AMERICA'S SECOND CLASS NON-CITIZENS: WHY AN AMNESTY WON'T SUFFICE

By Donald Kerwin
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2001

CMS
Center for Migration Studies
New York
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Donald Kerwin is the Executive Director of the Catholic Legal Immigration Network, Inc. (CLINIC). The opinions expressed in this paper are the author's own and not necessarily those of CLINIC's sister agency, the U.S. Catholic Conference. Mr. Kerwin wishes to thank CLINIC senior attorney Charles Wheeler for his thoughtful review of the paper.

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Occasional Paper #11

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The Center for Migration Studies of New York, Inc.
209 Flagg Place
Staten Island, NY 10304

ISBN 1-57703-023-0

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INTRODUCTION
AN UNTAINABLE SITUATION

"Mr. L-," a national of the Dominican Republic, married "Mrs. L-," a U.S. citizen, in January 2000. Mr. L- entered the United States in 1998 with a non-immigrant visa, which has since expired. Mrs. L- recently gave birth to the couple's first child. Mr. L- works as a cook in a mini-market, six days per week from 7:30 a.m. to 9:30 p.m. He earns $375 per week and has been unable to find a higher paying job. The couple live with Mrs. L-'s mother, step-father and four younger siblings. Mr. L- supports his immediate family and helps his mother-in-law with living expenses. As a U.S. citizen, Mrs. L- can file an immigrant visa petition for Mr. L-. In conjunction with the petition, Mr. L- would be eligible to file an application for permanent residence. However, an affidavit of support must accompany the application and Mrs. L-, who does not work, cannot satisfy the affidavit's income requirements. Nor has the couple been able to find a relative or friend with adequate income to co-sponsor Mr. L-. Mr. L- faces indefinite undocumented status and continued exploitation by his employer.¹

"Mr. G-," a lawful permanent resident for 50 years, retired in 1978. He was watching television one afternoon when his grandson rushed into the house, followed by police officers. The police found narcotics in the boy's room and arrested the boy and Mr. G-. Mr. G- languished in jail for 90 days before pleading guilty on the advice of counsel to a drug possession charge. He received probation. Twenty years later, the INS deported the 81-year-old man as an aggravated felon.²

"Mr. and Mrs. S-," Mexican nationals, entered the United States in the mid-1980s. They have worked in the same pork packing plant for four years and, before that, in another plant. The couple has four children, ranging from 18 months to 17 years of age. Their two youngest children are U.S. citizens by birth. The oldest, like their parents, are undocumented. Mr. and Mr. S- work on the production line from 6:30 a.m. to 6 p.m. on busy days and from 6:30 a.m. to 5 p.m. on normal days. They occasionally work on Saturdays. They receive 15-minute breaks every 2 hours, and 30 minutes for lunch. Over the last three years, they have witnessed a dramatic increase in line speed. However, their pay has not kept pace with their increased productivity; the plant's maximum wage has increased only 75 cents an hour, from $9.50 to $10.25, over the same period. Mrs. S- insists that women in the plant receive less pay than men for the same work. Mr. S- makes $10.25 an hour and Mrs. S- earns $9.50. Women who challenge these disparities, she says, are told to "go home." This leaves undocumented persons, like Mrs. S-, with few options. The company provides Mr. and Mrs. S- with health insurance, requiring a $14 weekly contribution. It charges employees for the cost of cleaning their uniforms, and for plastic gloves. It does not provide a pension or sick pay. After three years of work, Mr. and Mrs. S- finally began to receive two weeks of vacation per year. Neither Mr. S- nor Mrs. S- work under a contract. They must ask permission to use the bathroom, which often is delayed or denied. If grant-

¹Catholic Legal Immigration Network, Inc. (CLINIC), "Placing Immigrants at Risk: The Impact of Our Laws and Policies on American Families" (2000) [hereinafter "Placing Immigrants at Risk"] at 12. The five case studies have been adapted from CLINIC reports on immigrant families and laborers.
ed, the pace of the production line does not slow, and their co-workers must pick up the slack. Supervisors yell at the workers, using abusive language. Workers accidentally cut each other often, due to their proximity. The absence of training in how to use and sharpen knives increases the risk of accidents. In most cases, supervisors require injured employees to keep working. More violent injuries occur as well. One employee, for example, recently lost his hand. Mr. S suffers from recurrent hand and back pain. Mrs. S has "trigger" finger; her finger springs open, she cannot uncurl it gradually. The couple fear that management will make good on its threat to close the plant rather than allow the workers to organize. Mr. and Mrs. S provided their employers with false employment documents, which the company realizes. Mr. and Mrs. S have made a life for themselves in the United States. They own their home. Their children have grown up here and know no other country. Their lack of legal status puts them at risk of losing the lives they have built here.3

After arriving in the United States, "Mr. D," a Mexican national, found a job in a restaurant that paid him $150 a week for working ten hours a day, seven days a week (an hourly wage of $2.14). His employer routinely yelled racial epithets at him and hit him. Mr. D did not complain or report this treatment for fear that he would be fired. Once when Mr. D was too ill to work, his employer told him that the next time he missed work, he would be terminated. During his third year at the restaurant, Mr. D again became sick and could not work. When he returned, his employer made good on his threat. Mr. D found a job a month later at another restaurant. He earned $1.50 an hour and worked 10 hours a day, seven days a week. In his second year, his employer increased his pay to $2.00 an hour. After four years, Mr. D left the restaurant and began work at a dry cleaning store. He views this employer as more humane. He earns $2.75 an hour and works nine hours a day, six days a week. His employer told him that he could not pay more because Mr. D does not have a social security card.4

"M" and "J," ages 20 and 21, have resided in the United States since their infancy. They have lived their entire lives in a U.S. border community, frequently returning to Mexico during holidays and on school vacations to visit relatives. Their mother is a lawful permanent resident and their step-father a U.S. citizen. M- and J- have completed all of their education in the United States. Although they speak Spanish, they do not write it. Both have led exemplary lives, and neither has ever had a problem with the law. In June 1999, they completed their high school studies and both were offered partial scholarships to state universities. Unfortunately, because M- and J- had not secured permanent resident status, they could not afford to pursue their studies. Shortly after their step-father filed visa petitions for them, M- and J- went to Mexico to spend an evening with relatives. Upon their return, they told INS inspectors that they were U.S. citizens. INS officials charged M- and J- with making false claims to U.S. citizenship. They are now permanently barred from re-entering the United States. Should they attempt to reenter illegally, their prior orders of removal will be reinstated and they could face criminal prosecution.5

Over the last two years, my agency has carefully researched and reported on immigrant families and low-wage laborers in the United States.6 As a support agency to 200 legal service offices, we started with more than an academic sense of the problems faced by these populations due to our nation's laws and policies. We did not realize at that time, however, the extent of the problems or their cumulative impact. In reviewing several hundred cases, similar to those set forth above, we became convinced that the United States risks becoming a dual society, with millions of its newest members denied the right to participate in our constitutional democracy, separated from their families, barred from receiving public benefits, abused in the workplace, and generally relegated to second class status. By any understanding of our national interest, this situation cannot be sustained.

