federal government was not effectively enforcing immigration laws, exercising instead "self-imposed impotence."¹²⁰

On November 23, 1971, two weeks after the Governor had signed A.B. 528 into law, three industrial employers filed a request for an injunction to permanently restrain enforcement of the employer sanctions law on constitutional grounds. In the case, known as *Dolores Canning Company, Inc. v. Howard* (California Labor Commissioner), Judge Charles Church of the Superior Court for the County of Los Angeles granted the injunction. He concluded that the law was unconstitutional because "it encroache[d] upon the exclusive right of the Congress to regulate immigration," and "fail[ed] to provide that degree of certainty required to meet the constitutional guaran-

120. California Court of Appeals, Sacramento, 9 Cal. App. 3rd 588, "88 Cal. Rptr. 443" (1970).

tee of due process."¹²¹ In what became an historic decision, Church maintained that the reference to "an alien who is not entitled to lawful residence in the U.S." encroached upon and conflicted with federal law, since the INS may certify for employment temporary workers who may not be entitled to permanent residence in the United States. In addition, Church argued that the adverse effect clause was "vague and uncertain" -- in fact, "so patently inadequate that it requires no further comment by this court." Although the case rested on the conflict and ambiguities of these two terms -- "lawful residence" and "adverse effect" -- the judge refused to consider the last-minute definition of these terms in the California Administrative Code, which would have alleviated the difficulties.¹²² In July, 1974, the California Appellate Court upheld the judgment of unconstitutionality.¹²³ Citing the *Diaz and Rios v. Kay-Dix Ranch* precedent, the court added to Church's ruling that the whole field of immigration law had been preempted by Congress.

The only case ever to be heard on behalf of workers under this law is that of *DeCanas and Canas v. Bica*, in which two farmworkers, Leonor Alberti DeCanas and Miguel Canas, represented by the CRLA, sought an injunction and damages against farm labor contractors who allegedly made a practice of hiring undocumented workers. The Santa Barbara Superior Court dismissed the case with no written opinion, and in July, 1974, the California Court of Appeals reaffirmed the unconstitutionality of the Arnett law.¹²⁴ The decision rested on the

121. California Superior Court, Los Angeles County, *Memorandum Opinion* #016-928, filed Mar. 21, 1972.

122. Ibid. Early in 1972, the California Department of Industrial Relations added precise definitions of "adverse effect" and "lawful residence" to the Administrative Code. According to these definitions, employment of illegal aliens was considered to have an adverse effect on resident workers if it involved "(a) employment in any category of employment not enumerated on Schedule A in Labor Department Regulations 29 CFR Section 60.7 comprised of a listing of high labor-demand occupations such as medicine, nursing, pharmacy, etc.; or (b) payment...of less than the federal or state minimum wage, whichever is higher." "Lawful residence" was defined to include those certified by the INS to work in the U.S., even though they may not be entitled to permanent residence (*California Administrative Code*, sec. 16209, title 8, pt. 1, ch. 8, art. 1).

123. California Court of Appeals, Los Angeles, 40 Cal. App. 3rd 676-688, "115 Cal Rptr. 435" (1974).

124. Idem, 40 Cal. App. 3rd 976-981, "115 Cal. Rptr. 444" (1974).

argument that Section 2805 of the California Labor Code conflicted with "national law and policy"; in particular, Judge Lynn D. Compton argued that Congress had, with the Texas Proviso (see page 12), explicitly and deliberately made it *not* illegal to employ undocumented workers. The California Supreme Court denied a hearing.

Two points should be noted here. First, the California courts consistently reaffirmed the unconstitutionality of the law on the grounds that it constituted a violation of the federal preemption of immigration law and that it was ambiguous. Secondly, these very aspects of the statute were central to the successful enactment of the bill in the first place. The couching of labor law in terms that resembled immigration law, it will be remembered, both reflected the anti-alien ideological context from which it emerged and was a crucial component of the bill's acceptability. This resemblance to immigration law, in other words, reflected the role and location of the bill in a particular dialectical process, and manifested its essentially symbolic character. However, this resemblance to immigration law also resulted in the legal problems relating to congressional preemption.

