

## THE BORDER SECURITY AND IMMIGRATION IMPROVEMENT ACT: A MODERN SOLUTION TO A HISTORIC PROBLEM?

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### INTRODUCTION

The United States is essentially a country of immigrants; however, current United States immigration policy fails to adequately safeguard the rights of certain immigrant groups. Our nation's views toward immigration have changed considerably over the decades.<sup>1</sup> Today, there is a marked focus both in the political arena and in general public discourse on the problems caused by illegal immigration from Central and South America, and in particular from Mexico, to the United States.<sup>2</sup> The United States government estimates that over 200,000

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<sup>1</sup> National attitudes and corresponding public policy are some of the many factors contributing to the migration flow in and out of the country. IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY, 212–14 (Thomas Alexander Aleinikoff et al. eds., 5th ed. 2003) [hereinafter IMMIGRATION AND CITIZENSHIP]. The elements influencing this flow are often referred to as “push-pull” factors and include economic, social, and political problems in the country of origin and comparative advantage in the destination country. *Id.* at 214–15.

<sup>2</sup> Last summer, Congress introduced various bills and joint resolutions dealing specifically with or relating to immigration issues. *See, e.g.*, 149 CONG. REC. E1600 (daily ed. July 25, 2003) (statement of Rep. Kolbe) (discussing his recent introduction of the Border Hospital Survival and Illegal Immigrant Care Act, which aims to address problems arising from the Immigration and Naturalization Service's instruction to the Border Patrol not to apprehend injured illegal immigrants in order to escape financial responsibility); 149 CONG. REC. S9960 (daily ed. July 25, 2003) (statement of Sen. Cantwell) (proposing the International Marriage Broker Act of 2003, legislation aiming to protect “foreign women who meet their American husbands through . . . Internet sites and catalogs”). Recently, the problems associated with illegal immigration and possible reform measures have also been brought to the attention of the general public. *See, e.g.*, Steven Greenhouse, *Congress Looks to Grant Legal Status to Immigrants*, N.Y. TIMES, Oct. 13, 2003, at A9; Tim Padgett, *People Smugglers Inc.*, TIME, Aug. 18, 2003, at 42.

Mexican immigrants came to the United States in 2001 alone,<sup>3</sup> and as of 1996, half of the undocumented population, or more than 2.7 million immigrants, were from Mexico.<sup>4</sup> According to the 2000 census, Mexicans make up 30% of all foreign-born people in the United States,<sup>5</sup> qualifying as the largest group of immigrants, both legal and illegal, in this country.

In July 2003, Arizona Representatives Jim Kolbe and Jeff Flake, and Arizona Senator John McCain, introduced into Congress the Border Security and Immigration Improvement Act.<sup>6</sup> The bill's main proposal is to establish two new categories of nonimmigrant work visas.<sup>7</sup> It also provides for admission of temporary H-4A workers,<sup>8</sup> adjustment of alien status to that of H-4B nonimmigrant status in certain circumstances,<sup>9</sup> and allocation of additional funds to the United States Employment Service.<sup>10</sup> Most recently, President George W. Bush unveiled a similar immigration reform.<sup>11</sup>

This Note will analyze the likely effectiveness of the proposed legislation and its possible consequences on the

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<sup>3</sup> See OFFICE OF POLICY & PLANNING, U.S. DEP'T OF JUSTICE, ANNUAL REPORT: LEGAL IMMIGRATION, FISCAL YEAR 2001, at 2 (2002).

<sup>4</sup> See IMMIGRATION & NATURALIZATION SERV., U.S. DEP'T OF JUSTICE, 1998 STATISTICAL YEARBOOK OF THE IMMIGRATION AND NATURALIZATION SERV. 240 tbl.1 (2000).

<sup>5</sup> Elizabeth Grieco, *The Foreign Born from Mexico in the United States*, Migration Policy Institute, at <http://www.migrationinformation.org/feature/display.cfm?ID=163> (Oct. 1, 2003).

<sup>6</sup> S. 1461, H.R. 2899, 108th Cong. § 1 (2003).

<sup>7</sup> H.R. 2899. Section 2 of the Act proposes to amend section 101(a)(15)(H) of the Immigration and Nationality Act, 8 U.S.C. 1101(a)(15)(H):

(1) by striking "or (iii)" and inserting "(iii)"; and

(2) by striking "and the alien spouse" and inserting the following:

"or (iv)(a) subject to section 218A, who is coming to the United States to fill a job opportunity for temporary full-time employment at a place in the United States; or (b) whose status is adjusted under section 251 and who (except in the case of a spouse or child provided derivative status) is employed in the United States; and, except as provided in sections 218A and 251, the alien spouse".

*Id.* The proposed legislation changes previous visa programs by "allow[ing] the market to dictate the need for workers instead of setting limits on available visas." 149 CONG. REC. S9969 (daily ed. July 25, 2003) (statement of Sen. McCain). The second visa provision permits undocumented immigrants to seek legal status, which would authorize them to remain in the United States and work for three years. *Id.*

<sup>8</sup> H.R. 2899 § 3.

<sup>9</sup> *Id.* § 4.

<sup>10</sup> *Id.* § 5.

<sup>11</sup> Elisabeth Bumiller, *Bush Would Give Illegal Workers Broad New Rights*, N.Y. TIMES, Jan. 7, 2004, at A1.

migration relationship between the United States and Mexico. Part I of this Note will briefly examine the history of United States immigration policy with respect to Mexican migration. Part II will compare some of the key provisions of the Border Security and Immigration Improvement Act with similar provisions of past legislation, focusing on the relative successes and failures of these previous attempts at immigration regulation and the lessons to be learned from them. It will also look briefly at Canadian and European migration legislation for comparative purposes and for novel approaches to immigration policy. Part III of this Note will conclude with possible alternative solutions to the problems facing immigration policymakers today.

I. BRIEF HISTORY AND OVERVIEW OF THE EFFECTS OF UNITED STATES IMMIGRATION POLICY

A. *Predominant Pieces of Legislation Influencing Migration from Mexico to the United States*

The late 1800s and early 1900s marked a period of relatively unrestricted immigration from Mexico to the United States.<sup>12</sup> As the supply of Chinese workers decreased with the enactment of the Chinese Exclusion Act of 1882,<sup>13</sup> United States employers in the southwest began to recruit large numbers of Mexican laborers to lay rails and harvest crops.<sup>14</sup> The legislation passed during this period reflects a preference for Mexican immigrants over those from other parts of the world.<sup>15</sup>

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<sup>12</sup> See JoAnne D. Spotts, *U.S. Immigration Policy on the Southwest Border from Reagan Through Clinton, 1981-2001*, 16 GEO. IMMIGR. L.J. 601, 603-04 (2002) (discussing how the United States employed an "open border policy" encouraging immigration from 1880-1930); see also 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, 229-30 (1995).

<sup>13</sup> *Chae Chan Ping v. United States (The Chinese Exclusion Case)*, 130 U.S. 581, 589, 599-600 (1889). The Chinese Exclusion Act was the first piece of legislation to truly regulate immigration. ROGER DANIELS & OTIS L. GRAHAM, *DEBATING AMERICAN IMMIGRATION, 1882-PRESENT* 8 (2001). The Act provided for the exclusion of Chinese workers who had not been in the United States prior to the passage of the legislation. *Id.*

<sup>14</sup> Spotts, *supra* note 12, at 603.

<sup>15</sup> See, e.g., Immigration Act of 1924, ch. 190, 43 Stat. 153, *repealed by* Immigration and Nationality Act of 1965, Pub. L. No. 89-236, 79 Stat. 911 (codified as amended in scattered sections of 8 U.S.C.); National Origins Act, ch. 8, 42 Stat. 5

While the Chinese Exclusion Act granted Mexican migrants an overarching degree of protection, United States policies regarding Mexican immigration shifted in response to the changing economic situation in the country.<sup>16</sup> The Border Patrol was created in 1924 to control illegal immigration into the country.<sup>17</sup> The 1924 Act also established a visa requirement for all people wanting to immigrate to the United States;<sup>18</sup> however, Mexicans largely ignored this requirement and crossed the border without the necessary paperwork.<sup>19</sup>

The deportations of the 1920s marked a high point in restrictive United States immigration policy, but the institution of the Bracero Program two decades later signified a shift toward more liberal attitudes regarding immigration from Mexico.<sup>20</sup> In response to the labor shortages caused by World War II, Congress entered into a series of bilateral agreements with the Mexican government<sup>21</sup> that allowed for the importation of

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(1921), *repealed by* Immigration and Nationality Act of 1965, Pub. L. No. 89-236, 79 Stat. 911. Mexicans were exempt from both Acts by officially classifying them as white in order to avoid the prohibition of entry by people with more than fifty percent Indian blood. *See* Immigration Act of 1917, ch. 29, 39 Stat. 874, *repealed by* Immigration and Nationality Act of 1952, 66 Stat. 163 (codified as amended in scattered sections of 8 U.S.C.) (exempting certain Mexican immigrants from taking the literacy test required of other immigrants).

