INDIANA INTERNATIONAL & COMPARATIVE LAW REVIEW

Volume 15 2005 Number 2

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HIGHER EDUCATION FOR UNDOCUMENTED STUDENTS: THE CASE FOR OPEN ADMISSION AND IN-STATE TUITION RATES FOR STUDENTS WITHOUT LAWFUL IMMIGRATION STATUS

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I. INTRODUCTION

Many undocumented immigrant students in the United States have overcome tremendous barriers in order to excel in academics during their high school education. Some students have been denied access to postsecondary education because of their lack of immigration status. Other undocumented immigrant students have applied to institutions of higher education and have been accepted based on individual merit and academic success, only to find they cannot afford non-resident tuition rates.

This article examines common misconceptions regarding higher education for undocumented immigrant students. First, this article will demonstrate that enrollment and admission of undocumented immigrant students to institutions of higher education is permitted under federal law. Second, it will be shown that offering in-state tuition to students based on a uniformly applied residency requirement or other criteria (rather than residency in a state) is permitted under federal law. Finally, the most common arguments and concerns regarding higher education for undocumented students will be addressed in showing that sound public policy supports open admission and in-state tuition rates for students without lawful immigration status.

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II. UNDOCUMENTED STUDENTS IN THE UNITED STATES

A. *Undocumented Families*

Immigrant families come to the United States for many reasons, such as to search for work, to join family, or to flee dangerous situations in their home countries. Many immigrant families come to the United States without proper immigration documentation or permission, and are commonly referred to as "undocumented" immigrants.[3]

Although no scientifically reliable data has been developed, the U.S. Immigration and Naturalization Service (INS, now a division of the U.S. Department of Homeland Security called U.S. Citizenship and Immigration Services, USCIS) estimated that the total population of undocumented immigrants residing in the United States in January of 2000 was 7 million.[4] This number doubled from 3.5 million in January 1990.[5] An estimated 33% of the 7 million unauthorized immigrants in January 2000 were persons who initially entered the United States with some type of authorization, and remained beyond the expiration of their authorized stay (often termed "overstay").[6] The Urban Institute's estimate of the undocumented immigrant population residing in the United States in the year 2000 was higher at 8.5 million.[7] Other sources say this number now exceeds 10 million.[8]

B. *Undocumented Students*

Immigrant adults often come to the United States with children. The Urban Institute estimates that there are about 1.4 million undocumented children under the age of eighteen residing in the United States, and 1.1 million of them are of school-age (five to nineteen years old).[9] Immigrant children now

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3. These aliens are often times referred to as "illegal." The term "undocumented" is preferred since, in many cases, the alien's status remains undetermined. *See* Michael R. Curran, *Flickering Lamp Beside the Golden Door: Immigration, the Constitution, & Undocumented Aliens in the 1990's*, 30 CASE W. RES. J. INT'L L. 58 (1998).

4. U.S. IMMIGRATION AND NATURALIZATION SERVICE, OFFICE OF POLICY AND PLANNING, ESTIMATES OF THE UNAUTHORIZED IMMIGRANT POPULATION RESIDING IN THE UNITED STATES: 1990 TO 2000 (2003), at 1, http://uscis.gov/graphics/shared/aboutus/statistics/Illegals.htm (last visited Mar. 5, 2005).

5. *Id.* at 6.

6. *Id.*

7. MICHAEL FIX & JEFFREY S. PASSEL, THE URBAN INSTITUTE, U.S. IMMIGRATION—TRENDS & IMPLICATIONS FOR SCHOOLS, PRESENTATION PACKET FOR NATIONAL ASSOCIATION FOR BILINGUAL EDUCATION NO CHILD LEFT BEHIND IMPLEMENTATION INSTITUTE 9 (2003) (on file with authors).

8. J. GREGORY ROBINSON, U.S. CENSUS BUREAU, ESCAP II: DEMOGRAPHIC ANALYSIS RESULTS (2001), *at* http://www.census.gov/dmd/www/pdf/Report1.PDF (last visited Feb. 14, 2005).

9. FIX & PASSEL, *supra* note 7.

account for one in five of all children, and one in four low-income children.[10] In the year 2000, the Urban Institute estimated that between 50,000 to 65,000 undocumented immigrants graduate from U.S. high schools every year.[11] These approximately 1.1 million undocumented school-age children in the United States translate into 2% of the total student population.[12]

These school-age children are guaranteed access to primary and secondary education by the 1982 U.S. Supreme Court decision *Plyler v. Doe*[13] and by individual state compulsory school attendance laws.[14] Under *Plyler*, a state cannot deny a free public education from kindergarten through twelfth grade to undocumented immigrant students who are residing in a school district.[15] The Court relied on the Equal Protection Clause of the Fourteenth Amendment and decided that a Texas statute, which authorized schools to deny a free public education to undocumented immigrant children, was unconstitutional.[16] The Court stated that denial of a free public education to these children was unjustified because there was no empirical evidence presented to demonstrate that the policy would further some substantial state interest.[17] Thus, no child should be denied enrollment in public primary or secondary schools because of immigration status.

The holding in *Plyler* does not provide the same protection for these children once they reach college age.[18] Therefore, a college education seems out of reach for most undocumented immigrant students. First, it is often difficult to be admitted or enrolled in a college or university if an individual is an undocumented immigrant.[19] Second, although many of these students have lived in the United States for the majority of their lives, and have graduated from U.S. high schools, many do not qualify for in-state tuition at public

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10. *Id.* at 7.

11. NATIONAL IMMIGRATION LAW CENTER, THE DREAM ACT (2004), *at* http://www.nilc.org/immlawpolicy/DREAM/DREAM_Basic_Info_11-04.pdf (last visited Feb. 14, 2005); *see also* JEFFREY S. PASSEL & MICHAEL FIX, THE URBAN INSTITUTE, DEMOGRAPHIC INFORMATION RELATING TO H.R. 1918: THE STUDENT ADJUSTMENT ACT (2001) (on file with authors).

12. FIX & PASSEL, *supra* note 7, at 16.

13. Plyler v. Doe, 457 U.S. 202 (1982).

14. For example, see the compulsory school attendance law in Indiana, found in Sections 20-8.1-3-2 through 20-8.1-37 of the Indiana Code. This law is applicable to any student age seven through eighteen who resides in Indiana, without regard to legal domicile. IND. CODE §§ 20-8.1-3-2, and 17. Administrators of any educational, benevolent, correctional or training institution are responsible for ensuring that any person within their jurisdiction, and of compulsory school attendance age, be enrolled in school. *Id.* § 20-8.1-3-36.

15. *Plyler*, 457 U.S. at 229-30.

16. *Id.* at 230.

17. *Id.*

18. *Id.*

19. In the authors' experiences, the application process can discourage students from applying because most applications ask for immigration status. In addition, some people have the misconception that these students are ineligible for admission. *See also infra* Part III.

colleges and universities.[20] Out-of-state tuition fees can be more than three times the in-state tuition rate.[21] In addition, undocumented immigrant students do not qualify for government sponsored financial aid until they have attained legal residency in the United States.[22]

Given the complexities and narrow categories of eligibility within the law of immigration, many of these students are not currently eligible to become lawful permanent residents (LPR). For those who are eligible for an immigration benefit, the process of obtaining lawful immigration status may take several years.[23] Because they lack immigration status, these students are often times missing an opportunity to further their education beyond high school.

C. *Economic Impact*

Immigrants contribute significantly to the economy of the United States. The majority of undocumented immigrants work and pay taxes in their state of residence, and contribute significantly to the nation's economy.[24] In 1997, the United States acquired a $50 billion surplus from taxes paid by immigrants.[25] Approximately 43% of immigrants make less than $7.50 an hour in their jobs,[26] and only 26% of immigrants have health insurance through their jobs.[27] Data show that immigrant families use public benefits at lower rates than U.S. citizen

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20. This depends on whether the student is considered a resident or nonresident of the state. The term "residence" is defined by each state or state institution and will vary. *See* NATIONAL IMMIGRATION LAW CENTER, GUIDE TO IMMIGRANT ELIGIBILITY FOR FEDERAL PROGRAMS 2002 156 (4th ed. 2002) [hereinafter NILC Guide]; *see also infra* Part IV.

21. The average tuition for in-state undergraduates in Indiana in 2002-03 was $4,644 for a public 4-year institution, and $2,393 for a public 2-year institution. Indiana Commission for Higher Education, Indiana Higher Education Facts, *at* http://www.che.state.in.us/overview/facts.shtml (last visited Feb. 14, 2005). The current annual tuition at Indiana University for in-state residents is $6,777 and for out-of-state is $18,590. INDIANA CAREER AND POSTSECONDARY ADVANCEMENT CENTER (ICPAC), INDIANA UNIVERSITY-BLOOMINGTON COLLEGE SNAPSHOT, *at* http://www.learnmoreindiana.org/education/college_profiles/151351.xml (last updated Feb. 8, 2005).

22. *See* Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA), 8 U.S.C. §§ 1611, 1641 (2004); *see also* NILC Guide, *supra* note 20. Discussion of this issue is beyond the scope of this article.

23. Some visa preference categories can have waiting times as long as twelve years. *See* U.S. DEPARTMENT OF STATE, BUREAU OF CONSULAR AFFAIRS, VISA BULLETIN (2004), *at* http://travel.state.gov/visa/frvi_bulletincurrent.html (last visited Feb. 7, 2005).

24. FIX & PASSEL, *supra* note 7, at 16.

25. NATIONAL ACADEMY OF SCIENCES, THE NEW AMERICANS: ECONOMIC, DEMOGRAPHIC, AND FISCAL EFFECTS OF IMMIGRATION (1997).

26. MICHAEL FIX, URBAN INSTITUTE TABULATION OF CURRENT POPULATION SURVEY (2001).

27. LEIGHTON KU & SHANNON BLANEY, CENTER ON BUDGET AND POLICY PRIORITIES, HEALTH COVERAGE FOR LEGAL IMMIGRANT CHILDREN: NEW CENSUS DATA HIGHLIGHT IMPORTANCE OF RESTORING MEDICAID AND SCHIP COVERAGE 7-12 (2000), *available at* http://www.cbpp.org/10-4-00health.pdf.

families, and that availability of public benefits is rarely a factor in migrating to the United States.[28]

Unfortunately, many immigrant students drop out of high school, often because there is little hope for them to go on to college. In 2000, only 59.8% of noncitizens had completed high school.[29] While high school completion rates for the entire U.S. population have increased, completion rates for Hispanics/Latinos continue to rank below that of other populations.[30] More than two in five Hispanics living in the United States have not graduated from high school.[31] In 2002, the dropout rate for immigrant Latinos over sixteen attending U.S. secondary schools was estimated at 44.2%.[32] Compared to other groups, fewer Hispanic students complete a four-year college degree after graduating from high school.[33]

According to the U.S. Census Bureau, the foreign-born population accounted for 12.4% of the civilian labor force in 2000.[34] Not surprisingly, in 1999 the average earnings for individuals with a bachelor's degree in the United States was higher ($45,678) than those who had completed a high school education only ($24,572).[35] Studies have shown that immigrants who speak English or improve their English skills have higher earnings.[36] In a recent study, the Comptroller of Texas estimated that more than five dollars is generated into the economy for every dollar invested in immigrant students'

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28. *See* MICHAEL FIX & JEFFREY PASSEL, THE URBAN INSTITUTE, THE SCOPE AND IMPACT OF WELFARE REFORM'S IMMIGRANT PROVISIONS (2002), *available at* http://www.urban.org/UploadedPDF/410412_discussion02-03.pdf.

29. U.S. CENSUS BUREAU, PROFILE OF THE FOREIGN-BORN POPULATION IN THE UNITED STATES: 2000 36 (2001), *available at* http://www.census.gov/prod/2002pubs/p23-206.pdf (last visited Mar. 5, 2005) [hereinafter PROFILE].

30. *See* NATIONAL CENTER FOR EDUCATION STATISTICS, CURRENT POPULATION SURVEYS, 1972-2000 (2000).

31. MELISSA THERRIEN & ROBERTO R. RAMIREZ, U.S. CENSUS BUREAU, THE HISPANIC POPULATION IN THE UNITED STATES: POPULATION CHARACTERISTICS MARCH 2000 4 (2001), *available at* http://www.census.gov/population/socdemo/hispanic/p20-535/p20-535.pdf (last visited Mar. 5, 2005).

32. James A. Ferg-Cadima, Mexican American Legal Defense and Educational Fund (MALDEF), Student Adjustment Act of 2003 (H.R. 1684): FAQs, *at* http://www.maldef.org (on file with authors).

33. DEBORAH A. SANTIAGO & SARITA BROWN, PEW HISPANIC CENTER, FEDERAL POLICY AND LATINOS IN HIGHER EDUCATION 3 (JUNE 2004), http://www.pewhispanic.org/site/docs/pdf/Higher ED06.23.04final_afl.pdf (last visited Feb. 16, 2005).

34. PROFILE, *supra* note 29, at 5.

35. ERIC C. NEWBURGER & ANDREA E. CURRY, U.S. CENSUS BUREAU, EDUCATIONAL ATTAINMENT IN THE UNITED STATES (UPDATE): POPULATION CHARACTERISTICS MARCH 2000 1 (2000).

36. NATIONAL IMMIGRATION LAW CENTER, IMMIGRANTS, EMPLOYMENT & PUBLIC BENEFITS, *at* http://www.nilc.org/immspbs/research/pbimmfacts_0704.pdf (last visited Feb. 7, 2005).

education.[37] The long term cost implications of *not* educating these students in Texas was estimated at $319 billion in 1998 because of an anticipated increase in the need for social services and loss of public revenue.[38] By allowing undocumented students to go to college and obtain legal immigration status in the United States, some of these costs can be offset.

III. ENROLLMENT OR ADMISSION OF UNDOCUMENTED IMMIGRANT STUDENTS TO INSTITUTIONS OF HIGHER EDUCATION IS PERMITTED UNDER FEDERAL LAW.

No federal law prohibits the admission of undocumented immigrant students to state institutions of higher education. If an undocumented student meets the academic admission requirements of the institution, he or she may be considered for admission like any other student.

A. Pertinent Federal Statutes

The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA)[39] and the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA)[40] are two federal statutes that mention immigration status in the context of higher education. PRWORA is a comprehensive welfare reform plan that emphasizes making welfare a transition to work.[41] Neither IIRIRA nor PRWORA prohibits admission or enrollment of undocumented students. The specific language of the pertinent provisions of the two federal laws is as follows:

IIRIRA section 505 provides:

> Notwithstanding any other provision of law, an alien who is not lawfully present in the United States shall not be eligible on the basis of residence within a state (or political subdivision) for any post-secondary education benefit unless a citizen or national of the United States is eligible for such benefit (in no less amount, duration or scope) without regard to whether the citizen or national is such a resident.[42]

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37. Ferg-Cadima, *supra* note 32.

38. *Id.*

39. Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), 8 U.S.C. § 1623(a) (2004) (also known as "IIRIRA section 505").

40. Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA), 8 U.S.C. §§ 1611, 1641.

41. *See* U.S. DEPARTMENT OF HEALTH & HUMAN SERVICES, THE PERSONAL RESPONSIBILITY AND WORK OPPORTUNITY RECONCILIATION ACT OF 1996, *at* http://www.acf.dhhs.gov/programs/ofa/prwora96.htm (last visited Mar. 5, 2005).

42. 8 U.S.C. § 1623(a).

PRWORA is more oblique:

> [A]n alien who is not a qualified alien [i.e., not a lawful permanent resident, or lawfully admitted as a refugee or aslyee or alien lawfully present in the U.S. under two other laws] is not eligible for any public benefit . . . .[43]

These laws list two things a state or state-supported college or university cannot do. First, higher education benefits cannot be provided to foreign students "not lawfully present" in the United States "on the basis of *residence* within a state" where the same is not available to U.S. citizens.[44] Second, a public benefit, such as payment of financial assistance, cannot be provided to an alien who is not a "qualified" alien.[45] However, these statutes do not prevent or prohibit an institution of higher education from enrolling or admitting an undocumented immigrant student.

B. SEVIS and the Reporting Obligation of University Personnel

The Student and Exchange Visitor Information System (SEVIS)[46] is a recently established reporting system to monitor student compliance with the terms of their nonimmigrant visas and to keep track of those who are entering and exiting the United States. This program is mandated by 8 U.S.C. §1372,[47] which states:

> The Attorney General, in consultation with the Secretary of State and the Secretary of Education, shall develop and conduct a program to collect from approved institutions of higher education, other approved educational institutions, and designated exchange visitor programs in the United States . . .

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43. *Id.* §§ 1611 and 1641.

44. *Id.* § 1623(a) (emphasis added).

45. Under the PRWORA, "public benefit" includes only "post-secondary education . . . for which payments or assistance are provided to an individual . . . ." *Id.* §§ 1611, 1641. The term "qualified" alien is defined by Congress as:

> an alien who, at the time the alien applies for, receives, or attempts to receive a Federal public benefit, is . . . (1) an alien who is lawfully admitted for permanent residence under the Immigrant and Nationality Act, (2) an alien who is granted asylum under section 208 of such Act . . . , (3) a refugee who is admitted to the United States under section 207 of such Act . . . , (4) an alien who is paroled into the United States under section 212(d) of such Act, (5) an alien whose deportation has been withheld under section 243(h) of such Act . . . .

Id. § 1641(b).

46. Retention and Reporting of Information for F, J, and M Nonimmigrants; Student and Exchange Visitor Information System (SEVIS), 67 Fed. Reg. 76,256 (Dec. 11, 2002) (codified at 8 C.F.R. Pts 103, 214, 248, and 274a).

47. *Id.*

> information . . . with respect to aliens *who have the status, or are applying for the status, of nonimmigrants under subparagraph (F), (J), or (M) of section 101(a)(15) of the Immigration and Nationality Act [8 U.S.C. §1101(a)(15)(F), (J), or M)].*[48]

The purpose of SEVIS is to facilitate "timely reporting and monitoring of international students and exchange visitors in the United States."[49] SEVIS applies to international students and exchange visitors who are nonimmigrants[50] holding F, J, and M visas.[51] By statute, all foreign nationals (and therefore all alien students) are considered "immigrants" unless they establish eligibility for one of the categories of nonimmigrant aliens.[52] There is no requirement under SEVIS that university personnel report an undocumented immigrant student or any student who is not the bearer of an F, J or M nonimmigrant visa.

According to the Family Education Rights and Privacy Act (FERPA), public schools are prohibited from providing any outside agency with any information from the student's file without obtaining permission from the student or the student's parents.[53] This FERPA regulation does not apply to F, M, and J nonimmigrant visa holders to the extent that the Attorney General determines that waiving FERPA is necessary to implement SEVIS.[54] Although the implementation of SEVIS requires states and institutions of higher education to disclose information regarding entry and exit of nonimmigrant students on F, M, and J visas, SEVIS does not mandate that states or institutions of higher education refuse admission to undocumented students or report them to the Department of Homeland Security.

C. Court Cases Addressing Admission of Undocumented Students

There are very few cases specifically addressing the question of admission for undocumented students into institutions of higher education. In the case of *League of United Latin American Citizens v. Wilson*, the U.S. District Court for the Central District of California struck down, on the basis of federal preemption, California's Proposition 187, which denied higher

48. 8 U.S.C. § 1372(a) (2004) (emphasis added).

49. U.S. DEPARTMENT OF JUSTICE, IMMIGRATION AND NATURALIZATION SERVICE, USER MANUAL FOR SCHOOL USERS OF THE STUDENT AND EXCHANGE VISITOR INFORMATION SYSTEM 5 (2004) [hereinafter USER MANUAL].

50. A "nonimmigrant" is a foreign national who maintains residence in a foreign country, has no intention of abandoning that residence, and seeks temporary admission into the United States. Retention and Reporting of Information for F, J, and M Nonimmigrants; Student and Exchange Visitor Information System (SEVIS), 67 Fed. Reg. at 76,256.

51. *Id.* 8 U.S.C. § 1372(a).

52. 8 U.S.C. § 1101(a)(15)(A)-(J) (2004).

53. *See* 20 U.S.C. § 1232g-h (2004).

54. 8 C.F.R. § 214.1(h) (2004).

education to aliens not lawfully present in the United States.[55] The Court held that "states have no power to effectuate a scheme parallel to that specified in the [PRWORA], even if the parallel scheme does not conflict with the [PRWORA]" because Congress has expressly occupied the field of regulation of public postsecondary education benefits.[56] The Court further stated that because IIRIRA section 505 regulates eligibility of immigrants for postsecondary education benefits, it shows the intent of Congress to occupy this field.[57] Thus, the Court held that the federal laws oust state power to legislate in this area.[58] It is important to note that since this decision California not only admits undocumented students to institutions of higher education, but also has enacted legislation granting in-state tuition to certain undocumented immigrant students.[59]

Other courts have held that the field of postsecondary education for undocumented aliens is not completely occupied by the federal government, and therefore states can regulate in this area. In *Equal Access Education v. Merten*, the U.S. District Court for the Eastern District of Virginia recently addressed whether states could deny admission to higher education to undocumented immigrant students.[60] This case arose from the Virginia Attorney General's September 5, 2002 memorandum to all Virginia public colleges and universities, which stated that "the Attorney General is strongly of the view that illegal and undocumented aliens should not be admitted into our public colleges and universities at all . . . ."[61] In the opinion, the court stated that states have the discretion to limit admission of undocumented immigrant students to institutions of higher education.[62] However, the court held that, in order for the limitation to be valid under the Supremacy Clause of the U.S. Constitution, admissions policies must adopt federal immigration standards and not create or apply their own standards to determine the immigration status of applicants.[63]

In *Merten,* the court discussed whether PRWORA prohibits admission of undocumented students to institutions of higher education. The court stated that the PRWORA "addresses only post-secondary monetary assistance paid to the students or their households, not admissions to college or university." It concluded that "access to public higher education is not a benefit governed by

55. League of United Latin American Citizens v. Wilson, 997 F. Supp. 1244 (C.D. Cal. 1997).

56. *Id.* at 1255 (citing 8 U.S.C. § 1642(a)).

57. *Id.* at 1256.

58. *Id.* at 1261.

59. *See infra* section IV.

60. Equal Access Education v. Merten, 305 F. Supp. 2d 585 (E.D. Va. 2004).

61. *Id.* at 591 (citing COMMONWEALTH OF VIRGINIA ATTORNEY GENERAL MEMORANDUM, IMMIGRATION LAW COMPLIANCE UPDATE at 5 (Sept. 5, 2002)).

62. *Id.* at 607.

63. *Id.* at 608.

PRWORA, nor is it a field completely occupied by the federal government."[64] Thus, the court noted, "not only has Congress failed to occupy completely the field of illegal alien eligibility for public post-secondary education, it has failed to legislate in this field at all and thus has not occupied any part of it, completely or otherwise."[65]

This court also addressed whether SEVIS and IIRIRA preempt a state's ability to admit or deny admission to undocumented immigrants. The court stated that "Congress, by creating a category of student visas, has not demonstrated 'a clear and manifest purpose' to oust completely state power to promulgate non-conflicting state laws."[66] The court observed that "IIRIRA says nothing about admission of illegal aliens to post-secondary educational institutions."[67] The court concluded that "it is clear that Congress has left the states to decide for themselves whether or not to admit illegal aliens into their public post-secondary institutions."[68] This case was later overturned by the district court on the basis of the plaintiff's lack of standing.[69]

In upholding Virginia's preclusion of admission of undocumented students to higher education, *Merten* confirms the fact that there exists no federal law which denies or even addresses admission of undocumented immigrant students to public institutions of higher education.[70] Unlike the case *League of United Latin American Citizens v. Wilson*, *Merten* stands for the proposition that states have the authority to make their own determinations whether to admit or deny access to postsecondary education to undocumented immigrant students. In fact, approximately four years after the *League* decision, California passed legislation that grants in-state tuition to certain undocumented immigrant students attending state institutions of higher education.[71] Thus, admission of undocumented immigrant students to state institutions of higher education appears to remain an area left to the states' discretion.

IV. OFFERING IN-STATE TUITION TO STUDENTS BASED ON A UNIFORMLY APPLIED RESIDENCY REQUIREMENT OR GRADUATION FROM A STATE HIGH SCHOOL IS PERMITTED UNDER FEDERAL LAW.

Even if an undocumented immigrant student applies to a college or university and is accepted, in many states, he or she will be classified as a non-resident student for purposes of tuition. Thus, they must pay the out-of-state

64. *Id.* at 605.
65. *Id.*
66. *Id.* at 606 (quoting DeCanas v. Bica, 424 U.S. 351, 358 (1976)).
67. *Id.* at 607.
68. *Id.* at 607.
69. Equal Access Education v. Merten, 325 F. Supp. 2d 655 (E.D. Va. 2004).
70. The Court notes that "defendant's alleged admissions policies cannot conflict with a law that does not exist." *Merten*, 305 F. Supp. 2d at 608.
71. *See infra* Part IV.

tuition rates that are often three (or more) times the in-state tuition rates.[72] In order to increase access to postsecondary education for undocumented immigrant students, many states and public institutions of higher education have revised policies and passed legislation granting in-state tuition to undocumented immigrant students who meet certain criteria. As discussed below, federal law permits states and public institutions of higher education to offer in-state tuition to students based on uniformly applied criteria. Furthermore, offering in-state tuition to students based on a requirement other than residency within the state, such as graduation from a high school within that state, is permitted under federal law.

A. Pertinent Federal Statutes

IIRIRA and PRWORA, the two federal statutes that discuss immigration status in the context of higher education, leave the question of who pays in-state tuition rates to the discretion of the states.[73] While there are no federal regulations concerning these statutes, a plain reading of these statutes shows no prohibition of granting lower tuition rates based on a uniformly applied residency or other requirement. The use of the word "unless" in section 505 suggests that states have the power to determine residency for undocumented immigrant students.[74] In plain language, the statute simply conveys that a state cannot give additional consideration to an undocumented student that it would not give to a U.S. citizen student who is not a resident of that state.[75]

Under the PRWORA, "public benefit" in the context of higher education includes only "post-secondary education . . . for which payments or assistance are provided to an individual . . . ."[76] Thus, as affirmed in *Merten*, the term "benefit" as used in IIRIRA section 505, 8 U.S.C. § 1623, and in PRWORA, 8 U.S.C. § 1611 and § 1621, refers to a monetary benefit and not the granting of in-state tuition.[77] In *Plyler*, the Supreme Court stated that public education is not "merely some governmental 'benefit' indistinguishable from other forms of social welfare legislation."[78] The distinction lies in the importance of education and the "lasting impact of its deprivation on the life of a child."[79]

Where a federal statute does not "completely ouster" the state's power to regulate a matter, the federal law does not preempt the state's ability to exercise

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72. *See supra* note 21.

73. See *infra* Part III.A. for the specific language of relevant portions of these statutes.

74. *See* Michael A. Olivas, *A Rebuttal to FAIR: States Can Enact Residency Statutes for the Undocumented*, 7 BENDER'S IMMIGR. BULL. 652 (2002) [hereinafter *Rebuttal to FAIR*]; *see also* Michael A. Olivas, *IIRIRA, The DREAM Act, and Undocumented College Student Residency*, 30 J.C. & U.L. 435 (2004).

75. *See Rebuttal to FAIR, supra* note 74 at 653.

76. 8 U.S.C. § 1621 (2004).

77. *See Rebuttal to FAIR supra* note 74.

78. Plyler v. Doe, 457 U.S. 202,221 (1982).

79. *Id.* at 220.

its discretion in that subject area.[80] PRWORA section 1621(d) grants states the authority to enact state laws to provide for the eligibility of illegal aliens for certain state and local benefits.[81] Thus, even if in-state tuition were considered a "benefit," PRWORA does not completely ouster the state's power to regulate the matter, because it specifically provides states with the authority to do so. It has been argued that the notion of federalism and the Tenth Amendment to the U.S. Constitution provide that the power of discretion to award state benefits should rest with the states and not with the federal government.[82] Therefore, making in-state tuition qualification a question of graduation from a state high school or living in the state for a period of time would be a lawful exercise of power left to the states by IIRIRA and PRWORA.

B. Cases Addressing In-State Tuition for Undocumented Students

There are very few cases that address the issue of in-state tuition for nonimmigrant and undocumented immigrant students. In 1982, the U.S. Supreme Court in *Toll v. Moreno*, decided that resident-tuition status was not to be limited to U.S. citizens and lawful permanent residents alone.[83] The Court held that a Maryland rule violated the Supremacy Clause of the U.S. Constitution insofar as it prohibited G-4[84] nonimmigrant visa holders, who are permitted by law to establish a domicile in the United States, from establishing residency for purposes of in-state tuition.[85]

After several attempts, California passed a controversial law limiting post-secondary education opportunities for undocumented students that withstood state appellate court challenges.[86] This law was reviewed by the California Court of Appeals in *Regents of University of California v. Superior Court*,[87] commonly called the "Bradford Decision." The Bradford Decision and the *Carlson* line of cases uphold the discretion of states to limit eligibility for lower tuition rates to certain aliens with lawful immigration status.[88] However, these two cases do not hold that a state is prohibited from permitting

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80. DeCanas v. Bica, 424 U.S. 351, 358 (1976).

81. 8 U.S.C. § 1621(d).

82. U.S. CONST. amend. X. For further discussion of this argument, see Jennifer Galassi, *Dare to Dream? A Review of the Development, Relief, and Education for Alien Minors (DREAM) Act*, 24 CHICANO-LATINO L. REV. 79 (2003).

83. Toll v. Moreno, 458 U.S. 1, 17 (1982).

84. G-4 visas are issued to nonimmigrant aliens who are officers or employees of certain international organizations and to members of their immediate families. 8 U.S.C. § 1101(a)(15)(G)(iv).

85. *Toll*, 458 U.S. at 17.

86. *See* Regents of Univ. of Cal. v. Superior Court, 225 Cal. App. 3d 972 (Cal. Ct. App. 1990).

87. *See id. See also* Carlson v. Reed, 249 F.3d 876, 882-83 (9th Cir. 2001) (holding that a California statute prohibiting lower in-state tuition rates for holders of certain temporary visas is lawful).

88. *Regents of Univ. of Cal.*, 225 Cal. App. 3d at 980-82; *Carlson*, 249 F.3d at 882-83.

lower tuition rates for undocumented aliens. In fact, since these decisions, California has enacted legislation that grants in-state tuition to certain undocumented immigrant students.[89]

C. State Attempts to Address the Issue of In-State Tuition for Undocumented Students

States such as Texas, California, Utah, New York, Washington, Oklahoma, Illinois, and Kansas have addressed this issue by passing legislation which allows public colleges and universities to grant in-state tuition to undocumented immigrant students who have graduated from a state high school and meet certain uniformly applied criteria.[90] Many other states, including Arizona, Colorado, Florida, Hawaii, Maryland, Massachusetts, Michigan, New Jersey, New Mexico, Oregon, Rhode Island, and Wisconsin,[91] have introduced bills to allow undocumented students affordable access to public colleges and universities. In some states, the trustees of individual public colleges and universities are given the authority to set tuition policy. Several such colleges and universities in these states have addressed the issue of in-state tuition for undocumented immigrant students.[92] Finally, a few states, such as Alaska, have passed legislation requiring a student to be a U.S. citizen or legal resident to qualify as a state resident for purposes of tuition.[93] Laws permitting in-state tuition for certain undocumented students may be enacted by states as long as

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89. A.B. 540, 2001-02 Cal. Sess. (Cal. 2001) (signed into law on Oct. 12, 2001).

90. MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND (MALDEF), SURVEY OF RECENT STATE LAW AND LEGISLATION DURING THE 2003-04 LEGISLATIVE TERM AIMED AT FACILITATING UNDOCUMENTED STUDENT ACCESS TO STATE UNIVERSITIES (2003) [hereinafter MALDEF SURVEY]; *see* H.B. 1403, 77th Leg., Reg. Sess. (Tex. 2001) (signed into law on June 16, 2001); A.B. 540, 2001-02 Cal. Sess. (Cal. 2001)(signed into law on October 12, 2001); H.B. 144, 54th Leg., Gen. Sess. (Utah 2002) (signed into law on Mar. 26, 2002); S.B. 7784, 225th Leg., 2001 Sess. (N.Y. 2002) (signed into law Jun. 25, 2002); H.B. 1079, 58th Leg.; Reg. Sess. (Wash. 2003) (signed into law May 7, 2003); S.B. 596, 49th Leg., 1st Sess. (Okla. 2003) (signed into law May 12, 2003); H.B. 60, 93d Leg., Reg. Sess. (Ill. 2003) (signed into law May 17, 2003); H.B. 2145, 80th Leg., Reg. Sess. (Kan. 2003).

91. MALDEF SURVEY; *see* H.B. 2518, 46th Leg., 1st Reg. Sess. (Ariz. 2003); H.B. 1178, 64th Leg. 1st Reg. Sess. (Fla. 2003); H.B. 873, 22d Leg., 2003 Sess. (Haw. 2003); H.B. 253, 417th Leg., Reg. Sess. (Md. 2003); S.B. 520, 417th Leg., Reg. Sess. (Md. 2003); S.B. 237, 183d Leg., Reg. Sess. (Mass. 2003); S.B. 196, 92d Leg., 1st Reg. Sess. (Mich. 2003); 2633, 210th Leg., 2002-03 Sess. (N.J. 2003); S.B. 909, 46th Leg., 1st Sess. (N.M. 2003); S.B. 10, 72d Leg., 2003 Reg. Sess. (Or. 2003); H.B. 5802, 2003-04 Leg., Jan. Sess. (R.I. 2003); A.B. 95, 96th Leg., 2003-04 Reg. Sess. (Wis. 2003).

92. In Indiana, for example, the definition of "residency" for purposes of qualifying for in-state tuition is not codified in any state statute, nor is it defined by any state agency. Telephone Interview with Kent Weldon, Deputy Commissioner, Indiana Commission for Higher Education (March 2003). According to the Indiana Code, the authority to set fees (including the definition of residency for in-state fees) is given to the trustees of the institution. Thus, the residency policies for purposes of granting in-state tuition at public colleges and universities in Indiana will vary from institution to institution. IND. CODE § 20-12-1-2.

93. H.B. 39, 23d Leg., Reg. Sess. (Alaska 2003) (signed into law on Jan. 21, 2003).

they apply equally to residents and nonresidents, or are not based on residency within a state.[94]

In June of 2001, Texas became the first state to enact legislation to allow undocumented students to qualify for in-state tuition rates.[95] Eligible students under this law include undocumented students who (1) have graduated from a Texas high school or received the equivalent from the state, (2) are enrolled in a state institution of higher education, (3) have resided in Texas for three or more years, and (4) sign an affidavit in which they promise to file a petition to become a lawful permanent resident of the United States at their earliest opportunity.[96] Texas officials believe this law complies with the federal law because it sets a higher standard for undocumented immigrant students to receive in-state tuition than for U.S. citizens.[97] Moreover, it applies equally to nonresidents and residents and bases eligibility, in part, on where a person graduated from high school, rather than on residence within the state.[98] To date, there have been no reported court decisions in lawsuits challenging the Texas law.

The California legislature soon followed the Texas legislature in enacting a similar bill which applies to students who (1) have attended a California high school for three years or more, (2) have graduated from a California high school or attained the equivalent to a high school degree, (3) register as a student after fall of the 2001-02 school year, and (4) file an affidavit promising to apply for permanent residency at their earliest opportunity.[99] California public colleges have been granting in-state resident status to undocumented students since January 1, 2002. Proponents of this legislation indicate that it complies with section 505 of IIRIRA because it bases eligibility for in-state tuition on where a person graduated high school rather than on residency status.[100] Thus, the careful wording of the California law avoids any express or implied federal preemption issue.[101] In addition, anyone, including a U.S. citizen nonresident, who meets the above requirements, would also be entitled to in-state tuition.[102] Therefore, it does not discriminate against U.S. citizens.[103] Finally, the California law does not conflict with federal immigration law according to the

94. *See* NILC Guide, *supra* note 20, at 156; *see also* discussion of federal statutes *supra* Parts III.A. and IV.A.

95. H.B. 1403, 77th Leg., Reg. Sess. (Tex 2001) (signed into law on Jun. 16, 2001).

96. *Id.*

97. Sara Hebel, *States Take Diverging Approaches on Tuition Rates for Illegal Immigrants*, CHRON. OF HIGHER EDUC., Nov. 30, 2001.

98. *See* H.B. 1403, 77th Leg., Reg. Sess. (Tex. 2001), 77th Leg., Reg. Sess. (Tex. 2001) (signed into law on Jun. 16, 2001).

99. MALDEF SURVEY, *supra* note 90; *see* A.B. 540, 2001-02 Cal. Sess. (Cal. 2001) (signed into law on Oct. 12, 2001).

100. Hebel, *supra* note 97.

101. *Recent Legislation*, 115 HARV. L. REV. 1548, 1549 (2002).

102. *Id.* at 1552.

103. *Id.*

three-part test the U.S. Supreme Court established in *DeCanas v. Bica*.[104] Like Texas, there have been no reported decisions in lawsuits challenging this statute.

Utah was the third state to enact legislation allowing undocumented immigrants to be exempt from nonresident tuition.[105] Students are eligible if they (1) attend a Utah high school for three or more years, (2) graduate from a Utah high school or receive the equivalent within Utah, (3) register at an institution of higher education after the fall of the 2002-03 academic year, and (4) file an affidavit promising to apply to become a lawful permanent resident as soon as possible.[106] In a letter to the President of the University of Utah dated October 9, 2002, the Utah Assistant Attorney General concluded that the Utah statute is "valid and currently enforceable" under federal law because the above requirements "can be met by 'a citizen or national of the United States' regardless of whether he or she is a resident of Utah."[107] Thus, the law "does not appear to violate the letter or spirit of 8 U.S.C. § 1623 and appears valid."[108]

The Maryland legislature recently considered legislation with similar language to that of the Utah, Texas, and California statutes benefiting undocumented immigrant students.[109] In support of this legislation, the Maryland Assistant Attorney General concluded that the companion Senate Bill was not "preempted by a Federal Law which forbids encouraging aliens to enter or reside in the country in violation of the law."[110] Another Maryland Assistant Attorney General stated that the House Bill "grants the same benefit to citizens and nationals on the same basis without regard to whether they are residents."[111] Given the fact that "there is no applicable case law, or other interpretive guidance" with regard to 8 U.S.C. § 1623, the proposed House Bill is not clearly unconstitutional.[112] House Bill 253 was passed in the legislature; however, Governor Robert L. Ehrlich, Jr., vetoed it on May 21, 2003.[113] In his

104. *Id.* (citing DeCanas v. Bica, 424 U.S. 351 (1976) and providing a full legal analysis of the *DeCanas* test as it applies to the California legislation)).

105. *See* H.B. 144, 54th Leg., Gen. Sess. (Utah 2002) (signed into law on Mar. 26, 2002).

106. *Id.*

107. Letter from William T. Evans, Assistant Attorney General of Utah, to Bernard Machen, President of University of Utah (Oct. 9, 2002) (on file with authors).

108. *Id.*

109. *See* H.B. 253, 417th Leg. Reg. Sess. (Md. 2003); *see also* S.B. 520, 417th Leg., Reg. Sess. (Md. 2003).

110. Letter from Richard E. Israel, Assistant Attorney General, to Senator Hollinger (D-Md.) (Mar. 14, 2003) (on file with authors).

111. Letter from Kathryn M. Rowe, Assistant Attorney General, to Delegate Hixson (D-Md.) (Mar. 8, 2002) (on file with authors).

112. *Id.*

113. Governor's Veto Message, *at* http://mlis.state.md.us/2003rs/veto_letters/hb0253.htm (last visited Feb. 16, 2005).

veto message, Governor Ehrlich took the position that IIRIRA section 505 preempts the states from acting on this issue, and that the approach used in the legislation violates the spirit of IIRIRA section 505.[114]

State officials in Wisconsin and Virginia believe section 505 of IIRIRA prohibits states from offering in-state tuition to undocumented immigrants unless the same is provided equally to all citizens.[115] For this reason, Governor McCallum of Wisconsin vetoed a law in August of 2001.[116] In Virginia, a law was passed that aims at denying in-state tuition to undocumented students by using similar language to section 505 of the IIRIRA.[117] However, many lawyers and government officials believe this interpretation of section 505 is too narrow and not legally binding.[118] They believe that the federal government cannot decide how states and public colleges grant in-state tuition.[119] Undocumented immigrants that are eligible for these state provisions are not receiving any greater benefits than nonresident U.S. citizens.[120] Moreover, granting them in-state tuition is not based on residency within the state, but rather on attendance and graduation from a state high school. Thus, the state legislation does not run afoul of the federal statutes.

D. Proposed Federal Legislation to Address the Issue of In-State Tuition for Undocumented Students

As discussed above, section 505 of IIRIRA lacks federal regulations to assist in its interpretation and there is a broad disagreement regarding its effect on higher education tuition rates. Although states are able to implement legislation granting in-state tuition to undocumented immigrant students, recent federal legislation has been introduced in Congress that would repeal section 505 of IIRIRA, and put an end to any doubts state officials have about intent and interpretation of this federal law. In 2001, the Development, Relief, and Education for Alien Minors Act (DREAM Act) was introduced in the Senate by Senators Hatch (R-Utah) and Durbin (D-Ill.).[121] It failed to pass in the 107th Congress, and was reintroduced again this past spring in the 108th Congress.[122] In addition to repealing section 505 of IIRIRA, the DREAM Act would create

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114. *Id.*

115. Hebel, *supra* note 97.

116. *Id.*

117. *See* H.B. 2339, 2003 Sess. (Va. 2003).

118. Hebel, *supra* note 97.

119. *Id.*

120. *Id.*

121. *See* Angelo I. Amador, Mexican American Legal Defense and Educational Fund, *107th Congress (2001-2002) Student Adjustment Bills Side-by-Side Comparison* (2002) (Updated by James A. Ferg-Cadima); Development, Relief, and Education for Alien Minors (DREAM) Act, S. 1291, 107th Cong. (2001) [hereinafter DREAM].