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4"Work Without Justice" at 11-12.
5"Placing Immigrants at Risk" at 24.
6"Placing Immigrants at Risk"; "Work Without Justice."
This paper will describe the emergence of this growing subclass of non-citizens. It will then analyze the legal and policy barriers to the full participation of immigrant families and low-wage laborers in our nation's life. It will argue in favor of a broad legalization or amnesty program for undocumented persons in the United States. It will conclude that, although an amnesty is necessary, it must be coupled with fundamental reform of U.S. labor laws and policies. If not, an underground society, bereft of fundamental rights, will persist.

Family and work seem appropriate lenses for this analysis since most newcomers, documented and not, come for one or both of these reasons. Of the 660,477 persons who legally immigrated in 1998, 72 percent came based on a relationship to a U.S. citizen or lawful permanent resident and 12 percent came to fill a job. Immigration and Naturalization Service (INS) News Release, "INS Announces Legal Immigration Figures for FY 1998" (August 11, 1999).

The article does not propose eligibility criteria for an amnesty; these could be based on time in the United States, country of origin, family ties, employment, or other equities. Whatever the particular formula, the article envisions an amnesty that will broadly cover undocumented persons with families in the United States and whose work is essential to our nation's economy.
I.

A GROWING DIVIDE

We live in arguably the greatest era of immigration in our immigrant nation's history. The foreign-born comprise 28.4 million persons or 10.4 percent of our nation's population.9 Of these, 39.5 percent entered the United States in the last decade.10 In fact, more immigrants entered the United States in the 1990s - roughly eleven million - than in any decade in its history.11

Foreign-born children and U.S.-born children of immigrants represent 20 percent of all children in the United States.12 Ten percent of all children in the country live in "mixed-status" families, which are narrowly defined as those with at least one non-citizen parent and one citizen child.13 These figures rise dramatically in immigrant bastions such as New York City (27 percent) and Los Angeles (47 percent).14 At the same time, immigration has become a truly nationwide phenomenon. During the 1990s, the immigrant populations in 37 non-traditional immigrant receiving states grew at twice the rate as in the six largest traditional receiving states.15 Immigrants play a pivotal role in all of our nation's major institutions, from families, to schools, to a workforce now comprised of 12 percent foreign-born persons.16 These statistics make it difficult to argue that the United States has abandoned its immigrant heritage or that the nation's future will not turn on its newest members.

Yet the statistics also point to a growing breach between the native born and a large class of foreign-born persons, a breach perpetuated by our nation's immigration and labor laws. In 1980, for example, the poverty rate among foreign-born persons only narrowly exceeded the native-born rate.17 By 1999, however, 21.3 percent of foreign-born non-citizens lived below the federal poverty line, compared to 11.2 percent of natives.18

The disparities between the children in these two groups have grown even more dramatically. From 1970 to 1997, the poverty rate of the children of foreign-born persons rose from 11.9 to 29.5 percent.19 During the same period, the poverty rate among non-Hispanic white children rose from 10.1 percent to 12.9 percent.20 While ten percent of all children in the United States live in "mixed status" families, they represent 15 percent of the nation's poor children, defined as living in households earning less than 200 percent of the federal poverty line.21 By the same definition, 54 percent of non-citizen households are poor, compared to 31 percent of their citizen counterparts.22 The children of immigrants

10Id. at 3.
11Id. Fix and W. Zimmerman, "The Integration of Immigrant Families in the United States" (The Urban Institute, June 2000) [hereinafter "The Integration of Immigrant Families"] at 7-8.
13The Urban Institute, "All Under One Roof: Mixed Status Families in an Era of Reform" (June 1999) [hereinafter "Mixed Status Families"] at 2.
14The Integration of Immigrant Families in the United States" at 16.
15Id. at 9.
17The Integration of Immigrant Families" at v.
19"The Integration of Immigrant Families" at 27
20Id.
21Id. at 17.
22Id. at 29.
increasingly attend ethnically segregated and “linguistically isolated” schools; roughly half the children with “limited English proficiency” attend schools where 31 percent of the students lack basic proficiency in English.23 While the children of immigrants comprise a remarkable 20 percent of school age children nationwide, and a far higher percentage of students in immigrant-populous states,24 the undocumented are barred from receiving federal financial aid for college and must pay out-of-state or international tuition.25 This precludes hundreds of thousands — even if they qualify for immigrant visas or enjoy temporary legal status — from continuing their education, consigning them to lives on the nation’s socioeconomic margins.

Stark differences also appear between native- and foreign-born person in the workplace. Overall, 19.2 of foreign-born workers occupy service sector jobs, compared to 13.2 percent of native workers.26 Immigrant laborers work disproportionately in jobs - like garment, meat-packing, poultry processing, and agricultural labor - that U.S. citizens shun.27 Workers in these industries do not earn close to a livable wage, with their median incomes ranging from $6.42 to $9.18 an hour.28

In 1999, 36.3 percent of “full-time, year round” foreign-born workers, including 57.1 percent of those from Central America, earned less than $20,000, compared to 21.3 percent of native workers.29 In 1999, the median foreign-born worker earned $9.62 an hour, with Hispanic men earning $8.33 and Hispanic women earning $7.05.30 From 1996 to 1999, the median wage of the native-born rose 50 percent faster (from $11.50 to $12.31 an hour) than the median wage of the foreign-born (from $9.47 to $9.62).31 The outlook dims considerably for lower-end earners. In Los Angeles, for example, the average garment worker earns less than $8,000 a year.32 Florida farmworkers earn 40 cents for every 32 pounds of tomatoes they pick, a rate that has remained steady for 30 years.33 Day laborers surveyed in Southern California earned a mean salary of $568 a month.34 In addition, sub-minimum and non-payment of wages has become an endemic problem, particularly for day laborers and service sector employees.35

Beyond subsistence-level wages, most immigrants fail to receive basic benefits through work. Only 47 percent of foreign-born workers received health insurance in their jobs in 1999, 37 percent of Hispanic men and 34 percent of Hispanic women, compared to 59.2 percent of the native-born.36 In a 1999 study, not a single one of 481 day laborers in Southern California had health insurance.37

24Immigrant Students in U.S. Secondary Schools” at 1-2.
26“March 2000 Population Reports” at 5.
29“March 2000 Population Reports” at 5.
30“The Integration of Immigrant Families” at 23.
31Id.
32P. Liebhold and H. Rubenstein, Between a Rock and a Hard Place: A History of American Sweatshops, 1820-Present (UCLA Asian American Studies Center and Simon Wiesenthal Center Museum of Tolerances, 1999), at 56-57 [hereinafter “Between a Rock and a Hard Place”].
36“The Integration of Immigrant Families” at 24.
Immigrants also suffer from occupational hazards and working conditions more common to Third World countries. These include pesticide poisoning, perilous construction sites, exposure to dangerous chemicals, repetitive stress injuries and cuttings.
II.

IMMIGRANT FAMILIES

Socioeconomic attainment by immigrant families (relative to natives) continues to be a function of their length of time in the country. A recent cross-generational analysis of educational attainment, labor force participation, wages, and household income concluded that the overall performance of second generation immigrants equals or exceeds that of third generation non-Hispanic white natives. However, three laws passed in 1996 - the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("the 1996 Immigration Act"),\footnote{The Integration of Immigrant Families" at 19, citing Patel and Van Hook, "Adult Children of Immigrants: Integration of the Second Generation," presented at annual meeting of the Population Association of America, March 23-25, 2000, Los Angeles, California.} the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"),\footnote{Pub. L. No. 104-208, 110 Stat. 3009.} and the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 ("the 1996 Welfare Act")\footnote{Pub. L. No. 104-132, 110 Stat. 1214.} - threaten to upset this pattern. Since their passage, the impact of these laws has been well-documented, but their salient features bear repetition.\footnote{Pub. L. No. 104-193, 110 Stat. 2105.} An amnesty will be necessary to remedy their cumulative effect.