<sup>16</sup> *See, e.g.*, Victoria Lehrfeld, *Patterns of Migration: The Revolving Door from Western Mexico to California and Back Again*, 8 LA RAZA L.J. 208, 216 (1995) (discussing the deportation of thousands of Mexican immigrants due to a 1921 recession).

<sup>17</sup> Spotts, *supra* note 12, at 604.

<sup>18</sup> DANIELS & GRAHAM, *supra* note 13, at 22. The Act established a "consular control system," which required that all prospective migrants acquire a visa from a U.S. consulate abroad. *Id.*

<sup>19</sup> Spotts, *supra* note 12, at 604; *see also* DANIELS & GRAHAM, *supra* note 13, at 22 (discussing the obstacle posed to Mexicans by the visa requirement and various other fees imposed by the Act).

<sup>20</sup> *See* DEBRA L. DELAET, U.S. IMMIGRATION POLICY IN AN AGE OF RIGHTS 34 (2000); *see also* DANIELS & GRAHAM, *supra* note 13, at 32 (reviewing the effects of the program on Mexican and other Western Hemisphere immigrants in the United States during the period from 1943 to 1964). A bracero is a seasonal Mexican laborer who worked in the United States on farms and railroads to ease labor shortages in the World War II era. *See* OXFORD SPANISH DICTIONARY 87 (New Int'l ed. 1996).

<sup>21</sup> Farm Labor Supply Appropriations Act of 1944, Pub. L. No. 78-229, 58 Stat. 11 (1944); Farm Labor Act of 1943, Pub. L. No. 78-45, 57 Stat. 70 (repealed 1964). These laws waived the head tax and literacy test required of other workers. They also did away with the contract labor provisions but required that the temporary workers be registered in accordance with the Alien Registration Act. *See generally* Alien Registration Act, ch. 439, 54 Stat. 670 (1940) (codified as amended in

temporary laborers into the United States. These agreements resulted in thousands of Mexican migrants working in this country.<sup>22</sup> The Bracero Program reached its height in 1959, when an unprecedented 450,000 Mexican migrant workers entered the United States.<sup>23</sup>

Unlike the late nineteenth century, however, the Bracero period was not an era of totally unrestricted migration. Congress passed the “Wetback Act” in 1952,<sup>24</sup> which aimed to discourage illegal Mexican immigration by criminally sanctioning anyone who smuggled or harbored aliens who had not been inspected and legally admitted.<sup>25</sup> In 1954 alone, the United States deported 300,000 Mexicans under this Act.<sup>26</sup> The Bracero Program came to an end in 1964, due in part to widespread abuses by employers and increased opposition to the program by labor unions and civil rights advocacy groups.<sup>27</sup>

Contemporaneous with the passage of the Wetback Act, Congress enacted the McCarran-Walter Act, more commonly known as the Immigration and Nationality Act (“INA”).<sup>28</sup> While the INA continued the national origins system, it was innovative in its removal of racial bars to immigration and naturalization.<sup>29</sup> This Act spurred years of debate regarding immigration policy, which culminated in a profound revision of United States immigration law in 1965.<sup>30</sup> The INA established the fundamentals of the current visa system, and its subsequent amendments gradually created the temporary worker visa

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scattered sections of 18 U.S.C.) (amending previous law with respect to the immigration of aliens and requiring fingerprints and the registration of aliens).

<sup>22</sup> See Spotts, *supra* note 12, at 605–06 for a discussion of the factors inducing the passage of these laws and the program’s impact on the immigrant population.

<sup>23</sup> Spotts, *supra* note 12, at 605.

<sup>24</sup> Act of June 27, 1952, ch. 8, 66 Stat. 163, 228–29 (1952) (codified at 8 U.S.C. § 1324(a) (2000)).

<sup>25</sup> See Smith, *supra* note 12, at 245–46 (1995). The law also sought to decrease illegal immigration by allowing Border Patrol agents to pursue illegal aliens on private lands within 25 miles of the Mexico-United States border. Spotts, *supra* note 12, at 605.

<sup>26</sup> Spotts, *supra* note 12, at 605.

<sup>27</sup> *Id.*; see also HELENE HAYES, U.S. IMMIGRATION POLICY AND THE UNDOCUMENTED 29 (2001) (examining various legislated protections and benefits that were largely ignored by U.S. employers in their treatment of braceros).

<sup>28</sup> Pub. L. No. 82-414, 66 Stat. 163 (1952) (codified in various sections of 8 U.S.C.).

<sup>29</sup> DANIELS & GRAHAM, *supra* note 13, at 36.

<sup>30</sup> *Id.*

programs in effect today. The INA currently regulates the admission of nonimmigrant workers but will be amended and modified if the Border Security and Immigration Improvement Act is signed into law.

The Hart-Cellar Immigration Act of 1965<sup>31</sup> officially terminated the system established by the National Origins Acts of 1921 and 1924 and thereby reconfigured United States immigration policy as set forth by the INA.<sup>32</sup> While the 1965 Act purported to end the practice of regulating immigration based on race and discrimination by shifting the focus from economic concerns to “family reunification,”<sup>33</sup> the legislation actually produced a negative impact on immigration from Central and South America.<sup>34</sup> It effectively ended the “Good Neighbor” policy of past United States immigration legislation by limiting western hemisphere immigration for the first time in U.S. history.<sup>35</sup> As a result, an unforeseen volume of Mexican and Caribbean immigrants to the United States caused huge delays in the visa application process; this backlog delayed family reunification, which may have actually “spurred illegal immigration” from the aforementioned regions.<sup>36</sup>

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<sup>31</sup> Pub. L. No. 89-236, 79 Stat. 911 (1965) (codified in various sections of 8 U.S.C.).

<sup>32</sup> DANIELS & GRAHAM, *supra* note 13, at 148.

<sup>33</sup> *Id.* at 148–49.

<sup>34</sup> *See, e.g.*, HAYES, *supra* note 27, at 16–17 (noting that the 1965 Act and its subsequent amendments placed ceilings on immigration from the western hemisphere and that proponents of this ceiling used thinly veiled discriminatory language when discussing Latin American immigrants). *See generally* DANIELS & GRAHAM, *supra* note 13, at 144–51 (describing the historical basis for the 1965 Act and its impact on various immigrant populations); DELAET, *supra* note 20, at 40–41 (exploring the consequences of the 1965 Act and its amendments as being possibly discriminatory despite its official termination of discrimination-based immigration regulation).

<sup>35</sup> *See* Smith, *supra* note 12, at 234. The Johnson Administration was not in favor of this limitation, prompting one researcher to comment that:

It can only be inferred that the . . . [limitations] . . . were to reassure those concerned at the possibility of large immigration from Latin America or fearful of ill effects on the labor market or to provide a *quid pro quo* to influential members of Congress or interest groups in return for their support of the bill.

*Id.* (emphasis added) (quoting EDWARD P. HUTCHINSON, LEGISLATIVE HISTORY OF AMERICAN IMMIGRATION POLICY 1798-1965, at 378 (1981)).

<sup>36</sup> HAYES, *supra* note 27, at 19 (quoting THE UNAVOIDABLE ISSUE 15 (Demetrios G. Papademetriou & Mark J. Miller eds., 1983)).

In response to this increase in illegal immigration and a corresponding national perception that the United States had lost control of its borders, Congress passed the Immigration Reform and Control Act in November of 1986.<sup>37</sup> This legislation constituted a complete reconfiguration of the immigration policy created by the 1965 Act. Its main purpose 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.<sup>38</sup> Eighty-seven percent of the 1.7 million people who applied for general amnesty under this legalization provision were Mexican.<sup>39</sup>

The 1990s produced important legislation affecting the United States—Mexico migration relationship. The Immigration Act of November 1990 once again revised United States immigration law. This legislation established a higher, more flexible annual ceiling on immigration levels and instituted a permanent diversity program.<sup>40</sup> The legislature designed this program 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.<sup>41</sup> Congress later amended the Act to provide specifically that no person from a foreign state “contiguous to the United States” was eligible for a diversity visa,<sup>42</sup> thereby excluding Mexicans from the program altogether.

While not immigration legislation per se, Congress viewed the North American Free Trade Agreement (“NAFTA”),<sup>43</sup> signed in 1992, as a possible solution to illegal Mexican immigration.<sup>44</sup> Part of the rationale behind the agreement was that it would serve the United States’ interest in reducing illegal immigration

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<sup>37</sup> Pub. L. No. 99-603, 100 Stat. 3359 (1986) (codified in scattered sections of 8 U.S.C.).