122. NATIONAL IMMIGRATION LAW CENTER, DREAM ACT BASIC INFORMATION (2005), *at* http://www.nilc.org/immlawpolicy/DREAM/DREAM_Basic_Info_0205.pdf (last visited Mar. 5, 2005); *see* DREAM Act, S. 1545, 108th Cong. (2004).

an avenue for undocumented immigrant students to secure lawful immigration status in the United States through a process called "cancellation of removal" so that they can legally work and become eligible for educational benefits, such as state and federal financial aid.[123]

In order to qualify for relief under the DREAM Act, an immigrant student must be at least twelve years old on the date of enactment of the Act, and under twenty-one years old at the time he or she applies.[124] Students must have lived in the United States continuously for at least five years on the date of enactment in order to be eligible.[125] An individual must have earned a high school degree before applying for relief; however, some persons who would have qualified within the last four years will qualify if they are recent high school graduates and are now attending college or have graduated from college.[126] Finally, an individual must not have a criminal record and be able to demonstrate good moral character in order to qualify.[127]

The companion bill to the DREAM Act in the House of Representatives is called the Student Adjustment Act (SAA).[128] The SAA was originally introduced in the 107th Congress in 2001.[129] In the 107th Congress, the SAA attracted a bipartisan list of sixty-two co-sponsors.[130] It was reintroduced in Congress as the Student Adjustment Act of 2003 on April 10, 2003.[131] Similar to the DREAM Act, the SAA would also repeal section 505 of the IIRIRA and adjust to Lawful Permanent Resident status certain long-term resident students who (1) have not reached the age of twenty-one at the time of application, (2)

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123. NATIONAL IMMIGRATION LAW CENTER, *supra* note 122; *see* DREAM Act, S. 1545.

124. NATIONAL IMMIGRATION LAW CENTER, SUMMARY OF THE HATCH-DURBIN STUDENT ADJUSTMENT BILL, S. 1291 DEVELOPMENT, RELIEF, AND EDUCATION FOR ALIEN MINORS ACT (DREAM), *at* http://www.nilc.org/immlawpolicy/DREAM/DREAM_Summary.pdf (last visited Feb. 14, 2005) [hereinafter SUMMARY OF HATCH-DURBIN BILL]; *see* DREAM Act, S. 1545.

125. SUMMARY OF HATCH-DURBIN BILL, *supra* note 124; *see* DREAM Act, S. 1545.

126. SUMMARY OF HATCH-DURBIN BILL, *supra* note 124; *see* DREAM Act, S. 1545.

127. SUMMARY OF HATCH-DURBIN BILL, *supra* note 124; *see* DREAM Act, S. 1545. Significant concerns have been raised by pro-immigrant activists regarding the proposed federal legislation and the repeal of section 505. First, the proposals are too narrow and many students would be unable to meet all of the criteria. Students who arrive in the United States after their sixteenth birthday would not qualify. If a student fails to make a timely application, this would preclude the student from obtaining relief. In addition, the proposed benefits would not apply to students who entered the country legally on temporary visas. Beth Peters & Marshall Fitz, *To Repeal Or Not To Repeal: The Federal Prohibition on In-State Tuition for Undocumented Immigrants Revisited,* 168 EDUC. L. REP. 2 (2002), *available at* http://www.ilw.com/search/documentFrame.asp?Request=%22To+Repeal+Or+Not+To+Repeal%22&nPage=1&sort=Date&MaxFiles=25&Fuzzy=&Phonic=&Stemming=Yes&NaturalLanguage=No&HitNum=2&cmd=getdoc&DocId=1714&Index=%5c%5cilw%5cwwwroot%5cdtSearch%5cILW%20Web%20site&HitCount=12&hits=5+6+7+8+9+a+2c+2d+2e+2f+30+31+&hc=30&req=%22To+Repeal+Or+Not+To+Repeal%22 (last visited Feb. 14, 2005).

128. Student Adjustment Act of 2001, H.R. 1918, 107th Cong. (2001) (reintroduced as Student Adjustment Act of 2003 on Apr. 10, 2003) [hereinafter SAA].

129. *Id.*

130. SUMMARY OF HATCH-DURBIN BILL, *supra* note 122.

131. SAA, *supra* note 128.

are physically present in the United States on the date of enactment and have been physically present in the United States continuously for at least five years preceding such application, (3) are of good moral character, (4) are enrolled at or above the 7th grade or actively pursuing admission to a college at the time of application, and (5) have no criminal history.[132] An individual who would have met such requirements in the last four years and who has graduated from or enrolled in a college may also be eligible for such benefits.[133] The SAA legislation only applies to students already residing in the United States at the time of enactment.[134] Under the Act, all information obtained from the student for purposes of obtaining relief under this Act would be confidential and could not be used for any purpose other than to make a determination on the student's application.[135]

Because section 505 of IIRIRA lacks guidance to assist in its interpretation, states have been left with broad discretion to implement their own policies according to their interpretation of the law. The DREAM Act should be passed primarily to provide an avenue for these students to obtain lawful status in the United States, but also in order to settle any disputes regarding the effect of section 505 of IIRIRA on granting in-state tuition rates to undocumented students.

V. ADMISSION AND IN-STATE TUITION FOR UNDOCUMENTED STUDENTS IS SOCIALLY RESPONSIBLE

Many of the arguments against higher education for undocumented students are a mix of legal interpretation with social policy. It has been shown above that federal law prohibits neither admission nor in-state tuition rates for students without lawful immigration status. Further, states have the discretion, either through legislation, agency rulemaking, or education institutional policy to admit undocumented students and permit lower tuition rates for these students. Nevertheless, concerns frequently are voiced that admission and in-state tuition for these students is harmful to society in the United States. These contrary positions are not well founded.

A. The Economic Benefits of Educating the Undocumented Outweigh Any Perceived Harm

Supporters of the proposed legislation in Florida, including Governor Jeb Bush (R), maintain that educating undocumented immigrant students makes

132. *Id.*
133. *Id.*
134. Ferg-Cadima, *supra* note 32.
135. *Id.*

sense financially for the state.[136] Supporters realize that these students will be more productive with a degree, and that without one undocumented immigrant students are more likely to end up needing governmental assistance.[137] However, opponents argue that even if students obtain a college degree, they cannot legally work in the United States.[138] This is not the case because many of these students will be eligible to procure an immigration benefit in the future and become lawful permanent residents of the United States. Students may gain eligibility for an immigration benefit through a change in the law, similar to section245(i) of the Immigration and Nationality Act, which expired on April 30, 2001, that allows immigrants who entered without inspection the opportunity to adjust in certain circumstances.[139] Students may also gain eligibility if there is a future amnesty. In addition, many students may become eligible for a family or employment based immigration benefit in the future.

The U.S. Supreme Court in *Plyler*, examining the District Court's findings of fact, stated: "[T]he illegal alien of today may well be the legal alien of tomorrow," and that without an education, these undocumented children, "[already] disadvantaged as a result of poverty, lack of English-speaking ability, and undeniable racial prejudices . . . will become permanently locked into the lowest socio-economic class."[140] The rationale used by the Supreme Court in *Plyler* applies equally well to higher education:

> This situation raises the specter of a permanent caste of undocumented resident aliens, encouraged by some to remain here as a source of cheap labor, but nevertheless denied the benefits that our society makes available to citizens and lawful residents. The existence of such an underclass presents most difficult problems for a Nation that prides itself on adherence to principles of equality under law.[141]

After financially investing in these students' education from kindergarten through the twelfth grade, academically qualified students are unable to continue their education beyond high school. Many U.S. employers are forced to look outside of the United States to fill specialized positions because of a shortage of skilled workers in the United States. It makes better sense for states to educate their residents so they can contribute to society and the nation's economy to their fullest potential.

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136. Saundra Amrhein, *A Future Out of Reach?*, ST. PETERSBURG TIMES, Mar. 23, 2003, *available at* http://www.sptimes.com/2003/03/23/TampaBay/A_future_out_of_reach.shtml (last visited Feb. 7, 2005).

137. *Id.*

138. *Id.*

139. *See* Immigration and Nationality Act § 245(i).

140. Plyler v. Doe, 457 U.S. 202, 207-08 (1982) (quoting Plyler v. Doe, 458 F. Supp. 569, 577 (E.D. Tex. 1978)).

141. *Id.* at 218-19.

B. Admission of Undocumented Immigrants to Higher Education at Reasonable Rates Would Not Draw Illegal Immigrants to the United States and Would Not Drain Tax Funded Public Benefit Programs

Contrary to popular belief, immigrant families use public benefits (i.e., welfare, food stamps, Medicare, and similar assistance programs which are means-tested) less than U.S. citizen families, and availability of public welfare benefits is not what attracts immigrant families to the United States .[142] Even the U.S. Supreme Court has recognized this, noting "the available evidence suggests that illegal aliens underutilize public services, while contributing their labor to the local economy and tax money to the state fisc [sic]."[143] The Court observed that "few if any illegal immigrants come to this country . . . in order to avail themselves of a free education."[144] The Court concluded that educational benefits do not seem to be a stimulus for immigration to the United States.[145]

Opponents claim that increasing access to postsecondary education for undocumented immigrant students will only increase the numbers of such immigrants that come to the United States because they will find this opportunity very attractive.[146] However, as recognized by the U.S. Supreme Court, there is no evidence that undocumented immigrants come to the United States for education or public assistance benefits. More importantly, a large number of these families are likely to continue to reside in the United States, regardless of access to higher education.[147] These children should not be punished for the mistakes of their parents. It is in the best interest of the nation for them to obtain a college degree.

C. Undocumented Students Will Not Displace Qualified U.S. Citizen Students

Opponents argue that states and taxpayers should not have to subsidize the education of "illegal" immigrants, and that allowing undocumented students to go to college will, in turn, deny opportunities to deserving U.S. citizens.[148] However, undocumented students admitted to higher education do *not* receive a

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142. NATIONAL IMMIGRATION LAW CENTER, IMMIGRANTS, EMPLOYMENT & PUBLIC BENEFITS (2004), *at* http://www.nilc.org/immspbs/research/pbimmfacts_0704.pdf (last visited March 5, 2005) (citing MICHAEL FIX & JEFFREY PASSEL, URBAN INSTITUTE, THE SCOPE AND IMPACT OF WELFARE REFORM'S IMMIGRANT PROVISIONS (2002).

143. *Plyler*, 457 U.S. at 228.

144. *Id.*

145. *Id.* at 229.

146. Federation for American Immigration Reform (FAIR), Taxpayers Should Not Have to Subsidize College for Illegal Aliens, *at* http://www.fairus.org/html/04182108.htm (last updated May, 2003) (last visited Feb. 7, 2005) [hereinafter FAIR Brief].

147. AASCU Special Report: Access for All? Debating In-State Tuition for Undocumented Alien Students, *at* http://www.aascu.org/special_report/access_for_all.htm (last visited Feb. 14, 2005) [hereinafter AASCU].

148. FAIR Brief, *supra*, note 146.

"free ride" and are still required to pay tuition.[149] In addition, it is estimated that only approximately two percent of the student population would be able to take advantage of these policies.[150] Most importantly, increasing access to higher education for undocumented immigrants will improve the ability of colleges and universities to recruit the best qualified, most diverse population of students.[151] Offering in-state tuition to certain undocumented immigrant students would only increase the number of students that are able to go to college. It would provide an opportunity to students who otherwise would not be able to attend college.

D. Federal Statutes Outlawing Assisting Aliens to Enter the United States Do Not Apply to Admission and In-State Tuition for Undocumented Students

College and university personnel may question whether they have an affirmative duty to report undocumented students to USCIS where school officials believe a student is undocumented. Earlier in this discussion, it was explained that SEVIS and PRWORA do not establish an obligation to report undocumented students.

Under 8 U.S.C. § 1324, it is a crime for any person to encourage or induce "an alien to come to, enter, or reside in the United States, knowing or in reckless disregard of the fact that such coming to, entry or residence is or will be in violation of law . . . ."[152] However, in examining a statute with similar construction, the Supreme Court has held the term "person" does not include a state or its agencies.[153] Moreover, as discussed above, FERPA prohibits a school from disclosing personal information about the student without the consent of the student or the student's parents.[154] In March of 1994 (pre-SEVIS, but post-8 U.S.C. § 1324 and post-*Plyler*), a memorandum from INS stated, "The effect of *Plyler* on post-secondary education is not clear; however, Congress has not adopted legislation which would permit states and state-owned institutions to refuse admission to undocumented aliens or to disclose their records to the Immigration and Naturalization Service."[155]

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149. AASCU, *supra* note 148.

150. FIX & PASSEL, *supra* note 7, at 16.

151. *See generally* Michael A. Olivas, *Storytelling Out of School: Undocumented College Residency, Race, and Reaction*, 22 HASTINGS CONST. L.Q. 1019 (1995).

152. 8 U.S.C. § 1324(a)(1)(A)(iv) (2004).

153. Letter from Richard E. Israel, *supra* note 110 (citing Vt. Agency of Natural Res. v. United States, 529 U.S. 765, 120 S. Ct. 1858, 1866-67 (2000)).

154. *See supra* note 53 and accompanying text.

155. INS Memorandum, Revised School Approval Policy and Procedures (Jan. 14, 1994), *reproduced in* 71 INTERPRETER RELEASES 361 (Mar. 14, 1994) (emphasis added).

VI. CONCLUSION

The admission of undocumented immigrant students to institutions of higher education and granting of in-state tuition is not only permitted under federal law, but also socially responsible and good public policy. By limiting educational opportunities for these students, they are unable to develop critical skills needed to fully contribute to society and the economy. To deny undocumented students access to higher education would result in a permanent underclass of under-educated and under-utilized persons.

During a visit to Griegos Elementary School in Albuquerque, New Mexico, President Bush recently stated, "The question I like to ask every child in the classroom is, 'Are you going to college?' In this great country, we expect every child, regardless of how he or she is raised, to go to college."[156] In order for immigrant students to meet these high expectations, they must be given an equal opportunity to do so and not be forced to settle for less than what they are capable of achieving.

156. Press Release, Project Vote Smart, Remarks by the President in Q & A with the Travel Pool – Griegos Elementary School (Aug. 15, 2001) (on file with authors).

BASIC OPTIONS IN THE NON-IMMIGRANT BUSINESS CONTEXT

Jeff Papa*

I. INTRODUCTION

Companies located in the United States are sometimes confronted with a lack of qualified American applicants for a given position. While the goal of policy and individual employers should always be to fill these positions with American workers, this is often not possible or practical. If such a company is unable to locate a qualified U.S. worker, the company may turn to foreign graduates of U.S. universities or accept applications from qualified professionals trained in other countries.

The process of obtaining permission for these individuals to work in the United States on a temporary basis can often be confusing because there are many categories of work authorization, and the rules often change. Additionally, a given individual may qualify for more than one type of authorization (in which case the most advantageous or appropriate route should be determined), or the individual may not qualify for any category of authorization. This Article will explain the basic categories available in these circumstances, as well as various other related considerations that must be analyzed in the non-immigrant status context. For students or beginning practitioners, this Article may provide some useful insight into the terminology, inter-working of agencies, and context of available non-immigrant options.

II. REORGANIZATION OF LEGACY INS

As part of the response to the terrorist events on 9/11, the Department of Homeland Security (DHS) was created and several existing agencies were reorganized, split apart, combined, or eliminated. One of these agencies was the U.S. Immigration and Naturalization Service (INS).

Legacy INS functions were split into enforcement, benefits, and border components. Prior to the split, the INS was a part of the U.S. Department of Justice. Legacy INS functions, responsible for the granting of benefits, were located in a new entity, now known as the U.S. Citizenship and Immigration Services (CIS) and located in the new DHS. The enforcement functions of legacy INS were located in a new entity known as the U.S. Immigration and Customs Enforcement (ICE).[1] The Legacy INS border processing and

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1. Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (2002).

protecting functions were combined with elements of the former U.S. Customs Service (formerly part of the Treasury Department), and U.S. Border Patrol, and placed in the new entity known as the U.S. Customs and Border Protection (CBP), also as a part of the newly-formed DHS.[2]

As the U.S. Department of Labor (DOL) and the U.S. Department of State (DOS) continue to be involved in various aspects of immigration law, individuals dealing with immigration on a daily basis must now consider the rules and processes of at least five agencies when taking any immigration-related action, including DOL, DOS, ICE, CBP, and CIS. Basically, the CIS reviews, investigates and approves new, changed, or extended status for aliens wishing to be in the United States on a temporary or long-term basis. The CBP processes and investigates these individuals when they present themselves at a U.S. air, land, or sea port for entry. CBP also handles the former customs duties and processes returning U.S. citizens and permanent residents.[3] The DOS is responsible for verifying that an individual has the claimed identity, authorization, or qualification, as well as appropriate documentation, and is also responsible for issuing visas to qualified individuals.[4] The ICE investigates individuals and organizations that violate immigration rules inside the United States, and it apprehends and removes or prosecutes unauthorized or criminal aliens.[5] Finally, the DOL is involved in certain aspects of immigration applications to ensure protection of American workers from unfair competition and unfairly low wages.[6]

III. STATUS VERSUS VISA

When discussing non-immigrant classifications, it is easy to confuse the concepts of status and visa. In common parlance, many people refer to the authorization for a foreign individual to be present or to work in the United States as a "visa." This usage is incorrect, and should be replaced with the term "status." A visa can be thought of as an entry document needed to enter the United States at an airport, land border post, or seaport,[7] while status is the underlying permission to be in or work in the United States.[8]

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2. 8 C.F.R. § 100.4 (2004).

3. *See generally* 8 C.F.R. §§ 236, 238-240 (2004) (discussing expedited removal, removal of aggravated felons, removal of aliens); 28 C.F.R. § 200 (2004); Department of Homeland Security Reorganization Plan of Nov. 25, 2002, pursuant to Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (2002), http://www.dhs.gov/interweb/assetlibrary/reorganization_plan.pdf (last visited Jan. 13, 2005).

4. 22 C.F.R. §§ 22, 40, 41, 42, 44, 53, 62 (2004).

5. *See* sources cited *supra* note 3.

6. 20 C.F.R. §§ 655-56 (2004).

7. 22 C.F.R. § 41 (2004).

8. *See* 8 C.F.R. §§ 205, 212, 214, 248 (2004); Immigration and Nationality Act § 214(c)(1), 8 U.S.C. § 1184(c)(1) (2004).

In most cases, status is granted by the CIS. This means that the CIS has authorized an individual to be present, or to work in the United States.[9] If the individual is already present in the United States in a status that allows for change to another status, the authorization from CIS converts the person's status, and that individual may take up activity in accordance with the new status on its effective date.[10] Additionally, an individual in the United States who receives an extension of his or her current status may remain in the United States for the duration of the extension without the need for a visa.[11]

A visa, on the other hand, is a document that allows an individual to enter the United States.[12] Unlike status, which is approved by the CIS, visas are issued by the DOS.[13] In other words, a person already present in the United States who has been authorized by the CIS to change status or to extend their current status would not need a visa unless travel out of the United States is planned. Authorization from the CIS grants that person status to remain and act in accordance with that new or extended status.[14]

If, however, CIS approves a status for a person outside the United States, that person must present the status approval to a U.S. Consulate abroad (normally in his or her home country) in order to obtain a visa prior to entering the United States.[15] This also applies to persons who obtain an approval but are not eligible to change status in the United States, and to those with a legal status in the United States who decide to travel out of the United States but do not currently have a valid visa for reentering the United States; such individuals must also obtain a visa before returning to the United States[16] Also, it is important to note that not only does a visa need to be current (not expired) for entry into the United States, but it must be in the same category as the status approved by the CIS as well.[17]

Some examples of individuals who would need to obtain a new visa include persons abroad who will enter the United States to take up a new status, and individuals currently present in the United States who travel out of the

9. *See* 8 C.F.R. §§ 205, 212, 214, 248; Immigration and Nationality Act § 214(c)(1), 8 U.S.C. § 1184(c)(1).

10. *See* Immigration and Nationality Act § 248, 8 U.S.C. § 1258 (2004) (amended by § 301(b)(2) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA)).

11. *See* 8 C.F.R. §§ 214.1, 248 (2004).

12. *See* 22 C.F.R. § 41; 8 C.F.R. § 212.1 (2004).

13. *See* 22 C.F.R. § 41; 8 C.F.R. § 212.1.

14. *See* 8 C.F.R. § 214 (2004).

15. 22 C.F.R. § 41.10.

16. *Id.* § 41.1–41.3.

17. *Id.* § 41.112(d). One exception is the thirty-day rule, which allows individuals to travel to, and return from, a contiguous territory (such as Canada and Mexico) if the trip is less than thirty days in length, the individual has a current passport and an unexpired I-94 card, does not apply for a new U.S. visa while abroad, and is not a citizen of a state sponsor of terror. F and J status holders may also use this rule to visit adjacent islands (such as those in the Caribbean). *Id.*

United States holding an expired visa, a visa of a different category than the current status, and those persons not eligible to change status within the United States. A notable exception to these entry rules is that Canadian citizens are exempt from the need for a visa in many non-immigrant categories.[18] A Canadian citizen with status approval in most non-immigrant categories may simply present a current Canadian passport or long-form birth certificate along with the status-authorizing document to gain admission to the United States.[19]

IV. NON-IMMIGRANT VERSUS IMMIGRANT

Immigration law is generally divided into two broad categories of aliens seeking to enter the United States. These categories are Non-Immigrant and Immigrant. Aliens seeking to enter and remain indefinitely in the United States are classified as persons with immigrant intent, and they must seek an appropriate status in an immigrant classification. Aliens applying for temporary status in the United States normally must seek a non-immigrant classification.[20]

Successful immigrant applicants receive Lawful Permanent Resident Status.[21] This allows an individual to remain and work in the United States indefinitely, as long as they maintain a U.S. residence and avoid legal trouble.[22] This status is commonly referred to as a "Green Card," although the card is not in fact green.[23] Immigrant classifications are more difficult to obtain, and normally involve much more extensive qualification and proof, as well as medical and additional background checks. Non-immigrant classifications also go through qualification and background checking, but are more readily available to more individuals than immigrant classifications.

U.S. immigration law assumes that all individuals have immigrant intent, and persons applying for a non-immigrant classification must overcome this assumption or they are denied most non-immigrant classifications (excluding E, for example).[24] This is an important consideration, because in many cases applicants for non-immigrant status or visas need to document strong ties to their home country and demonstrate no current intention to stay beyond a temporary authorization.[25]

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18. *Id.* § 41.2. However, Canadians need visas for the E and K classifications. *Id.* § 41.2(m).

19. 8 C.F.R. § 212.1(a).

20. *See* U. S. DEPARTMENT OF STATE, 9 FOREIGN AFFAIRS MANUAL, VISAS 41.53–41.57 (2003), http://foia.state.gov/REGS/fams.asp?level=2&id=10&fam=0 (last visited Feb. 7, 2005).

21. *See* 8 C.F.R. §§ 204, 211, 247 (2004).

22. *Id.*

23. *See Why Isn't The Green Card Green?*, *at* http://uscis.gov/graphics/aboutus/history/articles/green.htm for a discussion on the history of green cards (last visited Nov. 29, 2004).

24. Immigration and Nationality Act § 214(b), 8 U.S.C. § 1184(b). An exception to this is the "dual-intent" rule, which allows for individuals applying for H or L non-immigrant status to concurrently hold immigrant intent. 8 C.F.R. § 214.2(h)(16)(l)(16); 70 INTERPRETER RELEASES 1456-58 (Nov. 1, 1993).

25. *See* Immigration and Nationality Act §§ 101(a)(15)(F)(1), 101(a)(15)(H)(ii)(a),

V. SELECTED NON-IMMIGRANT CLASSIFICATIONS AND RELATED ISSUES

In the non-immigrant commercial context, there are many considerations to examine in order to determine if an employer may apply to the CIS for non-immigrant status on behalf of a potential employee. These considerations usually involve both the alien showing qualification for a given status, as well as the employer demonstrating that a position qualifies as eligible to be filled by a classification of non-immigrant.

The most common non-immigrant classifications are set out below. While the various common categories are described, each category has an almost unlimited set of special exceptions and circumstances that can affect eligibility, duration, travel requirements and other facets of an individual circumstance. These examples are intended for general knowledge; actual cases should be examined by an immigration attorney or other individual with appropriate expertise.

A. H1B Status

The H1B classification is available to alien professionals who will fill a specialized knowledge position in the United States. Basic eligibility for H1B status requires that the proffered job requires at least a bachelor's degree in a specialty subject to properly perform the duties, and that the individual who will fill the position has that required education.[26] An example, here would be a proffered position of mechanical engineer. An employer would have to demonstrate that this position mostly involves performing duties normally associated with a mechanical engineer, and the potential employee would be required to demonstrate that he or she has earned at least a bachelor's degree in mechanical engineering or a closely-related subject.

More specifically, the position must meet one of four categories in order to qualify for H1B classification. One of the following criteria must be demonstrated: a bachelor's degree or equivalent is normally the minimum requirement for entry into the particular position; such degree requirement is common in the industry in parallel positions among similar organizations or that the particular position is so complex or unique that a degree is required; the employer normally requires such a degree or equivalent; or the nature of the specific duties is so specialized and complex that knowledge required to perform the duties is usually associated with attainment of a degree.[27]

In order to obtain CIS approval for an individual's H1B status, the company also must demonstrate proof of the prevailing wage for the offered position in the metropolitan area in which it will be located, and attest that the employee will be paid a minimum of ninety-five percent of that prevailing wage (some fields require a minimum salary equal to or greater than 100 percent of

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101(a)(15)(H)(iii), 8 U.S.C. § 1101(a).

26. Immigration and Nationality Act § 101(a)(15)(H)(i)(b), 8 U.S.C. § 1101(a).

27. 8 C.F.R. § 214.2(h)(4)(iii)(A).

the prevailing wage) during the course of H1B employment.[28] Furthermore, H1B approvals granted by the CIS are employer and location-specific. An alien with an H1B approval may not move to a new work location or different employer without first applying for a new or amended H1B approval from the CIS. Additionally, an employer who terminates an H1B employee prior to the end of the authorized period of employment is responsible for providing reasonable transportation home.[29]

Companies may file an initial petition for an H1B employee with any requested length of validity up to three years. An individual may request extensions of H1B status through a maximum time of six years, after which the individual is required to depart the United States for a period of at least one year before again being eligible for H1B status.[30] Time spent in L status by an individual also counts against this six year maximum.[31]

Spouses and unmarried children under the age of twenty-one may apply to accompany an individual holding H1B status as H4 dependents. H4 status allows immediate family members to accompany an H1B temporary worker, but H4 holders may not work in the United States.[32]

The number of new H1B approvals that may be granted each year is limited to 65,000.[33] During the 1990s, Congress repeatedly increased this number to 195,000, but beginning with fiscal year 2004 Congress did not act to increase the number, and the cap on new H1B petitions fell back to 65,000 for each succeeding fiscal year. Of these 65,000 potential H1B slots, 6,800 are reserved each year for nationals of Chile and Singapore under recent free-trade agreements.[34] Universities, some federal agencies, some non-profit research institutions, and some individuals who are current or recent H1B status-holders

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28. *Id.* § 214.2(h)(4)(i)(B)(1).

29. *Id.* § 214.2(h)(4)(iii)(E). This is usually considered to be a one-way, coach-class airline ticket to the individual's home country.

30. Individuals in H1B status who have a labor certification request filed on their behalf at least one year prior to the exhaustion of the six-year maximum may petition annually for an unlimited number of one year extensions until the labor certification request is adjudicated. American Competitiveness in the Twenty-First Century Act of 2000 § 106(a), Pub. L. No. 106-313, 114 Stat. 1251 (2000).

31. 8 C.F.R. § 214.2(a)(h)(13)(iii).

32. Most non-immigrant classifications allow for spouses and unmarried children under the age of twenty-one to obtain a dependent-based non-immigrant visa in order to accompany a principal applicant. This can present a problem where the significant other is not legally married to the principal applicant. Non-married co-habiting partners can be admitted as B2 visitors to accompany non-immigrants where a dependent status would not technically be available. State Dept. Cable No. 01-118790 (July 9, 2001), *reprinted in* 78 INTERPRETER RELEASES 1175-77 (July 16, 2001).

33. Immigration and Nationality Act § 214(g)(1)(A), 8 U.S.C. § 1184(g); 8 C.F.R. § 214.2(h)(8)(i)(B).

34. U.S.-Chile Free Trade Agreement Implementation Act, Pub. L. No. 108-77, 117 Stat. 909 (2003); U.S.-Singapore Free Trade Agreement Implementation Act, Pub. L. No. 108-78, 117 Stat. 948 (2003). U. S. DEPARTMENT OF STATE, 9 FOREIGN AFFAIRS MANUAL, VISAS 41.53 (2003), http://foia.state.gov/masterdocs/09fam/0941053R.pdf (last visited Feb. 7, 2005).

are exempt from the cap and may submit new H1B approvals outside the 65,000 limit.[35]

The 65,000 available H1B slots do not meet the current need for H1B employees, as evidenced by the fact that for fiscal year 2004 (October 1, 2003 through September 30, 2004), all of the H1B slots were filled (and thus no new applications accepted) by February, 2004.[36] The demand in fiscal year 2005 was even greater as the CIS closed new applications on the very first day of the fiscal year, October 1, 2004.[37] As a consequence, no new applications for non-exempt H1B positions may be filed for a starting date earlier than October 1, 2005. U.S. employers will go almost a full calendar year without available H1B slots, unless Congress acts to make additional numbers available.

In late 2004, Congress passed several significant changes to the H1B program. Congress reinstated and made permanent the required worker training fee to be paid for each H1B applicant. This fee is $1,500 for employers with more than twenty-five employees, and $750 for employers with twenty-five or fewer employees.[38] Congress also removed the provision allowing employers to pay as low as ninety-five percent of the prevailing wage—all employers must now pay at least 100 percent of the prevailing wage and the existing two levels of wages are changed to four levels of wages.[39] In light of the shortage of H1B slots available, Congress created a new annual allotment of 20,000 additional H1B slots, which will be available only to aliens who have earned a masters degree or higher at a U.S. institution of higher education.[40] A $500 fraud fee has also been added to all H1B petitions to assist the CIS in discovering and dealing with fraud.[41]

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35. Information Regarding the H-1B Numerical Limitation for Fiscal Year 2000, 65 Fed. Reg. 15178-80 (Mar. 21, 2000); Information Regarding the H-1B Numerical Limitation for Fiscal Year 2004, 69 Fed. Reg. 8675 (Feb. 25, 2004); 78 INTERPRETER RELEASES 1108-17 (July 2, 2001).

36. Press Release, American Immigration Lawyers Association, H-1B Cap Reached Signals Changes Needed, Posted on AILA InfoNet at Doc. No. 04021711 (Feb. 17, 2004), *at* http://www.aila.org/contentViewer.aspx?bc=9,594,4717 (last visited Mar. 6, 2005).

37. *See* Press Release, U.S. Department of Homeland Security, U.S. Citizenship and Immigration Services, Members of the Professions holding Advanced Degrees or Aliens of Exceptional Ability, § 203(b)(2) of the Act (Oct. 1, 2004), *available at* http://www.uscis.gov/graphics/ lawsregs/admindec3/b5/index.htm (last visited Nov. 6, 2004).

38. Consolidated Appropriations Act, 2004, Pub. L. No. 108-447, § 422, 118 Stat. 2809 (2004).

39. *Id.* § 423.

40. *Id.* § 425. Interestingly, although Congress specifically authorized the availability of these additional 20,000 H1B slots beginning in early March, the CIS issued a press release on March 4, 2005 stating that practitioners may not yet file for these slots because the CIS has failed to promulgate regulations for the technical implementation of the program. *See* Press Release, U.S. Department of Homeland Security, U.S. Citizenship and Immigration Services, USCIS to Implement H-1B Visa Reform Act of 2004 (Mar. 4, 2005), *at* http://uscis.gov/graphics/ publicaffairs/newsrels/H1BVisaReformAct03_04_05.pdf (last visited Mar. 6, 2005).

41. Consolidated Appropriations Act, 2004, Pub. L. No. 108-447, § 426, 118 Stat. 2809

B. L1 Status

Companies with operations in both the United States and foreign countries may be eligible to utilize the L1 status option.[42] To qualify for L status, an individual must normally have worked for at least one year of the past three years as a specialized knowledge or managerial/executive employee of a company abroad.[43] If that company abroad shares common ownership and control with a U.S. parent, subsidiary, or sister company, the U.S. company may petition the CIS to bring that individual temporarily to the United States in L status.

Two types of L1 status are available: L1A and L1B. L1A status is available to an individual who will be filling a managerial or executive role at the U.S. operation. Individuals in L1A status are limited to a total period, including extensions, of seven years in this status.[44] L1B status is available to individuals who will fill a specialized knowledge role at the U.S. operation. Individuals in L1B status are normally limited to a total period, including extensions, of five years in this status.[45] In some limited circumstances, an employee moved to a managerial or executive role with more than one year of L1B eligibility remaining may apply for a change to L1A status, and therefore be subject to the longer seven year limit on stay.[46]

Recognizing the need for flexibility, the law allows for classification as L1B or L1A to depend on the actual duties of the position in the United States, regardless of the duties abroad. In other words, a qualifying specialized knowledge employee abroad could qualify as a managerial employee, L1A, if the U.S. duties qualify as managerial or executive, and a manager or executive with the operation abroad could qualify as an L1B, specialized knowledge employee, if the U.S. position involves the use of special knowledge rather than managerial or executive functions.[47]

Spouses and unmarried children under the age of twenty-one may apply to accompany an individual holding L1B or L1A status as L2 dependents. Children in L2 status may not work in the United States. However, L2 spouses may apply separately for work authorization based on status as an L2 spouse.[48]

Established companies who have demonstrated qualification are also eligible to apply for a blanket authorization from the CIS, if they meet certain requirements.[49] A company may qualify for blanket approval if it has at least

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(2004).

42. 8 C.F.R. § 214.2(l).

43. *Id.* § 214.2(l)(1)(i).

44. Immigration and Nationality Act § 214(c)(2)(D)(i), 8 U.S.C. § 1184(c); *see* Immigration and Nationality Act § 101(a)(15)(L) for limitation on managerial or executive capacity.

45. Immigration and Nationality Act § 214(c)(2)(D)(ii), 8 U.S.C. § 1184(c).

46. 8 C.F.R. § 214.2(l)(15)(ii).

47. Matter of Vaillancourt, 13 I. & N. Dec. 654 (R.C. 1970).

48. Immigration and Nationality Act § 214(c)(2)(E), 8 U.S.C. § 1184(c).

49. 8 C.F.R. § 214.2(l)(7)(i).

three domestic and foreign branches, and the company has either transferred ten employees in L1 status in the past year, or has $25 million in U.S. sales or employs at least 1,000 workers in the United States.[50]

In the blanket approval process, the CIS examines the company's status, qualifications, and claims. If the CIS finds the company meets all of the requirements, the CIS may issue a blanket L approval notice. This notice may then be used by intra-company transferees to apply directly at a U.S. consulate abroad without gaining individual approval from the CIS in each case.[51] The consulate then has the responsibility to verify the individual's identity, as well as to verify that the individual meets all of the education, experience, and time-with-company requirements for L classification.[52]

One exception to the blanket process is that individuals who do not possess at least a related bachelor's degree may not utilize the blanket process to obtain L1B status.[53] Benefits to the company of utilizing this pre-screening process include eliminating the need to wait for individual approval from the CIS, and also that the blanket process allows individuals with as little as six months of service to the foreign parent, subsidiary, or sister company to qualify for L status.[54]

In late 2004, Congress passed several significant changes to the L program. L employees are now prohibited from being primarily stationed at the worksite of a third party where the employee would be supervised and controlled by a third party or where the placement is simply an arrangement to provide labor to the third party.[55] Congress also eliminated the six month provision for blanket L applicants—all L employees must now have a minimum of one year of service to the overseas affiliate.[56]

C. TN Status

TN status is a special classification created to comply with NAFTA, and is currently available to Canadian and Mexican nationals.[57] However, additional restrictions imposed on Mexican nationals make this classification more difficult to obtain.[58] TN status can be obtained by applying to the CIS for

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50. *Id.* § 214.2(l)(4).
51. *Id.* § 214.2(l)(5)(ii).
52. *Id.*
53. *Id.* § 214.2(l)(5)(ii)(D).
54. Immigration and Nationality Act § 214(c)(2)(A), 8 U.S.C. § 1184(c)(2)(A). Utilization of this six month provision must be carefully examined, though, as it may negatively impact the ability of the intra-company transferee to obtain permanent residence. 8 U.S.C. § 1184.
55. Consolidated Appropriations Act, 2004, Pub. L. No. 108-447, § 412, 118 Stat. 2809 (2004).
56. *Id.* § 413.
57. 8 C.F.R. § 214.6.
58. *See, e.g.*, 8 C.F.R. § 214.6(d).

advance permission or extensions of status.[59] However, in most cases an initial Canadian TN applicant may proceed directly to an airport, land border, or seaport for TN processing by CBP personnel. Mexican nationals may now apply directly to a U.S. consulate for TN status.[60]

TN status is limited to professionals in certain defined professions.[61] In most cases it must be demonstrated that the position being offered is a professional position that is specifically listed in the NAFTA agreement.[62] Most of the professional categories require that an individual possess at least a related bachelor's degree in order to qualify for TN status. One exception is the position of management consultant, which alternatively requires at least five years of related experience and is limited to temporary consulting (it may not be used to fill a regular position).

TN status is limited to an initial approval of one year, but may be extended in one year increments an unlimited number of times. However, TN status does not allow for immigrant intent, and CBP or CIS officers may deny an extension if immigrant intent is detected.[63] Some categories, such as management consultant, by their very nature do not justify excessive extensions.

Spouses and unmarried children under the age of twenty-one may apply to accompany an individual holding TN status as TD dependents. TD dependents may not work in the United States.[64]

D. E Status

Individuals who are nationals of countries with which the United States has a treaty of commerce and navigation, or a bilateral investment treaty, may be eligible for E status.[65] Initially, E-status holders are admitted for a period of two years, which can be extended indefinitely.[66]

There are two types of E status. E1 status is for aliens conducting trade in the United States, and E2 status is for aliens overseeing investment in the

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59. *Id.* § 214.6(h)(2).

60. *Id.* § 214.6(d).

61. *Id.* § 214.6(j). Designated professions include: Accountant, Architect, Computer Systems Analyst, Disaster Relief Insurance Claims Analyst, Economist, Engineer, Forester, Graphic Designer, Hotel Manager, Industrial Designer, Interior Designer, Land Surveyor, Landscape Architect, Lawyer, Librarian, Management Consultant, Mathematician, Range Manager, Research Assistant, Scientific Technician/Technologist, Social Worker, Sylviculturist, Technical Publications Writer, Urban Planner, Vocational Counselor, Medical/Allied Professional (Dentist, Dietician, Medical Laboratory Technologist, Nutritionist, Occupational Therapist, Pharmacist, Physician, Physical Therapist, Psychologist, Recreational Therapist, Registered Nurse, Veterinarian), Scientist, and Teacher. *Id.* § 214.6(c).

62. *Id.* § 214.6(c).

63. 22 C.F.R. § 41.59(c).

64. 8 C.F.R. § 214.6(j).

65. *Id.* § 214.2(e), § 214.2(R)(6).

66. *Id.* § 214.2(e)(19)-(20).

United States.[67] An individual seeking E status must be a national of a country with such a treaty, and the company the individual is representing must be owned or controlled by a majority of nationals of that country.

As E status is conditioned on the existence of a relevant treaty between the United States and the national's foreign government, application for initial E status may be made at a U.S. consulate in the foreign national's home country. This allows each U.S. consulate located in a country with an appropriate treaty to become familiar with the existence and terms of such treaty, and to better adjudicate E status applications relevant to the appropriate treaty. Alternatively, an E petition may be filed at a designated CIS service center.[68]

Spouses and unmarried children under the age of twenty-one may apply to accompany an individual holding E status as E dependents.[69] Children in E status may not work in the United States. However, E spouses may apply separately for work authorization based on status as an E spouse.[70]

E. B Status

Individuals may also apply for B visitor status.[71] There are two types of B status. B1 status is for business visitors, while the B2 status is intended for pleasure visitors, such as for tourism, personal visits, and medical care. B status can also be obtained directly from a U.S. consulate without prior approval from CIS.[72]

Visitors in B status may not be gainfully employed during their stay in the United States.[73] A visitor admitted in B1 status may attend business meetings, conduct negotiations, offer technical advice, and conduct other short-term business functions, but may not engage in regular labor or fill an open position in any way.[74]

The B classification does not allow derivative family members to obtain status under the principal applicant. Each individual desiring to visit the United States in B status must obtain separate authorization. While a B status visitor may be granted up to one year on entry, normal procedure allows for a six-month entry.[75] Admission is usually granted for the period necessary to

67. Immigration and Nationality Act § 101(a)(15)(E)(i) and (ii), 8 U.S.C. § 1101(a)(15)(E)(i) and (ii).

68. 8 C.F.R. § 214.2(e)(8)(iii). However, when exiting the United States a new visa may be required in order to return, and the U.S. consulate is likely to re-adjudicate eligibility prior to issuing an E category visa for U.S. reentry.

69. *Id.* § 214.2(e)(4).

70. Immigration and Nationality Act § 214(e)(6), 8 U.S.C. § 1184(e)(6).

71. *Id.* § 101(a)(15)(B), 8 U.S.C. § 1101(A)(15)(B).

72. U. S. DEPARTMENT OF STATE, 9 FOREIGN AFFAIRS MANUAL, VISAS 41.31 (2004), nn. 4-11, http://foia.state.gov/masterdocs/09fam/0941031N.pdf (last visited Feb. 7, 2005).

