



LATINO IMMIGRATION POLICY: *Context, Issues, Alternatives*

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José E. Cruz, editor

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New York Latino Research and Resources Network Conference
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November 3, 2006,
University at Albany, State University of New York

José E. Cruz, editor
New York Latino Research and Resources Network (NYLARNet)
University at Albany, State University of New York

This is a publication of the New York Latino Research and Resources Network (NYLARNet). NYLARNet was created to bring together the combined expertise of U.S. Latino Studies scholars and other professionals across research institutions within New York State in four target areas: Health, Education, Immigration, and Politics. This network is constituted by recognized scholars and other professionals who are engaged in critical thinking, dialogue, and the dissemination of information on U.S. Latino issues. NYLARNet addresses a broad spectrum of concerns related to the four target areas mentioned above, and provides information services to legislators, public agencies, community organizations, and the media on U.S. Latino affairs. NYLARNet pays special attention to the realities and needs of the largely neglected Latino populations throughout New York State and outside of New York City.

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José E. Cruz

INTRODUCTION

José E. Cruz

The papers that follow were presented at the New York Latino Research and Resources Network (NYLARRNet) Latino Immigration policy conference, held on November 3, 2006 at the University at Albany, State University of New York. The conference drew an audience of close to 150 participants from Academia, legislative offices, state agencies, and community organizations throughout the state of New York. By all accounts the conference was a tremendous success. Yet, the challenge of disseminating its message widely and of effecting some or all of the changes proposed during the proceedings remains. It is our expectation that this publication will contribute to the realization of those two goals.

The conference was held for two simple reasons: First, immigration is a topic of historical and contemporary importance. When we began planning the conference, there was no doubt in our minds that in light of the attention paid by the 109th U.S. Congress to immigration reform and in the wake of the mass mobilizations for immigrant rights that took place in the Spring of 2006 in New York and elsewhere, immigration was the topic that needed immediate attention. Second, the population of New York State that is immigrant and Latino is significant. While the term immigrant is ambiguous, for our purposes, we define Latino immigrants as those who presently are not citizens. In New York State, this amounts to 1.1 million Latinos from the Caribbean, Central, and South America. Together they comprise 39 percent of all Latinos in the state.

The Urgency of Immigration Reform

Immigrants today are not as large a proportion of the U.S. population as they were during the nineteenth and early twentieth century. Between 1901 and 1910, for example, the U.S. admitted a total of 8.7 million immigrants for an annual rate of 10.4 percent. During the period from 1991 to 2000, nine million immigrants entered the country but the annual rate was only 3.4 percent.¹ Today immigrants are more visible despite being a smaller proportion of the population because they look different than the society into which they are supposed to integrate. Also, a significant number, estimated at nearly 12 million, are in the United States without documentation, a fact that

¹ The annual rate is computed by dividing the sum of annual immigrant totals by the sum of annual U.S. population totals for the same number of years. For more details go to <http://www.census.gov/compendia/statab/tables/07s0005.xls>.

is readily touted whenever someone wants to emphasize the severity of the immigration problem.

In the post-9/11 context, immigrants have also come under intensified scrutiny. In 2005 the U.S. Congress decided to make it clear that immigrants were unwelcome and a threat when it voted to finance the construction of a wall along the southern border. In 2006, even after the massive mobilizations of May 1st, immigrants were campaign fodder in a number of congressional races. Today, many face deportation not because they are a threat or have committed crimes but because they don't know how to navigate the system or because of simple bureaucratic errors. To compound matters, the judicial system is increasingly unfriendly to the claims of immigrants because it has little discretion. To be sure, Muslims have borne the brunt of post-9/11 xenophobia. But in that context, views about immigration in general have shifted. Where once immigrants were considered indispensable and a positive element of our heritage they were now perceived to be a socioeconomic burden for the native-born, an element that corroded our culture, and weakened our security.

There is evidence that immigrants make significant contributions to our economy and society. They help sustain the national economy. They enrich our cultural heritage through language, music, and the arts. Despite rhetoric to the contrary, their impact on public sector budgets is small and the notion that immigrants abuse the welfare system is false. For example, fewer than 3 percent of immigrants receive food stamps. They pay sales and property taxes and, ironically, through the use of false social security numbers undocumented workers help subsidize the U.S. Treasury.

Nevertheless, public discussion of immigration ignores, downplays, or challenges the veracity of these contributions. The debate on immigration reform tends to focus on the question of numbers and security. Changes to our immigration policy are urgently needed but volume and security should not be the sole concern of reform initiatives. Our conference was one effort to shift the debate towards two critical questions: What should immigration policy accomplish?; and, what are some of the issues it should focus on, particularly in New York State? We hope this publication helps policymakers find adequate answers to those questions.

The Significance of a Focus on Latinos

Since Mexicans are the largest immigrant group in the United States, no analysis of immigration or immigration reform is complete without a focus on Latinos. In 2000, New York State counted 260,889 Mexican residents;

the number for New York City was 186,872 or 72 percent of the state total. While these are significant numbers, proportionally they reflect a small presence: less than 2 percent of the total state population and 2.3 percent of the population of New York City. Official numbers, however, do not portray the presence of this population in the state accurately because undocumented individuals are excluded. Further, the impact that Mexican immigrants have on the economy and the relevance of their presence for immigration policy are far greater than their numbers.

A focus on Latinos is important because as a whole their presence in the state is prominent. From 1990 to 1995, the population of the state grew in numbers by 0.86 percent. In contrast, between 1990 and 1996 the Latino population saw a 15 percent increase. In 2000, Latinos were 15 percent of the state's population, 18 percent of the New York Metro Area, and 27 percent of the population of New York City. Further, between 2000 and 2005 New York State lost about 2 percent of its population while Latino numbers increased by 6 percent. In 2004, the second largest group of immigrants admitted to the state was Dominicans.

In 2000, Latinos in the state numbered 2,846,469. Of these, 2,160,554 or 75.9 percent resided in New York City. In the Assembly Districts where Latinos are 40 percent of the population or more, they numbered 1,222,860 or 42.9 percent of the Latino state population and 56.5 percent of the city total. It is in these locales that demographic concentration does its nefarious magic, making it seem as if the immigration problem was completely out of control. Even though Puerto Ricans are the largest Latino sub-group in New York State, close to 64 percent of Latinos are Mexican, Dominican, Cuban, Spanish, or South/Central American. After subtracting the Puerto Rican component, Latinos are still a sizable minority: 17 percent of the population of New York City and 7 percent of the population of the state. Also, 66 percent of Latinos in the state were foreign-born in 2000; and of those, 59 percent were not citizens. This translates into more than one million residents, about 6 percent of the total population, that are directly affected by immigration policy.

Latinos are not just significant demographically. They also are the most visible target of immigration measures—from efforts to require verification of citizenship to receive Medicaid to the latest raid on a factory employing undocumented workers. Even Puerto Ricans, who are citizens by birth, can be affected by immigration issues on account of ethnicity and race. Employer verification requirements, for example, which apply to everyone, can be turned against them on account of color and/or physical traits. Lastly,

even after 9/11, Latinos are the number one scapegoat for everything that is negatively associated with immigration in culture, politics, the economy, and society. They are strongly criticized if they relish their national identity. Their loyalty is always under question, no matter what their economic, social, and political contribution to the general welfare may be. If you are a Mexican immigrant and you work hard year in and year out, nobody notices, unless it is the Department of Homeland Security on a publicity stunt. But go to a demonstration and wave the Mexican flag once and you become public enemy number one. Whenever our immigration policy is called dysfunctional, the focus is on what happens along the southern border. Whatever the proposed alternative may be—more resources for the Border Patrol, more Minutemen, or a new version of the Berlin Wall—the subtext, text, and pretext is clear: let's keep Mexicans in their place. Thus, public debate about immigration in the United States is always full of references to Mexico, California or Texas; rarely, if ever, do we hear mention of Canada, Buffalo, or Upstate New York. When it comes to immigration policy, Latinos are the Barbarians at the Gate.

Outline of the Book

The first two chapters in this volume provide useful historical and political background. *Supply-side analyzes of immigrant flows from Mexico* are usually focused on the role that economic conditions play as a push factor for cross-border movements. In Chapter 1 Susan Gauss offers a different perspective. Her account raises an interesting question: What would the contemporary immigration picture be if the Mexican labor movement truly represented the best interest of Mexican workers? While her assessment is less than rosy, it nevertheless maps out a terrain that is worth exploring in more detail.

In 1994, immigration historian Kitty Calavita wrote that U.S. immigration policy was doomed to fail. In her view, this was the case because immigration policy was unable to reconcile the interests of employers and workers, did not address the political implications of the need for low-wage labor, and required police functions that were at odds with liberal democratic principles. If Calavita is right, what Manuel García y Griego tells us in Chapter 2 should come as no surprise: as immigration policy failures become more evident, the tendency among policymakers is to react by proposing largely symbolic measures.

In Chapter 3 Immanuel Ness explores the implications for Latino immigrants of making guest worker programs the centerpiece of a new

immigration policy. In his view, the guest worker strategy is bound to work well for employers by maintaining a steady flow of compliant workers. Labor is right to oppose guest worker programs, he tell us, but this may be a futile stance. Instead, what is necessary is a strategy that is global in scope and focused on the right of all workers to organize.

The Chapters in Section 2 document and analyze economic, social, and political challenges Latino immigrants face. Amy Sugimori notes how they are not always compensated fully for their labor. Immigrant workers that rely on their own means of transportation to work but who are unable to secure a driver's license are put at a special disadvantage. Those who do domestic work find themselves in double jeopardy by their immigrant status and by the structure of their particular industry. Sadly, the paranoid and demagogic reaction by state officials to Governor Eliot Spitzer's Fall 2007 proposal to grant driver's licenses to undocumented workers clearly shows the utter disconnect that exists between the realities of immigrant life and immigration policy as well as the difficulties facing the struggle for immigrant rights.

Maud Easter points out the inadequacy of having a monocultural state bureaucracy addressing the needs of the more than one hundred and fifty diverse cultures that co-exist in New York. She also indicates that it is important for state government to address the issues immigrants face without succumbing to pressures to enforce federal immigration law. Without this bifurcated approach, she argues, all immigrants—documented or not—will be driven underground, away from public life and from the possibility of successful social integration.

On the face of it, political representation should be the least of immigrant concerns. In Congress, the New York delegation includes two Latinos that represent parts of the Bronx, Manhattan, Brooklyn and Queens; in the State legislature four Latino Senators and 12 Latino Assemblymen provide representation; in the city itself, with 10 members, Latinos are 20 percent of the city council. Yet, Latinos lack parity in representation and their voice in the political process is muted. In 2004, for example, only 51 percent of Latinos registered to vote in the state and of those only 30 percent cast a ballot. Political marginality is therefore a serious problem. This results in neglect of Latino concerns. According to Ron Hayduk, the problem is compounded by the inability of noncitizens to vote. As Hayduk demonstrates, noncitizen voting is an alternative that is firmly grounded in logic and history. Unfortunately, his proposal to allow noncitizens to participate in the electoral process with full voting rights is not likely to be met with much support from policy makers.

10 LATINO IMMIGRATION POLICY

Enfranchising noncitizens is the right thing to do but, if the reaction to Governor Spitzer's proposal to grant driver's licenses to undocumented workers is any guide, it is not something that will happen anytime soon.

History tells us that New York State has been an incubator for national policies. The law tells us that as far as immigration policy is concerned New York does not need to wait for the federal government to act. Immigration reform is indeed a federal matter and no one really wants state government to enforce federal immigration law. What is needed is for New York to do what it can to afford Latino immigrants the dignity and respect they deserve. It is time to stop using immigration policy to implement the police functions of the state apparatus. It is high time to make it instead a tool of socioeconomic and political integration. Successful integration breeds loyalty and loyalty means security. Treat Latino immigrants decently, give them rights commensurate with their contributions, and they will become integrated and loyal members of the polity.

SECTION 1 :

THE CONTEXT OF LATINO IMMIGRATION POLICY

CHAPTER 1

The World of Mexican Workers in Historical Perspective

Susan M. Gauss

Abstract

The long history of social injustice and union cynicism in the workplace in Mexico have been important factors in the successive waves of Mexican migration to the United States in the twentieth century. This paper examines labor organizing and worker identity since the Mexican Revolution of 1910–1920. In doing so, it sheds light on the working class’ radical roots, as well as on the political corruption and repression that have characterized union authority since the 1940s. Ultimately, it argues that the origins of workers’ current demands for social justice and democracy in both Mexico and the United States lay in a rich past of political engagement and public demonstration.

In November 1914, Mexican anarchist Ricardo Flores Magón issued his “Manifiesto to the Workers of the World.” From exile in the United States, he predicted that the fight of the “‘wage slave’ has no frontiers,” and warned that if Mexican workers lost the Revolution of 1910–1920, Mexico “would become an ideal land for business because of low salaries, and American workers would find their firms and factories there instead of the United States because it would be more profitable to employ Mexicans.”¹ The workers that Flores Magón helped to organize and inspire before he was forced into exile ultimately did win important gains as a result of the Revolution. Yet they continue to battle against low wages and unemployment, now in the face of new forces associated with neoliberalism and globalization. These factors have been critical in explaining why millions of Mexicans have emigrated to the United States during the twentieth century. However, equally influential in spurring Mexicans to leave for the United States has been the breach of legal rights guaranteed by revolutionary era legislation, including the rights to organize, to union autonomy, and to political democracy. Therefore, examini-

¹ Norman Caulfield, *Mexican Workers and the State, From the Porfiriato to NAFTA* (Fort Worth: Texas Christian University Press, 1998), 1.

ing Mexico's radical labor history can shed light on some of the economic, social, and ideological motivations prompting Mexicans to emigrate to the United States, and suggest potential implications for organizing Mexican immigrants in the twenty-first century.

In 1917, during the closing moments of the Mexican Revolution, Mexico's new ruling elites wrote a Constitution that incorporated one of the most progressive labor codes in the world at that time. Still in force today, Article 123 of the Constitution included provisions for eight-hour days, limits on child labor, days of rest, maternity leave at full wages, a minimum wage, overtime pay, and equal pay for equal work regardless of sex. Article 123 also included a provision stating "...workers shall have the right to organize for the defense of their...interests, by forming unions..."² Spurred by this new legislation, and the radical fervor of the Revolution, the 1920s was an effervescent period in the Mexican labor movement, as Communists, anarchists, Catholics, owners, and even the state itself fought to organize Mexico's workers. So successful were the communists in the early days, that, with the support of the Industrial Workers of the World, they formed the Mexican section of the Wobblies and the Mexican Communist Party.

By the 1930s, four major labor organizations struggled for control of the Mexican working class. The conflicts between unions were intense, and violence and even murder were common. In 1931, in an effort to overcome labor strife while breaking the Communist hold over labor, the state instituted a labor law aimed at codifying Article 123 and the rights of workers.³ These conflicts over labor organizing, as well as over the 1931 Federal Labor Law, anticipated one of the most enduring sources of tension in Mexico in the twentieth century: that of the power of the state to intervene in labor affairs. The most lasting legacy of this law has been that it established the state as the mediator between labor and capital.

Importantly, while the 1931 Federal Labor Law supplemented repression in the state's efforts to suppress labor radicals, it also provided the legal framework for workers to demand their full, constitutionally-guaranteed rights. And in the 1930s, in the hands of populist President Lázaro Cárdenas (1934-40), the Labor

² "The Constitution of 1917: Articles 27 and 123," in *The Mexico Reader, History, Culture, Politics*, eds. Gilbert M. Joseph & Timothy J. Henderson (Durham: Duke University Press, 2002), 401.

³ For more, see Jeffrey Bortz, "The Genesis of the Mexican Labor Relations System: Federal Labor Policy and the Textile Industry 1925-1940," *The Americas* 52 (July 1995): 3-69.

Law did exactly that. In those years, the Federal Labor Law provided the legal foundation for extensive reforms that, according to Marxist scholar Arturo Anguiano, ended the owners' "anachronistic practice of exploiting the working class to the point of exhaustion."⁴ These reforms included, among other things, real wage increases, a shift in shopfloor control from owners toward unions, executive support for strikes, and, perhaps most important, incorporation into President Cárdenas's revolutionary nationalist project. In exchange for these benefits, many workers gave up their independence and joined the state-allied Confederation of Mexican Workers (CTM). In the process, the ruling party gained an important ally in its struggle to harness the energies of Mexico's newly mobilized masses.

The demobilization of the 1930s would ultimately prove detrimental to the labor movement however, and, according to many scholars, was an early sign of the betrayal of the Revolution that was to come beginning in the 1940s. Global events, notably the struggle against fascism, conveniently aided the state in its efforts to demobilize unions. For example, the Mexican Communist Party abandoned its more revolutionary positions in the 1930s and 1940s, with Communist unions often allying with the state-affiliated CTM. In doing so, they took their cue from Earl Browder and United States communists, who were in line with Stalin's calls for appeasement with democratic capitalism in an effort to forestall the spread of fascism.⁵

In the 1940s, the state began the process of marginalizing communist unions from mainstream union politics. In 1948, the ruling Institutional Revolutionary Party (PRI), initiated the process of dismantling and rebuilding Mexico's remaining communist-dominated unions, including the powerful railway, oil, and mining unions. Using legislation, repression, and Cold War propaganda, the PRI replaced the leadership of these unions with its cronies. Called the *charrozo*, for the penchant of the newly installed railway union leader for *charrería*, or rodeo culture and dressing in traditional cowboy style, it destroyed the left's position within the mainstream labor movement. The CTM, with the PRI's assistance, subsequently consolidated its hold over national labor.⁶

4 Arturo Anguiano, *El Estado y la Política Obrera del Cardenismo* (Mexico: Ediciones Era, 1975), 46. All translations from the Spanish are mine.

5 Barry Carr, *Marxism & Communism in Twentieth-Century Mexico* (Lincoln: University of Nebraska Press, 1992), chapter 4.

6 Carr, *Marxism and Communism*, 168-76; Stephen R. Niblo, *Mexico in the 1940s: Modernity, Politics, and Corruption* (Wilmington, DE: Scholarly Resources, Inc. 1999), 191-95;

Since the 1940s, the state-allied CTM has continued to dominate labor in Mexico. The organization has been marked by *continismo*, or the practice of leaders perpetuating themselves in office, often for decades. Old-guard CTM labor leaders, colloquially referred to as *dinosaurios*, drew closer to both owners and the state through the twentieth century. Due to bribery and corruption, they have become a wealthy elite in their own right, as attested to by the vacation homes and luxury autos that many of them own. Their main task has been to deliver worker support for the PRI, especially in elections. Their defense of the working class consequently has been tepid; in fact, labor leaders themselves have often been the forces behind production speed-ups or strike repression. In return, they have been guaranteed legal, political, and financial subsidies by the state, such as the power over hiring and firing, state financial “donations,” and the involvement of state authorities in union conflicts. These subsidies have enabled CTM leaders to maintain control over the organization’s large, heterogeneous membership. At the same time, they have intensified the CTM’s dependence on the PRI, a situation exacerbated by the ruling party’s practice of supporting rival labor confederations in order to ensure that CTM leaders do not build an autonomous base of authority.⁷ Amid this institutionalization and politicization of the labor movement, the independent labor movement has struggled to survive.

For much of the mid-twentieth century, the inducements for workers to join in the PRI’s project were high. Drawn by new industrial jobs that were exploding amid the Mexican Miracle of the 1950s and 1960s, when Mexico saw average annual growth rates of over six percent, rural migrants fled the countryside in search of urban opportunities.⁸ During that period, Mexico was transformed into an urban, industrial society. As of 2005, roughly three-quarters of the Mexican population is urban, with close to one-quarter living in the world’s second-largest metropolitan area, Mexico City.⁹ Industry

Kevin J. Middlebrook, *The Paradox of Revolution: Labor, the State, and Authoritarianism in Mexico* (Baltimore: The Johns Hopkins University Press, 1995), 135-41; and Luis Medina, *Historia de la Revolución Mexicana, 1940-1952, Civilismo y modernización del autoritarismo* (México: El Colegio de México, Centro de Estudios Históricos, 1979), 151-75.

7 Middlebrook, *The Paradox*, 74, 95-105, 150.

8 Enrique Cárdenas, “The Process of Accelerated Industrialization in Mexico, 1929-1982,” in *An Economic History of Twentieth-Century Latin America, Volume 3: Industrialization and the State in Latin America: The Postwar Years*, eds. Cárdenas, José Antonio Ocampo, and Rosemary Thorp (Hampshire, England and New York: Palgrave, 2000), 189-91.

9 Any locality with more than 2499 inhabitants is defined as urban. Statistics from

accounts for close to 27 percent of its current GDP.¹⁰ For Mexico's unionized industrial workers, the 1950s and 1960s were a heady time, as real wages rose steadily. More importantly, as historian Steven Bachelet describes the impact of this transformation on Mexico's population: "For these new industrial workers, the ...factory became a cauldron where laborers fashioned a new political consciousness and social identity...onetime campesinos and rural dwellers took great pride in being at the forefront of national progress and modernization." As one autoworker declared, "I took real pride in saying I worked for General Motors...I was helping industrialize my country."¹¹

Along with these remarkable gains, however, came problems. During this era, emigration to the United States became institutionalized in the Bracero program of 1942-1964. The emigration of poor and working class Mexicans was central to the ruling party's national development strategy, facilitating social peace and industrial development amid a scarcity of rural employment. For example, a disproportionate number of permits, ranging from approximately 50-60 percent, were issued to campesinos from central Mexico. This region had presented some of the most serious opposition to the anticlerical efforts of the postrevolutionary state, and its rural lands were insufficient to sustain the rapidly expanding population.¹² Importantly, these migrants left for the United States for many of the same reasons that they continue to leave today, including a search for jobs, family, education, or even adventure.¹³

Despite this mass exodus, population growth that outstripped job growth meant that poverty remained endemic during the Mexican Miracle; unemployment and underemployment were chronic as well. While overall most Mexicans enjoyed higher standards of living, the income disparity between

Instituto Nacional de Estadística, Geografía, y Informática, *Censos de Población y Vivienda, 1995 y 2005*, <http://www.inegi.gob.mx> (accessed November 19, 2006).

10 Sticistic is for 2004. World Resources Institute, *Earthtrends*, <http://earthtrends.wri.org> (accessed November 19, 2006).

11 Steven J. Bachelet, "Tolling for the 'New Invaders': Autoworkers, Transnational Corporations, and Working-Class Culture in Mexico City, 1955-1968," in *Fragments of a Golden Age: The Politics of Culture in Mexico since 1940*, eds. Gilbert Joseph, Anne Rubenstein, and Eric Zolov (Durham: Duke University Press, 2001), 282-83.

12 James A. Sandos and Harry E. Cross, "National Development and International Labour Migration: Mexico 1940-1965," *Journal of Contemporary History* 18, no. 1 (January 1983): 44-45.

13 Comisión de Planeación Industrial de la Cámara Nacional de la Industria de Transformación, *Proceso Ocupacional (Un análisis del proceso en México)* (México: C.N.I.T., 1956), 131.

rich and poor exploded during the mid-twentieth century. While in 1958, the wealthiest five percent of Mexicans had incomes that were 22 times that of the poorest ten percent, by 1970, that figure had grown to 39 times. By 1980, the wealthiest five percent made 52 times the income of the poorest ten percent.¹⁴ As the benefits of the Miracle disproportionately accrued at the top, workers increasingly became disillusioned with the corrupt leaders of the CTM and their rigid alliance with the ruling party. As one autoworker pondered, “How can these men who accept bribes from the company [be] expect[ed] to defend workers?”¹⁵

The earliest manifestations that the independent labor movement had survived the purges of the late 1940s came in 1958, when an upstart militant group in the railway union ousted the PRI-backed leadership. Facing dissent that was spreading to the teachers, telephone, and oil workers unions, the PRI conceded an array of workers’ demands. The mobilizations continued unabated. In March 1959, the PRI responded, meeting the railway strikers with repression. A handful of workers were killed, over three thousand workers were arrested, and about 20,000 workers lost their jobs. In the end, about 500 workers were tried for a variety of offenses, and the strike’s leaders received sentences ranging from 11 to 16 years.¹⁶ Along with repression, the PRI continued to use the 1931 Federal Labor Law to control labor during the 1950s and 1960s. In these decades, few independent unions were able to attain the legal recognition required by law to be able to negotiate in national labor courts for workers’ rights. The 1966 formation of the Workers Congress, which joined the CTM and an array of national unions and confederations into a single ‘peak’ labor organization dominated by the CTM, further undermined opportunities for independent organizing by “mask[ing] factional rivalries and jurisdictional conflicts] within a broadly inclusive labor forum” identified with the ruling party.¹⁷

The year 1968 cast new light on the marginalization and repression of independent organizing. In that seminal year, Mexico sought to showcase the

14 Judith Adler Hellman, *Mexico In Crisis*, 2 ed. (New York: Holmes & Meier Publishers, 1983), 103, 299 n. 2. Hellman derives her data from Pablo González Casanova, “The Economic Development of Mexico,” *Scientific American* 243, no. 3 (September 1980): 202.

15 Baehelor, “Tolling for the ‘New Invaders,’” 307-08.

16 For an account of the strike, see Caulfield, *Mexican Workers and the State*, 110-120; and Dan Lobatz, *Mask of Democracy: Labor Suppression in Mexico Today* (Boston: South End Press, 1992), 68-71.

