January 2010

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Recommended Citation
Bill Ong Hing, Asian Americans and Immigration Reform, 17 Asian Am. L.J. 83 (2010).

Link to publisher version (DOI)
https://doi.org/10.15779/Z38T573

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Asian Americans and Immigration Reform

Bill Ong Hingt†

I. INTRODUCTION

The Asian American community has much to gain from progressive immigration reform. Asian Americans abroad make up the bulk of an immigrant entry list that commands a wait of almost two decades in some immigration categories. Many young men and women from Asian American communities face deportation even though they have grown up in the United States. Some are subject to harsh Immigration and Customs Enforcement (ICE) raids and detention policies. Of the estimated twelve million undocumented immigrants in America, more than ten percent are from Asian or Pacific countries.¹ Many undocumented Asian Americans are college or college-bound students hoping for the passage of the DREAM Act so that they can obtain citizenship and contribute more fully to U.S. society.²

Perhaps most importantly, Asian Americans should concern themselves with immigration reform because even the most cursory review of Asian American history informs us that immigration laws and enforcement have shaped and reshaped our communities since the 1800s. Today, every Asian American subgroup, with the exception of Japanese Americans, remains predominantly foreign-born.³ And when anti-immigrant restrictionists wage attacks on progressive immigration reform, it should not take much to realize that their efforts will, directly or indirectly, often affect Asian Americans.

Although the primary focus of the immigration reform debate revolves around border enforcement and whether to legalize the predominantly Latino undocumented population, Asian Americans should not be lulled into thinking that they are not part of the controversy. Any increased focus on border enforcement will likely affect interior enforcement, and any

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2. The goal of the Development, Relief and Education of Alien Minors (DREAM) Act is to allow certain undocumented students an opportunity to enlist in the military or go to college, providing them a path to citizenship they would not otherwise have. See DREAM Act Portal, Basic Information about the DREAM Act Legislation, Dec. 10, 2009, http://dreamact.info/students.

serious discussion of legalization will induce trade-offs that may affect family immigration categories. In other words, the term “comprehensive” immigration reform serves as an invitation to partisans from the right and the left to correct what they regard as problems in the current framework. We are a nation of immigrants, but we have always been a nation that loves to debate immigration policy, and efforts at progressive immigration reform are likely to be met with stiff opposition from restrictionists who disagree over who should be admitted to our shores.

The likelihood for comprehensive immigration reform in 2010 grows progressively dimmer as the November 2010 congressional elections draw closer. For a while—perhaps during the early, heady stages of healthcare reform—prospects for progressive immigration reform looked promising, as Democratic leaders were still operating in the glow of the first phase of the Obama administration. Immigration reform was getting pushed up to the front burner, as President Obama met with some thirty congressional leaders on June 25, 2009, announcing that the administration would begin working on comprehensive immigration reform right away, rather than in 2010.4 He asked Secretary of Homeland Security, Janet Napolitano, to begin working with leaders from both the House and the Senate to begin drafting legislation.5 But that was all before Congressional partisan politics substantially slowed health care reform efforts and the rest of Obama’s agenda.

So even if we get to immigration reform this year, what gets seriously considered may not be pretty. From the rhetoric generated by the administration, key legislators, and beltway immigrant rights advocates, we should ready ourselves for a set of unimaginative compromises that will include more militarization of the border; a guest worker program; reinforcement of employer sanction laws; a strict, penalty-enhanced legalization program for undocumented immigrants; possibly some backlog reduction for applicants waiting in the family immigration line; and the elimination of family immigration categories.6

Understandably, the undocumented immigrant issue drives the immigration debate. But for whatever reason—politics, short-sightedness, inability to think outside the box—the proposals for “solving” the undocumented immigrant issue usually focus on more enforcement.7 The problem, however, is that the round-them-up and seal-the-border approach will not address the long-term, systemic problem of Mexico’s economy and

5. Id.
7. Id.
the effects of globalization. And the focus on undocumented immigrants
distracts us from many other critical issues that immigrant rights advocates
outside the beltway wish that a Democratic-controlled Congress would
have the political gumption to address. In particular, due process concerns
emanating from draconian legislation in 1996 and the harsh, anti-immigrant
enforcement regime enacted in the post-9/11 era are given little serious
thought.\(^8\)

President Obama deserves credit for continuing to mention the need
for immigration reform. The country has needed broad, comprehensive
immigration reform for many years. The undocumented population totals
are estimated at ten to twelve million. Millions more languish in the
backlog of legal immigration waiting lists, and since the establishment of
the Department of Homeland Security on the heels of 9/11, immigration
raids have left innocent communities damaged and shocked by brutal
enforcement tactics. Major legislation was debated in 2006 and 2007,
bolstered in part by President George W. Bush’s call for a guest worker
program. But nothing got passed.

The attacks of 9/11 changed the political landscape for immigration
reform. Immediately before 9/11, Congress and the Bush Administration
were on the verge of major immigration reform. Vicente Fox, Mexico’s
president at the time, was pressuring President Bush to act. In addition to a
generous legalization program for undocumented immigrants, immigrant
rights advocates were advancing a very credible campaign to cure due
process defects resulting from draconian legislation signed by President
Clinton in 1996, and advocates of family immigration were pushing for an
increase in visas. That all changed on 9/11. Immigration reform discussions
got dropped. Immigration issues began being viewed through the lens of
national security. The new Department of Homeland Security was
established in 2002 and took over the old Immigration and Naturalization
Service and the Border Patrol from the Department of Justice. Not until
President Bush, encouraged by business supporters, proposed a guest
worker program in January 2004 did immigration reform get discussed
again. In the process, the “Fix ‘96” campaign was stalled, a push by
Vicente Fox for development assistance for Mexico was forgotten, an
enforcement-only approach was enacted, and the immigration debate as a
whole was shifted to the right.\(^9\)

In this essay, I first review a handful of policies that relate directly to
issues affecting Asian immigration. I then turn to other major immigration
policy questions that all Americans, including Asian Americans, should

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8. See, e.g., Create Peace, Justice with Humane Immigration Reform, AMERICAN FRIENDS
/i/87238.

9. Tom Barry, Napolitano’s Hard Echo of Liberal Immigration Reform Strategy, AMERICAS
II. FAMILY IMMIGRATION CATEGORIES

The majority of immigrants to the United States today enter in family categories. Some 400,000 to 600,000 immigrants qualify each year as immediate relatives (spouses, children, and parents of adults) of United States citizens. This immediate relative category is unlimited, although the number of immigrants has remained relatively steady in the past few years at around half a million. About 200,000 enter each year in the family preference categories, which include unmarried adult sons and daughters of U.S. citizens, spouses and children of lawful permanent residents, married sons and daughters of U.S. citizens, and the siblings of adult U.S. citizens. In 2006 and 2007, about 160,000 immigrants entered per year across all employment preference categories.

Promoting family reunification has been a major feature of immigration policy for decades. Prior to 1965, permitting spouses of U.S. citizens, relatives of lawful permanent residents, and even siblings of U.S. citizens to immigrate were important aspects of the immigration selection system. Reforms in 1965 reaffirmed the commitment to family reunification by creating the family preference system and eliminating the racist national origins quota system.

Nations with large numbers of descendents in the United States in 1965 were expected to benefit the most from a kinship-based system. At the time, fewer than a million Asian Americans resided in the country while the total U.S. population was more than 194 million. Although the kinship priority meant that Asians began on unequal footing, Asians were at least on par numerically, because each nation also received a quota of twenty thousand visas per country.

Gradually, by using the family categories to the extent they could be used and the labor employment route, Asians built a family base from which to use the kinship categories more and more. By the late 1980s, virtually ninety percent of all immigration to the United States—including Asian immigration—was through the kinship categories. And by the 1990s, the vast majority of these immigrants were from Asia and Latin

11. Id.
12. Id.
13. Id.
15. Id.
Once Asian and Latin immigrants began to dominate the family immigration categories, the kinship system was attacked. Consider the following critique in 1986:

Nowhere else in public policy do we say not "who are you and what are your characteristics?" but ask rather, as we do in immigration, "who are you related to?" Current policy says: "if you have the right relatives, we will give you a visa; if you don't have the right relatives, well, it is just too bad."17

The fact that family-based immigration dominates U.S. admissions policies is a real source of irritation for many policymakers and restrictionists. From the early 1980s to 1996, the leading voice attacking family immigration, especially the sibling category, was Republican Senator Alan Simpson of Wyoming. Simpson had been a member of the Select Commission on Immigration and Refugee Policy that issued a report in 1981 calling for major changes in the immigration laws. After the Immigration Reform and Control Act of 1986 (IRCA)18 was enacted to address the issue of undocumented immigrants through employer sanctions and legalization, Simpson trained his sights on legal immigration categories. At the time, although twenty percent of preference categories were available to labor employment immigrants (54,000), when the unrestricted immediate relative immigration categories were added to the total number of immigrants each year, fewer than ten percent of immigrants who were entering each year were doing so on the basis of job skills.

