

2010

## The Rise and Fall of Employer Sanctions

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### Recommended Citation

David Bacon and Bill O. Hing, *The Rise and Fall of Employer Sanctions*, 38 Fordham Urb. L.J. 77 (2010).

Available at: <https://ir.lawnet.fordham.edu/ulj/vol38/iss1/2>

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# THE RISE AND FALL OF EMPLOYER SANCTIONS\*

*David Bacon & Bill Ong Hing\*\**

## ABSTRACT

Workplace raids by gun-wielding Immigration and Customs Enforcement (ICE) agents that resulted in the mass arrests of dozens and sometimes hundreds of employees have ceased under the Obama administration. But “silent raids,” or audits of companies’ records by federal agents, that replaced them have resulted in the firing of thousands of undocumented workers. The administration defends these “softer, gentler” operations, yet the result is the same: workers who are here to support their families are out of work.

In this essay, David Bacon and Bill Ong Hing argue that ICE raids—be they of the Bush or the Obama kind—should cease. The basis for these operations—employer sanctions—should be repealed, and true reform that recognizes the rights of all workers should be enacted.

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## INTRODUCTION

Ana Contreras would have been a competitor for the national tai kwon do championship team in 2009. She was fourteen years old. For six years she went to practice instead of birthday parties, giving up the friendships

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most teenagers live for. Then in October 2009, disaster struck. Her mother Dolores lost her job. The money for classes was gone, and not just that. "I only bought clothes for her once a year, when my tax refund check came," Dolores Contreras explains. She continues:

Now she needs shoes, and I had to tell her we didn't have any money. I stopped the cable and the internet she needs for school. When my cell phone contract is up next month, I'll stop that too. I've never had enough money for a car, and now we've gone three months without paying the light bill.<sup>1</sup>

Dolores Contreras shared her misery with eighteen hundred other families. All lost their jobs when their employer, American Apparel, fired them for lacking immigration status. For months she carried around the letter from the Department of Homeland Security (DHS), handed to her by the company lawyer. It says the documents she provided when she was hired were no good, and without work authorization, her work life was over.<sup>2</sup>

Of course, it was not really over. Contreras still had to keep working if she and her daughter were to eat and pay rent. So instead of a job that barely paid her bills, she was forced to find another one that would not even do that.

Contreras is a skilled sewing machine operator. She came to the United States thirteen years earlier, after working many years in the garment factories of Tehuacan, Puebla, Mexico. There, companies like Levis make so many pairs of stonewashed jeans that rumor has it the town's water has turned blue. In Los Angeles, Contreras hoped to find the money to send home for her sister's weekly dialysis treatments, and to pay the living and school expenses for four other siblings. For five years she moved from shop to shop. Like most garment workers, she did not get paid for overtime, her paychecks were often short, and sometimes her employer disappeared overnight, owing weeks in back pay.

Finally Contreras got a job at American Apparel, famous for its sexy clothing, made in Los Angeles instead of overseas.<sup>3</sup> She still had to work like a demon. Her team of ten experienced seamstresses turned out thirty dozen tee shirts an hour. After dividing the piece rate evenly among them, she would come home with \$400 for a four-day week, after taxes. She paid

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1. Interview with "Dolores Contreras" (name changed for this article), in L.A., Cal. (Dec. 15, 2009).

2. *Id.*

3. Jim Straub, *Who's Your Daddy*, CLAMOR MAG., Fall 2006, available at <http://clamormagazine.org/issues/38/aa/straub.php>.

Social Security too, although she will never see a dime in benefits because her contributions were credited to an invented number.<sup>4</sup>

Now Contreras is working again in a sweatshop at half what she earned before. Meanwhile, American Apparel took steps to replace those who were fired.<sup>5</sup> Contreras says they are mostly older women with documents, who cannot work as fast. “Maybe they sew 10 dozen a day apiece,” she claims. “The only operators with papers are the older ones.” Younger, faster workers either have no papers, or if they have them, they find better-paying jobs doing something easier. “President Obama is responsible for putting us in this situation,” she charges angrily. “This is worse than an immigration raid. They want to keep us from working at all.”<sup>6</sup>

Contreras is right. The White House website says, “President Obama will remove incentives to enter the country illegally by preventing employers from hiring undocumented workers and enforcing the law.”<sup>7</sup> In June 2009, he told Congress members that the government will be “cracking down on employers who are using illegal workers in order to drive down wages—and oftentimes mistreat those workers.”<sup>8</sup>

The law Obama is enforcing is the 1986 Immigration Reform and Control Act,<sup>9</sup> which requires employers to keep records of workers’ immigration status, and prohibits them from “knowingly hiring” those who have no legal documents, or “work authorization.”<sup>10</sup> In effect, the law made it a crime for undocumented immigrants to work. This provision, employer sanctions, is the legal basis for all the workplace immigration raids and enforcement for a quarter century and now for Obama’s auditing of employment records. The end result is the same: workers lose their jobs. Sanctions pretend to punish employers, but in reality, they punish workers.

### I. OBAMA’S INTERIOR ENFORCEMENT STRATEGY

Workplace Immigration and Customs Enforcement (ICE) raids by gun-wielding agents resulting in the mass arrests of dozens and sometimes hundreds of employees that were common under the George W. Bush adminis-

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4. Interview with “Dolores Contreras,” *supra* note 1.

5. *Id.* Letters were sent to suspected undocumented workers. *Id.*

6. *Id.*

7. See *Immigration*, WHITE HOUSE, <http://www.whitehouse.gov/issues/immigration> (last visited Sept. 27, 2010).

8. Katherine Brandon, *Working Together for Immigration Reform*, THE WHITE HOUSE BLOG (June 25, 2009, 6:45 PM), <http://www.whitehouse.gov/blog/issues/Immigration.html>.

9. Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (codified as amended at 8 U.S.C. § 1324a et seq.).

10. 8 U.S.C. § 1324a (2005).

tration appear to have ceased under the Obama administration.<sup>11</sup> Legally questionable mass arrests continue to occur in neighborhoods under the pretext of serving warrants on criminal aliens.<sup>12</sup> However, disruptive, high-profile worksite raids appear to have subsided. When a Bush administration-style ICE raid took place in Washington State in February 2009 soon after Janet Napolitano took the helm as Secretary of the Department of Homeland Security (DHS), she expressed surprise and ordered an investigation. These types of raids were not in her strategy plan she noted; instead enforcement in her regime would focus on employers who hire undocumented workers, not on the workers themselves.<sup>13</sup>

Make no mistake, although deportations related to worksite operations may have decreased under the Obama approach in contrast with that under George W. Bush, actual deportation numbers are not down. According to the *Washington Post*, the Obama administration is deporting record numbers of undocumented immigrants, with ICE expecting to remove about 400,000 individuals in 2010.<sup>14</sup> The total is nearly ten percent above the Bush administration's 2008 sum and twenty-five percent more than were deported in 2007.<sup>15</sup> According to ICE, the increase has been partly a result of deporting those persons picked up for other crimes and expanding the search through prisons and jails for deportable immigrants already in custody.<sup>16</sup> "Unlike the former worksite raids that led to arrests and deportation, the 'silent raids,' or audits of companies' records by federal agents, usually result in firings."<sup>17</sup> "Just 765 undocumented workers have been arrested at their jobs in 2010 through early summer, compared with 5,100 in 2008, according to Department of Homeland Security figures."<sup>18</sup>

However, as we see from the Contreras family's plight, the Obama administration's focus-on-employers-rather-than-workers strategy in fact falls squarely on the shoulders of the workers. Immigration raids at factories and farms have been replaced with a quieter enforcement strategy: sending

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11. See generally, Bill Ong Hing, *Institutional Racism, ICE Raids, and Immigration Reform*, 44 USF L. REV. 307 (2009).

12. See Interview with Violeta Chapin, Professor of Law, Univ. of Colo., in Santa Fe, N.M. (Sept. 24, 2010).

13. *Secretary Seeks Review of Immigration Raid*, N.Y. TIMES, Feb. 26, 2009, at A19, available at <http://www.nytimes.com/2009/02/26/washington/26immig.html>.

14. Peter Slevin, *Deportation of Illegal Immigrants Increases Under Obama Administration*, WASH. POST, July 26, 2010, at A01.

15. *Id.*

16. See *id.*

17. Roy Maurer, *Undocumented Workers Fired, Firms Audited in 'Silent Raids,'* SOC'Y FOR HUMAN RESOURCE MGMT. (July 22, 2010), <http://www.shrm.org/hrdisciplines/global/Articles/Pages/SilentRaids.aspx>.