Furthermore, as Arnett pointed out, "The ambiguity...was what passed the law" (see p. 37). Again, the very aspect of the law that permitted the legislators to juggle the economic-ideological contradictions which they confronted became a central component of later conflicts. The location of the bill in a dialectical process, and the constraints thereby limiting it, generated these additional dilemmas -- this time of a legal nature.

IX

THE DISAPPEARANCE

At the end of 1974, the CRLA counsel who had represented DeCanas and Canas requested a hearing by the U.S. Supreme Court. As Arnett recalls, "Nobody expected the Supreme Court to hear it."¹²⁵ In early 1976, the Supreme Court not only heard the case, but reversed the California courts' findings. In a unanimous decision, the court determined that "a) standing alone, the fact that aliens are the subject of a state statute does not render it a regulation of immigration. Even if such local regulation has some purely speculative and indirect impact on immigration, it does not thereby become a constitutionally proscribed regulation of immigration....[and] b)....section 2805 is clearly within a State's police power to regulate the employment relationship so as to protect workers within the state..."¹²⁶

Contrary to the California courts' conclusions, the Supreme Court pointed out that there is evidence that Congress *intended* for states to legislate on the subject of employment of illegal aliens. Citing the 1974 amendments to the Farm Labor Contractor Registration Act, which prohibits farm labor contractors from hiring illegal aliens, the Supreme Court noted: "Of particular significance to our inquiry is the...provision [in the Farm Labor Contractor Registration Act] that compliance with this chapter shall not excuse anyone from compliance with *appropriate State law and regulation* [emphasis added]."¹²⁷ This passage distinctly implies that Congress did not intend to prohibit states from legislating with regard to alien employment. In concluding, the Supreme Court remanded the case to the California courts "for further proceedings not inconsistent with this

125. Personal interview with Arnett, Jan. 28, 1972.

126. U.S., Supreme Court, *DeCanas and Canas v. Bica*, #74-882. Supreme Court Decisions, *U.S. Law Week* 44 (1976) pp. 4235-39.

127. *Ibid.*, p. 4238.

opinion"¹²⁸ to determine if, in its application, Section 2805 would conflict with any federal laws.

Six years later, when asked about enforcement procedures for Section 2805, Gaylord Grove of the San Diego Office of Labor Law Enforcement responded confidently, "Oh, that law isn't enforced. It's been declared unconstitutional."¹²⁹ The California Attorney General's office, the CRLA, and the Los Angeles Legal Aid Office gave the same confident response. In spite of the Supreme Court's mandate, the law has been declared dead -- and buried alive.

In 1977, attempts to revive the legislation were ignored. Letters from Arnett urged Governor Jerry Brown and Attorney General Evell Younger to enforce the law and to bring it before the California courts "to seek the required judicial determination," as the Supreme Court had mandated.¹³⁰ The letters went unanswered, no further cases have been initiated, and the minimal enforcement apparatus has been dismantled.

So complete has been the "repeal" of the California employer sanctions legislation that in at least one case, a federal court directed an employer to violate the statute. In *National Labor Relations Board v. Apollo Tire Co., Inc.*, the National Labor Relations Board (NLRB) had brought a case on behalf of undocumented workers in California who had been denied overtime pay, had complained, and were subsequently laid off. The NLRB ordered the workers reinstated, and the decision was upheld by the U.S. Court of Appeals, in spite of the company's argument that to do so would force it to violate Section 2805 of the California Labor Code.¹³¹

The point here is not just that Section 2805 is not enforced; a defining characteristic of all symbolic law is that it is

128. Ibid., p. 4239.

129. Telephone interview, Jan. 5, 1982. Confronted with the fact that the U.S. Supreme Court had reversed the decision and remanded the case six years earlier, Grove expressed surprise: "Oh...that's interesting. Let me know what you find out..."

130. Arnett to Brown and Younger, Mar. 18, 1977. Because the original plaintiffs no longer wished to pursue the case, further court determinations would require that the Labor Commissioner and the Division of Labor Law Enforcement initiate a new case.