73. 8 C.F.R. § 214.1(e).

74. 22 C.F.R. § 41.31(b)(1)-(2).

75. 8 C.F.R. § 214.2(b)(1).

accomplish the objectives presented, and justified by the individual when presenting themselves to a CBP officer. If circumstances indicate a shorter period of stay is warranted, the CBP officer may authorize a period of less than six months, or in extreme cases, a period of longer than six months (but not more than one year). Limited extensions of B status may be obtained by applying directly to the CIS.[76]

F. Visa Waiver

Individuals holding passports from certain countries with low immigration fraud rates are eligible to utilize the Visa Waiver Program in place of visitor status. The visa waiver program allows these individuals to present themselves to a CBP officer at a U.S. point of entry using only a qualifying passport, without the need to apply first for CIS approval or a consular visa.[77]

Individuals entering the United States on the Visa Waiver Program are granted an admission period of ninety days, during which time they may not work. This period may not be extended, and the individual may not change to a different non-immigrant classification without departing the United States. In some limited circumstances, a U.S. citizen's immediate family member may be able to file an immigrant petition allowing the individual to remain in the United States.[78]

The visa waiver program has come under enhanced restrictions since 9/11. Starting on September 30, 2004, all visitors entering the United States on visa waiver became part of the "U.S. Visit" program. They are photographed, fingerprinted, and have their entry as well as departure dates monitored. The "U.S. Visit" program was previously in effect for those who do not qualify for the visa waiver program. As of October 26, 2004, all passports used for visa waiver admissions must be machine readable or the passport holder will require a visa for entry. The October 26, 2004, deadline for all visa waiver applicants to present passports containing biometric identification information at ports of entry into the United States has been extended until October 26, 2005.[79]

G. J Status

The J classification allows for individuals to participate in approved exchange visitor programs within the United States. This category is limited to certain types of professionals, students, teachers, trainees, and scholars.[80] The duration of the J status varies depending on the planned activity.

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76. *Id.* § 214.2(b)(2).

77. *Id.* § 217.1 (2004).

78. *Id.* § 245.1(i) (2004).

79. *See* Press Release, U.S. Dept. of State, Bureau of Public Affairs, Extension of Requirement for Biometric Passport Issuance by Visa Waiver Program Countries (Oct. 10, 2004), *at* http://www.state.gov/r/pa/prs/ps/2004/35066.htm (last visited Feb. 7, 2005).

80. Immigration and Nationality Act § 101(a)(15)(J), 8 U.S.C. § 1101(a)(15)(J).

J status requires the individual to be participating in a program approved by DOS as an appropriate J program.[81] Participation in many J programs will result in a two year home residency requirement for the participants. Under certain circumstances, such as if the individual receives funding from the United States or a foreign government, or if the skills used or learned in the J program are listed by DOS as being needed in the individual's home country, the individual may be required to return to his or her home country for a minimum of two years before any further immigrant or non-immigrant status can be awarded to the alien.[82] In certain circumstances, the alien may apply for a waiver of this requirement.[83]

J Status allows for spouses and unmarried children under the age of twenty-one to accompany the J1 status holder as J2 dependents. J2 dependents may apply to the CIS for work authorization to support themselves, but not to support the J1 principal.[84]

H. H3 Status

The H3 classification is available to bring trainees to the United States under certain circumstances. Gaining H3 approval for an individual from the CIS requires very detailed information about both the individual and the training program.[85]

H3 trainees cannot be used for productive work while in the United States, unless such work is incidental to the training program. The training that is being provided should be unavailable in the alien's home country. The company or organization sponsoring the H3 trainee cannot have the intention of eventually employing the trainee in the United States. The training program should already exist and be fully planned, including schedule and testing details. It should be demonstrated that the alien has a need for the training, beyond simple improvement on existing skills.[86]

H3 status allows a maximum program length of two years, but in any case the time requested must be justified by a detailed training and evaluation plan.[87] Spouses and unmarried children under the age of twenty-one may apply for H4 status to accompany an H3 trainee. H4 dependents are not authorized to work in the United States.

81. 22 C.F.R. § 62.20 (2004).
82. *Id.* § 41.63.
83. *Id.* § 41.63(b).
84. 8 C.F.R. § 214.2(j)(1)(v).
85. *Id.* § 214.2(h)(7).
86. *Id.* § 214.2(h)(7)(ii)(A).
87. *Id.* § 214.2(h)(9)(iii)(D)(2).

I. F Status

F status is accorded to aliens in order to attend school in the United States. F status should only be used by those with the legitimate intent of attending classes and completing an approved program of study.[88] However, for those individuals in valid student status, some work authorization is possible.

During enrollment in studies, a university may authorize curricular practical training (CPT), which allows off-campus employment in a field related to the student's studies.[89] CPT also requires that the work be affiliated with course work through the university. Upon completion of studies, a student may apply for Optional Practical Training (OPT), which allows up to one year of work in a field related to the studies just completed.[90] Graduates can use this OPT experience to gain practical experience prior to returning home, or they can use the OPT time to begin working prior to applying for a status of longer duration, such as H1B.

J. O Status

O status is available for aliens who possess extraordinary ability in the sciences, arts, education, athletics, or business, and for support personnel and family members of extraordinary ability aliens. Aliens possessing extraordinary ability are classified as O-1,[91] while supporting personnel are classified as O-2.[92] Spouses and unmarried children under the age of twenty-one receive the O-3 classification.[93] O-3 aliens are not permitted to work in the United States.

K. P Status

The P1 category is available for entertainers and athletes, as well as support personnel.[94] P-2 status can be afforded to athletes and entertainers engaged in a reciprocal exchange agreement. P3 status can be obtained for artists and entertainers who enter the United States solely to participate in a culturally unique program.[95] Spouses and unmarried children under the age of twenty-one can obtain P-4 status, but may not work in the United States.[96]

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88. *Id.* § 214.2(f).
89. *Id.* § 214.2(f)(10)(i).
90. *Id.* § 214.2(f)(10)(ii).
91. *Id.* § 214.2(o)(1)(i).
92. *Id.* § 214.2(o)(1)(ii)(B).
93. *Id.* § 214.2(o)(6)(iv).
94. *Id.* § 214.2(p).
95. *Id.* § 214.2(p)(6)(i)(A)-(B).
96. *Id.* § 214.2(p)(8)(iii)(D).

L. R Status

The R-1 category is available for certain religious workers, such as ministers and other individuals who will work in a professional religious occupation.[97] While the individual must be coming to the United States to work in a religious capacity, R status does not require that the individual have worked in a religious capacity abroad. It simply requires that the person has been a member of the denomination for which he or she will work for at least the past two years.[98] An individual does not need prior approval from the CIS to apply for an R visa at a U.S. consular post. Spouses and unmarried children under the age of twenty-one of R-1 status holders may obtain R-2 status.

M. Effect of Non-Immigrant Overstay or Status Violation

An individual who remains beyond the period of authorized non-immigrant stay, works without permission, or otherwise violates the terms and conditions of his or her status can suffer serious consequences. An overstay of even one day renders an individual ineligible for a change of status inside the United States. If the individual applies for and receives a new approval, he or she would be required to depart the United States and apply for a new visa and reentry based on the new status approval.[99] Additionally, any existing visa would be cancelled, and the overstay or other violation would need to be sufficiently explained to a U.S. consular officer abroad.[100]

Even more significantly, an individual who stays more than six months beyond an authorized stay will invoke a three-year bar on reentry to the United States upon departure.[101] If the individual overstayed by a year or longer, the bar on reentry raises to ten years.[102] As non-immigrant change of status cannot be approved within the United States for an individual who is out of status, this reentry bar can be very serious. Criminal activity can also render an individual ineligible for non-immigrant status.[103]

N. Beyond the Non-Immigrant Classifications

With the limited exception of the E category, non-immigrant classifications each have a maximum time period for which they may be used. After that time, the non-immigrant is expected to depart the United States. For those aliens who wish to remain permanently, the consideration then becomes whether that individual qualifies for any route to lawful permanent residency.

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97. *Id.* § 214.2(r).
98. 22 C.F.R. § 41.58.
99. Immigration and Nationality Act § 222(g)(2), 8 U.S.C. § 1202(g)(2) (2004).
100. *Id.* § 222(g), 8 U.S.C. § 1202(g).
101. *Id.* § 212(a)(9)(B)(i)(I); 8 U.S.C. § 1182(a)(9)(B)(i)(I) (2004).
102. *Id.* § 212(a)(9)(B)(i)(II); 8 U.S.C. § 1182(a)(9)(B)(i)(II).
103. *Id.* § 212, 8 U.S.C. § 1182; *Id.* § 237, 8 U.S.C. § 1227 (2004).

While immigrant classifications are not the topic of this Article, due to the long time periods and qualifying factors involved, non-immigrants who hope to legally remain beyond their eligibility for temporary status must examine carefully the available options. These include family-based options such as those based on a spouse,[104] fiancé,[105] or immediate family member who is a U.S. citizen.[106] There are also several employment-based avenues to permanent residence, which include such routes as labor certification (in which an employer demonstrates that there are no available American workers with the needed skill to fill a given position),[107] multinational manager status,[108] outstanding professor or researcher status,[109] and extraordinary ability status.[110] This is not an exhaustive list of available options, but it provides a sample of potential routes to permanent residence.

Once an individual obtains permanent resident status, he or she can maintain that status indefinitely, or after maintaining such residence for a given period of time, may apply for U.S. citizenship.[111] Normally, an individual would need to satisfactorily complete five years as a U.S. permanent resident prior to applying for citizenship.[112] In the case of those persons who obtained permanent residence through marriage to a U.S. citizen, this waiting period is three years.[113] At least half of the required time as a permanent resident must be spent while physically present in the United States.[114]

VI. STATUS RENEWAL VERSUS VISA RENEWAL

It cannot be stressed enough that status and visa are two separate concepts with very different implications. After successfully obtaining status from the CIS, and possibly a visa from DOS, an individual may have various expiration dates on various documents. This can be due to various reasons, but the important point to always remember is that the status authorizes the individual to remain and possibly to work in the United States, while the visa allows entry into the United States.

When an expiration date on one of these documents approaches, the document must be analyzed for the correct action to be taken: permanent departure from the United States, a request for extension of status from the

104. For K3 Visas, see 8 U.S.C. § 1182 § 101(a)(15)(K)(ii), 8 U.S.C. § 1101. For V Visas, see Immigration and Nationality Act §101(a)(15)(V), 8 U.S.C. § 1101.

105. For K1 Visas, see Immigration and Nationality Act § 101(a)(15)(K)(i), 8 U.S.C. § 1101.

106. *Id.* § 201(b)(2)(A)(i), 8 U.S.C. § 1151 (2004).

107. *Id.* § 212(a)(5)(A), 8 U.S.C. § 1182.

108. *Id.* § 203(b)(1)(C), 8 U.S.C. § 1153 (2004).

109. *Id.* § 203(b)(1)(B), 8 U.S.C. § 1153.

110. *Id.* § 203(b)(1)(A), 8 U.S.C. § 1153.

111. *Id.* § 318, 8 U.S.C. § 1429 (2004).

112. 8 C.F.R. § 316.5 (2004).

113. *Id.* § 319.1(a)(2) (2004).

114. Immigration and Nationality Act § 316, 8 U.S.C. § 1427(a) (2004).

CIS,[115] or application for a new visa from DOS at a U.S. consulate abroad. If the underlying status is expiring, an application for extension may be made to the CIS (in most cases from four to six months in advance) without departing the United States. Evidence of the currently authorized stay is found on the I-94 card, which is issued by the CIS for extensions of status and changes of status within the United States, or by the CBP upon entry into the United States.[116]

If the visa is expiring but the underlying existing, extended, or changed status will remain valid, no action needs to be taken unless travel out of, and return to, the United States is contemplated, because a visa is used only for entry purposes. When a visa is expiring, application for a new visa can be made at a U.S. consulate abroad as early as sixty days prior to expiration of the current visa. However, if an individual has changed to a new status classification, he or she may apply for a visa in the new classification at any time.

VII. VISA RENEWAL ISSUES

Foreign nationals legally working in the United States and their U.S. employers often find themselves in a difficult and unnecessary position. These individuals, most often professionals contributing to the U.S. economy, are normally able to receive extensions of permission from CIS to remain in the country and continue working in legitimate and valuable occupations for a limited period of time.

A difficulty arises for these employees and their U.S. employers in that the employees often need to travel internationally for both business and personal reasons. In most cases, this requires the additional step of obtaining a visa from the DOS in addition to the legal status already granted by the CIS.

This process often involves significant business interruption for the employer, personal difficulties for the employee, and great monetary expense for both. This inconvenience also applies to individuals who have changed status with approval from the CIS. For example, a student hired after completing a U.S. university degree, and approved for a professional status by the CIS while still present, would need a visa in a new classification in order to travel outside the United States. Until recently, most visa-seekers already in the United States had three main options: travel to a U.S. Consulate in Canada or Mexico, travel to a U.S. Consulate in the employee's home country,[117] or revalidate by mail from within the United States.[118] As explained below, this third option no longer exists.

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115. *See* 8 C.F.R. § 214.1.

116. *Id.* §§ 235.1(f), 235.4 (2004).

117. 22 C.F.R. § 41.101(a).

118. U. S. DEPARTMENT OF STATE, 9 FOREIGN AFFAIRS MANUAL, VISAS 41.102 (2003), http://foia.state.gov/masterdocs/09fam/0941102R.pdf (last visited Feb. 7, 2005).

The issuance of these visas is critical to the U.S. economy. All three previously existing methods were useful, but only because a better system has not been designed. All three are wasteful and time-consuming for employees, employers, and U.S. taxpayers.[119]

Sending employees to consulates in Canada or Mexico presents several problematic issues, several of which negatively impact the U.S. economy. The most immediate impact is the cost and loss of valuable work time from the employee. The costs of sending an employee to Canada or Mexico normally include airfare, lodging and other associated expenses. These costs increase quickly as family members are added to the travel expenses. Additionally, since the consulates do not operate on weekends or holidays, an employee must normally miss a minimum of two workdays. Recent changes expanding interviews as well as security and name checks may push this number up to several days. Many nationalities also require a Canadian or Mexican visitor visa in order to travel to the U.S. consulate, increasing cost and delay even further.

Similarly, employees who travel to a U.S. Consulate in their home country often experience large, unnecessary costs, and even longer delays waiting for a visa interview. This process results not only in time lost to U.S. companies, but a massive amount of money spent on airfare, lodging, entertainment, cabs, restaurants, and other items in foreign countries that could have been spent in the United States, or returned to the company bottom line. Hundreds of appointments are made at U.S. Consulates in Canada each week.[120] These appointments result in millions of dollars pouring into Canada that should be spent in the United States. The same is true of appointments in Mexico and employees' home countries. This volume of legitimate individuals traveling abroad for the purpose of obtaining new visas to carry out their duties (remember, the visa is only needed for travel, and in most cases these individuals have already received approval to remain in the U.S.) also unnecessarily adds volume to the border and customs officers who review these individuals upon their return from abroad.

The process of requiring or providing strong incentives to already-vetted and approved individuals to travel out of the United States in order to obtain

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119. Two other alternatives have been proposed: use of existing CIS biometric data collection offices to verify an applicant's identity, or extension of automatic visa revalidation to cover all travel. Letter from Advantest America Co., et. al., to Colin Powell, U.S. Secretary of State, and Tom Ridge, Secretary of U.S. Homeland Security, (July 12, 2004), *at* http://www.aila.org/newsVieweraspx?bc=273&docID=13570 (last visited Feb. 7, 2005). However, the former option may not allow for sufficient security checks while the person is available to be taken into custody (including added need for security and CIS officers at each of the biometric data collection points) and would be extremely difficult to match up with processing by mail. The latter option provides no security or identity evaluation, and would create additional confusion and need for secondary inspection at CBP processing posts.

120. *See generally* U.S. Dept. of State, Visa Appointment Reservation System, *at* www.nvars.com (last visited Feb. 1, 2005).

travel visas is, in fact, an outsourcing of potential growth for the American economy. For example, without the visa revalidation option below, a Japanese executive whose U.S. operation employs hundreds of U.S. workers could be forced to travel to Japan and spend three to five weeks or more waiting for a travel visa, even after waiting to obtain an interview.[121] This unnecessary time away from work (the individual's status and work permission have already been granted by CIS in most cases) could jeopardize the U.S. operation and its U.S. workers.

The third option previously available for some individuals had been the revalidation of existing visas by mail through DOS in Washington, D.C. This process was limited to people holding, or who very recently held, the same classification of visa they wished to renew. It was not available to individuals applying for the first time in the requested classification.

Unfortunately, this process often took ten to sixteen weeks or longer, during which time the applicants were without passports and original CIS authorizations. Some practitioners even reported lost, delayed and, misdirected original documents, as well as incorrect processing. This revalidation-by-mail process was eliminated on July 16, 2004, due to the fact that these visa issuances did not involve in-person verification of identity.[122] While creating serious problems for some, this step was understandable in the post-9/11 security environment because the DOS must be sure that the individual receiving a visa is actually the person represented by the paperwork presented.

VIII. A PROPOSAL FOR RENEWAL

In order to address the security, identity, and economic issues involved in visa revalidation, a new domestic DOS post to conduct in-person visa processing should be created. A central facility could be established in a U.S. city, possibly in an economically blighted area, to spur jobs and redevelopment, or perhaps in the planned build-out space at the CIS National Benefits Center (formerly and briefly known as the Missouri Service Center), to process visas only for persons currently legally in the United States and with prior approval and authorization from CIS.

While unconventional, this action would have multiple beneficial effects. Millions of dollars now spent in Canada, Mexico and other countries would instead flow to domestic airlines, hotels, restaurants and cab drivers as the applicants travel to a U.S. city and wait there for visa issuance. Security concerns with the current revalidation-by-mail process would be eliminated because each applicant and family member would be subjected to in-person interviews and biometric data collection. Applicants could also be asked to

121. *See generally* U.S. Dept. of State, Visa Wait Times, *at* http://travel.state.gov/visa/tempvisitors_wait.php. (last visited Feb. 1, 2005).

122. Discontinuation of Reissuance of Certain Nonimmigrant Visas in the United States, 69 Fed. Reg. 35,121 (Jun. 23, 2004).

validate information provided to CIS with employment and domicile documentation.

One justification for requiring some applicants to apply abroad may be that if the applicant is denied, they become the problem of the local government and do not require removal or Immigration Court proceedings. However, the vast majority of these applicants are legitimate professionals, all of whom have already been vetted by the CIS. The processing center could also take into custody any individual determined to be a security or criminal threat. If removal should become an issue for a significant number of applicants, DOS could require the posting of a bond for the purpose of covering return airfare when required, but in any case if the individual applying is one who should be removed, this proposed system would result in removal rather than continued presence in the United States.

With a domestic processing facility, the individuals would actually have to present themselves for investigation, fingerprinting, photographing, and a background check, which could result in a person being taken into custody if deemed a threat. The justification for sending these individuals abroad is the antiquated desire to have a non-admissible person be outside the United States at application so that deportation would not be necessary. The proposed system would be more appropriate in the current heightened security environment.

This system would also reduce the number of work days lost in many cases, reduce total dollar expense to the employee and employer, and reduce the burden on border officers. In addition, the new post could provide cost-effective training for, and probationary review of, new consular officers without first relocating them abroad. It would also add a large number of jobs for U.S. workers employed at the post (direct), and for an even larger number in support services (indirect). The center could even be intentionally located in an economically-blighted area to turn around a local economy. In fact, a modest "premium" fee could be charged to applicants to assist in covering start-up costs for the facility.

The establishment of this facility would provide increased security, efficiency, and jobs for American taxpayers. It would also provide increased efficiency and lower costs for U.S. companies and critical employees of these operations. The facility would also energize a local economy, and provide a cost-effective, real world training ground for new State Department visa officers without the need to first locate them overseas.

IX. CONCLUSION

Many measures taken in response to 9/11 were necessary to help ensure the safety of Americans at home and abroad, and were well justified. However, many of these measures are also costly and time consuming. A new domestic revalidation facility would benefit the individuals involved, as well as the economy—both local and national—while providing training opportunities for DOS and immigration officials, and allowing additional opportunities to verify identities and apprehend any discovered status violators or criminal aliens.

In most cases, the alien has already been authorized to remain and possibly to work in the United States, and a visa is only needed for returning to the United States after travel abroad. As such, the distinction between status and visa is an important one. Ultimately, many types of non-immigrant status exist, and the determination that a given position or potential employee may qualify for a given non-immigrant status requires analysis by an individual with detailed and current knowledge of the requirements of each potential category, as well as the potential effects that given actions, or inaction, can have on future non-immigrant or immigrant applications.

THE PLACE OF THE UNDOCUMENTED WORKER IN THE UNITED STATES LEGAL SYSTEM AFTER *HOFFMAN PLASTIC COMPOUNDS:* AN ASSESSMENT AND COMPARISON WITH ARGENTINA'S LEGAL SYSTEM

María Pabón López*

I. INTRODUCTION

The undocumented worker's place in the U.S. legal system has been described as "deeply ambivalent."[1] A leading immigration scholar coined this intriguing description more than fifteen years ago, shortly after the passage of the statute that outlawed the hiring of undocumented workers in the United States: the Immigration Reform and Control Act (IRCA).[2] This deep ambivalence reveals a pragmatic measure of tolerance for these workers, who occupy a key place in the U.S. economy[3]—particularly in the low skill, low

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1. Linda Bosniak, *Exclusion and Membership: The Dual Identity of the Undocumented Worker under United States Law*, 1988 WIS. L. REV. 955, 1023 (1988).

2. *See* 8 U.S.C. § 1324a (1994) (making unlawful the employment of undocumented workers). IRCA also contained a provision for sanctioning employers who hired undocumented workers. *Id.*

3. Studies show that immigrant workers may add up to an estimated $10 billion to the economy each year. *See Overall U.S. Economy Gains from Immigration, But It's Costly to Some States and Localities*, NAT'L ACAD. PRESS (May 17, 1997) (citing findings of a U.S. Commission on Immigration Reform study performed by the National Academy of Sciences, as stated by Rand Corp. economist James R. Smith, Commission Chair) (on file with author). The Urban Institute has estimated that undocumented workers have contributed $2.7 billion to Social Security and another $168 million to unemployment insurance taxes in the country. *See* THE VALUE OF UNDOCUMENTED WORKERS, AM. IMMIGRATION LAW FOUND. (April 2002) (on file with

wage labor force sector[4]—while at the same time underscoring their status as outsiders in the polity, based on their undocumented status. This state of deep ambivalence also reveals the coexistence of opposing attitudes or conflicting thoughts toward the undocumented workers, who have a dual nature in U.S. society, outsiders by nationality and lack of legal status and insiders because the U.S. economy needs their work. Despite this deep ambivalence, the years following the passage of IRCA saw a record growth in the numbers of undocumented workers in the country, in response to the rising needs of the U.S. workforce.[5] However, there has been no concomitant growth in IRCA-authorized sanctions imposed upon employers for whom the undocumented workers labor.[6] As such, the deep ambivalence toward the undocumented worker has continued in the face of the lack of effective deterrents to the hiring of undocumented workers.

In the last three years, the seminal U.S. Supreme Court's decision in *Hoffman Plastic Compounds, Inc. v. NLRB*[7] has rekindled the debate regarding the status of undocumented workers in the United States. In *Hoffman*, the Court denied an undocumented worker backpay, which the NLRB had awarded as a remedy to an unfair labor practice, finding that the award contradicted the policies of IRCA.[8] The *Hoffman* decision has had an indelible effect upon legal norms in the United States regarding the rights of undocumented workers,

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author), *available at* http://www.ailf.org/ipc/policy_reports_2002_value.asp. For a recent study of the economic impact of undocumented workers in a particular locality, see CHIRAG MEHTA ET AL., CHICAGO'S UNDOCUMENTED IMMIGRANTS: AN ANALYSIS OF WAGES, WORKING CONDITIONS AND ECONOMIC CONTRIBUTIONS, UNIVERSITY OF ILLINOIS CHICAGO 34 (2002) (discussing contributions of undocumented workers in the Chicago metropolitan area in the amount of 5.45 billion dollars annual spending, generating an additional 31908 jobs yearly to the local economy), *available at* http://www.uic.edu/cuppa/uicued/Publications/RECENT/undoc_full.pdf.

4. Undocumented workers are overrepresented in certain low skill, low wage labor force sectors. For example, undocumented workers account for about ten percent of all restaurant workers, and nearly twenty-five percent of all private household workers in the United States. *See* B. LINDSAY LOWELL & RICHARD FRY, PEW HISPANIC CENTER, ESTIMATING THE DISTRIBUTION OF UNDOCUMENTED WORKERS IN THE URBAN LABOR FORCE 4 (2002), *available at* http://pewhispanic.org/files/reports/6.1.pdf (on file with author).

5. As of October 1992, the Immigration and Naturalization Service (INS) estimated the number of undocumented population in the United States at 3.9 million. *See* Jeffrey Passel, *Undocumented Immigration to the United States: Numbers, Trends, and Characteristics, in* ILLEGAL IMMIGRATION IN AMERICA: A REFERENCE HANDBOOK 37 (David W. Haynes & Karen E. Roseumblum, eds. 1999).

6. In fact, the available data shows that for the years 2003 and 2004, only fifteen employers nationwide were fined for hiring undocumented workers. *See* DEPARTMENT OF HOMELAND SECURITY, UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES, EMPLOYER SANCTIONS FINAL ORDER, *available at* http://uscis.gov/graphics/aboutus/foia/ereadrm/esdefin4.htm (last visited March 21, 2005). The amount of the fines imposed during these years has ranged from a low of $2200 to a high of $59,356.60. *Id.* In another telling statistic, nationwide media attention has focused on the fact that in 2002, the former Immigration and Naturalization Service issued orders levying fines on only thirteen employers for hiring undocumented workers. Donald L. Bartlett & James B. Steele, *Who Left the Door Open?*, TIME, Sept.20, 2004, at 51.

7. 535 U.S. 137 (2002).

8. *Id.* at 149.

particularly at a time when the nation is coming to terms with the sheer number of undocumented workers[9] within its borders.

The undocumented worker faces a conflict between labor law and immigration law: whether the undocumented worker's unauthorized immigration status should be given priority over the illegality of the employer who violates labor law by hiring undocumented workers. Thus, one must ask whether the place of the undocumented worker in the U.S. legal system is still deeply ambivalent after *Hoffman*, or has that ambivalent state deteriorated as a result of the decision.

This article analyzes the place of the undocumented worker in the U.S. legal system after *Hoffman* and argues that the attitude of the polity has moved beyond deep ambivalence to a hostile inconsistency, as evidenced by the conflicting treatment of the claims of undocumented workers by the lower courts. This hostile inconsistency becomes even more obvious when compared to the treatment of undocumented workers in Argentina, another country with a sizable immigrant population. In contrast to the almost insurmountable barriers to legal immigration in the U.S. for the majority of non-U.S. citizen workers, Argentina's legal system allows such workers easier access to Argentina's workforce. Furthermore, the country's legal regime treats undocumented workers in a markedly less hostile and inconsistent manner than does the U.S. legal system. Whereas sanctions against companies for employing undocumented workers are a part of the U.S. legal system, it is the case that they are not the primary focus of enforcement actions. In Argentina, the legal system does the opposite, focusing instead on the employer as a main locus of the legal sanction.

Part II of this paper analyzes the *Hoffman* opinion and explores how it has been interpreted in subsequent case law to illuminate the current norms that affect the lives of undocumented workers in the United States. Part III examines leading federal and state labor and employment laws and analyzes the predominant statutory regimes affecting undocumented workers. Part IV

9. Estimates show that there are approximately six million undocumented workers in the United States economy, representing about five percent of all United States workers. *See* JEFFREY S. PASSEL, RANDY CAPPS & MICHAEL E. FIX, URBAN INSTITUTE IMMIGRATION STUDIES PROGRAM FACT SHEET, UNDOCUMENTED IMMIGRANTS: FACTS AND FIGURES (2004) (on file with author). Other estimates have shown a larger figure of undocumented workers, estimating the number at 7.8 million. *See* LOWELL & FRY, *supra* note 4. The latest estimates of the total undocumented population in the United States are available from the Pew Hispanic Center and show that there are 10.3 million undocumented residents in the country, with undocumented Mexicans accounting for 57% of the undocumented population. *See* JEFFREY S. PASSEL, PEW HISPANIC CENTER, ESTIMATES OF THE SIZE AND CHARACTERISTICS OF THE UNDOCUMENTED POPULATION 1 (2005), *available at* http://pewhispanic.org/files/reports/44.pdf (on file with author). The number of undocumented workers in the United States is understandably, hard to ascertain, as is, in general, subject of illegal immigration, which is "fraught with misinformation, and lack of information, complexity and paradox." David W. Haines & Karen E. Rosenblum, *Introduction: Problematic Labels, Volatile Issues, in* ILLEGAL IMMIGRATION IN AMERICA, *supra* note 5 at 1.

analyzes the current status and treatment of undocumented workers in Argentina, including the legal norms of Mercado Común del Sur (MERCOSUR),[10] South America's main regional economic integration regime. Part IV also provides a comparative analysis of the labor rights of undocumented workers in the United States and those of their counterparts in Argentina. Finally, this paper will conclude in Part V by canvassing proposed solutions to the hostile ambivalence towards undocumented workers in the U.S. legal system. These solutions will be assessed in an effort to better address the existence of undocumented workers, who are in this country to stay because of the economic situation and the cheap labor they provide.[11]

II. *HOFFMAN PLASTIC COMPOUNDS, INC. V. NLRB* AND ITS AFTERMATH

A. Hoffman Plastic Compounds, Inc. v. NLRB – *The Case*

The facts that give rise to *Hoffman* are as follows. José Castro and other employees of the Hoffman Plastic chemical compound production plant in Los Angeles took part in a campaign distributing authorization cards at their place of employment as part of a unionizing effort for the United Rubber, Cork, Linoleum, and Plastic Workers of America, an AFL-CIO affiliate.[12] A month after this activity began, the company terminated the persons involved in the union organizing efforts, including Mr. Castro.[13] Consequently, Mr. Castro and the other employees filed a complaint with the National Labor Relations Board (NLRB). Finding in favor of Mr. Castro and the other employees, the NLRB ordered that the company (1) cease and desist from further violations, (2) offer reinstatement and backpay to the employees; and (3) post a notice in the workplace regarding the order.[14]

During his testimony at an administrative compliance hearing held to determine the amount of backpay owed, Mr. Castro revealed information about his unauthorized entry into the United States, lack of employment authorization, and the use of fraudulent documents to obtain employment.[15] Taking into account this testimony, the Administrative Law Judge (ALJ) denied

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10. MERCOSUR was created by the Treaty of Asuncion Establishing a Common Market among Argentina, Brazil, Paraguay, Uruguay. *See* Argentina-Brazil-Paraguay-Uruguay: Treaty Establishing a Common Market, Mar. 26, 1991, 30 I.L.M. 1041 (entered into force Dec. 31, 1994).

11. *See* Kevin Johnson, *An Essay on Immigration, Citizenship, and U.S./Mexico Relations: The Tale of Two Treaties,* 5 S.W. J. L. & TRADE AM. 121, 141 (1998) (noting that business interests in the United States "treasure the cheap labor provided by the Mexican people"); *see generally* Christopher David Ruiz Cameron, *The Labyrinth of Solidarity: Why the Future of the American Labor Movement Depends on Latino Workers*, 53 U. MIAMI L. REV. 1089, 1098 (1999) (discussing the essential nature of the Latino worker to the U.S. economy).

12. *Hoffman Plastic Compounds, Inc.*, 535 U.S. at 140.

13. *Id.*

14. *Id.*

15. *Id.* at 141.

any backpay to Mr. Castro. Mr. Castro then appealed, and the NLRB reversed the ALJ's decision, ordering backpay for a period of three-and-a-half years, which it calculated from the day of discharge to the date that the company learned of Mr. Castro's undocumented status.[16] The company appealed to the U.S. Supreme Court after the Court of Appeals for the District of Columbia Circuit had enforced the NLRB's backpay order.[17]

The Supreme Court granted certiorari in the case and reversed the D.C. Circuit. In a five to four decision, the Court held that Congress's federal immigration policy, as expressed in IRCA, prohibited the NLRB remedy of backpay for an undocumented worker who had never had legal authorization to obtain employment in the United States.[18] The Court's decision resolved a circuit split: the Second and Ninth Circuit Courts of Appeal had allowed backpay awards to undocumented workers under the National Labor Relations Act (NLRA), whereas the Seventh Circuit Court of Appeals held exactly the opposite, denying backpay to the undocumented worker.[19] The Court began its analysis by reviewing its pre-IRCA precedent, as set forth in *Sure-Tan, Inc. v. NLRB.*[20] In *Sure-Tan,* the Court decided that an employer had engaged in an unfair labor practice by reporting to the Immigration and Naturalization Service (INS) certain undocumented workers in its workforce who had participated in union activities.[21]

The Court based its holding on NLRA precedent holding that an employer constructively discharges an employee when, with the purpose of discouraging union activity, the company purposefully creates working conditions so intolerable that the employee is left with no choice but to resign.[22] With regard to a remedy for the unfair labor practice, the Court conditioned backpay for the workers who had already been deported by requiring their legal reentry into the country and that they be legally entitled to be present and employed in the United States.[23] In fashioning this remedy, the Court in *Sure-Tan* balanced the policy regarding protection against unfair labor practices of the NLRA against the policy of the Immigration and Naturalization Act (INA) aimed at deterring undocumented immigration.[24] Foreshadowing *Hoffman*, the Supreme Court in *Sure-Tan* afforded a limited remedy to undocumented workers by having the NLRA policy yield to the INA policy.

The *Hoffman* Court then turned its analysis to the IRCA's comprehensive scheme prohibiting the employment of undocumented workers and the penalties

16. *Id.* at 142. The amount of backpay was calculated at $66, 951. *Id.*
17. Hoffman Plastic Compounds, Inc. v. NLRB, 237 F.3d 639 (D.C. Cir. 2001).
18. *Hoffman Plastic Compounds, Inc.*, 535 U.S. at 149.
19. *Id.* at 142 n.2. The NLRA is codified at 29 U.S.C. § 151 *et. seq.* (2000).
20. Sure-Tan, Inc. v. NLRB, 467 U.S. 883, 902-3 (1984).
21. *Id.* at 894.
22. *Id.*
23. *Id.* at 902-3.
24. *Id.* at 912-3.

to both employers and employees for violations of the scheme.[25] The Court found that Congress could not have meant for the NLRB to award backpay to an undocumented worker, who would otherwise be criminally liable for presenting false documents to obtain employment and who could not mitigate damages by obtaining other employment.[26] The Court then resolved the controversy over which policy prevails when labor policy and immigration policy are at odds in the area of backpay remedies: immigration policy as expressed in the IRCA's prohibition against the hiring of undocumented workers carried the day. Continuing the trend started in *Sure-Tan*, the Court chose to place labor policy over immigration policy, even in the face of one illegality under immigration law, committed by the undocumented worker in obtaining unauthorized employment as compared to the double illegality of the employer in (1) the hiring of the undocumented worker and (2) the violation of labor law.

However, as clearly stated in the *Hoffman* opinion, the other NLRA-imposed remedies, such as cease-and-desist orders and posting a notice to employees of their rights, with contempt enforcement, continue to apply to undocumented workers.[27] The Court also distinguished its *Hoffman* opinion from its own precedent regarding the awarding of backpay to workers who had engaged in criminal acts, by noting that it has never deferred to the NLRB's remedial preferences when they "potentially trench upon federal statutes and policies unrelated to the NLRA."[28] Furthermore, the Court rejected as a "slender reed"[29] a House committee report, which the dissent cited and which stated that the IRCA "does not 'undermine or diminish in any way labor protections in existing law, or . . . limit the powers of federal or state labor relation boards . . . to remedy unfair practices committed against undocumented employees.'"[30] Finally, the Court indicated that if relief is to be had, then it must be "addressed by Congressional action," not the courts.[31]

The dissent authored by Justice Breyer and joined by Justices Souter, Stevens, and Ginsburg first reviewed how all of the relevant agencies, including the Department of Justice, which was then in charge of overseeing INS's activities, had informed the Court that an award of backpay to an undocumented worker would not affect immigration policy.[32] Then the dissenters warned that eliminating backpay as a deterrent in the NLRB's "remedial arsenal" left it with fewer "weapons" and only "future-oriented" remedies such as cease-and-desist orders.[33] In the dissenters' view, this action

25. *Hoffman Plastic Compounds, Inc.*, 535 U.S. at 148.
26. *Id.* at 149, 151.
27. *Id.* at 152.
28. *Id.* at 144.
29. *Id.* at 150 n.4.
30. *Id.* at 157 (Breyer, J., dissenting) (citing H.R. No. 99-682 pt. 1 at 58 (1986)).
31. *Id* at 152 (citing *Sure-Tan, Inc*, 467 U.S. at 904).
32. *Id.* at 153 (Breyer, J., dissenting).
33. *Id.*

produced a counter effect to NLRA's policy, allowing employers to violate labor laws "at least once with impunity."[34]

The dissent further stressed the effect of the majority opinion with respect to immigration policy, arguing that the unwarranted removal of a "critically important remedial power" from the NLRB gave employers a greater incentive to employ undocumented workers.[35] Upon considering how the majority misapplied its own precedent, such as in *Sure-Tan*, the dissent concluded by stating that the NLRB's conclusion to award the backpay was reasonable, and the majority should have respected it.[36] Furthermore, Justice Breyer asserted that the majority should not have substituted its own independent view of the matter over that of the NLRB.[37] In the three years following *Hoffman*, much litigation has ensued with regard to its applicability to various other federal and state labor and employment law.

B. Cases in the Three Years Following Hoffman*: Mixed Results*

1. Federal cases

Following *Hoffman,* employers have argued that a myriad of federal laws do not apply to undocumented workers and that such workers are not entitled to the various comprehensive workforce protections afforded by U.S. law to its citizen or lawfully admitted workers.[38] These arguments have met with mixed success. For example, in *Zeng Liu v. Donna Karan International Inc.,*[39] the employer, fashion designer Donna Karan's company, sought to discover plaintiff employees' immigration status in an unpaid wages Fair Labor Standards Act (FLSA) case. Karan argued that under *Hoffman*, if undocumented, the plaintiffs would be unable to collect the unpaid wages.[40] The court disagreed and did not allow discovery, finding that the plaintiffs' immigration status was not relevant to its decision regarding unpaid wages, because *Hoffman* only concerned backpay as a remedy for a violation of the NLRA for work not performed,[41] rather than backpay for work performed in the unpaid wages situation at hand.

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34. *Id.*

35. *Id.* at 155.

36. *Id.* at 160.

37. *Id.* at 161.

38. *See, e.g.,* Martinez v. Mecca Farms, Inc., 213 F.R.D. 601 (S.D. Fla. 2002) (employer opposed class certification in wage and damages claim, stating that following *Hoffman*,the Migrant and Seasonal Agricultural Worker Protection Act did not apply to undocumented workers); Flores v. Nissen, 213 F. Supp. 2d 871, 823 n.4 (N.D. Ill. 2002) (Defendant employee argued that *Hoffman* should bar plaintiff, undocumented fellow employee, from recovering backpay as part of damages suffered in car accident).

39. Zeng Liu v. Donna Karan Int'l Inc., 207 F. Supp. 2d 191, 192 (S.D.N.Y. 2002). The FLSA is codified at 29 U.S.C. § 201 *et. seq.* (2000).

40. *Id.*

41. *Id.* There are several other reported cases in which lower courts have denied

In another FLSA case, *Singh v. Jutla*,[42] the court denied an employer's motion to dismiss wherein the employer argued that the court read *Hoffman* broadly to prohibit undocumented workers from obtaining labor law remedies other than backpay. In this case, the employer had recruited the employee knowing of his undocumented status, never paid the employee for work performed for almost three years, and then, when the employee filed his FLSA claim for the unpaid wages, called the INS, resulting in the employee's detention.[43] In fact, INS had detained Mr. Singh for fourteen months at the time of the writing of the opinion.[44] The District Court for the Northern District of California refused to extend *Hoffman* to bar the remedies Mr. Singh sought for unpaid wages.[45] The court noted that *Hoffman* did not preclude undocumented workers from seeking *any* form of relief.[46] The court reasoned that, unlike in *Hoffman*, Mr. Singh sought to recover unpaid wages for work already performed, and as such, the remedies sought were not barred to him.[47] The opinion did not reach the merits of Mr. Singh's case, that is, whether as an undocumented worker he would be able to recover damages and obtain injunctive relief under the FLSA against his employer for retaliating against him for filing an unpaid wage claim.

Yet another *Hoffman* discovery challenge took place in *De La Rosa v. Northern Harvest Furniture*,[48] a Title VII[49] action where the employer sought production of the employee's documents regarding his work authorization both at his time of employment and at the time of the litigation.[50] In that case, the District Court for the Central District of Illinois found that "[t]he only period for which immigration status might potentially be relevant" to the question of backpay under Title VII was the time after the employee was terminated and when the employer offered reinstatement.[51] Because this time period was not one for which the defendant had requested employment authorization documents, the court denied the motion to compel discovery.[52] The importance of the timing identified by the court in *De La Rosa* lies in the fact that a worker

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employer's requests for discovery into employee's immigration status when the request involves unpaid wages under the FLSA. *See* Flores v. Albertsons, CV 01-00515 AHM, 2002 U.S. Dist LEXIS 6171 (C.D. Cal. Apr. 9, 2002); Flores v. Amigon, 233 F. Supp. 2d 462, 464 (E.D.N.Y. 2002); Cortez v. Medina's Landscaping, No. 00 C 6320, 2002 U.S. Dist. LEXIS 18831, at *2 (N.D. Ill. Sep. 30, 2002). In another case, *Rodriguez v. The Texan, Inc.*, No. 01 C 1478, 2002 U.S. Dist. LEXIS 17379, at *7 (N.D. Ill. Sep. 13, 2002), the court granted a plaintiff's motion in limine to exclude any reference to his immigration status in an unpaid wages case under the FLSA.