17 Middlebrook, *The Paradox*, 151-53.

economic successes of the Mexican Miracle by hosting the Olympic Games. The modern buildings and sports arenas did little to hide the fact that the majority of Mexicans continued to live in wretched poverty. During the summer of 1968, working and middle-class students engaged in a series of pro-democracy demonstrations. As the start of the Olympics neared, ruling party leaders decided to use repression to subdue the growing demonstrations before international attention was focused on Mexico. The massacre that followed accomplished this task, but at great cost to the legitimacy of the PRI.

In the face of the erosion of its legitimacy, the PRI was forced to concede to a wave of breakaway union movements in the 1970s. Radicalized by the failures of the Mexican Miracle and the experience of 1968, however, these movements transcended wage issues and now included demands for democracy and union autonomy. By the mid-1970s, over 100 independent unions had formed, including in textiles, the metal, rubber, and auto industries, and in food processing. Between November 1975 and July 1976, this organizing translated into a serious threat to the regime, as electrical workers led a series of protests against corruption and the PRI's particular brand of authoritarian democracy. They were joined by hundreds of thousands of auto, metal, telephone and university workers, as well as by students and peasants. Unable to subdue the spreading dissent through negotiations, on July 16, 1976, the PRI ordered hired thugs and army units to occupy important electrical plants. Thousands of workers were summarily fired and replaced, and the movement was crushed.¹⁸ By 1976, independent organizing once again was quiescent.

Even more devastating for labor has been the economic turmoil that has crippled the Mexican economy since the 1980s. By the early 1980s, the Mexican Miracle had given way to the Lost Decade, a ten-year period when Mexico experienced little or no economic growth. The austerity measures imposed on Mexico by the International Monetary Fund and other financial institutions as a condition for receiving loans and aid erased the mid-century gains made by Mexico's working classes.¹⁹ This was a loss made even more stunning by the fact that real wages had climbed only slowly during the mid-

¹⁸ Laboltz, *Mask of Democracy*, 72-74.

¹⁹ For an account of the debt-driven crisis and description of the social impact of the adjustment measures imposed on Mexico during the Lost Decade, see Rosemary Thorp, *Progress, Poverty and Exclusion, An Economic History of Latin America in the Twentieth Century* (Washington, D.C.: Inter-American Development Bank, 1998), 205-225.

century burst of economic growth. In fact, scholars estimate that the decline in real wages of the 1940s was only recuperated in the late 1960s.²⁰ The economic turmoil of the 1980s erased even those gains. By 1986, approximately two-thirds of urban households existed below the official poverty line. Even unionized workers, whose organizations had managed to make some gains during the mid-century miracle, saw their wages drop precipitously during the 1980s. By 1992, the minimum wage was worth only one-third of its 1981 value, while non-wage benefits such as subsidized transport, health, housing and food dried up. As political scientist Judith Adler Hellman states, “Poor Mexicans have never been able to count on receiving a fair share of the national income, but at least they could count on riding [public transportation] for the equivalent of a few pennies and buying a stack of tortillas to see them through the day.”²¹ By the 1990s, even these basic necessities were out of the reach of many Mexicans.

The economic disarray of the past 25 years has provided a fresh climate for the penetration of Mexico by foreign investment, as companies have flooded into Mexico to take advantage of neoliberal policies and a workforce weakened by economic depression and decades of corruption and repression. For example, in 1987, Ford Motor Company fired all of its workers at its plant in Cuautitlán. Workers there previously had attained relatively high wages and control over the shopfloor in comparison to other Ford factories. Immediately after the mass firing, the company rehired the original workers under a new contract that enhanced the authority of corrupt union leaders. Workers’ wages dropped overnight. When the workers tried to affiliate with another labor federation, the CTM violently intervened to prevent it.²²

The CTM’s backing of the PRI has not been consistent in recent decades, and there have been instances when the leaders of the CTM have protested, for example against the deterioration of real wages in the 1980s. Most of their objections have been symbolic. The CTM has mostly toed the party line, acting more in the interests of business than of labor. Along with other official labor organizations, it has facilitated workforce downsizing, wage limits, and industrial restructuring, all of which the PRI pursued in order to prime the workforce for the privatization of state-owned companies and

²⁰ Jeffrey Bortz and Marcos Aguilera, “Earning a Living: A History of Real Wage Studies in Twentieth-Century Mexico,” *Latin American Research Review* 41, no. 2 (June 2006): 129.

²¹ Judith Adler Hellman, *Mexican Lives* (New York: The New Press, 1994), 9-10.

²² Labbotz, *Mask of Democracy*, 148.

expansion of owner authority over labor. In essence, the PRI has reorganized and weakened unions in order to clear the way for foreign investment.

Those workers who have challenged the state's control of unions and the effects of neoliberalism have been met with repression, including petroleum workers in 1989 and Ford auto workers in 1990. In the case of the petroleum workers, the loss was especially devastating. Though aligned with the PRI, the corrupt and often violent petroleum workers' union leaders, headed by Joaquín 'La Quina' Hernández Galicia, had regularly challenged the PRI in the twentieth century and forced concessions that had made oil workers among the best paid in Mexico. After the government's repression in 1989, the union's leaders were replaced by state-imposed leaders. The government asserted that in dismantling the union, it was merely trying to prosecute the union's leaders for criminal activities, including gun smuggling and murder. But as one oil worker stated in the aftermath, "'The blow that struck down La Quina...was not only a blow at him and his interests, but rather at the entire oil workers union...'"²³ This sort of repression continues today, as in the case of the government's Spring 2006 replacement of the mine workers union leader, Napoleón Gómez Urrutia, with a government ally. The government justified its actions with accusations of corruption against Gómez Urrutia, who now lives in exile in Vancouver. But all over Mexico, hundreds of thousands of miners walked off the job in protest. In response, the government initiated a series of crackdowns, highlighted by the videotaped killing of two striking workers by police trying to break a strike at a major steel mill on April 20, 2006.²⁴ Nevertheless, on April 28, 2006, 200,000 miners and foundry workers walked off the job to protest this repression. Strikes and work actions continued throughout the rest of that year, though the July 2006 election of conservative Felipe Calderón to the presidency put new pressures on the miners. Owners became bolder in undermining the protesting workers, and in October 2006, the mine workers union began to press the government for a compromise.²⁵

²³ Labotz, *Mask of Democracy*, 102-111.

²⁴ Dan Labotz, "Mexican Police Kill Two Workers, Injure Dozens at Steel Plant: Conflict Between Mine Workers Union and Government Spreads," *Mexican Labor News & Analysis* 11, no. 4 (April 2006), <http://www.ueinternational.org/> (accessed November 19, 2006).

²⁵ "Mexican Miners Union Changes Strategy, Seeks Compromise," *Mexican Labor News & Analysis* 11, no. 10 (October 2006), <http://www.ueinternational.org/> (accessed November 19, 2006).

Preparing the Mexican workforce for the North American Free Trade Agreement (NAFTA) was a key goal of the PRI in the late 1980s and early 1990s. But the companies that have flooded into Mexico since 1994 have done little to relieve the country's economic problems. Maquiladora jobs have little security, and workers often labor under conditions that do not even meet federal minimum standards. Labor inspectors close their eyes to the wide array of abuses in an effort to create a climate conducive to foreign investment, while traditional unions have done little to intervene. The labor laws that seemed so promising in the 1930s continue to be eschewed in favor of protecting owners, both Mexican and foreign, in the interests of economic growth.²⁶ President Vicente Fox (2000-2006) remained intent on insuring that Mexico's competitive advantage would remain its cheap labor; the 2006 election of Fox's fellow member of the conservative National Action Party, Felipe Calderón, augured more of the same.

At the same time, some of the most vibrant organizing is currently taking place in communities surrounding the maquiladoras along the United States-Mexico border. Workers and community organizers are joining to protest the environmental and human degradation that is a hallmark of border cities such as Reynoso and Brownsville. These organizations along the border are certainly driven by widespread poverty and poor working and living conditions. Yet, the expectations engendered by revolutionary era legislation guaranteeing the rights to organize, to autonomous unions, and to democracy, as well as the sense of betrayal resulting from their breach, have also inspired many Mexicans to continue organizing in the face of overwhelming odds.

NAFTA has made Mexico's workers acutely aware of the exploitation accompanying globalization. Yet it has also provided them with the opportunity to organize in ways that transcend traditional union structures. Non-traditional organizing is not new in Mexico. Throughout the twentieth century, workers often forged cross-sectoral alliances in order to build a broader base that could counter the weight of the state and corrupt union bureaucracy. In this new era of globalization, however, it is community organizations and transnational labor organizations that have provided the structural and material means for workers to contest the alliance of international business and the state. Importantly, some of this organizing, such as the Coalition for Justice in the Maquiladoras, is crossing the very national borders that

²⁶ For example, see Kathryn Kopinck, *Desert Capitalism. Maquiladoras in North America's Western Industrial Corridor* (Tucson: The University of Arizona Press, 1996), 167-172.

Flores Magón insinuated had to be overcome if workers were to challenge the exploitation attending the expansion of global capitalism. These grassroots organizations, some of which promote solidarity across Mexico, Central America, and Asia, are currently in the vanguard of the global struggle for workers' rights. Despite the innovative form of these organizations however, the struggle of Mexico's workers remains fulfilling the rights guaranteed to them by the Constitution over eighty years ago.

History has shown us that there are no easy solutions for Mexican workers living in the United States either. Efforts to deter emigration to the United States or encourage repatriation have largely been stopgap measures and have failed to address the more deeply rooted structural causes of inequality and corruption that foster migration. Alternatively, activists have focused on harnessing the joint energies of the United States and Mexican labor movements to the cause of immigrant rights. However, their attempts, too, have been erratic and incoherent, and undermined by a series of impediments to cross-border collaboration among unions, including wage disparities, incompatible union structures, the low status of unions in the United States, the continuing persecution of independent organizing efforts in Mexico, and the distinct domestic agendas of the labor movements. Since September 11, 2001, more restrictive immigration legislation and a political climate hostile to Mexican immigrants has further discouraged unions in the United States from getting involved in immigrant rights issues.²⁷ For these reasons, traditional labor unions seem unlikely to spearhead the struggle for the rights of Mexican migrants.

A more promising scenario envisions community-based organizations joining rank-and-file workers from both sides of the border within a common effort to improve the lives and defend the legal status of Mexicans living in the United States. These organizations have the capacity to draw from a wider array of community members than traditional labor organizations while circumventing many of the structural barriers to cross-border organizing that have hampered unions. Indeed, the immigrant rights demonstrations that took place across the United States in 2006 exploited the rich past of political engagement and public demonstration by Mexico's workers. By drawing on the skills, experiences, and frustrations of rank-and-file workers on both

²⁷ For more on links between United States and Mexican unions around the issue of immigrants rights, see Julie Watts, "Mexico-U.S. Migration and Labor Unions: Obstacles to Building Cross-Border Solidarity," Working Paper 79 (San Diego: UCSD, The Center for Comparative Immigration Studies, June 2003).

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sides of the border, and joining the rights of the working class to community causes, these organizations have the potential to create a durable, lasting, and dynamic immigrant rights campaign that could transform the very way in which people define immigrant rights, as well as how they organize in order to defend them.

CHAPTER 2

Beating Around the Bush: Symbolism and Substance in Contemporary Immigration Policy

Manuel García y Griego

Abstract

During the past half century U.S. immigration policy has undergone revolutionary changes. These include the adoption of numerical ceilings on immigration from Western Hemisphere countries, the enactment of employer sanctions and two legalization programs in 1986, the expansion of country quotas in 1990, the emergence of large visa backlogs for applicants from certain countries, and since 1996, the adoption of new conditions and procedures for the detention, apprehension and removal of unauthorized immigrants. More recently, concerns with terrorism and security have also become a focus of immigration policy. During the same period there has been a growing consensus among policy analysts as well as among the general public, that immigration policy has failed to achieve its major objectives. Alongside failure, a marked and repeated tendency to make symbolic changes has been observed. This paper analyzes how these trends, each pointing in a different direction, are closely interrelated. It also explores the reasons why symbolic responses have stronger appeal as the policy failures become more evident. The paper concludes that in order to reduce the growth of the undocumented population, the U.S. government must fashion a response that combines a wider door for legal entries and employment, and a narrower door for unauthorized immigration from all sources. With respect to the component that constitutes Mexican immigration, it is difficult to see how a substantive solution can be crafted without the active participation of both the leadership of Mexican immigrant organizations and the Mexican government.

Introduction: Failure (And Some Success) in Immigration Policy

Over the past three decades, U.S. immigration policy has been marked by a succession of remarkable political failures. The most striking of these are policy paralysis in the face of continued unauthorized migration (1975-1986 and again since 2001) and the adoption of policies that have not worked well or even produced large unintended and unwelcome effects. The Immigra-

tion Reform and Control Act (IRCA) of 1986 ended one decade of paralysis but its core provision, employer sanctions, was oversold as a deterrent to illegal migration. Subsequent policy responses have had the unintended effect of accelerating the growth of the undocumented population in the United States. Since about 1990, the unauthorized immigrant population of the United States has grown from somewhat over one million to about 12 million. Policy paralysis virtually guarantees a wrenching social and political experience when these issues finally become addressed.

For the families of the 40 million immigrants, legal and illegal, there are other indicators of political failure. The wait for a legal immigrant visa, depending upon the country and the visa category, can be several years. Spouses and children of legal immigrants have about a seven-year wait. Most applicants who are siblings of U.S. citizens have an eleven-year wait—22 years for applicants from the Philippines.¹ The problem of visa backlogs is only partially the consequence of policy administration; it also is determined by the demand for visas from countries that have a long-standing migration relationship with the United States. The political failures are multiple: the difficult wait of relatives who dutifully remain in their country of origin, expecting their turn to come up at the end of an impossibly long queue; the risks faced by families who choose not to wait, enter illegally or overstay a visa, and reside illegally in the U.S. during the several years as their paperwork gets processed; and the anger felt by members of both groups at the prospect that still others who do not qualify for a visa may obtain legalization or “amnesty” without having to endure this wait.

Immigration issues also have cast a shadow over U.S. relations with its Latin American neighbors, especially Mexico. In 2001, recently inaugurated presidents George W. Bush and Vicente Fox held a summit that initiated a consultation process intended to end in bilateral agreement, the reduction of illegal entries from Mexico, a decline in migrant deaths in the Arizona desert, and the adoption of a series of policies designed to facilitate the entry of temporary workers and reduce migration pressures in communities of origin. That process began to face significant obstacles at mid 2001, and was short-circuited by 9/11. The subsequent shift in U.S. public opinion against all immigration emboldened efforts to build a new wall along part of the U.S.-Mexico border in order to deter illegal entries. Bilateral relations have soured since then. Outgoing Mexican president Vicente Fox announced that

¹ U.S. Department of State, *Visa Bulletin VIII*, 97 (Sept. 2006).

Mexico would protest the U.S. decision to expand construction of a barrier at the border, and incoming Mexican president Felipe Calderón openly criticized the same policy during the first Bush-Calderón summit in 2007. Guatemala's leaders also expressed concerns regarding immigration during President Bush's visit to that country.²

The failures of immigration policy are so apparent that it is often forgotten that the U.S. also has had significant successes. The United States has successfully absorbed more immigrants than the rest of the world combined and, although this absorption has not been without incident, it compares favorably with the experience of industrial democracies in Western Europe and Japan. Some immigrants—Asians particularly—have achieved notable socioeconomic progress and lent continuing support to the founding myth of the United States as the land of opportunity. Moreover, although the U.S. has struggled with immigration regulation during the past half century, this also has been the case with Western Europe, and the U.S. has avoided some of the more serious policy blunders of its neighbors across the Atlantic.³

In this essay I focus on one pattern closely associated with policy failure: the emphasis of symbolism over substance in the design and implementation of policy. I argue that this pattern is not new. There have been long periods when political symbolism seemed to overshadow substantive changes in immigration policy. Since at least the mid 1980s we again find ourselves in a policy environment in which the means adopted are obviously inappropriate for the ends, where government action is crafted in order to send a message rather than to achieve administrative goals, and the unintended consequences of policy loom large by comparison to what is achieved. The review of the earlier history and more recent developments is intended to place current trends in perspective, to offer some guidance on how to interpret them, and to assess the possibilities of a course correction.

Symbolism in Immigration Policy Making, 1882-1986

In this essay I classify three different types of immigration policies as symbolic.

² "Mexican president criticizes 'absurd' U.S. border policies," *Washington Post*, 17 March 2007, A10; "Guatemalan immigration tops U.S. agenda," *Los Angeles Times*, 13 March 2007.

³ Compare the U.S. experience with immigration control, for example, with the German and French experiences with guest workers after 1970. Wayne A. Cornelius, Takeyuki Tsuda, Philip L. Martin and James F. Hollifield, eds. *Controlling Immigration: A Global Perspective*, 2d ed. (Stanford: Stanford U. Press, 2004).

One is represented by those laws seemingly designed to fail.⁴ Such policies can be expected to fall considerably short of their stated goals because there are insufficient resources to implement them properly or because they are designed with loopholes large enough to make them unworkable or inadequate. Another is represented by policies whose unintended consequences are large and unwelcome or perhaps even produce an outcome directly contrary to stated goals. I use the term “unintended” with reference to the stated goals of policy, not with respect to the often unknown intentions of legislators and policymakers. Policymakers rarely enunciate all of the goals sought in a particular action, and some of those “unintended” consequences may well have been intended and foreseeable. Some unintended consequences are a surprise to virtually everyone. Immigration flows are systemic in nature; few U.S. policies take this into account. When one prods or pokes in one place there are likely consequences in places and contexts quite removed from where we poked and prodded.

A third type of symbolic policy is one that has the explicit purpose, among others, to send a message to a particular target: the American electorate, a home constituency, the members of one’s political party, a foreign government, and/or the group of people whose actions are to be regulated by policy. Laws are sometimes adopted or changed to convey a commitment to a new course or direction for the country in the arena of immigration politics.

An early example of the adoption of a symbolic policy was the enactment of the Chinese Exclusion Act in 1882, which barred Chinese laborers from legal admission for ten years. The Act was extended another ten years and then made permanent. It was repealed in 1943. The passage of the Act in 1882 was spurred by the concerns of Irish Americans who felt they could not compete with Chinese laborers. However, its extension and permanent adoption essentially constituted a symbolic statement by Congress that the United States rejected the Chinese (and other Asians) as alien and inferior cultures incompatible with the United States. Eventually this position expanded to one that suggested immigrants of “lesser races” were not acceptable additions, and that the U.S. was a society reserved for whites.

The Act succeeded in bringing Chinese legal immigration to a virtual halt but did not stop this flow altogether. Chinese laborers seeking to enter illegally found ways to do so. Many of them traveled to Mexico, and from

4 Kitty Calowita, *California’s “Employer Sanctions”: The Case of the Disappearing Law* (La Jolla, Calif.: UCSD Center for U.S.-Mexican Studies, 1982).

there crossed the land border undetected into the United States. The Chinese Exclusion Act spawned the first large-scale undocumented immigration into the United States.

The repeal of the Chinese Exclusion Act in 1943 was itself another symbolic action. The Act had long been an irritant in bilateral relations. In the early 1940s, the Chinese Nationalist Government, a wartime ally of the United States, finally succeeded in its effort to gain support for the repeal of the Act, but Congress limited the quota to only 100 Chinese immigrants per year.

The Chinese Exclusion Act was the first of a series of policies and decisions that largely reflected a racial attitude that the U.S. was destined to remain a “white” nation—indeed, as a Nordic, Protestant nation. This attitude went hand-in-hand with the growing influence of social Darwinist thinking among elites and the fear of labor competition by working-class whites. In 1908 the Roosevelt administration reached an agreement with Japan by which its government would refrain from issuing passports to Japanese nationals bound for the United States. In 1917 the U.S. adopted a literacy requirement for all immigrants, and established a “Barred Zone” that excluded immigrants from most of Asia and Africa, and much of the Pacific. Proponents noted that the U.S. had a long-standing policy barring non-whites from naturalization; accordingly, these exclusions brought immigration policy into line with naturalization law.

The number of Asian immigrants had grown significantly by the early twentieth century, and some wanted to stay and become full members of American society. A Japanese and an Indian immigrant separately challenged the naturalization restrictions on non-white immigrants. Takao Ozawa challenged the denial of his naturalization application by noting that his color was white even if his nationality was not European. Bhagat Singh Thind challenged a similar denial by noting that high caste Indians were of the Caucasian race. In 1922 and 1923 the U.S. Supreme Court rejected both petitions and legitimated the race-based immigration and naturalization policy that had been articulated with the enactment of the Chinese Exclusion Act and the 1917 law that established the Barred Zone.⁵ Taken together, these policies had substantive consequences and carried enormous symbolism. They achieved many of their intended goals and also sent the world and Americans a powerful message.

⁵ *Takao Ozawa v. U.S.*, 260 U.S. 178 (1922); *United States v. Bhagat Singh Thind*, 261 U.S. 204 (1923). See also, Ian Haney-López, *White by Law: The Legal Construction of Race* (New York: New York U. Press, 1996).

The other major goal in the early twentieth century was to reduce immigration from eastern and southern Europe, especially Jewish immigrants from slavic countries, Italians, and Polish Catholics. From the perspective of the wealthy Bostonians and New Yorkers that led the Immigration Restriction League and similar groups, these immigrants, mostly peasant agricultural laborers who could not read or write, hardly represented an improvement as additions to American society or polity, or to the gene pool, for that matter. Madison Grant's lamentation of the decline of racial purity and the erosion of Anglo-Saxon society in *The Passing of the Great Race*, published in 1916, articulated this view in stark terms. In 1917 the U.S. Congress enacted a literacy requirement for all new immigrants. Testing immigrants in dozens of languages proved to be unworkable, however, and between 1921 and 1924 Congress adopted numerical restrictions to encourage immigration from the United Kingdom and northern Europe and severely limit the admission of Italians, Jews, and others.

Prior to 1920 there was relatively little immigration from countries in the Americas, other than Canada. When Congress virtually cut off legal immigration from countries such as Italy and Poland it apparently did not anticipate that employers and their agents would substitute them with immigrants from Mexico. Mexican immigration shot up in the 1920s and another group of restrictionists sprang up to advocate for the extension of quota restrictions to Mexico. Both houses eventually passed such a bill, vetoed by President Hoover.⁶ The onset of the Great Depression turned the tide of Mexican immigration and took the wind out of the sails of this movement. In the late 1920s the State Department adopted an approach to the review of visa applications from Mexico that made legal admission more difficult. This policy, which was continued in the 1930s and 1940s, was successful in constraining the growth of Mexican legal immigration when more favorable economic and social conditions returned.

Starting in 1942, the emphasis shifted to the temporary admission of *non immigrant* Mexican agricultural workers as an effort of wartime cooperation to provide labor during the emergency. These guest workers came to be known as "braceros." Bracero recruitment stimulated new illegal migration. Unauthorized immigrants apprehended by the Immigration Service rose from a few thousand per year in the early 1940s to tens of thousands later

⁶ Robert A. Divine, *American Immigration Policy, 1924-1952* (New Haven: Yale University Press, 1957).

in that decade, and climbed to a peak of about one million in 1954. In that year the U.S., with Mexican government cooperation, launched a deportation campaign and modified the implementation of the Bracero Program to make braceros more attractive to agricultural employers. A combination of enforcement and recruitment policies designed to discourage unauthorized migration continued into the late 1950s and produced a lasting shift from illegal to legal flows. By 1960 mass illegal migration was a distant memory.

In 1964-1965 the U.S. adopted two major changes in policy that had substantial impact on the course of subsequent migration from Mexico. Both of these policy changes were inspired by the same civil rights movement that produced landmark legislation in those years aimed at reducing discrimination against people of color: The first change was the termination of the Bracero Program, which was viewed by many as a government subsidy to agricultural employers that helped keep wages low and impeded labor organizing in the fields. The second was the 1965 Immigration Act, which repealed the national origins quotas of the 1920s. Both actions were freighted with symbolic meaning and led to substantial unintended effects. The return of unauthorized immigration to agriculture is clearly associated with the termination of the program. The 1965 Immigration Act, according to its proponents, was not likely to lead to changes in the ethnic composition of the nation's immigrants. However, European and Canadian immigration declined and Asian and Latin American immigration shot up.

The 1965 Act applied a ceiling of 120,000 visas to all countries in the western hemisphere and in the mid 1970s a 20,000 per-country quota was applied as well. The rising demand for visas among Mexican immigrants was fueled in part by returning ex-braceros and relatives of immigrants already in the United States. As demand outpaced the number of visas available each year, backlogs developed and the legal immigrant relatives of petitioners began to apply for naturalization in order to expedite the process (though the naturalization application process also represented additional paperwork and time). As the backlogs for visas grew in the 1970s, and processing dates moved years into the future, applicants—usually the spouses and children of legal immigrants—crossed the border illegally and waited their turn for a visa interview while present in the United States. The growing number of such persons, the piling up of back logs in visa applications, and the rising number of unauthorized immigrant spouses and children in the 1970s were mute testimony to the breaking down of an immigration system that was becoming unworkable.