131. U.S. Court of Appeals, Ninth Circuit, *Federal Reporter* 604 (2nd series, 1979), p. 1180.

not effectively enforced. Rather, this "disappearance" of Section 2805 suggests a dismantling of even the symbolic content of the legislation. While one characteristic of symbolic law is that it does not significantly alter the conditions to which it is addressed, another equally important trait is that an image of activity is maintained. In fact the smokescreen of token enforcement activity, behind which objective conditions are left unaltered, is the *sine qua non* of symbolic law, the central purpose of which is to transmit a message of concern. In the case of Section 2805, however, even this symbolic component has been revoked. Section 2805, remanded by the Supreme Court, "disappeared" on its way back from Washington.

A number of clues point to the reason for this disappearance. As Arnett recalls, "When it was remanded, everybody ran for cover." In particular, "the Attorney General, at the time considering running for Lieutenant Governor, needed this issue like he needed a hole in the head."¹³² Jack Otero, Santa Barbara County Deputy District Attorney, blamed "the politically charged atmosphere" for what he called court "inaction" on the law.¹³³ One counsel with the Los Angeles Legal Aid office, after calling the legislation "reactionary" and recommending that the CRLA in Sacramento might be a source of information about its "disappearance," added that "they may be a little sensitive about it....The idea is 'Let sleeping dogs lie.'"¹³⁴ Expressing a similar sensitivity, Huerta of the UFW wanted the UFW's connection with the law clearly understood: "That wasn't *our* bill."¹³⁵

It would appear that, by the time of the Supreme Court decision in 1976, the symbolic functions of the employer sanctions legislation had backfired. As this study has shown, the law had carried several symbolic messages. In the first place, it symbolized the penetration of an ideology that placed responsibility for high unemployment and welfare costs on illegal aliens; furthermore, it was not only a product of that ideology but symbolically reinforced it with its implicit message of blame. Secondly, it was simultaneously used as a means to rechannel

132. Telephone interview with Arnett, Jan. 5, 1982.

133. Quoted in the *San Diego Evening Tribune*, Feb. 24, 1977.

134. Telephone interview, Jan. 12, 1982.

135. Telephone interview with Huerta, Jan. 5, 1982.

and "respond" to the demands of increasingly visible groups within organized labor.

As California's unemployment rate climbed to 9.2% in 1976,¹³⁶ the "immigrant-as-villain" ideology regained momentum among policy-makers and in the media.¹³⁷ What had changed was the political utility of the law as a symbol of government concern for the worker. Immediately following the passage of the bill and before it was actually put into effect, a boomerang effect split organized labor on the issue and triggered protests throughout Southern California's Mexican-American community. According to extensive testimony during Assembly hearings in 1971 and early 1972, as a result of the law undocumented workers of senior employment status were laid off to be replaced by other illegal aliens at reduced wages. Others were "taxed" by their employers, according to witnesses: "The employers are asking people [for] \$200-\$500 in case they get arrested....I have eighteen such cases in my office."¹³⁸ Some employers apparently used the law as an opportunity to reduce wages, ostensibly to cover the cost of the "risk" involved. Thousands were simply fired.¹³⁹ A number of spokesmen for the Mexican-American community protested. According to one, "This is punitive against a group of people,"¹⁴⁰ while another affirmed, "It's a blanket thrown over a myriad of other problems....It's easy for you to write a law based on all these myths about the brown horde coming in armies over the border."¹⁴¹ Marches and protests throughout

136. California, EDD, Division of Employment Data and Research, "Employment and Unemployment," in *California Statistical Abstract* (Sacramento, 1980), p. 18.

137. See, for example, California, Attorney General, "State Attorney General's Task Force on Illegal Immigration Report," mimeographed, 1977, Arnett File; *San Francisco Chronicle*, Dec. 1, 1975; *Los Angeles Times*, Mar. 7, 1977; *San Mateo Times*, Apr. 21, 1977; *Los Angeles Herald-Tribune*, Feb. 25, 1977; *San Diego Evening Tribune*, Feb. 24, 1977; and *Redwood City Tribune*, Feb. 23, 1977.

138. Reverend Roberto Walker, testimony in Assembly Committee on Labor Relations, *Anti-Strikebreaking Legislation Hearings*, p. 28.

139. Assembly Committee on Labor Relations, *Strikebreaker Legislation Hearings*; idem, *Anti-Strikebreaking Legislation Hearings*; *People's World*, Dec. 11, 1971.