First, the 1996 Immigration Act ties family reunification to income in a way that denies legal reunification to thousands of families each year. Most legal immigrants come to join U.S. citizen or lawful permanent resident family members.\footnote{Placing Immigrants At Risk", D. Kerwin, "How Our Immigration Laws Divide, Impoverish, and Undermine American Families," Interpreter Releases, Vol. 76, No. 31 (August 16, 1999).} Through the visa petition process, these "intending" immigrants become lawful permanent residents.

Under the 1996 Immigration Act, a petitioning U.S. citizen or lawful permanent resident must demonstrate the means to maintain an income of 125 percent of the federal poverty guidelines and must agree to maintain his or her family member (the intending immigrant) at that same level.\footnote{Pub. L. No. 104-208, 110 Stat. 3009.} The petitioner/sponsor bears this responsibility until the family member naturalizes or works for 40 "qualifying quarters," normally ten years.\footnote{Immigration and Nationality Act ("INA") §§213A(f)(1)(E) and 213A(a)(1)(A).} Until then, the federal or state government can sue the sponsor to reimburse the cost of any "means-tested" public benefit used by the immigrant.\footnote{INA § 213A(a)(2)-(3).} If the petitioner cannot meet the 125 percent level through his or her own income or assets, he or she must obtain a co-sponsor who agrees to assume these responsibilities and liabilities.\footnote{INA § 213A(f)(5).}
In a nationwide survey, CLINIC found that 20 percent of U.S. citizens and permanent residents who come to charitable immigration programs to petition for family members cannot satisfy these requirements.52 Furthermore, families who meet the 125 percent requirement must often immigrate members on a staggered basis, extending their separation.53

These restrictions aim to screen out those who might need public benefits in the United States. Yet they prevent the admission of immigrants who, through their employment, could actually improve their families' financial situations.54 They prevent intending immigrants who live in the United States (the majority) from improving their job prospects by obtaining legal status. Even if this were a worthy goal, it was already realized with passage of the 1996 Welfare Act, which barred many immigrants who entered the country after August 22, 1996 from obtaining "means-tested" benefits for five years.55 After this time, "deeming," or attributing the sponsors' income to the immigrant, will disqualify most immigrants from receiving benefits until they naturalize or work for ten years. In other words, U.S. immigration laws preclude the admission of those who might use public benefits, but its public benefit laws make this nearly impossible.

Second, the 1996 Immigration Act created a series of bars to admission based on undocumented status, past removals, illegal re-entries, and a range of deceptions and mistakes that the law previously treated as forgivable. These bars have prevented thousands of persons from immigrating lawfully and have consigned them to lives on the socioeconomic edge.

The 1996 Immigration Act, for example, established a three-year bar to re-entry for those unlawfully in the United States for more than 180 days, and a ten-year bar for those unlawfully present for one year or more.56 To understand the reach of this provision, consider that estimates of the number of undocumented persons in the country, many in "mixed status" families, range from six to eleven million.57 The law allows for a discretionary waiver if the immigrant's exclusion would result in "extreme hardship" to his or her U.S. citizen or lawful permanent resident spouse or parent, but not to his or her child.58 Even those who ultimately qualify for a waiver must still wait outside the country, apart from their families for up to a year or longer, while their request is adjudicated. Given the reality of "mixed status" families, laws like this that target the undocumented unavoidably damage U.S. citizen and permanent resident family members, particularly children.59

The three- and ten-year bars apply to persons seeking admission from outside the country. Fortunately, Congress provided a temporary extension to a provision that allows undocumented persons to become lawful permanent residents without leaving the United States.60 Prior passage of the "Legal Immigration Family Equity Act" ("LIFE Act") on December 21, 2000,61 undocumented persons who had not filed visa petitions by January 14, 1998 were forced to either leave the country in order to secure a family-based visa, subjecting themselves to the bars on re-entry, or to remain and lose their chance at legal status. The latter course, viewed by many as the lesser of two evils, relegated these immigrant families to a state of permanent legal limbo. The LIFE Act restored adjustment to permanent residency

53Id. at 8.
55 8 USC § 1613; The 1996 Welfare Act § 403(a).
56INA § 212(a)(9)(B)(i)(I)-(II).
58INA § 212(a)(9)(B)(ii).
59The loss of Food Stamps to non-citizen parents, for example, would necessarily mean less food for their U.S. citizen children.
60INA § 245(c).
within the United States for those present on the date of the law’s enactment whose visa petitions were filed by April 30, 2001. Families who do not meet the April 30, 2001 deadline will face the very Hobson’s choice that this short-term restoration attempts to remedy.

The 1996 Immigration Act also erected a permanent bar, with a waiver possible only after ten years outside the country, for those who have been unlawfully present for more than one year or who were ordered removed, and who illegally reenter or attempt to reenter. In a recent case reported to CLINIC’s attention by one of its member agencies, an undocumented man raised in the United States became engaged to his U.S.-citizen high school sweetheart. Prior to their marriage, the couple traveled to Mexico to meet his parents. The INS caught the man as he attempted to re-enter the United States and he now faces a permanent bar to admission.

The law reserves particularly harsh treatment for persons who were once removed or ordered removed, even those with families in the United States. It bars the return for five years of “arriving aliens” who were previously ordered removed, for ten years for persons ordered removed in normal removal proceeding, for 20 years for those removed a second or subsequent time and forever for those convicted of an “aggravated felony.” Between 1996 and 2000, the INS removed an estimated 721,000 persons, many away from their families. All of them now face bars on re-entry.

Immigrants who illegally re-enter or attempt to re-enter, after being removed, face severe criminal and immigration sanctions. The latter include reinstatement of the prior removal order, with no possibility to remain based on family ties. In a familiar scenario, Mr. E departed from the United States after the date designated by an immigration judge. Three years later, he re-entered illegally, and four years after that, married a U.S. citizen. At this point, he wholly supports his wife and child, but cannot secure lawful immigration status and faces immediate deportation if he is ever apprehended by the INS.

Immigrants often make mistakes or engage in deceptions that prevent their re-entry. Permanent residents, for example, may claim to be U.S. citizens or improperly vote, some in the belief that they are citizens. These offenses trigger deportation and permanent exclusion, with a waiver available for only a tiny few. An estimated 20,000 people were caught last year trying to enter the United States by falsely claiming to be U.S. citizens.