<sup>38</sup> *Id.*

<sup>39</sup> UNDOCUMENTED MIGRATION TO THE UNITED STATES: IRCA AND THE EXPERIENCE OF THE 1980’S 184 (Frank D. Bean et al. eds., 1990) [hereinafter UNDOCUMENTED MIGRATION TO THE UNITED STATES].

<sup>40</sup> Pub. L. No. 101-649, 104 Stat. 4978 (1990) (codified in scattered sections of 8 U.S.C.).

<sup>41</sup> DANIELS & GRAHAM, *supra* note 13, at 54.

<sup>42</sup> *Id.*

<sup>43</sup> Pub. L. No. 103-182, 107 Stat. 2057 (1993).

<sup>44</sup> DELAET, *supra* note 20, at 2.

from Mexico by stimulating economic development in Mexico.<sup>45</sup> While NAFTA did indeed produce positive effects on the Mexican economy, it generally failed to resolve the severe economic problems of the border region, and as evidenced by the legislative action taken in 1996, it also failed to decrease the rate of illegal migration from that area.<sup>46</sup>

Congress enacted the Illegal Immigration Reform and Immigrant Responsibility Act on September 30, 1996.<sup>47</sup> The Act attempted to quell the rising tide of illegal migration across the southwest border by increasing Border Patrol funding and personnel, imposing new sanctions for smuggling and hiring illegal aliens, revising the removal and deportation procedures, and restricting the benefits previously available to aliens.<sup>48</sup> The reforms resulted in record numbers of deportations and the removal of thousands of Mexican nationals;<sup>49</sup> however, they did little to prevent illegal aliens from crossing the border.<sup>50</sup> At the end of President Clinton's second term in 2000, it was evident that the Act had had little effect on illegal immigration from Mexico and Latin America.<sup>51</sup>

The events of September 11, 2001 incited the next wave of major changes to immigration policy and enforcement.<sup>52</sup> The creation of the Department of Homeland Security altered the entire structure of governmental agencies.<sup>53</sup> What was previously Immigration and Naturalization Services in the Department of Justice became the Bureau of Citizenship and

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<sup>45</sup> *Id.*

<sup>46</sup> Gustavo Vega Caovas, *Convergence: Future Integration Between Mexico and the United States*, 10 U.S.-MEX. L.J. 17, 20 (2002); see also Roberto L. Martinez, *NAFTA's Effect on Human Rights at the Border*, 27 U.C. DAVIS L. REV. 979, 979-80 (1994) (commenting on NAFTA's failure to address human rights issues and its contribution to environmental destruction in the border region).

<sup>47</sup> Pub. L. No. 104-208, 110 Stat. 3009 (1996) (codified in scattered sections of 8 and 18 U.S.C.).

<sup>48</sup> *Id.*

<sup>49</sup> Kevin R. Johnson, *September 11 and Mexican Immigrants: Collateral Damage Comes Home*, 52 DEPAUL L. REV. 849, 851 (2003).

<sup>50</sup> Spotts, *supra* note 12, at 602 n.6.

<sup>51</sup> *Id.* at 617.

<sup>52</sup> See generally Doris Meissner, *Immigration in the Post 9-11 Era*, 40 BRANDEIS L.J. 851, 858 (2002) (discussing immigration policy as viewed through a "security lens" as a result of the terrorist attacks and suggesting that such policy must include heightened focus on visa programs as well as border control).

<sup>53</sup> Homeland Security Act of 2002, H.R. 5005, 107th Cong., 116 Stat. 2135 (2002) (enacted).

Immigration Service within the Department of Homeland Security,<sup>54</sup> recently renamed the United States Citizenship and Immigration Service.<sup>55</sup> Congress also enacted anti-terrorism legislation, which generally broadened the investigative powers of the Attorney General and the Department of Justice regarding intelligence activities, and more specifically gave them increased discretion to detain immigrants suspected of engaging in terrorist activities.<sup>56</sup>

For current and future Mexican migrants to the United States, perhaps the most visible effect of this intense shift in focus was the breakdown in amnesty talks between President George W. Bush and Mexican President Vicente Fox.<sup>57</sup> Even though President Fox favored a plan to increase labor migration and regularize undocumented Mexicans already in the United States and President Bush supported a major revision of current guest worker programs, a bilateral agreement seemed likely.<sup>58</sup> At a meeting in September of 2001, President Fox stated:

[W]e want to continue making progress towards the establishment of an agreement on migration which will be of mutual benefit to us, and which will recognize above all the value of migrants as human beings and as workers whose hard work is a daily contribution to the prosperity of this great nation.

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For this reason, we must, and we can, reach an agreement on migration before the end of this very year, which will allow us, before the end of our respective terms, to make sure that there are no Mexicans who have not entered this country legally in the United States, and that those . . . who have come into the country do so with the proper documents.<sup>59</sup>

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<sup>54</sup> Barbara Jordan, Immigration Reform and Accountability Act of 2002, H.R. 3231, 107th Cong. § 4 (2002).

<sup>55</sup> *Welcome to the USCIS*, at <http://uscis.gov/graphics/welcome.htm> (last modified Nov. 6, 2003).

<sup>56</sup> Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA Patriot) Act of 2001, Pub. L. No. 107-56, §§ 411–13, 115 Stat. 272 (2001) [hereinafter USA PATRIOT Act].

<sup>57</sup> Johnson, *supra* note 49, at 866–67.

<sup>58</sup> *Id.*

<sup>59</sup> Press Release, President George W. Bush & President Vicente Fox, Remarks by President Bush and President Vicente Fox of Mexico at Arrival Ceremony (Sept. 5, 2001), at <http://www.whitehouse.gov/news/releases/2001/09/20010905-2.html>.

At the end of their meeting, the two leaders issued a joint statement renewing their commitment to finding new and realistic approaches to ensuring safe, legal, and dignified migration.<sup>60</sup> They also expressed a willingness to continue the discussion in order to reach satisfactory results regarding undocumented Mexican workers in the United States.<sup>61</sup>

Immediately after the terrorist attacks, however, the talks ended, and the focus shifted from relaxing border controls to heightening them. The tabling of the amnesty plan combined with the sharply increased emphasis on using immigration law to promote homeland security has produced both direct and indirect consequences on immigration to the United States.<sup>62</sup> The actual effects of post-9/11 legislation on the Mexican immigrant community remain to be seen. However, since Mexicans currently constitute the largest group of documented and undocumented immigrants in this country, it is inevitable that they will be the group most affected by immigration reform, regardless of whether the proposals are aimed specifically at the Mexican community.

*B. Problems Faced by the United States as a Result of Illegal Immigration from Mexico*

The inability of most recent legislation to effectively control illegal immigration from Mexico has resulted in a myriad of difficulties for immigration enforcement officials and policymakers alike. Despite various increases in Border Patrol funding and personnel, or perhaps as a consequence of such increases, migrant deaths in and around the border region have

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<sup>60</sup> Michael J. Mayerle, *Proposed Guest Worker Statutes: An Unsatisfactory Answer to a Difficult, if not Impossible, Question*, 6 J. SMALL & EMERGING BUS. L. 559, 561 (2002).

<sup>61</sup> *Id.*

<sup>62</sup> See generally Johnson, *supra* note 49 (exploring the impact of the USA PATRIOT Act on the Mexican immigrant population in the United States and its effects on migration from Mexico to the United States); Hiroshi Motomura, *Immigration and We The People After September 11*, 66 ALB. L. REV. 413 (2003) (discussing immigration, citizenship, and diversity issues in the light of the government's response to the terrorist attacks of September 11, 2001); Marie A. Taylor, *Immigration Enforcement Post-September 11: Safeguarding the Civil Rights of Middle Eastern-American and Immigrant Communities*, 17 GEO. IMMIGR. L.J. 63 (2002) (examining the correlation between race, ethnicity, religion, and national origin and several immigration policies set forth after September 11).

escalated dramatically in recent years.<sup>63</sup> As Border Patrol employees increase and equipment improves, migrants are forced to attempt border crossings in increasingly remote areas with harsh conditions.<sup>64</sup> In the last fiscal year, an estimated 320 people died crossing the United States-Mexico border.<sup>65</sup> Because of the heightened risk, many would-be migrants enlist the help of smugglers,<sup>66</sup> an issue that the federal circuit courts have continuously been confronted with in recent years.<sup>67</sup> International human rights groups have charged the United States government with implementing immigration enforcement programs that put migrants in grave danger, but these charges seem to have little effect on United States policy.<sup>68</sup>

Another growing problem is the practice of racial profiling in immigration enforcement. The Fourth Amendment to the United States Constitution states:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.<sup>69</sup>

It seems, however, that this provision has not been universally applied, as many “Mexican-looking” people have undergone searches and seizures without a warrant.<sup>70</sup> While the

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<sup>63</sup> 149 CONG. REC. S9970 (daily ed. July 25, 2003) (statement of Sen. McCain).