18. *Id.*

federal agents to scour companies' records for undocumented immigrant workers. "While the sweeps of the past commonly led to the deportation of such workers, the 'silent raids,' as employers call the audits, usually result in the workers being fired, although in many cases they are not deported."<sup>19</sup> The idea is that if the workers cannot work, they will self-deport, leaving on their own. However, they actually do not leave because they need to work. They become more desperate and take jobs at lower wages.<sup>20</sup> Given the increasing scale of enforcement, this can lead to an overall reduction in the average wage level for millions of workers, which is, in effect, a subsidy to employers. Over a twelve-month period, ICE conducted audits of employee files at more than 2900 companies.<sup>21</sup> "The agency levied a record \$3 million in civil fines [in the first six months of 2010] on businesses that hired unauthorized immigrants, according to official figures."<sup>22</sup> Thousands of workers were fired.<sup>23</sup>

Employers say the audits reach more companies than the work-site roundups of the Bush administration. The audits force businesses to fire every suspected undocumented worker on the payroll—not just those who happened to be on duty at the time of a raid—and make it much harder to hire other unauthorized workers as replacements. Auditing is effective in getting unauthorized workers fired for sure.<sup>24</sup>

Consider other examples. An audit of Gebbers Farms in the orchard town of Brewster, Washington yielded results that were similar to what happened at American Apparel. Immigration inspectors scoured the records of Gebbers Farms and found evidence that approximately 550 of its workers, mostly immigrants from Mexico, did not have proper documentation.<sup>25</sup> So, those workers were fired.<sup>26</sup> ICE officials also pressured one of San Francisco's major building service companies, ABM, into firing hundreds of its own workers last spring.<sup>27</sup> ICE agents told ABM that they had

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19. Julia Preston, *Illegal Workers Swept from Jobs in "Silent Raids,"* N.Y. TIMES, July, 9, 2010, at A1, available at <http://www.nytimes.com/2010/07/10/us/10enforce.html>.

20. *See id.*

21. *See id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. *See* Melissa Sanchez, *Massive Firings in Brewster, and a Big Debate about Illegal Immigration,* SEATTLE TIMES, Feb. 13, 2010, [http://seattletimes.nwsourc.com/html/localnews/2011069760\\_brewster14.html](http://seattletimes.nwsourc.com/html/localnews/2011069760_brewster14.html).

26. *Id.*

27. Lauren Smiley, *Janitors Descend From Skyscrapers to Protest Immigration Raids,* SFWEEKLY BLOG (Apr. 27, 2010, 5:59 PM), [http://blogs.sfweekly.com/thesnitch/2010/04/janitors\\_descend\\_from\\_skyscrap.php](http://blogs.sfweekly.com/thesnitch/2010/04/janitors_descend_from_skyscrap.php).

flagged the personnel records of those workers.<sup>28</sup> Weeks earlier, the agents sifted through Social Security records and the I-9 immigration forms all workers have to fill out when they apply for jobs.<sup>29</sup> They then told ABM that the company had to fire 475 workers who were accused of lacking legal immigration status.<sup>30</sup> Similar ICE actions resulted in the firing of 1200 ABM janitors in Minneapolis, and 100 janitors in Seattle in the Fall of 2009.<sup>31</sup>

Echoing President Obama's theme of focusing on employers who use undocumented workers to "drive down wages" and "mistreat" workers, ICE chief John Morton says the agency is looking primarily for "'egregious employers' who commit both labor abuses and immigration violations."<sup>32</sup> But American Apparel, ABM, and Gebbers Farms do not appear to fit that profile.

While American Apparel is a huge corporation that makes hundreds of millions of dollars a year, the workers dismissed were "long-term employees being paid decent wages."<sup>33</sup> "The company is proud of their 'Made in America' labels" and had a reputation for paying more than most garment shops.<sup>34</sup> Before the audit, its CEO, Dov Charney, took to the streets and stood shoulder to shoulder with workers in protesting and demanding legalization for workers who have been "victimized by our broken immigration system."<sup>35</sup>

Similarly, Gebbers Farms had a general reputation for "doing right by their employees."<sup>36</sup> "It built housing and soccer fields for its workers and, unlike many other growers, provides stable year-round work."<sup>37</sup> "After the firings, Gebbers Farms advertised hundreds of jobs for orchard workers. But there were few takers in the state."<sup>38</sup> Finally, the employer applied to

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28. *See id.*

29. *See id.*

30. *See id.*

31. *See* Lornet Turnbull, *Illegal Workers Quietly Let Go*, SEATTLE TIMES, Nov. 23, 2009, [http://seattletimes.nwsourc.com/html/localnews/2010333876\\_firedjanitors23m.html](http://seattletimes.nwsourc.com/html/localnews/2010333876_firedjanitors23m.html); Sasha Aslanian, *1,200 Janitors Fired in 'Quiet' Immigration Raid*, MINNESOTA PUBLIC RADIO (Nov. 9, 2009), <http://minnesota.publicradio.org/display/web/2009/11/09/immigrants-fired/>.

32. Preston, *supra* note 19.

33. Ben Johnson, *Crackdown on American Apparel Workers Another Wasted Effort*, ALTERNET.ORG (Oct. 6, 2009), [http://www.alternet.org/immigration/143116/crackdown\\_on\\_american\\_apparel\\_workers\\_another\\_wasted\\_effort/](http://www.alternet.org/immigration/143116/crackdown_on_american_apparel_workers_another_wasted_effort/).

34. *Id.*

35. *Id.*

36. Preston, *supra* note 19.

37. Sanchez, *supra* note 25.

38. Preston, *supra* note 19.

the federal guest worker program to import about 1200 legal temporary workers - most from Mexico.<sup>39</sup> “The guest workers, who can stay for up to six months, also included about 300 from Jamaica.”<sup>40</sup> This was an implementation of the Chertoff strategy, “open the front door and you shut the back door.”<sup>41</sup> The unspoken rationale for the audits is revealed—force employers to use guest worker programs.

As for ABM, the building service has been a union company for decades, and many of the workers had been there for years. According to Olga Miranda, President of Service Employees Local 87: “They’ve been working in the buildings downtown for fifteen, twenty, some as many as twenty-seven years. They’ve built homes. They’ve provided for their families. They’ve sent their kids to college. They’re not new workers. They didn’t just get here a year ago.”<sup>42</sup>

The audit-and-fire strategy was initiated early in the Obama administration. For example, in May 2009, 254 workers at Overhill Farms in Los Angeles were fired under similar circumstances.<sup>43</sup> The company, with over 800 employees, was audited by the Internal Revenue Service earlier that year.<sup>44</sup> According to John Grant, Packinghouse Division Director for Local 770 of the United Food and Commercial Workers, which represents production employees at the food processing plant, “they found discrepancies in the Social Security numbers of many workers. Overhill then sent a letter . . . to 254 people—all members of our union—giving them thirty days to reconcile their numbers.”<sup>45</sup>

On May 2, the company stopped the production lines and sent everyone home, saying, there would be no work until “they called us to come back.”<sup>46</sup> For 254 people that call never came. According to a spokesman for Overhill Farms, “the company was required by federal law to terminate these employees because they had invalid Social Security numbers. To do

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39. *See id.*

40. *Id.*

41. *See* Michael Chertoff, Remarks at University of Southern California National Center for Risk and Economic Analysis of Terrorism Events (Aug. 13, 2008), *available at* [http://www.dhs.gov/xnews/speeches/sp\\_1219162986509.shtm](http://www.dhs.gov/xnews/speeches/sp_1219162986509.shtm).

42. Interview with Olga Miranda, President, Service Employees Local 87, in S.F., Cal., (May 3, 2010).

43. *See* Tiffany Ten Eyck, *Immigration Reform: What's Labor Up To?*, LABOR NOTES (June 5, 2009), <http://labornotes.org/node/2310>.

44. *See id.*

45. Interview with John Grant, Packinghouse Div. Dir., United Food and Commercial Workers Local 770, in L.A., Cal. (Dec. 15, 2009).

46. Interview with Isela Hernandez, in L.A., Cal. (Dec. 10, 2009).



otherwise would have exposed both the employees and the company to criminal and civil prosecution.”<sup>47</sup>

## II. BACKGROUND ON EMPLOYER SANCTIONS

The softer, gentler approach to employer sanctions enforcement implemented by the Obama administration may appear more humane on the surface. After all, auditing and firing is accomplished without guns, handcuffs, or detention. However, the result—loss of work—is not necessarily softer or gentler for the thousands of fired workers who have been working to support their families.

Employer sanctions are of relative recent vintage in the nation’s immigration laws. In the climate of heightened concerns over the number of undocumented workers (predominantly Mexican) in the United States in the 1970’s and early 1980’s, estimates of up to nine million undocumented people residing in the country were offered to demonstrate that immigration enforcement efforts were ineffectual.<sup>48</sup> Policymakers proposed addressing the situation from a new angle—by penalizing employers who were hiring undocumented workers, through what came to be called “employer sanctions.”<sup>49</sup> “By 1986, employer sanctions had become part of the nation’s immigration laws. The passage of the Immigration Reform and Control Act (IRCA) represented the culmination of years of social, political, and congressional debate about the perceived lack of control over the U.S. southern border.”<sup>50</sup> “The belief that something had to be done about the large numbers of undocumented workers who had entered the United States from Mexico in the 1970s was reinforced by the flood of Central Americans who began to arrive in the early 1980s.”<sup>51</sup> While the political turmoil of civil war in El Salvador, Guatemala, and Nicaragua drove many Central Americans from their homeland, they, along with the Mexicans who continued to arrive, were generally labeled “economic migrants” by

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47. Interview with Alex Auerbach, Director, Overhill Farms, in L.A., Cal. (Dec. 10, 2009).