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62"LIFE Act" § 1502.
63INA § 212(a)(9)(C).
64INA § 212(a)(9)(A)(i).
65INA § 212(a)(9)(A)(ii).
66id.
67id.
69INA § 241(a)(5).
70The Ninth Circuit Court of Appeals recently held that the deportation orders of persons who re-entered prior to April 1, 1997, the effective date of the 1996 Immigration Act, cannot be reinstated. Castro-Cornejo v. INS, No. 99-70267 (9th Cir., January 23, 2001).
72INA §§ 212(a)(6)(C)(i) and (a)(10)(D); INA §§ 237(a)(3)(D) and (a)(6).
73The Child Citizenship Act of 2000, signed into law on October 30, 2000, provides a narrow waiver to falsely claiming citizenship for the children of U.S. citizen or former U.S. citizen parents who resided in the United States prior to age 16; and who reasonably believed they were citizens. D. Schiller, "Lie About Citizenship Brings Hammer Down," San Antonio Express-News (February 25, 2001).
Renewed enforcement of the law's document fraud provisions may represent the most devastating legal development on the horizon for undocumented persons and their families. This provision, created by the Immigration Act of 1990\textsuperscript{75} and expanded by the 1996 Immigration Act,\textsuperscript{76} imposes severe penalties on immigrants who use, purchase, possess, or accept a false document, or put false information on a valid document, in order to gain an immigration-related benefit. The consequences of document fraud include fines, permanent inadmissibility,\textsuperscript{77} deportation,\textsuperscript{78} and even incarceration.

The INS did not begin to implement this provision until 1993, and only then in select areas. Nevertheless, over the next two years, it charged approximately 5,000 persons with civil document fraud, most for using false documents to work. At the time, they were not adequately notified of the consequences of a final document fraud order; the notice forms were not translated and they spoke only to the civil money penalties, not to the fact that the person could be deported and rendered permanently inadmissible. The vast majority of those charged waived their right to a hearing and were issued a final order.

A class action law suit filed in 1995 has prevented all enforcement of this provision up until now. However, the parties to the litigation reached a final settlement, which was approved by the district court on February 23, 2001. The INS is now able to enforce this provision through the use of new notice forms that adequately explain the rights, remedies, and consequences of a document fraud order. The use of false employment documents, sometimes as the result of INS delays and backlogs, is widespread in immigrant-dominated industries.\textsuperscript{79} An estimated 25 percent of the workforce in Iowa and Nebraska meatpacking plants, for example, lack proper documents.\textsuperscript{80} Given the high percentage of newcomers who work with false documents, enforcement of this provision could have a broad impact.

Third, the 1996 Immigration Act and AEDPA culminated a decade of legislation that expanded the crimes for which immigrants could be removed, eviscerated their ability to remain based on family ties, and mandated their detention in broad categories of cases. Permanent residents, with U.S. citizen spouses and children, steady jobs, and no ties to their country of birth, can now be removed for a laundry list of crimes (many minor) that they committed years before. One category of such crimes — "aggravated felonies" — includes offenses like shoplifting, driving under the influence, tax evasion, fraud, receipt of stolen property, obstruction of justice, perjury, document fraud, smuggling family members into the country (in some cases), and certain gambling offenses.\textsuperscript{81}

On a recent trip to El Paso, the author met with a group of women and their young children, whose husbands / fathers had been deported, most for convictions for driving under the influence. The women have formed a family support group that meets in a community center every Thursday night. An estimated 725 families belong to such groups in 27 states.\textsuperscript{82} The women's lives have changed dramatically for the worse since their husbands' removal. Some have lost homes and have been forced bankruptcy. Most have taken jobs, some second jobs, that keep them apart from their children. Many spoke of the difficulties that their children have experienced, traumatized by their fathers' arrests, living now apart from their fathers, forced to move to a different home (often doubling up with extended family), and returning home from school to an empty house. The women must now support their children, as well as send money to their husbands. They worry that their husbands will eventually opt to make new lives for themselves.

\textsuperscript{75}M. Peña, "Bureaucracy Pushes Many to Black Market in Forged Documents," EFE News Service (November 15, 2000).
\textsuperscript{76}"Meatpacking Plant Workforce and Safety" at 2.
\textsuperscript{77}INA § 101(a)(43).
\textsuperscript{78}INA § 101(a)(3).
\textsuperscript{80}Administrative Office of the United States Courts, Statistics Division, "Judicial Business of the United States Courts: 1
\textsuperscript{81}INA § 237(a)(3)(C)(ii). A similar waiver exists to this ground of deportation. INA § 237(a)(3)(C)(G).
\textsuperscript{82}M. Peña, "Bureaucracy Pushes Many to Black Market in Forged Documents," EFE News Service (November 15, 2000).
\textsuperscript{83}Meatpacking Plant Workforce and Safety" at 2.
The women hope for legislative relief that will return their husbands and restore their families. However, no such legislation is pending. To make matters worse, the Border Patrol regularly visits their homes to warn them that, if their husbands should return, they will be federally prosecuted for illegal re-entry after removal. This is not an idle threat. In 1999, "immigration" offenses comprised 18 percent of all federal criminal cases. From 1995 to 1999, federal criminal cases for immigration-related offenses rose 169 percent across the country, with increases of 918 percent in the Arizona district, 492 percent in the New Mexico district, 454 percent in the Western District of Texas, 343 percent in the Southern District of Texas, and 49 percent in the Southern District of California. Completing the circle, 20 percent of the 69,093 so-called "criminal" removals by the INS in 2000 were for immigration violations, such as illegal re-entry. This reflects a national trend, particularly pronounced in border communities, to criminalize, prosecute, and punish what were formerly treated as civil infractions.

The human tragedies created by the expanded and retroactively applied "criminal" grounds of removal have been so numerous and compelling that even the architects of the 1996 Immigration Act have criticized the INS for enforcing these provisions, arguing that the agency should exercise its "prosecutorial discretion" not to seek removal in certain cases. On November 17, 2000, her last day as INS Commissioner, Doris Meissner issued an internal INS instruction that set forth the criteria INS officials should weigh in determining whether to investigate and initiate proceedings in a case. While a potentially positive development, the mere possibility of a favorable exercise of discretion does little to soften the underlying laws.

The 1996 Immigration Act also mandates the detention of virtually all immigrants who face removal on criminal grounds. Since 1996, the INS has more than doubled its detention capacity from 8,592 to 19,300 beds a night, with no end to expansion in sight. Detention, by definition, separates families. In addition, INS detention practices, like the remoteness of facilities, frequent transfers, and strict visitation policies, create significant barriers to personal contact between detainees and their families. In one case reported by CLINIC, the INS detained a husband and wife seeking asylum (in separate pods) for 16 months, leaving their three children, ages 21, 19 and 15, to fare for themselves in Los Angeles. In July 1999, the INS finally released the couple who, by then, lacked employment, a home, health insurance or any means of support. The woman now tests positive for tuberculosis, which she apparently contracted in detention. In February 2000, doctors removed half of the man's cancerous lung, a condition that almost certainly developed during his detention. Prior to his release, detention officials had ordered chest x-rays for the man four times, but had failed to share the results with him, assuring him that "no news is good news."

Fourth, immigrants approved for family-based visas, who overcome the law's many barriers to reunification, still face multi-year waits before they can become lawful permanent residents. Backlogs in visa preference categories vary based on the intending immigrant's nationality and relationship to the sponsor. For example, a Mexican spouse or minor child of a permanent resident would currently face a
six-year backlog. A Mexican adult son or daughter of a permanent resident would face nearly a ten-year wait. As of January 1997, more than 3.5 million persons who had been approved for family-based visas languished in backlogs, including more than one million spouses and minor children of lawful permanent residents. Consular officials privately admit that these figures underestimate the problem.

In cases where the intending immigrant lives abroad, backlogs unnecessarily divide families. In the more common scenario, the intending immigrant already lives in the United States and the backlog causes him or her to overstay a temporary visa or otherwise to run afoul of the bars to admission for "unlawful presence." It also subjects him or her to possible deportation and to all the difficulties and uncertainties of life as an undocumented person.

