

Human Smuggling Across the U.S.-Mexico Border: U.S. Laws Are Not Stopping It

Outside the South Texas town of Victoria last week, more than 100 victims of a coyote [a person that preys on desperate people looking for new opportunities in a nation that has long been a promised land for immigrants]—from ages 3 to 91—were locked in a sweltering semi-trailer that quickly became a death trap. By the time authorities got to the abandoned trailer, 17 people had died, including a boy between the ages of 5 and 7. Another person would die at a local hospital. All these people had left their homes in Mexico and Central America, paid money for the clandestine passage, entrusted their lives to unknown human traffickers and then allowed themselves to be packed into conditions worse than those reserved for cattle. The result was an eerie scene at a truck stop, with bodies lying inside and outside the trailer and the survivors gasping for air. Unfortunately, this is becoming a familiar scene.¹

I. INTRODUCTION

In 1999, smuggled aliens constituted fourteen percent of all apprehensions made at the U.S.-Mexico border [the border], up from nine percent in 1997.² That number has increased as the human smuggling industry grows in popularity and necessity.³ Fearing they cannot safely make the journey across the border alone, illegal immigrants obtain the assistance of a “coyote”—the Mexican term for smuggler—in order to secure passage across the border.⁴

1. Eric Gay, *Preying*, FORT WORTH STAR-TELEGRAM, May 19, 2003, at 8. The human smuggling attempt that ended tragically in Victoria, TX in 2003 was the deadliest in fifteen years. Lee Hockstader & Karin Brulliard, *18 Migrants Found Dead in Trailer at Texas Truck Stop; Victims Are Believed To Be Illegal Immigrants*, WASH. POST, May 15, 2003, at A01 (stating seventeen found dead, one died in hospital).

2. U.S. GEN. ACCOUNTING OFFICE, REPORT TO CONGRESSIONAL COMMITTEES, ALIEN SMUGGLING: MANAGEMENT & OPERATIONAL IMPROVEMENTS NEEDED TO ADDRESS GROWING PROBLEM 2 (2000) [hereinafter GROWING PROBLEM GAO REPORT] (reporting data collected by Immigration and Nationalization Services (INS)).

3. *See id.* at 6 (reporting on growing epidemic of alien smuggling in United States); Letta Tayler, *Booming Business: Desperation Fuels Sophisticated Networks of Human Smugglers*, NEWSDAY, July 20, 2003, at A05 (explaining methods by which immigrants employ smugglers to get them across border). Tayler reported that in 2002, smugglers introduced an estimated one million illegal aliens into the United States through Mexico. *See* Tayler, *supra*, at A05.

4. *See* Gay, *supra* note 1, at 8 (explaining how smugglers prey on desperate Mexicans); *see also* Tayler, *supra* note 3, at A5 (describing stories of desperate attempts by Mexicans to cross U.S.-Mexico border).

Some immigrants willing to take the risk pay up to \$1500 to the coyote; others, ultimately, pay with their lives.⁵

As the United States spends more government funds to fortify the border, demand for human smugglers increases.⁶ According to United States immigration officials, the human smuggling industry grossed \$9.5 billion in 2002 alone.⁷

Many reasons exist for the boom in this dangerous and clandestine form of migration.⁸ Each time the government appropriates funds to build higher fences and develop technological methods to restrict potential border crossings, the United States ensures that coyotes will be kept in business.⁹ The government's failure to enforce employment laws already favorable to employers has augmented the steady stream of illegal immigrants who have little reason to fear punishment by the government once inside United States territory.¹⁰ The communities and networks that the successful immigrants smuggled from Mexico create in the United States stimulate the increasing flow of smuggled immigrants.¹¹

It is the hope of most immigrants for a more prosperous life in the United States that eclipses the perils associated with the risky journey across the border.¹² Such dangers have only increased in recent years with stricter border

5. See Peter Andreas, *The Transformation of Migrant-Smuggling Across the U.S.-Mexican Border*, in GLOBAL HUMAN SMUGGLING 107, 116 (David Kyle & Rey Koslowski eds., 2001) (reporting trip from Agua Preta, Mexico to Phoenix, AZ costs \$1500); Tayler, *supra* note 3, at A5 (recounting story of man who lost \$1500 fee when caught by border control). Between 1998 and 2003, fees demanded by coyotes grew from \$300 to \$1500. Tayler *supra* note 3, at A05; see also, e.g., Kim Cobb, *For Migrants, Jobs Come with a Price*, HOUS. CHRON., June 7, 2003, at 1 (reporting three men who illegally entered United States found dead in train car); Gay, *supra* note 1, at 8 (stating death toll in botched smuggling attempt); Tayler, *supra* note 3, at A5 (noting over two thousand reported deaths of migrants attempting to cross border).

6. Regina Germain, Panel Discussion, *Perspectives on the Bush Administration's New Immigrant Guestworker Proposal: The Time For Immigration Reform is Now*, 32 DENV. J. INT'L L. & POL'Y 747, 748-49 (2004) (correlating increased government expenditures for enforcement with increase in number of aliens in United States); see also Andreas, *supra* note 5, at 117 (opining tougher border enforcement causes higher fee for smugglers); Friedrich Heckmann et al., *Transatlantic Workshop on Human Smuggling*, Conference Report, 15 GEO. IMMIGR. L.J. 167, 170 (2000) (arguing reliance on smugglers leads to smugglers' organization and strength).

7. Tayler, *supra* note 3, at A5 (arguing crackdown on border control leads to increased need for smugglers).

8. See *infra* notes 9-11 and accompanying text (listing reasons for growth in alien smuggling).

9. Andreas, *supra* note 5, at 116 (noting smugglers not needed before border enforcement).

10. See Andreas, *supra* note 5, at 114 (suggesting law enforcement should instead concentrate on catching illegal entrants once in United States).

11. See Peter Schatzer, Lecture, *Trafficking in Human Beings in an Enlarging EU – Towards a Coordinated European Approach?* (Nov. 13, 2003), http://www.cicerofoundation.org/lectures.schatzer_nov03.html (suggesting immigrant networks in destination countries encourage further illegal immigration).

12. See Brunson McKinley, *There Are Ways to Curb the Worldwide Traffic in Migrants*, 21 TRAFFICKING IN MIGRANTS 1 (2000) (suggesting potential immigrants may be unaware of dangers of smuggling); see also Heckmann, et al., *supra* note 6, at 170 (articulating one reason for high demand of human smugglers). A study of illegal immigrants from Ecuador living in New York suggests that the success of smuggled immigrants from

controls.¹³ When the easiest and safest routes are closed off, smugglers must improvise to find open, and usually more treacherous, paths across the border.¹⁴ Because each trip across the fortified border carries increased risks for the smuggler himself, he raises his fee.¹⁵ Not only do smugglers continue to benefit from the United States' increased border enforcement, but they also profit from the lack of coordination among government entities charged with controlling immigration to the United States.¹⁶

Human "smuggling" is distinguished from human "trafficking."¹⁷ Smuggling is a business transaction in which a fee is exchanged for the services of the smuggler.¹⁸ Trafficking involves coercion of people—usually women and children—for the purpose of selling that person's sexual services or labor in the destination country.¹⁹

This Note will address the ways in which United States immigration and employment laws foster the demand for human smuggling through Mexico.²⁰ First, this Note will explore the history of employment and immigration laws

Ecuador incites others from the same communities in Ecuador to seek out smugglers for themselves. Heckmann et al., *supra* note 6, at 170.

13. See Andreas, *supra* note 5, at 116 (opining enforcement of border control drives human smuggling further underground); see also *Evaluating a Temporary Guest Worker Program: Hearing Before the Subcomm. on Immigr., Border Security, and Citizenship, Comm. on the Judiciary*, 108th Cong. 145-47 (2004) (testimony of Asa Hutchinson, Under Secretary for Border and Transportation Security, Dept. of Homeland Security) [hereinafter *Evaluating a Temporary Guest Worker Program*, Hutchinson Testimony] (discussing technologically-advanced measures taken by United States to reinforce U.S.-Mexico border).

14. See William J. Clinton, Memorandum, Deterring Illegal Immigration, 60 Fed. Reg. 7885, 7786 (Feb. 7, 1995) (admitting closing of entry points causes smugglers to seek new routes); Tayler, *supra* note 3, at A5 (acknowledging sealed entry points force smugglers into more dangerous routes).

15. See Andreas, *supra* note 5, at 116 (suggesting smuggling fees increase as dangers increase); Tayler, *supra* note 3, at A5 (arguing smugglers' fees increase as demand for their services increases).

16. See *Evaluating a Temporary Guest Worker Program: Hearing Before the Subcomm. on Immigr., Border Security, and Citizenship, Comm. on the Judiciary*, 108th Cong. 166 (2004) (testimony of Dr. Demetrios G. Papademetriou, President, Migration Policy Institute) [hereinafter *Evaluating a Temporary Guest Worker Program*, Papademetriou Testimony] (calling for better controls within United States, not only at border, to weaken smuggler syndicates); GROWING PROBLEM GAO REPORT, *supra* note 2, at 3 (pointing out lack of coordination among enforcement units at border); Press Release, U.S. Senate Comm. on Governmental Affairs, DHS Inspector General Releases Report Recommending Merger of Border Protection and Immigration and Customs Enforcement Agencies (Nov. 10, 2005)(on file with author)(recommending merger of ICE and CBP). Senator Joseph Lieberman cites DHS Inspector General documentation of coordination problems stemming from the separation of border protection and immigration control functions. See U.S. Senate Comm. on Governmental Affairs, *supra*.