48. Bill Ong Hing, *The Immigration and Naturalization Service, Community-Based Organizations, and the Legalization Experience: Lessons for the Self-Help Immigration Phenomenon*, 6 GEO. IMMIGR. L.J. 413, 470 (1992) [hereinafter Hing, *Lessons for the Self-Help*].

49. BILL ONG HING, *DEFINING AMERICA THROUGH IMMIGRATION POLICY 179-82*, 196-97 (2004).

50. *Id.* at 155.

51. *Id.*

the Reagan administration, the Immigration and Naturalization Service, and the courts.<sup>52</sup>

The idea of employer sanctions was not new.

In 1952—when the immigration laws were overhauled to clamp down on subversives and Communists—a provision outlawing willful importation, transportation, or harboring of undocumented aliens was debated; one amendment proposed imposing criminal penalties for the employment of undocumented aliens if the employer had “reasonable grounds to believe a worker was not legally in the United States.”<sup>53</sup>

Not only was the amendment soundly defeated, but the following language was added to the final legislation: “for the purposes of this section, employment (including the usual and normal practices incident to employment) shall not be deemed to constitute harboring.”<sup>54</sup> For the time being, we were not about to punish U.S. employers who might be benefiting from the labor of low-wage, undocumented workers. “Beginning in 1971, legislative proposals featuring employer sanctions as a centerpiece reappeared and were touted as the tool needed to resolve the undocumented alien problem.”<sup>55</sup> Resolving the “problem” of undocumented people essentially meant forcing them to leave the country by denying them the ability to work, and therefore to eat, pay rent, or support themselves and their families. By the end of the Carter administration in 1980, the Select Commission on Immigration and Refugee Policy portrayed the legalization of people already here as a necessary balance to sanctions, which, presumably, would discourage more undocumented people from coming in the future.<sup>56</sup>

Within thirty years of the 1952 rejection of employer sanctions, Congress believed that most Americans were convinced that a crisis over undocumented immigration—especially undocumented *Mexican* migration—existed and that something had to be done.<sup>57</sup> By 1986 federal employer sanctions were enacted as the major feature of reform. By a bare swing vote of only four members of the House of Representatives, legalization (or amnesty) provisions were also made part of the package to address the undocumented immigrant issue.<sup>58</sup>

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52. Susan Gzesh, *Central Americans and Asylum Policy in the Reagan Era*, MIGRATION INFO. SOURCE (Apr. 1, 2006), <http://www.migrationinformation.org/Feature/display.cfm?id=384>.

53. HING, *DEFINING AMERICA*, *supra* note 49, at 155.

54. Act of Mar. 20, 1952, Pub. L. No. 283, 66 Stat. 26.

55. HING, *DEFINING AMERICA*, *supra* note 49, at 156.

56. *See id.*

57. *See Hing, Lessons for the Self-Help*, *supra* note 48, at 475-76.

58. *See id.* at 480.

Although on paper it appeared that a deal involving employer sanctions for amnesty had been struck, there was not political trade-off; IRCA would have gone forward if legalization were dropped by the House, and its effective implementation in the hands of an inept Immigration and Naturalization Service was seriously in doubt.<sup>59</sup>

The efficacy of employer sanctions in reducing undocumented migration is hotly debated. Proponents of increased enforcement note that few employers have been fined or punished since 1986. That view, however, fails to note that hundreds of thousands of workers have been fired. In fact, punishing employers, or threatening to do so, was always simply a mechanism to criminalize work for the workers themselves, and thereby force them to leave the country, or not to come in the first place.

In addition to the many social and economic phenomena that historically cause undocumented migration to the United States from Mexico, we now know that NAFTA and the effects of globalization create great migration pressures on Mexicans.<sup>60</sup> The push-pull factors are strong. As the Mexican consul from Douglas, Arizona once noted, the border could be “mined” and migrants would still attempt to cross.<sup>61</sup> As Renee Saucedo points out: “So long as we have trade agreements like NAFTA that create poverty in countries like Mexico, people will continue to come here, no matter how many walls we build.”<sup>62</sup> Consider Ismael Rojas, who left his family in Mexico many times over a twenty-five-year period to work in the United States as an undocumented worker. In his words, “you can either abandon your children to make money to take care of them, or you can stay with your children and watch them live in misery. Poverty makes us leave our families.”<sup>63</sup> Utilizing employer sanctions to address the phenomenon of Mexican migration in this context of poverty and globalization causes misery for workers, but does not reduce migration. Arresting and deporting workers for working without authorization as a means of discouraging them from coming here for a better life simply cannot be effective in the face of such grave economic and social forces. We also need to ask ourselves whether we can really justify punishing workers who are here because of the effects of many U.S. economic policies.

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59. HING, *DEFINING AMERICA*, *supra* note 49, at 156.

60. *See generally* BILL ONG HING, *ETHICAL BORDERS: NAFTA, GLOBALIZATION, AND MEXICAN MIGRATION* (2010).

61. Interview with Jennifer Allen, Exec. Dir., Border Action Network, in Nogales, Ariz. (June 15, 2007).

62. Interview with Renee Saucedo, Dir., San Francisco Day Labor Program, in S.F., Cal. (May 3, 2010).

63. Ginger Thompson, *Mexican Leader Visits U.S. With a Vision to Sell*, N.Y. TIMES, Aug. 24, 2000, at A3, available at <http://www.nytimes.com/2000/08/24/world/mexican-leader-visits-us-with-a-vision-to-sell.html>.

Another problem with employer sanctions is the discrimination that results. Long before the recent evaluation of the discriminatory effects of the E-Verify program,<sup>64</sup> discrimination was rampant. In its final report to Congress on employer sanctions in 1990, the Government Accounting Office estimated that of 4.6 million employers in the United States, 346,000 admitted applying IRCA's verification requirements only to job applicants who had a "foreign" accent or appearance.<sup>65</sup> Another 430,000 employers only hired applicants born in the United States or did not hire applicants with temporary work documents in order to be cautious.<sup>66</sup>

Direct and indirect recruitment of Mexican workers has continued in spite of the implementation of employer sanctions legislation in 1986.<sup>67</sup> In 2001, researchers continued to identify organized groups of farm labor contractors who travel to Mexican cities and towns, where they offer loans and work guarantees to convince potential farm workers to cross the border into the United States.<sup>68</sup> The process involves well-organized networks of contractors and contractor agents representing major U.S. agricultural companies.<sup>69</sup> The headhunters are themselves often Mexicans who recruit in their own hometowns and farming communities where earning the trust of eager farm hands is not difficult.<sup>70</sup> One of the contractors' favorite tactics to attract workers is to offer them loans to help pay off debts, coupled with a pledge to find work for the person north of the border.<sup>71</sup> Many U.S. companies rely on these networks of recruiters.<sup>72</sup>

Even a cursory review of the ICE raids in the past few years reveals an obvious disparity in the targeting of undocumented workers over the em-

64. IMMIGR. POL'Y CTR., *E-VERIFY AND ARIZONA: EARLY EXPERIENCES FOR EMPLOYERS, EMPLOYEES, AND THE ECONOMY PORTEND A ROUGH ROAD AHEAD* (May 2008), available at <http://www.immigrationpolicy.org/sites/default/files/docs/AZE-verify04-08.pdf>. E-Verify is a federal, web-based program through which U.S. businesses can attempt to verify the work authorization of new hires. See IMMIGR. POL'Y CTR., *DECIPHERING THE NUMBERS ON E-VERIFY ACCURACY* (Feb. 11, 2009), available at <http://www.immigrationpolicy.org/sites/default/files/docs/Deciphering%20the%20Numbers%20on%20E-Verify%20Accuracy.pdf>.

65. Michael Fix & Frank D. Bean, *The Findings and Policy Implications of the GAO Report and the Urban Institute Hiring Audit*, 24 INT'L MIGRATION REV. 816 (1990).

66. Laura C. Oliveira, Comment, *A License to Exploit: The Need to Reform the H-2A Temporary Agricultural Guest Worker Program*, 5 SCHOLAR 153, 170 (2002).

67. See *supra* notes 49-59 and accompanying text.

68. See Dan Herbeck, *Family Charged With Keeping Workers in Illegal Conditions*, BUFFALO NEWS, June 19, 2002, [http://blogs.buffalonews.com/inside\\_the\\_news/2008/11/brainstorming-w.html](http://blogs.buffalonews.com/inside_the_news/2008/11/brainstorming-w.html).