In fact, soon after the Select Commission report, Senator Simpson proposed the elimination of the sibling immigration category. At the core of what became a long crusade, Simpson's complaint was that brothers and sisters were insignificant relatives for immigration purposes—that in U.S. culture, the sibling relationship is simply not close enough to justify providing an immigration preference. By 1989, Simpson's legislation was approved by the Senate, establishing a ceiling of 630,000 legal immigrants for three years.19 Of the total, 480,000 visas would be reserved for all types of family immigration, and 150,000 visas would be set aside for immigrants without family connections but with skills or job-related assets. After numerous markups and hearings, the House of Representatives, led by Democratic Congressman Bruce Morrison, passed a different bill that also would reduce family immigration dramatically for Asians and Latino,

16. Id.
providing only 185,000 family-based visas and 95,000 employment-based visas annually.\textsuperscript{20}

After furious negotiations, especially with fellow Democratic Congressman Howard Berman from Los Angeles, Morrison agreed to drop proposals that would have reduced the number of family-based visas. A compromise bill was enacted on October 26, 1990, which did not include Simpson's proposed family reductions.\textsuperscript{21} For the time being, proposals to cut back on family immigration were defeated. Although the main thrust of immigration law continued to be family immigration, the annual number of employment-based visas was nearly tripled from 54,000 to 140,000 per year.\textsuperscript{22}

Although Simpson was disappointed that he failed to reduce the Asian- and Latino-dominated family categories in 1990, he was able to install an overall numerical cap. Furthermore, for Simpson, the new employment categories and an expanded "diversity" program could attract immigrants who were not Asian or Latino: "We [now] open the front door wider to skilled workers of a more diverse range of nationalities."\textsuperscript{23}

Up to his retirement in 1996, Senator Simpson fought to eliminate the sibling category. On the eve of the 1996 presidential election, Congress enacted rather heinous immigration reform relating to deportation, asylum, and procedural issues.\textsuperscript{24} Until the late spring of 1996, the threat that the immigration legislation also would include cutbacks on legal immigration categories was real. Congressman Lamar Smith and Senator Simpson again took aim at the siblings-of-U.S.-citizens category as well as the category available to unmarried, adult sons and daughters of lawful resident aliens. Their efforts ultimately were not successful, so the 1996 legislation did not reduce family immigration.\textsuperscript{25}

Simpson's retirement certainly has not diminished political pressure to reduce family immigration. In 2006, the Migration Policy Institute, a Washington, D.C. think tank, issued a report suggesting that the sibling category was not serving a useful purpose.\textsuperscript{26} Then in 2007, the Bush Administration brokered a bi-partisan compromise on immigration reform sponsored by members of Congress that would eliminate the family sponsorship categories for siblings and adult children (married and unmarried). The category for parents of U.S. citizens also would be capped

\begin{footnotes}
20. \textit{Id.} at 122-23.
22. \textit{Id.} at 124.
24. Hing, \textit{supra} note 19, at 124.
25. \textit{Id.}
\end{footnotes}
for the first time. Instead, a new “points system” would be used that favored prospective immigrants with special or high-demand occupational skills, those with college degrees, and those who can speak English.

The 2007 legislative reform package was not passed, largely because of opposition from legislators who were opposed to sections of the bill that would have granted legalization to undocumented aliens. Comprehensive immigration reform was placed on the back burner during the 2008 election season, and the chances for immigration legislation in 2010 are dubious. However, if and when legislation is advanced seriously, some beltway immigrant rights advocates are fearful that attacks on family immigration categories will be renewed.

The current family-based system in fact suffers from a severe lack of sufficient visas. Instead of reducing family immigration (as the point system would have done), the necessary solution is to increase the family visa numbers in order to avoid backlogs for immigrants from China, India, and the Philippines.

III. DEPORTATION AND DETENTION

One can easily make assumptions about headlines such as “Ill and in Pain, Detainee Dies in U.S. Hands,” “ICE Raids Businesses Across California,” or “Judge Keeps His Word to Immigrant Who Kept His.” In the area of immigration enforcement, we often assume that raids and detention by Immigration and Customs Enforcement (ICE) or deportation of criminal aliens relate to Latino immigrants. After all, the majority of those detained and deported are, in fact, from Latin countries. However,
When we look beneath the headlines of these stories, we realize that enforcement stories often involve Asian immigrants, and these stories add force to the call for progressive reform in this area as well.

A. Detention

The story, “Ill and in Pain, Detainee Dies in U.S. Hands,” involved Hiu Lui Ng, who arrived in New York in 1992 at the age of seventeen. He and his wife, a U.S. citizen, had two citizen children. Ng’s wife was in the process of helping him apply for lawful immigrant status when he was arrested by ICE in the summer of 2007. Ng’s family tried to get him out of custody even as he was being shuttled between detention facilities.

Ng, however, began to fall ill in April of 2008. Soon he had to rely on other detainees to help him to the toilet, bring him food, and call his family. He was unable to obtain painkillers, because he could not stand in line to collect them. On July 26, 2008, attorney Andy Wong came to see Ng, but had to leave without talking to him because Ng was too weak to walk to the visiting area, and a wheelchair was denied.

By the end of July, a deportation officer informed Ng’s attorney that no examination by an outside doctor would be allowed, nor would Ng be provided a wheelchair. Ng’s lawyer filed a motion in federal court, and the federal judge ordered ICE to take Ng to a hospital. Doctors diagnosed Ng with a fractured spine, and identified cancer throughout his body. Ng died days later.

Appalling medical conditions at U.S. detention facilities have been well documented. For example, an investigative series by the Washington Post documented a number of cases in which seriously ill detainees died days or even weeks after requesting medical care and receiving ineffective, inappropriate care or no care at all. A staggering dearth of health-care resources was discovered. In one example, the Willacy County detention center in South Texas—the largest compound, with 2,018 detainees, had no clinical director, no pharmacist, and only a part-time psychiatrist. The investigation reported of “a hidden world of flawed medical judgments, faulty administrative practices, neglectful guards, ill-trained technicians, sloppy record-keeping, lost medical files and dangerous staff shortages. There is evidence that infectious diseases, including tuberculosis and chicken pox, are spreading inside the centers.”

The investigation further revealed frightening details affecting detainees suffering from mental

/enforcement_ar_08.pdf.
38. Bernstein, supra note 34.
39. Id.
40. Id.
illness:

Suicidal detainees can go undetected or unmonitored. Psychological problems are mistaken for physical maladies or a lack of coping skills. In some cases, detainees’ conditions severely deteriorate behind bars. Some get help only when cellmates force guards and medical staff to pay attention. And some are labeled psychotic when they are not; all they need are interpreters so they can explain themselves.\(^{42}\)

One of the records obtained by the *Washington Post* was a chart showing the cost savings for denial of each of a number of medical conditions—nearly half of which were mental illnesses. For example, one line item showed that denial of treatment for four people with manic-depressive psychosis resulted in cost-savings of $18,145.36.\(^{43}\) Based on confidential medical records and other sources, the *Washington Post* identified eighty-three deaths of immigration detainees since the creation of ICE in March 2003, to March 2008. The *Post* found that thirty of the deaths were questionable.\(^{44}\) Fifteen were suicides. One example was Sebastian Mejia Vincentes, who hung himself on August 22, 2004, while detained in a Virginia jail. As a mentally ill person, the adequacy of his supervision was questionable. He was dead four to six hours before his body was discovered despite a jail rule that detainees must be checked on every thirty minutes.\(^{45}\)

**B. ICE Raids**

Stories of abusive ICE raids have primarily highlighted factory and neighborhood operations that focus on the roundup of Latinos. However, the “ICE Raids Businesses Across California” story detailed the arrest of Chinese restaurant workers in 2008:\(^{46}\)

On Sept. 17, 2008, ICE special agents executed federal criminal search warrants at four sites in the northern California towns of Vacaville, Vallejo and Hercules—in the North Bay area northeast of San Francisco—as part of an investigation into the hiring and possible harboring of unauthorized workers at local Chinese restaurants. The raided sites included the King’s Buffet restaurant in Vacaville, one Vacaville residence, the Empire Buffet in Vallejo and one Vallejo

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43. Id.


46. WW4, *supra* note 35.
residence. Agents also conducted a search without a warrant at a home in Hercules.

Authorities are also investigating a second outlet of the Empire Buffet in San Pablo. That restaurant was not searched on September 17, because it was not open, most likely because agents had already rounded up its workers.