17. Heckmann et al., *supra* note 6, at 167 (defining trafficking as "smuggling plus coercion or exploitation"); U.S. GEN. ACCOUNTABILITY OFFICE, REPORT TO THE CHAIRMAN, SUBCOMMITTEE ON IMMIGRATION, BORDER SECURITY, AND CLAIMS, COMMITTEE ON THE JUDICIARY, HOUSE OF REPRESENTATIVES, COMBATING ALIEN SMUGGLING: OPPORTUNITIES EXIST TO IMPROVE THE FEDERAL RESPONSE 5 (2005) [hereinafter COMBATING ALIEN SMUGGLING GAO REPORT] (explaining differences between smuggling and trafficking).

18. See Anne Gallagher, *Trafficking, Smuggling, and Human Rights: Tricks and Treaties*, 12 FMR 25, 25-26 (2001) (explaining voluntary nature of smuggler/smugglee relationship).

19. *Id.* at 25 (stating men most often smuggled while women and children most often trafficked).

20. See *infra* Sections II-IV.

relating to undocumented workers in the United States.²¹ Next, this Note will analyze how these laws and policies have encouraged, rather than deterred, human smuggling.²² Finally, this Note will propose a strategy to curb the smuggling of humans across the border.²³

II. HISTORY

Since the United States began passing laws to restrict immigration, people desperately seeking a higher quality of life in America have paid smugglers to aid in their mission.²⁴ Throughout the twentieth century, human smuggling grew as an industry because the United States lacked the resources to monitor the entire border and enforce its immigration laws.²⁵ Largely undeterred, smuggling operations grew more organized as demand increased in the 1960s and 1970s.²⁶ Today, human smuggling from Mexico to the United States is a sophisticated and dangerous industry.²⁷ In this decade, human smuggling operations range from small outfits accomplished through the help of family and friends, to major networks where smugglers pack immigrants into containers and trucks without food or water.²⁸ Once in the United States, the smugglers often hold immigrants in drop houses until relatives wire any outstanding payments.²⁹ Immigrants are often physically abused and sexually

21. See *infra* Section II.

22. See *infra* Section III.

23. See *infra* Section IV.

24. See Andreas, *supra* note 5, at 109 (noting lack of regulation in Mexico-to-United States migration prior to 1882). The Chinese Exclusion Act of 1882 sought to stop Chinese immigrants arriving on the Mexican coast who would then use smugglers to get across the border into the American Southwest. *Id.*

25. Andreas, *supra* note 5, at 110-11 (summarizing Mexico-to-United States smuggling trends in the twentieth century).

26. Andreas, *supra* note 5, at 110 (noting competition among smugglers for growing business stimulated growth and organization of smuggling operations).

27. GROWING PROBLEM GAO REPORT, *supra* note 2, at 2 (admitting INS believes increase in border enforcement has led to greater organization of smuggling industry); COMBATING ALIEN SMUGGLING GAO REPORT, *supra* note 17, at 5 (reporting “criminal networks increasingly control the transnational flow of migrants”). Mexico’s Undersecretary for Migration estimates that over eighty percent of illegal immigrants from Mexico hire a smuggler, as opposed to fewer than ten percent in the 1970s. Tayler, *supra* note 3, at A5. U.S. and Mexican authorities state that the price of a trip from Central Mexico to Houston, Texas has risen from \$300 in the late 1990s to about \$1,500 today. Tayler, *supra* note 3, at A5.

28. Susan F. Martin, Smuggling and Trafficking in Humans: A Human Rights Issue, Best Practices for Migrant Workers Conference, Santiago, Chile (June 19-20, 2000) (describing types of smuggling operations); see also, e.g., *Deadly Consequences of Illegal Alien Smuggling: Hearing Before the Subcomm. on Immigr., Border Security, and Claims, H. Comm. on the Judiciary*, 108th Cong. 24 (2003) (statement of Peter K. Nunez, Board of Directors Chairman, Center for Immigration Studies) [hereinafter *Deadly Consequences of Illegal Alien Smuggling*, Nunez Statement] (citing common occurrence for smuggled immigrants to die from conditions crossing border); Harvey Rice, *Deadly Journey Detailed: Smuggling Survivors Testify During the Trial*, HOUS. CHRON., Dec. 24, 2004, at B1 (recognizing transportation of immigrants by truck trailer typical); Tayler, *supra* note 3, at A5 (estimating one million immigrants smuggled through Mexico from nearly one hundred countries in 2002).

29. *Pushing the Border Out on Alien Smuggling: New Tools and Intelligence Initiatives: Hearing Before the Subcomm. on Immigr., Border Security, and Claims, H. Comm. on the Judiciary*, 108th Cong. 36 (2004)

exploited by their smugglers.³⁰

A. Criminal Laws Addressing Alien Smuggling

The Immigration and Nationality Act of 1952 (INA) prohibits bringing aliens into the United States and provides criminal penalties of up to ten years imprisonment for violations.³¹ The Immigration and Customs Enforcement (ICE) branch of the Department of Homeland Security (DHS) is responsible for investigating violations of the human smuggling laws.³² Before the creation of ICE, the Immigration and Naturalization Service (INS)—formerly in charge of preventing human smuggling—failed to adequately enforce the law, mostly due to lack of coordination among field offices along the border, and a disorganized case management system.³³ In the relatively rare cases where smugglers were captured, penalties lacked deterrent effect.³⁴ For example, in fiscal year 1999, convicted smugglers received an average of ten months imprisonment and only a \$140 fine despite the § 1324 provision which allows for a ten year maximum

(statement of Rep. Sanchez) [hereinafter *Pushing the Border Out*, Sanchez Statement] (describing ICE raid in California revealed over one hundred immigrants packed into 1100-square-foot house). Sometimes smugglers demand more money from the immigrants than originally agreed, holding immigrants' children hostage until the parents can pay the new fee. Ernesto Londono, *Human Smuggling Cost Goes Far Beyond Dollars; Migrants Desperate for Entry to U.S. Fell Prey to Ruthless Traffickers*, DALLAS MORNING NEWS, Dec. 6, 2004, at 4A (recounting story of smuggled immigrant unable to pay additional \$2,200 to free children from smuggler). If payment cannot be made, American contractors can buy the immigrants from a smuggler and force them to work off their debt in exploitive conditions. Cobb, *supra* note 5, at 1 (illuminating one way in which smuggled migrants exploited in United States).

30. See *Pushing the Border Out on Alien Smuggling: New Tools and Intelligence Initiatives: Hearing Before the Subcomm. on Immigr., Border Security, and Claims, H. Comm. on the Judiciary*, 108th Cong. 17 (2004)(statement of John P. Torres, Deputy Asst. Director, Smuggling and Public Safety, U.S. Immigration and Customs Enforcement, U.S. Dept. of Homeland Security) [hereinafter *Pushing the Border Out*, Torres Statement] (highlighting smugglers' disregard for health and safety of immigrants).

31. 8 U.S.C. § 1324(a)(1)(A)(i), (a)(2) (2000). Section (a)(1)(A)(i) provides criminal penalties for any person who "knowing that a person is an alien, brings to or attempts to bring to the United States in any manner whatsoever such a person at a place other than a designated port of entry or place other than as designated by the Commissioner . . ." *Id.* Section (a)(2) provides that "[a]ny person who, knowing or in reckless disregard violates Section(a)(1)(A)(i) shall be fined and imprisoned not more than ten years. *Id.*

32. U.S. Immigration and Customs Enforcement, <http://www.ice.gov/graphics/about/index.htm> (last visited Feb. 26, 2006) (setting forth purpose, responsibilities, and goals of ICE). When the Department of Homeland Security was created in 2001, many border and security agencies—including the INS, the United States Customs Service, the Federal Protective Service, and the Federal Air Marshals Service—were merged into ICE in order to form a more unified front against illegal immigration. *Id.* Since its creation, however, ICE has been plagued by financial and organizational problems. John Mintz, *Cutbacks Threaten Work of Homeland Security Unit*, WASH. POST, Oct. 31, 2004, at A6. The main financial conflict stems from amounts owed to ICE, Customs and Border Protection, and Citizenship and Immigration Services for services rendered and funds provided during their creation. *Id.* ICE field agents say that a lack of funds will almost certainly threaten its ability to provide effective national security. *Id.*

33. GROWING PROBLEM GAO REPORT, *supra* note 2, at 3 (assessing difficulties prosecuting human smugglers). The report also lists a focus on prosecution of smugglers, not deterrence of human smuggling, among its findings of impediments to effective anti-smuggling enforcement. *Id.* at 3.