69. *Id.*

70. *Id.*

71. *Id.*

72. See MARY BAUER & SARAH REYNOLDS, S. POVERTY L. CTR., *CLOSE TO SLAVERY: GUESTWORKER PROGRAMS IN THE UNITED STATES* (Mar. 2007), available at <http://www.sharedprosperity.org/splcenter.org.SPLCguestworker.pdf>.

employers who hire them. Anyone who sympathizes with the undocumented worker's position but feels that "the law is the law" must hold employers to that same standard. That means demanding the enforcement of labor laws against unscrupulous employers who take advantage of low-income workers—documented or undocumented. All too often, the undocumented workforce that has been paid less than minimum wage for work conditions that violate health and safety standards is hauled away, and the employer receives no punishment. Instead of deporting the workers, we should remove the barriers that stand in the way of their efforts to place pressure on the employers to improve wage and work conditions. In the process, the jobs may, in fact, become more attractive to native workers—something that, ironically, anti-immigrant forces want.

In 2009, Ken Georgetti, president of the Canadian Labour Congress, and John Sweeney, president of the AFL-CIO, wrote to President Obama and Canadian Prime Minister Harper, reminding them that,

the failure of neoliberal policies to create decent jobs in the Mexican economy under NAFTA has meant that many displaced workers and new entrants have been forced into a desperate search to find employment elsewhere. . . . We believe that all workers, regardless of immigration status, should enjoy equal labor rights. . . . We also support an inclusive, practical and swift adjustment of status program, which we believe would have the effect of raising labor standards for all workers.<sup>73</sup>

While employer sanctions have little effect on migration, they have made workers more vulnerable to employer pressure. Because working is illegal for them, undocumented workers fear protesting low wages and bad conditions.<sup>74</sup> Employer sanctions bar them from receiving unemployment and disability benefits, although they make payments for them.<sup>75</sup> If they get fired for complaining or organizing it's much harder to find another job. Despite these obstacles, immigrant workers, including the undocumented, have asserted their labor rights, organized unions, and won better conditions.<sup>76</sup> But employer sanctions have made this harder and riskier.

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73. Letter from Ken Georgetti, President, Canadian Labour Cong., and John Sweeney, President, Am. Fed'n Labor and Cong. of Indus. Orgs., to Barack Obama, President, U.S., and Stephen Harper, Prime Minister, Can. (Feb. 18, 2009), available at <http://www.boston.com/news/politics/politicalintelligence/jjs%20kg%20letter%20to%20obama%20and%20harper%20%20021809.pdf>.

74. See Elise Foley, *Workers Rebuilding New Orleans Face Rampant Wage Theft*, WASH. INDEP., Sept. 1, 2010, <http://washingtonindependent.com/96411/workers-rebuilding-new-orleans-face-rampant-wage-theft>.

75. KEVIN R. JOHNSON ET AL., UNDERSTANDING IMMIGRATION LAW 444 (2009).

76. See Justin Akers Chacón, *Out From the Shadows, Into the Street: The New Immigrant Civil Rights Movement*, 47 INT'L SOCIALIST REV. (2006), available at <http://www.isreview.org/issues/47/newmovement.shtml>.

Using Social Security numbers to verify immigration status has led to firing and blacklisting many union activists.<sup>77</sup> Even citizens and permanent residents feel this impact, because in our diverse U.S. workplaces immigrant and native-born workers work together.<sup>78</sup> Making it a crime for one group to enforce the law or use their rights has simply created obstacles for everyone else. Unions now have greater difficulty defending the rights of their own members or organizing new ones. The exploitation of the undocumented workforce will only end if workers are free to make complaints and organize.

Eliminating the undocumented workforce without providing an avenue for their labor to be utilized in the United States also would have devastating economic consequences. Data reveal many U.S. job categories that rely on the undocumented workforce.<sup>79</sup> Gordon Hanson's findings for the Council on Foreign Relations support these arguments. He notes that between 1960 and 2000 the number of U.S. residents with less than twelve years of schooling fell from fifty percent to twelve percent.<sup>80</sup>

Arizona stands to see the negative effects of massive exclusion of an undocumented workforce. Before the state's enactment of its "Legal Workers Arizona Act" in 2007, the state experienced decades worth of growth, boosted by its estimated twelve percent undocumented labor force.<sup>81</sup> The new law caused many headaches and loss of production for Arizona employers who need workers.<sup>82</sup> Also, we should not lose sight of the fact that immigrants are consumers as well. Their consumption creates demand for certain goods and services, which in turn creates jobs.<sup>83</sup>

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77. David Bacon, Labor & Emp't Comm., Nat'l Lawyers Guild, Talking Points on Guest Workers (July 6, 2005), available at [http://www.nlg-laboremploy-comm.org/media/documents/nlg-laboremploy-comm.org\\_77.pdf](http://www.nlg-laboremploy-comm.org/media/documents/nlg-laboremploy-comm.org_77.pdf).

78. National Commission on ICE Misconduct and Violation of 4th Amendment Rights investigations of ICE raids reveal that citizens as well as immigrants were held in custody. See NAT'L COMM'N ON ICE MISCONDUCT & VIOLATIONS OF 4TH AMENDMENT RIGHTS, RAIDS ON WORKERS: DESTROYING OUR RIGHTS (2009), available at [http://www.icemisconduct.org/docUploads/UFCW%20ICE%20rpt%20FINAL%20150B\\_061809\\_130632.pdf?CFID=9083458&CFTOKEN=87909032](http://www.icemisconduct.org/docUploads/UFCW%20ICE%20rpt%20FINAL%20150B_061809_130632.pdf?CFID=9083458&CFTOKEN=87909032).

79. See BILL ONG HING, DEPORTING OUR SOULS: VALUES, MORALITY, AND IMMIGRATION POLICY 12-14 (2006). The categories include construction, food preparation, grounds maintenance, agriculture work, janitorial work, housekeeping, and sewing.

80. Gordon H. Hanson, *The Economic Logic of Illegal Immigration* 14 (Council on Foreign Rel., CSR No. 26, 2007).

81. Faye Bowers, *Employers Risk Little in Hiring Illegal Labor*, CHRISTIAN SCI. MONITOR, Apr. 18, 2006, <http://www.csmonitor.com/2006/0418/p01s01-usec.html>.

82. *Id.*

83. BILL ONG HING, TO BE AN AMERICAN: CULTURAL PLURALISM AND THE RHETORIC OF ASSIMILATION 46 (1997).

### III. UNION FOCUS—COINCIDENCE OR INTENTIONAL

President Obama says employer sanctions enforcement targets employers “who are using illegal workers in order to drive down wages—and oftentimes mistreat those workers.”<sup>84</sup> An ICE Worksite Enforcement Advisory claims “ICE . . . investigates employers who employ force, threats or coercion . . . in order to keep the unauthorized alien workers from reporting substandard wage or working conditions.”<sup>85</sup> One has to wonder whether firing or deporting workers who endure employer sanctions actually helps to cure such conditions. Also, consider the workers whom ICE has been targeting under the Obama approach. Workers at Smithfield were trying to organize a union to improve conditions.<sup>86</sup> Overhill Farms has a union.<sup>87</sup> American Apparel pays better than most garment factories.<sup>88</sup> The ABM workers in San Francisco, and another 1200 fired janitors in Minneapolis, were union members who were receiving a higher wage than non-union workers—and they had to strike to win it.<sup>89</sup>

ABM is one of the largest building service companies in the country, and it appears that union janitorial companies are the targets of the Obama administration’s immigration enforcement program.<sup>90</sup> A frustrated union official points out that,

Homeland Security is going after employers that are unions. . . . They’re going after employers that give benefits and are paying above the average. . . . What kind of economic recovery goes with firing thousands of workers? Why don’t they target employers who are not paying taxes, who are not obeying safety or labor laws?<sup>91</sup>

The 1200 fired janitors in Minneapolis belonged to SEIU Local 26, the 475 janitors in San Francisco were from Local 87, and 100 janitors working for Seattle Building Maintenance fired in November 2009 belonged to Local 6.<sup>92</sup>

And despite Obama’s contention that sanctions enforcement will punish those employers who exploit immigrants, employers are rewarded for coo-

84. See Brandon, *supra* note 8.

85. *Worksite Enforcement*, U.S. IMMIGR. AND CUSTOMS ENFORCEMENT, <http://www.ice.gov/worksite/index.htm> (last visited Oct. 8, 2010).

86. Steven Greenhouse, *Smithfield’s N.C. Plant Struggles to Replace Illegal Workers*, N.Y. TIMES, Oct. 13, 2007, <http://hamptonroads.com/node/344851>.

87. See Lee Sustar, *Immigrant Labor Under Attack*, SOCIALISTWORKER.ORG (Sept. 11, 2009), <http://socialistworker.org/2009/09/11/immigrant-labor-under-attack>.