The United States entered a severe recession in 1973–1974. A national controversy erupted as the number of apprehended Mexican unauthorized migrants grew to hundreds of thousands. Increasingly, however, it also became clear that the economy of the 1970s was attracting unauthorized immigrants from other countries as well, though mainly from the same source countries as legal immigrants. In 1975 an INS Commissioner testified that the deportation of “illegal aliens” could produce a million jobs—an attractive prospect for millions of unemployed Americans. However it is noteworthy that proposals to build a wall along the border with Mexico or to erect other barriers only received cursory attention and then dropped. At that time, additional border enforcement seemed to represent an inadequate solution even as a response that focused exclusively on Mexican illegal migration.

The initial pressure to take action against illegal immigration came from organized labor, and from the perspective of this group, the most glaring omission of U.S. immigration policy was the absence of employer sanctions—fines and other penalties to be applied to employers who knowingly hired unauthorized workers. (The proposal had been advocated two decades earlier by the Mexican government but had led to a disastrous political result.) Opposition to this policy by individual but powerful members of Congress frustrated early attempts. California and a number of other states adopted employer sanctions, with little effect in the mid 1970s. A Select Commission on Immigration and Refugee Policy was created during the Carter administration and it submitted its recommendations to President Reagan in 1981. The new administration showed little enthusiasm for employer sanctions and instead sought to gain support for a temporary worker program. (The Select Commission had rejected the argument that an expanded guest worker program could substitute for an existing flow of unauthorized immigrant workers.) That proposal did not secure much support, even from employers, who correctly viewed that it would constitute no improvement upon existing undocumented worker flows from the standpoint of wage and other costs. The Immigration Reform and Control Act finally was enacted in

⁷ Mexico advocated employer sanctions in 1950 and 1951 on the grounds of employer-employee equity, and with the firm conviction that migration outside of the Bracero Program could be stopped by suppressing the demand for unauthorized workers. However, in 1952 Congress enacted a bill that included what came to be known as the “Texas Proviso” (so-called because it was advocated by the Texas congressional delegation) that explicitly exempted employers from penalties—the opposite of the result desired by the Mexican government. The Texas Proviso was repealed in 1986 with the enactment of the Immigration Reform and Control Act.

1986—after a decade and a half of extended national debate.

IRCA turned out to be a paradox of symbol and substance. Before 1986 critics of employer sanctions had argued that this approach had little chance of success. Under IRCA, employers were required to review identification and other documents of each new hire to determine their eligibility for employment. Since there was (and is) no required national identification, U.S. citizens could present a driver's license and a Social Security card. Unfortunately, it was relatively easy in 1986 to purchase fraudulent documents for this purpose, and employers could only be penalized if they *knowingly* hired an unauthorized immigrant. The absence of a national identification of citizenship or legal status with authorization to work was viewed as a major loophole that would prevent even energetic enforcement efforts from achieving much success in preventing unauthorized immigrants from getting a job. However, energetic enforcement does not describe what the Reagan and first Bush administrations did with employer sanctions after 1987. Early enforcement of employer sanctions focused on employers located in areas where unauthorized immigrants were new arrivals, most notably in states such as Arkansas and Kentucky. That the enforcement effort was half-hearted generated little protest from the same groups that had so insistently pushed for employer sanctions before 1986. Since the early 1990s employer sanctions have virtually disappeared from the national debate.

In other respects, IRCA was moderately successful in achieving its stated aims. Though its central control measure was not seriously applied, the other provision that attracted controversy—legalization—was implemented successfully. Critics of legalization had argued that the fear of discovery and deportation would prevent large numbers of eligible migrants from stepping forward and submitting their applications to the Immigration and Naturalization Service. These critics erred. The participation of the eligible population, though not complete, greatly exceeded expectations. However, the other legalization program—Special Agricultural Workers (SAW)—was riddled with fraud.

Whatever one may think of how the SAW program was run, IRCA made it possible for millions of foreigners—over half of them Mexicans—to step out of the shadow of illegality, acquire documents that allowed them to travel with relative ease, apply for naturalization, and enter American society and polity. It also established a more-or-less permanent resident population, many of whose members had previously viewed their stay in the U.S. as temporary. Moreover, since legalization had been based on individual rather than

family applications, in many instances spouses and children who lived out of the country and did not qualify for legal status were brought into the U.S. as unauthorized immigrants.

Achieving Less With More, 1986-2007

With the issue of unauthorized immigration seemingly addressed in 1986, efforts turned to reforming the legal immigration system, increasing the number of visas available per country, providing a mechanism for reducing the backlogs, and expanding the number of employment-based visas in order to increase the admission of skilled workers and investors. The result, enacted in 1990, was a compromise that provided for some increase in the number of employment-based visas but maintained the emphasis on family sponsored visas for close relatives of legal immigrants and U.S. citizens. The 1990 Act is noteworthy mainly because it provided for increased immigration at a time when the American public still remained sharply divided over whether to increase legal immigrant admissions.

In 1992-1993, however, the U.S. entered a recession, and renewed attention was focused on illegal immigration and the growing evidence that IRCA had not achieved the goals of reducing illegal entries, constraining the growth of this population, or keeping immigration issues out of the headlines. One response, by a group of activists in California in 1994, was to promote Proposition 187, a citizen's initiative that sought to bar undocumented children from public schools, require school authorities to turn children over to immigration authorities, and exclude unauthorized immigrants from non-emergency public health services. After heated debate culminating in a massive demonstration in Los Angeles with widespread participation by Mexican and Central American immigrants, Proposition 187 was approved by about 60 percent of the California electorate. The proposition had been advanced with the full knowledge that in 1982 the U.S. Supreme Court had struck down as unconstitutional a similar Texas statute.⁸ Since there was little doubt that opponents of 187 would seek and probably obtain an injunction against its implementation (which they did the day after the election) in this sense the promotion of Proposition 187 was an exercise in symbolic action. Proponents used the support of 60 percent of the California electorate to send a message to other state governments, to Congress, and the courts. They hoped that the lawsuit against 187 would eventually be appealed to the U.S. Supreme Court,

⁸ *Plyler v. Doe* 457 U.S. 202 (1982).

which had become more conservative since 1982, and *Plyler* overturned.

This type of response has continued in the decade since 187: states and local governments enact ordinances and adopt policies to express outrage at illegal immigration and at the inadequate federal government response. Recent battles have been fought over whether states should demand proof of immigration status before issuing driver licenses, require undocumented college students residing in the state to pay out-of-state tuition, and instruct local police to turn unauthorized immigrants over to immigration authorities. There is little evidence that such efforts by state and local governments actually deter unauthorized immigration or even redirect it to other communities, but they do generate enormous publicity, divide the public, and achieve other—often partisan—political purposes.

A second type of policy response was to direct new federal resources and attention to border enforcement and the prevention of illegal entries. This took two principal forms. One was to elevate the cost of illegal entry by increasing the number of Border Patrol officers, constructing barriers, and applying new surveillance technology at the border. Another was to change the entire approach of border enforcement from one that emphasized the apprehension and return of border crossers to dramatically increase the visibility of enforcement efforts and Border Patrol presence in order to deter crossing attempts in the first place. This was first attempted along the urban border between El Paso and Ciudad Juárez, and it achieved the limited goal of reducing illegal entries into El Paso. The incoming Clinton administration extended this approach to the urban border between San Diego County and Tijuana in 1993, where it acquired the name of Operation Gatekeeper. It also obtained congressional support to construct a triple fence and to hire more Border Patrol officers. In subsequent years, additional miles of fencing have been built and variations of the new strategy have been adopted for other segments of the border.

Another policy response was the enactment of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA). This complex piece of legislation (adopted at the same time as welfare reform and an anti-terrorist law which also contained provisions regarding immigration) included a long list of sharply targeted measures to elevate the costs to immigrants of their illegal entry and continued presence in the United States. New criminal penalties were included, access to the courts denied, and the discretion of immigration judges to provide relief from deportation sharply curtailed (though the U.S. Supreme Court reinterpreted some of these

provisions).⁹ An effort by proponents to bar undocumented school children from K-12 education was defeated. However IIRIRA did require that states extend the same tuition breaks to non-resident students from other states that it made available to undocumented immigrant residents.

A new policy approach was pursued in the first months of 2001. Newly inaugurated presidents George W. Bush and Vicente Fox began a process but did not conclude a negotiated package of proposals to submit to the U.S. Congress. What can be discerned from unofficial post-9/11 reports is that the United States would have created a guest worker program and established some form of legalization for unauthorized residents. Mexico would have developed a package of investment opportunities to create jobs in sending regions, provided border intelligence to the U.S., and eventually adopted some form of policing on its side of the border to prevent Mexicans from leaving without documents. To suggest that such a package would have been difficult to sell in the U.S. Congress (and to the Mexican public) is an understatement, but we do not know how far it would have gone or even what a final package would have looked like.¹⁰

It is worth noting what has not been attempted in the two decades since IRCA. No serious effort to enforce employer sanctions or to make them enforceable was mounted. Work place raids to apprehend migrants in cities away from the border were occasionally conducted, but this approach received even less emphasis than it had in previous years. Employer organizations, immigrant rights organizations, Latino members of Congress and the Clinton administration preferred to emphasize border enforcement over interior enforcement. This policy trade-off was continued by the Bush administration, though it was interrupted by a few highly publicized raids at work sites during 2006, an election year.

Among these responses, it was border enforcement that had the most impact on migration flows, though not in the expected direction. The basic pattern of unauthorized migration before the mid 1980s was the parallel growth of two flows. One was a small but growing population of migrants that settled in the United States, usually as families and often with a mixture of immigration statuses among different family members. The other was a much larger sojourner migration dominated by single males or unaccompanied

⁹ *Immigration and Naturalization Service v. St. Cyr* 533 U.S. 289 (2001).

¹⁰ There was a previous attempt in 1991 by President Carlos Salinas to introduce a guest worker option into the negotiations that led to the North American Free Trade Agreement, but it did not get far in the absence of significant congressional support.

husbands and fathers who found temporary employment for perhaps up to a couple of years and then returned to families in Mexico. Frequently, there would be subsequent visits to the United States for temporary employment. The sojourners faced the prospect of apprehension at the border and occasionally needed to make multiple entry attempts after successive apprehensions. Sometimes they would be apprehended on the job in the U.S. and returned to Mexico; more often, they returned voluntarily.

U.S. policies adopted between 1986 and 1996 disturbed that pattern, and discouraged migrants from returning voluntarily. Without effective employer sanctions to bar them from employment or an adequate means to detect habitual residents and remove them, the resident population of unauthorized immigrants grew explosively. The new patterns of unauthorized migration included a substantial increase in the use of professional labor smugglers. Smuggler fees, typically reported under \$500 in the 1980s shot up to somewhat over \$1,000 to \$1,500 per person in the late 1990s and early 2000s, depending on destination, and smuggling services have become more elaborate and complex. The construction of the triple fence and heightened enforcement activity have nearly halted illegal entries in the immediate vicinity of Tijuana–San Ysidro–San Diego. This corridor used to account for nearly 50 percent of the apprehensions along the Mexican border. The flow has shifted east—much of it to difficult mountainous terrain and through the Arizona desert. The 1990s witnessed a surge in casualties among these border crossers, most of whom died from exposure or heat exhaustion.

The Mexican Migration Project, a data set of tens of thousands of interviews of Mexican migrants in Mexico and the United States, includes the migration histories of persons who have entered illegally since the 1980s. These migration histories allow for the calculation of changes in the probability of apprehension by the Border Patrol and for the average length of stay after arriving at a destination in the United States. Migrants began staying much longer in the 1990s in response to these new policies. Paradoxically, the growth in the size of the Border Patrol was accompanied by a *decline* in the probability of apprehension at the border.¹¹ This result is counterintuitive if the response of migrants to heightened enforcement had not changed. Prior to the 1990s, greater enforcement meant a higher apprehension probability, a larger number of repeated entries as a result of more unsuccessful attempts, and a larger

11 Douglas S. Massey, Jorge Durand, and Nolan J. Malone, *Beyond Smoke and Mirrors: Mexican Immigration in an Era of Economic Integration* (New York: Russell Sage Foundation, 2002), 107-132.

cumulative number of apprehensions. This is why apprehensions of migrants at the border grew explosively in the 1970s and 1980s.

Starting in the 1990s, the construction of border fences and the implementation of an approach that focused on preventing entries rather than apprehending entrants led to a widespread use of smugglers and a substantially increased cost for successful entries. The higher cost and greater risks of border crossing reduced the number of unauthorized immigrants who voluntarily returned to Mexico. It also discouraged some new migrants from even making the attempt, but to a lesser extent, because the higher costs associated with paying a labor smuggler were still within reach of families that had members with paying jobs in the United States. One result was fewer entry attempts that were financed more heavily and more successful, despite heightened border surveillance. Another result was even fewer voluntary returns (no sense in returning for a visit when re-entry carried high costs and significant risks). Not surprisingly, then, concentrating enforcement activity at the border and changing little else has resulted in an increase rather than a decrease in the number of undocumented immigrants residing in the United States.

The selective focus on the Mexican border has transformed the pattern of Mexican unauthorized migration without constraining its growth. It also has heightened the public perception that illegal immigration is a Mexican problem. Mexicans are the largest national group and constitute about half of the total population of unauthorized immigrants. Field work among unauthorized immigrants shows a growing proportion has entered through ports of entry, by using another person's immigration documents, by entering as a tourist and overstaying the visa, or some other means. As more resources have been dedicated to border enforcement, less is being accomplished with more.

Conclusion: From Symbols to Substance

Late in 2005 the House passed a bill that would make continued presence as an unauthorized immigrant a felony and result in criminal penalties to others—e.g., churches, non-profit immigrant rights groups—who provided assistance to such an immigrant. It can be inferred that the actual purpose of the measure, like others before it, was to send a message during an upcoming election year. In the spring of 2006 the Senate took up the bill and the American public received a message of its own. To the surprise of many observers, unauthorized immigrants, their families and supporters, participated in massive marches and rallies in major cities across the United States. These events

attracted hundreds of thousands of participants in Los Angeles, Chicago, and Dallas—and smaller but historically large crowds elsewhere. Employers in many instances gave their workers time off to participate.

In the years before IRCA, analysts held to a well-founded belief that unauthorized immigrants lived in fear of detection and stayed out of public view. This, in fact, made them attractive to some employers and problematic for activists who sought to support their interests. It is not hard to understand why people afraid of detection are easily exploited and difficult to organize. According to this image of the undocumented immigrant, protest marches on the scale observed in 2006 could not have been carried out.¹²

To be sure, Mexican unauthorized immigrants still live with fear as a constant companion, and they are indeed vulnerable to exploitation. But they also have established hundreds of hometown associations, which in turn have made important contributions to their communities in Mexico and to some extent in the United States. These organizations, the establishment of an Advisory Council by grass roots leaders that meets under the auspices of the Mexican Foreign Ministry, and the marches of 2006 all suggest important new developments. Unauthorized immigrants have put down roots, acquired new confidence, established a sense of permanence and connection with the United States that belies their immigration status, and have learned that one way to exercise political power is to manipulate symbols. Judging from the reaction in the Senate and the public, the 2006 protests achieved their immediate purpose. The marches shattered the myth that undocumented immigrants are friendless, passive subjects, and the Senate rejected the House's approach to immigration control.

It is difficult to see how unauthorized immigration, backlogs, and prickly relations with neighbors can be addressed without recognizing that Mexican migration, though important, is only one source among many immigration flows into the United States. Counterproductive attention to border enforcement is not an adequate substitute for addressing visa overstays. Ignoring the flow of unauthorized migrants from Canada—even if smaller—does nothing to address the national issue.

In order to reduce the growth of the undocumented population, the U.S. government must fashion a response that combines a wider door for legal

12. Not all participants, of course, were unauthorized. But there is widespread testimony to suggest that unauthorized immigrants were not a small fraction of these large crowds, which included their children, legal immigrants, friends, relatives, and supporters.

entries and employment, and a narrower door for unauthorized immigration from all sources. With respect to the component that constitutes Mexican immigration, it is difficult to see how a substantive solution can be crafted without the active participation of both the leadership of Mexican immigrant organizations and the Mexican government. Grassroots support of legalization was central to achieving a high level of participation in IRCA legalization. Similarly, any major policy change including new enforcement provisions, guest workers, and legalization has a much higher probability of success if it gets the support of immigrant organizations. Moreover, the Mexican government is in a position to help dissuade and prevent Mexican nationals from leaving for the United States if they do not have the appropriate documents. This would call for a degree of border cooperation with Mexico similar to what the U.S. has with Canada (though on different issues). Mexican support of this kind is an indispensable part of a long-term resolution of this issue, but the Mexican government has little incentive to do so as long as the U.S. continues with a symbolic (if expensive) enforcement approach that defines the entire problem as stopping illegal entries at the land border with Mexico.

CHAPTER 3

Workers and Latin American Migration to the US: New Government Policies and Worker Resistance

Immanuel Ness

Abstract

As the federal government seeks to restrict migration, demand for low-wage labor in the service and manufacturing sectors and the growth in the unregulated informal economy are stimulating demand for foreign laborers. This paper looks at the domestic forces and pressures that are shaping a new migration policy for the United States, focusing on the development of guest worker programs.

The United States' immigration policy toward skilled labor has become a sensitive political issue for policymakers. Since the passage of the 1965 Immigration Act, the political debate in the United States has shifted from ensuring the rights of foreigners from formerly excluded regions of Latin America to training U.S. workers of all backgrounds for jobs appropriate for the new neoliberal economy. As more workers have migrated to the United States to compete with native workers, immigration policy has become a significant arena of political struggle between supporters and opponents of restrictions.

The passage of the Immigration Reform and Control Act (IRCA) in 1986 was decisive in transforming the debate from unauthorized entry of migrants in the U.S. to the work and living conditions of migrant labor. Central to the 1986 act are provisions that ban businesses (by using employer sanctions) from hiring illegal immigrants. However, overall, federal and state authorities do not enforce the law. As a result, migration has grown even more rapidly in the ensuing two decades, as undocumented workers have inundated old and new labor markets, creating an oversupply of low-wage labor in a growing number of service industries.

Business interests argue that a comprehensive program of legal migration is necessary to bolster the economy, filling a shortage of professional workers in modern industry and providing a pool of low-wage workers to fill menial jobs that U.S. workers do not want. Some proponents of unauthorized

migration support corporate America's view that new migrants fill markets and long abandoned labor market niches and thus have not displaced U.S. workers who have moved up the job ladder.¹ One cannot demonstrate that labor shortages have directly compelled the U.S. government to allow more migrants. However, it is undeniable that in once solidly working-class industries where U.S. workers had been employed—such as building services, food processing, and transportation, many documented and undocumented newcomers now labor at lower wages.

Commencing in the late 1980s, the U.S. government sharply increased approval of foreign immigrant guest worker and student visas in a range of high-skill occupations, from medical professions to computer programming. Further, the insignificant penalties of IRCA have not deterred employers from hiring documented and undocumented immigrants—primarily from Mexico, the Caribbean, and Central America—into the service sector. Corporate interests contend that the United States has a shortage of skilled workers while simultaneously arguing that new entrants into the labor force do not want to work in less-skilled jobs. Congress, taking for granted the line of reasoning that the United States needs skilled labor to stimulate technological development as fact, has responded to business interests by passing legislation raising the ceiling on visas for foreign skilled workers in locations where, purportedly, a deficit of American workers exists.

The United States is expanding low-wage and flexible labor imports with alacrity even before it completes negotiations and ratifies an international agreement on migration by the World Trade Organization (WTO) framework that regulates global trade. Prospects for a massive immigrant labor force in the United States through the non-immigrant work visa will surely cut down labor power as corporate America asserts its inability to find workers at home for more and more jobs—or maintains that U.S. workers are disinterested in working them. Such a policy will undercut migrant workers and continue to hold hostage nations in Latin America.

As the federal government places even greater restrictions on migration, demand for low-wage labor in the service and manufacturing sectors and the growth in the unregulated informal economy have stimulated regional migration from Latin America to the United States. Leading observers consider the wide-ranging rise in unskilled migration to be a result of the demand for

¹ Roger Waldinger, *Still the Promised City: African Americans and Immigrants in Postindustrial New York* (Cambridge, Mass.: Harvard University Press, 1999).

cheap unskilled workers in the Global North and a growing supply of workers in Latin America and the Global South, due to growing poverty rates.² The INS (Immigration and Naturalization Service)³ has not enforced regulation of what it considers “illegal” migration across the Mexican boundary but has paid greater attention to issuing legal work visas to immigrants with greater skills. Roger Waldinger and other analysts of immigrants consider the undocumented migration from Latin America and elsewhere to be a positive development as new communities of immigrants provide necessary work while revitalizing neglected neighborhoods in and around major cities. However beneficial the new migrants are to the process of invigorating local economies, the research fails to consider the fact that native-born workers performed much of the erstwhile unskilled work at significantly higher levels of wages and benefits.⁴

As wages and working conditions have eroded, U.S. workers have searched for better employment while new immigrants have been willing to take on the new work. By following the job rather than the worker, we can grasp the changes in local labor markets that have made low-wage jobs no longer attractive to native-born workers. The argument that migrants are taking jobs that nobody else wants fails to consider the fact that the conditions of work and wages for those jobs in manufacturing and service sectors downgrade significantly. Missing from the debate is the even more dramatic growth in *skilled* worker migration to the United States. During the 1990s, the high-technology industry augmented the skilled labor workforce in the United States through the Non-Immigrant Visa (NIV) system. NIV permits foreign skilled workers to work for six years in the United States in jobs deemed to have too few employees.

Nevertheless, contrary to those who contend that the United States must recruit abroad to address labor shortages, the American working class is coping with a job shortage crisis of spectacular proportions. The crisis has two dimensions that encompass both class and race. The vast majority of job creation in the United States consists of positions slated to be filled by workers from Latin America and the Caribbean at significantly lower cost. If we follow the evolution of the job market, it is undeniable that U.S. workers of all back-

2 Stephen Castles and Mark J. Miller, *The Age of Migration: International Population Movements in the Modern World* (New York: Guilford Press, 2002), pp. 220-252.

3 Under President George W. Bush, the INS was renamed the U.S. Citizen and Immigrant Services under the umbrella of the Department of Homeland Security.

4 Waldinger, *Op. cit.*

grounds have lost jobs to low-wage manufacturing and service workers from Latin America who work for lower wages.⁵

The federal government's stance toward skilled immigrant labor is widely divergent from its position on unskilled labor. As Congress enacts policy to restrict low-wage migration to the United States, it also is substantially increasing the quotas on skilled non-immigrant workers. This policy divergence is consistent with the federal government's historical attitude toward immigrants since 1864, when the government hesitantly began regulating migration. Since the origins of the nation, the vast majority of immigrants to the United States came with few or no skills. Nonetheless, even as waves of unskilled migrants came to work in the manufacturing industries, the government made special provisions for skilled migrants to enter the country.⁶

The Immigration Policy Debate: The Guest worker Strategy

Much of the present debate on immigration policy is rooted in the failed outcomes of often unintended, utterly inconsistent U.S. government policies to establish and regulate the flow of authorized and unauthorized migrants. I argue that ineffectual regulatory policies have bifurcated migrant workers into two groups—undocumented laborers and guest workers. If government and corporate efforts to replace the undocumented laborers with an established legal migrant labor force succeed, conditions for all workers will significantly diminish.

However, as we have seen in past immigration bills, government programs are plagued with uncertainty and doubt. Can the government seriously address the status of more than 10 million undocumented migrants that business welcomes in flagrant defiance of 1986's IRCA? Since 2000, the American Federation of Labor–Congress of Industrial Organizations (AFL-CIO) adopted a policy for repeal of Public Law 99-603 of IRCA, which sanctions “employers who knowingly hire undocumented workers.” Nevertheless, if the government adopts a new guest worker law, unions will require a new policy that restores the rights of migrants and U.S. workers. If the new legislation moves all undocumented workers into a guest worker program, many

5 Stephen Steinberg, “Immigration, African Americans, and Race Discourse,” in Manning Marable, Immanuel Ness, Joseph Wilson, eds., *Race and Labor Matters in the New U.S. Economy* (Lanham, Maryland: Rowman and Littlefield Publishers, 2006), pp. 175-192.

6 Aristide R. Zolberg, *A Nation by Design: Immigration Policy in the Fashioning of America* (Cambridge, Mass.: Harvard University Press, 2006).

unions that have grown by organizing low-wage service workers conceivably could suffer a significant loss in membership.

A prevailing assertion in the labor policy and human resources literature is that U.S. workers are losing a competitive advantage to higher-skilled workers in Latin America. Due to a purported skills shortage, the United States must reluctantly recruit skilled workers from abroad to meet the demands of high-technology and business services on the one hand and hospitality workers on the other hand.⁷

A large and growing concern among academics and policymakers is that the American labor force may not be prepared to compete with more highly skilled foreign workers. At the same time that many policymakers oppose state-managed training and education, they argue that countries of the developing world are producing skilled workers at a more rapid pace than in the United States.