42. Singh v. Jutla, 214 F. Supp. 2d. 1056, 1062 (N.D. Cal. 2002).
43. *Id.* at 1057.
44. *Id.*
45. *Id.* at 1060.
46. *Id.* at 1061.
47. *Id.*
48. De La Rosa v. N. Harvest Furniture, 210 F.R.D. 237 (C.D. Ill. 2002).
49. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (2004).
50. *De La Rosa*, 210 F.R.D. at 238-9.
51. *Id.* at 239.
52. *Id.*

who is undocumented at the time of employment is not automatically disqualified from bringing an antidiscrimination claim under Title VII. Thus, there is no chilling effect to undocumented workers which would prevent them from bringing antidiscrimination actions under Title VII.

Notwithstanding its ruling, the *De La Rosa* court did note that in a Title VII case backpay is presumptively appropriate and "may only be denied for reasons which 'if applied generally, would not frustrate the central statutory purposes of eradicating discrimination . . . and making persons whole.'"[53] Furthermore, by contrasting its authority with that of the NLRB, the court hinted at what would happen if immigration law conflicted with anti-discrimination law, stating that it could not "conclude at this time that *Hoffman* is dispositive of the issues raised . . . ."[54] Thus, the court also hinted at its possible resolution of the case—assuming discovery into the employees' employment authorization at the appropriate time period for Title VII backpay had taken place—a much different outcome than what happened to Mr. Castro in *Hoffman*. Mr. De La Rosa's undocumented status quite possibly would not have precluded his obtaining backpay as a remedy under the anti-discrimination statute.

The only federal appellate case to have considered Title VII in regard to undocumented workers following *Hoffman* has followed this view. The Ninth Circuit, in *Rivera v. NIBCO, Inc.*,[55] has stated in dicta that *Hoffman* is not broadly applicable and that it doubts it is germane to the Title VII context.[56] The Ninth Circuit's view is based on the distinctions between the limited private enforcement allowed under the NLRA and the broad mandate under Title VII for individual plaintiffs to enforce the law by acting as private attorneys general.[57] Thus, according to the Ninth Circuit, and contrary to the arguments of some asserting that the undocumented have no rights in this country,[58] *Hoffman*'s holding was limited to the NLRA.

There are other instances where the employee's legal action has survived a *Hoffman* challenge, but just barely. In *López v. Superflex, Ltd.*,[59] the

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53. *Id.*

54. *Id.*

55. Rivera v. NIBCO, Inc., 364 F.3d 1057, 1067 (9th Cir. 2004), *reh'g denied*, 384 F.3d 822 (9th Cir. 2004), *cert. denied*, 73 U.S.L.W. 3415, 2005 WL 517010 (2005). The Supreme Court's recent denial of certiorari can be seen as reflecting a lack of intense dissatisfaction of the majority of the Justices with the decision below. *See* Peter Linzer, *The Meaning of Certiorari Denials*, 79 COLUM. L. REV. 1227, 1229 (1979).

56. *Rivera*, 364 F.3d at 1067.

57. *Id.*

58. *See* Christine Dana Smith, *Give Us Your Tired, Your Poor: Hoffman and the Future of Immigrants' Workplace Rights*, 72 U. CIN. L. REV. 363, 374 (2003) (narrating account of New York employer's attorney to an advocacy group stating: "I am sure you are aware of the ruling by the Supreme Court of the United States that illegal immigrants do not have the same rights as U.S. citizens.").

59. López v. Superflex, Ltd., No. 01 Civ. 10010 (NRB), 2002 U.S. Dist. LEXIS 15538 (S.D.N.Y. Aug. 21, 2002).

employer sought to dismiss an Americans with Disabilities Act (ADA) claim[60] for punitive and compensatory damages, arguing that under *Hoffman* the employee needed to plead his lawful presence in the United States in his complaint.[61] The District Court for the Southern District of New York denied the motion, finding no requirement that the employee plead that he was legally working in the United States, because the Supreme Court has rejected such heightened pleading unless mandated by the Federal Rules of Civil Procedure.[62]

The court in *López* did not rule on the issue of whether *Hoffman* applied to punitive and compensatory damages under the ADA.[63] The court, however, did clearly emphasize that:

> If Hoffman Plastics [sic] does deny undocumented workers the relief sought by plaintiff, then he would lack standing. . . . However, if plaintiff were to admit to being in the United States illegally or were to refuse to answer questions regarding his [immigration] status on the grounds that it is not relevant, then the issue of his standing would properly be before us, and we would address the issue of whether Hoffman Plastics [sic] applies to ADA claims for compensatory and punitive damages brought by undocumented aliens.[64]

In other words, if the court had been able to decide this issue, the employee would have suffered the same fate as Mr. Castro did in *Hoffman,* where his undocumented status negated recovery from his employer even though his employer violated the law. Similarly, because of his undocumented status, Mr. Lopez would not have been able to recover from his employer for a violation of the ADA. Furthermore, if Mr. López had not withdrawn his request for backpay, the court very possibly would also have precluded that remedy. The evidence for this assertion is the *Lopez* court's careful note of the *Hoffman* Court's language that "awarding backpay not only trivializes the immigration laws, it also condones and encourages future violations."[65]

2. State Supreme Court Cases: Worker's Compensation

Following the Supreme Court's decision in *Hoffman Plastic Compounds,* the highest courts in three states (Pennsylvania, Minnesota and Michigan) have considered the applicability of their worker's compensation statutory schemes

60. Mr. López, an employee with kidney disease, had been laid off without determining whether he could perform his old job or another job at the same employer. *Id.* at *2.

61. *Id.*

62. *Id.* at *7.

63. *Id.* at *3.

64. *Id.* at *7-8.

65. *Id.* at *6.

to undocumented workers.[66] These three cases have, again, evidenced a mixed result, where the tensions *Hoffman* raised regarding the employment of undocumented workers and their ability to recover for workplace injuries,[67] are clearly palpable in the strong dissents of each of the three opinions.

The Supreme Court of Pennsylvania decided a case where an employer, Reinforced Earth Company, argued that a worker's lack of work authorization vitiated his entitlement to compensation benefits for injuries suffered at his place of employment.[68] The court rejected the employer's argument because it was prohibited from making any extra-statutory declaration of public policy or judicial legislation to exclude undocumented workers from the reach of the worker's compensation system.[69] The court also held that an employer is not required to show job availability when seeking to suspend worker's compensation benefits granted to an employee who is an unauthorized alien.[70] Thus, in this case the public policy behind the worker's compensation system—a bilateral compact that assures the redress of worker's injuries while the worker gives up the right to sue his employer—won the day over the immigration law policy against the hiring of undocumented workers that the IRCA contains.

Although the opinion of the Pennsylvania Supreme Court in *Reinforced Earth* did not directly address, or even cite, *Hoffman,* the lone dissent of Justice Newman did use *Hoffman* to assert that the public policy of redressing the work-related injuries of employees, as enunciated in Pennsylvania's Worker's Compensation statutes should yield to the IRCA's congressional policy against the hiring of unauthorized workers.[71] Justice Newman would have had the majority in *Reinforced Earth* faithfully follow *Hoffman*, noting that the Supreme Court's decision "illustrates that where two legislative schemes apply to the same situation, one may have to yield to the higher policy interests served by the other."[72] In other words, in Justice Newman's view, the Pennsylvania Worker's Compensation policy of redressing the injuries of undocumented workers is of lower value to society than the IRCA's policy of not hiring

66. *See* Reinforced Earth Co. v. Worker's Comp. Appeal Bd. (Astudillo), 810 A.2d 99, 102 (Pa. 2002); Correa v. Waymouth Farms, Inc., 664 N.W.2d 324 (Minn. 2003); Sánchez v. Eagle Alloy, Inc., 671 N.W.2d 874 (Mich. 2003) *vacated by* 684 N.W.2d 342 (Mich. 2004).

67. It should be noted that foreign born workers most often work in dangerous occupations such as construction and manufacturing, and in fact have higher rates of job injuries and fatalities than native born workers. *See* Rebecca Smith, Amy Sugimori & Luna Yasui, *Low Pay: High Risk: State Models for Advancing Immigrant Workers Rights,* 28 N.Y.U. REV. L. & SOC. CHANGE 597, 599 (2004) (citing a Department of Health and Human Services study showing an increase in fatal injuries to foreign born workers and Latinos).

68. *Reinforced Earth Co.*, 810 A.2d at 102.

69. *Id.* at 105.

70. *Id.* at 107.

71. *Id.* at 112 (Newman, J., dissenting).

72. *Id.* at 110 (Newman, J., dissenting).

undocumented workers, and thus, it should yield to that higher immigration policy.[73]

According to Justice Newman, there should be no compensation for an injured worker who suffered an accident that rendered him unconscious, left him with a concussion, head injury, and acute cervical and lumbar-sacral strain and sprain,[74] because of his act of obtaining employment with fraudulent documentation. This of course is the extra-statutory declaration of public policy or judicial legislation in which the *Reinforced Earth* majority clearly refused to engage, emphasizing that the Pennsylvania General Assembly had not statutorily excluded undocumented workers from the purview of its Worker's Compensation Act.[75]

The Supreme Court of Minnesota similarly considered the appeal of an employer whose employee, an undocumented worker, received on the job injuries and was collecting temporary total disability payments.[76] The employer argued that the worker would not be able to conduct a diligent job search, as required by the statute for continued benefits, because his undocumented status would preclude him from obtaining employment without violating IRCA.[77] The Minnesota Supreme Court did not agree, relying on the Minnesota worker's compensation statutory language as well on the language of IRCA, which expressly failed to preclude payment of temporary total disability

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73. The employer had argued at the Pennsylvania Commonwealth Court, which was the court below, that the IRCA preempted its state Worker's Compensation law, so that the undocumented worker could not be considered an "employee" to receive benefits under the law. *Id.* at 103, n.5. The Commonwealth Court had rejected the argument, finding no preemption. *Id.* The Supreme Court of Minnesota has also rejected the argument that IRCA preempts its state Worker's Compensation statute, finding that IRCA was not aimed at impairing state labor law protections. Correa v. Waymouth Farms, Inc., 664 N.W.2d 324, 329 (Minn. 2003). Two courts of appeal have similarly rejected the argument that IRCA preempts state Worker's Compensation remedies with regard to undocumented workers. The Georgia Court of Appeals has consistently expressed its view that there is no conflict between IRCA and its state Worker's Compensation statute, so that an employer could not deny benefits under the statute to an undocumented worker. *See* Wet Walls, Inc.v. Ledezma, 598 S.E.2d 60, 63 (Ga. Ct. App. 2004); *see also*, Continental PET Technologies v. Palacias, 604 S.E.2d 627, 334 (Ga. Ct. App. 2004) (*en banc*). Earth First Grading v. Gutierrez, 606 S.E.2d 332, 334 (Ga. Ct. App. 2004). Similarly, because IRCA does not contain express preemption language, a Florida appellate court found that an undocumented worker would not be precluded from obtaining Worker's Compensation in that state. *See* Safeharbor Employer Serv. I. Inc. v. Cinto Velázquez, 860 So.2d 894, 896 (Fla. Ct. App. 2003). The preemption argument usually made and rejected with regard to IRCA in such cases is based on the Congress's authority over immigration law matters. *See* U.S. CONST. art. VI, cl.2. Congress has the power to "establish an uniform Rule of Naturalization." *See* U.S. CONST. art. I, § 8, cl. 4. The Supreme Court has found that the federal government's inherent sovereign power allows it to further regulate in the field of immigration. *See* United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537, 542 (1950).

74. *Reinforced Earth Co.*, 810 A.2d at 101.

75. *Id.* at 105.

76. Correa v. Waymouth Farms, Inc., 664 N.W.2d 324 (Minn. 2003).

77. *Id.* at 328.

payments.[78] The Court explicitly declined to address the public policy questions the employer raised, stating that "if policy considerations favor a different result, that determination is more properly left to the legislature to make."[79]

However, there was a strong dissent to the opinion from Justice Gilbert, who stated that the majority ignored the IRCA, an "important federal immigration requirement," by "creating a legal fiction of a diligent job search that is contrary to federal law."[80] Justice Gilbert used the *Hoffman* language, stating that the majority's holding "trivializes" immigration law, because the undocumented worker would have to conduct any job search through fraud and deception as to immigration status.[81]

Finally, in late 2003, the Supreme Court of Michigan granted the application for leave to appeal of an undocumented worker to whom the lower court had denied worker's compensation benefits.[82] The Court even invited amicus curiae briefs.[83] Although the Court of Appeals of Michigan held that the state's worker's compensation statute applied to undocumented workers, it found that the undocumented worker's criminal act of obtaining employment fraudulently mandated the denial of the worker's compensation benefits.[84] After consideration of the case for more than six months, the Michigan Supreme Court asserted that it was no longer persuaded that it should review the questions presented.[85] The court's action was criticized in dissent by two justices. Justice Kelly disagreed, finding jurisprudential and policy significance of the case.[86] Justice Markman noted that the decision of the court of appeals was a compromise that left many questions unanswered, and he highlighted the case's importance not only for the undocumented, "but equally for the rule of law and the meaning of citizenship."[87]

Thus, in the three years following *Hoffman* much litigation has ensued,[88] with employers arguing for an expansion of the decision's reach at both the state and federal level. There have been mixed results throughout, and

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78. *Id.* at 331.

79. *Id.*

80. *Id.* (Gilbert, J., dissenting).

81. *Id.* at 332 (Gilbert, J., dissenting).

82. Sanchez v. Eagle Alloy, Inc., 671 N.W.2d 874 (Mich. 2003) *vacated by* 684 N.W.2d 342 (Mich. 2004).

83. *Id.*

84. Sánchez v. Eagle Alloy, Inc., 658 N.W.2d 510, 515 (Mich. Ct. App. 2003).

85. Sánchez v. Eagle Alloy, Inc., 684 N.W.2d 342 (Mich. 2004). The effect of this order is that the published opinion of the Court of Appeals was left as binding precedent. *Id.* (Weaver, J., concurring).

86. *Id.* (Kelly, J., dissenting). Justice Kelly stated that "[t]he parties, the people of Michigan, and those who come into the state to work have a pressing interest in having these issues resolved by the state's highest court." *Id.*

87. *Id.* at 345 (Markman, J., dissenting). In fact, Justice Markman noted that "no other case has engendered more passionate debate . . . ." *Id.* at 343 (Markman, J., dissenting).

88. The *Hoffman* decision has been cited in 62 subsequent court decisions. *See* SHEPARD'S UNITED STATES CITATIONS (Mar. 29, 2005).

sometimes employers have not fared particularly well in having courts adopt a wide view that would leave undocumented workers with little or no labor law protections in the workplace.

Nevertheless, lower federal courts have resolved several of the cases on pretrial motions and have not addressed their merits, so that the final resolution of many of these *Hoffman* challenges remains to be seen. Furthermore, considering the time and resources spent by immigrants and their advocates defending these kinds of lawsuits, the undocumented workers' lives and working conditions are no better post-*Hoffman,* because the organizing and advocacy of labor and immigrants' rights groups has shifted to a defensive, rather than proactive, role to further the rights of undocumented workers in the United States.

III. CURRENT STATUTORY REGIMES AND CASE LAW REGARDING UNDOCUMENTED WORKERS

Undocumented workers are not universally protected in the workplace under U. S. law. Judicial, legislative, and administrative bodies have placed limitations upon the protection of the undocumented worker in the workplace in various contexts, as these entities struggle to reconcile labor law and policy with immigration law and policy. This phenomenon is evidence of the dual nature of the undocumented worker as both an outsider and insider to the U.S. community.[89]

A. NLRA

The NLRA statutory definition of "employee" does not exclude undocumented workers. Therefore, they fall under the purview of the NLRA.[90] In particular, undocumented workers are able to vote in union elections under the NLRA without regard to their immigration status.[91] The NLRA also protects undocumented workers against unfair labor practices.[92] An employer commits an unfair labor practice by reporting undocumented workers to the INS (now Department of Homeland Security or DHS) in retaliation for participating in union activities.[93] Prior to *Hoffman*, the undocumented worker had been allowed backpay, albeit in a restricted manner, as decided by the Supreme Court in the *Sure-Tan* case.[94]

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89. Bosniak, *supra* note 1, at 956 (discussing the dual identity of undocumented workers in the United States after IRCA, as "they are both outsiders and members, regulated objects of immigration control and subjects of membership in limited but important respects.").

90. Sure-Tan, Inc. v. NLRB, 467 U.S. 883, 891 (1984).

91. *See* Chicago Future, Inc. v. NLRB, No. 13-CA-40392, 2003 LEXIS NLRB 93, n.4 (N.L.R.B. Mar. 12, 2003).

92. *See* NLRB General Counsel Memorandum No. GC 02-06, Procedures and Remedies for Discriminatees Who May Be Undocumented Aliens after *Hoffman Plastic Compounds, Inc.* (July 19, 2002), 2002 WL1730518 [hereinafter NLRB General Counsel Memorandum].

93. *Sure-Tan Inc.*, 467 U.S. at 894.

94. *Id.* at 902-3. *See also supra* notes 20-24 and accompanying text.

After *Hoffman,* the NLRB has stated that it will object if employers "attempt to elicit evidence concerning an employee's asserted undocumented status in order to escape unfair labor practice liability."[95] Furthermore, with regard to undocumented workers, the NLRB has instructed its regional offices that:

> Regions have no obligation to investigate an employee's immigration status unless a respondent affirmatively establishes the existence of a substantial immigration issue. Regions should begin their analysis with the presumption that employees and employers alike have conformed to the law. The law—IRCA—protects employees against harassment by an employer which seeks to reverify their immigration status without cause. A substantial immigration issue is lodged when an employer establishes that it knows or has reason to know that a discriminatee is undocumented. Once an employer makes this showing, Regions should investigate the claim by asking the Union, the charging party and/or the discriminatee to respond to the employer's evidence. Again, a mere assertion is not a sufficient basis to trigger such an investigation.[96]

Hoffman has modified the NLRB remedial scheme by removing backpay as a remedy for an unfair labor practice for undocumented workers.[97] This modification has resulted in changes to NLRB policy regarding the remedies the Board will seek for undocumented workers, but not in the manner in which NLRB conducts its investigations of unfair labor practices.[98]

A recent NLRB case extends this result. *In re Tuv Taam Corporation* is a NLRB unfair labor practice case in which the Board refused to consider the immigration status of the discriminated employees until after the determination of the employer's liability.[99] The Board's rationale was that the immigration status of the discriminated employees had no bearing on the issue of whether the employer has engaged in an unfair labor practice.[100] Thus, the NLRB has limited *Hoffman* to its most restrictive holding. Bearing in mind that the majority in *Hoffman* was criticized by the dissent for failing to pay the requisite

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95. NLRB General Counsel Memorandum, *supra* note 92.

96. *Id.*

97. Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137, 150 (2002).

98. NLRB General Counsel Memorandum, *supra* note 92.

99. *In re* Tuv Taam Corp., 340 NLRB No. 86, 2003 WL 22295361, *6 (N.L.R.B. Sep. 30, 2003). In fact, the Board ordered conditional backpay as a remedy at this stage of the proceeding. *See id* at *7.

100. *Id.*

deference to the NLRB's own administrative opinion at the Board level,[101] this result is hardly surprising.

B. FLSA

There is consensus among the courts, before and after IRCA[102] and after *Hoffman*,[103] that undocumented workers are entitled to FLSA wage and hour enforcement remedies, including backpay, which is unpaid wages for work already performed.[104] The legislative history of IRCA explicitly supports this conclusion.[105] Yet at least one court has indicated that it will not allow a wage claim in a case where the worker obtained his employment in violation of IRCA.[106]

The United States Department of Labor has indicated that it will maintain its practice of full enforcement of the FLSA, without taking into account whether the employee is undocumented, on the theory that enforcement of the wage claims for work actually performed is different from the backpay remedy precluded in *Hoffman*.[107] This policy statement also includes enforcement of the Migrant and Seasonal Agricultural Worker Protection Act (AWPA).[108]

In summary, two norms are now evident with regard to allowing the undocumented worker to pursue wage claims under the FLSA. First, the immigration status of the claimant will most likely be undiscoverable, based on the fact that allowing discovery into this area would have a chilling effect on the filing of wage claims.[109] Second, the *Hoffman* decision generally will not

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101. *See supra* notes 35-37 and accompanying text (discussing Justice Breyer's view in the *Hoffman* dissent regarding the majority's lack of deference to the NLRB in the *Hoffman* decision).

102. *See generally* Richard E. Blum, *Labor Standards Enforcement and the Realities of Labor Migration: Protecting Undocumented Workers after Sure-Tan, The IRCA and Patel*, 63 N.Y.U. L. REV. 1342, 1355 (1988) (discussing cases before and after IRCA where FLSA protections were afforded to undocumented workers, in particular, the Eleventh Circuit Court of Appeals, which decided *Patel v. Quality Inn South*, 846 F.2d 700 (11th Cir. 1988), holding that the undocumented worker was "entitled to the full range of available remedies under the FLSA without regard to his immigration status").

103. *See supra* notes 38-47 and the cases cited therein.

104. *See* Blum, *supra* note 102, at 1344.

105. *See id.* at 1368 (discussing how IRCA was not meant to preclude FLSA and other labor law protections).

106. *See* Ulloa v. Al's All Tree Serv., 768 N.Y.S.2d 556, 558 (N.Y. D. Ct. 2003). This result stands in contrast to the New York Attorney General's view regarding state wage payments, where they would be enforced for undocumented workers. *See* Op. Att'y Gen. 2003-F3 (N.Y. Oct. 21, 2003), 2003 WL 22522840.

107. *See* U.S. Department of Labor, Employment Standards Division, *Application of U.S. Labor Laws to Immigrant Workers: Effect of Hoffman Plastics Decision on Laws Enforced by the Wage and Hour Division* (Fact Sheet #48) (Aug. 14, 2002), *available at* http://www.dol.gov/esa/regs/compliance/whd/whdfs48.htm (last visited Dec. 30, 2004), and cases cited therein.

108. *Id.* The AWPA is codified at 29 U.S.C. § 1801 *et. seq.* (2000).

109. *See supra* notes 38-47 and cases cited therein. *See also* Cabrera v. Ekema, No. 250854, 2005 Mich. App. LEXIS 616 (Mich. Ct. App. March 10, 2005) (denying discovery

bar recovery of wage claims,[110] a policy that reduces the incentives for unscrupulous employers from knowingly hiring undocumented workers and taking a chance of violating the FLSA and IRCA in the hope that the employees' undocumented status will bar their recovery of wages for work already performed.[111]

C. Anti-Discrimination Laws: The ADA, Title VII, and State Anti-Discrimination Laws

López v. Superflex,[112] is the only post-*Hoffman* reported case concerning an undocumented worker claiming discrimination under the ADA. The court did not reach the merits, but it is clear that it would certainly have denied the undocumented worker any remedies had the issue been before the court.[113]

Prior to the IRCA, courts interpreted the other main federal anti-discrimination statute, Title VII, as affording protection to undocumented workers.[114] After the IRCA, however, the Fourth Circuit Court of Appeals held en banc that because undocumented workers are ineligible for employment in the United States, they are ineligible for Title VII remedies.[115]

In at least one post-*Hoffman* Title VII reported opinion,[116] the court did not require the employee to disclose his immigration status. Thus, the court did not decide the case on the merits; however, the court gave indications of not finding *Hoffman* dispositive on the availability of backpay as a remedy for violations of Title VII.[117] The Ninth Circuit Court of Appeals reaffirmed this view in *Rivera v. NIBCO, Inc.*,[118] where, in an interlocutory appeal, the court held that an employer's discovery request as to the former employee's

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regarding worker's Social Security number in suit under FLSA).

110. *See supra* note 102 and case cited therein.

111. Recent research has shown that the industries in which the undocumented workers are mostly laboring are among those that are most represented in wage claims violations. *See* Smith et al., *supra* note 67, at 600 (citing survey by the Department of Labor showing that in the year 2000, 100 percent or all poultry processing plants surveyed were found to be noncompliant with federal wage and hour laws).

112. López v. Superflex, Ltd., No. 01-Civ.-10010(NRB), 2002 U.S. Dist. LEXIS 15538 (S.D.N.Y. Aug. 21, 2002).

113. *See supra* notes 59-65 and accompanying text for a discussion of *López*.

114. *See generally* María Ontiveros, *To Help Those Most In Need: Undocumented Workers' Rights and Remedies under Title VII*, 1994 N.Y.U. REV. L. & SOC. CHANGE 608, 614 (1994) (discussing cases regarding Title VII coverage of undocumented workers).

115. *See* Egbna v.Time-Life Libraries,153 F.3d 184, 186 (4th Cir. 1997) (*en banc*).

116. *See* De La Rosa v. N. Harvest Furniture, 210 F.R.D. 237 (C.D. Ill. 2002).

117. *See supra* notes 48-54 and accompanying text for a discussion of *De La Rosa*. In another recent decision, EEOC's motion to deny the employer pretrial access to the immigration status of the charging parties was granted based on the court's view that failure to do so "would significantly discourage employees from bringing actions against their employers who engage in discriminatory employment practices." EEOC v. First Wireless Group, 225 F.R.D. 404, 406 (E.D.N.Y. 2004). The court in this case explicitly rejected the employer's argument that any restriction based on such an *in terrorem* effect is the province of the legislature. *Id.* at 407.

118. Rivera v. NIBCO, Inc., 364 F.3d 1057 (9th Cir. 2004), *reh'g denied*, 384 F.3d 822 (9th Cir. 2004), *cert. denied.*, 73 U.S.L.W. 3415, 2005 WL 517010 (2005).

immigration status in a Title VII case placed an undue burden on the party bringing the claim.[119] Although the issue of backpay was not before the court, it nevertheless asserted that its interpretation of *Hoffman's* prohibition of backpay under NLRA did not serve to prohibit a district court from awarding backpay to a Title VII plaintiff.[120] This assertion, however, was subject to strong criticism by the dissent in the denial of a rehearing en banc of this case. Judges Bea, Kozinski, Kleinfield, and Gould dissented in a lengthy and well articulated opinion, stating:

> The panel's decision allows a plaintiff who claims that racially discriminatory firing caused backpay and frontpay lost wages, to refuse to answer deposition questions touching on her place of birth and immigration status. Thus, the panel's decision impedes the ascertainment of the truth in advance of trial, thereby profoundly subverting the purposes of liberal discovery in civil cases. The decision also frustrates the purposes of national immigration policy: to limit employment benefits to American citizens and foreign persons authorized to work in this country.[121]

The dissenters' characterization of national immigration policy as limiting employment benefits only to U.S. citizens and authorized noncitizens is particularly striking for its extensiveness. Although the dissent does not define the term "employment benefits," one can imagine that any common interpretation of the term would virtually erode any state or federal labor or employment law protection for undocumented workers.

The dissent recognized the realities of the litigation process between an undocumented worker and his or her employer, noting that:

> It may be tempting to increase the settlement value or the award of a minority worker's racial discrimination lawsuit by allowing her to include claimed lost wages and bar questioning of her immigration status. After all, the employer hired her and benefited from her labor. While she was working, the employer did not dig too deep into whether her papers were in order. Now that she asserts her civil rights against the employer's claimed discriminatory firing, the employer gets righteous, and for all the wrong reasons.[122]

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119. *Id.* at 1074.

120. *Id.*

121. *See* Rivera v. NIBCO, Inc. 384 F.3d 822, 823-4 (9th Cir. 2004) (Bea, J., dissenting), *cert. denied.*, 73 U.S.L.W. 3415, 2005 WL 517010 (2005).

122. *Id.*

The *Rivera* dissenters to the denial of rehearing en banc further cited *Hoffman* and recognized that "[i]f estoppel by the employer's acts could bar enforcement of our country's Immigration [sic] laws, the panel's opinion might not be so objectionable. Of course, we know such private conduct cannot frustrate explicitly stated congressional public policy . . . ."[123] In other words, the dissenters to the denial of rehearing en banc were also concerned about the realities of the employment relationship between the undocumented worker and the employer, particularly where an employer might be aware of the worker's unauthorized status and deriving benefit from his work.

Finally, the dissenters exposed the policy concerns and dangers of the *Rivera* approach and highlighted that:

> We risk corrupting an admirable civil rights policy to prevent discrimination when we rely on evasions to enforce it. . . . The fact is that if plaintiffs do not have authorized immigration status, they are not entitled to be awarded back wages or wages they might have earned in the future from a job which they were incapable of holding, under our Immigration laws.[124]

The words of the ninth circuit dissenters to the denial of rehearing en banc in *Rivera* clearly exemplify the tensions inherent in the difficult relationship among the undocumented worker, the often unscrupulous employer, and the United States polity.

The United States Supreme Court recently denied certiorari in *Rivera,* leaving the ninth circuit opinion as binding precedent.[125] There were no dissenters to the denial of certiorari and no written opinion of any kind with regard to the case. Since it is the first time the Supreme Court has reviewed remedies for undocumented workers following *Hoffman*, anecdotal reports suggest that it is seen as an omen for the labor law rights of undocumented workers in the United States.

However, the view of ninth circuit dissenters to the denial of rehearing en banc in *Rivera* found support in *Escobar v. Spartan Security Service,* a Title VII sexual harassment case where a lower federal court granted summary judgment and denied backpay to an undocumented worker based on *Hoffman.*[126] The court found that it was foreclosed from doing so by *Hoffman*'s rationale that an undocumented worker may not receive a backpay award as a

123. *Id.* (Bea, J., dissenting) (citation omitted).

124. *See id.* (citations omitted).

125. NIBCO, Inc. v. Rivera, 73 U.S.L.W. 3529, 2005 WL 517010 (Mar. 7, 2005). As noted *supra* at note 55, the Supreme Court's denial of certiorari could be analyzed to reflect a lack of "intense dissatisfaction" of the majority of the Justices with the decision below. *See* Peter Linzer, *The Meaning of Certiorari Denials,* 79 COLUM. L. REV. 1227, 1229 (1979).

126. Escobar v. Spartan Security Serv., 281 F. Supp. 2d. 895, 897 (S.D. Tex. 2003).

remedy, since it would represent earnings that he could not legally have earned.[127]

However, the federal agency charged with the enforcement of Title VII views *Hoffman* differently. Almost immediately after *Hoffman*, the Equal Employment Opportunity Commission (EEOC) indicated that it "will evaluate the effect *Hoffman* may have on the availability of monetary remedies to undocumented workers under the federal employment discrimination statutes."[128] The EEOC has further asserted:

> The Supreme Court's decision in *Hoffman* in no way calls into question the settled principle that undocumented workers are covered by the federal employment discrimination statutes and that it is as illegal for employers to discriminate against them as it is to discriminate against individuals authorized to work. When enforcing these laws, EEOC will not, on its own initiative, inquire into a worker's immigration status. Nor will EEOC consider an individual's immigration status when examining the underlying merits of a charge. The Commission will continue vigorously to pursue charges filed by any worker covered by the federal employment discrimination laws, including charges brought by undocumented workers, and will seek appropriate relief consistent with the Supreme Court's ruling in *Hoffman*. Enforcing the law to protect vulnerable workers, particularly low income and immigrant workers, remains a priority for EEOC.[129]

Thus, the coverage and enforcement of the anti-discrimination laws under the EEOC's purview has remained the same after *Hoffman*. It is only in the availability of remedies that the administrative agency has to implement changes wrought by the court decisions denying compensation to undocumented workers. The EEOC's policy, however, will effectively cause the agency to investigate claims, in an effort to protect the vulnerable workers in our midst, where there might be no remedy because of these court decisions limiting such remedies.

At least two state courts have taken a more expansive view of *Hoffman*'s reach. Recently in a state court under a state anti-discrimination statute denied an undocumented worker recovery using *Hoffman*. In *Crespo v. Evergo*

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127. *Id.*

128. U.S. Equal Employment Opportunity Commission, Rescission of Enforcement Guidance on Remedies Available to Undocumented Workers Under Federal Employment Discrimination Laws, *at* http://www.eeoc.gov/policy/docs/undoc-rescind.html (June 27, 2002) (last visited Dec. 30, 2004).

129. *Id.*

Corp.,[130] the Superior Court of New Jersey affirmed the trial court's denial of economic damages, including backpay, to an undocumented worker suing for wrongful termination under New Jersey's Law Against Discrimination (LAD).[131] The court also dismissed the complaint in its entirety, holding that in light of *Hoffman's* strong enforcement of the policies that the IRCA served, the plaintiff's statutory bar to employment precluded her eligibility for various economic and non economic remedies.[132]

In an unpublished opinion, another state court denied an undocumented worker recovery for discrimination based on medical condition, physical disability and wrongful termination under its state antidiscrimination statute.[133] The court cited *Hoffman* and found that the unclean hands doctrine precluded recovery of an employee who presented false documents to be hired in the first place.[134] The result then is that with regard to recovery for undocumented workers under Title VII and state antidiscrimination statutes, the period post *Hoffman* has seen both cases allowing and cases denying recovery for the worker. It is the case that the future is yet to come, and certainly the denial of certiorari in *Rivera* will likely be seen to represent the dominant trend in this area.

D. Worker's Compensation

In general, worker's compensation compensates employees who are injured on the job in exchange for their renunciation of the ability to sue the employer; the statutory schemes vary from state to state. As to the treatment of undocumented workers, from the coverage of the law to allowing of benefits for the undocumented workers, the prevailing trend favors the undocumented worker. In Texas, for example, undocumented workers have not been found to be precluded from compensation, both pre[135]-and post-IRCA and *Hoffman*. Similarly, post-IRCA, courts have found that undocumented workers are entitled to worker's compensation benefits in California,[136] Connecticut,[137] Louisiana,[138] New Jersey,[139] New York,[140] Oklahoma,[141] Minnesota,[142] and

130. Crespo v. Evergo Corp., 841 A.2d 471 (N.J. Super. Ct. App. Div. 2004).

131. N.J. STAT. ANN. § 10:5-1—10:5-42 (West 2004).

132. Crespo, 841 A.2d. at 401.

133. Morejon v. Hinge, No. BC255537, 2003 WL 22482036 at *1 (Ca. Ct. App., Nov. 21, 2003).

134. *Id.* at *10.

135. *See* Commercial Standard Fire & Marine Co. v. Galindo, 484 S.W.2d. 635 (Tex. App. 1972). Florida is another state that allowed undocumented employees worker's compensation benefits pre-IRCA since its statute includes "aliens" as employees. *See* Gene's Harvesting v. Rodriguez, 421 So. 2d 701 (Fla. Dist. Ct. App. 1982).

136. *See* Del Taco v. Worker's Comp. Appeals Bd., 94 Cal. Rptr. 2d 825 (Cal. Ct. App. 2000).

137. *See* Dowling v. Slotnik, 712 A.2d 396 (Conn. 1998).

138. *See* Artiga v. Patout, 671 So. 2d 1138 (La. Ct. App. 1996).

Virginia.[143] Pennsylvania and Minnesota have also allowed, under supreme court opinions, undocumented workers to obtain worker's compensation benefits post-*Hoffman*.[144] Other states that allow the undocumented to obtain worker's compensation post-*Hoffman* include Florida, [145] Ohio,[146] and Oklahoma.[147] Thus, in the worker's compensation area, the undocumented status of the injured employee has been evaluated by courts in different states before IRCA, which banned the employment of undocumented workers, after IRCA, and after *Hoffman*.

Virginia is a special case because its supreme court denied benefits to an undocumented worker in 1999. Its rationale was to attempt to reconcile its state worker's compensation law with the IRCA.[148] Shortly thereafter, the general assembly overrode the governor's veto, and passed legislation that gave worker's compensation coverage to undocumented workers.[149]

There are states that have limited or denied the availability of worker's compensation post-IRCA and post-*Hoffman*. For example, a court denied an undocumented worker in Nevada vocational rehabilitation benefits post-IRCA because of his unauthorized entry into the United States and his inability to work under IRCA.[150] Post-*Hoffman*, courts have denied worker's compensation to undocumented workers in Pennsylvania[151] and Michigan. Michigan used *Hoffman* to limit benefits from the date of discovery of an immigrant worker's undocumented status based on the crime of working in violation of IRCA.[152] Thus, in the area of worker's compensation, there has been a trend to allow recovery by the undocumented worker, although it is not a uniform rule. There have been varying results based on the statutory definition of "employee," but overall the negative effect of *Hoffman* has been less pronounced in this area. This is probably attributable to the state law analysis that the courts undertake in deciding whether an injured undocumented worker can obtain compensation for workplace injuries.

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139. *See* Mendoza v. Monmouth Recycling Corp., 672 A.2d 221 (N.J. Super. Ct. App. Div. 1996).

140. *See* N.Y. WORKERS' COMP. LAW § 17 (McKinney 2004).

141. *See* Lang v. Landeros, 918 P.2d 404 (Okla. Ct. App. 1996).

142. *See* Correa v. Waymouth Farms, Inc., 664 N.W.2d 324 (Minn. 2003).

143. H.B. 1036, 2000 Gen. Assem., Reg. Sess. (Va. 2000).

144. *See supra* Part II.B. and cases cited therein.

145. *See* Safeharbor Employer Serv. I, Inc. v. Cinto Velazquez, 860 So. 2d 984 (Fla. Dist. Ct. App. 2003).

146. *See* Rajeh v. Steel City Corp., 813 N.E.2d 697 (Ohio Ct. App. 2004).

147. *See* Cherokee Indus., Inc. v. Alvarez, 84 P.3d 798 (Okla. Civ. App. Okla. 2003).

148. Granados v. Windson Dev. Corp., 509 S.E.2d 290 (Va. 1999).

149. H.B. 1036, 2000 Gen. Assem., Reg. Sess. (Va. 2000).

150. Tarango v. State Indus. Ins. Sys., 25 P.3d. 175 (Nev. 2001).

151. *See* Mora v. DDP Contracting Co., 845 A.2d 950 (Pa. Commw. Ct. 2004).

152. Sanchez v. Eagle Alloy, Inc., 658 N.W.2d 510 (Mich. Ct. App. 2003).

E. Tort and Other Forms of Recovery

In actions for damages in tort cases, whether courts will allow an undocumented worker to recover for injuries will vary from state to state. Some courts have construed the *Hoffman* decision narrowly, while others have applied the ruling in a more generalized manner. In Florida, a federal district court granted an employer's motion for summary judgment, denying an award of lost wages to the estate of an undocumented laborer who died from injuries sustained in a forklift accident at a construction site.[153] Relying on *Hoffman*, the court reasoned that awarding lost wages would be equivalent to violating the IRCA.[154] The court's conclusion that awarding lost wages is inconsistent with the decision in *Hoffman* stems from its equation of backpay and lost wages, because both are awards for work never performed.[155]

The Southern District of New York departed from Florida's view, adopting a more limited interpretation of *Hoffman* by holding that an injured subcontractor's employee's alien status did not deprive the employee of his right to lost wages.[156] The court noted that, unlike *Hoffman*, this case involved a claim for relief under state, not federal, law.[157] The court noted that the employee's immigration status was relevant in making a determination of whether an award for lost wages was appropriate; however, it also acknowledged that undocumented persons do in fact obtain employment in the United States.[158] As a matter of New York's public policy, the court did not find that injured workers are barred from compensation in the form of backpay.[159] Similarly, in *Cano v. Mallory*,[160] a New York state court post *Hoffman* found that the undocumented status of an injured worker was not a bar to the civil action. Yet, it allowed the jury to consider the worker's undocumented status with regard to the issue of lost wages, but not regarding the issue of pain and suffering. This is but an example of the mixed results courts have reached following *Hoffman*.[161]

However, most recently in New York two lower companion cases limited the availability of remedies for injured undocumented workers filing personal injury lawsuits for workplace related injuries.[162] The undocumented workers

153. Veliz v. Rental Serv. Corp. USA, 313 F.Supp. 2d 1317, 1337 (M.D. Fla. 2003).
154. *Id.* at 1336.
155. *Id.* at 1337.
156. Madeira v. Affordable Hous. Found. Inc., 315 F.Supp. 2d 504, 507 (S.D.N.Y. 2004).
157. *Id.*
158. *Id.*
159. *Id.*
160. Cano v. Mallory Mgmt., 760 N.Y.S. 2d. 816 (N.Y. Sup. Ct. 2003).
161. *See id.*
162. *See* Sanango v. 200 E. 16th St. Hous. Corp.,No. 2571, 2004 N.Y. App. Div. LEXIS 15637 (N.Y. Sup. Ct. Dec.28, 2004); Balbuena v. IDR Realty, Inc., No. 2191, .2004 N.Y. App. Div. LEXIS 15627 (N.Y. Sup. Ct. Dec. 28, 2004). In an unpublished case decided days earlier, another division of the New York Supreme Court found that the plaintiff's undocumented status should not be a bar to recovery but only a factor for the jury to consider when determining

were allowed to pursue damages by the trial court for pain and suffering.[163] However, following *Hoffman* and its interpretation of IRCA's policy, the court found that the worker's undocumented status restricted the damages award for lost earnings to the amount he would have earned in his home country, since "an award based on a prevailing foreign wage would not offend any federal policy."[164] There was vigorous dissent by Judge Ellerin, who asserted that the legislative history of IRCA indicated that Congress did not intend to preempt state common law on the availability of damages for lost wages in tort actions.[165] The view expressed by Judge Ellerin's dissent has been followed by the Court of Appeals in Texas in allowing an injured undocumented worker to present evidence to recover damages for lost earnings, finding that *Hoffman* and its view of IRCA did not apply to state common law personal injury damages.[166]

With regard to other forms of recovery, post *Hoffman,* the Tennessee Court of Appeals allowed an employee to recover damages for breach of contract and intentional misrepresentation when he was hired and brought to the United States legally by a company which subsequently did not file his immigration documents, at which time he became undocumented.[167] The court declined to extend *Hoffman* to such a case, finding it inapplicable because it was based on a "delicate balance of immigration law and labor law" under the NLRA.[168]

As seen above, a review of the main statutes and court decisions affecting undocumented workers in this country reveals a hostile inconsistency,[169] where they are sometimes afforded remedies and other times they are not, based on predictable positions with regard to *Hoffman.* Table 1 below sets forth a selected summary of the current remedies available to undocumented workers under different statutory regimes. Using IRCA and its statement of the public policy against the hiring of undocumented workers, and following *Hoffman,* these provisions and decisions often neglect the real effects on the working

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entitlement to future lost wages. *See* Celi v. 42nd St. Dev. Project, Inc., No. 37491/01, 2004 WL 281902, *3 (N.Y. Sup. Ct. Nov. 9, 2004). An earlier case had refused to extend *Hoffman* to include state law tort remedies and denied discovery requested by employer to ascertain the worker's citizenship and tax records. *See* Llerena v. 302 W. 12th St. Condo., No. 102490/03, 2004 WL 279316, *2 (N.Y. Sup. Ct. Oct. 7, 2004).