Once a family member's "priority date" becomes current, he or she can apply to become a permanent resident. This occurs through either the "adjustment of status" process in the United States or "consular processing" abroad. In either case, immigrant families face yet another delay at this juncture. Overseas adjudication of waivers to bars for "unlawful presence," for example, can take a year or longer. The adjustment of status process averages 15 months nationally, with projected delays for applications filed now varying from five months in the INS's Baltimore district office to 27 months in Harlingen, Texas. Average delays for cases already in the system, however, exceed the 15 month projection. The total number of backlogged adjustment cases has risen from 121,000 in 1994 to more than one million at present.

Perhaps paramount among the unnecessary hardship that they cause, permanent residency backlogs postpone naturalization, which normally requires five years of permanent residence or three years if the applicant has a U.S. citizen spouse. A naturalization backlog of more than 800,000 cases, which has significantly decreased in recent years, and projected naturalization processing times of 12 month nationally, further delay citizenship. Citizenship expedites family reunification because "immediate" relatives of U.S. citizens -- the spouses, minor children, and the parents of adult citizens -- are exempt from the family-based visa caps and, thus, from the backlogs. More importantly, it constitutes the pre-condition to participation in our constitutional democracy.

Our current immigration laws and policies devastate thousands of immigrant families. Indeed, "mixed status" families increasingly view our laws as a "seamless web" that they cannot escape. A new amnesty program would safeguard thousands of U.S. families from the harsh consequences of these laws and policies, and would represent the kind of comprehensive solution necessary to address a social calamity of this magnitude.

93"The Needless Detention of Immigrants" at 9-10.
94Department of State, Bureau of Consular Affairs Visa Bulletin (March 2001).
95U.S. Department of State, Bureau of Consular Affairs, "Immigrant Visa Waiting List In The Family-Sponsored and Employment-Based Preferences As of January 1997" (March 1997).
96The LIFE Act created a new non-immigrant "V" visa for the spouses and minor children of lawful permanent residents who have been waiting for three or more years for an approved family-based visa. It also expanded the non-immigrant "K" visa (for fiancées) to include the spouses (outside the United States) of U.S. citizens, as well as minors accompanying or following to join. "LIFE Act" §§ 1102-1103.
97INS Service Center Data, "I-485 Projected Processing Time: November 30, 2000" (December 22, 2000).
III.

IMMIGRANT LABORERS

Immigrants play an essential role in our nation’s economy and make up a large portion of the labor force in industries — such as meatpacking, poultry processing, agricultural harvesting, hotel and food service, “day labor” and even construction — that U.S. citizens avoid. If anything, the need for immigrant labor will increase in the coming years. An amnesty would acknowledge the significant contributions that immigrant laborers make to the United States, the need for their services, and the equities they have established here. It would also empower legalized immigrants in the workplace. Legal status constitutes a foundational labor right because, in practice, other labor rights flow from it.

Most amnesty proposals would appropriately repeal “employer sanctions,” emoving a club now wielded by certain employers to drive wages and working conditions, and to diminish labor protections for all U.S. workers. Employer sanctions served as the theoretical linchpin of our last amnesty law, the Immigration Reform and Control Act of 1986 (IRCA), whose sponsors argued that sanctions would destroy the magnet that drew undocumented migrants to the United States. In fact, IRCA has operated as a tool for certain employers who, in return for assuming a minimal risk that they will be sanctioned for hiring undocumented persons, demand concessions in the form of sub-minimum wages and appalling working conditions. Employers also use the threat of deportation to suppress organizing efforts and even invite raids to break fledgling unions.

While necessary, an amnesty and an end to employer sanctions must be coupled with reform of our nation’s employment and labor laws. IRCA’s 2.6 million beneficiaries ascended rapidly to better jobs, creating a demand for undocumented persons to fill their places. Indeed, the U.S. undocumented population now significantly exceeds pre-IRCA levels, and disproportionately occupies the kind of jobs that U.S. citizens and lawful permanent residents shun. As an example, roughly one million farmworkers legalized their status under the 1986 amnesty, but the percentage of undocumented workers in agricultural labor more than tripled from 1990 to 1998. Absent labor reform, this pattern would likely replicate itself in the wake of a new amnesty program. A steady stream of newcomers, desperate for work at any cost and coming into the same labor market, will form the very kind of sub-class that an amnesty would attempt to eliminate.

98INS Service Center Data, “I-485, Application for Adjustment of Status: Fiscal Year 2001 Year to Date” (December 22, 2000).
100Federal Reserve Chairman Alan Greenspan has called for an increase in the admission of immigrant laborers. According to the Department of Labor, by 2008 the United States will have an estimated five million more jobs than laborers. The U.S.-Mexico Migration Panel, “Mexico-U.S. Migration: A Shared Responsibility, Summary of Recommendations” (February 14, 2001) at 1; See also, P. Belluck, “Short of People, Iowa Seeks to Be Ellis Island of Midwest,” New York Times (August 28, 2000).
Immigration policy cannot, by itself, resolve the larger social problems that plague low-wage immigrant laborers. At the same time, it would be beyond the scope of this article to outline the universe of potential remedies to problems as far-reaching as poverty, low wages, lack of health insurance, and poor working conditions. Thus, this article will take a middle ground, identifying some broader issues, but confining itself to a few specific remedies that arose in the course of CLINIC’s research on low-wage immigrant laborers.

First, like the native-born poor, low-wage immigrant laborers do not earn enough to escape poverty. While the restructured American economy has created great wealth, the real wages for low-income workers have dropped. From 1968 to 1994, the incomes of the bottom fifth of U.S. wage earners increased eight percent, a decrease in real dollars, while the wages of the top 20 percent grew by 44 percent. An estimated 25 percent of the U.S. workforce earns eight dollars per hour or less. Work at this rate (which significantly exceeds the minimum) will not bring a family of four to the federal poverty level, much less provide them with a “livable” income.

An obvious solution to this problem would be a significant increase in the federal minimum wage, which has languished at $5.15 an hour since September 1, 1997. Low-wage laborers play a crucial role in our economy, but despite often heroic work schedules, cannot lift themselves out of poverty. The federal government should address this injustice. Increased wages, basic benefits, and improved working conditions will also make jobs more palatable to native-born workers.

Second, although newcomers work disproportionately in jobs that do not provide basic benefits, gaps in health insurance coverage should be viewed as more of a poverty than an immigration issue. Rather than explore the many, complex proposals to extend health coverage to the estimated 44 million uninsured Americans, this article will focus on the narrow issue of government subsidies to industries that do not meet the basic needs of their employees. CLINIC’s report on low-wage laborers highlighted the degree to which profits have been privatized in many industries and costs socialized. In other words, private companies realize significant profits by paying low salaries, denying basic benefits, and demanding extraordinary productivity from their workers, but the broader community bears the costs of these employees. This often leads to misdirected anger at newcomers, twice victimizing them. In effect, problems that the public and lawmakers associate with newcomers actually have their roots in unjust employment practices.

Poultry processing and meat-packing companies, for example, typically locate their plants in economically depressed, rural areas that lack the infrastructure to support the resulting influx of immigrant laborers. These companies often receive state, local, and sometimes even federal tax credits, grants, and other financial incentives to locate in these areas. Yet despite the government’s largesse, the companies do not provide their employees with health benefits until they have worked for six months. Many suffer work-related injuries prior to this time. Immigrants without insurance or access to non-emergency Medicaid strain the resources of local hospitals and health clinics.