140. Abe Tapia, testimony in Assembly Committee on Labor Relations, *Anti-Strikebreaking Legislation Hearings*, p. 55.

141. Mark Day, testimony in *ibid.*, p. 29.

Southern California called attention to the damaging effects of the bill on Mexican-American workers. In one incident, Arnett was barricaded into his Sacramento office by 100 angry demonstrators. Risking an understatement, Greene of the CRLA admitted, "There is some Chicano ambivalence [to the bill]."¹⁴²

Not surprisingly this law, which on the surface appeared to be aimed at the employer, in practice put the onus on the employee -- both the undocumented and legally resident Mexican-Americans. Given the distribution of power in these employment relationships, any legislation which focuses on the kind of worker hired will disproportionately and adversely affect workers themselves.

In addition to these protests by Mexican-Americans, the UFW and the AFL-CIO soon came to see the kind-of-worker approach of the 1971 law as a mistake. Chavez and the UFW had begun to see the approach as divisive, and they increasingly embraced an organizing philosophy which disregarded workers' immigration status. UFW opposition to the employer sanctions law was further solidified in 1975 with the enactment of the California Agricultural Relations Act (*California Labor Code*, Section 1140-66), which extended organizing rights to farm workers and allowed undocumented workers to vote in union elections. By the time the DeCanas and Canas *versus* Bica case was remanded in 1976, the Mexican-American community in Southern California, the Chicano Caucus in the California Legislature, and important sectors of organized labor stood staunchly against employer sanctions.¹⁴³

Declared "discriminatory" and "divisive" by those very groups to whom it had been directed as a legislative symbol of concern, the ill-fated legislation was hidden away as an embarrassment. The law, the sole potential of which lay in the arena of political utility, had become a political liability. California employer sanctions, fought by important economic interests, in practice unenforceable, and, now, politically embarrassing, disappeared into legal oblivion.

142. *Sacramento Bee*, Feb. 2, 1972.

143. *Los Angeles Times*, Feb. 23, 1977 and Apr. 30, 1977; *San Diego Union*, Aug. 5, 1977; for the reversal of the UFW on the issue, see Martha V. Gottron, "Illegal Alien Curbs: House Action Stalled," *Congressional Quarterly: Weekly Report* 34 (Mar. 20, 1976), pp. 637-641.

X

CONCLUSION

It has been noted of the role of myths that "the purpose of myth is to provide a logical model capable of overcoming a contradiction (an impossible achievement if, as it happens, the contradiction is real)."¹⁴⁴ This is a study, not of myth, but of the dialectics of lawmaking and the place of symbolism in that dialectic. The role of symbolic law is to reconcile or "resolve" an inherent contradiction, and it shares this reconciliatory purpose with Lévi-Strauss' "myth." Yet, like myth, symbolic law can never effectively resolve the real contradictions to which it responds. On the contrary, it generates a new series of dilemmas, as the solution to one contradiction becomes a central component of the next.

The California employer sanctions law of 1971 emerged within an economic, ideological, and political context which not only defined the parameters within which it was formulated but also provided the components of the dialectical process that ultimately relegated it to oblivion. On the one hand, illegal aliens played a pivotal role in several of California's major industries; on the other, they were used ideologically to explain periodic downturns in the American economy. In the 1970-71 recession, as in every major recession since the late 1800's, policy-makers and the media frequently explained rising unemployment and welfare costs as the consequence of an influx of immigrants -- in this case "illegal." In spite of Department of Labor and other studies which have concluded that undocumented workers pay more in taxes than they receive in benefits and probably do not often displace American workers, the blame-the-immigrant ideology has for years served an important smokescreen function. Whether deliberately contrived or not, this ideology shifts attention away from the possible structural sources of recession and deteriorating working conditions and places the responsibility instead on a particular category of worker. This ideology, which comprises a partial "solution" to the system's legitimation problems, thus becomes a component

144. Claude Lévi-Strauss, *Structural Anthropology* (New York, 1963), p. 229.

of the dilemma to be resolved. Once such an ideology has gathered momentum, it generates political demands that something be done about the "problem." A.B. 528 was in large part an attempt to resolve this contradiction between the economic and the ideological.