ICE agents apparently made no criminal arrests but arrested twenty-one workers on administrative immigration violations. Thirteen of those arrested were picked up at the restaurants and eight were discovered at the residences, which were owned by individuals affiliated with the restaurants. According to ICE, six people were arrested at the Hercules residence; seven were arrested at Empire Buffet in Vallejo; and two were arrested at the Vallejo residence. . . .

The arrested workers are from five countries: nine from China, five from Mexico, three from Guatemala, two from Indonesia, one from Singapore and one from Honduras. 47

The most recent vintage of immigration raids arose when the Department of Homeland Security (DHS) was established in 2003, largely in response to the perceived national security lapses that led to the tragic events of 9/11. When DHS was established, it took over the responsibilities of many other departments, including the Immigration and Naturalization Service from the Department of Justice. Interior enforcement functions were channeled into the ICE unit. Border enforcement remained in the hands of the Border Patrol, which became part of the Border and Customs Protection unit.

When President George W. Bush offered a guest worker proposal in January 2004 as a partial solution to the undocumented immigration challenge, his party showed little interest, and it seems that an ICE raid strategy was implemented so that he could get traction on his plan. Bush's detractors on the right argued that his guest worker proposal was too lenient and amounted to amnesty. The Bush administration responded with a strong enforcement program, going after undocumented workers and sometimes their employers.

One of the largest immigration raids in U.S. history occurred in April 2008 in the small Midwestern town of Postville, Iowa. Postville, a community with a population of roughly 2,600 people, represented the quintessential American melting pot. The community housed a mix of Hasidic Jews who moved to Postville to open up a kosher meatpacking plant. Working alongside them were immigrant workers from Mexico and Central America, in addition to descendants of German Lutheran migrants. The raid occurred at their kosher meat plant Agriprocessors, Inc., the

47. WW4 Report, ICE Raids Businesses Across California, supra note 35.
largest employer in town and one of the largest in northeastern Iowa. ICE seized over 400 undocumented workers, including eighteen juveniles.48

Agriprocessors employed approximately 970 workers, eighty percent of whom were believed to have fraudulent identification.49 After the raid both Agriprocessors and the entire Postville community were in recovery mode. The company brought in a skeleton crew from New York to meet their staffing needs. Community residents observed the sudden drop in business and worried about the town’s future. Postville is home to many Latino businesses, and in the days after the raids many storefronts posted signs in Spanish reading “Closed”.50 Postville Mayor Robert Penrod speculated on the effect of a possible Agriprocessors plant closure upon the town, estimating that two-thirds of the homes would remain empty and that ninety-five percent of downtown businesses would “dry up.”51 One witness to the effects of the ICE raid in Postville labeled the government strategy “criminal,” as the women were made to wear restrictive “humiliating

48. Antonio Olivio, Immigration Raid Roils Iowa Melting Pot, CHI. TRI., May 19, 2008, available at http://www.chicagotribune.com/news/nationworld/chi-iowa-plant-raidmay19003571577.story. In a heavy-handed procedure, 302 of the workers were fast-tracked with criminal charges, most related to identity theft. Lynda Waddington, Postville Aftermath: 302 Detainees Charged Criminally. 297 Plead Guilty, May 22, 2008, http://iowaindependent.com/2366/postville-aftermath-302-detainees-charged-criminally-297-plead-guilty. Some believe the government effectively coerced detainees from Postville into accepting plea deals on lesser charges by pressuring them with the more lengthy and harsh sentences that could be imposed under the aggravated identity theft charges. Erik Camayd-Freixas, Interpreting after the Largest ICE Raid in US History: A Personal Account, June 13, 2008, http://www.essensialaestrogen.com/pdf/camayd.freixas.essay.pdf. Although most of those sentenced in the aftermath of the Postville raid signed plea agreements and received five-month prison sentences, two individuals were sentenced to twelve months behind bars. One of the workers, Ignacio Flores Figueroa, a Mexican citizen who gained employment at an Illinois steel plant while using false documents challenged the process. Although he originally provided fake documents to his employer that contained completely falsified numbers, later documents he used contained numbers assigned to another individual. The Supreme Court ruled in his favor, mandating that a prosecutor be able to show migrant detainees knowingly used identification that actually belonged to another person. In the case of the Postville detainees, their knowledge regarding the origin of fraudulent employment documents was not a factor, because the very fact that they were using fake documents led to their quick conviction on identity theft-related charges. Flores-Figueroa v. United States, No. 08-108 (2009).

49. Olivio, supra note 46. The raid was not the first sign of trouble for Agriprocessors, Inc. The company had been under scrutiny for numerous violations of environmental laws, labor laws, and was on notice that there was an alleged methamphetamine lab being run from inside the plant. Spencer S. Hsu, Immigration Raid Jars a Small Town, WASH. POST, May 18, 2008, available at http://www.washingtonpost.com/wp-dyn/content/article/2008/05/17/AR2008051702474.html. By October 2008, the Iowa Workforce Development announced it would levy nearly $10 million in fines against the company for alleged labor infractions. The next day, the former manager was arrested and charged with bank fraud, harboring undocumented immigrants for profit and abetting document fraud and identity theft. Steven Greenhouse, Shuttered Meat Plant Edges Back into Business, but its Town is Still Struggling, N.Y. TIMES, Dec. 4, 2008, http://www.nytimes.com/2008/12/05/us/05postville.html? r=1; JewishJournal.com, Rubashkin Son Arrested, Agriprocessors Fined $10 Million in Kosher Slaughterhouse Probe, Oct. 30, 2008, http://www.jewishjournal.com/food/article/rubashkin_son_arrested_agriprocessors_fined_10_million_in_kosher_slaughterbh.


51. Id.
G.P.S. bracelets” while caring for their children, and hundreds of women and children were faced with the threat of being left “homeless and starving.”

The school system felt the immediate impact of the raids. The local school district estimated that 150 of the 220 students from immigrant families were absent the day after the raid. One local nun, Sister Kathy Thill, of nearby Waterloo where the detainees were being held at a local fairground, spoke out against the raids. She participated in an effort to collect donations for the affected families but noted the fear in the community. Thill heard a story of someone who was stopped while shopping at a local Wal-Mart, and some residents were too scared to go to work. Sister Thill also spoke of her own apprehension as she got word of possible check points set up by ICE officials while she was en route to deliver donated items to families.

As discussed below, the authority for ICE to conduct workplace raids derives from employer sanctions, which make it unlawful for employers to hire undocumented workers. Employer sanctions have become an excuse to disrupt communities, neighborhoods, and families, and thus must be revisited.

C. Deportation

The story behind the headline “Judge Keeps His Word to Immigrant Who Kept His” concerns the pending deportation of a Chinese immigrant who entered the United States at the age of five. Qing Hong Wu committed a series of muggings at age fifteen and was sentenced to reform school in 1996. The criminal court judge told him to take advantage of the time to turn his life around; if Wu did that, the judge promised to stand behind him. Wu vowed to change. He became a model inmate, was released early, and became the sole support for his mother. However, almost fifteen years later, Wu was arrested by immigration authorities when he went to apply for citizenship and faced removal because of immigration laws that did not value rehabilitation. His family and the criminal court judge, keeping his promise, petitioned New York governor David Patterson to pardon Wu. Miraculously, the governor granted the

55. See infra Part IV.E and accompanying text.
56. Bernstein, supra note .
57. Id.
pardon on March 6, 2010, erasing the grounds for mandatory detention and deportation.\footnote{58} Wu is not the only lawful resident who entered as a toddler, made a mistake, and got caught in the web of deportation laws in spite of straightening up. Thousands of these individuals have been deported, and many are Asian Americans. This deportation process was facilitated by changes to the immigration laws in 1996 that eliminated discretionary relief for aggravated felons. Prior to 1996, a lawful permanent resident, convicted of a serious crime, could seek a discretionary waiver in immigration court by introducing evidence of rehabilitation, community service, and hardship to close relatives and employers.\footnote{59} After 1996, the waiver was no longer available, and any evidence of rehabilitation and hardship became irrelevant.\footnote{60}

\section*{IV. THINKING BROADLY ABOUT IMMIGRATION REFORM}

The United States is caught up in hysteria, media-induced fear, and misinformation over undocumented immigration. We have militarized the border through “Operation Gatekeeper” pushing border crossers into treacherous terrain, resulting in thousands of unnecessary deaths since the 1990s.\footnote{61} We have engaged in Gestapo-type raids of businesses, homes, and neighborhoods, sometimes separating children from their parents.\footnote{62} We have arrested and deported Asian immigrants who have resided in the United States most of their lives. We have rounded up Asian workers in restaurant sweeps. We have prosecuted human rights volunteers in the Arizona desert who provided food, water, and emergency medical care to the undocumented. We have encouraged private vigilantes to enforce a twisted sense of national security that results in armed ranchers pointing loaded assault weapons at teenage girls and the murder of a nine-year-old and her father in their living room.\footnote{63} Anti-immigrant ordinances and laws fomented by resentment over undocumented workers have been proposed and enacted in states and towns across the country, causing great division in those communities.\footnote{64} In the process, we have harmed countless innocent

60. Id. at 908-09.
64. See, e.g., New York Civil Liberties Union, Immigrants’ Rights, http://www.nyCLU.org}
families, wasted billions of dollars, and lost valuable time that would be better spent working to integrate newcomers into our society.\textsuperscript{65}

The hiring of substantial numbers of undocumented Mexican workers by U.S. employers of all sizes raises a number of questions. Why do these companies rely on such workers? Is it strictly for better profits? Should we be upset about this phenomenon, and if so, what should we be upset about? And why are undocumented Mexican workers so willing to take these low-paying jobs? What can we learn from the effects of NAFTA and globalization on Mexico?