88. See Johnson, *supra* note 33.

89. See Aslanian, *supra* note 31.

90. See *supra* notes 27, 31 and accompanying text.

91. Interview with Olga Miranda, *supra* note 42.

92. *Id.*

perating with ICE by being immunized from prosecution.<sup>93</sup> Javier Murillo, president of SEIU Local 26, says, “[t]he promise made during the audit is that if the company cooperates and complies, they won’t be fined. So this kind of enforcement really only hurts workers.”<sup>94</sup>

Workers fired at Overhill Farms accuse the company of hiring replacements, classified as “part timers,” who do not receive the benefits in the union contract.<sup>95</sup> By firing regular workers who were being paid benefits, the company was able to save “a lot of money.”<sup>96</sup>

The history of workplace immigration enforcement is filled with examples of employers who use audits and discrepancies as pretexts to discharge union militants or discourage worker organization. The sixteen-year union drive at the Smithfield pork plant in North Carolina, for instance, saw a raid, and the firing of fifty workers for bad Social Security numbers.<sup>97</sup> ICE’s campaign of audits and firings, which SEIU Local 26’s Murillo calls “the Obama enforcement policy,” targets the same set of employers the Bush raids went after—union companies or those with organizing drives.<sup>98</sup> If anything, ICE seems intent on punishing undocumented workers who earn too much, or become too visible by demanding higher wages and organizing unions.

This growing wave of firings is provoking sharp debate in unions, especially those with large immigrant memberships. Many of the food processing workers at Overhill Farms and ABM’s janitors have been dues-paying members for years. They expect the union to defend them when the company fires them for lack of status. “The union should try to stop people from losing their jobs,” protests Erlinda Silerio, an Overhill Farms worker. “It should try to get the company to hire us back, and pay compensation for the time we’ve been out.”<sup>99</sup> At American Apparel, although there was no union, some workers had actively tried to form one in past years.<sup>100</sup> Jose Covarrubias got a job as a cleaner when the garment union was helping them organize.<sup>101</sup> “I’d worked with the International Ladies’ Garment

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93. Interview with Javier Murillo, President, SEIU Local 26, in S.F., Cal. (May 3, 2010).

94. *Id.*

95. Interview with Lucia Vasquez, in L.A., Cal. (Dec. 10, 2009).

96. *Id.* An Overhill spokesman claimed that the replacements are paid at the same rate, although he acknowledged they lack benefits. Interview with Alex Auerbach, *supra* note 47.

97. Julia Preston, *Immigration Raid Draws Protest From Labor Officials*, N.Y. TIMES, Jan. 26, 2007, <http://www.nytimes.com/2007/01/26/us/26immig.html>.

98. Interview with Javier Murillo, *supra* note 93.

99. Interview with Erlinda Silerio, in L.A., Cal. (June 18, 2009).

100. Interview with Jose Covarrubias, in L.A., Cal. (Dec. 16, 2009).

101. *Id.*



Workers and the Garment Workers Center before,” he recalls, “in sweatshops where we sued the owners when they disappeared without paying us. When I got to American Apparel I joined right away. I debated with the non-union workers, trying to convince them the union would defend us.”<sup>102</sup>

The Obama approach ends up promoting a guest worker program akin to his predecessor’s vision. As we have seen, at Gebbers Farms, there really were no takers among the native work force, and guest workers were brought in.<sup>103</sup> Remarks by President Bush’s DHS Secretary Michael Chertoff in 2008 were revealing: “[T]here’s [an] obvious[] . . . solution to the problem of illegal work, which is you open the front door and you shut the back door . . . .”<sup>104</sup> “Opening the front door” allows employers to recruit workers to come to the United States, giving them visas that tie their ability to stay to their employment. And to force workers to come through this system, “closing the back door” criminalizes migrants who work without “work authorization.”<sup>105</sup> As Arizona Governor, DHS Secretary Janet Napolitano supported this arrangement, signing the state’s own draconian employer sanctions bill, while supporting guest worker programs.<sup>106</sup>

In its final proposal to “shut the back door,” the Bush administration announced a regulation requiring employers to fire any worker whose Social Security number did not match the Social Security Administration’s database.<sup>107</sup> Social Security no-match letters do not currently require employers to fire workers with mismatched numbers, although employers have nevertheless used them to terminate thousands of people.<sup>108</sup> President Bush would have made such terminations mandatory.

Unions, the ACLU, and the National Immigration Law Center got an injunction to stop the rule’s implementation in the summer of 2007, arguing it would harm citizens and legal residents who might be victims of clerical mistakes.<sup>109</sup> In July 2009, the Obama administration decided not to contest

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102. *Id.*

103. *See supra* notes 36-41 and accompanying text.

104. *See* Chertoff, *supra* note 41.

105. *Id.*

106. *See* Matthew Benson, *Napolitano Signs Immigrant Bill Targeting Employers*, ARIZ. REPUBLIC, July 2, 2007.

107. *See* Jacqueline McManus, *No-Match Letters From the Feds*, MONTEREY COUNTY HERALD, July 23, 2010.

108. *Id.*

109. *See* Memorandum from Alan Berkowitz and Carolyn Hall, Bingham McCutchen LLP, Federal Judge Enjoins Implementation of Homeland Security’s “No-Match Letter” Regulation (Oct. 12, 2007), available at <http://www.bingham.com/Media.aspx?MediaID=5959>.

the injunction.<sup>110</sup> But while dropping Bush's regulation, DHS announced it would beef up the use of the E-Verify electronic database, arguing that it's more efficient in targeting the undocumented.<sup>111</sup>

Social Security, however, continues to send no-match letters to employers, and the E-Verify database is compiled, in part, by sifting through Social Security numbers, looking for mismatches.<sup>112</sup> DHS Secretary Janet Napolitano called on employers to screen new hires using E-Verify, and said those who do so will be entitled to put a special logo on their products stating "I E-Verify."<sup>113</sup> And although the final regulations never took effect, DHS says an employer's failure to adequately follow up on a no-match letter can constitute evidence of or contribute to an employer's knowledge of an employee's unauthorized status.<sup>114</sup>

The twelve million undocumented people in the United States, spread in factories, fields, and construction sites throughout the country, encompass lots of workers. Many are aware of their rights and anxious to improve their lives. National union organizing campaigns, like Justice for Janitors and Hotel Workers Rising, depend on the determination and activism of these immigrants, documented and undocumented alike. That reality finally convinced the AFL-CIO in 1999 to reject the federation's former support for employer sanctions and call for repeal.<sup>115</sup> Unions recognized that sanctions enforcement makes it much more difficult for workers to defend their rights, organize unions, and raise wages.<sup>116</sup>

Opposing sanctions, however, puts labor in opposition to the current administration, which it helped elect. Some Washington D.C. lobbying groups have decided to support the administration policy of sanctions enforcement instead. One of them, Reform Immigration for America, says, "any employment verification system should determine employment autho-

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110. See Memorandum from Kate Kalmykov, Klasko, Rulon, Stock & Seltzer, LLP, DHS Does Away With the Social Security No-Match Rule in Favor of E-Verify (July 16, 2009), available at <http://blog.klaskolaw.com/2009/07/16/dhs-does-away-with-the-social-security-no-match-rule-in-favor-of-e-verify/>.

111. *Id.*

112. McManus, *supra* note 107.

113. Press Release, Department of Homeland Security, Secretary Napolitano, ICE Assistant Secretary Morton and USCIS Director Mayorkas Announce New Campaign to Recognize Employers Committed to Maintaining a Legal Workforce (Nov. 19, 2009), available at [http://www.dhs.gov/ynews/releases/pr\\_1258640944663.shtm](http://www.dhs.gov/ynews/releases/pr_1258640944663.shtm).

114. See McManus, *supra* note 107; see also 8 C.F.R. § 274a (2010).

115. David Bacon, *Justice Deported: Tuesday's Immigration Raids on Meatpacking Plants Weren't About Curbing Identity Theft, They Were About Union-Busting*, AM. PROSPECT, Dec. 14, 2006, <http://www.prospect.org/cs/articles?articleId=12297>.

116. *Id.*

rization accurately and efficiently.”<sup>117</sup> Verification of authorization is exactly what happened at American Apparel and ABM, and inevitably leads to firings.<sup>118</sup> The AFL-CIO and the Change to Win labor federation this spring also agreed on a new immigration position that supports a “secure and effective worker authorization mechanism . . . one that determines employment authorization accurately while providing maximum protection for workers.”<sup>119</sup>

Jose Covarrubias,<sup>120</sup> one of the fired American Apparel workers, is left defenseless by such protection, however. Instead, he says, “we need the unity of workers. There are 15 million people in the AFL-CIO. They have a lot of economic and political power. Why don’t they oppose these firings and defend us?” he asks.<sup>121</sup> “We’ve contributed to this movement for 20 years, and we’re not leaving. We’re going to stay and fight for a more just immigration reform.”<sup>122</sup>

#### IV. INSTITUTIONALIZED RACISM

Anyone who is opposed to racial profiling and racially discriminatory enforcement of laws should be concerned about the Obama employer sanctions enforcement strategy. As in the case of the Bush-style ICE raids, the Obama audit-style approach that has resulted in layoffs of thousands of workers has preyed almost exclusively on Latino workers.<sup>123</sup> The racial effects should not be facilely cast aside.