34. See *infra* note 35 and accompanying text (discussing lax consequences).

punishment for human smuggling.³⁵ In 1999, the INS reported that many drug smugglers were turning to human smuggling because of the lesser penalties.³⁶ Some lawmakers are concerned that the lack of resources in the border districts' U.S. Attorney's Offices may result in low prioritization of prosecuting human smugglers because of the short sentences imposed on those criminals.³⁷

Since September 11, 2001, a number of bills have been introduced in Congress that, along with a primary focus on homeland security, address human smuggling.³⁸ In December 2005, the House of Representatives passed the Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005.³⁹ This Act not only establishes mandatory minimum sentences, but also increases prison sentences for alien smugglers by ten years.⁴⁰ The Act also broadens the definition of alien smuggling, potentially casting a wider net over anyone who "assists, encourages, . . . or induces" aliens to enter the United States.⁴¹ Another bill that has been introduced, the Commercial Alien Smuggling Elimination Act (CASE Act), addresses the non-penal aspects of alien smuggling.⁴² The CASE Act creates a rewards program offering visas and monetary compensation for informants who cooperate with the government in prosecuting or otherwise disrupting human smuggling operations.⁴³ The

35. GROWING PROBLEM GAO REPORT, *supra* note 2, at 2 (citing average punishment incurred by approximately sixty one percent of almost two thousand smugglers prosecuted). In a 2004 congressional hearing on the subject, California Representative Elton Gallegly stated that the base sentence for human smuggling is six months to one year. *Pushing the Border Out on Alien Smuggling: New Tools and Intelligence Initiatives: Hearing Before the Subcomm. on Immigr., Border Security, and Claims, H. Comm. on the Judiciary*, 108th Cong. 37 (2004) (statement of Rep. Gallegly) [hereinafter *Pushing the Border Out*, Gallegly Statement] (opining longer prison sentences required to deter human smuggling). In 2004, approximately 2,400 defendants were convicted under INA § 274. COMBATING ALIEN SMUGGLING GAO REPORT, *supra* note 17.

36. GROWING PROBLEM GAO REPORT, *supra* note 2, at 9 (citing one reason for growth of human smuggling industry).

37. See *Pushing the Border Out on Alien Smuggling: New Tools and Intelligence Initiatives: Hearing Before the Subcomm. on Immigr., Border Security, and Claims, H. Comm. on the Judiciary*, 108th Cong. 2 (2004) (testimony of John N. Hostettler, Chairman, Subcomm. on Immigr., Border Security, and Claims) [hereinafter *Pushing the Border Out*, Hostettler Testimony] (hypothesizing low risk of being caught one reason for little deterrence of human smuggling operations).

38. See, e.g., Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005, H.R. 4437, 109th Cong. § 202 (2005) (increasing maximum sentences for alien smuggling); Strengthening America's Security Act of 2005, S. 1916, 109th Cong. § 12 (2005) (increasing maximum sentences); Commercial Alien Smuggling Elimination Act of 2005, H.R. 255, 109th Cong. § 4 (2005) (providing stricter penalties for smuggling humans and incentives to assist government in prosecutions of such).

39. Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005, H.R. 4437, 109th Cong. (2005) (submitted to Senate).

40. *Id.* at § 202.

41. *Id.* (delineating prohibited activities).

42. Commercial Alien Smuggling Elimination Act of 2005, H.R. 255, 109th Cong. (2005).

43. *Id.* at § 4. The rewards program would offer visas to potential informants and their families, allowing them to stay in the United States in return for information provided to the government that aids in its anti-alien smuggling efforts. *Id.* In addition, up to \$100,000 may be awarded to informants at the discretion of the Secretary of Homeland Security. *Id.*

CASE Act also creates an outreach program to educate the public on the penalties involved in bringing illegal aliens into the United States and the financial rewards and visa incentives available for providing information to the government about human smuggling operations.⁴⁴

B. Misguided Immigration Laws

Employment related immigration law also affects the human smuggling industry.⁴⁵ Prior to 1986, it was legal for an American employer to hire illegal aliens.⁴⁶ That year Congress passed the Immigration Reform and Control Act (IRCA) amending the INA of 1952.⁴⁷ The Act granted amnesty for millions of illegal immigrants already residing in the United States, while at the same time providing for employer sanctions against the hiring of illegal immigrants.⁴⁸ Congress intended for employer sanctions to discourage the hiring of illegal aliens, thereby reducing the possibility of job placement as an incentive to immigrate illegally.⁴⁹ IRCA rewarded 2.8 million illegal aliens living in the United States with permanent resident status.⁵⁰ Employer sanctions have, however, been given out sparingly.⁵¹ One reason for the difficulty in fining

44. *Id.* (suggesting outreach program but without guidelines for implementation).

45. *See infra* notes 51-56 and accompanying text (demonstrating employer sanctions easy to avoid).

46. Jenny Schulz, Note, *Grappling with a Meaty Issue: IIRIRA's Effect on Immigrants in the Meatpacking Industry*, 2 J. GENDER RACE & JUST. 137, 142 (1998) (noting no mention of employment in previous INA).

47. Immigration Reform and Control Act, 8 U.S.C. § 1324a (2000) (amending Immigration and Nationality Act, 8 U.S.C. §§ 1101-1524 (1952)).

48. *Id.* (allowing illegal aliens to gain citizenship once certain criteria met). An illegal alien would be given the status of lawful temporary resident if he had entered the United States illegally before January 1, 1982, had maintained a "continuous unlawful status" since that date, had applied for adjustment of status within one year of Nov. 6, 1986, and had maintained a "continuous physical presence" in the United States since Nov. 6, 1986. 8 U.S.C. § 1255a(a)(1)(A)-(a)(2)(A) (2000). After nineteen months of continuous presence in the United States, the temporary resident had two years in which to apply for permanent resident status. 8 U.S.C. § 1255a(b)(1)(A),(B) (2000). If the immigrant was not a criminal and demonstrated "[b]asic citizenship skills," he would be granted permanent resident status. 8 U.S.C. § 1255a(b)(1)(C),(D) (2000). IRCA also made the employment of illegal aliens unlawful. 8 U.S.C. § 1324a(a) (2000). Civil penalties for violations are \$250-\$2000 per alien for a first offense and up to \$10,000 for a second and third violation, and employers who demonstrate a "criminal pattern" of employing illegal aliens face up to \$3000 per alien and up to six months imprisonment. 8 U.S.C. § 1324a(e)(4)(A)(i)-(iii), (f)(1).

49. *Comments on H.R. 3362-Employer Sanctions Improvement Act: Hearing Before the Subcomm. on International Law, Immigrations and Refugees, Comm. on the Judiciary, H.R.*, 103d Cong. (1994) (statement of Laurie E. Ekstrand, Associate Director Administration of Justice Issues, U.S. General Accounting Office), available at <http://archive.gao.gov/t2pbat2/152558.pdf> (stating desired effect of employer sanctions on illegal immigration).

50. *See Evaluating a Temporary Guest Worker Program*, Papademetriou Testimony, *supra* note 16, at 169-70 (discussing effects of legalization provisions of IRCA).

51. Kris Axtman, *Wal-Mart Raids Send Signal to Other Firms, Intentional or Not*, CHRISTIAN SCI. MONITOR, Oct. 27, 2003, at 3 (illustrating recent decline in employers fined for immigration violations). According to the Center for Comparative Immigration Studies at the University of California at San Diego, 14,311 employers were fined for employing illegal aliens in 1990, and only 178 in 2000. *Id.* In 2003, only fifteen employers were fined. Alan Zarembo, *The Nation: Garment Laborers Say Bush Guest-Worker Plan an*

employers for violations of IRCA is that they must have hired the immigrant knowing that he or she was an illegal alien, and workers often provide genuine-looking fraudulent documents to employers.⁵² In what would have been a precedent-setting case in the enforcement of employer sanctions, a federal jury in Tennessee acquitted a large food company of charges that it violated IRCA.⁵³ Tyson Foods could not be penalized for charges of “bringing in and harboring aliens” and fraudulent misuse of visas because the prosecution failed to prove that Tyson employed illegal aliens “knowingly.”⁵⁴

Government officials have ignored alleged IRCA violations in exchange for employers’ cooperation in deporting illegal aliens, and have even warned employers in advance of a raid.⁵⁵ Employers who are penalized receive relatively small fines compared to the amount of money saved by employing illegal immigrants.⁵⁶

IRCA’s requirement that illegal aliens must have arrived before January 1, 1982 caused a five-year gap of illegal aliens residing in the United States to be ineligible for legalization.⁵⁷ Due to lax enforcement, however, those millions of ineligible immigrants had little incentive to leave the United States, and

Ill Fit, L.A. TIMES, Feb. 8, 2004, at A1. During the last decade, the number of illegal immigrants living and working in the United States has risen steadily. *See id.*

52. 8 U.S.C. § 1324a(a)(1),(2) (2000) (making it illegal to knowingly hire and retain illegal aliens). Under IRCA, an employer may assert that he acted in good faith in accepting a worker’s eligibility documents. 8 U.S.C. § 1324a(a)(3) (2000). Good fraudulent documents, however, can easily deceive an employer. *See Schulz, supra* note 46, at 144 (suggesting employer acting in compliance with statute if worker presents well-made false documents); *see also* Sidney Weintraub, *IRCA and the Facilitation of U.S.-Mexico Migration Dialogue in 3 MIGRATION BETWEEN MEXICO AND THE UNITED STATES: BINATIONAL STUDY 1229, 1230* (1998), available at <http://www.utexas.edu/lbj/uscir/binpap-v.html> (pointing out failure of IRCA to require stricter identification); Javier Erik Olvera & Hector Gutierrez, *Loopholes in Law Give Employers Wiggle Room*, ROCKY MTN. NEWS, Sept. 2, 2003, at 15A (noting employers could avoid law by assuming validity of documents presented).