Without an adequate national visa system to accommodate the flow of needed immigrant workers, market forces have made adjustments through the employment of undocumented workers. Undocumented immigrants account for about 4.3 percent of the civilian labor force—approximately 6.3 million workers out of a labor force of 146 million.\textsuperscript{66} Although they can be found in many sectors of the economy, undocumented workers tend to be overrepresented in certain occupations and industries. Three times as many undocumented immigrants work in agriculture, construction, and extraction as do U.S. citizens. Though roughly half of native citizen workers are in areas of management, business, professional occupations, sales, and administrative support, only about one-quarter of undocumented workers are in these areas.\textsuperscript{67}

\textit{A. The Effects of NAFTA}

We were told that the North American Fair Trade Agreement (NAFTA) involving the United States, Canada, and Mexico would fix the undocumented Mexican migration problem. NAFTA, effective in 1994, would promote economic development in Mexico, creating jobs that would keep Mexicans home. In a non-protectionist, free trade environment, each country would specialize in areas and products where each had a comparative advantage. Middle-class jobs would flourish in every region, and poor countries would prosper. Opponents of NAFTA warned that U.S. jobs would be lost to Mexico, where the low-wage workforce would undercut higher-paid U.S. workers. Harsh, but a good sign for Mexico, right?

Somehow, things did not turn out that way. Mexico has lost far more jobs than it has gained under NAFTA. What we have now learned, for example, about the effect of NAFTA on Mexican corn production, is quite revealing. Mexico’s 10,000-year heritage of corn production was destroyed

\textsuperscript{65} See \textit{Bill Ong Hing, Deporting Our Souls—Values, Morality, and Immigration Policy} 164-203 (2006).


\textsuperscript{67} \textit{Id.}
under NAFTA rules. Mexican corn prices spiraled down in competition from heavily subsidized U.S. imports. Local farm incomes were slashed, resulting in rural suffering and misery from which millions of workers sought escape. Oxfam International, the confederation of organizations working to end poverty and injustice across the globe, went so far as to call the arrangement “rigged,” as U.S. corn was dumped into Mexico at artificially low prices that were essentially $105 million to $145 million a year less than the cost of production.

The Mexican government should be criticized for liberalizing the corn market with little regard for the three million Mexican farmers who suffered as a result. However, the United States shares much of the blame for so heavily subsidizing its corn industry and for dumping its corn in Mexico without considering the consequences. As Oxfam summarized: “If the benefits of world trade are to be shared fairly—as everyone says they want to see happen—developing countries like Mexico must be allowed to protect their weaker industries. And rich countries like the U.S. must stop subsidizing their agricultural exports.” There is a good argument that the United States has a historical debt to pay for what it has done to the agricultural sector in Mexico.

Instead of reducing undocumented migration, half a million Mexican migrants continue to flow across the border annually. NAFTA was a half-baked idea that left out the ingredients needed to bolster the Mexican economy—a true partnership including serious support for infrastructure, development, and labor visas, much like what the wealthy nations of the European Union have done for their poorer members. NAFTA has caused job displacement in Mexico, and we should not be surprised that Mexican workers end up looking to El Norte—the United States—for work.

Understanding the effects of NAFTA and other aspects of the globalized economy can give us the foundation for a better approach to reducing the flow of Mexican workers to the United States. As we develop a new vision, we should remain cognizant of our historical as well as continuing economic and social relationship with Mexico. After all, Mexico is a friend, not an enemy.

**B. Lessons from the EU Labor Movement**

In contrast to the failure of NAFTA to incorporate labor migration in its provisions, the evolution of the European Union (EU) has proceeded

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69. Id.
70. Id.
71. Id.
72. Id.
73. Id.
with the mobility of workers in mind. The EU permits open labor and engages in development assistance to poorer nations to reduce migration pressures, yet maintains border control. This is done with a commitment to "harmonizing" labor standards among member nations in terms of wages, workweek, and other labor cost factors. Economic development aid has been provided to poorer countries like Spain and Portugal to strengthen economic opportunities throughout the region (and to lessen the pressure to migrate). But the EU also anticipated meeting labor needs through movement. In order to ease mobility of workers, a European Social Fund provides vocational training and retraining. This is flexible enough to adapt to business needs in different member countries. The idea is that if the EU truly wants to integrate its member nations’ economies, the free movement of workers is necessary, and they should have the right to accept employment in any member nation. And the workers’ families have the right to follow and establish new residence with the workers.

The EU approach to labor migration has been thoughtful and deliberate. Beginning with the EU’s 1973 expansion to include Denmark, Ireland, and the United Kingdom, the British pushed for an approach to aid poorer regions as an antecedent to membership. When Greece (1981), and Portugal and Spain (1986) were added, all three nations as well as Ireland received infusions of capital and assistance with institutional planning. This shared-responsibility model was based on “a commitment to the values of internal solidarity and mutual support.”

This approach worked. The gap between the poorer and richer nations narrowed. By the beginning of the new millennium, Ireland’s economy had been transformed, and its per capita GDP was above the EU average. Incredibly, Ireland—a nation that for generations had been a place of steady outward emigration—began attracting immigrants. Across Europe, the feared “mass migration of the unemployed” fizzled. People stayed in their own countries because work opportunities were created.

The EU example is one we should carefully consider. North America is not the same type of union. However, the underlying values of mutual assistance for trading partners that is beneficial to all partners are worthy of emulation. North American countries would be smart to develop a new approach in view of the mounting economic prowess of the EU as well as

74. *Jennifer E. Harman, Mexican President Vicente Fox’s Proposal for Expanding NAFTA Into a European Union-Style Common Market—Obstacles and Outlook, 7 L. & BUS. REV. AM. 207, 216 (2001).*


countries like China.

C. An Avenue for Workers

Whatever the cause for concern, real solutions to the undocumented immigration situation have to be considered. The standard, well-rehearsed solutions have revolved around border enforcement, for example in the form of more fencing and agents, and greater enforcement of penalties against employers who hire undocumented workers. But we have seen that those standard solutions have had little impact on the flow of undocumented migration. The best solution is to develop a system that regularizes a flow of workers to the United States, as we help Mexico with its infrastructure and economy so that Mexico can retain many of its workers as well. By finding solutions to the undocumented Mexican immigration challenge, anti-immigrant hysteria will ease, benefiting all immigrants, including Asians.

Among the most prominent proposals is the guest worker program offered by President Bush halfway in his administration. Under the plan, first presented on January 7, 2004, undocumented immigrants and workers from abroad would “be able to apply for a three-year work permit, which would be renewable at least once . . . Workers would be allowed to switch jobs and to move from one type of work to another . . . Those coming from abroad would be able to bring family members.”

The Bush proposal was shrewd; not including an automatic path toward citizenship for the workers addressed the concerns of some anti-immigrant groups. But by providing an opportunity to work for up to six years, many undocumented workers would step forward and reveal themselves, while a large pool of low-wage workers would make the business community extremely happy. In fact, providing a perpetual pool of low-wage workers would revolutionize the labor market.

While legalization (or amnesty) proposals for the estimated twelve million undocumented immigrants in the United States have gone through several iterations during the past few years, Senators McCain (until he ran for President) and Kennedy and Representatives Kolbe, Flake, and Gutierrez introduced sweeping immigration reform in 2005 and 2006 that included major guest worker components. A new temporary worker visa would be created for jobs that did not require special skills.