163. *Sanango,* 2004 N.Y. App. Div. LEXIS 15637 at *2-3.

164. *Balbuena,* 2004 N.Y. App. Div. LEXIS 15627 at *2.

165. *Id.* at *5 (Ellerin, J., dissenting).

166. Tyson Foods Inc. v. Guzman, 116 S.W.2d 233, 244 (Tex. Ct. App. 2003); Wudson Rosa v. United Rentals, Inc., No. 2004-232, 2005 N.H. LEXIS 35 (N.H. 2005) (allowing undocumented worker to sue for recovery of injuries while finding his immigration status admissible evidence).

167. *See* Chopra v. U.S. Professionals L.L.C., No. W2004-01189-COA-R3-CV, 2005 WL 28036 (Tenn. Ct. App. Feb. 2, 2005). Two state law cases predating *Hoffman* had also allowed unauthorized workers to sue for breach of contract, see Gates v. Rivers Constr. Co., 515 P. 2d 1020, 1024 (Alaska 1973) or recover based on an unjust enrichment theory, see Nizamuddowlah v. Bengal Cabaret, Inc., 399 N.Y.S.2d 854, 857 (N.Y. Sup. Ct. 1977).

168. *Chopra,* 2005 WL 28036 at *3-4.

169. *See supra* Part I.

conditions and the lives of undocumented workers. For example, one of the overlooked aspects of post-IRCA life for the undocumented worker is the enforcement of sanctions against employers for the hiring of undocumented workers.[170] Argentina, among other countries, focuses on the employer as the locus of the enforcement of sanctions against the hiring of undocumented workers, as will be shown in the next part of this article.[171]

Table 1. Summary of Applicability and Remedies Available to Undocumented Workers in the United States Post *Hoffman* Decision under Various Labor and Employment Laws.

Legal Regime	Case(s)	Applicability/Remedy Available
National Labor Relations Act (NLRA)	*Hoffman Plastic Compounds v. NLRB*, 535 U.S. 137 (2002) *In re Tuv Taam*, 340 NLRB No. 86 (2003)	Only cease and desist order. No backpay as remedy for unfair labor practices. May include compensation for work performed.
Fair Labor Standards Act (FLSA)	*Singh v. Charanjit Jutla*, 214 F. Supp. 2d. 1056 (N.D. Cal. 2002) *Zeng Liu v. Donna Karan*, 207 F. Supp. 2d 191 (S.D.N.Y. 2002)	Back wages for work actually performed. Immigration status not relevant nor discoverable.
Americans with Disabilities Act (ADA)	*Lopez v. Superflex* (Unpublished opinion)	An award of backpay is not a prerequisite for punitive damages under the ADA. Do not need to plead lawful presence. Yet court in dicta suggests that if issue came before it, it would probably follow *Hoffman*.
Title VII (Anti Disc.) and State Anti Disc. Statutes	*De La Rosa v. Northern Harvest Furniture*, 210 F.R.D. 237 (C.D. Ill. 2002) (Title VII)	Undocumented workers are covered by federal employment discrimination statutes.
	Rivera v. NIBCO, 364 F.3d 1057 (9th Cir. 2004) (Title V)	Undocumented worker not forced to disclose immigration status.
	Crespo v Evergo Corp., 841 A.2d 471 (N.J. Super. Ct. App. Div. 2004) (NJ state law) *Escobar v. Spartan*, 281 F. Supp. 2d 895 (S.D. Tex. 2003) *Morejon v. Hinge* (CA - unpublished opinion)	Undocumented worker was not allowed to recover economic damages including backpay. Unclean hands prevented recovery

170. *See supra* note 6 for data regarding the lax enforcement of employer sanctions for the hiring of undocumented workers.

171. *See infra* Part IV.

Legal Regime	Case(s)	Applicability/Remedy Available
Worker's Comp.	*Reinforced Earth Co. v. Worker's Comp. App. Bd.* (Astudillo), 810 A.2d 99 (Pa. 2002)	Worker's Compensation benefits were not precluded by undocumented status. Also CA, OK, MN, TN, OH, TN (unpublished)
	Sanchez v. Eagle Alloy Inc., 684 N.W.2d 342 (Mich. 2004) *Mora v. DDP Contractors* 845 A.2d 950 (Pa. Commw. Ct. 2004)	Cannot collect worker's compensation benefits upon employer being notified of undocumented status. No wage loss benefits if undocumented. Also IN (unpublished)
Tort Recovery	*Madeira v. Affordable Housing Inc.*, 315 F. Supp. 2d 504 (S.D.N.Y. 2004) *Tyson v. Guzman* 116 S.W.3d 233 (Tex. App. 2003)	Can collect compensatory damages for personal injuries sustained during course of work. Tort recovery not precluded by undocumented status
	Veliz v. Rental Service Corp., 313 F.Supp. 2d 1317 (N.D. Fla. 2003) *Sanango v. 200 E. 16th Str. Hous.* (Unreported FL opinion) *Balbuena v. 42nd Str. Dev.* (NY – unreported opinion) *Cano v. Mallory*, 760 N.Y.S. 2d 816 (N.Y. Sup. Ct. 2003) *Celi v. 42nd Str. Dev.* (NY – unpublished opinion)	Cannot recover for lost wages in a tort lawsuit. Can recover lost earnings from home country. Issue of undocumented status may be presented to the jury with regard of lost earnings

IV. CURRENT STATUS OF IMMIGRATION LAW POLICY IN ARGENTINA REGARDING UNDOCUMENTED WORKERS

Argentina is a Latin American country with a very rich immigrant past[172] and present.[173] Because Argentina is one of the main immigrant receiving countries in the Americas, it is worth analyzing and comparing its treatment of the undocumented worker with the United States's. Although Argentina boasts a large immigrant population,[174] its undocumented population in comparison to the United States makes up a significantly smaller proportion of its immigrant population.[175] Nevertheless, it is important to analyze the response of the Argentine legal system to undocumented workers, since that country has opened its doors to immigrants despite serious economic difficulties, and has not experienced the deep ambiguity or the hostile inconsistency with regard to these workers seen in the United States.

In recent times, the complexities of immigration law and policy, and their potential conflicts with worker rights and privileges, have taken a greater meaning following Argentina's entry into MERCOSUR, the Southern Cones' scheme of regional integration.[176] Now, two different sources of law may affect

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172. *See* FERNANDO DEVOTO, HISTORIA DE LA IMMIGRACION ARGENTINA 294 (2003) (noting that the 1914 census showed the country to be 27.3% immigrant); *see also,* Lawrence M. Friedman, *Erewhon: The Coming Global Legal Order,* 37 STAN. J. INT'L L. 347 (2001) (describing Argentina as an "immigration"country that was always eager to recruit new citizens); CARL SOLDBERG, IMMIGRATION AND NATIONALISM 7 (1970) (discussing Argentine political view that "to govern is to populate," and the quickest method to do this is via immigration); *see also* Barbara Hines, *An Overview of Argentine Immigration Law,* 9 IND. INT'L & COMP. L. REV. 395, 395 (1999) (discussing Argentine Constitution's provisions encouraging immigration to that country.").

173. *See* U.N. RESEARCH INST. FOR SOC. DEV., THE DYNAMICS OF ARGENTINE MIGRATION vii (Alfredo Lattes & Enrique Oteiza, eds., 1987) (discussing current pattern of migration in Argentina, which shows substantial influx of immigrants).

174. Current official figures indicate that the immigrant population in Argentina is comprised of a little under two million immigrants. *See* Instituto Nacional de Estadistica y Censo, Población total por lugar de nacimiento, según provincia, *at* http://www.indec.mecon.gov.ar/ (last visited Dec. 30, 2004).

175. The latest data from the International Labor Organization indicates that there are 800,000 undocumented immigrants in Argentina. *En la Argentina: Hay 800 mil immigrantes ilegales,* EL TRIBUNO (Salta, Argentina) May 21, 2004 *available at* http://www.eltribuno.com.ar/2004/nacionales/20040521_221524.php (last visited Mar. 15, 2005). Other estimates have found the undocumented population in Argentina to be in 50,000 to 2,500,000 range. *See* Hines *supra* note 172 at 398.

176. The Southern Cone of South American typically refers to the southernmost countries of South America: Argentina, Chile, and Uruguay. *See* Horacio Sabarots, *Inmigrantes vs. "Ilegales": Estereotipos Desigualitarios en la Sociedad Argentina,* at 2, *available at* http://www.ehu.es/CEIC/AMERICA/recursos/INMIGRANTES_VS.pdf (Oct. 1999) (last visited Mar. 15, 2005). For an excellent discussion of MERCOSUR, see Rafael A. Porrata-Doria, Jr., *MERCOSUR: The Common Market of the Twenty First Century?,* 32 GA. J. INT'L & COMP. L. 1 (2004) (discussing MERCOSUR's founding ascendancy in the 1990s); *see infra* Section IV.B. (discussing MERCOSUR and its implications); *see also* JOHN WEEKS, CENTER FOR DEVELOPMENT POLICY AND RESEARCH, HAVE WORKERS IN LATIN AMERICA GAINED FROM

undocumented workers in Argentina, depending on their country of origin and migration. Immigrants coming from a non-MERCOSUR country are subject to Argentine immigration law as well as any other treaty or bilateral agreement between the immigrant's country of origin and Argentina.[177] However, if an immigrant is from a MERCOSUR participant or associate country, and migrates to another participating or associate country, he or she will be subject to the country's immigration laws as well as MERCOSUR- in a light most favorable to the immigrant- to effectuate MERCOSUR's final objective of the free circulation of persons among its signatory countries.[178] Though possibly subject to more than one source of law, immigrant workers to Argentina can at the very least rest assured that neither scheme mandates the revocation of specific labor remedies should they become undocumented.

A. Argentina's Immigration Law

Argentina's current immigration law includes particular provisions designed to protect the immigrant worker legally residing there. Article 20 of the immigration law provides that the country will admit foreigners and classify them into one of three categories: permanent residents ("residentes permanentes"), temporary residents ("residentes temporarios"), or transient residents ("residentes transitorios.").[179] Until the Argentine government processes all formal documents, it grants the foreigner applying for any of the above statuses a form of residency called precarious residency status ("residencia precaria") for a period of 180 days.[180] This provisional residency affords foreigners various privileges, including the ability to work during that period.[181] Obtaining this precarious residence is not a very complicated matter, and is usually completed with relative ease and without the long waits endured by immigrants wanting to enter the United States. For example, the number of immigrants moving to Argentina permanently in the years 1995-2002, is but a fraction of those seeking permanent residency in the United States in the year 2004.[182]

LIBERALIZATION AND REGIONAL INTEGRATION?, CDPR DISCUSSION PAPER. 1199 (1999), *available at* http://www.soas.ac.uk/cdp rfiles/dp/DP11JW.PDF (discussing workers' rights and exercise of those rights as key to the equitable distribution of gains from liberalization and integration growth in Latin America).

177. *See e.g.* Law No. 25.889, May 17, 2004, B.O. 18/05/04 (Arg.) (bilateral Migration Agreement between Argentina and Peru).

178. *See* Law No. 25.871, Jan. 20, 2004, B.O. art. 28 (Arg.).

179. *Id.* at art. 20.

180. *Id.*

181. *Id.*

182. During the years 1995-2002, census data shows that 89,388 foreigners settled permanently in Argentina for those years. INSTIUTO NACIONAL DE ESTADISTICA Y CENSOS, RADICACION DEFINITVA DE EXTRANJEROS POR AÑO DE OBTENCION DEL BENEFICIO SEGUN GRUPOS DE NAICONALIDADES 1995-2002, *at* http://www.indec.mecon.ar/ (last visited Mar. 25, 2005). In comparison, there were 662,029 immigrants admitted to the United States in the year 2004 alone. UNITED STATES DEPARTMENT OF HOMELAND SECURITY, CITIZENSHIP AND IMMIGRATION SERVICES, IMMIGRATION INFORMATION, IMMIGRATION IN FISCAL YEAR 2004, *at*

Foreign workers are covered by treaties or agreements entered into by the Republic of Argentina and the country's immigration law, whichever is more favorable for the migrant person.[183] However, Article 53 explicitly prohibits foreigners residing "irregularly" in the country from working.[184] In this context, the term "irregular" refers to those immigrants residing in Argentina without proper residency documentation.

Like immigration law and policy in the United States, Argentine immigration law prohibits employers from employing foreign workers residing "irregularly."[185] However, further provisions make clear that the application of this law will not exempt an employer from obligations emerging from labor legislation regarding foreigners, regardless of their immigration status.[186] More importantly, the law states that immigration status will not affect the rights of foreign workers acquired through work already performed.[187] Similar to U.S. policy as set forth in IRCA, the law in Argentina also imposes sanctions on those who employ or recruit foreign workers lacking the proper migration status to work.[188] For every foreigner hired by an employer in violation of such provision, the law imposes a fine in the amount of fifty minimum salaries.[189]

Thus, in summary, one of Argentina's articulated goals regarding foreign workers is for the country to adopt all necessary measures that will effectively eliminate the employment of immigrants with "irregular" status (those without working or residency papers).[190] In an effort to promote this purpose, Argentina's immigration law calls for the imposition of sanctions on employers, without diminishing the rights of immigrant workers in regard to their employment.[191]

Argentine case law confirms this view. In an early leading *en banc* appellate decision, the court of appeals in labor matters found that the fact that the employment contract with an undocumented worker is invalid should not be a bar for the judiciary to recognize the worker's right to obtain his labor law

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http://uscis.gov/graphics/shared/aboutus/statistics/annual/fy94/722.htm (last visited Mar. 25, 2005).

183. Law No. 25.871 at art. 28.

184. *Id.* at art. 53.

185. *Id.* at art. 55.

186. *Id.* at art. 56.

187. *Id.*

188. *Id.* at art. 55. *See also* Law No. 20.744, May 13, 1976, B.O. art. 40, 42 (Arg.) (prohibition of illegal employment contracts directed at the employer and will not affect the right of the employee from receiving pay for work performed during the contract period or compensation after the contract ends.).

189. *Id.* at art. 59. The minimum salary in Argentina currently is 450 pesos per month for salaried employees and 2.25 pesos per hour for hourly workers. Decree No. 1194, Sept. 1, 2004, B.O. art. 1 (Arg.). The current exchange rate is approximately 3 pesos per U.S. Dollar; thus, the fine amounts under Argentine law for the hiring of undocumented workers would be 22,500 pesos or approximately $7500 U.S. Dollars for salaried employees and 112.50 or $37.50 U.S. Dollars per hour for hourly workers. Compare these fines with those recently assessed to the employers who hired undocumented workers in the United States, *supra* note 6.

190. Law No. 25.871, Jan. 20, 2004, B.O. art. 16 (Arg.).

191. *Id.*

remedies.[192] Subsequent cases have reaffirmed this holding and for example, stated that the employer cannot raise the defense of the void contract to an action by an employee [193] and have even allowed an undocumented worker to recover compensation for being fired for refusing to perform certain tasks.[194] Furthermore, an undocumented worker's right to salary for unlawful firing has been confirmed by a court even in the face of the employer's knowing act of hiring an undocumented Chilean worker.[195] Finally, once an employer has received a fine for hiring undocumented workers, courts have refused to apply equitable principles or consider ability to pay as a factor to reduce the fine.[196] Instead they require strict compliance with the enforcement of employer sanctions for having hired undocumented workers in Argentina.[197]

B. Immigrant Workers and the Law of MERCOSUR

The existence of MERCOSUR further complicates the situation regarding immigrant workers in Latin America and particularly in Argentina. MERCOSUR is a regional integration organization in which Argentina, Brazil, Uruguay, and Paraguay are member countries, and Chile and Bolivia are associate countries.[198] Created by the Treaty of Asunción in 1994, MERCOSUR's ultimate goal is to create a common market for member countries throughout the southern cone region.[199] In addition to the removal of trade restrictions among member countries and the imposition of a common tariff to non-member countries, a common market includes the free movement of production factors such as labor, capital, and resources.[200]

In 2002, all MERCOSUR member and associate countries signed an agreement addressing and establishing residency norms for immigrant workers.[201] The agreement establishes a uniform method for granting temporary resident status of up to two years for immigrants of member

192. "Nauroth y Echegaray," CNTrab. 193 [LEXIS Argentina No. 60000831] (1973) (*en banc*).

193. "Portillo, López," CNTrab. No. 6 [LEXIS Argentina No. 13/5401] (1987).

194. "De Aguilar, Marinete," CNTrab. No. 10 [LEXIS Argentina No. 30000530] (1999).

195. "Lezcano, Angelica," CNTrab. No. 3 [1994 J.A. 387].

196. "Coman, Ana R. v. Dir. Nac. Migraciones," CNFed. No. 4 [May 21, 2002].

197. *Id.*

198. *See* Argentina-Brazil-Paraguay-Uruguay: Treaty Establishing a Common Market, Mar. 26, 1991, 30 I.L.M. 1041 (entered into force Dec. 31, 1994); *see also* Porrata-Doria, *supra* note 176, at 1.

199. *Id.*

200. Iris Mabel Laredo, *The Regional Integration as an Alternative in the New World Order*, *in* INTEGRACIÓN REGIONAL AMERICANA COMPARADA (John S. Shultz ed., 1995).

201. Law No. 25.903, July 13, 2004, B.O., art. 1 (Arg.) (ratifying Agreement Regarding Residency for Nationals of MERCOSUR Party States). It should be noted that this Agreement was proposed as an alternative to a general amnesty program throughout the MERCOSUR. *See Acuerdo Historico en Brasil,* LA FRAGUA, (Nov. 12, 2002) (transcript interview with Argentina's Immigration Minister) (on file with author).

countries.[202] As was the case in Argentina's immigration law, most of the provisions included in the agreement aim to protect the rights of those immigrants of "regular" status.[203] For example, according to the agreement, all participating countries must embrace a unified effort to deter the employment of "illegal" immigrants in each other's territories.[204] More specifically, parties that employ workers in "illegal" conditions will face the imposition of sanctions. Importantly, however, MERCOSUR's provisions also guarantee that the repercussions of such measures will not affect the rights of immigrant workers as a consequence of work already performed.[205] It is in these particular provisions that the disparity between the United States and Latin America becomes apparent.

Thus, although immigration laws in Argentina and the MERCOSUR agreement may be similar to the policy of the United States, those legislative provisions provide two fundamental distinctions that make an enormous difference for the rights of undocumented workers. First, the process to obtain residency status throughout Latin America is much more feasible for immigrants wanting to migrate. Second, the legislative provisions related to undocumented workers in Argentina provide a caveat that though courts may sanction employers for hiring "irregular" immigrants, the worker will retain those rights acquired as a result of the work already performed. These factors, when compared with the United States' approach, illustrate an important distinction in immigration policy and further magnify the implications of *Hoffman* to undocumented workers. When analyzed in conjunction, it is fair to say that "irregular" workers in Argentina enjoy certain established rights that undocumented workers in the United States do not enjoy, post-*Hoffman*, in a consistent manner.

V. CONCLUSION

At least five solutions to the current hostile inconsistency in the lives of undocumented workers in the United States exist. Three come in the form of proposals in the domestic realm; the other two resort to international law remedies. One commentator has proposed the enactment of a federal statute that would "specifically provide[] undocumented workers with the right to bring claims under federal statutes aimed at ensuring fair practices and equal protection in employment."[206] This proposed statute should include an available remedy in the event that the traditional labor statute's remedy

202. *Id.* at art. 5.

203. *See, e.g., id.* at art.9 (granting equal civil rights to those who have obtained residency according to the terms of the Agreement).

204. *Id.* at art.10.

205. *Id.* at art. 10(b).

206. Elizabeth M. Dunne, *The Embarrassing Secret of Immigration Policy: Understanding Why Congress Should Enact an Enforcement Statute for Undocumented Workers*, 49 EMORY L.J. 623, 672 (2000).

conflicts with immigration policy. This proposal would appear to be an excellent solution to the IRCA-induced inability of many courts to effectuate labor law policy, yet in the current climate, it is not a feasible solution. Following the September 11, 2001, tragedy, there does not appear to be much support at the federal legislative level for any seemingly pro-immigrant legislation. Other federal proposals that have been called for include the enactment of sanctions against the employers in the amount of wages saved by hiring undocumented workers,[207] or for limited amnesty for undocumented workers who have good faith labor law claims.[208] These also do not appear to be feasible at this time, for the post-9/11 anti-immigrant reasoning stated above.

A second domestic solution suggests a call to state legislatures and courts to play an even more active role to protect the labor and employment law rights of the undocumented workers. The example of Virginia in the worker's compensation context[209] should serve as a harbinger for future expansion of protection of the undocumented. Also, in 2002, shortly after the *Hoffman* decision, the state of California passed SB 1818, commonly called the "*Hoffman* fix."[210] The enactment of Chapter 1071 amends California's Labor Code,[211] Government Code,[212] Health and Safety Code,[213] and Civil Code,[214] and makes immigration status irrelevant for the enforcement of state labor, employment, civil rights and employee housing laws. The amendment also prohibits discovery into such status absent a showing of clear and convincing evidence.[215] This is yet another example of the power of the states to overcome the federal immigration policy's untoward reach, based on the Supreme Court's interpretation of the IRCA's policy in *Hoffman.*

The last domestic solution is found in two recently introduced federal bills that propose to restore and reaffirm the legal rights and remedies of undocumented workers under civil rights statutes. More specifically, in order to provide protection to undocumented workers, H.R. 3809, the Fairness and Individual Rights Necessary to Ensure a Stronger Society (FAIRNESS) Act, would amend the language of the Immigration and Nationality Act (INA).[216] The bill proposes to amend section 274A(h) of the INA by including language

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207. *See* Shahid Haque, Note, *Beyond Hoffman Plastic: Reforming National Labor Relations Policy to Conform to the Immigration Reform and Control Act*, 79 CHI.-KENT L. REV. 1357 (2004).

208. *See* Sara Bollerup, *America's Scapegoats: The Undocumented Worker and Hoffman Plastic Compounds Inc. v. National Labor Relations Board*, 38 NEW ENG. L. REV. 1009 (2004).

209. *See supra* note 137 and the accompanying text.

210. S.B.1818, 2001-02 Sess. (Cal. 2002) (codified at CAL. CIV. CODE 3339 (West. Supp. 2003)).

211. CAL. LAB. CODE § 1171.5 (Deering 2004).

212. CAL. GOV'T CODE § 7285 (Deering 2004).

213. CAL. HEALTH AND SAFETY CODE § 24000 (Deering 2004).

214. CAL. CIV. CODE § 3339 (Deering 2004).

215. S.B.1818, 2001-02 Sess.

216. Fairness and Individual Rights Necessary to Ensure a Stronger Society: Civil Rights Act of 2004, H.R. 3809, 108th Cong. § 702 (2004).

that would not deny backpay remedies to a present or former employee for either the employer's or employee's failure to comply with the section's particular requirements or federal law violation related to the established employee verification system.[217] In its findings, the bill announces numerous concerns resulting from the court's decision in *Hoffman*.[218] In particular, the bill distinctly notes that the majority in *Hoffman* made clear that "any 'perceived deficiency in the NLRA's existing remedial arsenal' must be 'addressed by congressional action.'"[219] Furthermore, S. 2381/HR 4262, the Safe, Orderly, Legal Visas and Enforcement (SOLVE) Act, sponsored by Senators Kennedy, Clinton and Feingold, and by Representative Gutierrez and over forty co-sponsors in the House, added to its other immigration proposals the restoration of labor rights denied in *Hoffman*.[220] Although these bills failed to be enacted in the 108th Congress and have not been reintroduced, the mere fact that they were proposed is telling of the viability to legislatively address the restoration of the labor protections of undocumented workers that the Supreme Court denied in *Hoffman*.

Finally, there are two international law approaches that could address the effects of *Hoffman*. The first is a human rights approach,[221] which may force the United States to view the dilemma of undocumented workers from a wider perspective than merely its domestic immigration policy by taking into account the Universal Declaration of Human Rights and other international human rights norms. The feasibility of such a proposal is unclear in this era in which U. S. courts have just begun to apply customary international law in their decisionmaking.[222] If this era continues, a proposal of this kind may succeed in the future.

Another international law approach consists of the invocation of international organizations' oversight functions. In fact, the AFL-CIO filed a complaint with the International Labor Organization (ILO) in protest of *Hoffman* and its limitation of remedies to undocumented workers in the United States, claiming the decision contravened international treaties on worker's

217. *Id.*

218. *Id.* § 701.

219. *Id.*

220. *See* Safe, Orderly, Legal Visas and Enforcement (SOLVE) Act of 2004, S. 2381, 108th Cong. § 321(2004); *see also,* Safe, Orderly, Legal Visas and Enforcement (SOLVE) Act of 2004, H.R. 4262, 108th Cong. § 321(2004).

221. Neil A. Friedman, *A Human Rights Approach to the Labor Rights of Undocumented Workers*, 74 CAL. L. REV. 1715 (1986).

222. *See* Roper v. Simmons, 125 S. Ct. 1183, 1199 (2005) (citing U.N. Convention on the Rights of the Child and other international law covenants to forbid execution of juveniles under the Eight Amendment.); *but see* Beharry v. Reno, 183 F. Supp. 2d 584,595-601 (E.D.N.Y. 2002), rev'd, 329 F.3d 51, 64 (2d Cir. 2003) (reversing on other grounds lower court's decision that deportable noncitizen should be afforded hearing regarding the right of U.S. citizen child to be raised with two parents as required by U.N. Convention on the Rights of the Child, the Universal Declaration of Human Rights and other customary international law.).

rights.[223] In response, the ILO concluded that the available remedies left to the NLRB were inadequate to ensure the effective protection against anti-union discrimination.[224] The ILO did not offer a proposed remedy or sanction, but it asserted that executive and congressional action must address the deficiency.[225] The Committee's report concludes with a recommendation inviting the government to explore all possible solutions, including legislative amendments, in order to ensure the protection of all workers against anti-union discrimination in the wake of the *Hoffman* decision.[226]

The oversight of the Inter-American Human Rights system is another action that was undertaken by the Government of Mexico by filing with the Inter-American Court of Human rights a complaint on behalf of its citizen workers in the United States. The Court issued its comprehensive advisory opinion in 2003, where it unequivocally declared that workers should be treated equally regardless of immigration status.[227]

In conclusion, the place of the undocumented worker in the United States' legal realm has moved from deep ambivalence to hostile inconsistency. Other immigrant-receiving countries, as shown by Argentina's as well as MERCOSUR's legal regimes, demonstrate that prohibitions on hiring undocumented workers need not eliminate those workers' labor law protections. It may serve the United States well to look to the south for some valuable lessons in how to treat those vulnerable workers in an effort to deter unauthorized immigration. Even as signs emerge hinting of remedies for undocumented workers in some areas of labor law protection, the sheer denial of some rights is certainly cause for concern.

In the three years following *Hoffman*, the decision has been used by some to send a message to undocumented workers to be docile and not complain about their working conditions or else.[228] The message of "[k]now your place, do the work, stay in the shadows, accept what your betters give you and never think of organizing to challenge the structure which holds you in chains" is still

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223. *See* Reports of the ILO Committee of Freedom of Association No. 329, 331 (LXXXIV, 2003, Series B, No. 2) re: Case No. 2227 (United States) October 18, 2002, complaint by the AFL-CIO.

224. *See* Reports of the ILO Committee of Freedom of Association No. 332 (LXXXVI, 2003, Series B, No. 3) May 9, 2003.

225. *Id.* It should be noted that with regard to its enforcement mechanisms, the ILO's shortfall has been "its lack of bite." *See* Phillip Seckman, *Invigorating Enforcement Mechanisms of the International Labor Organization in Pursuit of U.S. Labor Objectives,* 32 DENV. J. INT'L L. & POL'Y 675, 697 (2004).

226. *See* Reports of the ILO Committee of Freedom of Association No. 332 *supra* note 224.

227. *See* Sarah Paoletti, *Human Rights for all Workers: the Emergence of Protections for Unauthorized Workers in the Inter-American Human Rights System,* 12 HUM. RTS. BRIEF 5 (2004)(discussing Inter-American Court of Human Rights advisory opinion and its critical guidance with regard to migrant workers.).

228. David Bacon, *Supreme Court v. Unions,* THE NATION, May 2, 2002, *available at* http://www.thenation.com/doc.mhtml?i=20020520&s=bacon) (last visited Dec. 30, 2004).

alive and well, albeit with some protections granted erratically to the undocumented worker in our midst. Simply put, these actions deny the undocumented workers in our midst of the most basic of their attributes, their personhood. The denial of the undocumented workers' personhood because they lack U.S. citizenship should not be part of their existence in our democratic state as it is not consistent the ideals of freedom and equality that founded this nation.

ASIANS, GAY MARRIAGE, AND IMMIGRATION: FAMILY UNIFICATION AT A CROSSROADS

Victor C. Romero*

I. INTRODUCTION: ASIANS, GAYS, AND FAMILY UNIFICATION

Family unification has long been a significant component of U.S. immigration policy,[1] and the Asian Pacific American (APA) community has long been a champion of laws that strengthen America's commitment to this goal.[2] The recent emergence of same-gender marriages among state and local governments has caused society to consider more closely its definition of the family, challenging the traditional notion that only civil unions between heterosexuals should be celebrated. But because U.S. immigration law does not include a gay or lesbian partner within its statutory definition of "spouse,"[3] binational same-gender couples may not legally remain in the country together, even if they have been married under favorable domestic or foreign law.

Aside from burdening close to 36,000 binational same-gender couples in the nation today,[4] restrictive U.S. immigration policies pose a particular

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1. The current family-preference categories enshrined in the Immigration and Nationality Act (INA) have been a fixture of immigration law since at least the passage of the McCarran-Walter Act of 1952. *See* Immigration and Nationality Act of 1952, Pub. L. 82-414, 66 Stat. 1952 (codified as amended at 8 U.S.C. §§ 1101-1537 (2000)).

2. *See, e.g.*, U.C. Berkeley Center for Labor Research and Education - Institute of Industrial Relations, *Advancing an Asian Agenda for Immigration Reform: Conference Summary and Recommendations,* Foreword (2002), *at* http://laborcenter.berkeley.edu/immigrantworkers/asianagenda.pdf (last visited Aug. 5, 2004) (noting that although family reunification is one of the "most critical issues" for the Asian community, it has not been a national priority).

3. Adams v. Howerton, 673 F.2d 1036, 1042 (9th Cir. 1982) (limiting the definition of "spouse" to those involved in a heterosexual marriage only). Moreover, the Defense of Marriage Act of 1996 deprives same-gender partners from receiving federal benefits. Defense of Marriage Act of 1996, 1 U.S.C. § 7 (1996).

4. E-mail from Adam Francoeur, Staff Member, Immigration Equality, to Victor C. Romero, Professor of Law, Penn State-Dickinson School of Law (June 18, 2004, 12:39 PM EDT) (on file with author) (reporting 35,820 binational same-gender couples in the U.S. today, based on preliminary findings of Urban Institute study of 2000 Census data) [hereinafter Francoeur E-mail].

dilemma to APAs who otherwise advocate family unity, yet embrace more traditional notions of the family. This is because traditional conceptions of marriage and the family may wreak havoc on the approximately 16,000 binational couples in which the foreign partner is Asian.[5] APAs who clamor for family-friendly immigration policies but temper their advocacy with tradition create a risk of deportation for thousands of gay and lesbian Asian immigrants with whom they should seek to build coalitions. Advocating a traditional view of family unity thus endangers the immigration status of thousands of Asian gays and lesbians, undermining claims to family unification the APA community has long valued.

II. FAMILY UNIFICATION AS AN APA VALUE

A. Nisbett's Research Supports Common Belief that APAs Value Family in Ways Different from European Americans

In his book *Geography of Thought*, social psychologist Richard Nisbett argues that, contrary to conventional wisdom, Westerners and East Asians differ in the way they view the world.[6] Although he is careful to point out that Asian Americans pose a peculiar problem, Nisbett supports his hypotheses about the differences between ancient Greek (Western) and Chinese (Asian) modes of thinking with numerous examples of experiments conducted on modern persons.

In one study by social psychologists Sheena Iyengar and Mark Lepper, for example, children were asked to work on anagrams, such as "What word can you make from GREIT?" Some children were told that they must work on a particular set of anagrams, others were given a choice, and still others were told that their mothers had selected a set for them to work on. The American children were most motivated when they were allowed to choose the set themselves, and least motivated when they were told their mothers had chosen the set for them. In contrast, the Japanese and Chinese children were most motivated when told that their mother had chosen the set, indicating the value they placed on the family relationship over the individualism valued by the American children.[7] The study concludes that because Westerners have long valued individualism while Easterners have long valued family, Easterners are less open to claims of individual rights than their Western counterparts.

Gay and lesbian activism is therefore less likely to be prevalent in Eastern than in Western societies because gay individuals are less likely to be understood or supported by Eastern families who might view "coming out" as

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5. *Id.* (reporting the following breakdown by national origin of Asian partner: Philippines – 2,009; China – 1,295; India – 1,225; Japan – 984; Vietnam – 809; and Thailand – 765; another 9,062 are from other Asian countries).

6. *See generally* RICHARD E. NISBETT, THE GEOGRAPHY OF THOUGHT (2003).

7. *Id.* at 58-59.

disruptive of family peace. While there are certainly many conservative Western families that might also suppress individual expression, European Americans are more likely to understand the source of their kin's individualism even if they might not appreciate this particular manifestation of it. Put differently, the typical modern Westerner subscribes to a variant of John Stuart Mill's "harm principle"[8]—that an individual is free to do as she pleases as long as she does no harm to anyone else. Asians, according to Nisbett, do not begin with the same premise. Instead, they seek harmony in human interaction, just as they seek harmony between humans and nature. The individual is therefore subordinate to the family, and unlike in Western culture, will not seek to please herself first, but will rather seek to understand and fulfill her role within the existing social structure.[9]

The Nisbett paradigm of East-West differences reflects the lived experiences of many APAs. APA Presbyterian minister Cal Chin, though sympathetic to the gay rights movement, explains the opposition of many in the Chinese American community thusly: "I wouldn't use 'conservative' to describe Chinese American views .... I would say that Chinese Americans are more corporate in their thinking; they think about how an individual and an individual's actions impact the community. You can't act in isolation."[10] Chin notes that Chinese Americans "tend to place family and community over individual preferences and lifestyle."[11] This emphasis on family and community has led some APA community leaders to draw distinctions between minority statuses, distinguishing between being Asian (and thus part of the family) and being gay (and therefore not). The Reverend Raymond Kwong, who like Chin, is a minister of APA descent, explains: "We are sympathetic to true minorities. Gays and lesbians are not a genuine minority. The Supreme Court laid down qualifications of a minority and one is immutable characteristic – skin color. Have you ever met an ex-Asian? However, there are thousands of ex-gays."[12]

This tension among APAs over individual rights versus family cultural traditions was recently tested when *Details* magazine's April 2004 edition carried a photo-spread entitled "Gay or Asian?" in which the author, Whitney McNally, enumerated perceived similarities between gays and Asian males,

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8. *See generally* John Stuart Mill, *On Liberty*, *in* 43 GREAT BOOKS OF THE WESTERN WORLD 312 (Robert Maynard Hutchins ed., 1952) (stating "that for such actions as are prejudicial to the interests of others, the individual is accountable, and may be subject to either social or legal punishment, if society is of the opinion that one or the other is requisite for its protection").

9. NISBETT, *supra* note 6, at 53 ("When describing themselves, Asians make reference to social roles ('I am Joan's friend') to a much greater extent than Americans do.").

10. Julie D. Soo, *We Asked, They Told: Chinese Americans Unsettled on Same-Sex Marriage*, ASIAN WEEK, May 21, 2004, *available at* http://news.asianweek.com/news/view_article.html?article_id=b0b5a28f6cabaea5fc76d4584301d61e (last visited Feb. 9, 2004).

11. *Id.*

12. *Id.*

based on crude stereotypes. It reads, for instance: "Ladyboy Fingers: Soft and long. Perfect for both waxing on and off, plucking the koto, or gripping the Kendo stick."[13] How would Reverend Kwong and his ilk have responded to this piece? Would they have been inclined to claim that it discriminated against Asians but not gays, thereby protecting the Asian "family" and its male members from slanderous comparisons to "sexual deviants"? Claiming discrimination against Asians but not gays would be a difficult trick, especially considering the large number of Asian males that are gay. Some communities even have their own gay APA associations. The Gay Asian and Pacific Islander Men of New York issued a nuanced response that carefully identified the nature and extent of the offense: "[The *Details* piece] 'was an absurd and tasteless play on worn out stereotypes of both the LGBT[14] community and East Asian cultures. It demeaned all gay men as sexaholics, Asians as exotic chattels from far off lands, and Asian men as passive and effeminate.'"[15]

Gay rights issues become particularly difficult for APAs within the context of immigration law. While APAs have historically supported legislation that unites and keeps families together, that advocacy has been limited to traditional depictions of the family. The argument goes something like this: If Europeans are able to immigrate fairly quickly so they can be with their stateside families, so should Asians, because Asians value families just as much as Europeans do. Asians are not asking for special consideration for non-traditional families; they simply want what Europeans already enjoy—routine, predictable, and timely family-based immigration.

Such an approach is safe and may be politically expedient, but it contains within it a contradiction—it assumes that the only binational families that exist are heterosexual ones. A forthcoming Urban Institute study reveals that this is not true. Preliminary data culled from the 2000 Census reveals that not only are there at least 35,820 binational same-gender couples present in the United States, but in forty-five percent of the cases, the foreign partner is Asian.[16] This means that by limiting their immigration law reform advocacy to traditional, heterosexual marriages and families, APAs put at risk approximately 16,000 Asian nationals because their U.S.-citizen partners are not permitted to petition for them to remain in the country as their "spouse."[17]

Thus, two problems arise out of excluding gay and lesbian APAs from the discussion and advocacy. First, not including gay and lesbian APAs undercuts the family unification argument. If families are formed by gays and

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13. Whitney McNally, *Gay or Asian?*, DETAILS, April 2004, at 52, *available at* http://www.asianmediawatchdog.com/detail/detailpic.html (last visited on Dec. 27, 2004).

14. "LGBT" stands for Lesbian, Gay, Bisexual and Transgender.

15. Phil Tajitsu Nash, *Washington Journal: Gays: The New 'Heathen Chinee,'* ASIAN WEEK, Apr. 9, 2004, *available at* http://news.asianweek.com/news/view_article.html?article_id=6fe0596a85a6a9f9fe0e3fa647418753. (last visited Jan. 27, 2004).

16. Francoeur E-mail, *supra* note 4.

17. *See supra* note 3 and accompanying text.

lesbians whether *de jure* or *de facto*, then they deserve to receive the same family-reunification benefits afforded straight European and Asian families. Moreover, to draw the line at "Asians" neglects the reality that a large number of Asian noncitizens living in this country are gay. Second, such a limited perspective is particularly short-sighted when viewed through the lens of U.S. immigration history, whose foundations can be traced to the anti-Chinese movement of the late nineteenth century.

B. The Anti-Asian Legacy of Immigration Law

Immigration law governs when noncitizens of the United States are permitted to enter and required to leave the country. While the first hundred years of our nation's history saw immigration virtually unregulated by the federal government,[18] events of the mid to late nineteenth century saw the United States tighten its borders, following what was perceived to be the arrival of large numbers of Chinese laborers, particularly on the economically-depressed West Coast.[19] Growing anxiety among policymakers culminated in the adoption of the Chinese Exclusion Act of 1882,[20] the most significant restriction on immigration since the nation's founding.[21] The Act not only suspended further immigration of Chinese nationals, but it also required those in the United States to procure re-entry certificates before leaving the country, and authorized the deportation of Chinese individuals who violated the Act.[22]

The severity of the Act prompted litigation, leading to the U.S. Supreme Court's landmark opinions in two immigration law cases: *Chae Chan Ping v. United States* and *Fong Yue Ting v. United States*.[23] In *Chae Chan Ping*, the Court held that Congress has exclusive authority over immigration law and can therefore decide to prevent a returning Chinese laborer from re-entering the country.[24] Petitioner Chae Chan Ping had procured the requisite re-entry certificates prior to leaving the United States to visit China. Between then and when he returned, however, Congress decided to revoke all certificates, including Chae Chan Ping's. For the Court to curb Congress's power would

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18. *E.g.*, GERALD L. NEUMAN, STRANGERS TO THE CONSTITUTION: IMMIGRANTS, BORDERS, AND FUNDAMENTAL LAW 19 (1996) (During the first century of the Republic, "[r]egulation of transborder movement of persons existed, primarily at the state level but also supplemented by federal legislation.").

19. *See generally* LUCY E. SALYER, LAWS HARSH AS TIGERS: CHINESE IMMIGRANTS AND THE SHAPING OF MODERN IMMIGRATION LAW (1995).