Yet, if the United States has too few high-technology workers, the primary cause is the nation's failure to promote education and training in new and emerging sectors. Instead, the United States has been addressing the need for labor by expanding guest worker programs in both skilled and less-skilled occupations. Large multinational corporations with no demonstrated interest in educating U.S. workers told Congress that America was facing a critical crisis of engineers and highly skilled professional workers. In turn, with the backing of President George H. W. Bush, the United States Congress passed the Immigration Act of 1990. The Act authorized increases in the admission of foreign nationals seeking permanent resident status in the U.S. while creating a program to expand and expedite the admission of temporary foreign skilled workers and students pursuing careers in high technology. However, the Act was in reality founded on the pretense that a severe shortage was undermin-

7 For further information by leading economists, national experts, on labor and migration and U.S. government officials see Thomas Friedman, *The World is Flat: A Brief History of the Twenty-First Century* (New York: Farrar, Straus and Giroux, 2005); Tamor Jacoby, "Testimony of Tamor Jacoby before the U.S. Senate Committee on the Judiciary" (Washington, DC: Government Printing Office, July 26, 2005); Frank Levy and Richard J. Murnane, *The New Division of Labor: How Computers are Creating the Next Job Market* (Cambridge, Mass.: Harvard University Press, 2004); National Research Council, *Building a Workforce for the Information Economy* (Washington, DC: National Academies Press, 2000); Demetrios G. Papademetriou and Stephen Yale-Loehr, "Balancing Interests: Rethinking U.S. Selection of Skilled Immigrants," *International Migration Policy Program Series*, Vol. 4, (New York: Carnegie Endowment for International Peace, 1997); and Anna Lee Saxenian, *New Argonauts: Regional Advantage in a Global Economy* (Cambridge, Mass.: Harvard University Press, 2006).

ing American global preeminence in high technology. The program set in motion a mass wave of migration that has almost completely transformed the economic geography of high technology by assigning Indian guest workers who enter the U.S. for brief periods to fill the breach.

In the 1990s, with attention drawn to the outsourcing of manufacturing jobs to the Global South, the growth of skilled guest workers in the Information Technology (IT) sector went largely unnoticed below the radar screen of public scrutiny. New skilled and unskilled immigrants, conventionally portrayed as assiduous and eager to work long hours at low pay, have entered an array of previously high-paying industries once dominated by native-born workers. Academic and popular discourses suggest that these new immigrant laborers are working in low-wage unskilled menial jobs in the service economy. This logic has motivated federal government lawmakers to support the expansion of guest workers in the United States by controlling their flow and restricting their rights. Such government programs could create an international contingent of temporary and seasonal migrant labor that will come and go to and from the Global North, as multinational corporations need them. This scheme could transform labor relations throughout the world.

The U.S. Citizenship and Immigration Services (USCIS) defines workers in the H-2B visa category as beneficiaries of, or part of, a guest worker program designed to make foreign migrant laborers available to U.S. companies facing labor shortages. The H-2B program complements the H-2A labor program through allocating non-agricultural workers to U.S. business. Notably, the H-2B program provides seasonal, intermittent, and temporary workers to “augment their existing labor force.” Every fiscal year the USCIS sets a numerical quota of at least 66,000 workers, but business is lobbying for extensively expanding the program, and the U.S. sees guest workers as a substitute for undocumented labor, since they subject foreign workers to significantly higher surveillance and control.

Almost every year, hotels and resorts maintain that a shortage of U.S. laborers constrains their ability to operate efficiently. The range of H-2B workers is now growing to encompass a growing number of jobs considered indispensable well-paying positions. However, the USCIS contends there is a scarcity of jobs in construction, health care, landscaping, lumber, manufacturing, food service/processing, and resort/hospitality services. Today, even for U.S. laborers, business is converting a growing number of positions into contract, temporary, and contingent labor. Since the jobs are neither covered by U.S. national labor law protecting guest workers from employer abuse,

nor are adequately monitored by the U.S. and foreign governments, every year, resorts, hotels, and hospitality companies request as many workers as possible annually, even when guest worker quotas are already set.

For H-2B workers in the Caribbean, profits from the hospitality industry do not stay there but are repatriated to multinational corporations in the North, a process known as “leakage.” The repatriation of profits further depletes the economy of needed resources for education, housing, and health care. Thus many workers contend that migration is not a choice but an economic necessity to support their families and improve their quality of life. New formulations do not have to close national borders, but should permit (or require) all workers to form unions in their own countries and enforce prevailing wage laws that permit U.S. workers to compete for jobs. While the establishment of a program that would allow at least 400,000 guest workers into the country may undermine U.S. workers standards, corporations will benefit even more if laborers are under constant surveillance and supervision. While business has done quite well with undocumented workers, the fact that these migrant workers are joining unions at the most rapid pace since the labor upsurge of the 1930s poses a potential dilemma if profit margins are to be maintained and increased. Witness the modestly successful effort by unions to organize hospitality, hotel, and health care workers in major cities.

Corporate Strategy

The expansion of guest worker programs is intended to further discipline labor, at home and abroad, as a means of increasing profits for the capitalist class—especially for financial corporations that indirectly benefit from the restructuring of labor markets. Undocumented workers as opposed to guest workers may move from job to job and could join unions to raise their wages and conditions. Concomitantly, guest workers must go home upon completion of the job and almost all have no recourse to join unions. Why establish a dichotomy among immigrants and divide one group against the other? The massive and widespread protests of immigrants in Southern California in the spring of 2006 demonstrated the power of foreigners in the United States, confirming in the process that most undocumented migrants oppose a government guest worker program aimed at consigning all migrant workers to subordinate conditions, which seeks to prevent mobilization and unionization by threatening deportation.

Today, we are actually witnessing the destabilization of the employer–employee relationship that survived from the end of World War II to the early 1980s. That relationship is rooted in the class compromise of the New

Deal in the 1930s, which obligated U.S. employers to continue to pay workers even if business slowed, and that provides health and pension benefits to workers through the workplace. The restructuring of work has significant national and global implications for labor that will intensify joblessness and unemployment.

Thus, even before the U.S. negotiates a new General Agreement on Tariffs and Trade treaty through the WTO, widening the market for global service workers, the country is leading the way in hiring foreign contract workers en masse. The insatiable urge of policymakers is to ease the way for corporations to create a new body of contract workers unprotected by U.S. labor laws, and thus unable to organize into unions or, in the case of unskilled workers, to protest wages and conditions, an attitude punishable by deportation. The United States is at the forefront of negotiations with the WTO to do away with trade barriers that impede importing and exporting professional and unskilled labor, called the General Agreement on Trade and Services Mode Four (GATS-4).

Since the proliferation of market reforms in the late 1970s, global barriers to trade liberalization have been systematically demolished. Finance capitalists controlling the world's money see restrictions to the flow of capital, goods, and labor as sandcastles to be washed away by corporate managers of the world economy. In the meantime, the global market economy resembles a Lego building under construction to prevent the resurgence of social protections. The new wall that is replacing government protections is a sturdy and essential component of market liberalization, one that expands trade in goods and services to promote the trade in workers between countries. Resistance to the neoliberal program will build a wall around any country that seeks to moderate the market. The next round of negotiations under GATS-4 will from time to time fill spot shortages in skilled and unskilled labor that supporters believe are inevitable in the global trade regime. Thus, rather than employing workers, GATS-4 will allow General Motors, for example, to contract workers from Latin America and the Caribbean to fill spot shortages at significantly lower wages and without the obligation to pay for health care, unemployment insurance, pension benefits, or even workers' compensation.

As far as Latin America is concerned, a completely new perspective is emerging among corporate and government managers. In the 1970s and 1980s, national leaders viewed relocating skilled labor from the South to the North as a *brain drain* that deprived Third World countries of professional workers, a resource that would otherwise improve their standard of living.

Now, the region, as well as China, India, Jamaica, and the Philippines view workers as profitable commodities for export to the Global North. Once seen as a fundamental component of what Samir Amin viewed as unequal exchange, today, corporate and government leaders promote the export of labor as a means to create capital through foreign remittances, and potentially a source of good will that will encourage multinationals to relocate subsidiaries to their countries.

As noted, a growing number of economies in Latin America and throughout the Global South are warping as development policies direct disproportionate funding to IT, business services, nursing, or hospitality for global exports, ignoring other key components of their burgeoning economies. Ostensibly, in GATS-4 negotiations within the WTO, the developing world is arguing that temporary labor migration is as vital to their economic growth as goods and services are to advanced economies. Explicitly, a growing number of countries in Latin America consider the expansion in the movement of people from poor to advanced countries to perform services an important source of exports and revenue.⁸ The neoliberal argument is that excluding the comparative wage advantage in low-wage labor is an important part of the worldwide market from global trade agreements.

While actively negotiating a global labor migration agreement, foreign workers are useful scapegoats of right-wing governments to garner votes from workers fearing job loss. The decision by Bush to send 6,000 troops to the U.S. border with Mexico is a hypocritical approach to dealing with growing unemployment and economic stagnation. Though such arguments are delusions intended to pacify right wing workers, most U.S. workers recognize that absent strong labor institutions, they are too weak to counter avaricious multinational corporations; hence they tend to believe that the capitalist neoliberal system is beyond reproach. Therefore, some workers are easily convinced that foreign workers and the relocation of industry are leading sources of unemployment. The media and politicians conveniently blame migrant workers for taking away jobs, even if those very officials are actively establishing guest worker programs. Politicians do not consider inequality and immiseration in Mexico as causes of the growing migration of workers and peasants to the U.S.⁹ Overall, corporations have always supported

8 Aadiya Matho and Antonia Carzaniga, eds., *Moving People to Deliver Services: Labor Mobility and the WTO* (Washington, DC: World Bank Publications, 2003), pp. 1-19

9 Lou Dobbs, *Exporting America: Why Corporate Greed is Exporting American Jobs Overseas* (New York: Warner Books, 2004).

migration, so Congress and the President must toe a thin line to create the impression that they are responding to job shortages by restricting immigration. Since 1990, the unsurprising trend has been that, almost immediately after elections, Congress relaxes restrictions on immigration.

Resistance from Labor

The new configuration of industry has transformed the traditional institutional forms of labor organization of the American working class that took shape through the industrial unions established from the 1920s through the 1950s. The institutional form of labor–management relations, based on recognition and collective bargaining, does not facilitate new forms of labor activism in the “New Economy.” Managers are now gaining the upper hand even in industries and localities where strong unions have solidified control over labor markets through collective bargaining agreements that restrict local labor competition.

Over the past two decades, the extraordinary growth of documented and undocumented migrant labor has transformed state and national labor regulatory systems, thereby creating new challenges for workers and their unions in maintaining wages and labor standards. In some cases, migrant laborers have replaced workers and their unions throughout entire labor markets. The demand to expand and institutionalize migrant labor systems will further erode the capacity of unions to organize workers ostensibly employed for foreign contractors in both professional and menial labor markets. Simultaneously, efforts to enlarge the migrant labor programs leave newcomers defenseless to corporate despotism. In the new global labor commodity chain, migrants in a growing number of service industries are considered factors of production to be dispensed with when no longer considered necessary.¹⁰

To respond effectively to the capitalist effort to lower wages on a global scale, the working class and poor must win organizing victories and must unify across borders through struggling for the right to join unions. Many foreign manufacturing jobs pay poverty wages even by standards of the Global South.¹¹ Therefore, for an accurate analysis, one must follow the *job* and not the *worker* to assess the degree to which decent-paying jobs in the United States are transforming into poverty-wage jobs in Latin America.

¹⁰ Gary Gereffi and Miguel Korzeniewicz, eds., *Commodity Chains and Global Capitalism* (Westport, CT: Greenwood Publishing Company, 1993), pp. 123–142.

¹¹ Kimberly Ann Elliott and Richard B. Freeman, *Can Labor Standards Improve Under Globalization?* (Washington, DC: Peterson Institute for International Economics, 2003).

Organizing guest workers into unions would staunch the decline in unions throughout the world. However, due to restrictions imposed on guest workers, and employer efforts to circumvent the law, guest workers may be among the least-protected workers in the nation.

To halt the decline in organized labor, national labor federations must demand that all guest worker have the legal right to unionize. To do so, labor must oppose all immigrant policies that segregate workers into specific groups. Organized labor should not select those workers that will become eligible for employment and citizenship in the imperialist center of power, but should turn attention to workers and labor throughout the world who are also suffering from the policies of international capitalists.

Sustainable development policies must invest in the social infrastructure in Latin America and the Caribbean to advance the economic interests of the poor and working class plagued by unrelenting poverty. Poverty in the South triggers migration to the North. Organized labor in the United States is only beginning to address the issue of poverty in Latin America, particularly how capitalist policies transform poor countries into even poorer ones through policies that lead to the elimination of public education, housing, and health care. This crisis of capital is particularly troubling for racial minorities. In the United States, the job crisis hits African Americans and people of color the hardest.

To reject guest workers while embracing undocumented workers—as many unions do—is a contradictory pathway to failure and the further diminution of organized labor. Why should organized labor support repealing the employer sanction provision in IRCA that undermines the ability of undocumented workers to resist corporate exploitation if they are not endeavoring to defend the rights of non-immigrant workers to organize? In 2006, nine to 12 million migrants work in the United States. Equally, many non-immigrants also work in exploitative jobs and have no recourse to improve their conditions.

Currently, it is naïve and foolhardy to think that migrant worker resistance on the job is encouraging a movement of guest workers, especially in the United States, where corporate control over labor is so strong. Still, some successful campaigns are underway to improve guest worker conditions in the agricultural sector—for example, the precedent-setting victory by the Farm Labor Organizing Committee (FLOC) in September 2004 with the North Carolina Growers Association to unionize 8,000 guest workers, ending a five-year boycott against Mt. Olive products. In April 2006, the United Farm Workers (UFW) reported that it reached an agreement with Global Hor-

zons, a leading guest worker company based in Los Angeles, to improve wages, benefits, and working conditions for foreign H-2A guest workers. The international labor import firm acceded to a comprehensive agreement for decent wages for Thai and Vietnamese agricultural workers in Washington State.

Arturo S. Rodríguez, president of the UFW, declared that: For the first time, some imported agricultural guest workers have a national union contract guaranteeing employers comply with all relevant state and federal laws—in this case through a three-step grievance procedure ending in binding mediation. For the first time, a national union contract will protect agricultural guest workers from retaliation for complaining about conditions or treatment. For the first time, a union contract will require that agricultural guest workers receive a 2 percent pay increase above the Adverse Effect Wage Rate mandated under federal law, which is always higher than the state or federal minimum wage. Currently, the wage rate for agricultural guest workers in Washington State is \$9.01 an hour.¹²

These two recent victories in North Carolina and Washington State set an important precedent for unionization of guest workers in the hospitality and IT industries in the United States to ensure good wages, protections, and working conditions. Now that capital is increasingly integrating globally, organized labor must follow with authentic forms of collaboration. Business is using prospects for a guest worker program to do away with living-wage jobs and as a means of supplying a steady source of highly competent skilled IT workers and low-wage laborers working in the U.S. hospitality industry. The corporate frenzy for low-wage labor will not stop until organized labor transforms into a social movement that pushes government and business to advance the wages and human rights of working people in the United States and throughout the world.

While the International Confederation of Free Trade Unions (ICFTU) has initiated more expansive efforts, as an ossified organization, most of the proclamations are mere formalities. The human rights route through the International Labour Organization (ILO) has also fallen short of passing

¹² Arturo S. Rodríguez, "Statement Announcing UFW Contract with Global Horizons," Seattle, Washington, April 11, 2006.

resolutions acceptable to the United States. ILO conventions on the rights of workers are a step in the right direction, but without a base rooted in labor, they are unlikely to expand the rights of workers. Similarly, efforts by university students to eliminate sweatshops globally may represent a model for an international organization of guest workers. However, we cannot delude ourselves into believing that earnest but feeble efforts, such as the United Students Against Sweatshops (USAS) will amount to more than an idea or a means by which students can assuage their guilty consciences.

Conclusion

Our de facto immigration policy today consists of efforts to restrict the flow of undocumented workers by expanding the flow of guest workers. This serves to maintain a steady flow of compliant laborers. This fits with a new phase of corporate restructuring that will produce a foreign workforce that will have even less power than undocumented workers today. If guest worker programs over the last decade in the IT and hospitality industry provide any clue to what the future holds, one can expect that businesses will continue to sidestep federal laws that mandate payment of wages equivalent to U.S. workers. As in the past, no means to monitor illegal corporate practices will be in place. In this environment, organized labor in the United States and throughout the world must search for a means to counter neoliberal reforms that only benefit corporations at the expense of workers everywhere. As unions reach a breaking point, most are clueless about organizing new migrant workers and protecting members. At this stage of capitalist hegemony, the need to organize globally is more prescient than ever. However, organizing must be rooted in and established through worker struggles with strong support from existing unions.

Labor is right to oppose a guest worker program that interferes with a concentrated strategy to organize undocumented workers. Yet, labor does not have the prescience to recognize that if enacted a guest worker program policy will force unauthorized workers out of the country. Organized labor has found itself supporting an undocumented amnesty program that leads to full citizenship against a guest worker program that mistreats workers. However, no matter the case, guest worker programs are here to stay. It is necessary to find a means to advance the rights of guest workers in all sectors of the economy. While organized labor is correct to oppose the concept of migrant guest workers, due to nativist sentiment among the U.S. working class such a position is likely to fail if unions simultaneously support organizing undocu-

mented workers. The only answer for building a strong labor movement is to consider workers in the global context rather than continuing to pursue a failed strategy of dividing migrant workers. This suggests reaching out to workers internationally rather than on worker ethnic and national bonds. Such a strategy would stipulate that all migrant workers working in the United States have the right to organize unions that are capable of monitoring conditions and representing their interests. Most important, the program must place workers in a position to demand unionization through fostering self-governance and autonomy from large national unions.

The U.S. labor movement's historical responses to government policy on migrant workers greatly illuminate the steady declining relevance of unions today. To strengthen workers in the United States, it is necessary to do away with much of the labor law established through the National Labor Relations Act—policies that are no longer effective or relevant to workers today. As finance capital restructures labor markets on a global basis, the urgency for unions and workers to reach out to workers abroad is crucial in building power for all workers of the world. This effort of building international solidarity through setting standards that permit organizing among all workers is long overdue.

SECTION 2:

LATINO IMMIGRATION POLICY:
ISSUES AND ALTERNATIVES

CHAPTER 4

Rights Begin at Home: What New York State Can do to Advance the Rights of Latino Immigrant Workers

Amy Sugimori

Abstract

As the possibility of comprehensive immigration reform at the federal level seems unclear, immigrant workers and advocates are organizing and pushing for policy change to address day-to-day problems at the state and local level. As described in the first section of this paper, immigration status and concerns about immigration enforcement have an extremely chilling effect on workers' ability to stand up for their workplace rights; moreover, workers are being pitted against each other based on immigration. Comprehensive immigration reform that provides workers with a means of adjusting their status would eliminate one of the most effective tools of keeping workers silent about abuse. However, New York State does not have to wait for the federal government to act in order to improve conditions of Latino immigrant workers throughout the state. While immigration reform is a federal matter, there are a number of actions that can be taken at the state level that would eliminate major barriers faced by many immigrants and advance conditions of workers across the board.

Executive Summary

This paper highlights key issues that affect immigrant workers in general and Latino immigrant workers in particular as well as key policies that are being developed by immigrant worker organizing and advocacy groups that would advance conditions of these workers in the state of New York. The issues and the policies recommended are as follows:

Issue 1: Unpaid or underpaid wages are a major issue faced by low-wage immigrant workers. The Urban Institute recently found that two million immigrants nationwide earn less than the minimum wage. Employers' failure to pay all of the wages due has a serious impact on workers who are already earning low wages.

The U.S. Department of Labor, Bureau of Labor Statistics reported that, in 2003, “black and Hispanic or Latino workers continued to be more than twice as likely as their white counterparts to be among the working poor.” Employers are particularly emboldened to cut corners on wage and hour laws in a context in which they are unlikely to face serious consequences for doing so. Though the passage in 1997 of the Unpaid Wages Prohibition Act (UWPA) gave New York State one of the strongest wage enforcement laws in the country, New York’s wage and hour laws are being sorely under-enforced. The New York State Department of Labor can play a stronger role in the enforcement of wage and hours laws.

Recommendations:

- Seek unpaid wages going back a full six years.
- Seek the full range of remedies available to workers as well as the maximum penalties for violations provided by UWPA.
- Enforce the statutory daily overtime premiums (also called “spread-of-hours” pay) for low-wage workers for hours worked in excess of 10 hours in a day.
- Investigate complaints promptly and thoroughly and keep workers informed of progress.
- Identify employees who are misclassified as “independent contractors” when investigating wage claims and apply the Labor law expansively to include workers intended to be covered.
 - Minimize workers’ risk of retaliation and maximize impact:
 - For example, use an individual complaint as a starting point for investigating an entire firm’s payroll practices to ensure the employer is held responsible for all violations.
 - Take steps to protect the anonymity of workers who initiate complaints.
 - Build on the model developed by the Apparel Industry Task Force and pro-actively target for investigation and enforcement industries known for violations of wage and hour laws, drawing on enforcement data, field research and pooled intelligence from stakeholders.
- Improve responsiveness to immigrant communities:
 - Make clear statements that the state is not enforcing immigration law or screening workers based on immigration status.
 - The State Department of Labor can internally examine its practices to identify any features of its interactions with workers and the public that might lead to the conclusion that it is screening workers based on immigration status and then take steps to change those practices or correct any misimpressions that may arise.

- Improve outreach to immigrant communities by partnering with community groups that have their roots in those communities.
- Prioritize language access by ensuring that there are sufficient investigators with language and cultural skills to communicate effectively with immigrant worker communities and that all outreach materials are available in languages spoken by immigrant workers.
- Take steps to make agencies more accessible, accountable, and transparent:
 - Provide comprehensive data on complaint-driven and investigation-driven enforcement, broken down by month, including data on the number of workers affected and wages recovered.
 - Record the industry classification code of all employers involved, and publish data by industry groups.
 - Make key forms, policy manuals, and procedures available to the public in a variety of languages.
 - Respond to additional requests for data made pursuant to the Freedom of Information Law (FOIL) within statutorily mandated timeframes.
- Establish a private right of action for New York Labor Law rights that currently lack one, or where the law is unclear. A model is provided by the California Labor Code’s Private Attorney’s General Act of 2004.
- Close loopholes for employers who knowingly misclassify their employees as “independent contractors.”
- Pass stricter prohibitions against employers who retaliate against complaining employees.
- Enact legislation requiring state agencies to do outreach and provide know-your-rights materials in multiple languages.
- Pass legislation assuring that all workers, regardless of immigration status, are protected by labor and employment laws.
- Toll statute of limitations pending agency investigation of wage and hour complaints.
- Permit third party (i.e., labor and community groups) complaints for wage and hour violations.
- Enhance liquidated damages to workers for unpaid wages.
- Eliminate the provision in the Wage Order for Miscellaneous Industries that subjects certain categories of workers to lesser overtime provisions. 12 NYCRR § 142-2.2 can be amended to provide full overtime protections of 1 and ½ times the regular rate of pay to all workers for more than 40 hours of work performed in a week.

Issue 2: For over four years, the New York State Department of Motor Vehicles (DMV) has created barriers for hundreds of thousands of immigrant New Yorkers who need to obtain and maintain their driver's licenses. Approximately 300,000 immigrants throughout New York State have faced suspension of their driver's licenses over the past two years. During that time, many have seen their licenses expire and were unable to renew them. Countless others will never be able to obtain a driver's license in New York. In addition to this, DMV is stamping visa information on the face of certain driver's licenses. The immigration status information is often technically incorrect. Moreover, the stamping flags the bearer of the driver's license as foreign, creates confusion and misunderstanding, and makes the bearer more vulnerable to discrimination and mistreatment based on immigration status.

Recommendations:

- New York State should refuse to adopt REAL ID requirements passed by Congress.
- Eliminate immigration status requirements. The best use of DMV resources and staff time is on ensuring that driver's license applicants provide secure identity documents and that they know how to drive. They should not be serving an immigration law enforcement role. Policy or law should specifically provide that eligibility for a driver's license shall not be conditioned on a particular immigration status.
- One driver's license for all workers. A system that provides different or marked driver's licenses based on holder's immigration status subjects immigrants to discrimination and assumptions about their status as well as their rights in this country.
- Provide for acceptance of secure identity documents that immigrants can provide. There are a number of different documents that immigrants can provide that are secure and legitimate means of establishing identity and date of birth. Numerous other agencies and businesses recognize this. For example, foreign passports can be accepted without regard to I-94 or visa information as can consular identification documents.
- Provide acceptable alternatives to the Social Security Number. For example, provide that instead of a Social Security Number, applicants can provide: an Individual Taxpayer Identification Number (ITIN) or a letter or form from the United States Social Security Administration that states that the applicant is not eligible or sworn statement under the penalty of perjury, stating that the applicant does not have a Social Security Number.

- DMV should not be called upon to enforce or assist in enforcement of immigration law.

Issue 3: Certain sectors that are characterized by low wages and poor working conditions are also pre-dominated by immigrant workers. Two examples of such industries are day labor and domestic work. While workers in those sectors face a range of abuses that are associated with their immigration status, the particular structures of the industries also leave workers vulnerable to abuse. New York State can adopt key legislative and policy strategies to address the specific challenges faced by workers in these industries.

