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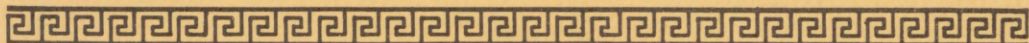
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AMERICA'S NEW IMMIGRATION LAW: ORIGINS, RATIONALES, AND POTENTIAL CONSEQUENCES

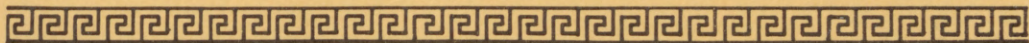
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SIMPSON-MAZZOLI VS. THE REALITIES OF MEXICAN IMMIGRATION

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The essays of this anthology have placed in perspective many of the crucial issues in the current debate surrounding proposed revisions of America's immigration policy. This essay will review some of the observations and insights contained in this volume; it will offer some new perspectives, both from Mexico and other countries which send large numbers of migrants to the United States, and from those nations which have experimented with immigration laws similar to the one currently under consideration in the U.S. Congress; and it will present some conclusions that we might draw from this collection of expert opinion and analysis.

As Charles Keely and Lawrence Fuchs have indicated, we have had for at least the last ten years what most members of the U.S. public see as a major "illegal alien" problem. Like so many of the social and economic problems that our country faces today, this one is largely self-inflicted. A series of changes in U.S. immigration law and policy in the period since 1964 have made migration to the United States much more difficult for certain kinds of people. These changes apply particularly to those who have low incomes, who are neither white-collar nor highly skilled, and who lack immediate relatives (spouses, adult children, or parents) who are U.S. citizens.

If one has the added misfortune of coming from a country like Mexico, which has a huge demand for U.S. immigrant visas but a quota of only 20,000 visas per year, legal admission to the United States is even more difficult. With the unilateral termination of the Bracero Program in 1964, the U.S. basically eliminated a legal entry option for those Mexicans who did not want to become permanent residents of the U.S. — those who wanted only a sojourn

of relatively high-paying employment in this country. In its place, we have had the H-2 program which Terry McCoy has described — a system that has all the defects of the former *bracero* contract-labor program but has worked much less efficiently and has been virtually unused by employers who rely upon Mexican labor.

Unfortunately, while we have narrowed the legal-entry option for most would-be migrants from Mexico, the U.S. employer demand for their labor has not decreased appreciably, and the supply of surplus (or at least underemployed) labor in Mexico has increased significantly during the last two decades. Market forces, working within a more restrictive framework for legal immigration, have produced a large, clandestine flow of migrant workers from Mexico and other Caribbean-basin countries to the United States. This outcome was inevitable, given the powerful economic and demographic forces at work in both the sending countries and in the U.S., and given the failure of the U.S. political and legislative process to provide an adequate legal-entry option for enough people from those countries most likely to export low-skilled labor to the United States.

In Western Europe, because of the guest-worker programs created in those countries during the 1960s, the illegal component of immigration has been relatively small. Only about 10% of the total number of foreign workers who entered the EEC countries, according to the best available estimates, did so illegally. The European guest-worker programs did have their share of problems, but most of their difficulties (e.g., failure to set a limit on the length of stay) arose as a result of actions by the governments of the host countries and their citizens. The difficulties aside, the European countries avoided through this mechanism an "illegal alien problem" on anything approaching the U.S. scale.

As Aristide Zolberg's theoretical analysis suggests, the experience of most of the world's industrialized countries during the last two decades has shown that the governments of labor-importing countries often lack the capacity to influence most aspects of international labor migration (e.g., the volume, the destinations, and the permanence or temporariness of the migration); but they can determine, to a large degree, whether the migration will take predominantly legal or predominantly illegal forms. The level of such labor migration is usually determined not

by governments, but by immigrants and their employers. The most that governments can do is either to facilitate or (to a lesser extent) to impede these worker movements — not to stop them. So the real policy issue for the United States in this area lies in attempting to influence the size of the illegal component of migration flows.

Over its 100-year history, Mexican migration to the U.S. has developed into a highly institutionalized phenomenon which thrives on thousands of kinship networks with "anchors" in both countries. Certain firms and sectors of the U.S. economy have come to rely almost totally on Mexican or other foreign workers. Given the huge wage differential between Mexico and the U.S., recently widened by peso devaluations and skyrocketing inflation in Mexico, the U.S. at this time is not facing a decision about whether to import foreign labor or not. This country made that decision, at least with respect to Mexican labor, four or five generations ago.