20. Chinese Exclusion Act of 1882, ch. 126, 22 Stat. 58 (1982) (repealed 1943).

21. *E.g.*, T. ALEXANDER ALEINIKOFF, SEMBLANCES OF SOVEREIGNTY: THE CONSTITUTION, THE STATE, AND AMERICAN CITIZENSHIP 13 (2002) (describing the Chinese Exclusion laws as "the first significant federal immigration legislation enacted since the adoption of the Constitution").

22. *See* Chinese Exclusion Act of 1882, ch. 126, 22 Stat. 58.

23. *See generally* Gabriel J. Chin, *Chae Chan Ping and Fong Yue Ting, in* IMMIGRATION STORIES (Peter H. Schuck & David A. Martin, eds. forthcoming 2005).

24. Chae Chan Ping v. United States, 130 U.S. 581 (1889).

have been tantamount to restricting the federal government's autonomy; Congress's decision was therefore "conclusive upon the judiciary."[25] A product of the larger racism that was infecting the country at the time,[26] Justice Field's opinion upholding Congress's policies is laced with anti-Chinese rhetoric, describing their presence in the country as "an Oriental invasion"[27] and characterizing the immigrants as "foreigners of a different race . . . who will not assimilate with us."[28] Bob Chang argues that this rhetoric contributes to the perception of APAs as "perpetual internal foreigners,"[29] those that the law allows into the country but marks as different from the norm.

The Court extended Congress's plenary power over excluding noncitizens to deporting them in *Fong Yue Ting v. United States*. Aside from holding that Fong Yue Ting and his two copetitioners could be deported for failing to comply with the Act, the Court specifically endorsed a provision requiring applicants for residence certificates to produce "a credible white witness" who could vouch for the Chinese.[30] Even if one were to assume that the Chinese at the time were notoriously untrustworthy so as to justify a general rule requiring a "credible witness," Congress should have drafted the provision to make credibility, and not race, the sticking point. While such an overtly racist law finds little resonance today due to its over- and under-inclusiveness,[31] one can still find contemporary examples of race being used as a proxy for disloyalty and distrust, especially in the targeting of the Arab and Muslim communities after 9/11.[32]

In sum, *Chae Chan Ping* and *Fong Yue Ting* teach that the APA community should think carefully about the policy positions it chooses to

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25. *Id.* at 606.

26. *See generally* BILL ONG HING, DEFINING AMERICA THROUGH IMMIGRATION POLICY (2004) (Mapping Racism Series); Kevin R. Johnson, *Race, the Immigration Laws, and Domestic Race Relations: A 'Magic Mirror' Into the Heart of Darkness*, 73 IND. L.J. 1111 (1998); Gabriel J. Chin, *Segregation's Last Stronghold: Race Discrimination and the Constitutional Law of Immigration*, 46 UCLA L. REV. 1 (1998); ANGELO H. ANCHETA, RACE, RIGHTS, AND THE ASIAN AMERICAN EXPERIENCE (1998).

27. *Chae Chan Ping*, 130 U.S. at 595.

28. *Id.* at 606.

29. ROBERT S. CHANG, DISORIENTED 38 (1999).

30. Fong Yue Ting v. United States, 149 U.S. 698, 732 (1893) (upholding "white witness" provision).

31. *See* Joseph Tussman & Jacobus TenBroek, *The Equal Protection of the Laws*, 37 CAL. L. REV. 341, 348-53 (1949) (defining over- and under-inclusiveness in equal protection analysis of government action).

32. *See generally* DAVID COLE, ENEMY ALIENS: DOUBLE STANDARDS AND CONSTITUTIONAL FREEDOMS IN THE WAR ON TERRORISM (2003); Susan M. Akram & Kevin R. Johnson, *Race, Civil Rights, and Immigration Law After September 11, 2001: The Targeting of Muslims and Arabs*, 58 N.Y.U. ANN. SURV. AM. L. 295 (2002); Leti Volpp, *The Citizen and the Terrorist*, 49 UCLA L. REV. 1575 (2002); Sameer M. Ashar, *Immigration Enforcement and Subordination: The Consequences of Racial Profiling After September 11*, 34 CONN. L. REV. 1185 (2002); Victor C. Romero, *Proxies for Loyalty in Constitutional Immigration Law: Citizenship and Race After September 11*, 52 DEPAUL L. REV. 871 (2003).

advocate in the immigration debate. Arguing for family unity for one group while forgetting the needs of another neglects the anti-Chinese legacy of our immigration law, and perhaps inadvertently, replaces one stereotype—the historically "unassimilable Asian"—with another—the currently "unassimilable gay or lesbian." As Phil Tajitsu Nash correctly notes:

> LGBT people should have the same rights as the rest of us to share the government-sanctioned rights and responsibilities of marriage, as well as all of the other guarantees of life, liberty and the pursuit of happiness. And, based on our community's history, we APAs should be among their strongest supporters.[33]

Like the Chinese before them, gays and lesbians suffer discrimination under our immigration law. In order to fully understand the ramifications of a pro-family reunification agenda that includes advocating for binational same-gender partners, it is important to review briefly the status of gays and lesbians within our immigration law, past and present.[34]

C. The Anti-Gay Reality of Immigration Law

As mentioned earlier, same-gender partners are not considered "spouses" under federal law, generally, and immigration law, in particular. There have been, however, other cases in which gay men have been the subject of discrimination under U.S. immigration law. Two in particular stand out: *Rosenberg v. Fleuti*[35] and *Boutilier v. INS*.[36] In both, the Immigration and Naturalization Service (INS)[37] sought to deport admitted gay men George Fleuti and Michael Boutilier because they suffered from a "psychopathic personality," which the INS contended included homosexuality.[38] Neither Fleuti nor Boutilier were evaluated to be "psychopathic," although both admitted to being gay.

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33. Nash, *supra* note 15.

34. *See generally* JOYCE MURDOCH & DEB PRICE, COURTING JUSTICE: GAY MEN & LESBIANS V. THE SUPREME COURT (2001) (providing journalists' accounts of the human face of the gay rights movement, including interviews with immigration litigants before the Court). On gay rights and the law generally, see WILLIAM N. ESKRIDGE JR., GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET (1999).

35. 374 U.S. 449 (1963).

36. 387 U.S. 118 (1967).

37. Since March 1, 2003, the enforcement functions of the INS have been transferred to U.S. Immigration and Customs Enforcement (ICE). Dept. of Homeland Security, Immigration & Borders, at http://www.dhs.gov/dhspublic/theme_home4.jsp (last visited on Feb. 9, 2005).

38. For a detailed account of the personal stories of Fleuti and Boutilier, see MURDOCH & PRICE, *supra* note 34, at 89-134.

In *Fleuti*, the Court did not reach the underlying issue, relying instead on a technicality. The INS's theory was that because Fleuti had left the United States for a day trip to Ensenada, Mexico, in August 1956, he was mistakenly allowed to re-enter despite his "psychopathic personality." The Court did not decide whether homosexuality was a psychopathic disorder under the immigration code; instead, it ruled that Fleuti's Mexican trip was both brief and innocent, and that therefore he could not be deported unless the INS could show otherwise.[39]

While a victory for Fleuti, the Court's decision to dodge the substantive issue came back to haunt another gay man four years later. In *Boutilier v. INS*, the Court ruled that the deportation provision regarding "psychopathic personality" was broad enough to include "homosexuality" and that it gave adequate notice to Boutilier that he might be deported for engaging in sex with persons of the same gender.[40] Ironically, the deportable Boutilier had more substantial connections with the United States than did Fleuti, whom the Court allowed to remain: Boutilier had resided in the United States many years longer than Fleuti, had lived with family in New York, and had enjoyed a seven-year relationship with an American man.[41]

Although homosexuality is no longer viewed as a "psychopathic personality," and indeed, individuals who are persecuted on the basis of their homosexual status may come to the United States as refugees,[42] foreign gay and lesbian partners of U.S. citizens may not immigrate as family members. That means that Michael Boutilier, even if he had not been deported, would still have had to find some way to remain here permanently[43] (through his employer, for instance) other than through his long-term relationship with his U.S. citizen partner.

Asians no longer have to worry about being excluded from immigrating because of their race, nor are they barred under state laws from marrying outside their race.[44] In contrast, foreign same-gender partners of U.S. citizens still face the prospect of deportation because the federal government and its immigration laws do not recognize same-gender marriages.[45] In May of 2004,

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39. *Fleuti*, 374 U.S. at 462-63.

40. *Boutilier*, 387 U.S. at 118-19.

41. MURDOCH & PRICE, *supra* note 34, at 103.

42. *See* Matter of Toboso-Alfonso, 20 IMMIGR. & NAT'LITY DECISIONS 819 (Att'y Gen. June 12, 1994).

43. Apparently, American consulates abroad are permitted to allow non-marital partners (gay or straight) the ability to visit the U.S. as tourists when their partners apply for temporary work visas. *See* Michael A. Scaperlanda, *Kulturkampf in the Backwaters: Homosexuality and Immigration Law*, 11 WIDENER J. PUB. L. 475, 493 (2002). While a welcome development, this does not entitle a gay couple to reside in the United States *permanently*.

44. *See* Loving v. Virginia, 388 U.S. 1 (1967) (striking Virginia anti-miscegenation law as unconstitutional promulgation of white supremacy).

45. See, e.g., Victor C. Romero, *The Selective Deportation of Same-Gender Partners: In Search of the "Rara Avis,"* 56 U. MIAMI L. REV. 537 (2002).

many gay and lesbian couples flocked to Massachusetts courts to marry, celebrating that state's monumental move to become the first in the nation to recognize same-gender marriages.[46] At least one couple was left to watch from the sidelines: American Austin Naughton and his partner of five years, a Spanish national here on a non-immigrant visa, decided not to wed that day. As Naughton put it, "If we marry, he could be deported."[47] Naughton's unnamed Spanish partner could just as well have been Asian. As two recent studies show, there is much to be learned about the Asian gay and lesbian community that should be considered in formulating an immigration platform that is pro-family, pro-Asian, and pro-gay rights.

III. RECENT EMPIRICAL RESEARCH ON APA AND ASIAN IMMIGRANT GAYS AND LESBIANS

A. The 2004 Asian American Federation of New York's Report on Asian Pacific American Same-Gender Households in New York, San Francisco, and Los Angeles

In a path-breaking report on three of the largest Asian gay communities in the United States, the Asian American Federation of New York utilized year 2000 Census data to study same-gender households in New York City, San Francisco, and Los Angeles.[48] The study reveals that a great majority of gay and lesbian partners were immigrants,[49] most of whom entered the United States in 1980 or later—81% in New York City, 73% in San Francisco, and 83% in Los Angeles—far higher than their non-Asian counterparts, the great majority of whom were U.S. citizens by birth.[50] Interestingly, most of the Asian respondents were U.S. citizens either by birth or naturalization—57% in New York City, 70% in San Francisco, and 72% in Los Angeles—although this was lower than comparable data for non-Asians.[51] Nonetheless, significant numbers of Asian gays and lesbians reported noncitizenship, close to a third on average—42% in New York, 29% in San Francisco, and 28% in Los Angeles.

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46. Elizabeth Mehren, *Massachusetts Begins Allowing Gays to Wed*, L.A. TIMES, May 17, 2004, at A10.

47. *Id.*

48. Asian American Federation of New York, *Asian Pacific American Same-Sex Households: A Census Report On New York, San Francisco, And Los Angeles* (Mar. 22, 2004), http://www.aafny.org/cic/report/GLReport.pdf (last visited Jan. 17, 2005).

49. While one might be foreign-born and still be a citizen at birth if one's parent is a citizen, this study used the foreign-born population to represent the immigrant population. *Id.* at 13 n.9.

50. *Id.* at 13-14.

51. *Id.* at 13.

Because current immigration and nationality law does not recognize same-gender relations, these APA gay and lesbian noncitizens—approximately a third of the population of same-gender APA households surveyed—will need to seek naturalization through a means other than marriage.

B. The Urban Institute's Forthcoming Report on Binational Same-Gender Couples in the United States

Preliminary figures out of the Urban Institute's report, commissioned by the group Immigration Equality, also raise concern.[52] Like the tri-city report, these preliminary findings are based on the year 2000 Census. They reveal a substantial number of same-gender binational couples, 16,000, in which the foreign partner is Asian. Indeed, this number may be lower than it actually is because of underreporting and undercounting.[53]

Taking the data from both of these surveys, educated guesses can be made as to the likely impact of current immigration law on Asian gays in binational same-gender partnerships. Assuming a little less than a third of Asian gays and lesbians around the country are noncitizens, and that there are 16,000 such persons currently involved in binational relationships, then a conservative estimate yields about 5,000 Asian gays and lesbians who may not adjust their status based on their current relationships with U.S. citizens. Even assuming that some are in the process of adjusting their papers through their employers or some other legitimate means—and that some may not want to get married—this still leaves a sizeable number of APA members who are without any means to remain legitimately in the United States. Had they been straight, they could marry their partners; being gay, that option is unavailable to them.

Some in the APA community have begun to embrace the fight for gay marriage as their fight. The Gay Asian Pacific Support Network sponsored an "Asian and Allies Rally for Marriage Equality" in August 2004 in Los Angeles.[54] Their website invited supporters to bring along "family, friends, and loved ones as we take a stand for fairness, justice, and equality. Make a statement. Make a difference. Make marriage happen."[55] For the many APA members who are foreign same-gender partners of U.S. citizens, the stakes are even higher since they risk deportation (and if they are abroad, exclusion). A family unification immigration policy for Asians should include unification for those Asians whose choice to create a family involves a partnership with someone of the same gender.

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52. *See* Francoeur E-mail, *supra* note 4.

53. *Id.*

54. Gay Asian Pacific Support Network, GAPSN Events: Asians and Allies Rally for Marriage Equality, (on file with author).

55. *Id.*

IV. CONCLUSION

Asian Pacific Americans have long valued family. They have also long valued tradition, embracing values imported from ancestral lands and cultures. In the context of U.S. immigration policy, APAs have combined these two points to support legislation that promotes family unification. They contend that because family unification has been a mainstay of immigration policy for many years, it should be applied fairly to all immigrants and their families, including Asians, who, because of U.S. Citizenship and Immigration Services (USCIS) backlogs inherited from the INS, have to wait for interminably long periods of time. Because of the recent movement toward greater recognition for same-gender marriages and gay and lesbian families, APAs should consider carefully whether they should continue on the traditional path they have chosen—that is, to argue for the guarantee of equal treatment of traditional immigrant families—or to expand their argument to advocate for the protection of non-traditional, but just as loving and legitimate, same-gender marriages and families. Aside from being a logical extension of the basic APA position on family unity, fighting for the protection of same-gender binational marriages simultaneously benefits the thousands of Asian same-gender partners who risk deportation unless the law is changed. Hopefully, upon further reflection, APAs, the gay and lesbian community, and the gay and lesbian APA community together will support a broader definition of family reunification than that which currently exists under immigration law.

Hiram Kwan, immigration counsel to George Fleuti, the gay man the INS sought to deport in the early 1960s, once admitted that although he originally did not see Fleuti's battle as a struggle for civil rights, "[N]ow, I see it from the bigger picture .... He was discriminated against as much as the blacks and the yellows and the Indians and the Jews. . . . I would say the homosexual is the yellow person of today."[56] Kwan's point may be taken one step further: Sometimes the homosexual *is* a yellow person.

56. MURDOCH & PRICE, *supra* note 34, at 98-99.

"GOOD FENCES MAKE GOOD NEIGHBORS:"[1] NATIONAL SECURITY AND TERRORISM— TIME TO FENCE IN OUR SOUTHERN BORDER

Justin C. Glon*

I. INTRODUCTION

> "In this age of terror, the security of our borders is more important than ever . . ."[2]

The events of September 11, 2001, led to what many government officials are calling an "Age of Terror"[3] where individuals dedicated to acquiring weapons of mass destruction (WMD)[4] purposefully violate all legal restraint[5] and deliberately murder civilians in order to advance their anti-

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1. ROBERT FROST, *Mending Wall*, *in* NORTH OF BOSTON (1914).

2. Press Release, White House, President Bush, Mexican President Fox Reaffirm Commitment to Security (Mar. 6, 2004), http://www.whitehouse.gov/news/releases/2004/03/20040306-3.html (last visited Mar. 3, 2005) (quoting President George W. Bush). President Bush also stated:

> I will continue to speak about the effects of 9/11 on our country and my presidency. I will continue to mourn the loss of life on that day, but I'll never forget the lessons. The terrorists declared war on us on that day, and I will continue to pursue this war. I have an obligation to those who died; I have an obligation to those who were heroic in their attempts to rescue. And I won't forget that obligation.

Id.

3. Terrorism, as defined by the FBI, is the "unlawful use of force and violence against persons or property to intimidate or coerce a government, the civilian population, or any segment thereof, in furtherance of political or social objectives." *Terrorism in the United States: Counterterrorism Threat Assessment and Warning Unit, Counterterrorism Division*, Federal Bureau of Investigations, 1999 (quoting 28 C.F.R. § 0.85).

4. The phrase Weapon of Mass Destruction is generally "synonymous with nuclear, biological, or chemical weapons." *See* MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 188 (10th ed. 2004). However, of growing use is the Department of Defense's classification of weapons – "chemical, biological, radiological, nuclear materials, or high-yield explosive – which includes radiological or 'dirty' bombs and conventional explosives." Intellibridge, *The Evolving Nature of "Weapons of Mass Destruction"*, HOMELAND SECURITY MONITOR, http://www.homelandsecuritymonitor.com/Docs/Evolving.pdf (last updated Aug. 29, 2004) (last visited Mar. 20, 2005).

5. John Yoo, *The Rules of War: Sept. 11 Has Changed the Rules*, UC BERKELEY NEWS,

democratic goals.[6] The Bush Administration has taken a dramatically different stance on national security in light of the ever-present threat that terrorists may use biological, chemical, or even nuclear weapons against the civilian population of the United States.[7] The centerpiece of President Bush's national security strategy is to address threats immediately in order to prevent even the possibility of another attack like September 11th.[8] While much has been done to counter "transnational terrorists" and "rogue states," including the use of preemptive military force,[9] little has been done to remedy the admittedly weak and porous international border separating the United States from Mexico to the south.[10] Although there have been proposals for increased cooperation among

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June 15, 2004, at 1.

> Al Qaeda is an organization with covert cells of operatives who hide among civilians. It has no territory to defend, no population to protect, no infrastructure or armies in the field to attack. Its primary goal—to target and kill large numbers of civilians—violates the very core purpose of the laws of war to spare civilian life and limit combat to armies.

Id.

6. William C. Bradford, *The Changing Laws of War: Do We Need a New Legal Regime After September 11?*, 79 NOTRE DAME L. REV. 1365, 1367-70 (2004); *see also* Interview by Maria Bartiromo with Colin L. Powell, Secretary of State, *The Wall Street Journal Report with Maria Bartiromo,* at U.S. Department of State, Washington, D.C. (Nov. 12, 2004), http://www.state.gov/secretary/former/powell/remarks/38165.htm (last visited Mar. 3, 2005).

7. Dalia Sussman, *Terrorists Will Strike Again: Public Supports Bush, But Doubts Government Can Prevent Another Attack*, ABCNews Poll, July 16, 2002, http://www.abcnews.go.com/sections/us/DailyNews/terror_poll020716.html (last visited Mar. 3, 2005). "There continues to be an increase in public apprehension about the possibility of future terrorism and doubts that the government is able to prevent any such attack from occurring. These perceptions of future attack have affected the public and policymakers much since September 11." *Id.*

8. Bob Woodward, Bush at War, Remarks during an online discussion forum moderated by the Washington Post (Nov. 19, 2002) (transcript available at http://www.washingtonpost.com/wp-srv/liveonline/02/special/nation/sp_nation_woodward 111902.htm (last visited Mar. 18, 2005)).

9. Bradford, *supra* note 6, at 1367-70.

> Immediately upon its promulgation the Bush Doctrine sparked a legal debate over whether the use of military force to prevent megaterrorism on the order of September 11 constituted one of the permissible exceptions to a general prohibition on the use of force in international relations, and whether the substantive and procedural obligations concerning resolution of international disputes incumbent upon member states of the United Nations could countenance the resort to self-help under such circumstances. Although the U.S.-led intervention against and deposition of the Hussein regime in Iraq in March and April 2003 was predicated not upon an argument in favor of preventive war, but upon far less controversial legal justifications, the characterization of the grounds for intervention for domestic political consumption by the Bush Administration as a preventive war, along with a widespread perception that intervention could not be legally justified on any other basis, has thrust the contentious assertion of the right of states to engage in preventive war to the forefront of international legal discourse.

Id.

10. JIM TURNER, HOUSE SELECT COMMITTEE ON HOMELAND SECURITY, TRANSFORMING THE SOUTHERN BORDER: PROVIDING SECURITY & PROSPERITY IN THE POST 9/11 WORLD ii (2004).

the different administrative and protective agencies,[11] more federally authorized law enforcement officers,[12] implementation of new communication tools and other technologies,[13] larger and more accessible detention centers,[14] and for far-reaching intelligence gathering devices,[15] these provisions are not enough to secure the Southern Border and prevent individuals of national security concern from entering the country.

> We have very major security gaps on our Southern Border that are not being addressed. Just last week, I visited Brownsville and Harlingen and learned that thousands of illegal immigrants, from countries other than Mexico, are coming across the border, being arrested by the Border Patrol and then being released into the community because we have no available detention space. We have places on our border where there is nothing – no fencing, no electronic monitoring, and no effective law enforcement presence – to stop people from coming across the border. Our ports-of-entry are so congested, that at times, cars are just waived through the border, with hardly any inspection. All of these security gaps could provide the pathway for a terrorist to enter the United States and do grave harm. This country is fighting a war against terror, but nowhere is the gap between rhetoric and reality greater than on our Southern Border.

Id.

11. *Id.* "It is critical that the Department of Homeland Security coordinate plans and carry out missions with Department of Interior, Department of Agriculture and Tribal Nations." *Id.* at 96.

12. *Id.* "To better protect America from terrorism . . . we must identify the personnel level necessary to staff our myriad of consular, interdiction, enforcement, prosecutorial, judicial, and detention agencies." *Id.* at 123.

13. *Id.*

> A layered approach to border security necessarily involves a variety of monitoring and detection technologies. Yet DHS [Department of Homeland Security] has failed to consistently and evenly deploy technology along our Southern Border and at the ports-of-entry. In fact, hundreds of miles of our border go unmonitored by personnel or technology every day, despite the fact that technology currently exists to close this gap to terrorists and illicit cargo.

Id.

14. *Id.*

> The "catch-and-release" cycle must be broken. For the United States to have a coherent border security strategy, there must be some consequence for trying to illegally enter our country. Due to increased apprehensions and security concerns, detention facilities need to be built or expanded to meet the need for additional bed space. Penalties need to be enhanced and resources need to be provided to the Department of Justice to prosecute and imprison those illegal immigrants who routinely flaunt our immigration laws by repeatedly crossing the borders illegally.

Id. at 126.

15. *Id.* at 123.

> Intelligence is a critical tool in the arsenal used by our border agencies to combat potential terrorists from crossing the border. Currently, intelligence is not being used effectively on the Southern Border. CBP inspectors, Border Patrol agents and ICE [Immigration and Customs Enforcement] special agents, complained about the utility of the intelligence information currently received. It is neither enough nor timely. Unless it is improved, they cannot be expected to accurately and efficiently "connect the dots" and identify the terrorist threat on the Southern Border in a timely manner.

Id. at 124.

Part I of this Note will analyze the history of the United States's Southern Border policies with Mexico and what has been done to prevent the rise in illegal immigration over the past 140 years. Primary focus will be placed on national security concerns that arise from such illegal immigration rather than any arguable economic or criminal effects. Part II will examine the need for increased border security after September 11th and explain why illegal immigration is a problem worthy of the utmost attention. Part III of this note will provide a legal basis for the right to protect our Southern Border through security fencing operations by analyzing state sovereignty, plenary power, natural law, inherent rights to self-defense, federal war-making powers, and the "Invasion Clause" of the Constitution. The focus will be on the creation of a security fence that spans the entire southwestern border, allowing for international trade and commerce, entry and exit, and legal immigration only through specified ports in order to defend the nation's vital interests against external threats. Underlying the proposal to construct a security fence will be an examination of criticisms surrounding such policies, specifically analyzing the threat to Federal Indian lands, destruction of environmental protection policies, and possible human right abuses. Finally, Part IV will offer some recommendations and conclusions for the construction of a security fence on the Southern Border, reviewing the legal justifications and the national security interests that must be given primary attention in the post-September 11th world.

II. HISTORY OF THE SOUTHERN BORDER

"Our inability to control our borders is America's Trojan horse."[16]

Immigration across the Southern Border has been one of the most important issues between the United States and Mexico over the past 140 years. During this period, the United States implemented a number of policies to deal with its most pressing concern, illegal immigration.[17] The following historical analysis demonstrates how these policies and prevention techniques have completely and utterly failed, both in preventing illegal immigration across the Southern Border and in protecting America's national security.[18]

16. Michael Giorgino, Border *Fence is Vital to National Security*, The League of Women Voters California, *at* http://www.smartvoter.org/2004/11/02/ca/state/vote/giorgino_m/paper3.html (last visited Mar. 20, 2005). "Illegal immigration overwhelms our social services and diminishes respect for our laws. Far more dangerous is the threat of more 9/11-type terrorists crossing the border—waiting for another chance to strike." *Id.*

17. TURNER, *supra* note 10, at 97.

18. *Id.*

A. *Early Immigration 1850-1930*[19]

In the late 1800s, the key immigration issue between the United States and Mexico was the creation of a cheap labor base for American agriculture and industry.[20] The expansion of cattle ranches, primarily in Texas, and growth of fruit production in California, led to the heavy recruitment of Mexican workers by American employers.[21] The immigration of these workers was not prohibited, but was in fact encouraged in order to fully meet the production needs of America's industries.[22] Between 1850 and 1880, over 50,000 Mexican workers immigrated to the United States, and by 1900, a large Mexican workforce was well established in the American southwest.[23]

The Mexican Revolution in 1910 lead to a drastic increase in immigration to the United States.[24] The Mexican government was unable and unwilling to provide basic necessities to its citizens, forcing many of them to look for a better life in the United States.[25] World War I also caused a marked increase in Mexican immigration.[26] Immigrant laborers had little difficulty gaining employment in the United States while American workers were fighting in the war overseas.[27] Mexican workers excelled in a number of key industries, often finding employment as machinists, mechanics, painters, farmers and plumbers.[28]

As Mexican immigration increased, so did the demand for border security and immigration restrictions.[29] On May 28, 1924, Congress passed the Labor Appropriation Act of 1924, officially establishing the U.S. Border Patrol for the purpose of securing the border between inspection stations and for stemming the flow of illegal immigration.[30] The Act of 1924 created the requirement that "all prospective immigrants to the United States obtain a visa from a consular official of the U.S. Department of State in their own homeland" prior to

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19. For a well-written and detailed history of the Southern Border, see JoAnne D. Spotts, *U.S. Immigration Policy on the Southwest Border from Reagan Through Clinton, 1981-2001*, 16 GEO. IMMIGR. L.J. 601 (2002).

20. *Id.* at 603.

21. Public Broadcasting Station, *The Border: Mexican Immigrant Labor History*, *at* http://www.pbs.org/kpbs/theborder/history/timeline/17.html (last visited Mar. 18, 2005) [hereinafter PBS].

22. Spotts, *supra* note 19, at 604.

23. PBS, *supra* note 21.

24. *Id.*

25. Cindy Baxman, *Border Revolution: History of the Mexican Revolution, 1910-1920*, *at* http://history.acusd.edu/gen/projects/border/page03.html (May 15, 1998) (last visited Mar. 20, 2005).

26. *Id.*

27. *Id.*

28. PBS, *supra* note 21.

29. U.S. Customs and Border Protection, U.S. Border Patrol History, *at* http://www.cbp.gov/xp/cgov/border_security/border_patrol/history.xml (July 15, 2003) (last visited Feb. 21, 2005).

30. *Id.*

admittance.[31] For many Mexican laborers, the requirement of obtaining a visa was a significant burden and thus was often ignored.[32] Instead, most Mexican immigrants continued to cross the border informally, but "what had once been legal, [and even encouraged], was now considered illegal by the U.S. government."[33] Additional restrictions were placed on immigration during the Great Depression.[34] Mexicans who were unable to prove that they had secured employment within the United States were summarily denied visas.[35] Mexican immigrants already within the country who failed to obtain a visa prior to entry were deported and warned not to return to the country.[36] Despite these restrictive policies, immigration continued to increase.[37] By 1930, there were over 1.5 million Mexican immigrants living within the United States, with more than 700,000 living within the state of Texas alone.[38]

B. 1930-1965: Mexican Immigration Fluctuates[39]

Toward the end of the Great Depression, and with the start of the New Deal,[40] immigration from Mexico began to increase once again.[41] In 1942, the United States entered World War II against the Axis Powers of Europe and Asia.[42] Migrant workers were welcomed into America to fill labor shortages throughout the country.[43] It was at this time that Congress passed a number of laws allowing for the legal importation of temporary Mexican workers.[44] Under the Bracero Program, for example, more than four million Mexican laborers came to the United States to work, primarily as farmhands.[45]

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31. Spotts, *supra* note 19, at 604.
32. *Id.*
33. *Id. See also* ROGER DANIELS & OTIS L. GRAHAM, DEBATING AMERICAN IMMIGRATION, 1882-PRESENT 42-45 (Rowman & Littlefield 2001).
34. PBS, *supra* note 21.
35. *Id.*
36. *Id.*
37. The Library of Congress, Depression and Struggle for Survival, *at* http://www.memory.loc.gov/learn/features/immig/mexican6.html (Sept. 11, 2003) (last visited Feb. 23, 2005).
38. Spotts, *supra* note 19, at 604-05; *see also* Red River Authority of Texas, Mexican Americans—The Handbook of Texas, *at* http://www.rra.dst.tx.us/c_t/History1/MEXICAN%20AMERICANS.cfm (Dec. 4, 2002) (last visited Feb. 24, 2005).
39. Spotts, *supra* note 19, at 605.
40. *Id.*
41. *Id.*
42. PBS, *supra* note 21.
43. DANIELS & GRAHAM, *supra* note 33, at 49-52.
44. *Id.*
45. PBS, *supra* note 21.

> The Bracero Program of 1942-64, first negotiated by the United States and Mexico as an emergency measure during World War II, encouraged large migrations of Mexican workers to the United States. Under the terms of the program, American agricultural enterprises could legally bring Mexican contract laborers for seasonal work. In the off-season, many did not return home and

While there was growth in the legal importation of laborers, illegal immigration also continued to rise.[46] In 1949, over 280,000 illegal immigrants were seized by the United States Border Patrol, while in 1953, the number of those seized grew to over 860,000.[47] Feeling pressure to address this flood of illegal immigration, Congress passed the Wetback Act, which allowed Border Patrol agents to enter both public and private lands in order to seek out and detain illegal immigrants.[48] The focus of this intense border enforcement statute was capturing "illegal aliens," but often agents operating under the act targeted, and apprehended, lawfully admitted Mexicans as well.[49] In the first year of the Wetback Act, over one million illegal immigrants were detected and over 300,000 of them were deported.[50] In 1964, the temporary worker programs came to an end with the assumption that the laborers would leave the United States and return to their homeland.[51] Most laborers did return to Mexico, but "many remained and were instantly transformed from legal to illegal status."[52]

C. 1965-1980: Increased Immigration[53]

In 1965, President Lyndon Johnson signed the Immigration Act of 1965, which drastically changed America's immigration law.[54] The Immigration Act was primarily a "corrective measure instituted to atone for past history of discrimination in immigration."[55] The Act did reduce institutionalized racial discrimination,[56] but it also had the effect of converting immigration admissions

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settled on the border, often selecting a place where people from their home state were already established.

Olivia Cadaval, *United States-Mexico Borderlands/Frontera*, Migration in History, *at* http://www.smithsonianeducation.org/migrations/bord/intro.html. (last visited Mar. 20, 2005).

46. Spotts, *supra* note 19, at 605.

47. PBS, *supra* note 21, *at* http://www.pbs.org/kpbs/theborder/history/timeline/20.html.

48. Act of May 19, 1921, ch. 8, 42 Stat. 5; National Origins Act, ch. 190, 43 Stat. 153 (1924) (repealed 1965). "The 'Wetback Act' . . . aimed to discourage illegal Mexican immigration by criminally sanctioning anyone who smuggled or harbored aliens who had not been inspected and legally admitted. In 1954 alone, the United States deported 300,000 Mexicans under this Act." *See* Kiera LoBreglio, *The Border Security and Immigration Improvement Act: A Modern Solution to a Historic Problem?*, 78 ST. JOHN'S L. REV. 933, 936 (2004).

49. *See* PBS, *supra* note 21, *at* http://www.pbs.org/kpbs/theborder/history/index.html.

50. James F. Smith, *A Nation That Welcomes Immigrants? An Historical Examination of United States Immigration Policy*, 1 U.C. DAVIS J. INT'L L. & POL'Y 227, 246 (1995).

51. *Id.*

52. Spotts, *supra* note 19, at 606.

53. *Id.*

54. Devin Love-Andrews, *Immigration Act of 1965*, North Park University of Chicago, *at* http://campus.northpark.edu/history/WebChron/USA/ImmigrationAct.html (Sept. 11, 2003) (last visited Mar. 20, 2005).

55. *Id.*

56. Act of Oct. 3, 1965, Pub. L. No. 89-236, 79 Stat. 911 (codified as amended at 8 U.S.C. 1152(a) (1994)).

"into a social and political policy that served the private interests of U.S. legal permanent residents and their relatives."[57]

The 1965 Act limited the number of immigrants admitted from countries in the Western Hemisphere, and also created a cap of no more than 20,000 immigrants from any one country.[58] The immigration limits placed on countries in the Western Hemisphere created extremely long waiting periods for Mexican aliens seeking immigrant visas.[59] For example, by 1976, "the waiting period for Mexicans to immigrate legally into the United States was over two and a half years long."[60] This backlog caused a dramatic increase in the amount of illegal immigration over the Southwest Border.[61] In 1978, Congress established a worldwide cap on immigration, rather than country-specific limitations,[62] and also created the Select Committee on Immigration and Refugee Policy (SCIRP).[63] SCRIP's primary goal was to analyze immigration policies, particularly the Immigration Act of 1965, and present recommendations for improvement.[64] The sixteen-member committee, appointed by President Carter, issued their report on March 1, 1981.[65] Its basic conclusion was that controlled immigration must be made a primary national interest.[66] SCRIP's recommendations were summarized and presented by Chairman Theodore Hesburgh:

> We recommend closing the back door to undocumented, illegal migration, opening the front door a little more to accommodate legal migration in the interests of this country, defining our immigration goals clearly and providing a structure to implement them effectively, and setting forth procedures which will lead to fair and efficient adjudication and administration of U.S. immigration laws.[67]

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57. Spotts, *supra* note 19, at 606.

58. PBS, *supra* note 21, *at* http://www.pbs.org/kpbs/theborder/history/timeline/23.html.

59. LoBreglio, *supra* note 48, at 938. The Immigration Act of 1965 for the first time put a cap on immigration from the Western Hemisphere. As a result, Mexicans often had to wait years in order to gain the visas they need to enter the United States. *Id.* This ultimately delayed family reunification, which was the stated goal and purpose behind the Act. *Id.*

60. Spotts, *supra* note 19, at 607.

61. *Id.*

62. *Id.*

63. PHILIP MARTIN &PETER DUIGNAN, HOOVER INSTITUTION, MAKING AND REMAKING AMERICA: IMMIGRATION INTO THE UNITED STATES (2003), http://wwwhoover.stanford.edu/publications/he/25/25.pdf (last visited Mar. 18, 2005).

64. Spotts, *supra* note 19, at 607.

65. Federation for American Immigration Reform, U.S. Immigration History, *at* http://www.fairus.org/Research/Research.cfm?ID=1820&c=2 (July 2004) (last visited Mar.3, 2005) [hereinafter Federation].

66. *Id.*

67. *Id.*

The report specifically called for "civil and criminal sanctions against employers who hired illegal immigrants, enhanced border enforcement, and an amnesty for illegal immigrants who had been here for a lengthy (but unspecified) period of time."[68] By 1981, the number of undocumented aliens in the United States was estimated to be over 2,500,000, with illegal Mexicans making up over half that number.[69] Illegal immigration had now become a major problem in the United States and was gaining the attention of key politicians in Washington.[70]

D. 1980-2000: Immigration Concerns Take Center Stage

In 1986, Congress passed the Immigration Reform and Control Act (IRCA)[71] in response to the increase in illegal immigration and the public concern that America's borders were being overrun.[72] IRCA's main objective was to "curtail illegal immigration by legalizing illegal immigrants already in the country, imposing sanctions on employers who hired undocumented illegal workers, and allocating additional funds to the Immigration and Naturalization Service for border enforcement."[73] Mexicans were by far the largest group to apply for amnesty under the provisions of the IRCA.[74]

The prospect of employment and amnesty in the United States encouraged many Mexicans to enter the United States illegally.[75] The IRCA attempted to address this issue by creating a new series of employer sanctions for those who knowingly hired illegal aliens not authorized to work in the United States.[76] The legislation also created a seven-year special agricultural worker program that expedited the availability of immigrant laborers and provided statutory protections for both U.S. and alien workers.[77] In practice, however, these provisions largely failed, as illegal aliens were often able to produce fake passports and other documents that would allow them to avoid apprehension and governmental sanction.[78] Consequently, the reforms enacted in the early 1980s, under the helm of President Reagan, were unable to adequately address the growing problem of illegal immigration.[79]

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68. Spotts, *supra* note 19, at 607.

69. U.S. ENGLISH FOUNDATION, INC., AMERICAN IMMIGRATION—AN OVERVIEW, *at* http://www.us-english.org/foundation/research/amimmigr/Chapter3.PDF (last visited Mar. 18, 2005).

70. Spotts, *supra* note 19, at 607.

71. Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (1986) [hereinafter IRCA].

72. LoBreglio, *supra* note 48, at 939.

73. *Id.*

74. *Id.*

75. Federation, *supra* note 65.

76. *Id.*

77. IRCA, *supra* note 71.

78. Spotts, *supra* note 19, at 611.

79. *Id.*

President George Bush, Sr., was not any more successful than President Reagan in reducing the flow of illegal immigration.[80] Over two million individuals "had been approved for temporary residency under the amnesty program established by IRCA"[81] and nearly one million were still waiting to be processed.[82] In response to this growing problem, Congress passed the Immigration Act of 1990.[83] The Act established a higher limit on immigration levels and started the diversity program in order to "encourage immigration from countries that had demonstrated low levels of immigration to the United States since the 1965 Act and that were currently underrepresented in the United States population."[84] Amendments to the Immigration Act later prohibited Mexicans from eligibility for the diversity program.[85] The only two provisions of the Act that specifically "related to illegal immigration had to do with the deportation of criminal aliens and increasing the size of the Border Patrol."[86] In the end, President Bush, during his four-year presidency, never gave the issue of illegal immigration the attention it deserved. The President was not involved in the passage of the Immigration Act of 1990 and did not enact any reforms, even as illegal immigration continued to skyrocket.[87]

By the time President Bill Clinton was sworn into office in 1992, public frustration over illegal immigration was at an all time high.[88] Both President Clinton and Congress viewed the North American Free Trade Agreement (NAFTA)[89] as a possible solution to illegal Mexican immigration.[90] The idea was that NAFTA would improve the economic situation in Mexico, and thus encourage would-be Mexican immigrants to stay within their homeland where work would now be available.[91] NAFTA did improve the Mexican economy but it failed to solve the problem of illegal immigration.[92] Most of the

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80. *Id.*

81. *Id.*

82. NANCY RYTINA, U.S. IMMIGRATION AND NATURALIZATION SERVICE, IRCA LEGALIZATION EFFECTS: LAWFUL PERMANENT RESIDENCE AND NATURALIZATION THROUGH 2001 (2002), *at* http://uscis.gov/graphics/shared/aboutus/statistics/IRCA_REPORT/irca0114int.pdf (2002) (last visited Mar. 18, 2005).

83. Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (1990).

84. LoBreglio, *supra* note 48, at 939.

85. *Id.*

86. Spotts, *supra* note 19, at 612.

87. *Id.*

88. *Id.*

89. The North American Free Trade Agreement, *available at* http://www.dfaitmaeci.gc.ca/nafta-alena/agree-en.asp (last visited Mar. 18, 2005). "Implementation of the North American Free Trade Agreement (NAFTA) began on January 1, 1994. This agreement removed most barriers to trade and investment among the United States, Canada, and Mexico." U.S. Department of Agriculture, Foreign Agricultural Service, The North American Free Trade Agreement, *at* http://www.fas.usda.gov/itp/Policy/NAFTA/nafta.html (last visited Mar. 18, 2005).