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105“The Integration of Immigrant Families” at 12-13.
106Of course, the size of the U.S. undocumented population also turns on migration “push” factors. In this regard, at least one study has concluded that projected decreases in the growth of the Mexican labor force from age 15 to 44, due to declining birth rates in Mexico, may significantly “reduce emigration pressures” by 2010. Projected job growth in Mexico, due to the restructuring and privatization of the Mexican economy, could further diminish emigration to the United States. The Binational Study on Migration, “Migration Between Mexico and the United States” (1997) at 29-31.
109At $8 an hour, an employee working 50 weeks at 40 hours per week each would earn $16,000 for the year. In 2001, the poverty line for a family of four (in the 48 contiguous states and the District of Columbia) has been set at $17,650. 66 Fed. Reg. 10695-10697 (February 16, 2001).
In addition, workers and their children often do not speak English, which places stress on local schools, government services and charitable agencies. Many communities also lack adequate housing to accommodate the new workers. In instances brought to CLINIC’s attention, human resources directors for poultry and meat-packing plants have approached local charities and churches to see if they could help meet the housing and other basic needs of plant employees.

If government does not take steps to mandate health coverage to uninsured persons, at the very least it should condition corporate tax breaks and incentives on the provision of basic employee benefits. Missouri offers a case in point. In 1999, the state’s legislature formed a Joint Committee on Immigration in response to what was perceived as an “immigration” problem, caused by the influx of newcomers to work in the state’s poultry processing and meat-packing plants. The resolution that established the committee focused on the health, social service, educational, and law enforcement burdens created by immigrants. In hearings, advocates sought to re-frame the issue in terms of unfair labor practices, describing grueling jobs in plants with an annual turnover rate of 75 percent, workers who could not afford housing and health care, and others who suffered injuries that made them physically unable to work. The committee’s recommendations in December 1999 focused largely on employers’ responsibility for their workers. In particular, the committee encouraged corporations to offer English language classes for their workers and families, and concluded that “before a business can qualify for state tax credits, grants, or other related benefits, it should assist its employees in finding adequate health care.”

Third, the relative powerlessness of individual immigrants in the face of gross abuses in the workplace makes the right to organize of paramount importance to them. In this, they participate in a broad social trend. Despite recent organizing victories, membership in labor unions declined from 39 percent of the overall U.S. workforce in 1954 to 13.9 percent in 1999. Likewise, unions have only recently reversed their long enmity towards undocumented workers, targeting recent organizing efforts to newcomers. In part, this reversal speaks to the self-interest of organized labor, which is confronted with a growing immigrant work force. In California, for example, Asians and Hispanics comprise 41 percent of the working age population between ages 20 and 54. However, it also reflects the depth of abuses in many industries and the ways in which employers exploit the undocumented to the detriment of all workers.

10 States should likewise adopt minimum wage standards based on the cost of living in their states. At present, 11 states have adopted (marginally) higher minimum wage rates than the federal rate. In addition, many local governments have adopted “living wage” laws, which require their contractors to pay their employees a wage normally significantly above the minimum. These provisions tend to have a broad impact beyond the narrow category of employees to which they directly apply.

11 D. Fink, Cutting Into the Meatpacking Line: Workers and Change in the Rural Midwest, University of North Carolina Press (1998) at 69; T. Tagami, Lexington Herald-Leader, “Roadblock Reveals Problem for Courts” (November 26, 2000) (Poultry processing plant in rural Kentucky received federal and state tax breaks worth more than $40 million, $7.1 million in county-funded federal grants and loans, and $1 million in federal grants to train workers).


13 Missouri House Concurrent Resolution No. 10, 1st Session, 90th General Assembly (1999).

14 Report of the Missouri Joint Interim Committee on Immigration, 90th General Assembly, 1st Session (December 1999).


Newcomers also suffer from deficiencies in our nation's system of labor protections, some common to all workers, others specific to immigrants. The National Labor Relations Act (NLRA)\(^\text{117}\) prohibits employers from interfering with the rights to organize, to bargain collectively, to strike, to pressure employees to support a particular union, or to discourage them (through discrimination) from joining a labor organization. While the NLRA's protections apply to undocumented workers, millions of workers in immigrant-dominated industries fall outside its definition of "employees," including an estimated three million agricultural laborers, one million domestic employees, and seven million (typically mis-classified) independent contractors.\(^\text{118}\) The Wagner Act of 1935 (the original NLRA) excluded agricultural laborers and domestic workers from its protections, reasoning that the close relationships these employees enjoyed with their employers ill-suited them for protections designed to curb "industrial strife and unrest."\(^\text{119}\) Of course, if it ever did, this rationale no longer applies and agricultural laborers and domestic workers now suffer from some of the worst abuses in the U.S. labor force, including indentured servitude and slavery.\(^\text{120}\)

In a comprehensive study of U.S. labor protections, Human Rights Watch starkly summarized the plight of laborers excluded from NLRA's protections:

Their employees can fire them with impunity for engaging in concerted activity, including trying to form a union, to bargain collectively, or to strike. They have no labor board or unfair labor practice mechanism they can turn to for redress. These workers include many or all farmworkers, household employees, taxi drivers, college professors, delivery truck drivers, engineers, product sellers and distributors, doctors, nurses, newspaper employees, Indian casino employees, employees labeled 'supervisors' and 'managers' who may have minimal supervisory or managerial responsibility, and others.\(^\text{121}\)

Immigrants in these industries suffer from abuses that can only be remedied through collective action. The NLRA's protections must be extended to them.

In addition, under established law, employers can permanently replace striking workers and, after a year, replacement workers can vote to decertify the union.\(^\text{122}\) The "permanent replacement" doctrine applies to workers who strike over economic terms and conditions of employment, and not over unfair labor conditions. However, it often takes years in court to determine the type of strike, with the result that "the strike is often long broken and workers scattered to other jobs."\(^\text{123}\) Human Rights Watch argues persuasively that this doctrine should be legislatively overturned.\(^\text{124}\)

As with other employment laws, the NLRA's enforcement remedies need to be strengthened. The NLRB can order an employer to pay back wages and benefits, to reinstate an employee (if he or she can legally work), to obey the law, and to undo the illegal steps taken.\(^\text{125}\) However, these penalties do not suffice to dissuade anti-organizing efforts by the employer, which include firing labor organizers.\(^\text{126}\) Human Rights

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\(^{118}\) *Forbidden Workers* at 14-17.

\(^{119}\) 29 USC §§ 151-169.

\(^{120}\) 1929 USC § 152(3); "Unfair Advantage" at 189.

\(^{121}\) "Unfair Advantage" at 173-175; 49 Stat. 449, §§ 1 and 2(3).

\(^{122}\) D. France, "Slavery's New Face," *Newsweek* (December 18, 2000) ("Slavery is alive in America today. The victims are mostly women who have been tricked into bondage, ironically often by people who immigrated here from their own homelands. Most female Asian slaves are forced into prostitution rings. Most Latin American slaves are required to work in the fields, while those from the Middle East or Africa are trapped as domestic workers in affluent homes."); "Work Without Justice" at 7-8, 16-21; "Unfair Advantage" at 176-178.

\(^{123}\) "Unfair Advantage" at 173.