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*; see also The National Immigration Forum, *Mexico-U.S. Migration: A Shared Responsibility* (Feb. 9, 2003), at <http://www.immigrationforum.org/pubs/articles/mexicous2001htm>.

<sup>67</sup> See *United States v. Lopez-Garcia*, 316 F.3d 967, 968 (9th Cir. 2003) (examining a sentence imposed for transporting illegal aliens in violation of 8 U.S.C. § 1324(a)(1)(A)(ii)); *United States v. Sierra Velasquez*, 310 F.3d 1217, 1220 (9th Cir. 2002) (reviewing the elements of the crime of hostage-taking within the people-smuggling context); *Lopez de Jesus v. INS*, 312 F.3d 155, 158–59 (5th Cir. 2002) (addressing the constitutionality of the application of a statute rendering the petitioner inadmissible as a result of helping his spouse to enter the United States unlawfully); *United States v. Colon*, 220 F.3d 48, 51 (2d Cir. 2000) (discussing sentencing adjustments for minimal participation in alien smuggling in violation of 18 U.S.C. § 371 and 8 U.S.C. § 1324(a)(1)(A)(i)–(iii)).

<sup>68</sup> Bill Ong Hing, *The Dark Side of Operation Gatekeeper*, 7 U.C. DAVIS J. INT’L L. & POL’Y 121, 124 (2001).

<sup>69</sup> U.S. CONST. amend. IV.

<sup>70</sup> Alfredo Mirande, *Is There a “Mexican Exception” to the Fourth Amendment?*, 55 FLA. L. REV. 365, 368 (2003).

INA provides for warrantless searches of vehicles “within a reasonable distance from any external boundary of the United States”<sup>71</sup> and the Attorney General’s relevant regulation has defined “reasonable distance” as within 100 miles of the border,<sup>72</sup> Border Patrol agents in Mexican border states routinely stop Hispanic-looking individuals more than 100 miles from the border.<sup>73</sup> Additionally, the Fifth Circuit has upheld vehicle stops based solely on race, a position seemingly at odds with the Supreme Court’s interpretation of the Fourth Amendment.<sup>74</sup> On the contrary, the Ninth Circuit has stated that Hispanic appearance may not be considered a relevant factor in the absence of individualized suspicion.<sup>75</sup> The division in the application of the Fourth Amendment with respect to racial profiling in immigration enforcement is a grave problem that must be resolved by the Supreme Court.<sup>76</sup>

Finally, the issue of violence against illegal immigrants at the hands of United States immigration officials has historically plagued the Border Patrol.<sup>77</sup> As society’s attitude toward

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<sup>71</sup> 8 U.S.C. § 1357(a)(3) (Supp. V 1988).

<sup>72</sup> 8 C.F.R. § 287.1 (2003).

<sup>73</sup> See Renata Ann Gowie, *Driving While Mexican: Why the Supreme Court Must Reexamine United States v. Brignoni-Ponce*, 422 U.S. 873 (1975), 23 HOUS. J. INT’L L. 233, 234–35 (2001).

<sup>74</sup> *United States v. Chavez-Chavez*, 205 F.3d 145, 148 (5th Cir. 2000), *cert. denied*, 531 U.S. 906 (2000); see also Gowie, *supra* note 73, at 248 (positing that the Fifth Circuit often relies on Hispanic appearance as justification for border patrol stops of illegal aliens). In *United States v. Brignoni-Ponce*, the Supreme Court stated that “Mexican appearance” cannot be the sole reason for making an investigatory immigration stop but instead was one of many legitimate considerations. 422 U.S. 873, 887 (1975). It is unclear how the Fifth Circuit’s validation of stops based solely on race squares with the Supreme Court’s position.

<sup>75</sup> *United States v. Montero-Camargo*, 208 F.3d 1122, 1131–35 (9th Cir. 2000) (en banc), *cert. denied*, 531 U.S. 889 (2000); see also Gowie, *supra* note 73, at 248 (stating that the Ninth Circuit held that race is an impermissible factor when determining whether Border Patrol agents had reasonable suspicion for an investigatory stop).

<sup>76</sup> It is important to remember, however, that the judiciary has historically been hesitant to interfere in immigration enforcement, using the plenary power doctrine as an avoidance method. See Kevin R. Johnson, *The Case Against Race Profiling in Immigration Enforcement*, 78 WASH. U. L.Q. 675, 689 (2000). Under this doctrine, immigration laws regulating the admission of immigrants are not subject to judicial review, because Congress has the plenary power to make such a decision. *Chae Chan Ping v. United States (The Chinese Exclusion Case)*, 130 U.S. 581, 609 (1889).

<sup>77</sup> See generally Jesus A. Trevino, *Border Violence Against Illegal Immigrants and the Need to Change the Border Patrol’s Current Complaint Review Process*, 21 HOUS. J. INT’L L. 85 (1998) (documenting abuses of illegal immigrants along the

immigration shifts in response to current events, so does immigration officials' treatment of detained individuals.<sup>78</sup> In view of the current national "anti-immigrant" or "anti-terrorist" viewpoint, it is important to ensure that Border Patrol officers' treatment of illegal aliens is carefully scrutinized in order to avoid further abuses and violations of basic individual rights.

## II. COMPARATIVE ANALYSIS: PROPOSED LEGISLATION, SIMILAR PAST LEGISLATION, AND SELECT FOREIGN PROGRAMS

Comparative law is an important method of analyzing and understanding one's own legal system. Legislative comparative law involves the process of studying foreign laws in order to draft new national laws.<sup>79</sup> As stated by Sir Henry Maine in 1871, "The chief function of comparative jurisprudence is to facilitate legislation and the practical improvement of the law."<sup>80</sup> More recently, it has been declared that "[i]n a world shrinking at an ever accelerating rate because of a relentlessly expanding, uniformity imposing technology, both opportunity and need for the comparative study of law are unprecedented."<sup>81</sup> Therefore, in view of the chronic problems facing current immigration policymakers, a study of the proposed legislation's likely effectiveness based on past legislative successes and failures, both national and foreign, seems appropriate. This section of the Note will compare specific provisions of the proposed Border Security and Immigration Improvement Act with past United States temporary worker legislation and Canadian and European Union guest worker and immigration policies, attempting to draw relevant parallels and point out possible strengths and weaknesses of the proposed Act.

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Mexico-United States border by Border Patrol agents).

<sup>78</sup> *Id.* at 96.

<sup>79</sup> PETER DE CRUZ, *COMPARATIVE LAW IN A CHANGING WORLD* 13 (1999).

<sup>80</sup> *Id.* at 14 (quoting SIR HENRY MILLER, *VILLAGE COMMUNITIES* 4 (1871)). Édouard Lambert, one of the founders of the International Congress of Comparative Law in Paris in 1900, stated:

[C]omparative law must resolve the accidental and divisive differences in the laws of peoples at similar stages of cultural and economic development, and reduce the number of divergencies in law, attributable not to the political, moral or social qualities of the different nations but to historical accident or to temporary or contingent circumstances.

*Id.* at 15.

<sup>81</sup> *Id.* at 29.

Much of the past legislation concerning temporary or nonimmigrant workers seemed relatively revolutionary in their respective moments and responded specifically to the current labor needs of the country. For example, as noted in Part I, the Bracero Program of the 1940s addressed the country's shortage of agricultural laborers due to World War II. More recently, Congress' expansion of the nonimmigrant visa program in the late 1990s and 2000 responded to the rapid growth of the technology industry during the 1990s.<sup>82</sup> While the immigration agenda of the Bracero period focused on permitting a regionally specific group of migrant workers to enter the United States—then, Latin American, mainly Mexican, farm workers—today's legislation does not.<sup>83</sup> Moreover, as Mexicans continue to constitute the largest legal and illegal immigrant population in the country, the current immigration reform proposals, drafted in part in response to the continuing influx of illegal Mexican aliens to the United States,<sup>84</sup> make no mention of this specific immigrant population.<sup>85</sup>

A. *Comparison of the Border Security and Immigration Improvement Act with Past Domestic Temporary Worker and Illegal Immigration Legislation*

1. The Bracero Program

Congress signed the bilateral Bracero agreements with the Mexican government in order to “[make] an appropriation to assist in providing a supply and distribution of farm labor for the calendar year 1943.”<sup>86</sup> Section 5(g) of the statute specifically stated its purpose as “facilitat[ing] the employment by agricultural employers in the United States of native-born residents of North America, South America, and Central America, and the islands adjacent thereto, desiring to perform

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<sup>82</sup> Leah Phelps Carpenter, *The Status of the H-1B Visa in These Conflicting Times*, 10 TULSA J. COMP. & INT'L L. 553, 559 (2003).