The hard reality is that neither the U.S. nor the governments of the main source countries now have the capacity to shut off or sharply reduce the flow simply by policy decision or legislative fiat. The United States cannot build a wall around its economy, hoping to cut off new entries of foreign workers, so that it can concentrate on legalizing those who are already here as permanent settlers. Short of a full-scale militarization of the border, no policy will prevent a continued influx into this country of Mexican migrants who cannot meet the stringent criteria for admission as permanent legal residents, usually because they lack immediate relatives who are U.S. citizens. These people will come legally if they have a legal-entry option, illegally if they do not. So the issue of reducing the size of the illegal component in this flow remains. Attaining that objective is extremely difficult at a time when the U.S. is mired in an economic depression, and when two out of three Americans, according to a 1980 Gallup poll, believe that the U.S. should halt *all* immigration until the unemployment rate falls below five percent — which many economists doubt will happen again in this century.

The Simpson-Mazzoli Approach

Despite these unfavorable conditions — some would say because of them — the U.S. Congress is now plunging forward with its first major effort to overhaul our immigration laws and policy since 1952. The proposal under consideration, the Simpson-Mazzoli Bill, has received strong bipartisan support from members of Congress and the general endorsement of the Reagan administration.

The Simpson-Mazzoli Bill is a sprawling, complex piece of legislation, but its main objective is to reduce illegal immigration. To accomplish that end, it relies basically on a single remedy: employer sanctions. This provision of the bill would impose a graduated series of penalties — beginning with warnings and civil fines of \$1,000 per illegal immigrant employed, ending with a \$3,000 criminal fine per alien or one year in jail, or both — on employers who “knowingly hire” people who have not been authorized to work in the United States.

As indicated by Manuel García y Griego, the basic idea is simple: to curtail the flow of new foreign entrants, we must eliminate job opportunities for them in this country, and the way to do that is to penalize their employers. According to its proponents, this approach will also induce illegal aliens who do not qualify for amnesty (legalization of their status) to go back to their home countries by making them unemployable. The logic of this approach is persuasive enough to have won the editorial endorsement of nearly every major newspaper in the United States. In practice, however, the employer sanctions approach turns out to be a quack remedy.

Virtually all members of Congress, as well as editorial writers and columnists, have chosen to ignore the fact, pointed out by Kitty Calavita and Carl Schwarz, that this approach to immigration control has already been tried in a dozen U.S. jurisdictions since 1971 and in at least 20 other countries around the world. The results have been practically identical in each case: employer penalties have not reduced the hiring of illegal immigrants and often have created additional problems. The eleven states in this country that have adopted this type of legislation include California and most of the other states that have large concentrations of undocumented immigrants. As Schwarz has reminded us, not a single person has ever been

convicted under California's employer sanctions law since its passage in 1971, and nationwide, state-level employer sanctions laws have resulted in only five convictions: one in Kansas, where a convicted employer got a \$250 fine; two in Virginia, where the convicted employers received fines of \$80 and \$55, plus a 30-day suspended jail sentence; and two in Montana against the same corporation, which decided not to contest the \$3,200 fine because the legal expenses of an appeal would have exceeded the amount of the penalty.

Similarly, the major General Accounting Office report cited by several of the contributors to this volume concluded that in all of the 20 countries surveyed by the GAO, "laws penalizing employers of illegal aliens were not an effective deterrent to . . . illegal employment Employers either were able to evade responsibility for illegal employment or, once apprehended, were penalized too little to deter such acts."¹ Clearly, judges do not consider the employment of undocumented workers a serious crime, and they are reluctant to impose penalties. And the more severe the penalty, the less likely it is to be applied, especially criminal fines and jail sentences.

Proponents of the federal-level employer sanctions embodied in the Simpson-Mazzoli Bill dismiss the abysmal record of prosecution and conviction under existing state laws as evidence only of the need to deal with the illegal immigration problem on a national basis. They point out that the fines prescribed by several of these state laws were not heavy enough to deter most employers and argue that the worldwide failure of employer sanctions laws to deter the employment of illegal immigrants should not diminish our confidence in the remedy. The proponents of the Simpson-Mazzoli Bill have adopted this line of argumentation because, despite the failures noted above, none of the countries with such laws on the books have abandoned them. Instead, as the GAO report revealed, several countries recently have put more teeth into their laws and urged judges to take the penalties more seriously.

1. U.S. General Accounting Office, *Information on the Enforcement of Laws Regarding Employment of Aliens in Selected Countries* (August 31, 1982).