Recommendations:

- Support and sustain worker centers that emphasize worker leadership and community investment.
- Protect and expand the wage and hour rights of day laborers.
 - Ban fees or improper wage deductions for:
 - Cashing a check issued by a day labor service agency or other day labor employer.
 - Transportation between the place of hire and work site.
 - Establish wage parity between day laborers with full-time permanent employees performing similar tasks.
 - Require timely payments in cash or an immediately redeemable check.
 - Mandate daily rather than weekly overtime rates.
 - Require employers to compensate day laborers for traveling time between the point of hire and worksite and for time spent waiting for late employers.
 - Protect the First Amendment rights of day laborers to gather and seek work in public.
- Ensure a safe and healthy employment and work environment for all day laborers.
 - Require labor employers to cover the medical and compensatory costs of a work related injury if workers' compensation is not available.
 - Require employers to provide written notice to and obtain the written consent of day laborers asked to perform work that would expose them to hazardous materials or conditions.
 - Ensure that motor vehicles used to transport day laborers are registered and meet basic safety requirements.
- Adopt a Domestic Workers' Bill of Rights that includes the following:

- A living wage of \$14.00/hour (\$16.00/hour if the employer does not provide health benefits).
 - Overtime pay for all domestic workers (including those who live in the employer's home) for every hour over 40 hours worked a week.
 - Family and medical leave.
 - At least one day of rest a week.
 - Designated paid holidays.
 - Paid vacation days.
 - Paid sick days.
 - Advance notice of termination of employment.
 - Severance pay in accordance with number of years worked.
 - Inclusion of domestic workers under employment discrimination protections.
 - Inclusion of domestic workers under state labor law.
 - Employer recordkeeping requirements.
- Eliminate the provision in the Wage Order for Miscellaneous Industries that subjects domestic workers to lesser overtime provisions. Provide full overtime protections of 1 and ½ times the regular rate of pay to all workers for more than 40 hours of work performed in a week.

Introduction: The Impact of Immigration on the Realities Faced by

Latino Immigrant Workers

While federal and state legal workplace protections apply to all workers, regardless of immigration status,¹ hundreds of thousands of workers throughout

¹ See, e.g., US DOL WHD, fact sheet #48: Application of U.S. Labor Laws to Immigrant Workers: Effect of Hoffman Plastics Decision on Laws Enforced by the Wage and Hour Division, at <http://www.dol.gov/esc/regs/compliance/whd/wheids48.htm> (stating that it will fully and vigorously enforce the Occupational Safety and Health Act (OSHA), the FLSA, the Migrant and Seasonal Worker Protection Act (AWPPA), and the Mine Safety and Health Act without regard to whether an employee is documented or undocumented); New York State Attorney General Formal Opinion No. 2003-43, 2003 N.Y. AG Lexis 20 at *12. (stating that “a backpay award to an undocumented worker for work that was not actually performed is fundamentally different from an award mandating payment of wages for work that the undocumented worker has already performed for the employer.”); EEOC press release, “EEOC Redefirms Commitment to Protecting Undocumented Workers from Discrimination” (June 28, 2002), (“Hoffman Plastics...does not affect the government’s ability to root out discrimination against undocumented workers” and has “...directed its field offices that claims for all forms of relief, other than reinstatement and post-termination backpay for periods after discharge or failure to hire, should be processed in accord with existing standards, without regard to an individual’s immigration status.”); Balbuena v. IDR Realty LLC, 2006 N.Y. Lexis 200, 2006 NY Slip

New York State face serious obstacles to realizing their rights in the workplace. A 2002 decision by the U.S. Supreme Court, *Hoffman Plastic Compounds v. NLRB*,² determined that an undocumented worker who was illegally fired for engaging in protected organizing activity was not eligible for the remedy of backpay—pay for the time he was not working due to the illegal firing—because of his immigration status. While the Supreme Court’s ruling applied only to eligibility for backpay under the National Labor Relations Act, it has led to arguments by employers and their lawyers that undocumented workers should not be covered by the range of labor and employment laws, or that they should not be eligible for full remedies under those laws. Moreover, immigrant workers face a range of barriers to enforcement of their legal rights in the workplace. Significantly, they are extremely vulnerable to retaliation for speaking up about their rights.

Unscrupulous employers take advantage of undocumented immigrant workers because they think they can get away with it: They count on the workers’ fear of immigration consequences to keep them silent: to prevent them from organizing, from speaking out about bad conditions, from cooperating with government agencies to enforce their rights. Workers’ fears are reinforced by instances in which employer retaliation actually results in immigration enforcement. The following are only a few examples. In Kansas, a worker was turned over by his employer to the Department of Justice and ultimately placed in immigration proceedings after he filed a workers’ compensation claim for an on-the-job injury and spoke to the press about it.³ In Minnesota, a worker who was injured on the job was turned in to the federal immigration authorities by his employer who then argued that he was not entitled to wage loss benefits in workers’ compensation because of his undocumented status.⁴ In California, a worker was turned in to immigration by her employer for filing a claim for unpaid wages and overtime under the Fair Labor Standards Act (FLSA).⁵

When low-road employers take advantage of workers, fear of immigration consequences, it has a negative impact on all workers and permits bad

Op 1248 (N.Y. Feb 21, 2006) (Holding undocumented workers are not precluded from recovering lost earnings in tort).

2 535 U.S. 137 (2002).

3 U.S. Department of Justice, District of Kansas press release, “Six Illegal Aliens Who Worked For Cessna Have Pleaded Guilty” (August 28, 2006), *available at* <http://www.usdoj.gov/usao/ks/press/Aug06/Aug28b.html>.

4 *Correa v. Weymouth Farms, Inc.*, 664 N.W.2d 324 (2003).

5 *Conteras v. Corinthian Vigor Ins. Brokerage Inc.*, 25 FSupp.2d 1053 (N.D. Cal. 1998).

employers to obtain an unfair advantage over high-road employers. Congress recognized this when it enacted the law providing for sanctions against employers who hire undocumented workers. It specifically highlighted the importance of ensuring that the labor and employment laws protect all workers, regardless of immigration status.⁶ Immigration and Customs Enforcement (ICE) also recognizes this. ICE itself has a policy discouraging investigators from responding when there is an existing labor dispute, in recognition that unscrupulous employers may use ICE to retaliate against workers.⁷

However, the reality is that many immigrants fear accessing agencies such as the State Department of Labor (DOL) out of fear that accessing a government agency could lead to immigration proceedings. This perception can create serious problems for agencies that are primarily responsible for enforcing workplace protections. Workers are in the best position to identify violations of labor and employment rights. State DOL agents can best do their job with the cooperation of workers who can provide them with necessary information and report violations of labor and employment laws. Their job is much more difficult if they are identified as immigration agents. An extreme example of this took place in July 2005 in North Carolina when ICE agents posed as OSHA agents in order to conduct a workplace raid. Following the raid, Allen McNeely, the head of the North Carolina Labor Department's Occupational Safety and Health division was strongly critical of that choice, saying that "the ruse eroded trust between the Labor Department and the workers it is trying to keep safe," and further: "We are dealing with a population of workers who need to know about safety," McNeely said. "Now they're going to identify us as entrappers."⁸

While the New York State DOL is not enforcing immigration law and does not have the authority to do so, as discussed below, it should take steps to dispel immigrant workers' fears in order to effectively enforce wage and hour laws. Workers' immigration status is not relevant to DOL's ability to enforce wage and hour rights. Following the Supreme Court's decision in Hoffman Plastics, the New York State Attorney General issued a formal opinion to the NY State DOL making it clear that the Hoffman decision had no bearing on

6 H.R. Rep. No. 99-682, pt. 2, at 8-9, *reprinted* in 1986 U.S.C.A.N. 5662 (1986).

7 ICE Operations Instruction 287.3a. (redesignated April 28, 2000 as 33.14(f)) of the SAFM) <http://uscis.gov/iplbin/ipext.dll/inserts/slb/slb-1/slb-45859/slb-53376/slb-53401?i=templates&n=document-frame.htm#slb-c12873a>

8 Associated Press, "State labor officials complain about immigrant arrests" (July 8, 2005).

DOL enforcement of wage and hour laws.⁹ However, certain routine practices may unintentionally create the impression that DOL is screening workers for immigration status.

For example, the DOL complaint form includes a space for a social security number (SSN). Workers may not be aware that a SSN is not required to file a complaint with DOL. DOL can make it clear that workers are not required to provide a SSN. This is good policy because it will maximize the effectiveness of the agency: the perception that SSNs are required to file a complaint deters immigrants from coming forward. SSNs are not necessary for assessment of a wage claim's validity or for the enforcement of the wage and hour laws and *even if* the DOL has a valid administrative convenience interest in requiring wage claimants to provide an SSN, these interests are outweighed by the primary interest in ensuring that all workers are paid the basic minimum wage and overtime pay. Moreover, the federal Privacy Act limits states' ability to condition benefits, rights or privileges under law on disclosure of a SSN and requires state agencies that collect SSNs to inform individuals "whether that disclosure is mandatory or voluntary, by what statutory or other authority such number is solicited, and what uses will be made of it."¹⁰

Additionally, actions taken at the local level that seek to engage in enforcement of immigration law can lead to increased confusion and fear among immigrant communities with respect to which agencies are enforcing immigration law; thus pushing already vulnerable workers further underground. For example, the Suffolk County legislature recently passed a local law creating penalties against county contractors who employ undocumented immigrants. Federal law already controls in this area; however this was part of a range of efforts taken by the Suffolk County Executive to engage in control of immigration at the local level, as noted in an August 2006 *New York Times* editorial describing the approach as "vigilante governance, a one-note policy fueled by resentment and indignation."¹¹

⁹ See N.Y. Attorney General Opn. No. 2003-F3. The decision of the United States Supreme Court in *Hoffman Plastic Compounds, Inc. v. National Labor Relations Board*, 535 U.S. 137 (2002), does not preclude the New York State Department of Labor from enforcing State wage payment laws on behalf of undocumented immigrants. (October 21, 2003) available at: http://www.oag.state.ny.us/lawyers/opinions/2003/formal/2003_13.html.

¹⁰ The applicable section of the Privacy Act was not codified but is available at 5 USC 552a (note).

¹¹ Editorial: The Same Old Note on Immigration, *New York Times* (Long Island, August 13, 2006).

It is inappropriate for local governments to engage in duplicative or even contradictory regulation of immigration law. As the U.S. Supreme Court has observed, “Power to regulate immigration is unquestionably exclusively a federal power.”¹² States and localities are specifically pre-empted from creating sanctions relating to the employment of undocumented immigrants. This is solely within the purview of the federal government. The Immigration Reform and Control Act provides “[t]he provisions of this section preempt any State or local law imposing civil or criminal sanctions . . . upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens.”¹³ The legislative history of the IRCA explains that: “[t]he penalties contained in this legislation are intended to specifically preempt any state or local laws providing civil fines and/or criminal sanctions on the hiring, recruitment or referral of undocumented aliens.”¹⁴

Moreover, it is inappropriate for state or local agencies to engage in enforcement of immigration law for the critical reason that state and local agents lack the training and expertise to navigate the complexities of immigration law. Though laypeople often talk in terms of citizen/noncitizen or documented/undocumented, there is not such a bright line. In addition to citizenship and legal permanent residence (green card holder), there is an alphabet of visa categories from A to V as well as status as an asylee, temporary resident, or temporary protected status.¹⁵ A person can transition from one status to another over time and depending on circumstances.

Because of this complexity, one of the risks associated with requiring state agents to make determinations of immigration status is that it can lead to racial or ethnic profiling and charges of discrimination. An example of this can be found in the aftermath of “Operation Restoration,” a collaboration between local police and Border Patrol agents in Chandler, Arizona. An investigation into “Operation Restoration” by the State Attorney General’s

¹² *DeCanas v. Bica*, 424 U.S. 351, 354 (1976). See also *Fiallo v. Bell*, 430 U.S. 787, 792 (1977) (“Over no conceivable subject is the legislative power of Congress more complete.”); *Toll v. Moreno*, 458 U.S. 1, 10 (1982) (The Supreme Court has “long recognized the preeminent role of the Federal Government with respect to the regulation of aliens within our borders.”).

¹³ 8 U.S.C.A. §1324a(r)(2).

¹⁴ H.R. Rep. No. 99-582(1), ct 58 (1986) *reprinted in* 1986 U.S.C.A.N. 5649, 5662.

¹⁵ See U.S. Citizenship and Immigration Services, Immigration Classifications and Visa Categories, available at: <http://www.uscis.gov/portal/site/uscis/menuitem.5c9f9bb95919135666f614176543f6d1d/?vgnextoid=e6cc08875d714d010vgnVCM1000004813d6d1RCRD&vgnextchannel=e6d408875d714d010vgnVCM1000004813d6d1RCRD>.

office concluded “without a doubt that residents of Chandler, Arizona were stopped, detained, and interrogated by officers...purely because of the color of their skin.” Furthermore, the roundups “greatly harmed the trust relationship between the Chandler Police and many of the city’s residents.”¹⁶ In 1999, the Chandler City Council unanimously approved a \$400,000 settlement of a lawsuit stemming from the police role in the roundups.¹⁷

It is within this context—one in which immigrant workers are fearful that efforts to enforce their labor rights will result in deportation and in which the perils outweighing state and local enforcement of immigration law far outweigh its benefits—that New York State must identify ways in which it can affirmatively advance the conditions of Latino immigrant workers, and by extension, all New Yorkers.

New York State Should Ensure Meaningful Enforcement of Wage and Hour Laws

Unpaid or underpaid wages are a major issue faced by low-wage immigrant workers. The Urban Institute recently found that two million immigrants nationwide earn less than the minimum wage.¹⁸ Employers’ failure to pay all of the wages due has a serious impact on workers who are already earning low wages. The U.S. Department of Labor Bureau of Labor Statistics reported that, in 2003, “black and Hispanic or Latino workers continued to be more than twice as likely as their white counterparts to be among the working poor.”¹⁹ Employers are particularly emboldened to cut corners on wage and hour laws in a context in which they are unlikely to face serious consequences for doing so. Though the passage in 1997 of the Unpaid Wages Prohibition Act (UWPA) gave New York State one of the strongest wage enforcement laws in the country, New York’s wage and hour laws are being sorely under-enforced. In 2004, an investigation by *Newsday* revealed that enforcement of the minimum wage by the state Department of Labor (DOL) has seriously declined since 1994.²⁰

¹⁶ Karen Brandon, “U.S. Weighs Local Role on Immigration,” *Chicago Tribune* (Apr. 14, 2002).

¹⁷ American Immigration Lawyers Association, “DOJ Opinion on State and Local Police Enforcing Immigration Laws Bodes Ill for Low Enforcement Communities” (Apr. 9, 2002) *available at* <<http://www.aiala.org>>

¹⁸ Randolph Capps, Michael E. Fix, Jeffrey S. Passel, Jason Ost, & Dan Perez-Lopez, “Profile of Low-Wage Immigrant Workforce,” Urban Institute, Oct. 27, 2003.

¹⁹ U.S. Department of Labor, Bureau of Labor Statistics, *A Profile of the Working Poor*, 2003 (March 2005), *at* 1.

²⁰ Jordan Rau, “NY Labor Law Enforcement: A Fight for Fair Pay, State Labor Agency’s Reinforcement of Rules Requiring Proper Wage for Workers Has Waned During Pataki’s Tenure,” *New York Newsday*, April 11, 2004, p. A6.

A major problem is that absent strong enforcement of existing laws, the costs of violating wage and hour laws are actually lower—*even if caught*—than the costs of complying. This sends a perverse message to employers who might be inclined to cut corners. The New York State statute of limitations for violations of wage and hour laws is six years.²¹ The law specifically provides, “All employees shall have the right to recover full wages, benefits and wage supplements accrued during the six years previous to the commencing of such action, whether such action is instituted by the employee or by the commissioner.”²² However, in meetings with advocates, representatives from the State DOL indicated that, as a matter of practice, DOL only pursues two years’ worth of wages.²³

Workers are entitled to the full amount of wages, benefits or wage supplements they are due. If the agency settles with employers who have violated the law for less than the full amount, the message to employers is that there is no benefit to complying with the law. In cases where the violation is willful, DOL should also recover for workers liquidated damages of 25 percent of the full amount of wages, benefits or wage supplements due to the worker, as provided by New York law.²⁴ Moreover, the DOL should also seek the maximum civil²⁵ and criminal penalties²⁶ provided by the UWPFA. In conversations with advocates, representatives from the NY State DOL indicated that as a matter of policy, DOL did not seek liquidated damages or civil or criminal penalties under the UWPFA in administrative or civil actions.²⁷ Moreover, the experience of many workers is that the DOL settles claims with employers for less than the full amount due to the workers.²⁸

²¹ N.Y. LAB. L. § 198(3).

²² *Id.*

²³ Letter from Amy Carroll, MFY Legal Services for New York Low-Wage Worker Advocates Coalition to Charles Desjerno, Chief Labor Standards Investigator, NY State Department of Labor (Feb. 17, 2005) (on file with author).

²⁴ N.Y. LAB. L. § 198

²⁵ N.Y. LAB. L. § 218 (provides for civil penalty of double the amount due to the worker, or for escalating penalties for violations other than failure to pay wages, benefits or wage supplements).

²⁶ N.Y. LAB. L. § 198-a (increasing the range of criminal fines to \$500-\$20,000).

²⁷ Letter from Amy Carroll, MFY Legal Services for New York Low-Wage Worker Advocates Coalition to Richard Cuocolo, Director, Division of Labor Standards and Charles Desjerno, Chief Labor Standards Investigator, NY State Department of Labor (Sept. 28, 2005) (on file with author).

²⁸ Rau, “NY Labor Law Enforcement:...”

The new administration in Albany must take a new approach to wage and hour enforcement by the State DOL. The Campaign to End Wage Theft, a New York coalition of community and advocacy organizations, released a report, *Protecting New York's Workers: How the State Department of Labor Can Improve Wage and Hour Enforcement*, that provides concrete recommendations for reform.²⁹

Recommendations:

NY State DOL can and should aggressively enforce laws: create real costs for violations.

- The New York State DOL can and should seek unpaid wages going back a full six years.
- The New York State DOL can and should seek the full range of remedies available to workers as well as the maximum penalties for violations provided by the Unpaid Wages Prohibition Act (UWPA).
- The New York DOL should enforce the statutory daily overtime premiums (also called “spread-of-hours” pay) for low-wage workers for hours worked in excess of 10 hours in a day,³⁰ as courts have begun to do despite the NYDOL’s refusal to enforce.
- The New York DOL should promptly and thoroughly investigate complaints, and keep workers informed of progress.
- The New York DOL should identify employees who are misclassified as “independent contractors” when investigating wage claims and apply the Labor law expansively to include workers intended to be covered.³¹
- The New York State DOL can and should minimize workers’ risk of retaliation and maximize impact:
 - For example, DOL can use an individual complaint as a starting point for investigating an entire firm’s payroll practices to ensure the employer is held responsible for all violations.

²⁹ *Protecting New York’s Workers: How the State Department of Labor Can Improve Wage and Hour Enforcement* (Dec. 2006) is available at: http://brennancenter.org/dynamic/subpages/download_file_47027.pdf.

³⁰ 12 NYCRR § 142-2.4 (2006).

³¹ For more on the problem of misclassifying employees as “independent contractors” and the costs to the workers and to the public fisc, see 1099.d: Misclassification of Employees as Independent Contractors,” at <http://www.nelp.org/docuploads/independent%20contractor%20misclassification%2Epdf>, and Combating Independent Contractor Misclassification in the States: Models for Successful Reform, at <http://www.nelp.org/docuploads/COMBATING%20INDEPENDENT%20CONTRACTOR%20MISCLASSIFICATION%2Epdf>

- If DOL is investigating the entire firm's practices, it can also take steps to protect the anonymity of the worker who initiated the complaint.
- The New York State DOL can also build on the model developed with its Apparel Industry Task Force³² and pro-actively target for investigation and enforcement industries known for violations of wage and hour laws, drawing on enforcement data, field research and pooled intelligence from stakeholders.
- The New York State DOL can and should improve responsiveness to immigrant communities:
 - The NY State DOL can make clear statements that it is not enforcing immigration law or screening workers based on immigration status.
 - Moreover, it can internally examine its practices to identify any features of its interactions with workers and the public that might lead to the conclusion that it is screening workers based on immigration status and then take steps to change those practices or correct any misimpressions that may arise.
- The New York State DOL can improve outreach to immigrant communities by partnering with community groups that have their roots in those communities. Currently, the Labor Bureau of the NY State Attorney General's Office works closely with a number of community-based organizations.
- The New York State DOL can prioritize language access by ensuring that there are sufficient investigators with language and cultural skills to communicate effectively with immigrant worker communities and that all outreach materials are available in languages spoken by immigrant workers.
- The New York State DOL should take steps to make the agency more accessible, accountable, and transparent:
 - Provide comprehensive data on complaint-driven and investigation-driven enforcement, broken down by month, including data on the number of workers affected and wages recovered.
 - Record the industry classification code of all employers involved, and publish data by industry groups.
 - Make key forms, policy manuals, and procedures available to the public in a variety of languages.
 - Respond to additional requests for data made pursuant to the Freedom of Information Law (FOIL) within statutorily mandated timeframes.

³² For more information about the Apparel Industry Task Force, see: <http://www.labor.state.ny.us/workerProtection/LaborStandards/workprot/garment.asp>.

Possible Legislative Enhancements

Certain legislative changes could also increase the effectiveness of the NY State DOL. Some examples of such legislative changes are the following:

- Establish a private right of action for New York Labor Law rights that currently lack one, or where the law is unclear. A model is provided by the California Labor Code’s Private Attorneys General Act of 2004.³³
- Close loopholes for employers who knowingly misclassify their employees as “independent contractors.”³⁴
- Pass stricter prohibitions against employers who retaliate against complaining employees.³⁵
- Enact legislation requiring state agencies to do outreach and provide know-your-rights materials in multiple languages.³⁶
- Pass legislation assuring that all workers, regardless of immigration status, are protected by labor and employment laws.³⁷
- Toll statute of limitations pending agency investigation of wage and hour complaints.
- Permit third party (i.e., labor and community groups) complaints for wage and hour violations.³⁸
- Enhance liquidated damages to workers for unpaid wages. Current law provides for liquidated damages of only 25 percent of the total amount owed. Double or even triple damages would have a more powerful deterrent effect.

³³ Cal. Labor Code § 2698-2699.5.

³⁴ See NIEP Fact Sheet: Independent Contractor Legislation in the States: Models for Successful Reform, available at <http://www.niep.org/docUploads/COMBATING%20INDEPENDENT%20CONTRACTOR%20MISCLASSIFICATION%2Epdf>

³⁵ See e.g., SF Administrative Code CH. 12R(6).

³⁶ See MA Gen. Laws Ch. 151A § 62A, setting benchmarks for making state agency materials available in certain languages

³⁷ See CA Gov’t Code § 7285.

³⁸ For example, the San Francisco Minimum wage provides that “any entity a member of which is aggrieved by a violation of this Chapter, or any other person or entity acting on behalf of the public as provided for under applicable state law, may bring a civil action in a court of competent jurisdiction against the Employer or other person violating this Chapter.” San Francisco Admin. Code § 12R (7) (c) <http://www.sfgov.org/site/uploadedfiles/cise/mwo/MWOrdinance.pdf>; see, also, IL day labor law, Public Act 094-0511; CAs AB 633.

Rulemaking Solution

- *Equal rights to overtime pay.* The NY State Department of Labor, can, through rulemaking, eliminate the provision in the Wage Order for Miscellaneous Industries that subjects certain categories of workers to lesser overtime provisions. 12 NYCRR § 142-2.2 can be amended to provide full overtime protections of 1 and ½ times the regular rate of pay to all workers for more than 40 hours of work performed in a week.

New York State Should Provide Equal Access to Driver's Licenses

For over four years, the New York State Department of Motor Vehicles (DMV) has created barriers for hundreds of thousands of immigrant New Yorkers who need to obtain and maintain their driver's licenses. Approximately 300,000 immigrants throughout New York State have faced suspension of their driver's licenses over the past two years. During that time, many have seen their licenses expire and were unable to renew them. Countless others will never be able to obtain a driver's license in New York. In addition to this, DMV is stamping visa information on the face of certain driver's licenses. The immigration status information is often technically incorrect. Moreover, the stamping flags the bearer of the driver's license as foreign, creates confusion and misunderstanding, and makes the bearer more vulnerable to discrimination and mistreatment based on immigration status.

These practices have serious social and economic consequences that extend beyond the individual immigrants who are denied licenses or who receive driver's licenses with visa information stamped on them. Immigrants contribute substantially to the social, cultural and economic well-being of New York State. Denying licenses to hundreds of thousands of immigrant New Yorkers is simply bad policy, as is providing visa information on driver's licenses.

Legal and policy context

While, in practice, applicants for driver's licenses face obstacles to obtaining them based on immigration status, a plain reading of existing New York law and regulations indicates that immigration status is not a bar to access to driver's licenses and non-driver identification cards. The focus of the statute is on proving identity, age and fitness. There is also a requirement that the department of motor vehicles capture applicants' SSNs.³⁹ While SSNs are not available to cer-

³⁹ NY State Vehicle and Traffic Law § 502 provides in part: Application for a driver's license shall be made to the commissioner. The fee prescribed by law may be submitted with such application. The applicant shall furnish such proof of identity, age,

tain immigrants, such as those who are not authorized to work in the U.S. and who are not eligible for certain state or federal benefits, the requirement does not in itself provide a bar to eligibility for driver's licenses. As clarified in motor vehicle regulations, those who are not eligible for SSNs are simply required to prove that they are not eligible in place of providing a number.