At the same time, another contradiction was becoming apparent. As labor in the agricultural sector was achieving dramatic and visible organizing successes, employers' access to undocumented workers became increasingly crucial to the maintenance of profits. Simultaneously, the visibility and militance which pushed California farm workers into the national spotlight made it ever more difficult for the California legislature to ignore the farm workers' plight. Rechannelling issues of working conditions, strikebreaking, and unemployment into a focus on particular kinds of workers, supporters of A.B. 528 publicized the bill as protective labor legislation aimed at redressing the grievances of resident workers. This redefinition of the issues was not only eminently compatible with the prevalent immigrant-as-enemy ideology, but was a crucial first step in "resolving" the two related sets of contradictions.

The legislation as initially formulated attempted to respond to contradictory economic, ideological, and political demands. It was symbolic in that it transmitted a message which reproduced a structure of beliefs concerning the immigrant's role in the economic crisis; and it served symbolically as a public announcement of the California Legislature's sensitivity to the concerns of the farm worker.

After weaving its way through the amendment process, the bill in its final form was comprised exclusively of these symbolic components. In the process of making the statute acceptable to employers and their representatives, the Legislature deleted those provisions which might have made it an effective threat to employers. From the clash between economic reality, ideology, and political demands evolved a statute -- albeit a short-lived one -- which, while retaining its ideological and political elements, interfered not at all with the economic reality. These legislators did not pursue a preconceived path to innocuous law. Rather, after pressing the bill through the filter of economic reality, they were left with nothing but the ideological-political residue.

Finally, while the kind-of-worker focus of the law and its ambiguity reflected its location and role in a dialectical process and determined its acceptability, these same aspects of the legislation ultimately ensnared it in additional difficulties. In

ensuing litigation, the courts questioned the validity of a state statute which came precariously close to immigration law -- an exclusively federal domain -- and they criticized the ambiguity of its terms. Furthermore, the negative repercussions which the law unleashed on workers and which were its sole impact were not lost on major sectors of the labor movement and the Mexican-American community in Southern California, who launched protests and demonstrations against the measure. The symbol of concern had become a symbol of repression as its only remaining function, its political utility, backfired. On remand from the Supreme Court in 1976, the DeCanas Case -- and the Arnett Law -- were "dead on arrival."

Future Research

This study traces the history of California's employer sanctions legislation. In so doing, it attempts to refine and clarify the concept of symbolic law as one component in the dialectical process of lawmaking. In some ways, this case study is ideal for the purpose: it allows us to identify and differentiate the distinct ways in which the term "symbolic" has been used in previous studies; it helps clarify the issues of causality and intentionality and refutes a simplistic, voluntaristic interpretation of symbolic law; and it illustrates the inadequacies of symbolic law as a final "solution" in the dialectic.

Legislation may be symbolic in that it may be the product of, and symbolically reproduce, a given structure of belief with regard to the source of the problem under consideration. Furthermore, the term "symbolic law" has been used to refer to legislation which, while placating given interest groups, does not effectively alter objective conditions. It is, in other words, solely symbolic, its only impact the subjective one of political reassurance. A.B. 528 in its final form -- ambiguous, unenforceable, and fraught with loopholes -- exemplifies such legislation.

With regard to the issue of causality, there may be a few notable instances of the premeditated, intentional creation of symbolic law for the purpose of placating an aroused public. However, law is much more frequently *rendered* symbolic through the clash of contradictory forces in the political arena. Again, A.B. 528, weaving its way through an amendment process that simultaneously emasculated it and made it politically acceptable, is exemplary.

Previous analyses have examined the role of symbolic law as an ideal solution to particular kinds of contradictions. In contrast, this discussion of symbolic law illustrates its role in an ongoing dialectical process, in which the symbolic solution neither entirely resolves the contradiction nor always functions as successful symbolism. In this case, for example, the very features of A.B. 528 which made it a potentially successful solution to inherent economic-ideological-political contradictions, comprised the basis of further dilemmas in the form of legal and political difficulties. In other words, this study elaborates on the nature of symbolic law, not as a way to transcend prevailing contradictions, but rather as one stage in a continuous series of dilemmas and attempted resolutions.