The GAO reported that France and Germany had enacted new laws to increase the effectiveness of existing employer sanctions. These laws, which went into effect on January 1, 1982, increased the maximum fine for violators from \$20,000 to \$40,000 in West Germany and from \$450 to \$3,000 in France. Germany's new law also eliminated a loophole that enabled an employer to evade responsibility by "leasing" workers from subcontractors and allowed various law-enforcement agencies to pool information on suspected employers of illegal immigrants. The report also noted that Canada has made the enforcement of employer sanctions "a higher priority" for the Royal Canadian Mounted Police and that authorities in Hong Kong planned to introduce a new computerized system of worker identification that would hinder counterfeiting of credentials. The GAO could not assess the effects of these changes, since its field investigation ended just as the changes were being implemented, and it has done no follow-up studies.

Senator Alan Simpson, the principal author of the employer sanctions legislation pending in Congress, requested the original GAO report on this subject but has not requested any updated information. His staff believes that it is "too soon to tell" about the possible consequences of the recent changes in laws and enforcement strategies in the countries previously studied by the GAO. They note that authorities in Hong Kong reportedly told Attorney General William French Smith that their new identification system designed to prevent illegal immigrants from obtaining employment was "working well." Yet no independent source has confirmed that Hong Kong's worker-identification system has solved its illegal alien "problem," which has been less than monumental in the recent past (an estimated 5,500 illegal aliens were in Hong Kong in 1982). In fact, there is still not a single documented case of successfully using employer sanctions laws to reduce the population of illegal immigrants *anywhere in the world*.

None of the recent changes in laws and enforcement strategies mentioned in the GAO report and trumpeted by defenders of Simpson-Mazzoli can be expected to have a dramatic impact on the situations depicted in that report. If a \$20,000 maximum fine failed to deter West German employers from hiring Turkish "illegals," why should a \$40,000 fine be more effective? As the GAO reported,

German employers "generally appeal administrative fines that they consider too great. Such appeals have generally met with success, as judges have not considered the hiring of illegal aliens a serious violation. Because judges have been lenient, . . . employers accept the fines as a business cost."

Essentially the same picture emerges from all of the other countries studied by the GAO. Employers have devised an endless variety of schemes — and Barbara Strickland's essay includes some examples of them — to evade legal responsibility under employer sanctions laws; and judges are reluctant to impose more than token penalties on these "white-collar criminals," who are usually respected small businessmen in their communities. The few unlucky employers who have been caught and convicted have successfully appealed their cases, securing much reduced fines or avoiding penalties altogether. Thus, police and prosecutors are understandably unenthusiastic about investing much time and effort in taking such cases to court.

But if civil fines are not an effective deterrent, what about criminal penalties? In Germany, for example, employers can be tried as criminals and imprisoned for up to three years for employing illegal immigrants under deplorable working conditions. But when queried by the GAO's investigators, German officials did not know of any employer who had even been imprisoned as a result of such a violation. "Legal proceedings against employers are few because employers and illegal employees cooperate and refuse to testify against one another," the GAO reported. In Canada, court backlogs and excessive costs involved in keeping the illegal immigrant (the prime witness) in Canada for the employer's trial have caused officials to forego prosecuting many employers. In the first nine months of 1981, only 27 employers were prosecuted under Canada's employer sanctions law. Will judges in the United States be any less reluctant to jail employer's convicted of hiring unauthorized immigrants? The more severe the penalty, the less likely that judges will apply it in such cases.

Defenders of the Simpson-Mazzoli Bill argue that authorities can maximize the law's effectiveness by encouraging voluntary compliance, which they can allegedly bring about by targeting enforcement efforts on firms known to be "major employers" of illegal aliens. But

recent data from several studies of Mexican "illegals" show that the vast majority of them work in small businesses with fewer than 50 employees. Another enforcement strategy under discussion would emphasize highly publicized test cases of prosecution in large cities. However, anti-immigrant hysteria among the general public would probably have to be considerably more intense than at present to guarantee a high level of public tolerance for such "show trials."

Employer Sanctions — Who Pays?

At the state level, this kind of legislation has had an adverse impact on immigrant workers themselves, rather than on their employers, and such laws have sometimes worked to the detriment of Hispanic-origin U.S. citizens, an issue explored in the present volume by Alejandro Portes and Frank del Olmo. The undocumented worker is already vulnerable to exploitation or blackmail by unscrupulous employers because of his or her illegal entry into the United States. The Simpson-Mazzoli Bill will exacerbate this problem by giving employers a motive to compensate for a perceived risk of being fined under an employer sanctions law. As Kitty Calavita's research has revealed, such laws cause deterioration in wages and working conditions for the undocumented and increase the worker's fear of arrest and deportation. Like workplace raids conducted by the Immigration and Naturalization Service, employer sanctions legislation does not reduce the employment of undocumented workers. Such actions only drive the hiring underground. They intensify the immigrants' fear and increase the employer's power to manipulate this fear through threats to call immigration authorities when workers complain about wages or working conditions.