\(^{124}\) NLRB u. MacKay Radio & Telegraph Company, 304 U.S. 333, 345-346 (1938); "Unfair Advantage" at 190-208.

\(^{125}\) "Unfair Advantage" at 194-195.

\(^{126}\) Other recommendations by Human Rights Watch to bring U.S. labor laws and policies into compliance with international norms include: allowing workers to receive information from union advocates in the workplace (in non-work areas during non-work times); proportional access by union advocates to workers forced to attend "captive audience" meetings at the workplace; closer scrutiny for "coercive effect" of "predictions" by employers of workplace closures, firings, wage and benefit cuts, and other potential negative consequences of unionizing; expediting union elections after employees file a petition seeking them; expanding the concept of "bargaining unit" to accommodate contingent workers, contract workers, and others in new occupations and industries; requiring employers to treat as their employees "sub-contractors" over whom they enjoy "effective economic power" and control; awarding punitive damages for the willful refusal of employers to bargain in good faith; "first contract arbitration" where the workplace has been previously unorganized and the employer has bargained in bad-faith; and, loosening the ban on "solidarity action or secondary boycotts" by other sympathetic unions. "Unfair Advantage" at 17-32.
Watch recommends reinstatement in meritory cases during litigation, punitive damages for willful violations of the law, and substantial fines for repeated violations against union supporters.  

It also recommends a series of immigrant-specific reforms. For example, an internal INS instruction requires INS officials to make a reasonable attempt to determine whether information leading to a possible raid or other enforcement activity has been provided “to interfere with or to retaliate against” employees attempting to exercise their labor rights. If this has occurred, the proposed enforcement activity must be reviewed internally and can be cancelled. The INS instruction does not have the force of law. To the contrary, it explicitly recognizes that an INS raid can take place during a labor dispute. Human Rights Watch recommends that this “discretionary” policy (against INS actions during organizing efforts) be mandated and codified in a statute or regulation. It would also codify the NLRB’s internal prohibition against inquiries into immigration status by NLRB staff or in NLRB proceedings.

Other immigrant-specific recommendations include: creation of a new non-immigrant visa for workers who suffer violations of their right to associate; provision of work authorization to laborers who obtain reinstatement orders; removal of the ban on representation of the undocumented and on class action lawsuits on behalf of farmworkers by Legal Services Corporation-funded attorneys; and revision of the H-2A non-immigrant worker program to allow these workers to transfer to different employers, to gain access to federal courts, and to learn their rights. The latter recommendation will be considered in the larger discussion on immigration between Mexico and the United States. Without job portability, labor protections, and even the opportunity for permanent residence, such a program could easily lead to the kind of gross abuses, including de facto involuntary servitude, associated with the "bracero" program and discredited "guest worker" programs in the past. This risk would be particularly great with agricultural laborers who already endure low wages and perhaps the worst working conditions in the U.S. workforce.

Fourth, while federal employment laws generally apply to undocumented persons, they do not cover significant categories of low-wage laborers, do not apply to all employment practices, and do not provide adequate enforcement remedies and resources. In addition, low-wage immigrant laborers often do not understand and employers deny them access to information about their legal rights, which exacerbates these problems. As indicated below, federal labor laws and their state counterparts need to be expanded, strengthened, and, above all, meaningfully enforced.

The Fair Labor Standards Act of 1938 (FLSA) sets minimum wage, overtime pay, and child labor standards. However, it does not speak to other terms and conditions of employment that continue to be governed by whatever agreement exists between the employer and employee. The FLSA

127 USC § 160(c).
128 "Unfair Advantage" at 18 ("An employer determined to get rid of a union activist knows that all that awaits, after years of litigation if the employer persists in appeals, is a reinstatement order the worker is likely to decline and a modest back pay award. For many this is a small price to pay to destroy a workers' organizing effort by firing its leaders.")
129 id. at 19.
130 INS Operating Instruction 287.3a, revised December 4, 1996, redesignated as 33.14(h) of INS Special Agent’s Field Manual, March 13, 1998.
131 "Unfair Advantage" at 33-34.
132 Id. at 34-35.
133 Id. at 36-39.
136 "Unfair Advantage" at 153-158; "The Disposable Workforce" at 25-26; "Work Without Justice" at 26.
137 For an excellent summary of federal employment laws as they apply to immigrant laborers, see K. Herrling, "Federal Employment Laws and Immigrant Workers," Immigration Briefings, No. 60-10 (November 2000) [hereinafter "Federal Employment Laws"].
138 42 Stat. 1060.
also exempts certain children working in agricultural jobs from its child labor protections, generally allowing them to work at younger ages and at more hazardous jobs than other children.\textsuperscript{139} States could, in theory, fill some of these gaps, but they have not. As an example, 18 of 46 states surveyed in 1997 reported that they had set no minimum age for migrant or seasonal farmwork, and 16 states had established minimum ages between ages nine and twelve.\textsuperscript{140} Given the paltry protections provided to children who work in agriculture, it should come as little surprise that DOL investigations in 1998 found only 104 minors illegally employed, including nine- and ten-year-olds picking strawberries in Louisiana and children ranging in age from six to ten picking onions for a Texas grower.\textsuperscript{141}

Title VII of the Civil Rights Act of 1964 precludes discrimination based on national origin in hiring, firing, classification, recruitment, compensation and provision of benefits.\textsuperscript{142} However, under established case law, its protections do not extend to undocumented workers in the five states subject to the jurisdiction of the Fourth Circuit Court of Appeals.\textsuperscript{143}

Apart from the groups not covered by these laws, remedies for violations typically do not dissuade employer misconduct. This goes partly to the remedial purposes of the laws. The FLSA, for example, aims to make mistreated employees financially whole, rather than to punish employers. Thus, remedies for minimum or overtime wage violations include back pay and liquidated damages equal to the amount owed.\textsuperscript{144} Repeated or willful violations of these provisions carry fines no greater than $1,000 per violation.\textsuperscript{145} The penalties for firing or discriminating against employees who bring complaints or institute actions under the law include reinstatement, promotion, payment of lost wages, and liquidated damages equal to lost wages.\textsuperscript{146} Willful violations of these provisions carry potential criminal liability.\textsuperscript{147} Even assuming consistent reporting of violations and rigorous application of these remedies, the remedies lack the teeth to serve as a meaningful disincentive to violations.\textsuperscript{148} Not surprisingly, they operate against the backdrop of rampant and growing discrimination against immigrants.\textsuperscript{149}

State laws do not significantly bolster protections against employer misconduct.\textsuperscript{150} For example, prior to passage in New York of the Unpaid Wages Prohibition Act in September 1997, willful and repeated non-payment of wages in the state carried only a 25 percent civil penalty and a misdemeanor criminal sanction. In addition, New York's labor department employed only one inspector for every 7,000 private employers on Long Island and, according to one study, penalties had been imposed in only two percent of the cases settled over a three-year period.\textsuperscript{151} The Act increased the civil penalties for repeat or willful non-payment to 200 percent of the wages owed, and increased the criminal penalty to a felony. Unfortunately, these constitute some of the nation's strongest remedies for non-payment of wages.\textsuperscript{152}