As we have argued elsewhere, racism against Latinos has been institutionalized in the enforcement of U.S. immigration laws.<sup>124</sup> In contemporary terms and within the black-white paradigm in the United States, institutional racism is understood to have resulted from the social caste system that sustained, and was sustained by, slavery and racial segregation. Although the laws that enforced this caste system are no longer in place, one can argue that its basic structure still stands to this day. So today, one

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117. *About Reform Immigration for America*, CAMPAIGN TO REFORM IMMIGR. FOR AM., <http://reformimmigrationforamerica.org/blog/about/> (last visited Oct. 8, 2010).

118. *See supra* notes 1-4, 24-31 and accompanying text.

119. Press Release, Change to Win, Change to Win and AFL-CIO Unveil Unified Immigration Reform Framework (Apr. 14, 2009), *available at* <http://www.changetowin.org/for-the-media/press-releases-and-statements/change-to-win-and-afl-cio-unveil-unified-immigration-reform-framework.html>.

120. Interview with Jose Covarrubias, *supra* note 100.

121. *Id.*

122. *Id.*

123. Interview with Isela Hernandez, *supra* note 46; Interview with Olga Martinez, *supra* note 42; Interview with Renee Saucedo, *supra* note 62.

124. *See generally* Hing, *supra* note 11.

might claim that institutionalized racism deprives a racially identified group, usually defined as generally inferior to the defining dominant group, equal access to education, medical care, law, politics, housing, and the like.<sup>125</sup>

“By understanding the fundamental principles of institutionalized racism we begin to see the application of the concept beyond the conventional black-white paradigm.”<sup>126</sup> Institutional racism embodies discriminating against certain groups of people through the use of biased laws or practices.<sup>127</sup> Structures and social arrangements become accepted, and they operate and are manipulated in such a way as to support or acquiesce in acts of racism. Institutional racism can be subtle and less visible, but is no less destructive to human life and human dignity than individual acts of racism.<sup>128</sup>

The forces of racism have become embodied in U.S. immigration laws.<sup>129</sup> As these laws are enforced, they are accepted as common practice, in spite of their racial effects. We may not like particular laws or enforcement policies because of their harshness or their violations of human dignity or civil rights, but many of us do not sense the inherent racism because we are not cognizant of the dominant racial framework. “Understanding the evolution of U.S. immigration laws and enforcement provides us with a better awareness of [what is happening and] the institutional racism that controls those policies.”<sup>130</sup>

Rightly or wrongly, today the so-called “illegal immigration” problem has become synonymous with the control, or lack thereof, of the southwest border. “As such, the ‘problem’ is synonymous with Mexican migration, and Mexican immigrants have come to be regarded by many anti-

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125. *Id.* at 323.

126. *Id.*

127. See generally Rachel F. Moran, *Whatever Happened to Racism*, 79 ST. JOHN'S L. REV. 899 (2005).

128. *Id.*

129. Kevin Johnson has recognized:

There is no better body of law to illustrate the close nexus between race and class than U.S. immigration law and its enforcement. At bottom, U.S. immigration law historically has operated—and continues to operate—to prevent many poor and working noncitizens of color from migrating to, and harshly treating those living in, the United States. The laws are nothing less than a “magic mirror” into the nation’s collective consciousness about its perceived national identity—an identity that marginalizes poor and working immigrants of color and denies them full membership in American social life.

Kevin R. Johnson, *The Intersection of Race and Class in U.S. Immigration Law and Enforcement*, 72 LAW & CONTEMP. PROBS. 1, 2 (2009).

130. Hing, *supra* note 11, at 324.

immigrant voices as the enemy.”<sup>131</sup> The anti-immigrant activists do not regard themselves as racist; they view themselves as the voice for law and order.<sup>132</sup> “The history of the border, labor recruitment and border enforcement explains how the institutionalization of anti-Mexican immigration policies has created the structure to allow these voices to claim racial and ethnic neutrality and for many Americans accept that claim.”<sup>133</sup>

The current numerical limitation system, while not explicitly racist, operates in a manner that severely restricts immigration from Mexico and the high-visa-demand countries of Asia. The 1965 amendments represented a welcome change, but the new law was no panacea.<sup>134</sup> President John F. Kennedy originally had proposed a large pool of immigration visas to be doled out on a first-come, first-serve system without country quotas.<sup>135</sup> If implemented, the system immediately would have facilitated the entry of large numbers of Asian immigrants, because a first-come, first-serve system would benefit countries with the biggest demand. After JFK’s assassination, his brother, Ted, and President Lyndon Johnson continued to promote the legislation.<sup>136</sup> However, JFK’s egalitarian vision did not survive the political process. Instead, a system that included per country caps of approximately 20,000 visas for each country outside the Western Hemisphere was established in the 1965 immigration act, with only 200 visas available for territories such as Hong Kong.<sup>137</sup> An Eastern Hemisphere numerical limitation of 170,000 visas was established.<sup>138</sup>

Between 1965 and 1976, while the rest of the world enjoyed an expansion of numerical limitations and a definite preference system, Mexico and other countries of the Western Hemisphere were suddenly faced with numerical limitations for the first time. These countries had to share a quota of 120,000. The system was first-come, first-serve system, with Mexico taking a big share of the 120,000, more than 40,000 each year because of its high visa demands.<sup>139</sup> Applicants had to meet strict labor certification requirements, but waivers were available to certain applicants like parents

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131. *Id.* at 326; see also Douglas S. Massey, *Backfire at the Border: Why Enforcement Without Legalization Cannot Stop Illegal Immigration* (Ctr. for Trade Pol’y Stud., Cato Inst., Trade Pol’y Analysis No. 29, 2006).

132. *About FAIR, FED’N FOR AM. IMMIGR. REFORM*, <http://www.fairus.org/site/PageNavigator/about> (last visited Oct. 24, 2010).

133. Hing, *supra* note 11, at 325.

134. Immigration and Nationality Act of 1965 (Hart-Celler Act), Pub. L. No. 89-236, 79 Stat. 911.

135. HING, *DEFINING AMERICA*, *supra* note 49, at 93-98.

136. *Id.*

137. 8 U.S.C. § 1152(c) (2006).

138. 8 U.S.C. § 1151(a) (2006).

139. *Silva v. Bell*, 605 F.2d 978, 980-82 (7th Cir. 1979).

of U.S. citizen children; many Mexicans qualified for that waiver.<sup>140</sup> As one might expect, given the new numerical limitations but large visa demands, by 1976 the Western Hemisphere system resulted in a severe backlog of approximately three years and a waiting list with nearly 300,000 names.<sup>141</sup>

As the framework resulted in growing visa backlogs for Western Hemisphere countries, things got worse in 1977. Congress altered the Western Hemisphere system yet again, imposing the same preference system and a 20,000 visa per country numerical limitation that the rest of the world first confronted in 1965.<sup>142</sup> Thus, Mexico's annual visa usage rate (more than 40,000) was virtually sliced in half overnight, and thousands were left stranded on the old system's waiting list.<sup>143</sup>

Today's selection system simply does not have room for many relatives because of numerical limitations or those who are simply displaced workers. They do not qualify for special visas set aside for professionals and management employees of multi-national corporations or those visas that require substantial funds for investment.<sup>144</sup> Similarly, the system has no slot for anyone whose livelihood is controlled by trade agreements and globalization that cause job loss in low-income regions, as multi-national corporations, the beneficiaries of free trade, relocate to other sites where their production costs are cheaper.

The system results in severe backlogs in certain family immigration categories—particularly for spouses, unmarried sons and daughters of lawful permanent residents, and siblings of U.S. citizens. For some countries, such as the Philippines and Mexico, the waiting periods for certain categories are ten to twenty years!<sup>145</sup> Given the severe backlogs and the continuing allure of the United States (not simply in terms of economic opportunities, but because relatives are already here due to recruitment efforts or political stability), many would-be immigrants are left with little choice. Inevitably they explore other ways of entering the United States without waiting. By doing so, they fall into the jaws of the immigration exclusion laws that provide civil and criminal penalties for circumventing the proper immigration procedures.

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140. *Id.*

141. HING, *DEFINING AMERICA*, *supra* note 49, at 97-100.

142. Act of Oct. 20, 1976, Pub. L. No. 94-571, 90 Stat. 2703.

143. *Silva*, 605 F.2d at 980-82.

144. 8 U.S.C. §§ 1101(a)(15), 1153(b)(5), (c) (2006).

145. See U.S. Dep't of State, *Visa Bulletin*, TRAVEL.STATE.GOV, [http://travel.state.gov/visa/bulletin/bulletin\\_1360.html](http://travel.state.gov/visa/bulletin/bulletin_1360.html) (last visited Oct. 8, 2010).