The legalization component of the McCain-Kennedy Bill would have allowed undocumented aliens to obtain a lawful status. The person’s spouse and children could also apply. The applicant would pay an initial $1,000 fine. Much of the McCain-Kennedy Bill was incorporated into a package that received strong bipartisan support in the U.S. Senate in the spring of

2006, but the legislation never passed.\(^7\)\(^9\)

A similar approach for resolving the labor needs of employers and addressing the migration pressures from Mexico was offered by an independent task force assembled by the Migration Policy Institute.\(^8\) The task force recommended establishing a “new provisional visa” that begins with an approach similar to that proposed by President Bush: a three-year work visa that is renewable once. Provisional visa holders would include workers with special skills, as well as those who would hold “low- and semi-skilled jobs.”\(^8\)\(^1\) The visas would be “suitable for large numbers of workers who are not in temporary or seasonal jobs across the occupational spectrum.”\(^8\)\(^2\) Provisional workers could then obtain permanent status by graduating to immigrant status later. Essentially, the task force and other commentators have advocated creating larger temporary worker programs as well as expanding permanent immigration opportunities. Douglas Massey goes a step further, arguing that the number of permanent immigration visas for Mexicans should be increased five-fold to one hundred thousand visas each year, given the special relationship the United States has with Mexico.\(^8\)\(^3\)

Whether we adopt a provisional worker approach, a five-fold increase of permanent visas to Mexicans, or move toward an EU approach to open labor migration, what we now know about the effect of NAFTA and globalization on the Mexican workforce compels us to consider new approaches to the border. At the very least, the facts demand that we soften the rhetoric on the so-called immigration problem. The “illegal activity” is the result of pressures our own policies (e.g., subsidies for our corn farmers) and other forces such as our thirst for Chinese-made products have induced. Thus, the case can be made that legalization and a broader visa regime not only are the right things to do, but they are the least we can do.

Understanding the effects of NAFTA and other aspects of the globalized economy provides us with the foundation to develop a better approach to the flow of Mexican workers to the United States. The failure of current militarized and racialized enforcement strategies to stem that flow further challenges us to step back and address the issue more thoughtfully. In the United States, we tend to hear about the job losses suffered by U.S. workers because of NAFTA, but we hear little about Mexican job loss and fail to consider the fact that the United States very


\(^9\) Id. at 38-40.

\(^1\) Id.

\(^2\) Id.

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well may need immigrant workers of all sorts.

When we consider the devastating impact on Mexico that NAFTA and other international monetary and trade agreements supported by the United States have had, the responsibility for exploring creative answers to assist Mexico out of its current quagmire is placed at our doorstep. Any serious conversations about Mexican migrants must start with an understanding that border crossers from Mexico are not simply migrant workers; they are in fact “economic refugees.” Yet in considering the U.S. relationship with Mexico and migration, economic concerns should not be our strict guide. After all, “migration policies have important implications in terms of ethics, human rights or global justice.”

The unrealistic demand by some restrictionists to round up and deport all undocumented immigrants ignores the economic disaster that would befall the United States. Aside from the fact that many U.S. industries would suffer from a lack of workers, 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. Gordon Hanson’s findings for the Council on Foreign Relations support these arguments. He notes that between the years of 1960 and 2000 the number of U.S. residents with less than twelve years of schooling fell from fifty percent to twelve percent. The undocumented have filled a void many Americans feel overqualified to fill. In turn the staffing of these industries stimulates the economy. Low-skilled workers help agricultural, textile, industrial, and food service industries thrive and then benefit the local economies where those businesses are located. Arizona’s economy, for example, relies on an estimated twelve percent undocumented labor force.

Those who believe that the law should be abided by at any cost are unfamiliar with the details of immigration law. Legal avenues for obtaining status under current immigration law are quite complicated. Considering the irrationality of certain immigration provisions may help the naysayer understand why many would-be immigrants do not or cannot pursue legal means of obtaining status. Backlogs in family immigration categories can range up to twenty years. Visas for those who want to work or be with family members part of the year on a regular basis are highly difficult to obtain.

D. Investing in Mexico

We can be innovative in creating a just border. Under the circumstances, one approach is to consider a pure open border. Another might be something along the lines of more flexible, innovative visas. Still another—which is my preference and will be more beneficial to Mexico in the long term—is helping Mexico keep committed, able workers in Mexico by helping to improve economic and social opportunities in Mexico. This EU-style approach of serious investment would diminish migration incentives. Vicente Fox’s pre-9/11 call for a common market in North America with the free movement of labor as well as goods, services, and capital was on the right track.88

Mexico’s infrastructure—roads, schools, telecommunications—needs attention. A national plan for infrastructure and transportation has not been developed.89 Reducing geographical disparities within Mexico would likely decrease pressures to emigrate, and a first priority should be improving the road system from the U.S. border to the central and southern parts of Mexico.90 Better roads not only improve conditions for travelers, but are also necessary for greater trade. Foreign as well as domestic investment could be attracted. The states of Oaxaca, Zacatecas, Michoacán, and Guanajuato, in the central and southern parts of the country, have the highest unemployment rates and are the primary sources of migrants to the border and to the United States.91 Yet, in spite of the growth in trade under NAFTA that has benefited some multinational corporations, significant investment in transportation and infrastructure has not occurred.

The problem with NAFTA was not what it included, but what it did not include—a “unified approach” that recognized the need for the three countries to come together across social and economic lines.92 The three NAFTA countries—the United States, Mexico, and Canada—should establish an investment fund to improve roads, telecommunications, and post-secondary education in Mexico.93 Mexico lacks the capital to build the infrastructure necessary to help narrow the gap with Canada and the United States.94 If its northern neighbors contributed ten percent of what the EU spends on aid and provided wise investments in infrastructure and education, Mexico could experience growth at a rate twice that of Canada and the United States.95 “The psychology of North America would change quickly, and the problems of immigration, corruption, and drugs would

88. PASTOR, supra note 74, at 98.
89. Id. at 93.
90. Id. at 137.
91. Id.
92. Id. at 2.
93. Id. at 136.
94. Id. at 145.
95. Id. at 191.
look different. North America would have found the magic formula to lift developing countries to the industrial world, and that would be the 21st-century equivalent of the shot heard round the world," writes Robert Pastor. 96 By building up the central part of the country, border congestion could be relieved, and the whole system could be better managed.97

Further, significant investment in new technologies in small and medium-sized industries is a must. Some of this can be achieved through tax incentives to spur economic growth in Mexico’s interior. Fruit and vegetable production development can absorb some of the rural workers that have been displaced.98

Focusing on the educational system in Mexico is especially key. Mexican students fall near the bottom in cross-country comparisons on basic literacy, math, and science.99 In the United States, the adult education level in the United States is almost thirteen years of school; in Mexico, about seven.100 This low education level has severe implications for competitiveness and standard of living for Mexicans, whether they remain in Mexico or migrate to the United States.

Mexican migrants are among the country’s most able workers. They leave for better wages—not necessarily because they were unemployed. Their income in the United States is better than what they were making in Mexico, but it’s unclear if their productivity—measured in part by their remittances—is higher than what it would have been if they remained in Mexico. Concentrating on investments in Mexico to create more jobs would provide incentives for able Mexican workers to remain home.

E. Repeal Employer Sanctions

Employer sanctions—those statutory provisions justifying the arrest of undocumented workers, such as Chinese restaurant workers and Mexican factory workers—illustrate how immigrants have come to be demonized. At the end of World War II, initial efforts to completely demonize the immigrant worker by imposing employer sanctions on a labor displacement theory failed. In the mid-1970s, a plan known as the Rodino proposal, to make hiring of undocumented workers unlawful, was constantly debated. Finally, the employer sanctions effort was accomplished as part of the Immigration Reform and Control Act of 1986 (IRCA), and workers caught working without authorization at job sites could be targeted. Throughout the debate, Mexican workers were largely the focal point, but they became

96. Id.
97. Id. at 139.
100. Id.
dehumanized simply as "unauthorized" workers once sanctions were enacted.

In remedying the effects of an overzealous immigration enforcement system that leads to ICE raids, a primary target must be employer sanctions. Understanding that NAFTA, globalization, and United States economic influence have everything to do with the movement of migrants from a country like Mexico are enough for us to realize that they are actually economic refugees. The history of U.S. labor recruitment of Mexican workers and the attraction that the United States has represented to Mexican workers is well documented. This understanding and the human rights costs are sufficient bases for ending workplace raids of the nature that occurred during the Bush administration. However, for over two decades it has been a crime for an undocumented worker to hold a job in the United States; and in the minds of the public and policy makers, that worker is Mexican. To enforce the prohibition, agents conduct immigration raids, and the victims of those raids mostly have been Mexican.