Regulations issued by the Department of Motor Vehicles make it clear that applicants for both driver's licenses and non-driver identification cards are only required to provide SSNs if they are in fact eligible for a SSN.⁴⁰ As discussed below, many categories of immigrants and non-immigrants are not eligible for SSNs—even fewer since a 2003 change in Social Security regulations, and these requirements were not designed to create a bar to all applicants who are not able to obtain a SSN. In practice, the proof the New York Department of Motor Vehicles has been requiring is a letter from the Social Security Administration dated within 30 days of the application.⁴¹ This requirement was established by the Commissioner of Motor Vehicles through “the issuance of an internal memorandum (referred to by DMV as a ‘mailbag’).”⁴²

The New York Department of Motor Vehicles (DMV) has been requiring applicants for driver's licenses and non-driver IDs and applicants to

and fitness as may be required by the commissioner. The commissioner may also provide that the application procedure shall include the taking of a photo image or images of the applicant in accordance with rules and regulations prescribed by the commissioner. In addition, the commissioner also shall require that the applicant provide his or her Social Security number. The social security number requirement was included in 1995. Chapter 81 of the Laws of 1995.

40 15 NYCRR §3.9(a) provides that: An applicant for a license or a non-driver identification card or an application renewing such a license or such identification card must submit his or her social security number or provide proof that he/she is not eligible for a social security number.

41 The DMV website states: If you are not eligible for a Social Security Card, you must provide a letter or form SSA-L676 from the US Social Security Administration (SSA) that states that you are not eligible. The SSA letter or form must have been issued no more than 30 days before the date of your application. You must also show the Immigration and Naturalization Service (INS) documents that the SSA used to determine that you are not eligible for a Social Security Card. New York State DMV: Proofs of Identity and Date of Birth Required to Apply for a Driver License, a Learner Permit or a Non-driver Photo ID Card <http://www.nydmv.state.ny.us/idlicense.htm>.

42 *Cubas v. Pataki*, No. 112371/04, Decision and Order of Karen S. Smith, dated May 9, 2005, slip op., at 4, available at: <http://www.courts.state.ny.us/press/dmvmfindex.pdf>. The May 9 Decision and Order cites Mailbag #79-2001, September 6, 2001.

renew such documents to provide a SSN only since the 1995⁴³ amendment to the Vehicle and Traffic Law. This requirement came as part of New York's "welfare reform" and was included to help enforce child support requirements. Through Chapter 81 of the Laws of 1995, the state legislature amended Section 502 of the Vehicle and Traffic Code to provide, "[i]n addition, the commissioner also shall require that the applicant provide his or her SSN."⁴⁴ At the same time, the legislature also amended the Section 510 of the Vehicle and Traffic Law to include the following section:

4-e. Suspension and disqualification for failure to make child support payments. (1) The commissioner, on behalf of the department, shall enter into a written agreement with the commissioner of social services, on behalf of the department of social services, which shall set forth the procedures for suspending the driving privileges of individuals who have failed to make payments of child support or combined child and spousal support.⁴⁵

In brief, someone who was found to be delinquent in his or her child support or child and spousal support payments could face suspension of his or her license for that failure. Thus the collection of SSNs by DMV specifically relates to tracking people who owe child and spousal support.

Not everyone is eligible to obtain a SSN. In particular immigrants with a range of different statuses who do not have work authorization, are unlikely to be eligible for a SSN. In 2003, the Social Security Administration changed its regulations placing serious restriction on access to SSNs for immigrants who needed them to obtain state driver's licenses. Section 422.104 of the Social Security regulations was amended to define what constitutes a "valid 'nonwork reason' for assigning an SSN to an alien who does not have evidence of authority permitting him or her to work."⁴⁶ In particular, the Social Security Administration stated that it would "no longer assign an SSN to an alien for any nonwork purpose other than to receive Federal, state or local benefits as described in Sec. 422.104."⁴⁷

The notice of proposed rulemaking that appeared in 68 Fed. Reg. 14563 (March 26, 2003) drew comment from a number of private individuals, orga-

43 S.B. 5380-A; A. 7984-A: Medicaid Reform—Reimbursement Programs—Welfare Reform: which, *inter alia* amended "the social services law and the vehicle and traffic law in relation to suspension of drivers' licenses of persons who are delinquent in the payment of child support."

44 Chapter 81 § 209.

45 Chapter 81 § 211.

46 Final Rules: 20 CFR Part 422 at 55305.

47 *Id.*

mizations, states and even a foreign government concerned about its effect on applicants for driver's licenses. In response to the concerns expressed during the period for comment, the Social Security Administration (SSA) acknowledged that the definition might present a challenge, but stated that “[w]e have encouraged states to develop an alternative identifier for several years,” and identified a resulting reduction in the number of states requiring SSNs and driver's license applicants.⁴⁸ The SSA went on to state that “[a]s issuing drivers' licenses is a State function, we continue to urge those few remaining states that require an SSN from all drivers' license applicants to develop an alternative identifier for those individuals affected by this rule change.”⁴⁹ The SSA also highlighted that “the primary use of SSNs is for SSA to track earnings over a worker's lifetime.”⁵⁰

Only South Dakota and the District of Columbia require SSNs from all driver's license applicants with no exceptions.⁵¹ As discussed above, New York is one of the vast majority of other states that has adopted an alternative, allowing those who are not eligible for a SSN to provide proof that they are not eligible for one.

Current DMV practice

As discussed above, the SSN requirement does not create an inflexible barrier to immigrants seeking to obtain driver's licenses. However, many immigrants are facing inflexible barriers to access to driver's licenses due to DMV practices that do not reflect existing law or regulations. These policies were not adopted through a formal and public rulemaking process, but through internal guidance memoranda issued from the Commissioner of Motor Vehicles to DMV offices. The process through which these policies, which have affected hundreds of thousands of New Yorkers were developed only came to light through the discovery process in litigation filed challenging DMV practices.

Around April 19, 2002 DMV adopted a new series of policies that have seriously impacted immigrant applicants for driver's licenses. Through an internal guidance, or “mailbag,” DMV instituted a “one year/six month requirement” for immigration status; ceased to accept foreign birth certifi-

⁴⁸ 20 CFR Part 422 of 55306.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ See, National Immigration Law Center, Overview of States' Driver's License Requirements, available at http://www.nilc.org/immispos/DLs/stcte_dl_qamns_omvw_071205.pdf.

catas to establish identity and/or age; and developed a “Temporary Visitors Program” involving specially marked driver’s licenses.⁵²

The Immigration Status Requirement

The “one year/six month requirement” means that an applicant has to provide Department of Homeland Security (DHS) documentation establishing his or her legal presence in the U.S. and that he or she has a status issued for at least a year’s duration with at least six months remaining at the time of application. Driver’s license applicants who provide a SSA ineligibility letter instead of a SSN are being required to also provide “the DHS documentation submitted to SSA to obtain the ineligibility letter. Furthermore the DHS documentation must establish that the applicant meets the legal presence requirement and satisfies the one year/six month rule.”⁵³

The DMV now requires that almost all immigration documents that can be used to satisfy identification requirements be issued by the U.S. Citizenship and Immigration Services (USCIS) for one year or more and have six months of validity remaining.⁵⁴

The “Temporary Visitor Program”

According to the papers filed in the litigation, the “Temporary Visitor Program” was developed around January 2003, “to provide temporary licenses and non-driver identification cards to persons whose DHS documents show that they are not seeking to remain in this country permanently.”⁵⁵ Since that time, DMV has been marking certain immigrants’ and asylees’ licenses with the designation “Temporary Visitor exp. _/_/_/_(date). This practice has the effect of marking an individual a “temporary visitor” which is a technical term. This leads to confusion on the part of employers and others and often to discrimination against the holder of a stamped driver’s license.

SSN Verification And The No-Match Letters

At some point in 2002, DMV began a process of checking its database with

⁵² *Cubas v. Pataki*, No. 112371/04, Decision and Order of Karen S. Smith, dated May 9, 2005, slip op., at 6.

⁵³ *Cubas v. Pataki*, Slip op at 6.

⁵⁴ See, New York State DMV: Proofs of Identity and Date of Birth Required to Apply for a Driver License, a Learner Permit or a Non-driver Photo ID Card <http://www.nydmv.state.ny.us/idlicense.htm>.

⁵⁵ *Cubas v. Pataki*, Slip op at 6.

the SSA's database and found that it was "unable to verify the SSN for approximately 600,000 persons" out of the total "11.5 million persons holding New York State drivers' licenses."⁵⁶ As a result of this process, DMV sent letters to holders of driver's licenses whose names and SSNs as provided to DMV do not match the SSA's information informing them that they need to correct their information with DMV within 15 days or face possible suspension of their licenses.⁵⁷ People who have received such letters are not able to renew expired licenses, register a car or make a change of address to their licenses.

This program together with the "one year/ six month requirement" has created a system in which hundreds of thousands of driver's licenses holders face permanent expiration of their licenses and countless of others are never able to obtain driver's licenses in the first instance.

Federal Context: The REAL ID Act

The REAL ID Act was originally introduced in January 2005 by Representative James Sensenbrenner (R-WI) as H.R. 418. On February 8, 2005, The National Governors Association and the American Association of Motor Vehicle Administrators sent a letter to the House leadership opposing H.R. 418 and expressing continued preference for the driver's license and ID provisions of the Intelligence Reform and Terrorism Prevention Act of 2004.⁵⁸ The H.R. 418 passed in the House of Representatives by a vote of 261-161 on February 10, 2005.⁵⁹ The *Wall Street Journal* strongly criticized the REAL ID Act in a February 17 editorial, stating "Aside from the privacy implications of this show-us-your-papers Sensenbrenner approach, and the fact that governors, State legislatures and motor vehicle departments have denounced the bill as expensive and burdensome, there's another reality: Even if the REAL ID Act had been in place prior to 9/11, it's unlikely that the license provisions would have prevented the attacks."⁶⁰

⁵⁶ *Cubas v. Pataki*, Slip op at 6-7.

⁵⁷ Letter from N.Y. Department of Motor Vehicles to DMV Customer dated March 5, 2004 regarding inability to verify social security number (on file with author).

⁵⁸ Letter from National Governors Association and American Association of Motor Vehicles Administrators to Dennis Hastert, Thomas Delay and Nancy Pelosi, dated February 8, 2005, available at <http://www.nga.org/portals/site/nga/menuitem.cbb67818b34088d18c27811050101000/?vgnextoid=31087618c4042010VgnVCM1000001c01010dRCRD>.

⁵⁹ <http://thomas.loc.gov/cgi-bin/bdquery/z?d109:HR00418:@@R>.

⁶⁰ Editorial, "National ID Party" *Wall Street Journal*, Feb. 17, 2005, included in Senate Record, <http://thomas.loc.gov/r109/r109d20qps.html> Page: S3980

A bill comparable to REAL ID was not introduced in the Senate. However the bill gained significant traction when it was attached to the first major “must-pass” piece of legislation that came up. Pursuant to H. Res. 151, the text of H.R. 418 was appended as Division B to the end of H.R. 1268, the House version of the Emergency Supplemental Appropriations Bill on March 15, 2005.⁶¹ On March 17, 2005 the National Governors Association, The National Conference of State Legislatures and the American Association of Motor Vehicle Administrators sent a letter to Senate leadership expressing their opposition to H.R. 418, now attached to H.R. 1268.⁶² While the REAL ID Act was attached to the House version of the Emergency Supplemental Appropriations Bill, it was never attached to the Senate version. During the April 20, 2005 Senate debate about the Emergency Supplemental Appropriations Bill, Senator Durbin spoke out in opposition to the REAL ID Act: “The REAL ID Act is a measure the House Republicans attached to the supplemental appropriations bill. It has little or nothing to do with appropriations for tsunami victims, or appropriations for our men and women in uniform. It is a separate immigration matter, and a very controversial one. They chose this bill because they know we need this bill. It needs to be signed by the President. So they are hoping to push through this change in immigration law on a bill that is a must-pass bill. We have had no hearings, no debate, no votes in the Senate on this so-called REAL ID Act.”⁶³ The REAL ID Act was included in the Supplemental Conference Report on May 3, 2005, and was ultimately included in the final agreement that was passed in the House and Senate.⁶⁴

The REAL ID Act Provisions

The REAL ID Act of 2005, which was attached as Division B of the supplemental appropriations bill, created minimum standards for federal recognition of driver’s licenses and identification cards issued by the states. Specifically, the law states that “[b]eginning 3 years after the date of the enactment of this [law], a Federal agency may not accept, for any official purpose, a driver’s

⁶¹ <https://thomas.loc.gov/cgi-bin/bdquery/z?d1109:H.RES:151>.

⁶² Letter from National Governors Association, National Conference of State Legislatures and American Association of Motor Vehicle Administrators to William H. Frist and Harry Reid, dated March 17, 2005, *available at*: <http://www.ncsl.org/statefed/GPPIRealID.htm>.

⁶³ Page: S3977 <http://thomas.loc.gov/r109/r109cd20app5.html>

⁶⁴ Public Law 109-13, Emergency Supplemental Appropriations for Defense, the Global war on Terror and Tsunami Relief, May 11, 2005

license or identification card issued by a State to any person unless the State is meeting the requirements of this section.”⁶⁵ The law provides minimum features required on each driver’s license and identification card.⁶⁶

It also sets minimum issuance standards including “evidence of lawful status;” evidence that the applicant is

- (i) a citizen or national of the United states;
- (ii) is an alien lawfully admitted for permanent or temporary residence in the United States;
- (iii) has conditional permanent resident status in the United States;
- (iv) has an approved application for asylum in the United States or has entered into the United States in refugee status;
- (v) has a valid, unexpired nonimmigrant visa or nonimmigrant visa status for entry into the United States;
- (vi) has a pending application for asylum in the United States;
- (vii) has a pending or approved application for temporary protected status in the United States;
- (viii) has approved deferred action status; or
- (ix) has a pending application for adjustment of status to that of an alien lawfully admitted for permanent residence in the United States or conditional permanent resident status in the United States.⁶⁷

Additionally, it provides that for applicants with the statuses described in sections v-ix, the state is only permitted to issue a temporary driver’s license or identification card which would expire when the applicant’s authorized stay in the United States expired.⁶⁸ If the applicant has an indefinite period of authorized stay, the license or identification card is to expire in one year.⁶⁹ Moreover, the card or license is to have a clear indication that it is temporary and must state the date on which it expires.⁷⁰ In this respect, the

⁶⁵ Public Law 109-13, § 202(c)(1)

⁶⁶ Public Law 109-13, § 202(b): (1) The person’s full legal name. (2) The person’s date of birth. (3) The person’s gender. (4) The person’s driver’s license or identification card number. (5) A digital photograph of the person. (6) The person’s address of principle residence. (7) The person’s signature. (8) Physical security features designed to prevent tampering, counterfeiting, or duplication of the document for fraudulent purposes. (9) A common machine-readable technology with defined minimum data elements

⁶⁷ Public Law 109-13, § 202(c)(2)(B).

⁶⁸ *Id.*, § 202(c)(2)(C).

⁶⁹ *Id.*

⁷⁰ *Id.*

card would be similar to the one issued in New York under the Temporary Visitors Program.

In addition to providing minimum requirements for state-issued driver's licenses and identification cards, the REAL ID Act places affirmative requirements on issuing agencies regarding verifying documents provided by applicants. State agencies are required to verify the "issuance, validity, and completeness of each document" provided by applicants with the agency that issued the document.⁷¹ It also clearly specifies that "[t]he State shall not accept any foreign document, other than an official passport,"⁷² and it requires states to enter into a memorandum of understanding with the Secretary of Homeland Security by September 11, 2005 to "routinely utilize the automated system known as Systematic Alien Verification for Entitlements ...to verify the legal presence status of a person, other than a United States citizen, applying for a driver's license or identification card."⁷³

The Act goes on to provide detailed specifications regarding the collection and maintenance of records; mandatory photographs; confirmation of SSNs with the Social Security Administration; ensuring physical security of locations where licenses and identification cards are produced; training staff on fraudulent document recognition; limitation on period of validity of licenses and identification cards; and other particulars. Moreover, a state complying with the driver's license provisions of REAL ID would have to "provide access to all other States to information contained in the motor vehicle database," which would have to include "all data fields printed on driver's licenses and identification cards: as well as "motor vehicle drivers' histories, including motor vehicle violations, suspensions, and points on licenses."⁷⁴

In the case of a state driver's license or identification card that does not comply with all of the REAL ID requirements, the state would be required to mark that license or identification card as distinct. In particular, it would have to clearly state "on its face that it may not be accepted by any Federal agency for federal identification or any other official purpose;" and use "a unique design or color to alert Federal agency and other law enforcement personnel that it may not be accepted for any such purpose."⁷⁵

⁷¹ *Id.* § 202(c)(3)(A).

⁷² *Id.* § 202(c)(3)(B).

⁷³ *Id.* § 202(c)(3)(C).

⁷⁴ *Id.* § 202(c)(3)(d)(12)-(13).

⁷⁵ *Id.* § 202(c)(3)(d)(11).

The Drivers license implications of REAL ID

Under REAL ID, state drivers' license records, containing more information than before, would be digitized and stored in an electronic format.⁷⁶ They would be required to link electronically to all other states' databases.⁷⁷ As the number of people with access to these extensive records increases, so do the opportunities for abuse of this confidential information. By mandating such a comprehensive and accessible database, the REAL ID Act increases the chances of personal security breaches.

As the National Governors' Association has stated, the REAL ID Act places DMV employees in the inappropriate position of enforcing federal immigration law. Under the new law, DMV employees would be expected to verify the authenticity of birth certificates, foreign passports, visas, and other documents. The employees are not currently trained for such responsibilities nor are there resources to support such extensive training. In Tennessee, where DMV employees were required to perform such verifications, the high rate of error and delay has created systemic problems of mistaken denials and discrimination.⁷⁸ Shifting these responsibilities to the states on a nationwide scale will have serious social and economic consequences.

The increased time and resources that it will take to implement REAL ID's drivers' license provisions will impact all New Yorkers—citizens and non-citizens alike. Every step of the process will take more time. "If you think a trip to the division of motor vehicle is a bad experience today, wait until the REAL ID takes effect," Sen. Dick Durbin, D-Ill., has said.⁷⁹ The DMV will be required to verify the authenticity of each applicant's documents with the agency that issued them. This means that each applicant's birth certificate, Social Security card, utility bills, and so on will have to be verified by the agency that issued the document. The current level of frustration with drivers' license renewal processes will exponentially increase as drivers are required to make multiple trips and take extra steps for verification.

The passage of the REAL ID Act is another example of the federal government placing unfunded mandates on the states. In a March analysis of

⁷⁶ *Id.* § 202(c)(3)(d)(1), (13).

⁷⁷ *Id.* § 202(c)(3)(d)(12).

⁷⁸ See Tennessee Immigrant and Refugee Rights Coalition, "The Tennessee Driving Certificate—Background, Pitfalls, and Lessons Learned" (June 2005), available at http://www.nilc.org/immpps/DLs/TN_cert_lessons_learned_0605.pdf.

⁷⁹ Suzanne Gamboa, "Republican senator joins Democrats in criticizing new driver's license rules," *Associated Press*, May 11, 2005.

the proposed 2006 federal budget, the National Conference of State Legislatures (NCSL) identified at least \$30 billion in federal unfunded mandates and cost shifts to states—on top of mandates and cost shifts in the previous two fiscal years worth at least \$51 billion.⁸⁰ In September 2006, NCSL, the National Governors Association (NGA), and the American Association of Motor Vehicle Administrators (AAMVA) issued a report estimating that the cost to states of implementing REAL ID to be more than \$11 billion.⁸¹

Post-REAL ID: states are not required to comply

The House of Representatives' conference report on H.R. 1268 highlights that "202(a)(1) states that the law is binding on Federal agencies – not the states. Consequently, this Act does not directly impose federal standards with respect to states' issuance of driver's licenses and personal identification cards. The application of the law is indirect, and hence states need not comply with the listed standards."⁸² In fact, states are considering refusal to comply with the REAL ID standards. In March 2006, the New Hampshire House of Representatives passed House Bill 1582 prohibiting the state from participating in REAL ID's driver's licenses provisions. In August 2006, NCSL's Standing Committee on Transportation adopted a "Policy on Implementation of the REAL ID" calling the federal government to take numerous steps to address its concerns about REAL ID and ultimately calls on the federal government to "Repeal the REAL ID Act if Congress does not provide for full funding or the federal government does not provide for the points listed in this policy on or before December 31, 2007."⁸³

New York State can and should refuse to adopt REAL ID's driver's licenses provisions. In December of 2005, the New York City Council passed Resolution 1009-A expressing its continued opposition to the federal REAL ID Act and calling on New York State to opt out of its driver's license

⁸⁰ Phil Magers, "Analysis: States might challenge Real ID," *UPI*, May 12, 2005.

⁸¹ National Governors Association, National Conference of State Legislatures, American Association of Motor Vehicle Administrators, "The Real ID Act: National Impact Analysis," (September 2006), *hereinafter*, NGA, NCSL, AAMVA Report.

⁸² Conference Report on H.R. 1268 – (House of Representatives - May 03, 2005) of H2873.

⁸³ National Conference of State Legislatures, Standing Committee on Transportation, "Policy on Implementation of the REAL ID", available at <http://www.ncsl.org/statedet/transportation.htm#REALID>.

provisions.⁸⁴ The REAL ID Act does not include penalties to states that do not adopt its requirements. The consequence is that the state-issued license will not be accepted for federal identification purposes. The significance of this will greatly depend on whether all states choose to adopt the REAL ID standards or not.

What New York can do to provide immigrants with equal access to driver's licenses

As discussed above, no change in law or regulations would be required to provide immigrants with access to driver's licenses. The governor and the DMV can simply change the agency practices that currently bar access based on immigration status. However, the legislature can also pass legislation removing the DMV's discretion to bar access based on immigration status. Such legislation was introduced in both houses of the legislature in the past session as A 612-A and S 7388.

The following is a list of elements of policy or legislation that would provide a lawful and secure means for New Yorkers to get driver's licenses.

- ***Refusal to adopt REAL ID requirements.***
- ***Eliminate immigration status requirements.*** The best use of DMV resources and staff time is on ensuring that driver's license applicants provide secure identity documents and that they know how to drive. They should not be serving an immigration law enforcement role. Policy or law should specifically provide that eligibility for a driver's license shall not be conditioned on a particular immigration status.
- ***One driver's license for all workers.*** A system that provides different or marked driver's licenses based on holder's immigration status subjects immigrants to discrimination and assumptions about their status as well as their rights in this country.
- ***Provide for acceptance of secure identity documents that immigrants can provide.*** There are a number of different documents that immigrants can provide that are secure and legitimate means of establishing identity and date of birth. Numerous other agencies and business recognize this. For example, foreign passports can be accepted without regard to I-94 or visa information as can consular identification documents.

⁸⁴ National Governors Association, National Conference of State Legislatures, American Association of Motor Vehicle Administrators, "The Real ID Act: National Impact Analysis," (September 2006), *hereinafter*, NGA, NCSL, AAMVA Report.

- *Provide acceptable alternatives to the Social Security Number.* For example, provide that instead of a Social Security Number, applicants can provide: an Individual Taxpayer Identification Number (ITIN) or a letter or form from the United States Social Security Administration that states that the applicant is not eligible or sworn statement under the penalty of perjury, stating that the applicant does not have a Social Security Number.
- *DMV should not be called upon to enforce or assist in enforcement of immigration law.*

New York State Should Take Steps to Address the Specific Challenges Faced By Workers in Key Sectors Dominated by Immigrant Workers Earning Low Wages

Certain sectors that are characterized by low wages and poor working conditions are also pre-dominated by immigrant workers. Two examples of such industries are day labor and domestic work. While workers in those sectors face a range of abuses that are associated with their immigration status, the particular structures of the industries also leave workers vulnerable to abuse. New York State can adopt key legislative and policy strategies to address the specific challenges faced by workers in these industries.

New York State Should Provide Support for Community Job Centers for Day Laborers and Industry-Specific Wage and Hour and Health and Safety Protections

A recent report on day laborers in the New York metropolitan area of New York City, Westchester and Long Island revealed that on any given day, thousands of workers are either employed or seeking work throughout the region as a day laborer.⁸⁵ The report, which defines day labor as “looking for work daily in a public venue,”⁸⁶ also indicated that the vast majority of day laborers are men and that 88 percent of those surveyed were “migrant workers from Mexico, Central America, and South America.”⁸⁷ Day laborers face violations of their rights on a regular basis. According to a 2003 study focusing on day laborers in New York, 85 percent of all day laborers “report at least one type of abuse including paying less than the agreed upon amount, abandoned at the work site, bad checks ... in the form of

⁸⁵ Nik Theodore, Abel Valenzuela Jr. and Edwin Meléndez, “La Esquina (The Corner): Day Laborers on the Margins of New York’s Formal Economy,” 9 WorkingUSA: The Journal of Labor and Society 407 (Dec. 2006).

⁸⁶ *Id.* at 410.