<sup>83</sup> See Border Security and Immigration Improvement Act, S. 1461, 108th Cong. (2003); Border Security and Immigration Improvement Act, H.R. 2899, 108th Cong. (2003).

<sup>84</sup> See 149 CONG. REC. S9960, S9969–70 (daily ed. July 25, 2003) (statement of Sen. McCain).

<sup>85</sup> H.R. 2899, 108th Cong. (2003).

<sup>86</sup> Farm Labor Act of 1943, Pub. L. No. 78-45, 57 Stat. 70 (repealed 1964).

agricultural labor in the United States . . . .”<sup>87</sup> The legislative language was also clear as to the targeted population. However, the statutory protections aimed at these temporary workers were rather general and rarely enforced.<sup>88</sup> The results of the program varied. While many braceros worked in the United States for a limited time and then returned to Mexico, many stayed in America and continued to work illegally.<sup>89</sup>

In direct contrast to the Bracero legislation’s specific purpose of recruiting Latin American agricultural laborers for a specific calendar year, the Border Security and Immigration Improvement Act’s goal is broad, its function being “[t]o establish two new categories of nonimmigrant workers, and for other purposes.”<sup>90</sup> The proposed amendments to the nonimmigrant worker section of the INA are minimal—the Border Security and Immigration Improvement Act does not add or remove any categories of workers or establish any new objectives of immigration legislation.<sup>91</sup> The proposed changes alter the wording of the statute and add a new procedure for admission of temporary workers under section 218 of the INA.<sup>92</sup> However, the Act addresses the failures of past programs, such as the Bracero Program, to adequately protect the rights of temporary workers.<sup>93</sup> By granting complete portability across all sectors, the proposed legislation purports to ensure that workers have the freedom to leave exploitative employers and seek employment elsewhere.<sup>94</sup> Additionally, the bill provides workers with the right to self-petition for residency after three years of employment in order to guard against employers’ use of residency status to manipulate or exploit them.<sup>95</sup>

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<sup>87</sup> *Id.*

<sup>88</sup> *See* HAYES, *supra* note 27, at 29. The program afforded wage controls, medical insurance, free housing, and transportation, among other things. *Id.* Employers rarely observed these provisions, however, and the government did little to enforce them. *Id.*

<sup>89</sup> *Id.* at 30.

<sup>90</sup> H.R. 2899.

<sup>91</sup> *Id.* §§ 3–4.

<sup>92</sup> *Id.*

<sup>93</sup> *See* 149 CONG. REC. S9960 (daily ed. July 25, 2003) (statement of Sen. McCain).

<sup>94</sup> *See id.*

<sup>95</sup> *Id.*

## 2. 1943 H-2 Visa Program

In 1943, Congress established the H-2 visa program in order to import Caribbean workers to cut sugar cane in the United States.<sup>96</sup> Like the Bracero legislation and unlike the Border Security and Immigration Improvement Act, the H-2 legislation stated a specific purpose and targeted a population from a specific region. After the end of Bracero Program in the 1960s and in response to western growers' lobbying efforts, Secretary of Labor Wirtz expanded the H-2 program to include Mexican temporary agricultural workers.<sup>97</sup>

The Border Security and Immigration Improvement Act's creation of two new nonimmigrant worker visa categories, however, is a general response to an extremely broad issue. Whereas Wirtz expanded the H-2 category to include Mexican farm workers based on a distinct, expressed need for them, the Border Security and Immigration Improvement Act's limitless visa availability aspect theoretically proposes to allow the market to dictate the need for workers.<sup>98</sup> Its sponsors neither address specific sectors in need of temporary workers nor indicate any areas currently overburdened with nonimmigrant workers.<sup>99</sup> The solution seems to require little more than adherence to the current, circular state of affairs—the market continues to support illegal employment, thus illegal immigrants continue to come. This Note contends that future immigration legislation must address the root causes of illegal migration and attempt to deal with them in a population specific manner.

## 3. Migrant and Seasonal Agricultural Worker's Protection Act

Congress passed the Migrant and Seasonal Agricultural Workers' Protection Act ("MASAWPA") in 1983.<sup>100</sup> Congress designed the Act to provide migrant and seasonal farm workers with protections regarding pay rates and working conditions, to require farm labor contractors to register with the United States Department of Labor, and to establish safeguards for farm

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<sup>96</sup> Rain Levy Minns, *Registry Systems for Foreign and Domestic Farmworkers in the United States: Theory vs. Reality*, 15 GEO. IMMIGR. L.J. 663, 667 (2001).

<sup>97</sup> *Id.*

<sup>98</sup> 149 CONG. REC. S9960 (daily ed. July 25, 2003) (statement of Sen. McCain).

<sup>99</sup> *See id.*

<sup>100</sup> Pub. L. No. 97-470, 96 Stat. 2583 (codified at 29 U.S.C. § 1801 et seq. (2000)); *see also* Minns, *supra* note 96, at 667.

workers and agricultural associations and employers.<sup>101</sup> The MASAWPA was a step in the right direction because it moved toward greater protection of the rights of a specific class of nonimmigrant workers. However, although MASAWPA is the primary federal legislation protecting agricultural workers, it does not extend these safeguards to H-2A or illegal workers discussed below.<sup>102</sup>

The Border Security and Immigration Act, in contrast, attempts to bestow upon all foreign workers certain protections and safeguards against abuse. It seeks to ensure increased worker protection by stating that United States labor laws are fully applicable to migrants.<sup>103</sup> It also attempts to extend greater protection to these workers by providing for a self-petition option, thereby preventing abusive manipulation of residency status by employers.<sup>104</sup>

#### 4. Immigration Reform and Control Act of 1986

The Immigration Reform and Control Act of 1986 (“IRCA”) amended the INA and established the H-2A temporary worker visa program.<sup>105</sup> The H-2A program provided in part for the adjustment to legal permanent resident status of special agricultural workers who could prove that they worked in United States agriculture for 90 days between May 1, 1985 and May 1, 1986.<sup>106</sup> This provision led to the legalization of almost 1.1 million previously undocumented workers.<sup>107</sup> In 1992, however, the Commission on Agricultural Workers reported that, despite the IRCA amendments to the INA, illegal immigration had continued to rise, working conditions for farm workers had continued to decline, and the rate of unemployment for domestic

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<sup>101</sup> Minns, *supra* note 96, at 667.

<sup>102</sup> *Id.* at 668.

<sup>103</sup> 149 CONG. REC. S9960, 9969–70 (daily ed. July 25, 2003) (statement of Sen. McCain).

<sup>104</sup> *Id.* at S9962.

<sup>105</sup> Pub. L. No. 99-603, § 301, 100 Stat. 3359, 3411 (1986) (codified in scattered sections of 8 U.S.C.). The Act modified the H-2 visa program, dividing it into the H-2A and H-2B programs. The H-2A program deals with temporary agricultural workers and the H-2B program concerns all other temporary workers. Under the H-2A program, farmers may file for temporary nonimmigrant workers if they are unable to find sufficient domestic agricultural workers. *Id.*

<sup>106</sup> Minns, *supra* note 96, at 668.

<sup>107</sup> *Id.*

agricultural workers remained high.<sup>108</sup> Additionally, the majority of the 1.1 million newly-legalized workers were undereducated and poor, which created an unforeseen burden on the national welfare system.<sup>109</sup>

Like the Immigration Reform and Control Act, the Border Security and Immigration Improvement Act also provides for the adjustment to legal permanent resident status of nonimmigrant aliens, either immediately upon the petition of the alien's employer or upon petition by the alien herself but only if the alien has maintained nonimmigrant status for three years.<sup>110</sup> The Border Security and Immigration Improvement Act expands upon previous legislation by requiring the use of an electronic job registry by any employer seeking to recruit a nonimmigrant worker.<sup>111</sup> The effectiveness of a registry system is debatable, however, as access to the Internet is such a determining variable.<sup>112</sup> The proposed amendments to the INA vary slightly

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<sup>108</sup> *Id.* (citing *Agricultural Commission Calls for Better IRCA Enforcement, Other Measures*, 70 INTERPRETER RELEASES 245 (1993)).

<sup>109</sup> See UNDOCUMENTED MIGRATION TO THE UNITED STATES, *supra* note 39, at 198.

<sup>110</sup> H.R. 2899, 108th Cong. § 3(h)(1)(A)–(B) (2003).

<sup>111</sup> *Id.* § 3(i). Under this provision, the Act requires any employer seeking nonimmigrant labor to make a good faith effort to recruit United States workers for the position by advertising the job on an electronic job registry system for at least fourteen days. Once the fourteen day period expires, the employer may advertise and offer the position to individuals only by means of the registry system. *Id.* The implementation of job registry systems is a solution that was suggested in the past. The 106th Congress saw the introduction of three bills proposing registry systems. See Minns, *supra* note 96, at 673 (discussing proposed bills S. 1814, H.R. 4056, and H.R. 4548, 106th Cong. (2000)).