The rationale for employer sanctions always has been that the law would dry up jobs for the undocumented and discourage them from coming. However, a close look at ICE raids reveals that employer sanctions have had disastrous effects on all workers. Instead of reinforcing or tweaking employer sanctions, we would be much better off if we ended them. Our experience shows that raids and enforcement of employer sanctions can leave severe emotional scars on families. Increased enforcement has poisoned communities, spawning scores of state and local anti-immigrant laws and ordinances that target workers and their families. Most importantly, employer sanctions do not address the real question: why can't migrant workers find work back home instead of coming to the United States to feed their families? While the racial effects of globalization are ignored, the racial effects of employer sanctions are manifested in the arrests of "unauthorized" workers.

Trying to discourage workers from coming by arresting them for working without authorization, or trying to prevent them from finding work, is doomed to fail in the face of the strong economic pressure they experience at home. To reduce it, we need to change our trade and economic policies so that they do not produce poverty in countries like Mexico. 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

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103. Id.
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.”104 A joint statement by the AFL-CIO and Change to Win federations recognizes that “an essential component of the long-term solution is a fair trade and globalization model that uplifts all workers.”105 Continued support for work authorization and employer sanctions contradicts this understanding. Even with a legalization program, millions of people will remain without papers as more come every year.106 For them, work without “authorization” will still be a crime. And while employer sanctions have little effect on migration, they will continue to make workers vulnerable to employer pressure. When undocumented workers are fired for protesting low wages and bad conditions, employer sanctions bar them from receiving unemployment and disability benefits, although they pay for them. Moreover, it is very difficult for undocumented workers to find new jobs.

The alternative to using employer sanctions is enforcing the right of workers to organize and enforcing minimum wage, overtime and other worker protection laws. Eliminating sanctions will not change the requirement that people immigrate to the United States legally. The Bureau of Immigration and Customs Enforcement will still have the power to enforce immigration law. And if a fair legalization program were passed at the same time sanctions were eliminated, many undocumented workers currently in the United States would normalize their status. A more generous policy for issuing residence and family-unification visas would allow families to cross the border legally, without the servitude-like restrictions of guest worker programs.

F. Broaden the Permanent Visa System

America’s immigration system requires comprehensive reform that serves everyone who lives and works in America. Our country’s outdated immigration policy is incapable of dealing with the new century’s immigration patterns or economic realities. In effect, U.S. policy undermines the very ideals and values our country was built on, and serves neither business nor workers.

The number of available employment visas must be increased substantially. From 2005 to 2008, approximately 500,000 unauthorized

immigrants a year entered the United States, the largest group coming from Latin America, mainly Mexico. Instead of relying on short-term "guest worker" visas, labor shortages should be filled with workers with full rights, a path to permanent residence, and, if they choose, citizenship. Congress has arbitrarily set the number of employment-based admissions for permanent visas at 140,000 visas annually. This number falls far short of satisfying the actual number of visas needed to meet the U.S. demand for labor and make family reunification possible. Such a liberal expansion would prevent the creation of an underclass of workers, since immigrants would have full employment rights and access to a permanent future in the U.S. community, economy, and democracy.

The number of visas available should be adjusted to reflect actual, demonstrated labor shortages. A new visa program must ensure that U.S. workers are the first ones to be considered for available jobs and that the economic incentives are in place for U.S. employers to hire U.S. workers first. Access to the program should be frozen in areas with high unemployment, and the employer application fees for hiring new foreign workers under the program should be significant.

Under the current visa program, families often have to wait five to twenty years to be reunited with their family members. The vast majority of those on the family immigration waiting list are Chinese, Indians, Filipinos, and Mexicans. The visa limits and structural delays must be revamped to end the separation of families that currently contributes to the number of undocumented immigrants entering the country. Family reunification must remain a high priority to be fair to the workers that we have recruited and to families that are already here.

V. THE POLITICS OF REFORM

Enacting immigration legislation that includes a large investment component for Mexico or coming up with a separate Mexico investment piece on its own or as part of NAFTA reform with Canada is, of course, a


109. Id.

110. As of this writing, the April 2010 family visa bulletin issued by immigration officials shows the primary backlogged countries as China, India, the Philippines, and Mexico. See Visa Bulletin for April 2010, available at http://www.travel.state.gov/visa/frvi/bulletin/bulletin_4747.html (last visited April 16, 2010).
political challenge. However, I believe that our nation is up to that challenge and that a proposal for massive investment in Mexico coupled with EU-style labor migration can find support from what are regarded as pro- and anti-immigrant quarters. Pro-immigrant groups want Mexican workers and their families treated fairly and humanely. Anti-immigrant groups want Mexican workers and their families to stay in Mexico and to stop entering illegally. The violent approach to immigration enforcement has not accomplished anything for either group. Smart-thinking anti-immigrant forces should be able to see how an invest-in-Mexico and open labor migration approach will actually help move them closer to achieving their goals given the EU’s experience.

Stranger political coalitions have come together in the past. In the 1920s, long after the enactment of the Chinese exclusion laws and the curtailment of Japanese labor migration to the United States, a wave of anti-Filipino sentiment rose along the West Coast. The large number of Filipino workers coming in stirred up economic and social complaints among the white workers, and calls for the exclusion of Filipinos ensued. At the time, however, the Philippines were a possession of the United States and, as such, Filipinos were considered U.S. nationals not subject to immigration laws. Ultimately, a coalition of anti-Filipino advocates and Filipino nationalists seeking Philippine independence was able to convince Congress to enact the Philippine Independence Act of 1934. The law, which would take effect in 1946, granted the Philippines its independence and reduced Filipino immigration to the United States to an annual quota of fifty visas.\footnote{111. BILL ONG HING, MAKING AND REMAKING ASIAN AMERICA THROUGH IMMIGRATION POLICY 88 (1993).}

From my perspective, stories of ICE raids victims, the senseless prosecutions of human rights workers providing water and medical aid to border crossers facing death in the desert, the accounts of contributions that undocumented migrants continue to make to the United States, and the DREAM Act students who are at the threshold of greatness are reason enough for policy makers to realize that we need a new, nonviolent approach to the U.S.-Mexico border. And when you add the information on the effect of NAFTA on the Mexican economy and the example of the EU approach to poorer nations who have been welcomed into that community, I would hope that little doubt would be left in the minds of the thoughtful public and clear-headed policy makers that the solution to the so-called undocumented immigration problem lies in the realm of a generous approach to the border and assisting Mexico with its economy.

After more than thirty-five years of advocacy on behalf of immigrants, I know that getting policy makers to do the right thing will require political will, power and jockeying. Political forces have come together to drive
dramatic changes in immigration policy in my lifetime. In 1952, Harry Truman vetoed legislation for failing to correct the inherent racism embedded in the national origins quota selection system: “The time to shake off this dead weight of past mistakes is now. The time to develop a decent policy of immigration—a fitting instrument for our foreign policy and a true reflection of the ideals we stand for, at home and abroad—is now.”112 Then in 1958—two years before he was elected president—John F. Kennedy set out his broad philosophy on immigration policy in his book, *A Nation of Immigrants*. He wrote: “Immigration policy should be generous; it should be fair; it should be flexible. With such a policy we can turn to the world, and to our own past, with clean hands and a clear conscience.”113 Their hopes finally were embodied in the 1965 amendments that opened up immigration to the United States to migrants from all over the world. The 1986 legalization program contained in IRCA, albeit limited and a narrow political victory, gave a second chance to three million undocumented immigrants. Ronald Reagan supported the legalization provision and upon signing IRCA, he stated: “We have consistently supported a legalization program which is both generous to the alien and fair to the countless thousands of people throughout the world who seek legally to come to America. The legalization provisions in this act will go far to improve the lives of a class of individuals who now must hide in the shadows, without access to many of the benefits of a free and open society.” Even before he became president, Reagan wondered about what he called “the illegal alien fuss. Are great numbers of our unemployed really victims of the illegal alien invasion, or are those illegal tourists actually doing work our own people won’t do? One thing is certain in this hungry world: No regulation or law should be allowed if it results in crops rotting in the fields for lack of harvesters.”114 Political leadership was necessary in both the 1960s and the 1980s, and the leadership emerged.

Today, the debate over what is termed “comprehensive immigration reform” does not contain the investment elements of my proposals. It is hard enough to get legalization seriously considered, I am told. How could I ask for billions to be invested in Mexico? My answer is relatively simple. Major resistance to legalization today is couched in terms of, “if you reward these law breakers, then more will come” or “we have to get control of the border first.” My proposal of investments in Mexico and an EU-style border for labor migration are major building blocks to the long-term solution of reducing undocumented migration. The violent, intrusive enforcement approach has failed because it does not address the root causes


of migration or the need that many U.S. employers have for low-wage workers.

I believe that there is political interest in the approach I advocate. After meeting with the Congressional Hispanic Caucus in March 2009, President Obama confirmed his strong support for comprehensive immigration reform and explained why a piecemeal approach will not work.