90. LoBreglio, *supra* note 48, at 940.

91. *Id.*

92. *Id.*

economic improvements were not being realized in the border regions. Immigrants were still enticed to enter the United States in order capitalize on the growing economy to the north.[93] In response, President Clinton hired 600 more Border Patrol agents to secure the Southern Border.[94] Increasing the number of Border Patrol agents became the Clinton administration's primary solution when confronted with the problem of illegal immigration.[95]

In 1994, the Border Patrol began putting up physical barriers and walls in order to make illegal entry into the United States as difficult as possible.[96] Operation "Hold the Line" was established in 1993 in El Paso, Texas, and proved to be an immediate success.[97] Under this plan, agents and technology were concentrated in specific areas, providing a "show of force" to potential illegal immigrants.[98] The number of illegal immigrants attempting to cross the border at or near El Paso was drastically reduced.[99] This encouraged the Border Patrol to undertake a similar full-scale effort in San Diego, California, where more than half of all illegal entries were occurring.[100] The San Diego plan, called "Operation Gatekeeper," was fully implemented in 1994.[101] In the next two years, the number of illegal entries in this region fell by more than 75%.[102] With illegal entries at a more manageable level, the Border Patrol was able to concentrate its resources on other areas, such as establishing anti-smuggling units and creating search and rescue teams.[103]

In 1996, Congress passed the Illegal Immigration Reform and Immigration Responsibility Act (IIRIRA).[104] The provisions of IIRIRA were aimed at creating stronger penalties against illegal immigration and organizing the removal process by limiting the number of appeals.[105] The IIRIRA also

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93. *Id.*

94. Spotts, *supra* note 19, at 613.

95. *Id.*

96. Federation, *supra* note 65.

97. U.S. Customs and Border Protection, *supra* note 29.

98. *Id.*

99. *Id.*

100. *Id.*

101. U.S. Citizenship and Immigration Services, *Operation Gatekeeper: New Resources, Enhanced Results*, *at* http://www.uscis.gov/graphics/publicaffairs/factsheets/opgatefs.htm (July 14, 1998) (last visited Mar. 18, 2005).

> On October 1, 1994, a new initiative called Operation Gatekeeper was launched to restore integrity and safety to the San Diego border, the busiest in the nation. By committing unprecedented resources and implementing innovative strategies, the Immigration and Naturalization Service and other federal agencies have met this ambitious goal. Today, Gatekeeper is the model for operations in other vulnerable border regions.

Id.

102. U.S. Customs and Border Protection, *supra* note 29.

103. *Id.*

104. Illegal Immigration Reform and Immigration Responsibility Act, Pub. L. No. 104-208, 100 Stat. 3009 (1996).

105. Federation, *supra* note 65.

authorized the hiring of five thousand additional Border Patrol agents, increased the severity of punishment for those who smuggled illegal immigrants into the United States, and most importantly, authorized the construction of a triple-layered, fourteen-mile-long, security fence just south of San Diego, California.[106] The IIRIRA was created to deter would-be illegal immigrants from even attempting to enter the United States, rather than tracking down and punishing those who had already evaded detection and were physically within the country.[107]

As of October 1996, there were over five million illegal aliens living within the United States and that number was increasing at an average rate of 275,000 per year.[108] In 1997, the United States Commission on Immigration Reform[109] recommended that "illegal immigration be completely shut down while simultaneously reducing the levels of legal immigration."[110] As the United States prepared to enter the next century, it was obvious that NAFTA, the IIRIRA, and other immigration reforms had little success in slowing the tide of illegal immigration into the United States.[111] The Border Patrol continued to grow in size and was apprehending greater numbers of illegal immigrants each year. Although more apprehensions were taking place, U.S. Immigration and Naturalization Service (INS) statistics also showed that the number of immigrants entering the United States illegally without detection had increased at a rate of about 300,000 per year.[112]

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106. Spotts, *supra* note 19, at 615.

107. *Id.*

108. U.S. GENERAL ACCOUNTING OFFICE, ILLEGAL IMMIGRATION: SOUTHWEST BORDER STRATEGY RESULTS INCONCLUSIVE; MORE EVALUATION NEEDED (GAO/GDD-98-21, Dec. 11, 1997), http://www.fas.org/irp/gao/ggd98021.htm (last visited Mar. 18, 2005) [hereinafter GAO].

109. *See generally* U.S. Commission on Immigration Reform, Mexico – U.S. Binational Migration Study Report, *at* http://www.utexas.edu/lbj/uscir/binational.html (last updated Mar. 14, 1998) (last visited Mar. 18 2005).

> After a meeting of the Migration and Consular Affairs Group of the Mexican-United States Binational Commission in March 1995, the governments of Mexico and the United States decided to undertake a joint study of migration between the two countries. Research teams in each country studied each of five aspects of migration within their country and collaboratively analyzed the findings. National coordinators were designated for each country with the Commission on Immigration Reform coordinating the work of U.S. researchers. The main objective of the Binational Study is to contribute to a better understanding and appreciation of the nature, dimensions, and consequences of migration from Mexico to the United States.

Id.

110. Spotts, *supra* note 19, 616.

111. *Id.* at 617.

112. GAO, *supra* note 108, at 10; *see also* Spotts, *supra* note 19, at 617.

III. THE NEED FOR A SECURITY FENCE

> The superior man, when resting in safety, does not forget that danger may come. When in a state of security he does not forget the possibility of ruin. When all is orderly, he does not forget that disorder may come. Thus his person is not endangered, and his States and all their clans are preserved.[113]

In a perfect world there would be no war, no terrorism, and no need for national borders.[114] In this perfect world, the mass murder of innocent civilians in furtherance of some radical religious or political ideology would be merely a bad dream.[115] Instead, all individuals would live together in peace and harmony. Unfortunately, we do not live in a perfect world.[116] The terrorist acts that occurred on September 11, 2001, sadly illustrated that the dream of a world without borders is still far from being realized.[117]

As a result of the September 11th attacks, the majority of Americans have called for enhanced homeland security measures, including heightened border protection.[118] However, the federal government has decided to employ only the most minimal measures to strengthen the security of America's borders.[119] In fact, if there is one message current border security strategies are sending to would-be terrorists around the world, it is that the golden doors to America are still wide open.[120] Alarmingly, September 11th, in addition to the federal government's historically lax border control policies, illustrates the reality that America remains highly susceptible to another terrorist attack.[121]

A. The Simplicity of Crossing the Border

The Southern Border encompasses nearly 2,000 miles of land adjacent to Mexico, with thousands of potential illegal crossing points.[122] The border

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113. Confucius, Chinese philosopher & reformer (551 B.C. - 479 BC), *at* http://www.quotationspage.com/quotes/Confucius (last visited Mar. 3, 2005).

114. Melissa Blair, *Terrorism, America's Porous Borders, and the Role of the Invasion Clause Post - 9/11/2001*, 87 MARQ. L. REV. 167 (2003).

115. *Id.*

116. *Id.* "On September 11, 2001, terrorists invaded our country in the worst possible way - and the world will never forget this day." *Id.*

117. *Id.*

118. Joe Kovacs, *Americans Urge: Defend the Border!*, WORLDNETDAILY, Jan. 20, 2005, *at* http://www.worldnetdaily.com/news/article.asp?ARTICLE_ID=42460 (last visited Mar. 4, 2005).

119. Blair, *supra* note 114, at 167.

120. Michelle Malkin, *Invasion: How America Welcomes Terrorists*, Address at the Chicago/Oakbrook CMF Conference (Mar. 22, 2003), *in* CARDINAL MINDSZENTY FOUNDATION, MINDSZENTY REPORT, June 2003, *at* http://www.mindszenty.org/report/2003/mr_0603.pdf (last visited Mar. 18, 2005).

121. Blair, *supra* note 114, at 167.

122. TURNER, *supra* note 10, at 15-16.

includes such diverse areas as the residential neighborhoods of San Diego, California, and the barren deserts just outside of Presidio, Texas.[123] The Rio Grande River marks half of the United States-Mexico border, including the entire border between Mexico and Texas.[124] In many areas, the Rio Grande River offers only a very limited barrier to illegal border crossings, as the river is relatively easy to cross either on foot or by vehicle.[125] West of El Paso, the Rio Grande's path turns toward the north and no longer provides a clear mark of the United States-Mexico boundary.[126] "Through most of New Mexico, Arizona, and California, nothing more than two or three strands of barbed wire fencing . . . serve as a barrier to border crossings."[127] Clearly this type of fencing is not an effective obstacle to those determined to enter the United States illegally.[128]

Other more remote areas along the Southern Border have absolutely no fencing or security mechanism of any kind.[129] In these areas, the United States government relies heavily on the remoteness of the region to deter illegal border

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123. *Id.* at 16.

124. *Id.*

125. U.S. Border Report, Migration across the Mexico border: Undocumented aliens and illegal drugs enter Southwest U.S.A., *at* http://www.dslextreme.com/users/surferslim/text1.html (Jan. 1, 2001) (last visited Mar. 18, 2005).

126. TURNER, *supra* note 10, at 16. For a map of the area, see *One River, One Country: McAllen, Texas and Matamoros, Mexico*, THE ECONOMIST NEWSPAPER LIMITED, 1997, *at* http://www.uwec.edu/Geography/Ivogeler/w188/articles/txmx.htm (last visited Mar. 18, 2005).

127. TURNER, *supra* note 10, at 16.

128. *Id.*

129. *Id. See also* Michelle Malkin, Immigration, the War on Terror, and the Rule of Law, Speech delivered at the Hillsdale College Seminar, Rancho Mirage, Cal., (Feb. 18, 2003), *at* http://www.hillsdale.edu/newimprimis/2003/april/default.htm (last visited Mar. 4, 2005).

> A year-and-a half after September 11, we have new laws, new agencies, and lots of new government spending to fight off foreign invaders. But our immigration policies leave the door to our nation open wide to the world's law-breakers and evildoers:
>
> According to the Immigration and Naturalization Service, at least 78,000 illegal aliens from terror-supporting or terror-friendly countries live in the U.S. They are among an estimated seven to eleven million illegal aliens who have crossed our borders illegally, overstayed visas illegally, jumped ship illegally and evaded deportation orders illegally.
>
> More than 300,000 illegal alien fugitives, including 6,000 from the Middle East, remain on the loose despite deportation orders.
>
> Last year, at least 105 foreign nationals suspected of terrorist involvement received U.S. visas because of lapses in a new background check system.
>
> There is still no systematic tracking of criminal alien felons across the country. Sanctuary for illegal aliens remains the policy in almost every major metropolis.
>
> And "catch and release" remains standard operating procedure for untold thousands of illegal aliens who pass through the fingers of federal immigration authorities every day.

Id.

crossings.[130] Vehicle barriers have been constructed along some sections of the border, but these have not stopped individual illegal immigrants from crossing the border by foot.[131] Additionally, these barriers are only present in some areas and nothing has prevented illegal immigrants from simply driving around them.[132] The reality of the situation is that an illegal immigrant can literally "drive a truck through the porous U.S. border" at any time.[133]

Every day, over one thousand illegal immigrants cross the 2,000-mile Southern Border between the United States and Mexico.[134] The INS estimated that in January of 2000 there were over seven million illegal aliens living in the United States, a number that is growing by half a million each and every year.[135] Thus, the illegal-alien population in 2004 is estimated to be well over

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130. TURNER, *supra* note 10, at 17; *see also* U.S. GEN. ACCOUNTING. OFFICE, BORDER SECURITY: AGENCIES NEED TO BETTER COORDINATE THEIR STRATEGIES AND OPERATIONS ON FEDERAL LANDS (GAO-04-590, July 2004), http://www.gao.gov/atext/d04590.txt (last visited Mar 18, 2005).

131. TURNER, *supra* note 10, at 17-18; *see also* NAT'L PARK SERV., U.S. DEP'T OF THE INTERIOR, PARK SERVICE APPROVES ENVIRONMENTAL ASSESSMENT FOR VEHICLE BARRIER AT ORGAN PIPE CACTUS AND CORONADO NATIONAL MONUMENTS (Aug. 7, 2003), http://www.nps.gov/orpi/vbeis.htm (last visited Mar. 18, 2005).

132. *Id.* at 18. One striking example of the ease with which an illegal immigrant can drive a vehicle across the Southern border occurred outside of El Paso:

> Border Patrol staff, while flying in broad daylight from El Paso to Presidio in an Immigration and Customs Enforcement (ICE) Blackhawk helicopter, observed three large panel trucks, two buses and four 18-wheel tractor trailers parked in a remote box canyon not far from the border. Upon landing, ICE Air and Marine Operations (AMO) officers accompanying the staff were unable to find any people present or other indications of the purpose of these vehicles in such a remote location that close to the border. The windows on the buses were blacked out and the trucks were parked close to one another in an apparent attempt to deter entry. The nearest farm was some miles away. Upon our return from touring the Presidio port-of-entry a few hours later, the four tractor trailers were spotted again, but this time, on the Mexican side of the border, having illegally driven back across the Rio Grande from the United States into Mexico.

Id.

133. *Id.* at 18; NAT'L COMM'N ON TERRORIST ATTACKS UPON THE U. S., WHAT TO DO? A GLOBAL STRATEGY (Aug. 21, 2004), http://www.9-11commission.gov/report/911Report_Ch12.htm (last visited Mar. 4, 2005).

> More than 500 million people annually cross U.S. borders at legal entry points, about 330 million of them noncitizens. Another 500,000 or more enter illegally without inspection across America's thousands of miles of land borders or remain in the country past the expiration of their permitted stay. The challenge for national security in an age of terrorism is to prevent the very few people who may pose overwhelming risks from entering or remaining in the United States undetected.

Id.

134. *See generally* GAO, *supra* note 108.

135. OFFICE OF POLICY AND PLANNING, U.S. IMMIGRATION AND NATURALIZATION SERVICE, ESTIMATES OF THE UNAUTHORIZED IMMIGRANT POPULATION RESIDING IN THE UNITED STATES: 1990 TO 2000, 1 (Jan. 2003), http://uscis.gov/graphics/shared/aboutus/statistics/Ill_Report_1211.pdf (Jan. 2003) (last visited Mar. 4, 2005).

eight million.[136] Included in this estimate are approximately 78,000 illegal aliens from countries that are of special concern in the war on terror.[137]

Crossing the Southern Border from Mexico is not difficult.[138] It is the primary method most illegal immigrants use in order to enter the United States undetected.[139] For the first seven months of 2004, approximately 660,000 illegal immigrants were arrested along the Southern Border.[140] The Border Patrol estimated that by the end of 2004 the total number of apprehensions in this region would total over one million.[141] These numbers only represent those illegal immigrants who are actually detected and apprehended by the Border Patrol.[142] The number of those who avoid detection and are able to successfully enter the country remains unknown, however, estimates range from 150,000 to 600,000 persons per year.[143] Such a porous border can easily give access to terrorists intending to attack America from within.[144]

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136. *Id.*

137. *See* Mark Krikorian, *Safety Through Immigration Control*, PROVIDENCE J., Apr. 24, 2004, *at* http://www.cis.org/articles/2004/mskoped042404.html (last visited Mar. 4, 2005). Not only are many of the illegal immigrants from countries of terrorist concern but many of the attackers, including those on September 11th, were illegal immigrants that were not prevented from entering the United States.

> Our enemies have repeatedly exercised this option of inserting terrorists by exploiting weaknesses in our immigration system. A Center for Immigration Studies analysis found that nearly every element of the immigration system has been penetrated by the enemy. Of the 48 al-Qaida operatives who have committed terrorist acts here since 1993 (including the 9/11 hijackers), a third were here on various temporary visas, another third were legal residents or naturalized citizens, a fourth were illegal aliens, and the rest had pending asylum applications.

Id.

138. TURNER, *supra* note 10, at 11.

139. Department of Homeland Security, *Deportable Aliens Located by Program, Border Patrol Sector and Investigations District, Fiscal Years 1996-2002*, *in* 2002 YEARBOOK OF IMMIGRATION STATISTICS 171, Table 40 (2002) [hereinafter DHS].

140. *Id.*

141. *Id.*

> Government apprehension data shows that Southern Border apprehensions reached 1,615,844 in 1986 and then decreased for three consecutive years after the passage of the Immigration Reform and Control Act, an amnesty program for certain illegal immigrants. From a low of 852,506 apprehensions in 1989, the numbers steadily increased every year until 2000 when it set an all time high at 1,643,679. Border apprehensions then declined 25% to 1,235,717 in 2001, another 25% in 2002 to 929,809 and another 2% to 905,065 in 2003.

Id.

142. *Id.*

143. SUB-COMM. ON CRIMINAL JUSTICE, DRUG POLICY AND HUMAN RES., U. S. HOUSE, COMM. ON GOV'T REFORM, FEDERAL LAW ENFORCEMENT AT THE BORDERS AND PORTS OF ENTRY: CHALLENGES AND SOLUTIONS, 30 (Report 107-794, July 2002); NAT'L COMM. ON TERRORIST ATTACKS UPON THE U.S., THE 9/11 COMMISSION REPORT 383; CENTER FOR STRATEGIC AND INTERNATIONAL STUDIES (CSIS), MANAGING MEXICAN MIGRATION TO THE UNITED STATES: RECOMMENDATIONS FOR POLICYMAKERS, 1-3 (Apr. 2004).

144. TURNER, *supra* note 10, at 11.

An immense amount of money has been spent on preventing terrorists from entering the United States through official ports of entry such as airports and harbors, but little has been done to prevent illegal immigration from Mexico.[145] Terrorist organizations have already recognized the openness of America's Southern Border.[146] In 2002, al Qaeda, through a posting on their website, noted: "In 1996, 254 million persons, 75 million automobiles, and 3.5 million trucks entered America from Mexico. At the 38 official border crossings, only 5 percent of this huge total is inspected . . . . These are figures that really call for contemplation."[147]

Al Qaeda has long been interested in America's Southern Border.[148] On August 18, 2004, the Federal Bureau of Investigations issued an alert, warning that al Qaeda leaders might attempt to enter the United States by crossing the Southern Border from Mexico.[149] This alert came just months after Border Patrol agents apprehended two terrorist suspects that entered the United States by crossing the Southern Border.[150] Equally troubling, just prior to September

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> Prior to September 11, 2001, it was extremely easy to enter the United States illegally, either by sneaking across the border or by securing permission to enter temporarily and then never leaving. Incredibly this has not changed in any meaningful way. With very few exceptions, any individual who is determined to enter the United States illegally will eventually be successful.
>
> We cannot pretend that our homeland is secure if our borders are not. Every year millions of illegal aliens cross our borders, and fewer than half of them are apprehended. If it is so easy for impoverished and poorly-educated people to illegally cross our borders, consider how much easier it is for well-financed and highly-trained terrorists to do the same.

Id. at 12 (quoting T. J. Bonner, President of the National Border Patrol Council, *How Secure Are America's Borders?*, (Aug. 23, 2004)).

145. Pia M. Orrenius, *Illegal Immigration and Enforcement Along the Southwest Border*, FED. RESERVE BANK OF DALLAS, June 2001, http://www.dallasfed.org/research/border/tbe_orrenius.pdf (last visited Mar. 20, 2005).

146. TURNER, *supra* note 10, at 12.

147. *Id.*

148. *Id.*

149. *Id.* at 12-13; *see also* Lennox Samuels, *Hitting Below the Border: Mexican Tourist Spots, Oil Platforms Seen as Potential Targets*, DALLAS MORNING NEWS, August 7, 2004, at 1A.

150. News Release, Department of Homeland Security, Pakistani Man Charged with Criminal Immigration Violations (Aug. 10, 2004).

> Farida Goolam Mahomed Ahmed, a Pakistani citizen, was arrested on July 19, 2004, by Border Patrol agents after they noted her passport was missing four pages and after they found a pair of muddy pants in her baggage. The investigation also showed that she had flown into Mexico City on a British Airways flight from London on July 14, 2004, and within a week had apparently walked across the Rio Grande and entered the United States illegally. On August 5, 2004, federal officials charged Kamran Ahktar, a Pakistani citizen, with immigration violations after he was detained in Charlotte, North Carolina on July 20, 2004, while videotaping the downtown area of Charlotte. The affidavit supporting the complaint detaining him noted that immigration records show that Shaikh entered the United States by illegally crossing the border from Mexico in 1991.

Id.

11th, two Syrian nationals were caught after attempting to cross the border near Eagle Pass, Texas.[151] Seized from these would-be immigrants were cameras with pictures of the nuclear power plant in the Mexican port of Vera Cruz.[152] Government officials noted that an attack at the Vera Cruz nuclear plant could have threatened thousands of lives within the United States.[153] Adding to this problem is the possibility that corrupt Mexican officials might assist terrorists in their mission to enter the United States.[154] In the last two years, over fifty Mexican officials have been arrested for corruption.[155]

B. Illegal Immigration and Terrorism

Data from the Department of Homeland Security does not provide information on people who successfully cross the border and enter the United States undetected.[156] However, the Department generally accepts the notion that data collected from those apprehended is most likely similar to the data of those who escape detection.[157] In 2002, nationals of over 180 countries were apprehended.[158] In 2003, 95% of the illegal immigrants apprehended were Mexicans.[159] The remaining 5%, or 49,500 individuals, which the Department of Homeland Security terms "OTMs" (Other Than Mexicans), were from countries around the world.[160]

Border Patrol data has revealed a frightening trend taking place on the Southern Border.[161] Over the past year, there has been a significant increase in the number of OTMs entering the United States illegally from Mexico.[162] Data shows that for the first seven months of 2004, 40,739 OTMs were apprehended; a 36% increase in those captured over the same seven-month period in 2003.[163] In one Border Patrol sector alone, agents caught 23,178

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151. TURNER, *supra* note 10, at 13.

152. *Id.*

153. *Id.*

154. *Id.*

155. Ricardo Sandoval, *U.S., Mexico Say Border Breaches May be Tied to Terror Activity*, DALLAS MORNING NEWS, Aug. 17, 2004. "In November 2003, it was reported that a Mexican diplomat who served in Lebanon was arrested for her part in providing Mexican travel documents to unnamed Middle Easterners, a trend that is growing in occurrence." *Id.*

156. TURNER, *supra* note 10, at 14.

157. *Id.*

158. DHS, *supra* note 139 at 174, Table 39.

159. TURNER, *supra* note 10, at 14.

160. *Id.* "In the first seven months of 2004, 95% (752,749) of the 793,488 apprehensions were Mexican nationals. Honduras, El Salvador and Guatemala were the top three countries in the remaining 5% or 40,739 OTMs." *Id.* at n.23.

161. *Id.* at 14.

162. Leo W. Banks, *Other Than Mexicans*, TUSCON WEEKLY, Sept. 2, 2004, *at* http://www.tucsonweekly.com/gbase/Currents/Content?oid=oid%3A60078 (last visited Mar. 4, 2005).

163. TURNER, *supra* note 10, at 14.

OTMs through August 2004, compared to just 14,919 OTMs in all of 2003.[164] Of the 23,178 OTMs caught, 16,616 were released on bond into the United States without further detention or proceedings.[165]

With the increasing numbers of OTMs, border officials have also recognized a startling increase in the number of foreign nationals from countries of national security concern.[166] These countries are often referred to as "countries of interest" or "COIs".[167] Border Patrol agents recorded around 3,500 COI apprehensions on the Southern Border in 2003.[168] Evidence collected from Southern Border crossing sites indicates that foreign nationals from countries of national security interest are crossing the Southern Border at a growing rate.[169]

Certainly, most illegal immigrants have no connection with international terrorism.[170] However, evidence shows that there is some correlation between the terrorist acts committed in the United States and the immigration status of the perpetrators.[171] The INS has disclosed some information indicating that at

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164. *Id.*

> The Brownsville Sector has been a growing target for illegal immigration by both Mexican and OTM nationals. Brownsville has also been the site of much of the crime that often accompanies illegal immigration. In the first half of 2004, Border Patrol agents in Brownsville apprehended over 20,000 criminal immigrants including over 80 homicide suspects, 30 kidnapping suspects, 150 sexual assault suspects, 200 robbery suspects, 1,200 suspects for assaults of other types and 2,600 suspects implicated in dangerous narcotics related charges.

Id. See also Bill Hess, *Illegal Immigration Numbers Don't Show Drop in Country*, SIERRA VISTA HERALD Dec. 2, 2003, *at* http://www.svherald.com/articles/2003/12/02/news/news4.txt (last visited Mar. 4, 2005).

165. TURNER, *supra* note 10, at 14.

166. *Id.* at 15.

167. *Id.*

168. *Id.* A list of COI apprehensions for the first seven months of 2004 for the Southern Border includes nationals from Afghanistan (16), Egypt (18), Kazakhstan (2), Kuwait (2), Indonesia (19), Iran (13), Iraq (10), Lebanon (13), Pakistan (109), Saudi Arabia (7), Somalia (5), Sudan (6), Syria (10), Tajikistan (3), Turkey (26), Uzbekistan (13) and Yemen (3). *Id.*

169. *Id.* The tribal police on the Tohono O'odham Nation reported finding an Iranian passport on their reservation." *Id.* The national security interests surrounding Iran could not be more important:

> Iran remains the ideological center of the America-hatred pervading the Islamic Middle East. That theocracy began warring with America when its rulers took 52 Americans hostage in 1979. Highlights of Iran's terrorism on Americans include the bombing and murder of 241 Marines in Beirut in 1983 and the killing of 19 US servicemen bombed at Khobar Towers in Saudi Arabia in 1996.
>
> More recently, intelligence sources believe Iran harbors Al Qaeda operatives who orchestrated the bombing of a Western residential compound in Saudi Arabia last month [June 2003] that killed nine Americans. Iran . . . [continues to] sponsor[] such terrorist groups as Hezbollah, Hamas and Islamic Jihad in Lebanon, Israel, Gaza and the West Bank . . . . Clearly, Iran is the root of Islamic terrorism.

Joseph Kellard, *Iran is the Root of Islamic Terrorism*, CAPITALISM MAG., July 5, 2003, *at* http://www.capmag.com/article.asp?ID=2888 (last visited Mar. 4, 2005).

170. TURNER, *supra* note 10.

171. Siobhan Gorman, *A Nation Without Borders*, 33 THE NAT'L J. 48 (2001); *see also*

least three of the September 11th terrorists were illegal immigrants.[172] Of the forty-eight foreign born terrorists who committed attacks on the United States since 1993, twenty-two of them violated immigration laws.[173] In fact, an illegal immigrant has participated in every major terrorist plot perpetrated against the United States by foreign terrorists since 1993.[174] Again, while most illegal immigrants are not a threat to America's national security, the "former INS's 'catch and release' policy is analogous to playing Russian roulette with the lives of thousands of U.S. citizens."[175] September 11th should be a reminder that terrorists who seek to destroy America or attack innocent civilians may already be present and operating within the United States.[176]

C. The Government is Not Doing Enough

Seventy-seven percent of Americans believe that the government is not doing all it can "to control the border and to screen people allowed into the country."[177] Eighty-five percent of Americans think that "enforcement of

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Chadwick M. Graham, Note, *Defeating an Invisible Enemy: The Western Superpowers' Efforts to Combat Terrorism by Fighting Illegal Immigration*, 14 TRANSNAT'L L. & CONTEMP. PROBS. 281 (2004).

172. Blair, *supra* note 114, at 174.

173. Graham, *supra* note 171, at 286.

174. *Id.*

> Even though the September 11 attacks raised global awareness concerning the connection between terrorism and illegal immigration, the link existed long before 2001.
>
> Terrorist Mir Aimal Kansi shot and killed two CIA agents in 1993. Kansi legally entered the United States with a valid business visa.
>
> Six of the seven foreign-born terrorists involved in the first Trade Center bombing had violated immigration law at some point prior to taking part in the attack. The Abouhalima brothers, Ismoil, and Salameh had all overstayed visas at some point, and Ajaj and Yousef both had no legal right to be in the country.
>
> Eleven foreign-born terrorists were arrested while formulating a plot to destroy several New York landmarks and murder prominent political figures .... Three of the terrorists had violated U.S. immigration laws after receiving valid tourist visas. Seven of the other eight perpetrators became legal residents by marrying women who were U.S. citizens. ...
>
> In 1997, a Palestinian immigrant, Ghazi Ibrahim Abu Maizar, came within hours of detonating a bomb in a Brooklyn, New York, subway station .... On three separate occasions, Maizar attempted to enter the United States illegally through Canada.
>
> Three terrorists from Algeria plotted the "millennium" attack in December of 1999. All three were living in the United States illegally at the time.

Id. at 287-88.

175. *Id.* at 286-287; *see also* Wes Vernon, *How P.C. State Department and INS Abet Terrorists*, NEWSMAX, Sept. 25, 2002, *at* www.newsmax.com/archives/articles/2002/9/24/205216.shtml (last visited Mar. 4, 2005).

176. Graham, *supra* note 171, at 289.

177. *Poll: Many Believe Lax Border Controls Contributed to Attacks*, NAT'L J.

immigration laws and the border has been too lax and this made it easier for the [9-11] terrorists to enter the country."[178] Furthermore, over 79% of Americans want the government to militarize the border.[179]

Regardless of the criticism of America's border security mechanisms, it is important to note that the government has implemented a number of improvements since September 11th.[180] Funds have been appropriated for hiring and training Border Patrol agents. In fact, over 500 Border Patrol agents were hired in 2002 alone.[181] Additional appropriations were allotted to improve the technology used to detect illegal border crossings.[182] A "comprehensive preparedness program" was also enacted to help train and equip border security agents in countering terrorist attempts to bring WMDs into the United States.[183] Also worth mentioning is the growing cooperation between North American countries. Meetings have been held to determine the feasibility of developing an intergovernmental network where data could be shared between all countries in North America in order to counter illegal immigration.[184]

Nevertheless, a number of critical problems continue to persist.[185] Border Patrol agents are transferring to higher paying, less dangerous, jobs elsewhere.[186] As a result, some border sectors are only being patrolled by agents during daylight hours, while most illegal immigration continues to occur at night.[187] Even with evidence showing the rise in illegal immigration, the Bush Administration is attempting to cut funding for border security by $705 million per year.[188] The technological equipment acquired by Border Patrol agencies after September 11th is largely inadequate and outdated.[189] According

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CONG.DAILY, Sept. 28, 2001 (on file with author).

178. *Id.*

179. Bill O'Reilly, A *Politician Who Supports Putting Troops on our Borders*, FOXNEWS, *at* http://www.foxnews.com/sotry/0,2933,69555,00.html. (Nov. 8, 2002) (last visited March 26, 2005).

180. TURNER, *supra* note 10, at 18-21.

181. Senator Robert C. Byrd, *Protecting the Nation From Terrorist Attack*, FIN. TIMES INFO., Jan. 16, 2003.

182. *See* Enhanced Border Security and Visa Entry Reform Act of 2002, Pub. L. No. 107-173, 102, 116 Stat. 543, 102 (2002); Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA PATRIOT Act), Pub. L. No. 107-56, 402, 115 Stat. 272, 402 (2001).

183. Blair, *supra* note 114, at 176; *see also* 50 U.S.C.S. § 2353 (Law. Co-op. 2002).

184. Blair, *supra* note 114, at 176; *see also* 8 U.S.C.S. § 1751 (Law. Co-op. 2002).

185. *Border Sieve; Terrorists Can Join Masses Sneaking Into U.S.*, SAN DIEGO UNION-TRIB., Aug. 12, 2002, at B-6.

186. *Id.*

187. J. Zane Walley, *Arizona Border: Unwatched and Unguarded*, WORLDNETDAILY, April 8, 2003, *at* http://worldnetdaily.com/news/article.asp?ARTICLE_ID=31932 (last visited Mar. 26, 2005).

188. OFFICE OF MANAGEMENT AND BUDGET, BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 2003: PROTECTING THE HOMELAND (2003), *available at* http://www.whitehouse.gov/omb/budget/fy2003/budget.html (last visited Mar. 20, 2005).

189. Matthew Maddox, *Military Needed to Enforce U.S. Border*, BATTALION, July 1, 2002. One can only hope that none of the aliens entering through our border were terrorists.

to homeland security experts, illegal immigration levels are still at an all time high.[190] Clearly the federal government has not done enough to protect the nation's borders, and what has been done is largely unsuccessful.[191]

Hundreds of thousands of illegal immigrants, and tons of contraband, successfully cross America's Southern Border every year.[192] There is nothing to stop equally determined terrorists from taking advantage of the same loopholes in order to enter the United States, bringing with them weapons and the intent to use them.[193] The relative ease by which potential terrorists can cross the United States-Mexico border reveals glaring weaknesses in the border security system.[194] To provide the necessary protection there must be a genuine transformation of the Southern Border. The deployment of new technology to monitor the entire border twenty-four hours a day, the doubling of Border

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> The border must remain militarized and closed. It isn't just a crossing point for Mexicans on their way to work. It's the most popular route for drug dealers and smugglers. An estimated 400 tons of cocaine, 150 tons of methamphetamines and 15 tons of heroin entered the US across the border last year alone. 2.7 million unauthorized Mexicans have established residence in the United States. The Mexican-American border is the busiest American frontier. The wage differential between the two countries ($5/day - $60/day) is the greatest between any two bordering countries in the world. In a few decades the Mexican-American population will become the largest single minority in the United States.

John Barry, *U.S.-Mexican Border: Can Good Fences Make Bad Neighbors?*, SPEAKOUT, June 15, 2000, *at* http://speakout.com/activism/issue_briefs/1370b-1.html (last visited Mar. 6, 2005).

190. The White House, *Reform the Immigration System – White House Budget Statement*, *at* http://www.isn.org/news/20010302070338.html (last visited Mar. 20, 2005).

191. Giorgino, *supra* note 16.

> The . . . old rules may have seemed proper before 9/11. They make absolutely no sense in a frightening new world where chemical, biological, or even tactical nuclear weapons can be carried into our communities in a backpack. Anyone who thinks what happened at the World Trade Center can't happen again and can't happen here is living in a dream world.

Id.

192. OFFICE OF NAT'L DRUG CONTROL POLICY, SHIELDING U.S. BORDERS FROM THE DRUG THREAT (1999), *at* www.ncjrs.org/ondcppubs/publications/policy/99ndcs/iv-f.html (last visited Mar. 6, 2005).

> In 1998, 278 million people, 86 million cars, and four million trucks and rail cars entered the United States from Mexico. More than half of the cocaine on our streets and large quantities of heroin, marijuana, and methamphetamine enter the United States across the Southwest border. Illegal drugs enter by all modes of conveyance—car, truck, train, and pedestrian border-crossers. They cross the open desert in armed pack trains as well as on the backs of human "mules." They are tossed over border fences and then whisked away on foot or by vehicle. Planes and boats find gaps in U.S./Mexican coverage and position drugs close to the border for eventual transfer to the United States.

Id.

193. *Id.*

194. Interview with John Annerino, Photojournalist, *in Photographer Recounts Crossing U.S. Border With Mexican Illegal Immigrants*, NATIONAL GEOGRAPHIC NEWS, Jan. 23, 2003, *at* http://news.nationalgeographic.com/news/2003/01/0123_030123_border.html (last visited Mar. 20, 2005). "The busiest gateway for illegal immigrants crossing the U.S.-Mexico border for the past five years—a 261-mile-long (420 kilometer) stretch of Sonoran Desert in southern Arizona—is now considered the deadliest point of entry as well." *Id.*

Patrol agents and inspectors, and increasing the detention space as well as the judicial and prosecutorial services needed to support these law enforcement efforts, is a start, but it is not nearly enough.[195] The security of the country, in the face of terrorists, who have both the ability and the intent to infiltrate and attack the United States, requires much more. In response to these threats, the United States must take a new direction. It must build a fully functional security fence to run the entire length of the Southern Border.

IV. LEGAL JUSTIFICATIONS FOR FENCING OUR SOUTHERN BORDER

"Crave death . . . . Make sure that nobody is following you . . . . Bring knives, your will, IDs, your passport . . . . Pray: 'Oh God, you who open all doors, please open all doors for me, open all venues for me, open all avenues for me.'" These instructions were found in September 11th terrorist-hijacker Mohammed Atta's luggage.[196] Other terrorists undoubtedly are ready and willing to follow these directions. As long as this terrorist threat remains, the federal government must aggressively protect our borders to ensure the safety of the citizens of the United States of America. The idea of building a security fence to prevent threats to national security is not new, nor has discussion of such fences been limited to the border between the United States and Mexico.[197]

A. Security Fences Around the World

Historically, there have been innumerable instances where nations have attempted to protect their lands and citizens by building security fences or walls. From the Great Wall of China to the infamous Berlin Wall, barriers have long been put up in order to protect valuable national interests.[198] Today there are security fences all around the world.[199] Nations have put them up to disrupt the movement of terrorists, smugglers, and illegal immigrants.[200]

India has constructed a 1,800-mile security fence on its border with Pakistan, with most of the fence extending into the disputed territory of Kashmir.[201] The fence's primary objective is to stop terrorists from crossing into India from Pakistan and to prevent missile attacks from striking Indian

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195. TURNER, *supra* note 10, at 122-128.

196. *Id.* MICHELLE MALKIN, INVASION 3 (2002) (citing Bob Woodward, *In Hijacker's Bags, a Call to Planning, Prayer, and Death*, WASH. POST, Sept. 28, 2001, at A1).

197. Posting of James Joyner to Outside the Beltway *at* http://www.outsidethebeltway.com/archives/9170 (Feb. 7, 2005) (last visited Mar. 6, 2005) (quoting Abigail Cutler, *Security Fences*, ATLANTIC MONTHLY, Mar. 2005) [hereinafter Joyner].

198. Barry, *supra* note 188.

199. *Id.*

200. Jonathan L. Snow, *The Foundation for Defense of Democracies, Security Fences Around the World*, *at* http://www.defenddemocracy.org/publications/publications_show.htm?doc_id=211945 (Feb. 23, 2004) (last visited Mar. 18, 2005).

201. *Id.* at 1.

targets.[202] The fence was also constructed in order to reduce the flow of arms and ammunition to and from Pakistan.[203] Made primarily of barbed wire, the fence swallows up acres of fertile farmland, all in the furtherance of national security.[204] India has also constructed a security fence on its border with Bangladesh in order to prevent the infiltration of armed rebels and attacks on its citizens.[205] The fence will ultimately extend over 2,000 miles and will cost the Indian government over one billion dollars.[206]

Saudi Arabia built a security barrier between itself and Yemen in order to "stop the flow of terrorists and smugglers over this porous border region."[207] When the fence is completed it will be over ten feet high and extend the full length of the Saudi-Yemen border.[208] The Saudis have justified the security fence by claiming that it "is necessary to ensure the safety of Saudi nationals."[209] On February 18, 2004, the Saudis halted construction of the barrier.[210] When construction starts up again in 2005, it will be done in accordance with a Saudi-Yemeni border treaty and in cooperation with the Yemeni government.[211]

In 1999, Uzbekistan constructed a security fence made primarily of barbed wire on their border with Kyrgyzstan[212] "The fence was constructed after Islamic terrorists from Kyrgyzstan were blamed for bomb attacks in the Uzbek capital of Tashkent."[213] The fence led to the separation of family members and also caused many workers within the border region to suffer severe economic hardship, especially those who worked in agricultural production.[214]

The British government began constructing a series of separation fences known as the 'Peace Line' in Northern Ireland in the 1970s[215] These barriers were constructed of brick, iron, and steel and were "first erected in 1970 to curb the escalating violence between Catholic and Protestant neighborhoods" in Belfast, Northern Ireland.[216] The fences are over twelve meters in height,

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202. *Id.*

203. Joyner, *supra* note 197.

204. Somini Sengupta, *With Wrath and Wire, India Builds a Great Wall*, N.Y. TIMES, Jan. 2, 2002, at A4.

205. Snow, *supra* note 200; *see also* Agence France Press, *India Finishes Fence along 'Sensitive' Third of Bangladesh Border*, Nov. 11, 2003, *at* http://quickstart.clari.net/qs_se/webnews/wed/ct/Qindia-bangladesh.R3MO_DNC.html (last visited Mar. 6, 2005).

206. Joyner, *supra* note 197.

207. Snow, *supra* note 200; *see also* John Bradley, *Saudi Arabia Enrages Yemen with Fence*, INDEPENDENT (UK), Feb. 11, 2004.

208. Joyner, *supra* note 197.

209. Snow, *supra* note 200.

210. *Id.* Nick Megoran, *Bad Neighbors, Bad Fences*, ASIA TIMES, March 15, 2000.

211. Joyner, *supra* note 197.

212. Snow, *supra* note 200.

213. *Id.*

214. *Id.*

215. *Id. See also* Joyner, *supra* note 197.

216. Joyner, *supra* note 197.

"average 500 meters in length, and have multiplied over the years, from 18 in the early 1990s to 40 today."[217] The fences have been highly successful in preventing terrorist attacks.[218] "The gates of the fence remain closed at night, allowing two policemen to do the security job that used to take dozens."[219]

In 2004, Thailand announced plans to build a concrete fence along parts of its 650-kilometer border with Malaysia in order to keep terrorists and smugglers from sneaking across the southern border.[220] Still in the early planning stages, it is unclear what the final length and makeup of the fence will be.[221] However, officials have recently declared the intention of having military commands along the border fence in order to close down suspected escape routes used by secessionists in Thailand's largely Muslim southern regions.[222]

In 1991, the United Nations Security Council established a demilitarized zone (DMZ) to separate the countries of Iraq and Kuwait.[223] "The DMZ extends six miles into Iraq, three miles into Kuwait, and across the full length of the 120-mile border from Saudi Arabia to the Persian Gulf."[224] The barrier consists primarily of an electric fence, but is also supported by a "15-foot-wide and 15-foot-deep trench, complete with a 10-foot-high supporting dirt brace, and is guarded by hundreds of soldiers, several patrol boats, and helicopters."[225] In addition to the DMZ, Kuwait decided in January of 2004 to construct a new "217-kilometer iron separation barrier as well."[226]

The DMZ between North and South Korea was constructed in 1953 and is "the most heavily fortified border in the world, consisting of sensors, watchtowers, razor wire, landmines, automatic artillery, [and] tank traps."[227] This DMZ stretches approximately 250 kilometers in length, averages four kilometers in width and is patrolled by over two million troops.[228]

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217. Snow, *supra* note 200; *see also* Sharon Sadeh, *Belfast Separation Fences Divide, but Slow Violence*, HA'ARETZ, Sept. 4, 2003, *at* http://www.16beavergroup.org/mtarchive/archives/000453.php (last visited Mar. 6, 2005).

218. Snow, *supra* note 200.

219. *Id.*

220. *Id. See also Fencing Out Troublemakers*, THE STRAITS TIMES (Singapore), Feb.19, 2004, *at* http://www.straitstimes.asia1.com.sg/home/1,8676,,00.html? (last visited Feb. 21, 2005).