This analysis provides a theoretical and historical framework for two kinds of future research. Additional case studies may further clarify the concept of symbolic law, elaborating both on the precise political mechanisms that render law purely symbolic, and on the specific conditions under which symbolic law may be repealed either formally or by administrative fiat. Secondly, at a time when contemporary immigration policy proposals at the federal level include an employer sanctions component, this study provides a dialectical-structural framework from which to view such proposals and may generate a series of hypotheses or specific questions to be asked with regard to their economic, ideological, and political origins.

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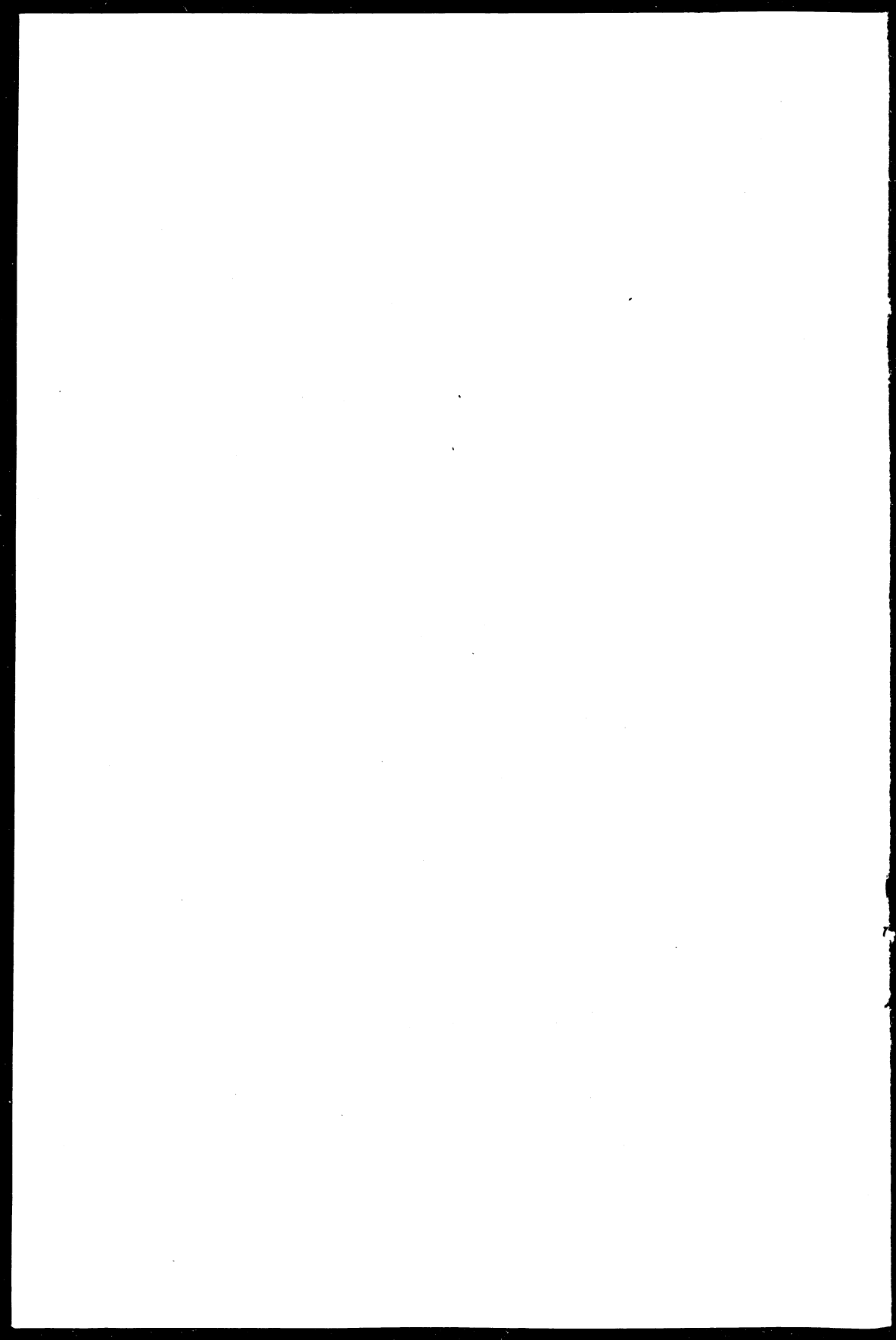
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