53. Scott Kilman, *Tyson Acquitted of Scheme to Hire Illegal Workers*, WALL ST. J., Mar. 27, 2003, at A3 (suggesting government hoped for precedential decision enforcing immigration law).

54. *United States v. Tyson Foods, Inc.*, No. 4: 01-cr-061, available at <https://ecf.tmed.uscourts.gov> (last visited Feb. 9, 2005) (acquitting corporation and its executives of all thirty-six counts); Marisa Taylor & Leonel Sanchez, *Working in Plain Sight: More Companies Hiring Illegal Employees as Government Enforcement Drops Sharply*, SAN DIEGO UNION-TRIB., Jan. 11, 2004, at A1 (illustrating inability to prove Tyson knowingly hired illegal aliens demonstrates failure of immigration law).

55. Stephen J. Hedges et al., *The New Jungle*, U.S. NEWS & WORLD REPORT, Sept. 23, 1996, available at 1996 WLNR 4185886 (noting INS allows meatpacking plants to hire replacement workers before raid). In a press conference after a major raid in a large meatpacking plant in Nebraska, INS officials stated that because the company had cooperated with the INS, the company would not be penalized for employing illegal immigrants. *Id.* The chief of police in the town in which one of the largest meatpacking plants in the United States employs thousands of illegal aliens says that he does not call INS when an illegal alien is arrested because INS officials say they are too busy. *Id.*

56. *See* Linda S. Bosniak, *Exclusion and Membership: The Dual Identity of the Undocumented Worker Under United States Law*, 1988 WIS. L. REV. 955, 1014-15 (1988) (noting employers willing to absorb costs of fines as costs of doing business).

57. *Evaluating a Temporary Guest Worker Proposal*, Papademetriou Testimony, *supra* note 16, at 170 (estimating number of ineligible illegal immigrants at three million).

therefore their communities continued to exist underground.⁵⁸ For most illegal immigrants, once inside the border there is little fear of prosecution.⁵⁹

To advance the government's attack on illegal immigration by "prevention through deterrence," in 1996, the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) amended the IRCA.⁶⁰ One of IIRIRA's main components reinforced border security again by adding one thousand border agents for five years and using new identification verification technologies.⁶¹ IIRIRA also sought to place a greater burden on employers hiring illegal immigrants by implementing three pilot programs for automated employee identification systems.⁶² The government believed that a system of employment verification would deter potential immigrants from seeking jobs in the United States.⁶³ It is not required that employers participate in these verification programs; thereby perpetuating the status quo of non-compliance.⁶⁴ IIRIRA recognized human smuggling as a concern and probable consequence of strict border enforcement, creating stiffer penalties for smugglers and

58. *Evaluating a Temporary Guest Worker Proposal*, Papademetriou Testimony, *supra* note 16, at 170 (suggesting illegal immigrants remaining in United States perpetuate future generations). Papademetriou also opines that during legislative debates regarding IRCA, few lawmakers addressed the fact that the United States labor market depends on illegal immigrants. *Id.* at 168.

59. *See* Axtman, *supra* note 51, at 3 (suggesting getting past border biggest hurdle for illegal immigrants seeking work); *see also* Zaremba, *supra* note 51, at A1 (citing less than one percent of eight to eleven million illegal United States immigrants deported in 2003).

60. Illegal Immigration Reform and Immigrant Responsibility Act, Pub. L. No. 104-208, 110 Stat. 3009, Division C (codified as amended 8 U.S.C. § 1324a (1997)); Andreas, *supra* note 5, at 114 (naming government's offensive).

61. *Fact Sheet: Illegal Immigration Reform and Immigrant Responsibility Act of 1996*, U.S. DEPARTMENT OF JUSTICE, U.S. CITIZENSHIP AND IMMIGRATION SERVICES (Mar. 24, 1997), at <http://uscis.gov/graphics/publicaffairs/factsheets/948.htm>; Charles C. Foster, *1996 Immigration Act: Its Impact on U.S. Legal Residents and Undocumented Aliens*, 34 HOUS. LAW. 28, 30 (1997) (discussing provisions for greater border enforcement). The Act also authorized \$12 million to be spent on fencing, fingerprinting, and automated recordkeeping. Illegal Immigration Reform and Immigrant Responsibility Act, Pub. L. No. 104-208, 110 Stat. 3009, Division C (codified as amended at 8 U.S.C. § 1324a (1997)).

62. Pub. L. No. 104-208, 110 Stat. 3009, Division C, § 401. The programs are voluntary for employers. *Id.* at § 402(a). Under the Basic Pilot Program, a potential employee must present a Social Security Number in addition to his I-9. *Id.* at § 403(a). The employer then has three days to verify the employee's identity by transmitting his identification information. *Report to Congress on the Basic Pilot Program*, June 2004, at 2 [hereinafter *INS Report to Congress*] at <http://uscis.gov/graphics/aboutus/repstudies/piloteval/BasicFINAL0704.pdf>. The information is then checked against either the Social Security Administration's Numerical Identification File if the employee attests to being a U.S. citizen, or the Citizenship and Immigration Service's Customer Processing System. *Id.* The Citizen Attestation Verification Pilot and the Machine-Readable Document Pilot were terminated in 2003. *Id.* at 1. In December of 2004 the Basic Pilot program was made available to employers in all states. *Id.* at 10.

63. Clinton, *supra* note 14, at 7886 (arguing employment deterrence will augment border deterrence).

64. Illegal Immigration Reform and Immigrant Responsibility Act, Pub. L. No. 104-208, 110 Stat. 3009, Division C, §402 (codified as amended at 8 U.S.C. § 1324a (2000)) (stating participation voluntary); *INS Report to Congress*, *supra* note 62, at 9 (reporting lack of participation resulted in not realizing goals of program). *But see* Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005, H.R. 4437, 109th Cong. § 702 (2005) (requiring employers to verify all potential employee's eligibility or become subject to fines).

increasing the base sentencing level.⁶⁵

1. NAFTA's Failure to Address Immigration Law

Congress had another opportunity to affect illegal immigration reform in 1995 when it passed the North American Free Trade Agreement (NAFTA).⁶⁶ Because it is a trade agreement, NAFTA does not directly address the illegal immigration that was sure to follow in its wake.⁶⁷ Proponents believed that NAFTA would decrease wage disparities between the United States and Mexico by not only providing an export market for Mexico, but also by relocating industry to Mexico from the United States and Canada, thereby reducing incentive to illegally emigrate north.⁶⁸ NAFTA sought to open the economic border between the United States and Mexican economies, yet fortify the physical border between the two countries.⁶⁹ Consequently, the INS created Operation Gatekeeper in San Diego, Operation Hold the Line in El Paso, and Operation Rio Grande in southeast Texas to put into effect the increased border fortification provisions of NAFTA.⁷⁰ In reality, tighter border security at usual crossing points only drove immigrants willing to make the cross into the United States further underground, and into more dangerous sections of the border with less enforcement, perpetuating the reliance on experienced smugglers.⁷¹

65. 8 U.S.C. § 1324(a)(2)(B)(iii) (2000) (providing for imprisonment of up to fifteen years for alien smuggling); Illegal Immigration Reform and Immigrant Responsibility Act, Pub. L. No. 104-208, 110 Stat. 3009, Division C, § 203 (codified as amended at 8 U.S.C. § 1324a (2000)) (raising base offense level by three and enhancing sentencing for multiple aliens smuggled).

66. See generally Susan Pozo, *Illegal Immigration, Wage Volatility, and NAFTA*, 1 SUM NAFTA: L. & BUS. REV. AM. 3, 3 (1995) (arguing reasons why illegal immigration reform received little attention in legislating NAFTA). Pozo suggests that analysts believed that NAFTA would freeze illegal immigration because it was intended to decrease wage disparities between the United States and Mexico. *Id.* at 3.

67. See M. Jeanette Yakamovich, *NAFTA on the Move: The United States and Mexico on a Journey Toward the Free Movement of Workers—A NAFTA Progress Report and EU Comparison*, 8 L. & BUS. REV. AM. 463, 464 (2002) (pointing out open economic borders lead to open geographic borders).

68. See Pozo, *supra* note 66, at 3 (stating reasons for belief in decrease in wage disparity between United States and Mexico). Migration expert Douglas Massey argues that it is also the “social capital” formation in the United States and facility of transportation through new infrastructures that agreements like NAFTA create, and not solely wage differentials, that drive the migration. See Douglas S. Massey, *March of Folly*, AM. PROSPECT, Mar.-Apr. 1998, at 22.

69. Don M. Mitchell, *The Geography of Injustice: Borders and the Continuing Immiseration of California Agricultural Labor in Era of “Free Trade”*, 2 RICH. J. GLOBAL L. & BUS. 145, 158 (2001) (highlighting inherent contradiction regarding open border in NAFTA).

70. See generally *Operation Gatekeeper: Mixed Results From a Mixed Operation*, CTR. FOR IMMIGR. STUD. (1995) (presenting data on effectiveness of operation) at <http://www.cis.org/articles/1995/border/border5.html>.