I think the American people . . . appreciate and believe in immigration. But they can’t have a situation where you just have half a million people pouring over the border without any kind of mechanism to control it. So we’ve got to deal with that at the same time as we deal in a humane fashion with folks who are putting down roots here, have become our neighbors, have become our friends, they may have children who are U.S. citizens . . . That’s the kind of comprehensive approach that we have to take.  

While he campaigned for the presidency, Obama recognized the strategic link between investment in Mexico and the reduction in undocumented migration:

At a national level, our diplomacy with Mexico must aim to amend NAFTA. I will seek enforceable labor and environment standards—not unenforceable side agreements that have done little to curb NAFTA’s failures. To reduce illegal immigration, we also have to help Mexico develop its own economy, so that more Mexicans can live their dreams south of the border. That’s why I’ll increase foreign assistance, including expanded micro-financing for businesses in Mexico.

On the “Agenda” section of its website, the White House outlines a series of goals regarding immigration that invokes a similar sentiment:

Strengthen Border Control
President Obama will protect the integrity of our borders by investing in additional personnel, infrastructure, and technology on the border and at our ports of entry.

Improve Our Immigration System
President Obama will fix the dysfunctional immigration bureaucracy and enable legal immigration so that families can stay together.

Remove Incentives to Enter Illegally
President Obama will remove incentives to enter the country illegally by preventing employers from hiring undocumented workers and enforcing

the law.

Bring People Out of the Shadows
President Obama supports a system that allows undocumented immigrants who are in good standing to pay a fine, learn English, and go to the back of the line for the opportunity to become citizens.

Work with Mexico
President Obama will promote economic development in Mexico to decrease the economic desperation that leads to illegal immigration.117

An influential immigrant rights organization, America’s Voice, also includes the “[r]eduction of migration pressures in sending countries over time” as part of its reform agenda.118

Observers like Robert Pastor have called for substantial EU-style investments in Mexico.119 Laura Carlsen, the director of the America Policy Program in Mexico City, advocates a renegotiation of NAFTA that “should include a view toward job generation and retention in Mexico, and a compensation fund similar to the European Union’s transition funds for less-developed countries.” Why? In part because when Mexican real wages drop ten percent, apprehensions at the border rise around eight percent. Real wages in Mexico fell twenty-four percent from December 2006 to August 2008 and are plummeting now with the economic crisis.120

The sooner the anti-immigrant forces recognize these connections, the better. It is in their interests, as well as the interest of all residents in the NAFTA countries, to make the connections between real investment and development in Mexico. The investment strategy is the sensible way to

118. We believe sensible immigration reform legislation should combine the following elements to secure the border and reduce illegal immigration:
* A program that requires those here illegally to get on the right side of the law by passing background checks, studying English, paying taxes, and working towards full U.S. citizenship.
* Reunification of families separated by outdated immigration laws.
* A commission to regulate the future flow of employment-based immigration so that workers’ rights are protected and honest businesses are able to grow.
* A crackdown on unscrupulous employers who hire undocumented workers and undermine their law-abiding competitors.
* Smart and professional border enforcement, conducted in consultation with border communities.
* Reform of current immigration enforcement practices, including the right to fair proceedings, humane treatment of immigration detainees, and respect for community policing.
* Reduction of migration pressures in sending countries over time.

119. See generally PASTOR, supra note 74.
relieve the pressures for undocumented migration.

The most influential immigrant rights advocates in Washington, D.C. have adopted an interesting rule-of-law political strategy in the last few years to push for comprehensive immigration reform. Tom Barry offers a stinging rebuke of what he regards as the prevailing beltway strategy:

[A] platform propagated the language advanced by the Center for American Progress, America's Voice, [National Council of La Raza] and others in the CIR coalition, stating: "We must require them to come out of the shadows and get right with the law."

In their new strategy for liberal immigration reform, these immigrant-rights advocates haven't been entirely clear about their priorities. While advancing the tough "rule of law" enforcement and "get right with the law" language, they haven't explicitly rejected the "enforcement-first" approach.

They presented no vision of a future immigration policy that would ensure that immigration flows are sustainable socially and economically. It shouldn't be surprising, then, that the Democratic Party leadership, like the Republicans, have interpreted the apparent political consensus around a "rule of law" immigration and border policy as a political mandate to continue along the "enforcement first" path set by the Bush administration. Napolitano is doing just that, and it may be time for liberal immigration reform advocates to revisit their opportunistic "rule of law" messaging and center-right framing of the immigration crisis.

From what I know of the advocacy groups upbraided by Barry, they have appeared to adopt a rule of law theme probably, in their view, to gain credibility with the public and the media, while co-opting the law-and-order rhetoric of restrictionists. Like Barry, I fear that this theme can be interpreted as an endorsement of the "enforcement first" methods of the Bush administration with all of its ugly trappings. On the other hand, when a Bush administration-style ICE raid took place in Washington State in February 2009 after Napolitano took the reins of DHS, she appeared surprised and ordered an investigation. No other such raids have occurred since then, and Napolitano has indicated that enforcement should focus on employers who hire undocumented workers, not on the workers themselves. America's Voice consistently has been super-critical of ICE raids. Also, a review of the immigration advocacy positions of the organizations identified by Barry do in fact include what might be labeled as an "outline" for immigration reform that is "holistic." Still, there is

121. Barry, supra note 9.
122. The National Council of La Raza states its position this way:
NCLR supports comprehensive immigration reform that includes the following principles:
1. Restoring order by getting the 12 million undocumented people in our country to come forward, obtain legal status, learn English, and assume the rights and responsibilities of citizenship while
danger that the right can take the requirement that undocumented immigrants “get on the right side of the law,” or “restoring order” themes, and call it an endorsement of raids and an agreement that the border must be secure before legalization can be considered.

While I do not like the rule-of-law political strategy, especially if it is interpreted to mean that the border must be secure before anything else can be legislated, the advocacy of my positions for investment in Mexico and a new vision of the border for labor migration can be part of any strategy that seeks progressive immigration reform. My real concern is that the debate over whether millions of undocumented workers in the United States should be granted legalization distracts us from the more important questions about how we can structure the relationship between Mexico, the United States, and Canada in a manner that is good for all three countries. In my view, the debate actually has to be recast to focus on the causes of undocumented migration from Mexico and addresses those causes. The cause is not the recruitment of undocumented workers by U.S. employers; the cause is the economic problem in Mexico in which the United States has had a hand. My investment proposal is more about addressing push factors rather than pull factors of migration.

VI. LONG-RANGE SOLUTIONS

Advocacy for legalization for undocumented immigrants often generates the question: What about those who enter illegally after the first twelve million are granted amnesty? The question assumes that undocumented migration would continue. The question also assumes that legalization would be legislated without anything else. That is the key; without comprehensive reform, legalization alone will solve nothing but the status for those who benefit from the program. Minimally, legalization must be complemented with liberalization of the labor and family immigration categories. However, as I have argued above, in addition to the visa liberalization, the better approach would include EU-type investment in the Mexican economy and infrastructure and adjustment to the agricultural chapter of NAFTA. What we do know for sure is that the current enforcement-only approach is not working. The EU evidence is clear: a visa expansion and investment approach is much more likely to have a real, long-term impact on Mexican migration.

Those looking for a permanent, overnight solution to the challenge of

creating smart enforcement policies that uphold national security and the Constitution;
2. Cracking down on unscrupulous employers whose practices undermine conditions for all workers;
3. Unclogging legal channels to reunite families and allow future workers to come in with the essential rights and protections that safeguard our workforce; and
undocumented migration will not find it. We certainly have not found it in the enforcement-only strategy in which our nation is currently engaged. And, truth be told, many of the policies I advocate will take years to fully take effect. Certainly, legalization for the undocumented, an expansion of the labor and family visa categories, and allowing Mexico to regain control of its own food production will have significant, immediate effects. However, the long-range task of building Mexico’s infrastructure and economy in order to significantly reduce emigration will take time. That process took time in countries like Ireland, Spain, and Portugal in the EU experience as well. However, the longer we wait to embark on that task of effective assistance in Mexico, the longer we delay making progress along those lines.

Some may find my position contradictory. In addition to legalization for the undocumented, I advocate open labor migration opportunities for nationals of NAFTA countries in the same manner as EU nationals have within the EU. That position is grounded in the rights that I believe workers should hold inherently as well as the fact that U.S. businesses need workers. On the other hand, my call for deep investment in Mexico, if heeded, will result in more employment opportunities in Mexico, encouraging Mexicans to stay home. This is important for Mexico; Mexico’s loss of able-bodied workers is not a good idea, as Mexico will need workers to build its economy and infrastructure with the investment funds. Is this really a contradiction? I think not. First of all, since there are millions of workers involved, both outcomes can coexist; it will be a matter of balance. But in the long run, I believe that more Mexican workers will stay at home, rather than traveling to work.