<sup>112</sup> The use of an electronic employment registry seems useless when the target population is undocumented aliens. When the BCIS implemented the Special Registry system for males from certain countries, mainly Muslim, in 2002, its sole means of dissemination to the public was via the Internet. Thousands of people targeted by this program had no idea of its existence, and immigrants rights groups and other agencies bore the burden of spreading the information. Symposium on Defending Immigrants: Legal and Other Strategies Against Detention and Deportation at St. John's University (Oct. 9, 2003). A year later, re-registration looms, but information regarding the process and the consequences of removal for failure to re-register are not widely known. Deborah Kong, Associated Press, *Advocates Blast U.S. Immigration Sign-Up*, (Oct. 30, 2003), <http://www.macon.com/mld/macon/news/713910.htm>. Additionally, the Act proposes the creation of an Employment Eligibility Confirmation System. H.R. 2899 § 3(j). The system will function to respond to inquiries made by workers, employers, or other entities via a toll-free telephone line or other toll-free electronic media regarding whether an individual is authorized to be employed. *Id.* Again, the Act falls short in terms of reaching the target population. At a time when such a high

from the relevant provisions of the IRCA with respect to their technicalities and specific requirements. Examples include length of stay, the self-petition option, and the broader scope of the Border Security and Immigration Improvement Act, which allows for adjustment of status of any nonimmigrant worker that meets the requirements, whereas the IRCA only provided for adjustment for temporary agricultural workers. Nonetheless, the generalities and overarching concepts remain the same.

#### 5. Immigration Act of 1990

The Immigration Act of 1990, passed on November 29, 1990, was touted as a comprehensive reform of immigration policy.<sup>113</sup> In reality, however, the Act made few policy changes but drastically increased the levels of legal immigration, provided for the deportation of criminal aliens, and expanded the size of the Border Patrol.<sup>114</sup> The increased numbers of available visas reflected a political compromise between the House and Senate, rather than the changing needs of the market, and the Act did little to decrease the rate of illegal immigration.<sup>115</sup>

The Border Security and Immigration Improvement Act is similar to the 1990 Act in its seemingly drastic measure of limitless visa availability but relative failure to adequately address the actual needs of the labor market. The 1990 Act did little to effectively curb illegal immigration; the rising tide of illegal migration across the southwestern border of the United States presented the Clinton Administration with a conundrum.

#### 6. Illegal Immigration Reform and Immigrant Responsibility Act of 1996

In 1994, then Attorney General Janet Reno set forth a plan designed to combat illegal entry along the southwest border.<sup>116</sup> The new strategy involved shutting off the more common, urban routes used by illegal aliens and shifting migrant traffic to more remote areas where the Border Patrol had an advantage due to

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percentage of the nonimmigrant aliens in this country is Hispanic, the absence of a provision for a bilingual information system is striking.

<sup>113</sup> Spotts, *supra* note 12, at 612.

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> *Id.* at 614.

the difficult, dangerous terrain.<sup>117</sup> The Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA") was derived directly from this program; it allowed for, among other things, the hiring of additional Border Patrol agents, added penalties for alien smugglers, and provided for reinforcement and construction of fencing along the border.<sup>118</sup> The objective of the reform was to deter illegal entry to the United States instead of dealing with illegal aliens once they were already here.<sup>119</sup> Despite an increase in arrests along the border, the IIRIRA, like so many other reforms before it, failed to produce a dramatic downturn in illegal immigration.<sup>120</sup> Immigration and naturalization statistics approximate that during Clinton's presidency the number of illegal aliens coming to the United States had increased at a rate of 300,000 per year and that by July of 2000, there were six million illegal immigrants residing here.<sup>121</sup>

The Border Security and Immigration Improvement Act is readily distinguishable from the IIRIRA. It shifts the focus from keeping illegal aliens out at all costs to recognizing the reality of illegal immigration. There has been a movement away from criminal sanctions and penalties designed to shut down illegal immigration altogether and toward an increased emphasis on addressing the realities of a market that has historically been aided by illegal employment. Rather than completely excluding illegal aliens, the Act attempts to deal with those already here, living and working as members of our society.

These comparisons are not intended to indicate that the United States government has been completely unsuccessful in decreasing the flow of illegal immigrants, especially those crossing the southwestern border. The comparison simply serves to point out that United States immigration policy needs to be comprehensively reevaluated. Legislators must carefully consider which provisions of each past reform were successful and which resulted in little or no effect on the problem of illegal

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<sup>117</sup> *Id.*

<sup>118</sup> Pub. L. No. 104-208, 110 Stat. 3009 (1996) (codified in scattered sections of 8 U.S.C.); *see also* Spotts, *supra* note 12, at 615 (discussing the enactment of the IIRIRA as a result of the perceived success of the five-part plan announced in 1994 by Attorney General Reno).

<sup>119</sup> Spotts, *supra* note 12, at 615.

<sup>120</sup> *Id.* at 617.

<sup>121</sup> *Id.*

immigration. While some reforms such as IRCA and IIRIRA made broad changes to immigration policy, it seems that much immigration legislation—including the Border Security and Immigration Improvement Act—involved a mere tweaking of existing regulations and requirements.

In recent years, senators and representatives have proposed bills of similar magnitude and scope. For example, in July 2001, Representative Luis Gutierrez (D-IL) introduced the U.S. Employee, Family Unity, and Legalization Act.<sup>122</sup> The Act proposed to grant temporary legal status to illegal aliens who were in the country before February 2, 2000 and immediate legal status to those in the country before February 6, 1996. The Act also provided for a rolling legalization.<sup>123</sup>

Senator Phil Gramm (R-TX) proposed another solution, which favored a guest worker program that would allow Mexican workers to obtain a seasonal or year-round work permit, thereby authorizing them to work in the United States.<sup>124</sup> Under this proposal, Mexican laborers could have worked in this country for a year but then had to return to Mexico.<sup>125</sup> Seasonal workers could stay in the United States indefinitely, while workers with a year-round permit could work in the United States for three consecutive years and then had to return to Mexico for at least one year before applying to work in the United States again.<sup>126</sup> United States economic conditions would determine the availability of the guest worker permits, and the laborers would have been fully covered by employment law.<sup>127</sup> While Senator Gramm's proposal differed topically from Representative Gutierrez's, its basic foundation and goals were the same.

Other bills proposed a combination of these solutions, granting permanent residency to some aliens and temporary work permission to others.<sup>128</sup> The Border Security and

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<sup>122</sup> H.R. 500, 107th Cong. (2001).

<sup>123</sup> *Id.*; see also Mayerle, *supra* note 60, at 573–74 (discussing a number of bills generally categorized as proposing permanent legal residency for all undocumented workers in the United States, advocating for a guest worker system that would grant them temporary legal status, or a combination of the two systems).

<sup>124</sup> Mayerle, *supra* note 60, at 574.

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> See, e.g., H-2A Reform and Agricultural Worker Adjustment Act of 2001, S. 1313, H.R. 2736, 107th Cong. (2001); Agricultural Job Opportunity Benefits and Security Act of 2001, S. 1161, 107th Cong. (2001).

Immigration Improvement Act is hardly more than a variation of these past, unenacted proposals. It is strikingly similar to the "guest worker plus"<sup>129</sup> programs proposed in the 107th Congress, one in a long line of essentially indistinguishable reforms that failed to address the underlying problems that either cause or are caused by illegal immigration.

Instead of manipulating statutory language and amending the current regulatory measures, future immigration reform legislation must encompass the successful elements of past reforms while completely discarding their ineffective aspects. General provisions that, for example, create new visa categories cannot be expected to effectively remedy regionally specific and population specific immigration issues. Since the United States is currently faced with high rates of illegal immigration from Mexico, it must enact legislation designed specifically to deal with Mexican immigration. In other words, immigration reform cannot attempt to deal with "illegal immigration" as a general concept; rather, it must address specific populations and the particular problems presented by them. For example, Mexican migration is not only spurred by family reunification or economic concerns. The problems resulting from this migration do not solely involve negative effects on the American economy. Immigration policy must look at the push and pull factors unique to each immigrant population and their consequences in order to enact effective immigration legislation. Immigration policy based on perceived economic threats cannot be expected to effectively deal with perceived security threats and vice versa. The issues must be separated and analyzed with respect to the population most likely to be affected by any resulting policy.

*B. Comparison of the Border Security and Immigration Improvement with Canadian and European Union Guest Worker and Immigration Legislation*

There may be a discriminatory effect upon different immigrant populations and immigrants based on their country if this legislation is not drafted carefully. For this reason, it is

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<sup>129</sup> See Mayerle, *supra* note 60, at 575 (discussing the introduction of bills combining the permanent residency and temporary worker status provisions of the Gramm and Gutierrez bills).

necessary to take a brief look at foreign legislation concerned with protecting the basic human rights of immigrants.