71. See, e.g., Andreas, *supra* note 5, at 116 (correlating increased demand for smugglers with increased difficulty in crossing); Mitchell, *supra* note 69, at 159 (arguing Operation Gatekeeper has drastically increased risks associated with smuggling); Ken Ellingwood, *Data on Border Arrests Raise Gatekeeper Debate*, L.A. TIMES, Oct. 1, 1999, at A3 (proffering border enforcement in San Diego shifting smuggling routes to rural California). Between 1999 and 2004, 1896 people died trying to cross the border. Germain, *supra* note 6, at 749.

C. Employment Law: Lessons Not Learned From History

Labor shortages in the United States during World War II led to the formal recruitment of Mexican laborers in agriculture through the Bracero Program.⁷² The goal of the program was to provide temporary labor for American businesses without adding any new permanent American residents.⁷³ Due to heavy lobbying from American farmers, the Bracero program extended beyond the war years and was not terminated until 1964.⁷⁴ Because the existence of readily-available cheap labor suppressed working conditions and wages for farm workers in America, farmers lobbied the government to continue the program, rather than spend money on labor-saving innovations.⁷⁵ The intention of the Bracero program was that upon its termination, the laborers would return to Mexico.⁷⁶ Yet the emigration from Mexico that occurred during the twenty-two years of the Bracero program created a strong network tying together American agriculture and Mexican laborers.⁷⁷ It was not only Mexican farm laborers legally participating in the Bracero program who came to the United States; the program also caused a surge of illegal immigration in other economic sectors spurred on by lack of workplace enforcement.⁷⁸ The termination of the program did not end the need for cheap labor, thus the Mexican labor supply was driven underground.⁷⁹ Because both supply and demand for cheap labor continued after the termination of the program, the

72. Andreas, *supra* note 5, at 109 (discussing origin of U.S. agriculture's dependence on Mexican labor). American farmers and railroaders used a "Food to Win the War" motto to persuade the government to facilitate hiring Mexican laborers. See Philip Martin, *Guest Worker Programs for the 21st Century*, CTR. FOR IMMIGR. STUD., 1 (Apr. 2000) (pointing out U.S. agribusiness' contribution to mass migration), available at <http://www.cis.org/articles/2000/back400.pdf>.

73. Martin, *supra* note 72, at 1 (arguing program's failure to provide merely temporary residents).

74. Mark Krikorian, *Flawed Assumptions Underlying Guestworker Programs*, CTR. FOR IMMIGR. STUD., 5 (Feb. 2004) (delineating history of government-induced migration), available at <http://www.cis.org/articles/2004/back204.pdf>. Krikorian refutes that the Bracero program was temporary, highlighting its twenty-two year life created by farmers' "addiction" to cheap Mexican labor. *Id.* at 5.

75. Martin, *supra* note 72, at 2 (arguing farmers favor maintenance of program over mechanization); see also Krikorian, *supra* note 74, at 6 (pointing out increase in low-skilled workers reduces incentive for innovation).

76. Krikorian, *supra* note 74, at 5 (noting unlike goods, people have free will); Andreas, *supra* note 5, at 110 (noting farmers' desire to continue hiring Mexican workers).

77. Krikorian, *supra* note 74, at 5 (calling Mexican guestworkers participating in Bracero "magnets for further immigration"); Martin, *supra* note 72, at ¶ 9 (noting interdependence between U.S. agriculture and Mexican laborers).

78. See Krikorian, *supra* note 74, at 5 (noting increase of both legal and illegal immigration). The Center for Immigration Studies states that in addition to admitting 4.6 million Mexicans to work on U.S. farms during the program, the United States apprehended between 4.9 and 5.3 million illegal Mexican immigrants. *Id.*; Martin, *supra* note 72, at 1-2 (suggesting requirement for knowingly hiring unauthorized workers not enforced).

79. Andreas, *supra* note 5, at 110 (pointing out symbiosis between Mexican laborers and U.S. employers perpetuated by Bracero). Andreas also notes that employers had little to fear if caught employing illegal immigrants because it was not illegal to do so at the time. *Id.* at 110; see also *supra* note 46 and accompanying text.

human smuggling industry boomed.⁸⁰

Despite the unintended results of the Bracero program, the current administration seeks to implement another guest worker plan.⁸¹ Under President George W. Bush's guest worker proposal, the United States, for a one-time fee, would grant to currently illegal immigrants legal status in the United States for three years.⁸² The status would be renewable, and the workers could travel freely between the United States and Mexico.⁸³ The program would also require employers to try to fill positions with Americans before foreigners, and to report to the government when foreigners enter and leave their employment.⁸⁴ The Administration believes that temporary legal status will satisfy immigrant workers, resulting in the elimination of illegal immigration as the status quo in the United States.⁸⁵ Supporters also argue that increasing the supply of legal workers will discourage employers from hiring illegal workers.⁸⁶ By increasing the number of immigrant workers who may legally enter and exit over the border, the need for illegal smuggling should decrease.⁸⁷

80. See Andreas, *supra* note 5, at 110 (citing large migrant flow and competition among smugglers for business forces organization of smuggling industry); see also Gustavo Lopez Castro, *Factors that Influence Migration: Coyotes and Alien Smuggling in 3* MIGRATION BETWEEN MEXICO AND THE UNITED STATES: BINATIONAL STUDY 965 (U.S. Commission on Immigration Reform, 1998) [hereinafter BINATIONAL STUDY] (noting increase in significance of activities of coyotes after termination of Bracero program), available at <http://www.utexas.edu/lbj/uscir/binpap-v.html>.

81. Press Release, White House, Fact Sheet: Fair and Secure Immigration Reform (Jan. 7, 2004) [hereinafter Fact Sheet], www.whitehouse.gov/news/releases/2004/01/20040107-1.html (assuming guest worker program will control illegal immigration); Germain, *supra* note 6, at 750 (listing highlights of guest worker proposal). According to a national Gallup poll conducted after Bush's announcement of the proposal, fifty-five percent of Americans opposed it. Germain, *supra* note 6, at 747 n.5; see also Secure America and Orderly Immigration Act, S. 1033, 109th Cong. (2005) (creating H-5A visa for temporary workers). Massachusetts Democrat Edward Kennedy and Arizona Republican John McCain introduced the Secure America and Orderly Immigration Act into the Senate in May 2005. Secure America and Orderly Immigration Act, S. 1033, 109th Cong. (2005).

82. Fact Sheet, *supra* note 81; see also Secure America and Orderly Immigration Act, S. 1033, 109th Cong. § 306 (2005) (allowing nonimmigrant aliens to petition for lawful permanent resident status after four years).

83. Fact Sheet, *supra* note 81.

84. Fact Sheet, *supra* note 81; *Evaluating a Temporary Guest Worker Program*, Hutchinson Testimony, *supra* note 13, at 148 (assuming employers willing to take on burden and cooperate with government); Sergio Bustos & Daniel Gonzalez, *Laboring in Vain?*, ARIZ. REPUBLIC, Oct. 24, 2004, at A1 (arguing costs of participation offset by assurance program will force competitors to comply).

85. *Evaluating a Temporary Guest Worker Proposal*, Papademetriou Testimony, *supra* note 16, at 166 (articulating Administration's expected result from guest worker program). Papademetriou remains skeptical of this lofty goal, stating that visa control is only one "leg" of the "three-legged stool" of immigration along with hope for permanent legal status, and destruction of alien smuggling operations. *Id.*

86. Bustos & Gonzalez, *supra* note 84, at A1 (suggesting employers would prefer to hire legal workers instead of illegal workers).

87. Staff editorial, *Death by Immigration: Bush's Guest Worker Proposal is Imperfect, But the Status Quo of Exploitation is Intolerable and Often Deadly*, HOUS. CHRON., Dec. 29, 2004, at 8 (arguing legal flow of workers reduces reliance on illegal means of crossing). But see Amy Borrus & Geri Smith, *Spotlight on the Border: A Viable Plan on Immigration Tops the Bush-Fox Agenda*, BUS. WK., Sept. 10, 2001, at 40 (noting

D. Economic Policies of the Internal Revenue Service and Social Security Administration

Lack of coordination among ICE, the Internal Revenue Service (IRS), and the Social Security Administration (SSA) is one reason for the rampant use of fraudulent documents obtained by illegal immigrants for the purpose of procuring work in the United States.⁸⁸ When employers file income tax returns with the IRS, the SSA compares the names listed as employees with the Social Security Number (SSN) given to the employer by the worker.⁸⁹ When a name and SSN do not match information on file with the SSA, the wages of that worker are not credited to his SSA account, but are placed in an Earnings Suspense File.⁹⁰ In 2004, the Earnings Suspense File totaled \$463 billion in wages.⁹¹ The SSA's only recourse against this problem is to send "no-match" letters to employers in order to inform them that at least one of their employees is using fraudulent documentation.⁹² The SSA has no legal authority to penalize employers who submit mismatched SSNs or the workers who use them.⁹³ The SSA relies on the IRS to penalize the employers of workers with fraudulent SSNs.⁹⁴ The IRS has the authority to impose a \$50 fine per no-match employee up to \$250,000 but it has yet to do so.⁹⁵ If confronted by their employer regarding the no-match letter, employees usually leave on their own before they are fired, and use the same false document to work for another

Mexico's wage rates at one tenth of United States' wage rates will still drive illegal immigrants to U.S.).