The basic civil sanction of removal (deportation) applies to individuals who fall into the immigration trap of following their instincts to reunite with families or to seek economic opportunities. The categories of deportable aliens include the following persons: those who are in the United States in violation of the immigration laws (e.g., entry without inspection, false claim to citizenship); those non-immigrants who overstay their visas or work without authorization; those who have helped others enter (smuggled) without inspection; and, those who are parties to sham marriages.<sup>146</sup> Additional civil penalties, including fines, can be imposed for forging or counterfeiting an immigration document, failing to depart pursuant to a removal order, entering without inspection, and entering into a sham marriage.<sup>147</sup>

Congress also has enacted criminal provisions that go far beyond the civil sanction of removal and monetary fines for many of these actions. For example, the following acts are criminalized (subject to imprisonment and/or monetary fines): falsifying registration information about the family; any bringing in (smuggling), transporting, or harboring (within the United States) of an undocumented alien (including family members); entry without inspection or through misrepresentation; the reentry of an alien (without permission) who previously has been removed or denied admission; and, making a false claim of U.S. citizenship.<sup>148</sup>

So given insufficient supply of immigrant visas to satisfy the demands for family reunification, and no supply for simple, displaced working class workers, the action of traveling to the United States by circumventing the current structure can easily result in civil and, at times, criminal liability. The migrants who fall into those groups are from the countries whose family immigration quotas are oversubscribed or whose economy has been damaged by globalization and free trade. Those countries are primarily Asian and Latin.

It does not take long to realize that while immigration laws and enforcement policies have evolved in a manner that continues to prey on Mexicans, Asians, and other Latin migrants, the relationship of those laws and policies with other racialized institutions underscores the structural challenges that immigrants of color face. Consider NAFTA and the World Trade Organization. For example, NAFTA has placed Mexico at such a competitive disadvantage with the United States in the production of corn that Mexico now imports most of its corn from the United States, and Mex-

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146. 8 U.S.C. §§ 1227(a), 1324(c)-(d), 1325(b)-(c), 1326; *see also* JOHNSON ET AL., *supra* note 75, at 314-20.

147. *See* JOHNSON ET AL., *supra* note 75, at 231-33, 407-12.

148. *See* 8 U.S.C. §§ 1306(b)-(c), 1324(a), 1325(b), 1326; 18 U.S.C. §§ 911, 1015.

ican corn farm workers have lost their jobs.<sup>149</sup> The U.S.-embraced World Trade Organization, which advocates global free trade, favors lowest-bid manufacturing nations like China and India, so that manufacturers in a country like Mexico cannot compete and must lay off workers.<sup>150</sup> Is there little wonder that so many Mexican workers look to the United States for jobs, especially when so many of the multi-national corporations and companies that benefit from free trade are headquartered here?

Think also of refugee resettlement programs as an institution. “When Southeast Asian refugees are resettled in public housing or poor neighborhoods, their children find themselves in an environment that can lead to bad behavior or crime.”<sup>151</sup> Refugee parents, like other working class immigrant parents, often work long hours and their children are left unsupervised.<sup>152</sup> And consider U.S. involvement in wars and civil conflict abroad. The institution of war itself produces refugees. U.S. participation in civil conflict in countries like Guatemala and El Salvador produced refugees in the 1980s.<sup>153</sup> But think also of U.S. involvement in places like southeast Asia,<sup>154</sup> and now Afghanistan and Iraq, that also has produced involuntary migrants of color to our shores.<sup>155</sup>

Other racialized institutions that interact with immigration laws and enforcement also come to mind: think of the criminal justice system, poor neighborhoods, and inner city schools. Even coming back full circle to enslavement of people—today’s human trafficking institutions—we begin to realize a sad interaction with immigration laws that require greater attention. These institutions can all lead to situations that spell trouble within the immigration enforcement framework.

Thus, the immigration admission and enforcement regimes may appear neutral on their face, but they have evolved in a racialized manner,<sup>156</sup> and when the immigration framework interacts with other institutions such as the criminal justice system, NAFTA, globalization, poor neighborhoods,

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149. HING, *supra* note 60; Bill Ong Hing, *NAFTA, Globalization, and Mexican Migrants*, 5 J.L. ECON. & POL’Y 87 (2009).

150. HING, *supra* note 60, at 94-95.

151. Hing, *supra* note 11, at 347; *see also* Bill Ong Hing, *Detention to Deportation: Rethinking the Removal of Cambodian Refugees*, 38 U.C. DAVIS. L. REV. 891, 939-49 (2005) [hereinafter Hing, *Detention to Deportation*]; Duc Ta, *We All Make Mistakes: One Day I’ll Be Free Five Years to Life*, 31 AMERASIA J. 113-20 (2005).

152. Hing, *Detention to Deportation*, *supra* note 151, 939-49.

153. Gzesh, *supra* note 52.

154. BILL ONG HING, *MAKING AND REMAKING ASIAN AMERICA THROUGH IMMIGRATION POLICY, 1850-1990*, at 121-38 (1993).

155. *Iraq, Afghan Refugees Start Over in US*, MILITARY.COM (Oct. 1, 2009), <http://www.military.com/NewsContent/0,13319,202225,00.html>.

156. *See supra* notes 123-155 and accompanying text.



and schools in which many immigrants and refugees are situated, you realize that the structure generates racial group disparities as well.<sup>157</sup> NAFTA and globalization provide a major reason why many migrants of color cannot remain in their native countries if they are to provide for their families. The criminal justice system and poverty prey heavily on poor communities of color, leading to deportable offenses if defendants are not U.S. citizens.<sup>158</sup>

The construction of the U.S. immigration policy and enforcement regime has resulted in a framework that victimizes Latin and Asian immigrants.<sup>159</sup> These immigrants of color ended up being the subject of ICE raids during the Bush administration.<sup>160</sup> They are the ones who comprise the immigration visa backlogs. They are the ones that attempt to traverse the hostile southwest border. Today, Latino and Latina workers are the primary victims of the Obama audit strategy.<sup>161</sup>

Their victimization has been institutionalized. Thus, any complaint about immigrants—fiscal or social—can be voiced in non-racial, rule-of-law terms because the institution has masked the racialization with laws and operations that are couched in non-racial terms. Anti-immigrant pundits are shielded from charges of racism by labeling their targets “law breakers” or “unassimilable.” Deportation, detention, and exclusion at the border can be declared race-neutral by the DHS because the system already has been molded by decades of racialized refinement. Officials are simply “enforcing the laws.” The victimization of Latinos by immigration laws and enforcement policies has been normalized, allowing Americans to accept statistics about disproportionality (just as they have with respect to racial inequities in, for example, the educational or criminal justice systems) as “just the way things are.”<sup>162</sup> Like white privilege, institutionalized racism generally goes unrecognized by those who are not negatively impacted.<sup>163</sup>

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157. See generally HING, *supra* note 60.

158. See generally Hing, *Detention to Deportation*, *supra* note 151.

159. See *supra* notes 123-155 and accompanying text.

160. See generally Hing, *supra* note 11.

161. See *supra* notes 95-123 and accompanying text.

162. Anne C. Kubisch, *Why Structural Racism? Why a Structural Racism Caucus?*, POVERTY & RACE RES. ACTION COUNCIL, Nov./Dec. 2006, available at [http://www.prrac.org/full\\_text.php?text\\_id=1094&item\\_id=10187&newsletter\\_id=90&header=Symposium:%20Structural%20Racism](http://www.prrac.org/full_text.php?text_id=1094&item_id=10187&newsletter_id=90&header=Symposium:%20Structural%20Racism).

163. Sylvia Law puts it this way:

[W]hile white people benefit from white privilege, it is systemic and invisible, and not a matter of individual wrong doing or guilt. I am not guilty of racism because a cab picks me up. I do not discriminate when cops don't stop me for no reason, and then let me talk them out of a ticket. I am not a racist because my daddy got a

We should know better. The cards are stacked against Latin migrants—especially Mexicans. The immigration law and enforcement traps are set through a militarized border practice and an anachronistic visa system. It's no surprise that Mexican immigrants are the victims of those traps. They have been set up by the vestiges of a border history of labor recruitment like the Bracero Program, Supreme Court deference to enforcement, and border militarization that laid the groundwork for current laws and enforcement policies.<sup>164</sup> The resulting practice can be implemented through seemingly non-racial provisions and operations that actually result in severe racist outcomes.