#### 1. The Canadian Immigration and Refugee Protection Act

Section 3 of the Canadian Immigration and Refugee Protection Act (the “CIARPA”) sets forth the objectives and application of the legislation.<sup>130</sup> While this Note will not examine the specifics of the guest worker provisions of the Act, the terms regarding the facilitation of “the entry of visitors, students and temporary workers for purposes such as trade, commerce, tourism, international understanding and cultural, educational and scientific activities”<sup>131</sup> supply the link between this piece of legislation and the Border Security and Immigration Improvement Act. The purposes of the Act warrant consideration and comparison as they vary greatly from the goals of present United States immigration law and may provide some guidance.

While the CIARPA purported to achieve the standard goals of immigration legislation, such as the development of a “strong and prosperous” economy,<sup>132</sup> it also aimed to accomplish goals absent from United States immigration policy, including the “promot[ion of] international justice and security by fostering respect for human rights and by denying access to Canadian territory to persons who are criminals or security risks.”<sup>133</sup> Additionally, the legislation intended to “promote the successful integration of permanent residents into Canada, while recognizing that integration involves mutual obligations for new immigrants and Canadian society.”<sup>134</sup>

With respect to the application of the law, this legislation must be applied in a manner that “furthers the domestic and international interests of Canada.”<sup>135</sup> However, it must also “promote[] accountability and transparency by enhancing public awareness of immigration and refugee programs”<sup>136</sup> and

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<sup>130</sup> Immigration and Refugee Protection Act, S.C., ch. 27, § 3 (2001) (Can).

<sup>131</sup> *Id.* § 3(1)(g).

<sup>132</sup> *Id.* § 3(1)(c).

<sup>133</sup> *Id.* § 3(1)(i).

<sup>134</sup> *Id.* § 3(1)(e).

<sup>135</sup> *Id.* § 3(3)(a).

<sup>136</sup> *Id.* § 3(3)(b).

“compl[y] with international human rights instruments to which Canada is signatory.”<sup>137</sup>

While the United States faces unique immigration issues and cannot be expected to model its legislation directly after Canada, it might benefit from incorporating some of the accountability, public awareness, and human rights elements of the Canadian law into its continuing debate on immigration policy and enforcement. The Border Security and Immigration Improvement Act purports to protect immigrants and temporary workers from historical abuses,<sup>138</sup> but it lacks a real mechanism to ensure that these protections are duly enforced and that violations are properly punished. The creation of the office of the Citizenship and Immigration Services Ombudsman, within the Department of Homeland Security,<sup>139</sup> represents progress in recognizing the need for an increased focus on human rights. However, it is crucial that the office develops a visible public presence, which is instrumental in protecting the rights of immigrants.<sup>140</sup> By inserting such accountability and awareness language into its purpose section, the Border Security and Immigration Improvement Act could provide a direct link between the office of the Ombudsman and the legislation and, at the same time, revolutionize immigration policy and greatly expand the human rights dialogue in this country.

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<sup>137</sup> *Id.* § 3(3)(f).

<sup>138</sup> *See* 149 CONG. REC. S9960, 9969–70 (daily ed. July 25, 2003) (statement of Sen. McCain).

<sup>139</sup> *See* Homeland Security Act of 2002, H.R. 5710, 107th Cong. § 452 (2002).

<sup>140</sup> The Canadian Human Rights Act, R.S.C., ch. H-6 (1985), could also serve as a model for creating a visible human rights agency in the United States. The purpose clause of the Act states:

The purpose of this Act is to extend the laws in Canada to give effect, within the purview of matters coming within the legislative authority of Parliament, to the principle that all individuals should have an opportunity equal with other individuals to make for themselves the lives that they are able and wish to have and to have their needs accommodated, consistent with their duties and obligations as members of society, without being hindered in or prevented from doing so by discriminatory practices based on race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability or conviction for an offence for which a pardon has been granted.

*Id.* § 2. By making human rights a separate category of federal legislation, the rights protections included in immigration legislation would be grounded in an extended basis for recognition and enforcement.

## 2. The European Union Perspective

In 2001, the Joint Parliamentary Assembly of the Partnership Agreement between the members of the African, Caribbean and Pacific Group of States and the European Community and its member states (ACP-EU) met in Brussels and issued a Resolution concerning, among other things, immigration, trafficking in persons, the rights of the individual, and anti-discriminatory measures.<sup>141</sup> Statement 3 of the Resolution demands that the “EU Member States . . . promote and protect the human rights and fundamental freedoms of all migrants, in conformity with the Universal Declaration of Human Rights, regardless of the migrant’s immigration status.”<sup>142</sup> Additionally, Statement 8 calls on the European Union Member States and the European Commission to promote “the social and economic development of poor countries as a means of managing migratory flows, which will persist so long as the prosperity gap remains and increases.”<sup>143</sup> Perhaps most importantly, the Resolution calls on all the participating countries to honor their responsibilities in accordance with the Copenhagen criteria, namely that developed countries donate 0.7% of their GDP to North-South cooperation programs and that developing countries use at least 30% of their budget for social, educational, and health development programs.<sup>144</sup>

This Resolution, while not readily comparable in structure or function to the Border Security and Immigration and Improvement Act, provides a useful frame of reference for future immigration policy between Mexico and the United States. The parties to this resolution are similar to Mexico and the United States in that one represents a relatively poor, underdeveloped region while the other represents a rich, developed, international political player. The migration relationship between African, Caribbean and Pacific states and the European Union is not identical to that of the United States and Mexico, but the focus on human rights and accountability in their dialog and resulting resolution were educative.<sup>145</sup> The bilateral nature of the

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<sup>141</sup> Resolution on Migration, 2002 O.J. (C 78) 58.

<sup>142</sup> *Id.* cl. 3.

<sup>143</sup> *Id.* cl. 8.

<sup>144</sup> *Id.* cl. 12.

<sup>145</sup> In other relevant parts, the Resolution recognizes that the EU’s “current immigration policy, aimed at curbing migration flow, has led to an increase in

Resolution recognized that immigration is not a problem to be dealt with solely by the sending or receiving country and reflected a commitment to cooperation in dealing with immigration issues. It is also important to note that the actual statutes underlying European temporary worker and immigration policies comply with the International Convention Concerning Migration for Employment, a treaty to which the United States is not a signatory, in part because its current guest worker programs fall far short of the internationally recognized standards.<sup>146</sup>

### III. POSSIBLE ALTERNATIVE SOLUTIONS TO THE PROBLEM OF ILLEGAL IMMIGRATION FROM MEXICO

By all accounts, contemporary United States immigration policy has been ineffective in significantly reducing the flow of illegal migration from Mexico. In comparison with past domestic legislation and Canadian and European Union perspectives on immigration, it seems imperative that the United States seriously reconsider its immigration schemes and revise its current policy.

Immigration scholars have offered suggestions on how to make effective changes to the present state of affairs.<sup>147</sup> One suggestion is a labor migration agreement between the United States and Mexico and the removal of a temporary worker program from the immigration agenda.<sup>148</sup> Another alternative is

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illegal immigration without achieving the declared objectives." *Id.* cl. C. "[A] responsible and sustainable migration policy must focus on . . . sustainable development, education and democracy in the countries of emigration," *Id.* cl. 10, and "social, economic and political development of the world's poorer nations can provide structural alternatives in reducing illegal or clandestine immigration." *Id.* cl. 11. See generally JOANNA APAP, THE RIGHTS OF IMMIGRANT WORKERS IN THE EUROPEAN UNION (2002) (evaluating the evolving policies toward third country nationals, particularly from the Maghreb, living and working in the European Union, with a focus on the dialog concerning the human rights and fundamental freedoms of these workers).

<sup>146</sup> See Mary Lee Hall, *Defending the Rights of H-2A Farmworkers*, 27 N.C. J. INT'L L. & COMM. REG. 521, 522 (2002).

<sup>147</sup> See IMMIGRATION AND CITIZENSHIP, *supra* note 1, at 374–92.