Some core U.S. industries thrive because there is an immigrant labor base willing to do the work necessary to keep those industries going. Consider agriculture, and the broader hospitality and food/restaurant industry. In many parts of the country, there are not enough willing U.S. workers to fill the many agriculture and food industry jobs. The migrant labor force fills this need and thus helps these industries grow and stimulate the economy, thereby helping the business owners and businesses remain viable.

On the other hand, we should not lose sight of the different reasons that workers migrate. Many—especially Asian immigrants—come because they want to join family here. However, others simply come for the work, but really do not want to uproot their home, their life. Coming to the United States is not an easy or always desirable path for many. They would stay home if real employment opportunities existed for them. The current economic imbalance does not allow those types of fully voluntary decisions to be made.

I realize the need for bold leadership if more integration among North American countries, such as serious investment in Mexico and expanding
the visa system, are to be implemented. Our nation experienced that bold leadership in the immigration context in the past—when Harry Truman vetoed major legislation in 1952 and chastised Congress for not overhauling the visa system, when Dwight Eisenhower called on ending the racist national origins quota system, when John Kennedy and Lyndon Johnson led the country to finally reform the vision of the immigration selection system in the 1960s, and when Ronald Reagan spoke out in support of granting legalization to undocumented workers in the 1980s.

Investment in Mexico will take serious money—billions. However, we have wasted billions on an enforcement-only approach, and the money would be better spent encouraging Mexicans to stay home through investment. Following World War II, the United States demonstrated leadership and made massive investments in the futures of the nation and the world in efforts such as the Marshall Plan to help rebuild Europe and the G.I. Bill to repay and invest in our soldiers. These efforts were publicly financed, but they helped the United States experience an impressive period of economic growth; they were investments that paid off. Call it a bailout of Mexico if you must, but my proposal concerns a broader vision of North America that will help to stabilize the entire North American region, not just Mexico. In the process, undocumented Mexican migration will come under control.

VII. CONCLUSION

Many recent calls for immigration reform tend to fall into the trap of viewing such migration purely in terms of filling the employment needs of U.S. businesses, or emphasizing the economic boon that immigrants represent to the United States. Nobel laureate Gary Becker argues that we should give priority to immigrants from our NAFTA partners, recognizing them as human capital, resembling the movement of goods, services, and

123. See generally, Timothy A. Canova, Closing the Border and Opening the Door: Mobility, Adjustment, and the Sequencing of Reform, 5 GEO. J.L. & PUB. POL’Y 341 (2007).

124. Id. at 394. Canova goes on:

[W]hatever future the polity can imagine and agree upon, the state can claim the resources to plan it; and with sufficient financial resources, the state can mobilize armies, rebuild shattered societies, modernize public infrastructure, and train and educate millions of citizens. [Taking on debt may be necessary, but with] university students [who borrow for their education,] taking on debt is . . . a good investment in the future . . . Such mobilization of financial resources would allow the federal government to influence and perhaps once again dominate events in the world by directing the pattern of production; spending on health and education, in foreign aid and public infrastructure. While enormous public spending will never guarantee success, without sufficient public spending, failure is only a matter of time. [Such an investment] would spur a generation of men and women to productive, creative, and meaningful work on both sides of the border . . .

Id. at 402, 413. He acknowledges that the United States is the largest deficit country in the world and that the dollar is exposed and vulnerable to foreign exchange and global capital markets. Yet, he believes that the United States is wealthy enough to support a massive foreign aid program for Mexico’s regional development. Id. at 409-10.
Similarly, after she left office in 2009, Secretary of State Condoleezza Rice lamented over the Bush administration’s failure to achieve immigration reform. “We need immigration reform. I don’t care if it’s for the person who crawls across the desert to earn $5 an hour, or for Sergey Brin, who came here from Russia and founded Google . . . . As a country, we can’t have people living in the shadows. It’s just wrong. It’s not only ineffective, it’s wrong.” Rice spoke of the importance of immigrants to the country’s financial health, and the need for immigration reform in promoting America’s economic growth. This is an alluring approach that caters to economic concerns that apparently matter a great deal in the public’s attitude toward immigration.

However, when we focus purely on the economic well-being of the country in judging immigration, we miss an opportunity to make a bold statement on immigration and to reframe the debate in a manner that can demonstrate our humanity. I believe that the vast majority of Americans, if given the choice, would not endorse the mistreatment of immigrants—documented or undocumented. Currently, Americans see no immediate way to intervene in uncivil immigration enforcement methods such as Operation Gatekeeper and ICE raids that victimize Latinos and Asians. If Americans understood the impact of NAFTA and globalization on Mexico, they would recognize the need to work with Mexico as regional partners with much to gain. If Americans realized that family visa constraints result in long backlogs for Asians who are waiting patiently in line, they might see the need for expansion of visa numbers. But a vocal minority represented by the Federation for American Immigration Reform and Arizona-style politicians have hijacked the issue. As with many other policy debates, in the area of immigration policy and enforcement, “[the] fervor and activism of [a] small minority greatly magnify their influence, especially within the U.S. Congress.”

When it comes to the treatment of our fellow human beings who have crossed into our territory, we should consider what has driven or attracted them to travel before we become overly judgmental. As American culture, economic influence, political power, and military presence affect the far reaches of the globe, we cannot be too surprised at the attraction that the United States holds throughout the world. Coupled with the ubiquity of

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127. In fairness to former Secretary Rice, she went beyond the economic benefit of immigrants and stated: “If we . . . start to believe somehow that it is instead a threat to us to have [immigrants] come here, we are going to lose one of the strongest elements not only of our national wealth, but also of our national soul.” Id.

American culture, the United States appeals to would-be immigrants and refugees who seek the American dream of freedom, prosperity, and consumerism. Migrant workers, refugees, high-tech workers, multi-national executives, and familial relatives (both professionals and those from the working class) from all over the world respond to this attraction. Thus, America itself is responsible for luring countless migrants to our shores each year, as the phenomenon reinvigorates the Statue of Liberty’s call to those “yearning to breathe free.” And it should not be surprising that able-bodied, hard working individuals from the Philippines, China, India, South Korea, and Mexico dominate the family categories hoping to share the American dream.

The anti-immigrant lobby has used the politics of fear to generate much of the hysteria over immigration today. They advance the image of hordes of immigrants coming from Asia and Latin America to take our jobs and commit crimes, all the while not wanting to speak English. Through fear and intimidation, comprehensive immigration reform has been stalled. Fear makes us lose our conscience; fear paralyzes us; we lose our sense of analysis and reflection.129 We should know better.130 The evidence on NAFTA and other factors of globalization are clear. As long as the economic imbalance between Mexico and the United States persists, Mexican migration will persist. As long as political tensions in Asia and the pull of family reunification persists, Chinese, Filipinos, Indians, South Koreans, and Vietnamese will continue to be attracted to the United States. The market forces are simply too strong to be overcome by standard enforcement-only responses through more border fencing, ICE raids, or renewing employer sanction efforts.

The time has come to think beyond enforcement-only approaches—to think creatively. We need to re-think employer sanctions and the harsh consequences of ICE raids that are conducted under the auspices of such laws. We need to think about expanding visa categories that reflect the needs of the regional and global economies in which we are engaged. NAFTA and our current family categories have been riddled with

130. As the New York Times has reminded us, the rhetoric of the anti-immigrant contingent is grounded in a historical philosophy that best be cast aside:

The restrictionist message is brutally simple — that illegal immigrants deserve no rights, mercy or hope. It refuses to recognize that illegality is not an identity; it is a status that can be mended by making reparations and resuming a lawful life. Unless the nation contains its enforcement compulsion, illegal immigrants will remain forever Them and never Us, subject to whatever abusive regimes the powers of the moment may devise.

Every time this country has singled out a group of newly arrived immigrants for unjust punishment, the shame has echoed through history. Think of the Chinese and Irish, Catholics and Americans of Japanese ancestry. Children someday will study the Great Immigration Panic of the early 2000s, which harmed countless lives, wasted billions of dollars and mocked the nation’s most deeply held values.

oversights and mistakes. But we can learn from examples such as the EU or come up with our own creative solutions. The smart thing to do—and the right thing to do—is to recognize that a brighter economic and social future will come with an open-minded approach to familial as well as economic needs of visa seekers.

Asian Americans should be the first to endorse progressive approaches to immigration reform. Our Asian friends and relatives continue to be caught in the web of anachronistic immigration policies and enforcement. Moreover, our history has taught us to pay attention when any group of immigrants is under attack, because that is our past as well as our present. Easing the tension over immigration—Asian or not—would be a major step for all of us in our attempt to take full part in the great immigrant experiment that is the United States.