Despite what some employers may tell their illegal-immigrant employees, the employer's actual risk of detection and prosecution under the Simpson-Mazzoli Bill will be quite small. When President Jimmy Carter's Attorney General, Griffin Bell, was asked how the Justice Department expected to enforce the Carter administration's proposed employer sanctions law, he replied: "We are traveling on the assumption the Americans are law-abiding people Once they realize it is now the law that you should not employ an undocumented alien, they will follow the

law." The Reagan administration and most of Congress now ask us to make a similar leap of faith. But in all probability, voluntary compliance will not be widespread enough to produce any noticeable reduction in the hiring of undocumented immigrants.

Moreover, Congress is not likely to allocate enough resources to enforce the employer sanctions provision of the Simpson-Mazzoli legislation; and much of its appropriation would in any case be spent on the printing and distribution of affidavit forms that employers would have to fill out for each new employee hired. With these forms, an employer would attest that he or she had inspected certain common identifiers such as Social Security cards, driver's licenses, and birth certificates. As in Canada, the illegal immigrant applying for a job can easily circumvent this system by purchasing bogus identification cards or borrowing legal cards from friends or relatives. But again, Simpson-Mazzoli would victimize the undocumented by making the use of fraudulent documents to obtain employment a felony. Eventually, a new counterfeit-resistant worker-identification card and a nationwide computerized verification system for such cards might reduce these problems. But the Reagan administration itself has estimated the cost of such a card and verification system at between \$850 million and \$2 billion.

In light of all this evidence, the confidence that most members of Congress and media commentators still place in the employer sanctions concept is nothing less than astonishing. Their faith represents a classic example of the "don't let the facts get in the way" approach to public policymaking. The authors of the pending legislation, Senator Simpson and Congressman Mazzoli, have at least practiced the virtue of candor. They have described their bill as a "leap into the dark" but stand by the proposal because, they allege, previous employer sanctions laws have failed to reduce the hiring of illegal immigrants due to a lack of proper enforcement. They argue that with enough money, personnel, and a strong will to enforce, employer penalties can be an effective means of immigration control. Unfortunately, there is still not a shred of evidence to support this claim.

A Politically Necessary Experiment

Nothing that the U.S. government has done in the last 100 years has appreciably reduced the demand for Mexican and other foreign labor in our economy. Given this track record, this country may today be facing the alternatives of immigration regulated by market forces or militarization of the border, coupled with the kinds of internal controls on population movement that some European countries have but that most Americans would find intolerable. This type of governmental "cure" seems, on the basis of existing evidence, worse than the perceived "illness."

Nonetheless, the U.S. is apparently condemned to having a great national experiment with employer sanctions. Those segments of the public who are even marginally concerned about immigration are demanding that their elected officials "do something" about illegal aliens, refugees, and other foreigners whose presence here they associate with a wide variety of economic and social problems. But the American people are likely to be disappointed by the results of their new immigration law. It seems destined to join the century-long procession of more-or-less symbolic laws in this field — laws which serve a political function but have no major impact on the underlying demand for foreign labor.

The United States today faces the challenge of somehow bringing its immigration laws into closer correspondence with the enduring economic and demographic realities that generate international labor migration. The Simpson-Mazzoli proposal fails that crucial test. It and all other legislation that ignores the realities of illegal immigration from Mexico and other countries can only breed more illegality, as would-be immigrants and their employers scramble to adapt to another change in the rules of the game.

Several of the contributors to this volume have pointed towards a more realistic (though politically unattractive) approach to the issue. That approach, I submit, would begin by recognizing that Americans simply do not want some kinds of jobs in some industries in some parts of the country. U.S.-born workers will not likely fill these jobs, regardless of the incentives that the government may try to create or the penalties that it may seek to impose on

employers who hire without regard to immigration status. With that realization, we could then get on with the business of improving the status of the foreign workers who do want to fill those jobs. Legalization of their status in the U.S. (under a plan which will minimize the procedural difficulties raised by Thomas Heller and Robert Olson), more vigorous enforcement of minimum wage and fair labor standards laws, and noninterference by immigration authorities in efforts to unionize undocumented workers would all serve to increase the bargaining power of foreign workers in the U.S. labor market. We might thus reduce the immigrants' vulnerability to exploitation as well as their tendency to depress wages and working conditions for some U.S. citizens employed in the same firms. This approach may not affect the level of immigration, but it would substantially reduce the adverse effects of the immigrants' presence in our labor markets.