221. Snow, *supra* note 200.

222. Austin Ramzy, *Bad Neighbors, Better Fences*, TIME MAGAZINE ASIA, Mar. 8, 2004, *available at* http://www.tiime.com/time/asia/magazine/article/0,13673,501040315598570,00.html (last visited Mar. 26, 2005).

223. Snow, *supra* note 200; *see also Kuwait Installs Iron Barrier on its Borders with Iraq*, ARABICNEWS, Jan. 14, 2004, *at* http://www.arabicnews.com/ansub/Daily/Day/040114/2004011402.html (last visited Mar. 6, 2005).

224. Snow, *supra* note 200; *see also* Darrin Mortenson, *120-Mile Barrier Keeps Iraq, Kuwait at Arm's Length*, N.COUNTY TIMES, Mar. 5, 2003, *at* http://www.nctimes.com/articles/2003/03/05/export5020.txt (last visited Mar. 6, 2005).

225. Snow, *supra* note 200.

226. *Id.*

227. *Id.*

228. Joe Havely, *Korea's DMZ: 'Scariest place on Earth'*, *at* http://www.cnn.com/2003/

In addition to the above mentioned security fences, perhaps the most recognized and controversial fence, was built in 2003 by Israel in the disputed West Bank territory.[229] This security fence elicited protest from the international community and was debated at an advisory hearing in the International Court of Justice.[230]

Although security fences continue to persist all over the world, they are not immune from criticism.[231] In America, security fences have been opposed due to supposed human rights abuses,[232] destruction of environmental habitats and the prevention of animal migration,[233] racial and ethnic discrimination,[234]

WORLD/asiapcf/east/04/22/koreas.dmz/index.html (Aug. 28, 2003) (last visited Mar. 18, 2005). This has been called the "the scariest place on earth" by President Bill Clinton. *Id.*

229. Sean D. Murphy ed., *Contemporary Practice of the United States Relating to International Law: Settlement of Disputes: ICJ Advisory Opinion on Israeli Security Fence*, 98 AM. J. INT'L L. 361 (2004). "Though the International Court of Justice has ruled that the fence violates international law, it remains highly popular among Israelis—attacks have declined by as much as 90 percent in certain areas since construction began, two years ago." Joyner *supra* note 197.

230. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, 2004 I.C.J. 131 (July 9, 2004) [hereinafter Advisory Opinion].

> Advisory Opinion: The Court is of the opinion that the construction of the wall and its associated regime impede the liberty of movement of the inhabitants of the Occupied Palestinian Territory . . . as guaranteed under Article 12, paragraph 1, of the International Covenant on Civil and Political Rights. They also impede the exercise by the persons concerned of the right to work, to health, to education and to an adequate standard of living as proclaimed in the International Covenant on Economic, Social and Cultural Rights and in the United Nations Convention on the Rights of the Child.

Id.

231. *Id.*

232. Steve Helfand, *Desensitization to Border Violence & The Bivens Remedy to Effectuate Systemic Change*, 12 LA RAZA L.J. 87 (2000).

> The greater the shock value of the exhibited violence, the more likely the desensitization process will be overcome by society in general. The comparison of rates of abuse between the New York City community policing program and violence directed at illegal entrants by Border Patrol agents suggests that the rate of abuse along the border has not reached the numeric threshold to overcome the desensitization process.

Id. See also Bill Ong Hing, *The Dark Side of Operation Gatekeeper*, 7 U.C. DAVIS J. INT'L L.& POL'Y 121 (2001).

233. SCOTTY JOHNSON, BORDER LOCK-UP WILL ONLY HURT WILDLIFE (OR "DON'T FENCE 'EM OUT"), DEFENDERS OF WILDLIFE 1 (2003).

> The newest attempt by the Bush administration to deal with immigration problems along the border . . . reveals an unsurprising disregard for the environment. Even worse, it probably won't work. Current border policy has done little to stem the tide of undocumented migrants or drug smuggling. New plans by the Immigration and Naturalization Service (INS) are simple extensions of this failed policy with one difference: they will be devastating to Arizona's native wildlife and habitats.

Id. See also Tseming Yang, *Of Borders, Fences, and Global Environmentalism*, 4 CHI. J. INT'L L. 237 (2003).

234. Steven W. Bender, *Latcritical Perspectives: Individual Liberties, State Security, and the War on Terrorism: Sight, Sound, and Stereotype: The War on Terrorism and Its*

and impediments to trans-border Indian reservation movement.[235] However, the greatest criticism to such fences has come from the corporate community.[236] Fences have been proven to keep illegal immigrants from entering more developed neighboring nations, thus denying these nations a cheap supply of wage laborers.[237] Not only are businesses denied a cheap labor base, but they are also inhibited from freely trading across the border at the times and places they wish.[238] Fences regulate border transactions to predetermined ports of entry where security issues can be adequately addressed.[239] If trans-border trade is forced to enter and exit at designated ports, instead of anywhere along the border, it will increase transportation time and possibly lower corporate net profits.[240] Such are the primary arguments against constructing a permanent border security fence. Although each is important in its own right, none compare to the overwhelming interest a nation has in protecting its own territory and citizens.[241] In fact, as the next discussion will demonstrate, there can be little argument that the United States is permitted to build a complete border security fence between itself and Mexico. Such justifications are rooted in national sovereignty, natural law, the right of self-defense, the "war on terror," and the "Invasion Clause" of the U. S. Constitution.

B. State Sovereignty and Plenary Power

The plenary power doctrine underlies much of the historical precedence for both immigration and national security law.[242] Congress's judgments as to which non-citizens should be admitted into the United States, and which should be excluded, have largely been immune from judicial review.[243] Founded on notions of inherent state sovereignty, plenary power gives Congress complete discretion to exclude immigrants, including the ability to effectively stop illegal

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Consequences for Latinas/os, 81 OR. L. REV. 1153 (2002).

> Increased calls for border security after the September 11 terrorist attacks, as well as the practice of profiling Arab Americans and Arabs in settings ranging from Department of Justice investigatory interviews to airport passenger screenings, may signal invigorated use of profiling against Latinas/os, particularly in the effort to interdict undocumented immigrants. Alarmingly, use of racial profiling in aid of border security, immigration enforcement, and the war on drugs seems consistent with the newly established prerogatives of the war on terrorism.

Id. See also Barbara Hines, *So Near Yet So Far Away: The Effect of September 11th on Mexican Immigrants in the United States*, 8 TEX. HISP. J.L. & POL'Y 37 (2002).

235. Kevin R. Johnson, *Law and the Border: Open Borders?*, 51 UCLA L. REV. 193 (2003).

236. *Id.*

237. *Id.*

238. *Id.*

239. *See generally* Advisory Opinion, *supra* note 230.

240. *Id.*

241. *See generally* Bradford, *supra* note 6.

242. For a very good analysis of the plenary power doctrine, see Kevin R. Johnson, *Race and Immigration Law and Enforcement: A Response To Is There a Plenary Power Doctrine?*, 14 GEO. IMMIGR. L.J. 289 (2000).

243. JOHNSON, *supra* note 233, at 197.

immigration in any manner deemed necessary.[244] "Under a strict plenary power regime, the U.S. government may act as if it is in a state of nature without legal constraints in a modern 'survival of the fittest' world."[245] As such, the government of the United States can exclude illegal immigrants from its territory using whatever method that is determined to be will be most effective.[246]

Exclusion of illegal immigrants is part of the inherent territorial sovereignty of a nation.[247] As once stated by Chief Justice Marshall, "[t]he jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself."[248] Any restrictions or prohibitions on this right to exclusive territorial sovereignty must be consented to by the nation itself, and cannot be imposed by any foreign power.[249] The United States, in its relationship with foreign countries and their subjects, is one nation, "invested with powers which belong to independent nations, the exercise of which can be invoked for the maintenance of its absolute independence and security throughout its entire territory."[250]

International law largely respects each nation's inherent sovereignty, giving every country the discretion to make and manage immigration law systems.[251] "If sovereignty is to have any meaning, it must include a state's

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244. *Id.*

245. *Id. See also* Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power Over Foreign Affairs*, 81 TEX. L. REV. 1 (2002).

246. Natsu Taylor Saito, *The Enduring Effect of the Chinese Exclusion Cases: The "Plenary Power" Justification for On-Going Abuses of Human Rights*, 10 ASIAN L. J. 13, 14-15 (2003).

> Federal courts have already used the plenary power doctrine to justify exclusions and deportations based on national origin, to exclude or deport people based on their political beliefs or associations, to deny even permanent residents a Fifth Amendment right to due process in deportation proceedings, and to allow indefinite detention pending deportation . . . . The courts . . . [have had] to develop a jurisprudence that addresses the regulation of immigration as an exercise of U.S. sovereignty, a subject about which the Constitution is silent. There is, in fact, an abundance of international law in support of the plenary power doctrine.

Id.

247. Chae Chan Ping v. United States, 130 U.S. 581 (1889) [Hereinafter Chinese Exclusion Case].

248. The Schooner Exchange v. M'Faddon & Others, 11 U.S. 116, 136 (1812).

249. Saito, *supra* note 246, at 15.

250. Chinese Exclusion Case, *supra* note 247, at 603-04 (quoting Cohens v. Virginia, 19 U.S. (6 Wheat) 264, 413 (1821)); *see also* Hines v. Davidowitz, 312 U.S. 52 (1941); Bugajewitz v. Adams, 228 U.S. 585 (1913); United States *ex rel.* Turner v. Williams, 194 U.S. 279 (1904); The Japanese Immigrant Case, 189 U.S. 86 (1903); Fong Yue Ting v. United States, 149 U.S. 698, 705 (1893). For an analysis of these cases, see generally Louis Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and its Progeny*, 100 HARV. L. REV. 853 (1987).

251. Karen Engle, *Constructing Good Aliens and Good Citizens: Legitimizing the War on Terror(ism)*, 75 U. COLO. L. REV. 59, 65 (2004).

right to maintain its physical borders by deciding who may or may not enter."[252] In the United States, the Supreme Court has held that the political branches have plenary power over questions of immigration.[253] Foundational cases provide the nature and extent of this plenary power, relying heavily on "concepts of sovereignty, the right of a nation to absolute independence and security, and the need to exclude and expel foreigners as essential to self-preservation."[254] These concepts are grounded in international law, and support the idea that no other country or international organization can control the inherent rights of the United States unless the U.S. government explicitly consents to such international control.[255] "The power to . . . expel undesirable aliens . . . exists as inherently inseparable from the conception of nationality."[256] A nation has a duty to protect its own citizens and their property,[257] but it does not have a similar duty either to recognize or protect the rights claimed by the citizens of a foreign country.[258] As such, the United States is permitted by national sovereignty and plenary power to construct a security fence along its border with Mexico.

Only a security fence spanning the entire Southern Border can prevent millions of illegal immigrants, many of national security concern, from entering the United States undetected.[259] Refusing to adequately address the current illegal immigration problem could result in the loss of national sovereignty.[260] In this age of terror and weapons of mass destruction, the United States must prevent the migration of any true threat to its security, including undocumented

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252. *Id.*

253. Chinese Exclusion Case, *supra* note 247, at 605.

254. Robert Pauw, *Plenary Power: An Outmoded Doctrine that Should not Limit IIRIRA Reform*, 51 EMORY L.J. 1095, 1114 (2002); *see also* Ekiu v. United States, 142 U.S. 651, 659 (1892). "It is an accepted maxim of international law, that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or admit them only in such cases and upon such conditions as it may see fit to prescribe." *Id.*

255. Pauw, *supra* note 254 at 1115; *see generally* Peter J. Spiro, *Explaining the End of Plenary Power*, 16 GEO. IMMIGR. L.J. 339 (2002).

256. *See* Fong Yue Ting v. United States, 149 U.S. 698, 707-08 (1893) (quoting international law scholar, Emer de Vattel: "In virtue of its natural liberty, it belongs to the nation to judge whether its circumstances will or will not justify the admission of the foreigner"). The Court quotes Ortolan who writes, "The government of each state has always the right to compel foreigners who are found within its territory to go away, by having them taken to the frontier. This right is based on the fact that, the foreigner not making part of the nation, his individual reception into the territory is matter of pure permission, of simple tolerance, and creates no obligation." *Id.*

257. Pauw, *supra* note 254, at 1115-1116.

258. *See* Galvan v. Press, 347 U.S. 522, 530 (1954).

259. *See* Peter H. Schuck, *The Transformation of Immigration Law*, 84 COLUM. L. REV. 1, 89-90 (1984); Louis Henkin, *The Constitution as Compact and as Conscience: Individual Rights Abroad and at Our Gates*, 27 WM. & MARY L. REV. 11, 33 (1985).

260. Peter H. Schuck, *The Message of 187: Facing up to Illegal Immigration*, AM. PROSPECT, Spring 1995, at 85.

illegal immigrants.[261] At no time in the history of the United States has border enforcement been a more desperate issue.[262]

Rather than simply trying to fix an already broken system by hiring more agents and increasing the budget for outdated and flawed detection technology, the answer to the current terrorist threat is to properly fence the perimeter of the Southern Border and force would-be immigrants to enter the United States legally at predetermined ports of entry or to not enter at all.[263]

C. Inherent Right to Self-Defense

Throughout history, the ability of nations to resort to preventative measures of self-defense was generally immune from regulation under international law.[264] Sovereignty was its own justification for taking measures in self-defense, and nations have continued to claim the right to engage in any action necessary to counter perceived threats.[265] However, early international treaties and agreements, most notably the Covenant of the League of Nations, attempted to prohibit "aggressive" preventative force, commonly defined as the "use of armed force against the territorial integrity or political independence of another state."[266] The Charter of the United Nations, ratified in 1945, reflected the growing regulation of the use of preventative measures in self-defense.[267] Article 2(4) of the Charter prohibits "the threat or use of force against the territorial integrity or political independence of any state," and it is now considered "well settled in modern international law that no nation may engage in aggression."[268]

Although there are international treaties that restrict a nation from using aggressive preventative measures in self-defense, there is no restriction that limits a nation's inherent right to self-defense.[269] The U.N. Charter regulates

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261. Jan C. Ting, *Unobjectionable but Insufficient - Federal Initiatives in Response to the September 11 Terrorist Attacks*, 34 CONN. L. REV. 1145 (2002).

262. *See* Viet D. Dinh, *Foreword: Freedom and Security After September 11*, 25 HARV. J.L. & PUB. POL'Y 399, 401-06 (2002).

263. *See* U.S. Customs and Border Protection, *supra* note 29; *see also* Intelligence and Terrorism Information Center at the Center for Special Studies, *The Security Fence and Buffer Zone as a Successful Obstacle to Terrorism*, *at* http://www.intelligence.org.il/eng/c_t/fence/fence_b.htm (July 2004) (last visited March 8, 2005).

264. Bradford, *supra* note 6, at 1374-75.

265. LEE A. CASEY & DAVID B. RIVKIN, JR., WASHINGTON LEGAL FOUNDATION, "ANTICIPATORY" SELF-DEFENSE AGAINST TERRORISM IS LEGAL, (2001), *at* http://www.wlf.org/upload/casey.pdf (last visited Mar. 7, 2005).

266. *See Resolution on the Definition of Aggression*, G.A. Res. 3314, U.N. GAOR, 29th Sess., Supp. No. 31, at 142, U.N. Doc. A/9631 (1975).

267. Bradford, *supra* note 6, at 1375.

268. U.N. CHARTER art. 2, para. 4.

269. Statement of Kofi Annan, U.N. Secretary General, Oct. 8, 2001, *reprinted in* United States Embassy, Tokyo, Japan, *U.N. Secretary-General Affirms U.S. Right to Self-Defense*, October 8, 2001, *available at* http://japan.usembassy.gov/e/p/tp-se0486.html (last visited Mar. 7, 2005).

the use of preventative self-defense measures, but nations are still free to take any action deemed necessary as long as such measures are "in conformity with the Charter."[270] Accordingly, nations may continue to use preventative self-defense in order to protect their territory and citizens, as long as they do not infringe upon the territorial integrity or political independence of other nations.[271] Moreover, "self-defense remains so intrinsic to the concept of sovereignty, even in the Charter era, that the right is one that would be asserted by nations absent recognition in international law."[272]

Article 2(4) of the U.N. Charter expressly prohibits only three state actions: (1) the threat or use of force prejudicial to the territorial integrity of states; (2) the threat or use of force contrary to the political independence of states; and (3) the threat or use of force "in any other manner inconsistent with the Purposes of the United Nations."[273] Arguably then, all preventative measures that do not challenge either the territorial integrity or political independence of another state, and are not inconsistent with the maintenance of international peace and security, are therefore permissible.[274] The exercise of the right to self-defense, even where it involves the creation of physical barriers like a security fence, is consistent with the maintenance of international peace and security and is not contrary to the U.N. Charter.[275]

The Charter also recognizes in Article 51, the "inherent right" of a nation to provide assistance to other countries that may need support during their own self-defensive struggles.[276] The framers recognized that in order to achieve a lasting peace, countries must be permitted to take all necessary actions to resist national security threats.[277] The traditional right of nations to self-defend should be presumed to have survived the Charter in the absence of compelling

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> Immediately after the 11 September attacks on the United States, the Security Council expressed its determination to combat, by all means, threats to international peace and security caused by terrorist acts. The Council also reaffirmed the inherent right of individual or collective self-defence in accordance with the Charter of the United Nations. The States concerned have set their current military action in Afghanistan in that context.

Id.

270. Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. 66 (Jul. 8).

271. Bradford, *supra* note 6, at 1378.

272. Byard Q. Clemmons & Gary D. Brown, *Rethinking International Self-Defense: The United Nations' Emerging Role*, 45 NAVAL L. REV. 217, 218 (1998).

273. U.N. CHARTER art. 2, para. 4.

274. *See* Michael N. Schmitt, *Preemptive Strategies in International Law*, 24 MICH. J. INT'L L. 513, 521-22 (2003).

275. Jonathan Gurwitz, *Blame Terror, Not Fence, for no Peace*, SEATTLE POST-INTELLIGENCER, Mar. 2, 2004, *at* http://seattlepi.nwsource.com/opinion/162732_wall02.html (last visited Mar. 7, 2005). "The barrier to peace between Israelis and Palestinians is not this fence; rather, it is the terror supported and incited by Arafat that has made the fence necessary." *Id.*

276. *See* U.N. CHARTER art. 51 ("Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations. . . .").

277. Bradford, *supra* note 6, at 1378.

evidence to the contrary.[278] Accordingly, preventative measures, a subset of the inherent right of self-defense, do not violate the text of Article 51, and do not require that an armed attack occur before self-defensive measures can be taken by a nation.[279]

On July 9, 2004, Article 2(4) of the U.N. Charter was partially relied upon by the International Court of Justice (ICJ) in order to rule against the security fence constructed by Israel on its border with the Palestinians.[280] Article 2(4) of the Charter, however, was discussed only briefly, as the court relied much more on Articles 46 and 52 of the 1907 Hague Regulations[281] and Article 53 of the Fourth Geneva Convention,[282] which deal primarily with the wrongful requisition of disputed territory.[283] The court also limited their

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278. *Id.*

279. *See* Military and Paramilitary Activities, 1986 I.C.J. 14, 347-48 (June 27, 1986).

> I do not agree with a construction of the United Nations Charter which would read Article 51 as if it were worded: "Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if, and only if, an armed attack occurs . . . ." I do not agree that the terms or intent of Article 51 eliminate the right of self-defense under customary international law, or confine its entire scope to the express terms of Article 51.

Id.

280. Advisory Opinion, *supra* note 230.

281. Article 46 states: "Family honour and rights, the lives of persons, and private property, as well as religious convictions and practice, must be respected. Private property cannot be confiscated." Hague Convention art. 46 (1907), *at* http://www.lib.byu.edu/~rdh/wwi/hague.html (last visited Mar. 8, 2005). Article 52 states:

> Requisitions in kind and services shall not be demanded from municipalities or inhabitants except for the needs of the army of occupation. They shall be in proportion to the resources of the country, and of such a nature as not to involve the inhabitants in the obligation of taking part in military operations against their own country. Such requisitions and services shall only be demanded on the authority of the commander in the locality occupied. Contributions in kind shall as far is possible be paid for in cash; if not, a receipt shall be given and the payment of the amount due shall be made as soon as possible.

Id. at art. 52.

282. Article 53 of the Fourth Geneva Convention states: "Any destruction by the Occupying Power of real or personal property belonging individually or collectively to private persons, or to the State, or to other public authorities, or to social or cooperative organizations, is prohibited, except where such destruction is rendered absolutely necessary by military operations." Fourth Geneva Convention art. 53 (1949), *at* http://www.jewishvirtuallibrary.org/jsource/History/Human_Rights/geneva1.html. (last visited March 8, 2005).

283. Nicole Trudeau, *International Court of Justice to Give Advisory Opinion Concerning Israel's Barrier*, 11 HUM. RTS. BR. 34 (2004).

> At the October session, the Assembly passed a resolution demanding that Israel stop and reverse the construction of the wall in the Occupied Palestinian Territory, including and around East Jerusalem, which is in departure of the Armistice Line of 1949 and is in contradiction to relevant provisions of international law. Israel also states that the final border will be determined by negotiations because it does not recognize the Armistice Line of 1949 as a confirmed international boundary and disputes the legal status of the Occupied Palestinian Territory . . . . By building the Barrier on land in significant departure from the Line, the Palestinian Authority's views Israel as attempting to

Advisory Opinion to those fenced areas that were located within disputed Palestinian-Israeli lands, while refusing to make any ruling on the security fence that was found completely within Israeli territory.[284] As taken from the ICJ's limited discussion, it appears that, although self-defence does not justify the building of a security fence over disputed territory, it does appear to be sufficient justification for constructing a security fence over non-disputed lands.[285] Thus, it appears that international law does not prohibit the United States from erecting a security fence along the Southern Border with Mexico in furtherance of its inherent right of self-defense.

D. Natural Law

For centuries, academics and philosophers have defended the idea that there are absolute and universal rules that bind all mankind and political communities together and trump any inconsistent law.[286] Natural law is the "immediate and eternal expression of the principles of rights and justice that, though gleaned from observation of the natural universe and referenced as the ultimate origin of law and the beginning of moral life proper, long antedates the origin of man, and is effectively super-law."[287] Natural law and natural rights are rooted in the nature of man and the world, and are not restricted by the arbitrary power of the state.[288] As such, natural law often conflicts with man-made, positive law that is not in harmony with natural justice.[289] When such conflicts occur, natural law is meant to prevail over the inconsistent positive law.[290] Additionally, natural law rejects the idea that contrary laws even have

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> expropriate land occupied by the Palestinians .... The Court's advisory opinion on this issue, though not binding on Israel's actions, should be respected and upheld by both the Israeli and Palestinian leadership, as well as the international community.

Id.

284. Advisory Opinion, *supra* note 230.

285. *Id.*

286. *See* Louis Rene Beres, *On Assassination as Anticipatory Self-Defense: The Case of Israel*, 20 HOFSTRA L. REV. 321, 328 (1991).

287. *See* Louis Rene Beres, *International Law, Personhood and the Prevention of Genocide*, 11 LOY. L.A. INT'L & COMP. L. REV. 25, 34 (1989).

288. Posted by James A. Donald at *Natural Law and Natural Rights*, *at* http://www.jim.com/rights.html (last visited Mar. 7, 2005).

> Law derives from our right to defend ourselves and our property, not from the power of the state. If law was merely whatever the state decreed, then the concepts of the rule of law and of legitimacy could not have the meaning that they plainly do have, the idea of actions being lawful and unlawful would not have the emotional significance that it does have. As Alkibiades argued, (Xenophon) if the Athenian assembly could decree whatever law it chose, then such laws were "not law, but merely force." The Athenian assembly promptly proceeded to prove him right by issuing decrees that were clearly unlawful, and with the passage of time its decrees became more and more lawless.

Id.

289. Bradford, *supra* note 6, at 1427.

290. *Id.*

the force of law at all.[291] Simply put, natural law is "eternal and unchangeable, binding at all times upon all peoples."[292] It provides structure to the legal world by laying out inherent rights and duties of parties and declaring that only good laws have the force of law at all.[293]

The relationship between natural law and the right of a nation to engage in preventative measures of self-defense has been argued for centuries.[294] Cicero insisted that under natural law, "every means of securing our safety is honourable" if "our life be in danger from plots, or of open violence, or from the weapons of robbers or enemies."[295] Thomas Hobbes believed it impossible to surrender natural rights to life, liberty and security.[296] Such would be "against the dictates of true reason for a man to use all his endeavours to preserve and defend his Body, and the Members thereof from death."[297] John Locke elaborated on Hobbes' theories, believing that there was a settled natural right to use preventive force against threats to one's safety.[298]

The founders of modern international law also acknowledged inherent rights under natural law, especially with regard to a nation's right to self-defense.[299] Hugo Grotius, for example, believed that there was a fundamental right of self-defense under natural law for nations to undertake preventive measures that were necessary to protect their territory, civilians, and property.[300] International law theorists, including Alberico Gentili and Samuel von Pufendorf, recognized that "states were entitled, at natural law,"[301] to take preventative measures "even though an enemy has not yet fully revealed his intentions . . . ."[302] The only limitation mentioned by these scholars on a nation's right to use preventive measures to protect their territory and their

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291. *Id.*

292. CICERO, DE RE PUBLICA, DE LEGIBUS 385 (Clinton Walker Keyes trans., 1948), *available at* http://www.constitution.org/rom/cicero.htm (last visited Mar. 7, 2005).

293. Bradford, *supra* note 6, at 1427-28.

294. *Id.* at 1431.

295. The Speech of M.T. Cicero In Defence of Titus Annius Milo, *in* 3 ORATIONS OF MARCUS TULLIUS CICERO 394 (C. D. Yonge trans., 1911), *available at* http://www.phatnav.com/books/pdf/speech_in_defence_of_titus_annius_milo.pdf (last visited Mar. 7, 2005).

296. Donald, *supra* note 288.

297. THOMAS HOBBES, DE CIVE 47 (Howard Warrender ed., 1983) (1651), *available at* http://www.constitution.org/th/decive.htm (last visited Mar. 7, 2005).

298. Bradford, *supra* note 6, at 1431-32.

299. *See* HUGO GROTIUS, DE JURE BELLI AC PACIS LIBRI TRES 39 (Francis W. Kelsey trans., 1925) (1625), *available at* http://www.constitution.org/gro/djbp.htm (last visited Feb. 24, 2005).

> The law of nature is a dictate of right reason, which points out that an act, according as it is or is not in conformity with rational nature, has in it a quality of moral baseness or moral necessity; and that, in consequence, such an act is either forbidden or enjoined by the author of nature, God.

Id.

300. *Id.* at 176.

301. Bradford, *supra* note 6, at 1433.

302. SAMUEL VON PUFENDORF, ON THE DUTY OF MAN AND CITIZEN ACCORDING TO THE NATURAL LAW 32 (Frank Gardner trans., Oxford Univ. Press 1927) (1682), *available at* http://www.constitution.org/puf/puf-dut.htm (last visited Mar. 7, 2005).

citizens was that negotiation and compromise be attempted first.[303]

Eventually the ideas encapsulated within natural legal philosophy were incorporated by leading political figures into the laws and constitutions of their various respective states.[304] In the United States, Thomas Jefferson held that the natural law of self-defense "controlled the written laws," and that, regardless of any domestic or international laws restricting the use of preventative measures, the United States had the right, but also the "moral duty," to take all necessary precautions to ensure the nation's "preservation and safety."[305] The U.S. Constitution also reflected these ideals, acknowledging that the government did not grant rights to the American people, but rather protected and secured each person's natural rights to life, liberty, and property.[306]

At the end of the twentieth century, natural law jurisprudence continued to thrive, especially in the areas of international relations and human rights, where a number of scholars and non-governmental organizations attempted to extend the protection of inalienable rights to those being denied natural justice.[307] For "new natural law" theorists, there are limits to lawmaking.[308] Nations, although sovereign, are not free to transform a moral wrong into a legal right.[309] Arguably then, nations have the right, under natural law, to take all preventative measures necessary to counter foreign threats posed by enemies.[310] This general principle allows the use of preventative measures in self-defense to protect the nation's territory and citizens, and justifies the building of a security fence along the Southern Border between the United States and Mexico. This right holds true regardless of any domestic or international law to the contrary.[311]

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303. Bradford, *supra* note 6, at 1434-35.

304. *Id.*

305. *Id.*

> Compacts . . . between nation & nation are obligatory on them by the same moral law which obliges individuals to observe their compacts, and although treaties created the same moral duties between states that existed between individuals under natural law, for Jefferson there were circumstances . . . which sometimes excused the non-performance of contracts . . . between nation & nation.

Id. at n. 268 (quoting Thomas Jefferson, *Opinion on the French Treaties*, *in* THE POLITICAL WRITINGS OF THOMAS JEFFERSON 113-114 (Merril D. Peterson ed., 1993)).

306. BOB WIENER & ROSE WIENER, THE UNITED STATES CONSTITUTION AND NATURAL LAW, (1991), *available at* http://www.forerunner.com/forerunner/weiner/X0023_9110_Natural_Law.html (last visited Mar. 7, 2005).

307. *See generally* Gregory Flanagan, *Natural Rights and Natural Law*, The Libertocracy Association, *at* http://www.libertocracy.com/Librademia/Essays/Government/[7univerdefinlaw.htm#The%20right%20of%20nature (last visited Mar. 7, 2005).

308. Jude Chua Soo Meng, *To Close a Generation Gap: Thomists and the New Natural Law Theory*, QUODLIBET ONLINE J. OF CHRISTIAN THEOLOGY & PHIL., (2001), *at* http://www.quodlibet.net/pdf/meng-thomism.pdf (last visited Mar. 7, 2005).

309. Bradford, *supra* note 6, at 1437.

310. *Id.*

311. *Id.*

E. Law of War: National Security

President Bush has characterized the events of September 11th as acts of "war," while also acknowledging that the "war on terror is a different kind of war."[312] Unlike the conception of a war between two nations complete with declarations expressing their intent to do battle, the acts of terrorism targeting the United States over the past decade were not carried out under the authority or accountability of any particular country's government.[313] Thus, "because modern terrorists do not fight as a typical body of armed forces with long-range capabilities, governments at risk of terrorism must strengthen their borders . . . to combat this new threat."[314]

Under the Constitution of the United States, the President "shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States."[315] He is also vested with "the Executive Power" and charged with the duty to "take Care that the Laws be faithfully executed."[316] Finally, the President is also under an oath, taken the day upon entering office, requiring that he "preserve, protect and defend the Constitution of the United States."[317] Despite these constitutional provisions, the extent of the President's power, especially in regard to issues of national security, has been argued since the beginning of the United States as an independent nation.[318] The President is encouraged to exercise reasonable discretion in the use of preventative measures, but Congress is granted the ultimate power to "check executive action through its powers of appropriation, statutory authorization, and impeachment."[319] While the legislative and executive branches have fought over the exact commitments of power under the Constitution, the judicial branch has largely refused to rule upon issues of foreign relations due to the political question doctrine.[320] Instead the courts have recognized that the

312. Graham, *supra* note 171, at 293; *see also* President George W. Bush, Address to the Nation on the Capture of Saddam Hussein *at* http://www.whitehouse.gov/news/releases/2003/12/20031214-3.html (Dec. 14, 2003) (last visited Mar. 7, 2004).

313. Graham, *supra* note 171, at 293-94.

314. *Id.* at 294; *see also* President George W. Bush, *Remarks* at the American Legion National Convention in St. Louis, Missouri, Aug. 26, 2003, *at* http://www.state.gov/p/nea/rls/rm/23551.htm (last visited Mar. 7, 2005).

315. U.S. CONST. art. II, § 2.

316. *Id.* art. II, § 1-3.

317. *Id.* art. II, § 1.

318. *See* John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CAL. L. REV. 167 (1996).

319. *See* W. Michael Reisman, *War Powers: The Operational Code of Competence*, 83 AM. J. INT'L L. 777, 783 (1989).

320. Nada Mourtada-Sabbah, *The Political Question Doctrine, Executive Discretion, and Foreign Affairs*, WHITE HOUSE STUDIES, (2003), *at* http://www.findarticles.com/p/articles/mi_m0KVD/is_3_3/ai_n6142003 (last visited Mar. 7, 2005) ("This doctrine involves the deference that courts are said to show vis-a-vis the political departments, especially the executive branch, when the issue at hand involves what are considered to be political matters.").

President is entitled to the widest margin of discretion in the exercise of his constitutionally committed power as the "sole organ of the nation in its external relations" and as "Commander in Chief."[321]

The *Durand* court in 1860 upheld the exercise of the executive power to not only implement all necessary measures to protect the United States territory and citizens, but also declared that the President has a *duty* to do so.[322] The court recognized that threats to the United States "cannot be anticipated and provided for" and that measures taken in self-defense often "require the most prompt and decided action."[323] The court realized that the executive branch was best equipped to provide the swift and immediate response to such foreign threats.[324] It was the President's duty to use preventative measures to stop "acts of violence, or of threatened violence to the citizen or his property . . . ."[325]

Without question, the President has a moral and legal obligation to defend the United States and its citizens.[326] The *Neagle* Court implied that the origin of this presidential duty is found in extra-constitutional, nonpositivist sources of law.[327] Extra-constitutional obligations most likely are a reference to natural law and the requirement of doing what is just, even if that means violating positivist law.[328] As such, the President is required to engage in preventive action when necessary to defend the United States and its nationals against threats to life and liberty.[329] The Report of the International Commission on Intervention and State Sovereignty recognizes "that sovereignty implies responsibility . . . for the protection of [the] people [within] the state."[330] This offers strong support for the argument that "it is incumbent upon states to protect their nationals not only against domestic threats but from foreign threats as well . . . ."[331] Where a President perceives a potential threat

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321. Bradford, *supra* note 6, at 1442; *see also Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 139 (1866); The Prize Cases, 67 U.S. (2 Black) 635, 670 (1863); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 644-45 (1952).

322. Durand v. Hollins, 8 F. Cas. 111, 112 (C.C.S.D.N.Y. 1860) (No. 4186).

323. *Id.*

324. *Id.*

325. *Id.*

326. Bradford, *supra* note 6, at 1452-53. Individuals entered into contracts with political leaders in order to enhance their security, trading their personal liberty for the safety guaranteed by the sovereign, who was under a duty to defeat any threat to his citizens. *Id.* "Failure to engage or conquer threats to those within his protection stripped the sovereign" of his citizen's obedience and invalidated the contract. *Id.* at 1451. Conditionally exchanging protection for allegiance was adopted by a number of prominent colonial politicians and ultimately found expression in the Constitution of the United States. *Id.*

327. In re Neagle, 135 U.S. 1, 64 (1890).

328. Bradford, *supra* note 6, at 1454-55.

329. *Id.*

330. INT'L COMM'N ON INTERVENTION & STATE SOVEREIGNTY, THE RESPONSIBILITY TO PROTECT xi (2001), *available at* http://www.iciss.ca/report-en.asp (last visited Mar.7, 2005).

331. Bradford, *supra* note 6, at 1462.

to the national security of the United States, he may implement protective measures immediately, including those necessary to secure the nation's border from terrorist infiltration.[332]

F. Invasion Clause[333]

The United States Constitution provides as follows: "The United States . . . shall protect each of . . . [the states] against Invasion."[334] This clause is commonly referred to as the "Invasion Clause." James Madison, in *the Federalist No. 43*, provided the most explanatory description of the Invasion Clause. There he stated:

> A protection against invasion is due from every society to the parts composing it. The latitude of the expression here used seems to secure each State, not only against foreign hostility, but also against ambitious or vindictive enterprises of its more powerful neighbors. The history, both of ancient and modern confederacies, proves that the weaker members of the union ought not to be insensible to the policy of this article.[335]

Most courts refuse to hear arguments regarding the Invasion Clause, insisting that such matters are nonjusticiable political questions.[336] "[T]he protection of the states from "invasion" involves matters of foreign policy and defense, which are issues that the courts have been reluctant to consider."[337] The few courts that have agreed to hear Invasion Clause cases generally hold that the clause is only applicable when the protesting state is exposed to some sort of armed hostility stemming from a political entity, such as another state or a foreign country.[338] However, there is no express requirement in the Invasion Clause that the threat come from another state or foreign country.[339] Instead, the only requirement is that the federal government must protect the states from any domestic and foreign threats to their security.[340]

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332. Dahlia Lithwick, *What War Powers Does the President Have*, SLATE ONLINE NEWS, Sept. 13, 2001, *at* http://www.slate.msn.com/id/1008290 (last visited Mar. 7, 2005); *see also* Don Crawford, *President Bush, Please Close our Borders!*, WORLDNETDAILY, Feb. 4, 2005, *at* http://www.worldnetdaily.com/news/article.asp?ARTICLE_ID=42717 (last visited Feb. 25, 2005).

333. For a very good discussion on the Invasion Clause in reference to the illegal immigration taking place on the Canadian-U.S. border, see generally Blair, *supra* note 114.

334. U.S. CONST. art. IV, § 4.

335. THE FEDERALIST NO. 43 (James Madison) 298 (Tudor Publishing Co. 1788) (1947).

336. *See* Padavan v. United States, 82 F.3d 23, 28 (2d Cir. 1996).

337. *Id.*

338. *Id. See also* Barclays Bank PLC v. Franchise Tax Bd., 114 S. Ct. 2268, 2284-85 (1994); Chicago & S. Air Lines v. Waterman S.S., 333 U.S. 103, 111 (1948).

339. U.S. CONST. art. IV, § 4.

340. Blair, *supra* note 114, at 203; *see also* Arizona v. United States, 104 F.3d 1095 (9th

The term "invasion" has been, interpreted to refer to any hostile and foreign invasion perpetrated on American soil.[341] As such, the federal government has obligations under the Invasion Clause to protect the states from foreign threats, including terrorism.[342] In order to successfully prevent a terrorist invasion, or a terrorist attack, all necessary preventative measures must be taken, including the construction of a border-length security fence. As long as the threat remains, the federal government has a duty to aggressively protect the nation's borders and ensure that the citizens of the United States of America are safe and secure.[343] Yet, the legislative and executive branches have refused to appropriately address the national security issues connected with illegal immigration along the Southern Border.[344] As such, the government's inaction in the face of this foreign threat fails to adequately protect the states from invasion and likely violates the Invasion Clause.

V. CONCLUSION

"Mr. Bush, put up this wall!"[345]

Since September 11, 2001, much has been said about the porous Southern Border, the influx of illegal immigrants from nations of national security concern, and the ease of which weapons of mass destruction can be transported into the United States without detection.[346] The Department of Homeland Security and other executive agencies have implemented numerous measures in order to curb this tide of illegal immigration, but to a large extent these measures have failed.[347] Illegal immigration continues to grow, making it nearly certain that the United States will become the victim of another terrorist attack in the future.[348]

The argument in favor of constructing a security fence along the Southern Border between the United States and Mexico is merely an assertive acknowledgement of the right of a sovereign nation to control who shall and who shall not enter the country.[349] Such is a right long protected throughout

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Cir. 1996); California v. United States, 104 F.3d 1086 (9th Cir. 1996).

341. Blair, *supra* note 114, at 223.

342. *Id.* at 223.

343. *Id.*

344. Fred Elbel, Desert Invasion- U.S., Tidal Wave of Illegal Immigration, *at* http://www.desertinvasion.us/data/invasion_tidal_wave_2004.html (last visited Mar. 18, 2005); GEN. ACCOUNTING OFFICE, BORDER SECURITY—AGENCIES NEED TO BETTER COORDINATE THEIR STRATEGIES AND OPERATIONS ON FEDERAL LANDS (June 2004), *at* http://www.gao.gov/new.items/d04590.pdf (last visited Mar. 7, 2005); Frosty Woolridge, *Immigration Invasion-A View From a Border Patrol Officer*, WASH. DISPATCH, May 25, 2004, http://www.rense.com/general53/immig.htm (last visited Mar. 7, 2005).

345. Posting by Steve Sailor to Vdare.com, *The Call for American Unity*, July 2, 2002, *at* http://www.vdare.com/sailer/israeli_fence.htm (last visited Mar. 7, 2005).

346. *See supra* Part III.

347. *Id.*

348. *Id.*

349. *See supra* Part IV.

history and well codified in immigration law precedents.[350] Beyond a mere acknowledgment of a nation's sovereignty, there is a continuing recognition that nations have the universal customary right to use preventative self-defense against any security threat.[351] The right of self-defense is a right that is absolute, taking precedence over all other contrary laws and finding moral and legal justification in the annals of natural law jurisprudence.[352] Thus, even if a security fence is in tension with positive law, natural law stands on guard, prepared to support such actions in the name of justice and higher morality.[353]

In the United States, the President not only has the power to protect the nation's security, but also has a duty to do so.[354] This is especially true during a time of war.[355] The President must defend the country, and vital interests to the country, and this obligation is wholly consistent with international law.[356] Furthermore, the federal government has a constitutional duty to protect the states from invasion, and an invasion is becoming all too real as millions of illegal immigrants, many with national security concerns, enter the United States each year.[357]

The terrorist threat is not something to take lightly. Prevention must start at home by securing the nation's borders, rather than expending scarce resources abroad. A security fence is a reasonable, proportional, and necessary measure directed toward the reduction of a threat of the highest magnitude: terrorist infiltration of the United States. The threat is very real. Any government that fails to respond aggressively to the menace of weapons of mass destruction and armed terrorism fails in its most solemn duty to the American people.[358] The law governing self-defense, if it is to continue to serve any purpose in the post-September 11th world, must remain consistent with the moral imperative that nations are entitled, and obligated, to use all necessary means to defend their territory and their citizens.[359] Only then will the collective goals of security, justice and peace ultimately be achieved.

350. *Id.*
351. *Id.*
352. *Id.*
353. *Id.*
354. *Id.*
355. *Id.*
356. *Id.*
357. *Id.*
358. *Id.*
359. *Id.*