⁸⁷ *Id.* at 412-413.

payment, no breaks or water at the work site, robbery, and threats.”⁸⁸

A major problem faced by day laborers is lack of enforcement of the day laborers’ existing workplace rights. For example, in spite of the wage and hour protections already afforded to day laborers under federal and New York State law, studies and anecdotal evidence show that day laborers experience pervasive wage and hour violations. Day laborers are currently protected by a range of state and federal labor and employment laws. These include wage and hour rights as well as occupational safety and health rights. Some examples of existing NY state wage and hour rights that apply to day laborers include the following: the right to minimum wage and overtime.⁸⁹ The right to an additional hour’s pay at the minimum wage for any day in which the spread of hours worked exceeds 10 hours or where they work a “split shift” of non-consecutive hours.⁹⁰ The right to “call-in pay”: If, by request or permission of an employer they report for work on any day, they have a right to be paid the lesser of 4 hours or the regularly scheduled shift at the minimum wage.⁹¹ Day laborers also have the right to not have unauthorized deductions taken from their paycheck unless the deductions are required by law.⁹² Moreover, there are limitations on the amount an employer may deduct for meals provided to workers.⁹³ In spite of these protections, the results from the New York survey indicate that nearly 50 percent of day laborers experienced non-payment and/or underpayment of wages.⁹⁴ The short nature of the employment relationship, multiple barriers to enforcement resources and the lack of strong protective wage and hour laws render day laborers particularly vulnerable to non-payment of wages.

Wage and hour problems confronting day laborers take many forms and include: complete non-payment of wages; payment of less than the agreed upon rate; payment by checks with insufficient funds and late payment of wages. Furthermore, as the GAO report notes there are certain lawful practices such as permissible wage deductions under the FLSA for items such as meals

⁸⁸ Abel Valenzuela Jr. and Edwin Meléndez, *Day Labor in New York: Findings From the NYDL Survey* (2003), at ii.

⁸⁹ NY LAB § 652; 12 NYCRR §§ 142-1.1, 142-2.2

⁹⁰ 12 NYCRR § 142-2.4 (2006)

⁹¹ 12 NYCRR § 142-2.3 (2006)

⁹² NY LAB. § 193.

⁹³ 12 NYCRR § 142-2.5 (2006)

⁹⁴ Valenzuela Jr. and Meléndez, *Day Labor in New York...*, table 15.

and transportation that can adversely impact day laborers, bringing their take-home pay well below the minimum wage.⁹⁵ Day labor employers often delay payments of promised wages until the completion of a job. Upon completion, day laborers are commonly left with less than promised or a void check.

Similarly, the occupational health and safety problems faced by day laborers are not simply due to lack of legal protection. Many day laborers fall within the jurisdiction of the Federal Occupational Safety and Health Administration (OSHA). Limited investigative resources, the fleeing nature of day labor employment and the complaint driven nature of OSHA enforcement result in a virtual absence of health and safety enforcement for day laborers. In theory, the complaint process that drives enforcement of the Occupational Safety and Health Act makes it possible for any employee to report a health and safety violation. In practice, fear of retaliation, the short term nature of day labor, and limited enforcement resources have severely restricted OSHA monitoring of day labor worksites. OSHA's focus on larger projects and employers results in a lack of oversight of smaller employers more likely to employ day laborers. Moreover, day laborers face workplace hazards outside of the traditionally understood workplace, such as injury while being transported to the worksite by their employer.

Needing to work to support themselves and their families, day laborers must often perform hazardous tasks for the lowest of wages. Fearful of retaliation or unaware of their rights, many day laborers are reluctant to report occupational hazards and injuries or unpaid wage claims. Because of this and because of the structure of the day labor industry, the United States General Accounting Office observed in a September 2002 report that government agencies charged with enforcing labor and employment laws are unable to do their job with respect to day laborers because they do not find out about violations.⁹⁶ Day laborers—particularly those who are not organized—are unlikely to complain to the Federal or State Departments of Labor, due to fear of retaliation, lack of awareness of rights or how to enforce them, and real or perceived lack of access to government agencies. Since both Departments of Labor are largely complaint-driven in their enforcement activities, labor and employment laws go unenforced throughout the industry.

⁹⁵ GAO Report, *Worker Protection: Labor's Efforts to Enforce Protections for Day Laborers Could Benefit from Better Data and Guidance* GAO-02-925, 2002, at 23.

⁹⁶ GAO Report...

Day labor community job centers help agencies enforce labor and employment laws

Both the New York studies and the GAO report identify day labor community job centers as effective and immediate means to address the labor violations faced by day laborers. In its report, the GAO concluded that an effective way for agencies to improve their enforcement efforts is to develop relationships with agencies that serve day laborers—such as day labor community job centers. In fact, GAO worked with groups that run day labor community job centers, including the Latin American Workers Center and the Workplace Project in New York to gather the information for its report.⁹⁷ In addition to helping government agencies improve their enforcement activities, day labor community job centers engage in a range of activities to address violations themselves. As described in the GAO report, day labor community job centers provide day laborers with rights education. Many provide workers with booklets to help them record information about jobs performed and hours worked. They help workers negotiate with employers for wages owed. When employers refuse to pay, they engage in direct action, such as picketing, to pressure employers to pay; they assist workers in filing claims with government agencies; sometimes they refer workers to private attorneys or to the State Attorney General's office.⁹⁸ Moreover, the New York report describes the broader mediating role played by centers: they monitor employer practices; they help organize and normalize the hiring process; they provide opportunities for workers to develop skills and find better jobs; they also help to mediate community tensions and involve other community stakeholders in addressing the challenges faced by day laborers.⁹⁹

Many cities and towns choose to support day labor job centers

Public officials and police around the country have spoken in support of day labor job centers.¹⁰⁰ A growing number of towns and cities have decided to provide funds and support for centers. For example, Montgomery County Council member Tom Perez said the following in a January 2005 news release:

⁹⁷ GAO Report, at 29-32.

⁹⁸ GAO Report, at 34-35.

⁹⁹ Nik Theodore, Abel Valenzuela Jr. and Edwin Meléndez, "La Esquina (The Corner)..." 419.

¹⁰⁰ See, NELP, *Quotes from Public Official in Support of Day Labor Centers*, available at <http://www.nelp.org/docUploads/quotes%20from%20local%20officials%20on%20dcy%20labor%20centers%2Epdf>

This center renews our commitment to include everyone in Montgomery County's economic development. The successful partnership between business, government and CASA of Maryland has shown that matching employers and employees in a safe and organized environment benefits families, small businesses, and the community. The rising tide of Wheaton redevelopment must lift all boats to succeed.¹⁰¹

Cities and towns have decided to support day labor job centers because they play an important role in making cities and towns more livable and ensuring that rights are respected and laws are followed. The presence of a worker center in a community reduces concerns about traffic, health and safety, and community relations by providing a safe, secure place for workers to gather as they search for work. They play a significant role in easing community tensions by providing a space for dialogue between day laborers and local business owners, members of the community and government representatives.

Law and Policy Proposals

Policy Priority: Provide support and funding to day labor community job centers

- As described above, given the nature of the industry, an extremely effective first step is to support and sustain worker centers that emphasize worker leadership and community investment. Experience from around the country shows that day labor worker centers that are worker-led and that have ongoing community involvement and support can offer invaluable resources in protecting the workplace rights of day laborers and providing numerous benefits to the surrounding community.

Legislative Priorities: Address realities of day labor industry

The following are just a few examples of how legislation could be particularly tailored to address the realities of day labor work.

- *Protect and expand the wage and hour rights of day laborers.*
 - Ban fees or improper wage deductions for:
 - Cashing a check issued by a day labor service agency or other day labor employer.
 - Transportation between the place of hire and work site.

¹⁰¹ Montgomery County, MD Press Release, "Duncan Announces New Wheaton Day Laborer Site," available at <http://www.montgomerycountymd.gov/Apps/News/press/DisplayInfo.cfm?ItemID=1275>.

- Establish wage parity between day laborers with full-time permanent employees performing similar tasks.
- Require timely payments in cash or an immediately redeemable check.
- Mandate daily rather than weekly overtime rates.
- Require employers to compensate day laborers for traveling time between the point of hire and worksite and for time spent waiting for late employers.
- Protect the First Amendment rights of day laborers to gather and seek work in public.
- *Ensure a safe and healthy employment and work environment for all day laborers.*
 - Require labor employers to cover the medical and compensatory costs of a work related injury if workers' compensation is not available.
 - Require employers to provide written notice to and obtain the written consent of day laborers asked to perform work that would expose them to hazardous materials or conditions.
 - Ensure that motor vehicles used to transport day laborers are registered and meet basic safety requirements.

New York State Should Adopt a Domestic Worker Bill of Rights

As discussed below, domestic workers have been historically excluded from most federal and state labor and employment laws. The industry is dominated by women of color and immigrant women in particular.¹⁰² The isolated nature of their work puts them at a disadvantage in negotiating with their employers for better work conditions. Because of this, the results of a study conducted by Domestic Workers United and DataCenter come, unfortunately, as little surprise. The findings include the following: “[f]orty-one percent (41%) of the workers earn low wages. An additional 26% make wages below the poverty line or below minimum wage. Half of workers work overtime—often more than 50-60 hours a week. Sixty-seven percent (67%) don’t receive overtime pay for overtime hours worked.”¹⁰³ The report also identified verbal and physical abuse.¹⁰⁴

¹⁰² See, Domestic Workers United & DataCenter, “Home Is Where The Work Is: Inside New York’s Domestic Work Industry” (July 2006) at 10 (reporting that “Ninety-five percent of the domestic workers who responded to the survey are people of color and 93% are women. Three-fourth of workers (76%) are not U.S. citizens.”); Peggie R. Smith, *Regulating Paid Household Work: Class, Gender, Race, and Agendas of Reform*, 48 AM. U.L. REV. 851, 923 (April 1999) (observing that domestic workers are “disproportionately women of color” and “likely to be undocumented workers.”)

¹⁰³ Domestic Workers United & Datacenter, *Home Is Where The Work Is...* at 2.

¹⁰⁴ *Id.*, Table 5.3 Abusive Treatment By Employer.

Historic exclusion of domestic workers from federal and state labor protections

Domestic workers have historically been systematically excluded from workplace protections under federal law: The National Labor Relations Act, which protects workers' rights to organize and bargain collectively specifically excludes domestic workers from definition of "employee,"¹⁰⁵ thus excluding them from its protections. Until 1974 all domestic workers were completely excluded from coverage under FLSA,¹⁰⁶ which provides for minimum wage and overtime. The FLSA still excludes from coverage those domestic workers who are considered "casual" employees such as babysitters and "companions" for the sick or elderly.¹⁰⁷ Furthermore, domestic workers who live in the employer's home, unlike most other employees in the U.S., are not entitled to overtime under FLSA.¹⁰⁸ The regulations associated with the Occupational Safety and Health Act, which regulates health and safety conditions in the workplace explicitly exclude domestic workers from the Act's protections "[a]s a matter of policy."¹⁰⁹ Title VII bars employment discrimination on the basis of "race, color, religion, sex, or national origin," but applies only to employers with 15 or more employees, thus for practical purposes, excluding domestic workers.¹¹⁰ Similarly, they are excluded from the Family Medical Leave Act (FMLA), which protects workers' right to take up to 12 weeks unpaid leave due to illness, birth, adoption or foster placement of a child, or need to care for an ailing spouse, child or parent, because the FMLA protects only those employed by employers with at least 50 employees.¹¹¹

Domestic workers have similarly faced exclusion from protections under New York State labor and employment laws as well. Under New York regulation—the state wage order for miscellaneous industries—domestic workers who live in the employer's home are only entitled to overtime at a rate of one and a half times the minimum wage—as contrasted with the normal overtime rate of 1 and ½ times the regular rate of pay—and then only after 44 hours of work in a week—as contrasted to the normal overtime threshold of 40 hours

¹⁰⁵ 29 U.S.C. § 152(3).

¹⁰⁶ 29 U.S.C. § 201, et seq. They were included as part of the Pub. L. 93–259, the Fair Labor Standards Amendments of 1974.

¹⁰⁷ 29 USC § 213(o)(15).

¹⁰⁸ 29 U.S.C. § 213(o)(15); 29 U.S.C. § 213(o)(21).

¹⁰⁹ 29 CFR 1976.5.

¹¹⁰ 42 U.S.C.A. § 2000e.

¹¹¹ 29 U.S.C.A. § 2611 (2)(B)(ii).

of work in a week.¹¹² As under federal law, domestic workers are excluded for practical purposes from from New York State employment discrimination protections, which apply only to employers with more than 4 employees.¹¹³ Finally, domestic workers are not even guaranteed coverage under workers' compensation. Under New York State law, those who work more than 40 hours per week for the same employer are covered, but *only if* the employer has chosen to secure workers' compensation insurance.¹¹⁴

In addition to being denied basic workplace protections, many domestic workers are unlikely to have any of the additional benefits that are often provided through contract, such as paid sick leave, paid vacation leave, severance pay, days off from work, paid holidays and advance notice of termination. Moreover, many domestic workers are unaware of the rights they have or how to enforce them. Because of this, a number of groups around the state have been organizing domestic workers, pushing for recognition of a standard employment contract, and pushing for legal change to address the historical injustices faced by domestic workers.¹¹⁵

Some progress has been made at the local level. Legislation passed in New York City and Nassau County regulates agencies that place domestic workers in jobs. The laws require the agency to provide a written description of employee rights and employer obligations. The agency must give this written description to potential employers as well.¹¹⁶ When the agency arranges for a worker to apply for a position, it is required to provide a written job description.¹¹⁷ However, this is only a start. Comprehensive legislation at the state level is needed to right the wrongs that have developed in an industry that has gone largely unregulated throughout history. In 2006, legislation was introduced in both houses in the last session that would provide a broad “Domestic Worker Bill of Rights.” The bills were A02084 in the Assembly and S3547 in the Senate.

¹¹² 12 NYCRR § 142-2.2.

¹¹³ NY Exec. L. §292(5).

¹¹⁴ NY Work Comp Law §2(4).

¹¹⁵ See, Domestic Workers United & Datacenter, “Home Is Where The Work Is...

¹¹⁶ NYC Admin. Code § 20-771; Nassau Cty. Admin. Code § 21-9.10.02

¹¹⁷ NYC Admin. Code § 20-772; Nassau Cty. Admin. Code § 21-9.10.03.

Legislative Solutions

Some key elements of the Domestic Workers' Bill of Rights are the following:

- A living wage of \$14.00/hour (\$16.00/hour if the employer does not provide health benefits).
- Overtime pay for all domestic workers (including those who live in the employer's home) for every hour over 40 hours worked a week.
- Family and medical leave.
- At least one day of rest a week.
- Designated paid holidays.
- Paid vacation days.
- Paid sick days.
- Advance notice of termination of employment.
- Severance pay in accordance with number of years worked.
- Inclusion of domestic workers under employment discrimination protections.
- Inclusion of domestic workers under state labor law.
- Employer recordkeeping requirements.

Rulemaking Solution

- Equal rights to overtime pay. The NY State Department of Labor, can, through rulemaking, eliminate the provision in the Wage Order for Miscellaneous Industries that subjects domestic workers to lesser overtime provisions. 12 NYCRR § 142-2.2 can be amended to provide full overtime protections of 1 and ½ times the regular rate of pay to all workers for more than 40 hours of work performed in a week.

Conclusion

While the policy recommendations provided above are by no means exhaustive, they represent concrete administrative and legislative actions that New York State can take to enhance the conditions faced by Latino immigrant workers throughout the state. These interventions would have positive consequences that reach beyond the immigrant community. When wages and conditions for the most vulnerable workers are improved, all workers benefit. Moreover, when the economic situation of a significant segment of the population improves, there is a reverberating impact that benefits the entire state.

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CHAPTER 5

Learning from New York State Immigrant Women: State Policy Changes Needed to Provide Health, Education, and Safety to All Residents

Maud Easter

Abstract

This paper outlines the needed transformation of New York State policies to ensure that the state is able to implement its mission of strengthened healthcare, education, and safety for all state residents, including the one-third of the state's population which is foreign-born or children of foreign-born. Based on learnings from a statewide network of over 200 immigrant women leaders, specific policy changes are discussed: to create language accessibility, to provide culturally appropriate state-funded programs, and to remove immigration status as a barrier to needed services and protection.

Executive Summary

This paper is based on the work of Voices for Change: Immigrant Women & State Policy (Voices), a program of the Center for Women in Government & Civil Society at the University at Albany. Voices' network of over 200 immigrant women leaders has identified policy areas in which the requirements of state governments to accomplish their own goals coincide interestingly with the structural transformations seen as necessary to meet the needs of immigrant women, their families and their communities. The paper provides examples of this shared interest in rethinking state programs, as well as specific policy recommendations for immigrant inclusion in the public arena in which states solve problems, build capacity, and address present and future needs.

Attention to the states' role is critical because they have been forced to operate within an unsupportive federal system with two seriously broken policy frameworks. A convoluted and increasingly arbitrary federal immigration policy leaves most immigrant families with some undocumented member, discouraging the entire family's involvement in the state's public arena. The

absence of substantial federal immigrant policy, fails to help states overcome practical barriers in their ability to include, communicate with, and serve appropriately residents of increasingly diverse language and cultural backgrounds.

Three challenges are identified requiring systemic solutions in the New York State world (state agencies and local government/civil society agencies supported by state-directed funding), with specific strategies for policy makers detailed in the full text:

1. State-supported programs need major reorganization to ensure adequate expertise on the more than one hundred and fifty diverse cultures which have influenced the lives of New York State foreign-born persons and their children, and on the impact of the migration experience itself.
 2. State-supported programs need greatly enhanced communication capabilities, oral and written, in the more than one hundred and fifty languages spoken in New York State, so that communication with persons whose first language is not English can be effective in achieving state objectives.
 3. State programs need to give priority to the achievement of their own objectives, separating them from federal administration pressures to enforce civil immigration law, so that all immigrants—documented or undocumented—are not driven away from the public sphere of state programs by the fear of triggering deportation and family separation.
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Five years ago, about a month before 9/11 jolted American responses to the world, the Center for Women in Government & Civil Society, at the University at Albany, embarked on a new program, to bring the much-needed wisdom and experience of immigrant women into the New York State policy process. Exploring the perspectives of the state's over two million immigrant women has been an education for us and for policy makers in this post 9/11 climate, where the development of policy within a human rights framework has been deeply needed both for domestic inclusion and for global relations.

The program we developed, *Voices for Change: Immigrant Women & State Policy*, has been the source of incredible learning about the role that state-level governments play in the lives of immigrant women, their families and their communities—sadly, too often neglecting their needs, ignoring their strengths and even making their lives more vulnerable. We developed a

network that now includes over two hundred immigrant women, ethnically diverse and knowledgeable about the needs of other women, their families, and immigrant communities upstate and downstate. Most of the women are professionals in healthcare, social services, legal and education systems or are leaders of immigrant community based-organizations.

After a priority-setting initial policy symposium, Voices for Change has used conferences, training programs and focus groups to bring these immigrant women leaders together with state agency policy makers to discuss the systemic transformations which could make state programs more relevant to the one-third of New York State residents who are foreign-born or children of foreign-born.

First, let us look at a basic demographic picture of the state. The 2000 census told us that there are over four million foreign-born persons in New York State, which represents 20 percent of the population. However, if you include children of foreign-born persons, whose lives are often shaped significantly by the culture, language, and immigration status of their parents, a full 1/3 of New York State residents must be considered in implementing state objectives.

The 2000 census showed that the New York City (NYC) metro area has become the number one destination of choice for immigrants nationally. However, increasing numbers of newcomers are bypassing this and other historical gateways and settling directly in the suburbs, smaller cities, and rural communities typical of upstate New York. We believe that the findings of our work offer important insights not only for New York State, but also for the dozens of states—like Georgia, Ohio, and New Hampshire—which are struggling to create state programs responsive to new and rapidly expanding immigrant populations. Like all these states, New York State must develop strategies suitable for high percentage immigrant communities like NYC, where the challenge is relating to enormous diversity, and for lower percentage immigrant communities, like Utica or New Paltz, where the challenge is how to transform systems which have been organized historically to serve an English-speaking, US-born population, to include families from thirty to forty different countries of origin.

We have learned lessons not only about the need for transformation at the state level, but also about the unsupportive context within which state governments are forced to operate. It has become clear to us that many of the challenges facing state governments occur because they must operate within a federal system with two seriously broken policy frameworks: immigration

policy (governing who is allowed to migrate into the U.S.) and immigrant policy (the inclusion of immigrants in government's responsibilities to meet needs and strengthen opportunities).

States deal now with the results of a Kafkaesque federal immigration policy: Global migrants are greeted with the twenty-first century's version of Dickens' Bleak House—a convoluted immigration law developed in bits and pieces over time, with layer upon layer of often contradictory regulations, inhumanely long waiting times, with denial of a right to legal assistance and, recently, a denial of many appeal rights. This inhumane, incompetent and underfunded system, which among other things forces families into breaking civil immigration law provisions in order to live and raise children together, results in over twelve million people living in the fifty states, contributing to local communities and their economies, but driven underground—driven away from the public arena in which the states solve problems, build capacity and address present and future needs.

Over and over, women have told us that the impact of this broken immigration system is not only confined to the state's relationship with individuals who are themselves undocumented. Since almost every extended immigrant family has some member whose status is undocumented or is unresolved, most foreign-born persons, one-third of the New York State residents if you include children of the foreign-born, do not feel safe participating in, strengthening, and benefiting from state programs whose success is to serve them as well as all other state residents. The question is always there: if I go to a school meeting, a clinic, a business development program, will someone learn that one of my children, my mother, or my uncle doesn't have papers? The effort of the current U.S. administration—to add enforcement of civil immigration law to the missions of health departments, universities and local police agencies—has only compounded the problems states face in maintaining healthy populations, educating young people, and creating community partnerships for improved public safety.

There are great ironies in this situation, of course. The current surge of migrants from the countries of the south, seeking better employment and survivable lives for their families, has been set in motion in large part by the globalization promotion policies of the U.S. federal government; while at the same time, the administration's domestic policies post-9/11 have only exacerbated both the fears and the actual dangers most immigrants experience in interacting with the public world at the state level.

The second thing we've learned about the broken federal framework for

states speaks to immigrant policy, that is, how public institutions address the needs of immigrants and create opportunities for inclusion. Currently, the states are forced to operate within a federal system that fails dramatically in helping them overcome very practical barriers in their ability to include, communicate with, and serve appropriately residents of increasingly diverse language and cultural backgrounds.

For example, in the area of language access, state programs must develop the capacity to communicate in multiple languages about issues from driving safety to teen pregnancy, from school programs to diabetes treatment, from tax obligations to employment opportunities. In New York State, where state-supported programs need the capacity to communicate with persons speaking over one hundred and fifty languages, we know how invaluable federal assistance could be. However, there is no federal initiative to increase the supply of available trained interpreters in urban and rural areas across the country. There are no federal standards for effective interpretation. There is no federal translation bank for written materials, an enormously cost effective approach to the need nationally for key documents in many languages. Federal funding mechanisms either ignore language access expenses or reimburse at a level so low that most states do not participate. Most federal contracts do not require recipient agencies to offer adequate language services. Standards developed in response to Title VI of the 1964 Civil Rights Act, which requires provision for persons with limited English proficiency, lack adequate specificity and enforcement mechanisms.

There is not only a vacuum in which federal initiatives are desperately needed, but also—in some areas key to the health and welfare of states—national policies actually proactively forbid using federal resources to meet needs of state residents who are undocumented. This forces states to supplement federally funded programs with scarce state resources in order to achieve their health and welfare objectives: for example, while the federal government supports breast cancer screening for all women, without regard to immigration status, the state is often unsuccessful in encouraging undocumented women to get tested, since if the results indicate breast cancer, these women, ineligible for federally supported treatment, do not want to hear what they view as a death sentence. If states wish to reduce their breast cancer death rate, they need to act themselves to solve this problem.

Therefore, in looking at the federal context, when it comes to serving all residents, including immigrants, the states are either actively hindered, or left on their own, to accomplish their missions.

So now I'd like to turn to how immigrant women have assessed current

state policies, examining whether they are effective in including immigrants and whether they are effective in meeting New York State's health, education and safety objectives. What we have found particularly interesting is to examine the degree to which the state's interest in achieving its objectives coincides with the approaches recommended by immigrant women leaders. Not surprisingly, given that immigrants represent such a large percentage of state residents, we have found a high degree of congruence between what state agencies articulate as their mission for all New Yorkers and the goals of strategies recommended by women in our network.

When we brought immigrant women leaders together in 2001 to discuss needed state policy change, and at every conference, training program, and focus group we have organized since, women have highlighted three challenges requiring systemic solutions within the state world. Their analysis extends beyond state government itself to the wide civil society and local government network to which New York State policymakers allocate state and federal dollars.

- **First challenge:** State-supported programs need major reorganization to ensure adequate expertise on the more than one hundred and fifty diverse cultures which have influenced the lives of New York State foreign-born persons and their children, and on the impact of the migration experience itself.
- **Second challenge:** State-supported programs need greatly enhanced communication capabilities, oral and written, in the more than one hundred and fifty languages spoken in New York State, so that communication with persons whose first language is not English can be effective in achieving state objectives.