88. See Olvera & Gutierrez, *supra* note 52, at 15A (noting privacy laws prevent agencies from sharing information); Hernan Rozemberg, *Migrants Forced Out of Jobs*, ARIZ. REPUBLIC, July 6, 2002, at 1 (stating federal law prohibits SSA from sharing social security numbers with INS).

89. Marti Dinerstein, *Giving Cover to Illegal Aliens: IRS Tax I.D. Numbers Subvert Immigration Law*, CTR. FOR IMMIGR. STUD. 1, 2 (Nov. 2002) (describing process by which government discovers fraudulent SSNs).

90. NAT'L IMMIGR. LAW CTR., PROGRAM FACTS: SSA'S EARNINGS SUSPENSE FILE AND "NO-MATCH" LETTERS C13 (Mar. 2003) [hereinafter NO-MATCH LETTERS] (stating destination of wages earned by fraudulently documented employees), at http://www.nilc.org/immsemplymnt/SSA-NM_Pack/C04_SSA_NM_Facts-e.pdf.

91. OFF. OF THE INSPECTOR GEN., SOC. SEC. ADMIN., AUDIT REPORT, SOCIAL SECURITY NUMBER MISUSE IN THE SERVICE, RESTAURANT, AND AGRICULTURE INDUSTRIES, ¶ 2 (2005).

92. *SSA Begins Sending No-Match Letter to Employers for 2004*, IMMIGRS.' RIGHTS UPDATE, Apr. 2, 2004 (describing procedure for notifying employers of fraudulently documented employees), at <http://nilc.org/immsemplymnt/emprights/emprights075.htm>. In 2003, the SSA sent out 126,250 no-match letters, representing approximately 7.5 million incorrect W-2s. *Id.* California businesses alone receive thirty percent of all no-match letters sent. NO-MATCH LETTERS, *supra* note 90, at C13.

93. Dinerstein, *supra* note 89, at 2 (noting inability of SSA to enforce illegal employment law).

94. Dinerstein, *supra* note 89, at 2 (pointing out SSA's reliance on IRS for enforcement); *SSA Begins Sending No-Match Letter to Employers for 2004*, *supra* note 92, (explaining imposition of penalty not permitted until IRS notifies employer, not when no-match letter received).

95. *Social Security Number and Individual Taxpayer Identification Number Mismatches and Misuse: Hearing Before the Subcomm. on Oversight and Subcomm. on Social Security, H. Comm. on Ways and Means*, 108th Cong. 13 (2004) (statement of Mark W. Everson, Commissioner, Internal Revenue Service) [hereinafter *Joint Hearing on SSN and ITIN Mismatches and Misuse*, Everson Statement] (suggesting hesitance to penalize grows from assumption employers attempting to comply).

employer.⁹⁶ Some immigration experts argue that without sharing of information, each agency acts like its own government; facilitating the ease with which illegal immigrants can go without detection or prosecution.⁹⁷ Recently, Diplomatic Security, the law enforcement branch of the State Department, recognized that document fraud and alien smuggling are “inextricably linked” and neither can be effectively combated without interagency cooperation.⁹⁸

Another reason for the growth of the fraudulent document industry is that IRCA does not require employers to verify the authenticity of documents presented to them.⁹⁹ Therefore, employees face few obstacles in obtaining employment in the United States if they can acquire false documents.¹⁰⁰ Smugglers often obtain green cards and Social Security Cards and distribute them to immigrants based on similarity of appearance.¹⁰¹ Fake SSNs can be obtained easily, and enforcement at the border has forced frauds to use more sophisticated means of producing more valid-looking documents.¹⁰²

96. *Id.* (suggesting options for employees caught using fraudulent SSNs); Rozemberg, *supra* note 88 at 1 (noting most caught employees leave before investigation begins). Because a forged social security card can be bought for only fifty dollars, workers often buy another or use the same fake card with another employer. Rozemberg, *supra* note 88, at 1.

97. *Deadly Consequences of Illegal Alien Smuggling*, Nunez Statement, *supra* note 28, at 25-26 (questioning reason for inability to share information among agencies); *Social Security Number and Individual Taxpayer Identification Number Mismatches and Misuse: Hearing Before the Subcomm. on Oversight and Subcomm. on Social Security, H. Comm. on Ways and Means*, 108th Cong. 61, 62 (2004) (statement of Patrick P. O’Carroll, Acting Inspector General for Investigations, Office of the Inspector General, Social Security Administration) [hereinafter *Joint Hearing on SSN and ITIN Mismatches and Misuse*, O’Carroll Statement] (suggesting SSA and IRS work together with employers to minimize mis-matches).

98. *Pushing the Border Out on Alien Smuggling: New Tools and Intelligence Initiatives: Hearing Before the Subcomm. on Immigr., Border Security, and Claims, H. Comm. on the Judiciary*, 108th Cong. 9 (2004) (testimony of Joe D. Morton, Principal Deputy Assistant Sec’y, and Director, Diplomatic Sec. Service, Dep’t of State) [hereinafter *Pushing the Border Out*, Morton Testimony] (calling for cooperation among law enforcement branches of government against document fraud and alien smuggling); *see also* Secure America and Orderly Immigration Act, S. 1033, 109th Cong. § 124 (2005) (calling for sharing of government branches’ databases); COMBATING ALIEN SMUGGLING GAO REPORT, *supra* note 17, at 13 (emphasizing importance of information sharing to identify “connectivity” of each violation).

99. *See* 8 U.S.C. § 1324a(a) (2000). *But see* Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005, H.R. 4437, 109th Cong. (2005) (providing for a mandatory electronic employment eligibility verification system).

100. *See, e.g.*, Andreas, *supra* note 5, at 117 (noting few requirements for employers to verify documents encourages use of false documents); Olvera & Gutierrez, *supra* note 52, at 15A (questioning likelihood employers unaware of employing illegal workers); Rozemberg, *supra* note 88, at 1 (pointing out obligation to enforce belongs to immigration agents, not employers).

101. *See* BINATIONAL STUDY, *supra* note 80, at 969 (describing one method by which smuggled migrants obtain fraudulent identification); *Legislation Concerning Immigrant Issues: Hearing Before the Subcomm. on Immigr., Border Sec., and Claims, H.R. Comm. on the Judiciary*, 105th Cong. 91-92 (1997) (statement of Rosemary Jenks, Senior Fellow, Center for Immigr. Stud.) [hereinafter *Legislation Concerning Immigrant Issues*, Jenks Statement] (reporting smugglers include fraudulent identification as part of “package deals”).

102. *See* Rozemberg, *supra* note 88, at 1 (quoting illegal immigrant whose fifty dollar false social security card worked for seven years); Juan Gabriel Ronderos, Identity Fraud and Transnational Crime, presented at Seventh Meeting of the CSCAP Working Group on Transnational Crime, Manila, Philippines (May 31-June 1, 2000) (arguing identity fraud more organized as result of laws imposed); Fake Green Cards,

1. Individual Taxpayer Identification Numbers and Matricula Consular

In 1996, the IRS began issuing Individual Taxpayer Identification Numbers (ITINs) to people who do not qualify to receive a Social Security Number but are nonetheless required to file federal income taxes.¹⁰³ An IRS audit conducted in 1999 states that “[o]ver 340,000 of the ITINs were issued to self-documented illegal aliens.”¹⁰⁴ Moreover, ITINs are not being used only for tax identification, but for other purposes such as obtaining drivers’ licenses.¹⁰⁵

As a result of feelings toward foreigners in America in the wake of the September 11th terrorist attacks, the Mexican government took a new tack towards supporting its nationals in the United States by lobbying at the state and local level for the acceptance of the Mexican identification card, Matricula Consular.¹⁰⁶ Matriculas are only issued to Mexican nationals living outside Mexico and thus demonstrate to any United States authority that the holder of

www.homepage.mac.com/yespinoza/greencards.html (June 3, 1999) (pointing out ability to purchase publishing software on internet allows greater accuracy of fakes). A binational study of human smuggling found that during peak traffic periods, border inspectors spent more time looking at the document rather than the individual, making it easier for look-a-likes to pass. BINATIONAL STUDY, *supra* note 80, at 969.

103. *Joint Hearing on SSN and ITIN Mismatches and Misuse*, Everson Statement, *supra* note 95, at 11 (pointing out IRS does not differentiate between legal and illegal non-resident aliens in issuing ITINs). Illegal immigrants receive ITINs because the IRS criteria for resident alien status is a “substantial presence” in the United States, not legal presence. Dinerstein, *supra* note 89, at 2.

104. Memorandum for Comm’r Rossotti on The Internal Revenue Service’s Individual Taxpayer Identification Number Program Was Not Implemented in Accordance with Internal Revenue Code Regulations, 1 (Sept. 28, 1999) (redacted) [hereinafter IRS Memo] (demonstrating IRS’s concern over misuse of ITINs), available at <http://www.treas.gov/tigta/auditreports/reports/094505fr.html>. A 1999 Inspector General’s audit of the ITIN system points out that there is a conflict between the IRS disclosure protection to illegal aliens and IIRIRA’s requirement for sharing of information. *Id.* at 4. IIRIRA provides that information concerning illegal alien status should be provided to INS notwithstanding any other law. Illegal Immigration Reform and Immigrant Responsibility Act, Pub. L. No. 104-208, 110 Stat. 3009, Division C (codified as amended 8 U.S.C. § 1324a (1997)).