\textsuperscript{139}29 USC §§ 201 et seq.
\textsuperscript{140}"Federal Employment Laws" at 8.
\textsuperscript{143}29 USC § 2000e-2(a). Likewise, employers cannot discriminate against employees based on their opposition to an unlawful practice or their participation in an investigation, proceeding or hearing. 42 USC § 2000e-3.
\textsuperscript{145}152 USC § 216(b).
\textsuperscript{146}152 USC § 216(c).
\textsuperscript{147}152 USC § 216(e).
\textsuperscript{148}152 USC § 216(b).
\textsuperscript{149}152 USC § 216(d).
\textsuperscript{150}Similarly, under Title VII, courts may enjoin unlawful practices or order the payment of back-pay, reinstatement, hiring, or other equitable relief. 29 USC § 2000e-5(g)(1). Unfortunately, undocumented persons cannot be rehired. In addition, the Seventh Circuit Court of Appeals has held that back-pay cannot be awarded for work in undocumented status, barring this relief to such workers within its jurisdiction. Del Rey Tortilleria, Inc. v. NLRA, 976 F.2d 1115, 1118-22 (7th Cir. 1992).
\textsuperscript{151}"Work Without Justice" at 25; "The Disposable Workforce" at 26-28; "Federal Employment Laws" at 9.
Finally, federal and state government lack the resources to enforce existing laws. While the number of unfair labor practice cases has tripled since 1950, the number of staff at the National Labor Relations Board has recently fallen to 2,000 people, slightly above 1950 levels.\textsuperscript{153} Likewise, the U.S. Department of Labor (DOL) employs 942 “wage and hour” investigators, who must cover more than seven million work establishments, and roughly 100 million full- and part-time workers.\textsuperscript{154} In addition, in recent years, the enforcement responsibilities of DOL’s Wage and Hour division have expanded to cover additional laws.\textsuperscript{155} States employ an estimated 500 additional investigators.\textsuperscript{156} A 1997 survey of 46 state labor departments found 26 with 10 or fewer compliance officers.\textsuperscript{157} These states employed (in total) less than nine full-time compliance officers to investigate child labor violations. Typically, only a fraction of these officers speak Spanish or any language other than English.\textsuperscript{158}

The need for increased enforcement capacity has been highlighted by the startling levels of violations in industries targeted by DOL. A 1999 DOL and OSHA survey, for example, found that less than 40 of poultry processing plants complied with the FLSA, with most violations involving the failure to pay overtime or to keep adequate records of hours worked.\textsuperscript{159} In 1998, a DOL investigation of the garment industries in Los Angeles, San Francisco and New York resulted in back pay awards to 6,300 workers.\textsuperscript{160} In addition, DOL found a Texas sweat-shop that employed nine children, including seven under the age of 14.\textsuperscript{161} An estimated 60 percent of apparel manufacturers in Los Angeles violate wage and hour laws.\textsuperscript{162} Nearly half of the day laborers in the California study reported not having been paid at least once and the majority had received less than the agreed upon amount.\textsuperscript{163}

The Occupational Safety and Health Act of 1970 (“OSH-Act”)\textsuperscript{164} is another law often observed in the breach. As its name indicates, OSH-Act requires employers to comply with a range of safety and health standards, some particular to specific industries, others common to all industries. In broad strokes, employers must provide workplaces that are “free from recognized hazards,” comply with appropriate safety and health standards, warn workers of potential hazards and provide appropriate safety equipment.\textsuperscript{165} Employees, in turn, have the right to request an inspection of potentially hazardous safety and health conditions, and cannot be discriminated against for filing a complaint or instituting a proceeding.\textsuperscript{166} Employers must abate OSH-Act violations within a reasonable time, and can be assessed financial penalties and (in extreme cases) criminal sanctions.\textsuperscript{167}

\textsuperscript{153}“The Campaign for the Unpaid Wages Prohibition Act” at 4-7.
\textsuperscript{154}Id. at 3 (“Minimum wage laws exist - why not simply enforce them? ... First, drastic under-funding of federal and state government agencies means that there are not enough inspectors even to begin to cover the number of legitimate, registered businesses ... Second, many of the worst exploiters are part of the underground economy ... Third, the search for such violators is further hampered by the reluctance of many undocumented immigrants to report subminimum wages to government authorities, a reluctance which is exacerbated by the federal Department of Labor’s policy of cooperation with the Immigration and Naturalization Service (INS). Fourth, penalties for non- and under-payment of wages are so low, particularly at the state level where many immigrants bring cases, that they represent no deterrent at all.” (citations omitted)).
\textsuperscript{155}“Unfair Advantage” at 26.
\textsuperscript{157}U.S. General Accounting Office, “Garment Industry: Efforts to Address the Prevalence and Conditions of Sweatshops,” GAO/HEHS-95-29 (November 1990) at 8-10.
\textsuperscript{158}G. Anderson, “Fighting Sweatshop Abuses: An Interview with Charles Kernaghan,” America (May 27, 2000) at 7, 12.
\textsuperscript{160}“The Fight for Dignity” at 18.
\textsuperscript{161}“Poultry Processing Compliance Survey Fact Sheet.”
\textsuperscript{163}Id.
\textsuperscript{164}“Between a Rock and a Hard Place” at 56-57.
\textsuperscript{165}“Day Laborers in Southern California” at 15.
\textsuperscript{166}29 USC §§ 651, et seq.
\textsuperscript{167}29 USC §§ 654 and 655(b)(7).
These standards mask endemic health and safety violations in immigrant-dominated industries. For example, a survey of 51 poultry processing plants found a "general deficiency in the treatment of health hazards." In 1998, meat-packing and poultry processing work ranked first and third in incidence rates of repetitive stress disorders, like carpal tunnel syndrome. On January 16, 2001, OSHA issued a comprehensive regulation on ergonomics, ten years in the development, that would have required the re-design and arrangement of workplaces to reduce these often crippling injuries. However, Congressional Republicans, with the support of the new administration, rescinded the rule through a "resolution of disapproval" under the Congressional Review Act. Meat-packing work also rated first in overall injuries and illnesses. One study estimated that agricultural workers suffered 10,000 to 20,000 cases of physician-diagnosed pesticide illness and injury per year, and recognized the certainty of far more undiagnosed incidents. Meaningful enforcement of existing labor protections may constitute the most significant need of low-wage laborers in the nation.

168 USC §§ 657(d)(1), 660(e)(1).
169 USC §§ 658(a), 659(a), 666.
170 "Poultry Processing Compliance Fact Sheet."
IV.

CONCLUSION

It is axiomatic that our nation's political, social, and economic strength will increasingly depend on contributions of its newest members. Legal status represents the indispensable ingredient to the full participation of millions of American families in our nation's life. As a corollary, it would put these same families beyond the reach of the anti-family laws and policies outlined in this article.

Because it represents the key to other labor rights, legal status can also be viewed as the foundational labor right. Certain employers prefer the undocumented precisely because they can deny them a fair wage, basic benefits, and safe working conditions. They use the undocumented, in turn, to depress wages and to deny rights to all workers. An amnesty would lay the ground-work for the effective enjoyment of labor rights by all U.S. workers.

However, an amnesty must be coupled with basic reforms of U.S. labor laws and policies. The right to work in a minimum wage job, without benefits, perpetuates the poverty of our nation's essential low-wage laborers. Likewise, absent meaningful enforcement remedies and resources, the rights (on paper) to a safe workplace, to organize, or to work without discrimination are empty. Without generous and enforceable labor rights, employers will be able to offer the kinds of jobs that only the undocumented will fill, creating the very underclass that an amnesty would attempt to eliminate.