<sup>148</sup> *Id.* at 377, 380 (citing KEVIN R. JOHNSON, LEGAL IMMIGRATION IN THE 21ST CENTURY BLUEPRINTS FOR AN IDEAL LEGAL IMMIGRATION POLICY (Richard D. Lamm & Alan Simpson, eds., 2001)). Johnson cites the European Union's recognition of the inextricable link between trade and migration between neighboring countries as a model for the United States treatment of Mexican migration. *Id.* at 378. He also posits that there is no basis for the belief that new

to create a bi-national agency managed by the United States and Mexican governments to which migrants would apply for temporary work visas.<sup>149</sup> The same authors suggest that the revenue generated by federal taxes withheld from temporary workers be allotted to states with large immigration populations and the remainder of the funds be used to develop the markets and infrastructure in Mexico.<sup>150</sup>

A more economics-based suggestion involves the complete elimination of immigration barriers in order to promote maximum economic efficiency.<sup>151</sup> More specifically, the response to economic concerns generated by illegal immigration should contain less restrictive alternatives designed to alleviate the fiscal burden imposed on native citizens by immigrant workers.<sup>152</sup> In sum, the repeal of employer sanctions and the legalization of unauthorized immigrants through a liberal guest worker program would serve the interests of both citizens and immigrants in the labor market and the public sector in general.<sup>153</sup>

Proposed guest worker plus programs similar to the Border Security and Immigration Improvement Act have encountered

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temporary workers will be successful in preventing the abuses of past programs and prohibiting the exploitation of a cheap labor force. *Id.* at 380. Finally, he stresses that the United States and Mexico must combine efforts to develop the Mexican economy with the objective of reducing the economic incentives for Mexicans to leave their country. *Id.*

<sup>149</sup> *Id.* at 384–88 (citing proposals set forth by Jorge Durand and Douglas S. Massey, Jorge Durand & Douglas S. Massey, *Borderline Sanity*, AM. PROSPECT, Sept. 24, 2001, at 28). The agency would serve to eliminate the employer as petitioner for the temporary work visa, thereby reducing the possibility for corruption and manipulation in labor recruitment practices. *Id.*

<sup>150</sup> *Id.* at 387.

<sup>151</sup> Howard F. Chang, *Migration as International Trade: The Economic Gains from the Liberalized Movement of Labor*, 3 UCLA J. INT'L L. & FOREIGN AFF. 371, 372–73 (1998).

<sup>152</sup> See Howard F. Chang, *Immigration and the Workplace: Immigration Restrictions as Employment Discrimination*, 78 CHI.-KENT L. REV. 291, 312–13 (2003). Chang posits that the optimal response to negative impacts on the public sector as a result of immigration should be controlled not by exclusion but by fiscal methods. *Id.* For example, immigrants could be denied access to public benefits, which would improve the economic impact of immigration without excluding immigrants from the workforce. *Id.* The author states that exclusion is the more costly remedy, because it bans immigrants not only from our benefits systems but from our labor market as well, thereby decreasing any economic gain the United States might otherwise enjoy as a result of their labor. *Id.*

<sup>153</sup> *Id.* at 315–16.

both criticism and support.<sup>154</sup> Two frequent criticisms of such proposals are that by granting amnesty or a form of it, they reward the criminal activity of crossing the border illegally and working in the United States as an undocumented alien, and they do not improve wages or working conditions for temporary workers.<sup>155</sup> In the face of such critiques, three requisite conditions for a successful guest worker program have been suggested.<sup>156</sup> First, the scheme must provide for an “adequate level of control over unauthorized entry and work or the [guest worker] program becomes a supplement rather than a substitute for illegal movements.”<sup>157</sup> Second, employers must have a viable incentive to hire domestic workers before hiring foreign workers.<sup>158</sup> Finally, the program must implement measures to safeguard the “rights of temporary workers and the communities in which they work.”<sup>159</sup>

The third requisite condition provides the basis for what could be sweeping legislative reform. Historically, illegal alien workers and guest workers “have had little bargaining power and effectively no political rights,” allowing for the possibility of abuse and exploitation.<sup>160</sup> A Mexican woman explained her experience as an undocumented alien:

I crossed the border for the first time in 1996, looking for a better life. The second time I came on a tourist visa. That was two years ago. The worst part of this experience is the fear, the fear of not knowing what is going to happen to you. The politicians play on that, they know the undocumented people won't say anything, that we don't have a voice. But I don't want to claim that I'm a victim. I'm grateful for the opportunities the United States has given to me. If anything, I'm more disillusioned with the Mexican government. We feel forgotten. If our own government can't support us, how can we expect our neighbor to support us? The problem starts in Mexico. There is no education, no participation in solving the

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<sup>154</sup> Mayerle, *supra* note 60, at 576.

<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

<sup>157</sup> *Id.* (alteration in original) (citing *Guest Worker Visa Programs: Hearing Before the House Committee on the Judiciary*, 107th Cong. (2001) (testimony of Susan Martin, Director, Institute for the Study of International Migration at Georgetown University), available at <http://www.house.gov/judiciary/73263.pdf>).

<sup>158</sup> *Id.* at 577.

<sup>159</sup> *Id.* at 578.

<sup>160</sup> *Id.*

problem of immigration. I think what we need most is education, not just in Mexico but here too. Mexicans there need to understand how to support themselves, and Mexican immigrants in this country need to know how to defend themselves. Americans need to understand why we come here, and that we too contribute to the economy and society of the U.S. I hope more than anything that there is an amnesty. But I don't expect it. I think all we're really asking from the government is some education, recognition, and a little bit of humanity.<sup>161</sup>

As evidenced by this woman's comments, immigration policy does not exist in a void. It affects actual people, and each community comes to the United States for a different reason and sustains a different impact as a result of changing immigration law. In order to address illegal immigration from Mexico effectively and efficiently, Congress must narrow its focus and target the specific population, as did the Bracero Program and the 1942 H-2 visa extensions. In order to ensure that the target populations' rights are safeguarded, Congress must incorporate directly into immigration law the human rights and transparency elements of Canadian and European Union policy.

The current guest worker proposal moves toward protecting the rights of migrant workers. Congress could further this general purpose by adding a provision that allocates funds to either State or nongovernmental organizations for immigrant education programs designed to teach individuals about their rights and obligations under United States law without placing them in danger of arrest or deportation as a result of attendance. These programs would have to be aimed specifically at the Mexican community by providing for Spanish-language education and must address the basic concerns of most immigrant families, such as medical care and schooling for their children. Programs concentrating on the legal terminology and minutia of statutes would be confusing for most educated Americans, let alone for uneducated Mexican laborers. Providing sound education to temporary and illegal workers could reduce the burden on American society and possibly aid them in a successful reintegration upon their return to Mexico. Education for the general public designed to explore the reasons

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<sup>161</sup> Telephone Interview with Marta C. (Oct. 13, 2003) (on file with author).

and consequences of illegal immigration could also reduce the exploitation of and negative attitudes toward migrant workers.

Additionally, employer sanctions have proved relatively ineffective in deterring the hiring of illegal aliens.<sup>162</sup> Educating possible employers about the process of legal work authorization and the consequences of illegal employment might encourage employers to hire domestic employees before foreign ones or at least hire foreign workers legally. The inaccessibility and complexity of the current system seems to be a factor in promoting the hiring of illegal aliens.

Finally, the bill could further protect the rights of illegal immigrants by providing direct access to the Ombudsman or other national human rights agencies. For example, the telephone number for the Immigration Department of the Mexican National Commission for Human Rights is posted in all Mexican alien detention centers. Detainees can contact the Commission and request free legal counseling for the duration of their detention.<sup>163</sup> By implementing such a system, the United States government could expedite the process of legalization for qualified non-immigrants. A self-petition provision is an attractive theory, granting thousands of undocumented individuals a chance to change their status, but in the absence of legal counsel and accurate information regarding the process, it seems unlikely that uneducated laborers will actually be willing, or able, to proceed with the self-petition.

### CONCLUSION

The three requirements for a successful guest worker program provide a sound basis for dialog on immigration reform. It seems, however, that a fourth requisite condition must be added—the absolute necessity of a program designed to contact and work directly with the immigrant population that the legislation is intended to affect. For this reason, future immigration and guest worker legislation must focus on a

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<sup>162</sup> See, e.g., Chang, *supra* note 152, at 315 (suggesting that the repeal of employer sanctions would promote the interests of American citizens and unauthorized immigrants); Spotts, *supra* note 12, at 602 n.6 (discussing the IIRIRA's limited success in stopping illegal immigration from Mexico). *But see* Mayerle, *supra* note 60, at 580 (positing that employer sanctions play an important role in deterring illegal immigration).

<sup>163</sup> The author became aware of this information while working in Mexican detention centers as part of a summer internship program.

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specific population and take concrete, visible steps to safeguard the rights and specify the obligations of that community. The current proposed legislation would benefit from including education and human rights provisions within its allocation of funds section (Section 5). Future immigration debate must shift focus from the general purpose of national security to the more specific problems presented by and resulting from immigration from various regions of the world. Using the Canadian and European focus on human rights as a guide, United States immigration legislation as a whole must be revisited and overhauled in order to address the changing needs of American society and its economy and to safeguard the fundamental rights of the migrants who fulfill those needs. Additionally, drawing on the European example, this revision must be a bilateral effort, recognizing the Mexican government as a key force in creating and enforcing successful and humane immigration reform legislation.