105. *Joint Hearing on SSN and ITIN Mismatches and Misuse*, Everson Statement, *supra* note 95, at 9. Everson, Commissioner of the IRS, admits that while the IRS insists ITINs are for tax paying purposes only, a number of states allow ITINs to be used for other identification purposes. *Id.* Several banks in the United States permit applicants to open checking accounts by using an ITIN instead of a SSN. Oscar Avila, *Tax ID Numbers Opens Door Wider for Illegal Immigrants*, CHI. TRIB., Apr. 15, 2002, at 1; *see also* Dinerstein, *supra* note 89, at 4 (suggesting banks cater to illegal immigrants). There are no laws prohibiting illegal immigrants from opening accounts with American banks, and banks are not required to determine the legal status of applicants. U.S. GOV’T. ACCOUNTABILITY OFFICE, REPORT TO CONGRESSIONAL REQUESTERS, BORDER SECURITY: CONSULAR IDENTIFICATION CARDS ACCEPTED WITHIN UNITED STATES, BUT CONSISTENT FEDERAL GUIDANCE NEEDED 1, 7 (2004) [hereinafter BORDER SECURITY GAO REPORT]. By the end of 2002, over 5.5 million ITINs had been issued but only 1.5 million tax returns were filed using the ITIN. Marti Dinerstein, *IDs for Illegals: The “Matricula Consular” Advances Mexico’s Immigration Agenda*, CTR. FOR IMMIGR. STUD. 1, 8 (2003) [hereinafter *IDs for Illegals*].

106. *See IDs for Illegals*, *supra* note 105, at 2 (suggesting Mexican government believed easier to gain acceptance from state rather than national government); *The Matricula Consular*, 149 CONG. REC. H3738-39 (daily ed. May 7, 2003) (statement of Rep. Tancredo) (condemning Mexican government’s lobbying efforts at their consulates in United States); *Matricula Consular ID Cards*, FEDERATION FOR AMERICAN IMMIGRATION REFORM [hereinafter *Matricula Consular ID Cards*] (last updated Nov. 2003) (pointing out potential Constitutional conflict with federal foreign policy law) at http://www.fairus.org/site/PageServer?pagename=iic_immigrationissuecenters6520.

the card is residing in the United States illegally.¹⁰⁷ Matriculas are accepted for the purpose of establishing identity, opening bank accounts, and obtaining drivers' licenses.¹⁰⁸ Not surprisingly, the majority of states accepting matriculas are those with the highest number of Mexican immigrants.¹⁰⁹

III. ANALYSIS

The most effective means by which to eradicate human smuggling from Mexico is to erect legal barriers, not physical ones.¹¹⁰ The current criminal laws designed to punish human smugglers are not severe enough to threaten them, as evidenced by the rapid increase in human smuggling operations in recent years.¹¹¹ An expensive and technologically-advanced physical border alone will not deter desperate immigrants from attempting to cross, especially when they are aided by experienced smugglers and genuine-looking identification.¹¹² Potential immigrants know that if they can reach American soil, the American government will do little to send them home.¹¹³ In fact, American businesses may make a conscious effort to keep them here.¹¹⁴

The United States can take an affirmative step toward ceasing its encouragement of human smuggling through Mexico by passing provisions of the Border Protection, Antiterrorism, and Illegal Immigration Control Act and

107. See *Matricula Consular ID Cards*, *supra* note 106 (arguing acceptance of matriculas by American governments and businesses undermining illegal immigration enforcement). Mexico issued more than 2.2 million consular identification cards (CIDs) in 2002-2003. BORDER SECURITY GAO REPORT, *supra* note 105, at 1. Austin, Texas permits the use of CIDs to help its residents gain access to community courts and library cards. *Id.* at 7; see also Letter from House Homeland Security Committee Chairman Christopher Cox (R-Cal.), House Judiciary Committee Chairman F. James Sensenbrenner, Jr. (R-Wis.), House Judiciary Subcommittee on Courts, the Internet, and Intellectual Property Chairman Lamar Smith (R-Tex.), and House Appropriations Subcommittee on Homeland Security Chairman Harold Rogers (R-Ky.), to Tom Ridge, Secretary of Homeland Security (July 8, 2003) available at http://hsc.house.gov/text_release.cfm?id=47 (acknowledging matricula "breeder document for establishing a false identity").

108. See BORDER SECURITY GAO REPORT, *supra* note 105, at 7-8. Some 1159 U.S. police departments accept the matricula as proof of identity, 160 financial institutions in the United States accept the matricula for the purposes of opening a bank account, and 13 states accept the matricula for issuing driver's licenses. *Id.*

109. *IDs for Illegals*, *supra* note 105, at 5 (citing sixty-four percent of matriculas issued in 2002 by consulates in Arizona, Texas, and California).

110. See *supra* notes 9-11 and accompanying text (suggesting stricter border enforcement leads to greater reliance on smugglers).

111. See 8 U.S.C. § 1324(a)(2) (2000) (setting forth law against human smuggling); *supra* note 35 and accompanying text (contrasting actual punishment to punishment prescribed by statute); *supra* text accompanying note 2 (noting sharp increase in smugglers apprehended in two years).

112. See *supra* note 61 and accompanying text (noting border reinforcements prescribed by IIRIRA); *supra* notes 69-70 and accompanying text (giving examples of border reinforcement operations prescribed by NAFTA); *supra* notes 100-102 and accompanying text (describing ease with which illegal immigrants obtain fraudulent identification).

113. See *supra* note 59 and accompanying text (citing relatively few illegal immigrants deported from United States).

114. See *supra* note 55 and accompanying text (reporting employers avoid employer sanctions if assist INS); *supra* text accompanying note 64 (noting employers not required to participate in electronic employee verification systems).

the Commercial Alien Smuggling Act.¹¹⁵ The increase in length of prison sentences is vital to deterring alien smuggling, but only if effectively enforced.¹¹⁶ It is also important for the government to educate the public about the dangers of human smuggling and the consequences of participating in this illegal activity.¹¹⁷

President Bush's guest worker plan will not decrease the incentive for people to be smuggled from Mexico into the United States.¹¹⁸ There is little reason for immigrant workers to register with the federal government for a plan that would deport them in three years with no possibility for permanent legal status.¹¹⁹ Immigrants likely would prefer to work in the United States illegally and evade detection indefinitely than participate in a program resulting in certain deportation.¹²⁰

Foreign workers who do register for the program will have up to six years to reside legally in the United States and most certainly will put down roots in the United States.¹²¹ The number of initially legal temporary laborers likely will strengthen the Mexican immigrant network in the United States, thereby encouraging those ineligible to participate in the plan to use smugglers to join family members and friends in the United States.¹²² Moreover, it will be difficult for the government to enforce deportation after three years because

115. See *supra* notes 39-41 and accompanying text (outlining provisions of Border Protection, Antiterrorism, and Illegal Immigration Act of 2005); notes 42-44 and accompanying text (outlining provisions of CASE Act).

116. See *supra* note 40 and accompanying text (describing more serious punishment provided by Border Protection, Antiterrorism, and Illegal Immigration Act of 2005).

117. See *supra* text accompanying notes 43-44 (recognizing need to educate U.S. nationals and non-nationals about human smuggling).

118. See Andreas, *supra* note 5, at 109 (arguing Bracero instigated "mass" labor migration from Mexico to United States); Krikorian, *supra* note 74, at 2 (asserting government policies induce immigration); Martin, *supra* note 72, at ¶ 7 (reporting both Mexico and United States recognized Bracero program facilitated illegal immigration).

119. See Bustos & Gonzalez, *supra* note 84, at A1 (suggesting no incentive to register if no prospect of legal residency); Zarembo, *supra* note 51, at A1 (reporting current illegal workers find registration drawback to program).

120. See Bustos & Gonzalez, *supra* note 84, at A1 (reporting immigrants fear registering with government); Zarembo, *supra* note 51, at A1 (interviewing illegal garment workers who do not fear deportation and will not register for plan).

121. See *Evaluating a Temporary Guest Worker Proposal*, Papademetriou Testimony, *supra* note 16, at 167 (noting many illegal aliens in United States for years and now parents of citizen children); Andreas, *supra* note 5, at 110 (noting entrenchment of Mexican labor after Bracero program); *supra* note 78 and accompanying text (citing 4.9 million illegal immigrants deported during Bracero program); Krikorian, *supra* note 74, at 5 (recognizing people not goods, people have free will). Krikorian notes that laborers who come to the United States through guest worker programs serve as "magnets" for friends and family who might immigrate illegally. Krikorian, *supra* note 74, at 5.