### CONCLUSION

Wanting more blood, some on the right complain that the Obama employer sanctions “silent raid” approach is too soft, because although the workers get fired, they do not get deported.<sup>165</sup> They claim that “there is no drama, no trauma, no families being torn apart, no handcuffs.”<sup>166</sup> No trauma? Consider the fired San Francisco janitors who faced an agonizing dilemma. Should they turn themselves in to Homeland Security, who might charge them with providing a bad Social Security number to their employer, hold them for deportation, and even send them to prison, as was done with workers in Iowa and Howard Industries in Mississippi?<sup>167</sup> For workers with families, homes and deep roots in a community, it simply is not possible to just walk away and disappear. As SEIU Local 87 president, Olga Miranda, points out: “I have a lot of members who are single mothers whose children were born here. I have a member whose child has leukemia. What are they supposed to do? Leave their children here and go back to Mexico and wait? And wait for what?”<sup>168</sup>

Union leaders like Miranda see a conflict between the rhetoric used by the President and other Washington D.C. politicians and lobbyists in con-

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good VA mortgage that parleyed into good housing for the rest of our lives. That is not the point. Like it or not, we white people do benefit from white privilege. And most of the time we do not even notice it.

Sylvia A. Law, *White Privilege and Affirmative Action*, 32 AKRON L. REV. 603, 616 (1999).

164. See HING, *DEFINING AMERICA*, *supra* note 49, 99-100, 126-31, 139-44.

165. See Preston, *supra* note 19 (citing Sen. Jeff Sessions) (“This lax approach is particularly troubling . . . at a time when so many American citizens are struggling to find jobs.”).

166. *Id.* (citing Mark Reed, president of Border Management Strategies, a national consulting firm based in Tucson that advises companies across the country on immigration law).

167. See, e.g., Lynda Waddington, *Raids on Swift, Agriprocessors Highlighted in Immigration Policy Critique*, IOWA INDEP., June 22, 2009, <http://iowaindependent.com/16282/raids-on-agriprocessors-swift-highlighted-in-new-immigration-policy-critique>.

168. Interview with Olga Miranda, *supra* note 42.

demning the Arizona law, and the immigration proposals they make in Congress. “There’s a huge contradiction here,” she says.<sup>169</sup> “You can’t tell one state that what they’re doing is criminalizing people, and at the same time go after employers paying more than a living wage and the workers who have fought for that wage.”<sup>170</sup>

Renee Saucedo, attorney for La Raza Centro Legal and former director of the San Francisco Day Labor Program, is even more critical. “Those bills in Congress, which are presented as ones that will help some people get legal status, will actually make things much worse. We’ll see many more firings like the janitors here, and more punishments for people who are just working and trying to support their families.”<sup>171</sup>

Nevertheless, whether or not they are motivated by economic gain or anti-union animus, the current firings highlight larger questions of immigration enforcement policy. Nativo López, director of the Hermandad Mexicana Latinoamericana, a grassroots organizer who organized protests against the firings at Overhill Farms and American Apparel, puts it this way:

These workers have not only done nothing wrong, they’ve spent years making the company rich. No one ever called company profits illegal, or says they should give them back to the workers. So why are the workers called illegal? Any immigration policy that says these workers have no right to work and feed their families is wrong and needs to be changed.<sup>172</sup>

Whatever President Obama or Secretary Napolitano may claim about punishing exploitative employers, employers who cooperate with the audit initiative seem to evade sanctions.<sup>173</sup> ICE threatened to fine Dov Charney, American Apparel’s owner, but then withdrew the threat.<sup>174</sup> As a result, it’s the fired workers who are punished, as the employers escape fines in exchange for cooperation.<sup>175</sup>

And the justification for hurting workers is also implicit in the policy announced on the White House website, “remove incentives to enter the country illegally.”<sup>176</sup> This was the original justification for employer sanctions in 1986—if migrants cannot work, they will not come. Of course,

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169. *Id.*

170. *Id.*

171. Interview of Renee Saucedo, *supra* note 62.

172. Interview with Nativo López, Dir., Hermandad Mexicana Latinoamericana, in L.A., Cal. (June 18, 2009).

173. *See supra* note 93 and accompanying text.

174. *See* Interview with Peter Schey, in L.A., Cal. (Dec. 16, 2009).

175. *See* Interview with Javier Murillo, *supra* note 93.

176. *See Immigration, supra* note 7 and accompanying text.

people did come, because at the same time Congress passed IRCA,<sup>177</sup> it also began to debate NAFTA. That virtually guaranteed future migration. Since NAFTA went into effect in 1994, millions of Mexicans have been driven by poverty across the border.<sup>178</sup> The real questions we need to ask are what uproots people in Mexico, and why U.S. employers rely so heavily on low-wage workers.

Arguably, no one in the Obama or Bush administrations, or the Clinton administration before them, wants to stop migration to the United States or imagines that this could be done without catastrophic consequences. The very industries they target for enforcement are so dependent on the labor of migrants they would collapse without it.<sup>179</sup> Instead, immigration policy and enforcement consigns those migrants to an “illegal” status, and undermines the price of their labor. Enforcement is a means for managing the flow of migrants and making their labor available to employers at a price they want to pay.

In 1998, the Clinton administration mounted the largest sanctions enforcement action to date, in which agents sifted through the names of 24,310 workers in forty Nebraska meatpacking plants.<sup>180</sup> They then sent letters to 4762 workers, saying their documents were bad, and over 3500 were forced from their jobs.<sup>181</sup> Mark Reed, who directed “Operation Vanguard,” claimed it was really intended to pressure Congress and employer groups to support guest worker legislation.<sup>182</sup> “We depend on foreign labor,” he declared. “If we don’t have illegal immigration anymore, we’ll have the political support for guest workers.”<sup>183</sup>

Increased ICE raids, stepped up border enforcement, and employer sanctions have not reduced undocumented immigration to the United States.<sup>184</sup> The failure of these harsh efforts must teach us something. The enforcement-only approach has resulted in human tragedy, increased poverty, and family separation, while undocumented workers continue to flow into the

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177. Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (codified as amended at 8 U.S.C. § 1324a et seq.).

178. See generally HING, *ETHICAL BORDERS*, *supra* note 60.

179. Ricardo Sanchez, *Bush’s Immigration Proposal Keeps Industry in Cheap Labor*, SEATTLEPI.COM (Jan. 30, 2004), [http://www.seattlepi.com/opinion/158609\\_ricardo30.html](http://www.seattlepi.com/opinion/158609_ricardo30.html).

180. David Bacon, *The Political Economy of Immigration: Reform the Corporate Campaign for a U.S. Guest Worker Program*, MULTINATIONAL MONITOR (Nov. 2004), available at <http://multinationalmonitor.org/mm2004/112004/bacon.html>.

181. *Id.*

182. *Id.*

183. *Id.*

184. See HING, *supra* note 60, at 116-32.

United States.<sup>185</sup> This is a challenge that requires us to understand why workers come here and to address the challenge in a more sensible manner.

The inhumanity of the situation is apparent to many. As Tom Barry puts it,

we are wasting billions of dollars at home in what has become a war on immigrants. The collateral costs of this anti-immigrant crackdown—including labor shortages, families torn apart by deportations, overcrowded jails and detentions centers, deaths on the border, courts clogged with immigration cases, and divided communities—are also immense.<sup>186</sup>

And the *New York Times* mourns that after we get through this period of the “Great Immigration Panic,”<sup>187</sup>

someday, the country will recognize the true cost of its war on illegal immigration. We don’t mean dollars, though those are being squandered by the billions. The true cost is to the national identity: the sense of who we are and what we value. It will hit us once the enforcement fever breaks, when we look at what has been done and no longer recognize the country that did it.<sup>188</sup>

It’s time to come to our senses and realize that the enforcement plus guest worker approach has failed. The rise of employer sanctions enforcement causes hardship for our fellow human travelers who only seek an opportunity to work to feed their families at an honest day’s wage. While employer sanctions enforcement has risen, we pray for its fall. Undocumented migration is the result of factors and phenomena way beyond the control of intimidation, guns, and militarization. The time to get smart has arrived; we must begin considering more creative approaches by understanding the forces at work.<sup>189</sup>

Our current policies produce displaced people in Mexico, criminalize them once they arrive in the United States, and view them simply as a source of cheap labor for employers. We need to see migrants as human beings first and then formulate a policy to protect their human and labor

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185. See *id.*; see also HING, *DEFINING AMERICA*, *supra* note 49, at 184-205.

186. See Tom Barry, *Paying the Price of the Immigration Crackdown*, AMÉRICA LATINA EN MOVIMIENTO, May 23, 2008, <http://alainet.org/active/24228&lang=es>.

187. Editorial, *Great Immigration Panic*, N.Y. TIMES, June 3, 2008, <http://www.nytimes.com/2008/06/03/opinion/03tue1.html>.

188. *Id.*

189. This would include considering open labor movement between NAFTA countries as is the case among European Union countries, revising trade policies so that Mexico can compete with United States and Canadian companies, creating immigrant enterprise zones for certain parts of the United States, broadening the permanent visa system to allow more needed workers from Mexico to lawfully immigrate, and investing heavily in Mexico’s infrastructure so that more jobs are created in Mexico. See HING, *supra* note 60, at 133-59.

rights, along with those of other working people in this country. Repealing employer sanctions is critical in moving us in that direction.