122. See BINATIONAL STUDY, *supra* note 80, at 966 (reporting coyotes means by which workers with no job contacts can migrate to United States); Zarembo, *supra* note 51, at A1 (noting network of similar immigrants facilitates blending into United States). *But see Evaluating a Temporary Guest Worker Program*, Hutchinson Testimony, *supra* note 13, at 147 (suggesting provision of plan permitting travel between countries will ensure roots maintained in home country).

laborers can easily obtain new jobs with new identification.¹²³

A temporary guest worker program would result in a bureaucracy that employers will seek to avoid because it imposes greater requirements on them in terms of wage levels and working conditions.¹²⁴ In addition, because it will be impossible to prove that an employer sought American workers first, employers, particularly in agriculture, easily can hire illegal immigrants who will work for reduced wages and in deplorable conditions without recourse.¹²⁵ Creating a class of temporary workers does not eliminate the huge supply of illegal workers who will still be able to find jobs if they are successfully smuggled over the border.¹²⁶ In addition, the acceptance of ITINs and Matriculas at American banks and Departments of Motor Vehicles encourages, rather than deters, human smuggling because it facilitates the mainstreaming of illegal immigrants into America once they are here.¹²⁷

In issuing ITINs, the IRS is actually thwarting ICE's efforts to identify and remove illegal immigrants in the United States.¹²⁸ Clearly, the IRS is more concerned with culling taxes from more people rather than curbing illegal workers.¹²⁹ The very attractive message that ITINs convey to potential immigrants is that not only will they be able to work once they make it to the United States, but they also will enjoy access to the same public and private services as legal residents.¹³⁰

By accepting the Mexican Matricula Consular for the purpose of opening a

123. See Fake Green Cards, *supra* note 102 (describing ease with which fraudulent identification obtained); see also Krikorian, *supra* note 74, at 7. Krikorian hypothesizes that the need to register and track guest workers will overwhelm the currently backlogged immigration processing system. Krikorian, *supra* note 74, at 7.

124. See Martin, *supra* note 72, at ¶23 (suggesting employers deterred from hiring temporary guest workers to avoid compliance with governmental regulations). But see *Evaluating a Temporary Guest Worker Program*, Hutchinson Testimony, *supra* note 13, at 148 (assuming employers will report to government when foreign workers leave their employment).

125. See Fact Sheet, *supra* note 81 (stating employers required to look for American workers first but not suggesting plan for implementation of requirement); Bustos & Gonzalez, *supra* note 84, at A1 (discussing government's previous attempts to coerce employers into compliance with guest worker program). In 1997, onion farmers in Georgia denounced the guest worker program in place at the time claiming the program's required wages were too high. Bustos & Gonzalez, *supra* note 84, at A1; see also Germain, *supra* note 6, at 750 (pointing out program participants protected by U.S. labor laws).

126. See *supra* text accompanying notes 77-80 (noting failure of employer compliance in Bracero program led to increase in illegal immigration).

127. See *Joint Hearing on SSN and ITIN Mismatches and Misuse*, Everson Statement, *supra* note 95, at 11 (suggesting ITIN has taken on identification validity of SSN); IRS Memo, *supra* note 104 (admitting ITINs counter-productive to INS goal of identifying illegal aliens).

128. Dinerstein, *supra* note 89, at 2 (pointing out illegal residents receiving same tax benefits as legal residents); IRS Memo, *supra* note 104. Some immigrant advocates advise their clients to continue using fraudulent SSNs for identity purposes, but also to use their ITIN when dealing with the IRS. Dinerstein, *supra* note 89, at 2; Avila, *supra* note 105, at 1 (same).

129. Dinerstein, *supra* note 89, at 2 (suggesting IRS' goal in issuing ITINs to collect more tax revenue); Avila, *supra* note 105, at 1 (pointing out IRS presents workshops to educate immigrants on ITINs).

130. See IRS Memo, *supra* note 104 (pointing out policy concern that illegal aliens gaining tax benefits over nonresident aliens); *supra* note 107 (discussing ways in which ITINs used besides tax identification).

bank account, obtaining a driver's license, and accessing other public services, these public and private institutions further the ease with which a successfully smuggled Mexican immigrant can blend into mainstream America.¹³¹ While these governments and businesses realize the financial benefit of extending their services to illegal aliens, they ignore their encouragement of further illegal immigration.¹³² State governments should not accept Matriculas for anything more than identification, because doing so is tantamount to granting amnesty to illegal aliens who have successfully crossed the border.¹³³

The ease with which identification documents may be forged helps smugglers obtain more customers.¹³⁴ One way to impede the widespread use of fraudulent identification by migrants smuggled into the United States is to make the Social Security Card more secure and more difficult to forge.¹³⁵ Knowing that United States travel documents are the most sought after in the world, Diplomatic Security must prosecute all cases of fraudulent document use at the border in order to deter smugglers from offering that service to immigrants.¹³⁶

Because the documents required for employment under existing laws are so easily forged, and fraudulent documents so easy to obtain, it must be mandatory that employers verify the identification of every applicant, regardless of whether the applicant might be illegal.¹³⁷ Participation in a work eligibility

131. See *The Matricula Consular*, 149 CONG. REC. H3738, H3738 (daily ed. May 7, 2003) (statement of Rep. Tancredo) (suggesting U.S. government allowing Mexico to affect U.S. immigration policy); *IDs For Illegals*, *supra* note 105, at 2 (suggesting Mexican government using matriculas to ensure illegal Mexicans in United States not hassled); *supra* notes 107-108 (discussing widespread acceptance of Matricula by American governments and businesses).

132. See *The Matricula Consular*, 149 CONG. REC. H3738, H3739 (daily ed. May 7, 2003) (statement of Rep. Tancredo) (chastising American government for being "in league" with foreign governments); *Matricula Consular ID Cards*, *supra* note 106 (stating acceptance of matriculas undermine illegal immigration enforcement).

133. See Letter to Tom Ridge, Secretary of Homeland Security, *supra* note 107 (reporting FBI testimony regarding matriculas). In testimony before the House Judiciary Committee's Subcommittee on Immigration, Border Security, and Claims, the FBI witness stated that the Matricula draws greater numbers of aliens who are smuggled because they believe that the Matricula will entitle them to benefits once they reach the United States. *Id.*

134. See *supra* note 101 and accompanying text (reporting immigrants obtain fraudulent identification from smugglers).

135. See *Legislation Concerning Immigrant Issues*, Jenks Statement, *supra* note 101, at 92 (suggesting measures government could take to secure Social Security Card).

136. See *Pushing the Border Out*, Morton Statement, *supra* note 98, at 8 (stating document fraud and alien smuggling go hand in hand). Joe Morton, Principal Deputy Assistant Secretary for Diplomatic Security, has recognized in congressional testimony that increasing investigations of document fraud should have the effect of thwarting human smuggling operations. *Id.* at 11.

137. See *INS Report to Congress*, *supra* note 62, at 3. The U.S. Customs and Immigration Service admitted that a volunteer program placing additional burdens on employers caused employers not to participate in the program, thereby limiting the programs usefulness in deterring illegal employment. *Id.* The evaluations also revealed that participating employers did not fully comply, thereby losing sight of the program's purpose of deterring illegal employment, and thus causing discrimination against foreign-born, yet eligible, employees. *Id.*; see also *Legislation Concerning Immigrant Issues*, Jenks Statement, *supra* note 101, at 92 (arguing system

verification system must be mandatory because most employers are not likely to volunteer to participate in burdensome programs.¹³⁸ Only when such a system is enforced and non-complying employers are penalized, however, will the lure of guaranteed employment be tarnished for immigrants contemplating smuggling.¹³⁹

IV. CONCLUSION

People are not goods; humans deserve respect for their physical beings and freedom from exploitation. Tragedies like that which occurred in Victoria, Texas are sure to happen often if the United States continues to encourage human smuggling from Mexico. Because it is unlikely that the American government could ever achieve a total seal of the United States-Mexico border, the United States must focus on the underlying reasons for the prevalence of human smuggling from Mexico to the United States. The government must reconsider its desire for the economic benefits of the mainstreaming of illegal immigrants who arrive in the United States by way of smugglers in order to end that dangerous practice and save human lives.

When immigrants discover that they are able to work and live in the United States illegally, that message spreads among potential immigrant populations. Many of those potential immigrants, desirous of a more prosperous life in the United States, must obtain the services of a smuggler in order to reach America. In order to stop this message from being sent home to Mexico, the United States must focus on interior enforcement of its employment and immigration laws. Hopefully, in the long run, the creation of ICE and CBP will lead to greater coordination among branches of the government that can trace the money trail of human smuggling in order to cut off its source. The first remedial step the federal government can take is to stop issuing ITINs. Local governments must stop accepting Matricula Consulares. The acceptance of these cards for purposes other than identification demonstrates the local and national governments' priority of exacting a fee for successfully reaching the United States.

Smugglers must also be deterred in order to make it more difficult for potential immigrants to obtain their services. The real threat of harsh punishment if caught must outweigh the economic reasons that human smugglers continue their business. Maximum sentences must be imposed on

needed where employers can reliably verify work eligibility).

138. *INS Report to Congress*, *supra* note 62, at 8 (stating noncompliance diminished effectiveness of program, failing to reduce unauthorized employment). The Report argues that placing the system online will make it more user-friendly for employers and therefore more likely to be utilized. *Id.* at 9.

139. See Andreas, *supra* note 5, at 112 (arguing failure of sanctions under IRCA increased accessibility of fraudulent documents for smuggled migrants); Weintraub, *supra* note 52, at 1230-31 (arguing readily available fraudulent documents bypass intention of employer sanctions). *But see* Massey, *supra* note 68, at 22 (claiming IRCA's employer sanctions drove immigrant labor underground).

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those caught in order to set an example for future smugglers.

On an international level, the American and Mexican people need to be educated about the dangers inherent in human smuggling. The families of Mexicans residing in the United States need to know that if their family members can only join them through the use of a smuggler, they may never reach them alive. Additionally, the United States and Mexico must work together to end human smuggling in order to put human life above economic gain.

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