- **Third challenge:** State programs need to give priority to the achievement of their own objectives, separating them from federal administration pressures to enforce civil immigration law; so that all immigrants—documented or undocumented—are not driven away from the public sphere of state programs by the fear of triggering deportation and family separation.

Immigrant cultural competency: In response to years of pressure from the Latino and African American communities, New York State has taken initial steps to enhance some cultural understandings of its own agency staff and the programs which it funds. However, as immigrant women have pointed out eloquently, the state faces an additional and different set of challenges to become adequately culturally competent to interact effectively with those born in more than one hundred and fifty other cultures, who have now migrated to large and small cities, suburbs and rural areas across New York State. Here in the

Capital District, for example, there are immigrants from more than sixty different countries. In Utica, there are more than thirty ethnic communities to be served. And of course, any agency serving all of Queens needs strategies to understand and serve more than one hundred and fifty cultural communities.

Some examples: If the Department of Health wishes to prevent, diagnose and treat diabetes effectively, it will miss huge numbers of New Yorkers unless it understands multiple cultural views on diet, exercise, and preventive care. If the Division of Criminal Justice Services (DCJS) wishes to prevent domestic violence - the global incidence of which parallels US rates, that is, impacts twenty five to thirty percent of women and girls, then DCJS-funded prevention and service programs need to understand how multiple cultures view gender roles, how immigrant women will be less likely to seek safety if shelters are not located within and culturally shaped by their communities. If the Education Department sees parent involvement as essential to school success, it will need strategies for parent-teacher and PTA communications which bridge cultural and language barriers.

In addition to knowledge about specific cultures of origin, state programs also need to understand the cultural upheaval inherent in the process of global migration faced by all immigrants. Whether offering education, mental health services, or housing, state-supported agencies need empathetic staff who respect immigrants' bi-culturalism and value its contribution to healthy lives, and they need staff who understand and respect the strengths necessary to build a new life in a society often markedly different from their culture of origin.

- Immigrants often encounter for the first time massive bureaucratic service institutions, whose navigation requires learning a totally different set of family survival strategies – from the labyrinthine world of American healthcare coverage, to the child welfare system, to the regulations for starting a small business.
- The migration experience itself may have left a traumatic trail; arbitrary immigration processes in the U.S. may echo experiences with the arbitrary authorities most families encounter on their entire migration journey, often through multiple countries.
- Immigrants from cultures deeply scarred by poverty and/or war bring not only incredible survival skills, but also special needs for education and healthcare to make up for previously unavailable services.
- Immigrants from many countries find that that their central values, of community and extended family, collide with the American culture's emphasis on individual success.

- Cultures are at very different places in terms of gender expectations, requiring thoughtful and targeted agency strategies to ensure that immigrant women and girls are effectively served.

What policies do immigrant women leaders recommend to New York State to strengthen its cultural competencies?

1. Recognize that the existing pattern of state-supported services has evolved historically without adequate competencies to serve appropriately one-third of the state's residents.
2. Require all agencies seeking state resources to demonstrate competency in the multiple cultures of their community and, when a program is currently deficient, provide funding only when there is a commitment to and strategies for restructuring its efforts to acquire these competencies.
3. Restructure state programs to provide population-commensurate resources directly to immigrant community-based agencies with needed cultural and language competencies; and support collaboration efforts which adequately compensate immigrant organizations for assistance provided to non-immigrant agencies.
4. Evaluate agencies' competencies by examining the cultural congruency of their staffing, their training programs for non-culturally congruent staff, and the strength of their partnerships and resource-sharing with immigrant community-based organizations and leaders.

Let's look now at the challenge of ensuring accurate and effective communication between the state world and residents speaking over one hundred and fifty languages. The 2000 census showed that nearly fifty percent of New York City residents speak a language other than English at home—for the state as a whole, the percentage is over twenty-eight percent. Health, welfare, education and public safety programs only very rarely have the capacity to communicate directly with those whose first language is not English. Within state agencies, and in state-funded local agencies, bilingual staff are unusual, access to professional interpretation is rare, and most written materials are not available in multiple languages.

In the absence of federal assistance for effective language access policy, New York State is faced with removing these language barriers on its own. For example, if the Department of Mental Health seeks to reduce the suicide rate for New York State women, it needs to fund programs with staff able to communicate in multiple Asian languages, since, among ethnic groups, Asian

women have the highest suicide rate. If the Empire State Development Corporation wishes to foster small business start-ups, it needs to provide materials and technical assistance in multiple languages to support immigrant small business entrepreneurs, the growth engine of much economic development.

What policies do immigrant women leaders recommend to New York State to strengthen its language competency?

1. Develop statewide standards for language access, reflecting the need for communication with major and minor language groups, in rural and urban environments, and taking advantage of emerging technologies, such as the innovative approach of simultaneous telephonic interpretation, being piloted by New York State's own Center for Immigrant Health at New York University.
2. Create and support regional interpreter training programs upstate as well as downstate to increase significantly the number and language proficiencies of oral interpreters available to multiple state agency systems. Consider Utica's model program, the Multicultural Association of Medical Interpreters, which trains bilingual immigrants to offer expert interpretation services in Central New York.
3. Adapt state funding streams to include language services as necessary expenses appropriate for cost reimbursement, and make New York State a partner in the Medicaid program which at least can provide 50 percent cost reimbursement to the state.
4. Develop centralized translation services for cost-effective provision of multiple agency program materials in multiple languages.

Finally, let's look at the third challenge: providing immigrants confidentiality with respect to the federal civil immigration status of themselves or family members, so that fear or actual threat of deportation and family separation does not drive immigrants away from New York State programs which need their participation to achieve their own state objectives. This fear is very widespread and has only been exacerbated by federal policies post-9/11. For example, half of immigrant-headed households in New York State include at least one citizen, but research shows that often non-citizen parents are too afraid to participate in public programs, even for their eligible citizen children.

To our knowledge, only one New York State agency, the Crime Victims Board, has in place policies which proactively encourage all residents, whether or not they meet the requirements of the federal civil immigration

law, to feel safe and actually be safe in seeking their services. This “don’t ask, don’t tell” policy – that is, “We don’t ask about immigration status of yourself or your family members, and we don’t tell the federal immigration authorities anything we come to learn about your status”—eliminates a powerful potential barrier to effective service provision.

- For example, Social Service Departments will not be able to ensure that children in low income immigrant families receive nutrition assistance, if their parents are terrified of going to a government office for fear that they will be asked about immigration status of all members of their extended family; which is really irrelevant to achieving the goal of healthy child development.
- The AIDS Institute will be hampered in ensuring adequate HIV/AIDS prevention, diagnosis and treatment among foreign-born New Yorkers if it is not able to offer state-supported programs in areas in which the federal government denies services to undocumented persons, such as drug treatment assistance.
- The Department of Transportation will be unable to ensure road safety through driver licensing, and accident compensation through insurance, if undocumented workers, who in many parts of state must drive to reach their jobs, continue to be excluded from the licensure system.

What policies do immigrant women leaders recommend to New York State to remove barriers related to immigration status?

1. Ensure that state program eligibility policies focus on factors actually essential to successful implementation of state objectives, carefully considering whether or not immigration status has any relevance to program goals.
2. Communicate publicly and proactively to immigrant communities that they need not fear that involvement in the world of state programs will endanger the confidentiality of their families’ immigration status information. Provide adequate training for state agency staff and grantees to ensure that program design avoids the need for the participants to provide immigration status information.
3. Ensure that all agency staff implementing state programs are trained to separate issues of immigration status from issues central to their mission.
4. Provide that, if state residents actually seek assistance from state-supported programs in resolving immigrant status-related problems, agency staff are adequately trained to make appropriate referrals to community

resources with detailed and accurate immigration law expertise. For example, many immigrant victims of violence against women will need expert immigration law assistance in preserving the status of themselves and their children, independent of the status of their abuser, in order to be protected from continued violence.

Learning to separate immigration status from state objectives, achieving cultural competency, and removing language barriers are huge challenges facing New York and other states. Voices for Change is very interested in collaborating with other researchers to explore further this world in which there is a confluence between achieving state objectives and facilitating immigrant inclusion.

CHAPTER 6

Latinos and Immigrants: The Case for Noncitizen Voting Rights

Ron Hayduk

Abstract

Voting is for citizens only, right? Not exactly. It is not widely known that immigrants, or noncitizens, currently vote in local elections in over a half dozen cities and towns in the U.S.; nor that campaigns to expand the franchise to noncitizens have been launched in at least a dozen other jurisdictions from coast to coast over the past decade. These practices have their roots in another little-known fact: for most of the country's history—from the founding until the 1920s—noncitizens voted in forty states and federal territories in local, state, and even federal elections, and also held public office such as alderman, coroner, and school board member. Globally, over forty countries on nearly every continent permit voting by noncitizens. In the United States, legal immigrants, or resident aliens, pay taxes, own businesses and homes, send their children to public schools, and can be drafted or serve in the military. Yet, proposals to grant them voting rights are often met with great resistance. In a country where “no taxation without representation” was once a rallying cry for revolution, such a proposition may not, after all, be so outlandish. This paper examines the politics and practices of noncitizen voting in the United States, chronicling the rise and fall—and re-emergence—of immigrant voting in the U.S. In addition to making the case for noncitizen voting, this paper takes a look at the arguments for and against noncitizen voting, its impact (and potential impact) on Latino politics, and the prospects for a truly universal suffrage in America.

Executive Summary

■ Immigrants—Latinos in particular—have been subject to discrimination in a broad range of public policy and private practices, in part, because a large and growing segment of the newcomers are noncitizens. Policy makers and those with power can afford to ignore their interests. It was not always this way. In fact, noncitizens currently vote in elections in the U.S. today.

- The argument for noncitizen voting is strong:
 - 1) Noncitizen voting is legal. The Constitution does not preclude it and the courts have upheld voting by noncitizens. In fact, noncitizens enjoyed voting rights for most of our country's history—from the founding until the 1920s—in much of the country. Forty states and federal territories permitted noncitizen voting in local, state and even federal elections and noncitizens have held public office.
 - 2) It is also rational. There are good reasons for the enfranchisement of immigrants—both moral and practical—including notions of equal rights and treatment (as articulated in the American Revolution, the abolitionist movement, the suffrage movement, and the civil rights tradition).
 - 3) And feasible as well. Noncitizen voting is making a comeback. Immigrant voting rights have been restored in several municipalities in the U.S. Chicago permits noncitizens to vote in school board elections (as did New York City from 1970 to 2003, when school boards were eliminated); noncitizens currently vote in six municipalities in Maryland; and two cities in Massachusetts have extended the right to vote for local offices to noncitizens (though state action is needed to implement these local laws). In addition, nearly a dozen other jurisdictions have considered or are currently moving to establish noncitizen voting. Globally, over forty five countries on nearly every continent permit voting by resident immigrants.
 - The acquisition of political rights—including voting rights—has been a vital tool for every disempowered group in America's history to achieve economic, social and civil rights and equality. Because legislative bodies confer rights and make public policy, it is critical to possess the capacity to influence and/or select representatives. Legal barriers to political participation, however, have historically hampered the attainment of such rights by distinct classes of citizens, including African-Americans, women, and youth.
 - Although noncitizen immigrants behave in much the same ways as citizens, they possess fewer rights and benefits.¹ Immigrants are subject to

¹ The terms "immigrants," "foreign born," and "aliens" refer to the same persons and are used interchangeably in this paper. There are, however, several distinct categories of immigrants, the main distinction being "legal" versus "illegal" or undocumented immigrants. Legal permanent residents are those who obtain immigrant visas or "green cards" because they are either: (1) related to a U.S. citizen or permanent resident; (2) because they possess a needed or desirable job skill or ability; or (3) are spouses or children of green card holders. Other categories of legal immigrants include asylees, refugees, and "nonimmigrant" foreigners (such as students, tourists, diplomats, and temporary workers).

all laws and pay taxes, work in and/or own businesses, send their children to schools, can be drafted and serve in the military, and participate in all aspects of daily social life. Yet, noncitizen immigrants are excluded from selecting representatives at every level of governance who fashion public policy that affects them on a daily basis. These issues cut to the heart of citizenship and democratic participation.

■ As successful efforts to reinstate noncitizen voting rights show, campaigns based upon democratic and moral claims can mobilize noncitizens and their allies. Such campaigns provide immigrants with important means to defend themselves against nativist attacks, and also give other minority groups greater means to forge winning voting blocks that can advance their mutual interests. Immigrant's taxation without representation not only challenges the legitimacy of America's mantle of democratic governance, it also provides a rationale and opportunity for organizing a progressive political majority. Historically, immigrant votes often accounted for the difference between the winners and the losers in elections.² Noncitizen political participation could help strengthen progressive alliances in electoral contests and public policy formation.

■ Just as the civil rights movement sought to extend the franchise to African-Americans and others who had been barred from voting to attain equitable representation, a renewed movement for human rights would further extend the franchise to new Americans.³ Today, immigrant rights are the civil rights of the day and noncitizen voting is the suffrage movement of our time. Dominant political parties and candidates are increasingly turning their attention towards immigrants. It would be wise for policymakers to lead the way.

2 Steven P. Erie, *Rainbow's End: Irish Americans and the Dilemmas of Urban Machine Politics, 1840-1985* (Berkeley, University of California Press, 1989); and Martin Shefter, *Political Parties and the State: The American Historical Experience* (Princeton: Princeton University Press, 1994)

3 Of course, other electoral reforms are crucial to rectify the bias of the electorate and the nature of the political parties, such as Election Day voter registration, effective campaign finance reform, ballot access reform, and the inauguration of alternative representational schemes (such as proportional representation or instant run-off voting), if more democratic electoral politics and outcomes are to be achieved.

See Ronald Hayduk and Kevin Mattson, eds., *Democracy's Moment: Reforming the American Political System for the 21st Century* (Lanham, MD: Rowman & Littlefield Publishers, 2002)

The Appearance and Disappearance of Immigrant Voting Rights

The question of immigrant voting rights provides a great opportunity to look at our democracy, the meaning of citizenship, and the direction America is headed. What direction should we be headed? What will it mean to Latinos?

First, it is useful to examine some myths surrounding voting and citizenship in America. One is the familiar story about the nature of our democracy. As the story goes, Democracy has been expanding — a steady forward march toward greater inclusion of groups who were excluded, particularly to vote and increase the number of representatives of previously excluded groups, such as African Americans, Latinos, and Asian-Americans. Initially, only white men with property could vote. African American men got the vote after the Civil War; Women got the vote in 1920; Blacks, Latinos and other minorities got the vote in reality following the 1965 Voting Rights Act; and 18 year olds got the vote in 1971.

There is much truth to this story. But, as with other stories, it distorts or omits important parts of actual history and contemporary practice. The most familiar omission is the roll back of voting rights of African American men after Reconstruction, through various laws and procedures such as poll taxes, literacy tests, grandfather clauses, felony disenfranchisement laws, and restrictive residency and voter registration requirements.

The appearance and disappearance of immigrant voting rights, or alien suffrage, as it was and is often referred to, is a less familiar element of the general story of voting rights. Language can be quite revealing and meaningful. The terms “aliens” and “alien suffrage” reveal much about historical perceptions of immigrants.

To many, the idea of allowing noncitizens to vote may sound odd or outlandish. For most Americans, voting is the essence of citizenship. But it was not always so, nor need it be.

Although this is not widely known, voting by noncitizens is as old as the Republic itself; it is as American as apple pie; and it is older than our national pastime (baseball).

Noncitizen immigrants enjoyed voting rights for most of America’s history and in much of the country. From 1776 to 1926, as many as forty states and federal territories permitted noncitizens to vote in local, state, and even federal elections. Noncitizens even held public office, such as the position of alderman. Benjamin Franklin framed the issue of voting rights pointedly: “They who have no voice nor vote in the electing of representatives do not

enjoy liberty, but are absolutely enslaved to those who have votes.”⁴ Many of the early colonies had already allowed noncitizen residents to vote, and the practice was continued when the new states formed their constitutions.

The emerging Republicanism and Liberalism in early American history made noncitizen voting a reasonable practice tied to inhabitants and difficult to challenge. America’s diversity was increasingly evident at the time of the Revolution, and alien suffrage was a logical extension of the revolutionary cry “No taxation without representation!” Democratic notions such as the belief that governments derive their “just powers from the consent of the governed,” became increasingly “common sense.” Thomas Paine declared he was a “citizen of the world.”

Early Americans viewed alien suffrage as an effective method to encourage newcomers to make the U.S. their home. And it worked. Budding Americans learned civics through practice. Getting a taste for democracy furthered immigrants’ understanding of our political system and nurtured attachments to their adopted communities.

For a good part of our country’s history, voting rights were determined not by citizenship, but by whether or not one was a white, male property holder. Thus, women and post-emancipation blacks—who were considered citizens—could be denied voting rights. In fact, alien suffrage was comparable with the exclusion of other categories of residents (women, men without property, and blacks) and actually buttressed the privileging of propertied white, male Christians.

The main point is that voting never was about citizenship *per se*, which is why of course women and post-Civil War blacks—who were citizens—could be denied voting rights. Voting is not inextricably linked to citizenship; it is not naturally connected. Voting was—and still is—primarily about who will have a say; about who will elect representatives of their choice, and

4 The full quote reads: “That they who have no voice nor vote in the electing of representatives do not enjoy liberty, but are absolutely enslaved to those who have votes, and their representatives: for, to be enslaved is to have governors whom other men have set over us, and be subject to laws made by the representatives of others without having had representatives of our own to give consent on our behalf.” Cited in “Woman suffrage. The argument of Carrie S. Burnham before Chief Justice Reed, and Associate Justices Agnew, Sharpswood and Mercur, of the Supreme court of Pennsylvania, in banc, on the third and fourth of April 1873,” page 31. Quoted from “*Votes for Women: Selections from the National American Woman Suffrage Association Collection, 1848-1921*.” [http://memory.loc.gov/cgi-bin/query/?amnen/naww@field\(DOCLD+@lit\(tbnqwsan3078div5\)\)](http://memory.loc.gov/cgi-bin/query/?amnen/naww@field(DOCLD+@lit(tbnqwsan3078div5)))

thereby, affect the direction of public policy that affects them on a daily basis. Voting recognizes individuals as legitimate stakeholders in the democratic process of governance. Voting is a mechanism to determine whose interests, wishes, preferences will prevail. In short, voting is about political power, rather than citizenship.

Immigrant voting rights apply reveal that voting rights have always been linked to questions about who would wield political power.

With the influx of different kinds and increasing numbers of immigrants, noncitizen voting rights began to be disputed, especially those of newcomers who held political views that challenged dominant groups. The case of the Irish illustrates this point. They were Catholics, drinkers, were not considered “white” (see Noel Ignatiev’s *How the Irish Became White*), and, most importantly, were opposed to slavery. The latter factor led the Southern states to roll back non citizen voting throughout the region.

The War of 1812 slowed and even reversed the spread of alien suffrage, in part by raising the specter of foreign “enemies.” Leading up to the Civil War, the South opposed immigrant voting. One of the first planks in the Confederate Constitution was to exclude from voting anyone who was not a U.S. citizen.

After the Civil War and during Reconstruction, nevertheless, alien suffrage spread in the South and West with the growing need for new labor. Many new states and territories used voting rights as an incentive to attract new immigrant settlers and as a pathway but not as a substitute to citizenship. The growing need for new labor also contributed to the adoption of alien suffrage. Many new states and territories used alien suffrage as an incentive to attract settlers. The general practice was to require residency from six months to one year before voting rights were granted. Wisconsin, which was admitted to the Union in 1848, revived and transformed noncitizen voting. Wisconsin’s constitution extended full voting rights (in local, state and national elections) to “declearnt aliens”—foreign born white persons who declare their intention to become citizens.⁵ In this formulation, alien suffrage was seen as a pathway to citizenship. Wisconsin’s model for enfranchising aliens proved popular; Congress passed a law with similar provisions for the Territories of Oregon, Minnesota, Washington, Kansas, Nebraska, Nevada, Dakota, Wyoming and Oklahoma. After achieving statehood many

5 Jamin B. Raskin, “Legal Aliens, Local Citizens: The Historical, Constitutional, and Theoretical Meanings of Alien Suffrage,” *University of Pennsylvania Law Review*, 141: (1993): 1406-1407.

of these states kept the practice of allowing declarant aliens voting rights. Thus, at least thirteen new states adopted alien suffrage. Noncitizen voting was practiced to its greatest extent by about 1875. By the close of the nineteenth century, nearly one-half of all the states and territories had some experience with voting by aliens, most of them lasted for more than half a century.

As the twentieth century approached, large numbers of Southern and Eastern European immigrants (Jews, Italians, Greeks, etc.) came to the U.S.—they were not universally seen as “white” at the time and often held politically “suspect” views. As a result, immigrant voting rights were increasingly challenged. These newer immigrants, coupled with the rise of mass social movements and third political parties (e.g., Populist, Labor, Suffragette, and Socialist), posed a potential threat to the dominant political and social order, and noncitizen voting was gradually eliminated state by state. The anti-immigrant backlash at the turn of the twentieth century and wartime hysteria during World War I led to the elimination of this long-standing practice.⁶

Importantly, noncitizen voting was abolished at the same time that other restrictive measures were enacted by elites, including literacy tests, poll taxes, felony disenfranchisement laws, and restrictive residency and voter registration requirements—all of which combined to disenfranchise millions of voters. Voter participation dropped precipitously from highs of nearly 80 percent of the voting-age population in the mid- to late nineteenth century down to 49 percent in 1924. Additional legislation drastically reduced the flow of immigrants into the U.S. and limited the proportion of non-Western European immigrants. It is revealing—but not coincidental—that immigrant voting has been buried in the annals of American history.

The notion that noncitizens should have the vote is older, was practiced longer, and is more consistent with democratic ideals than the idea that they should not. During 188 of the 231 years of U.S. history, citizens have had the right to vote somewhere in the country. Noncitizen voting is not the exception to the rule; exclusion of noncitizens from the vote is the anomaly. Curiously, this aspect of democratic participation has been eviscerated from our national memory. If noncitizen voting was common and effective, why was it eliminated?

The short answer is fear; fear of others who were different. Dominant groups in particular felt threatened by newcomers who held different political

6 Leon Aylsworth, “The Passing of Alien Suffrage,” *American Political Science Review*, Vol. 25, Issue 1 (February 1931), 114-116.

views, practiced different religions, spoke different languages, and were not seen as “white” in the taxonomy of the day. The newcomers were often seen as “inferior.”

Immigrant voting was rolled back in stages, usually at times of some internal conflict or war. For example after the French Revolution, the influx of radicals put fear into Federalists who thought such radicals might turn the tide in elections. During and after the War of 1812, fear of foreign enemies led to roll back in a few states. New York was one of the first states to eliminate noncitizen voting, followed by Connecticut and Massachusetts. Additional federal legislation drastically reduced the flow of immigrants into the U.S. and limited the proportion of non-Western European immigrants. Taken together, these developments limited democratic politics and progressive possibilities in the United States. By 1926, immigrant voting was history.

Exclusion and its Consequences

Today, about 25 million adults can't vote because they are noncitizens. In New York State, one out of every ten residents is unable to vote due to citizenship status. In New York City, 1.3 million adults or 22% of the total, are restricted. The same is true of other states and locales in the U.S. In many districts, one quarter to one half of all residents are noncitizens who cannot vote. This rivals the political exclusion of women before 1920, African Americans and other minorities—including Latinos—before 1965, and 18-year-olds before 1971. Today, we view these exclusions as sexist, racist and ageist. But the exclusion of noncitizens is not as commonly seen in the same light.

Immigrants—the majority of them Latinos—who are not U.S. citizens are omnipresent: they are teachers, students, firefighters, police officers, stock brokers, shopkeepers, nurses, doctors, sports players, movie stars, musicians, construction workers, gardeners, nannies, workers of every kind, and neighbors who live in every state, city, and suburb, and nearly every town in the United States. Thus, noncitizens behave in much the same ways as citizens but they possess fewer rights and benefits.

Immigrants are here to stay and their numbers will only increase, according to projections by the U.S. census. Contrary to popular belief, immigrants pay more in taxes than they receive in public expenditures. The National Research Council of the National Academy of Sciences reported that immigrants typically pay about \$80,000 more in taxes over the course of their lifetimes than they receive in federal, state, and local benefits. Immigrant households pay an estimated \$133 billion in property, sales, and income taxes to federal, state,

and local governments. In New York, for example, immigrants pay 15.5 percent of all taxes collected by the state, although they comprise only 12 percent of the total population.

Most immigrants want to become U.S. citizens, but the average time it takes to naturalize is eight to ten years, largely due to bureaucratic red tape. In addition, not all immigrants are eligible to become U.S. citizens today, unlike earlier times when almost everyone who came to the U.S. was able to naturalize because doing so was a much easier and faster process. As non-citizens immigrants suffer social and economic inequities, in part because policymakers can ignore their interests. Elected officials deliberately ignore non-citizens because they cannot vote. This makes perfect sense. After all, elections are about who gets the most votes.

Restoring immigrant voting rights would help make representatives and government more responsive and accountable to all the people. It would help reverse current inequities and make our political system more democratic.

Arguments against Immigrant Voting, and Counter Arguments

Citizenship First, Voting Rights Second

Opponents of noncitizen voting raise several objections. The most common is that immigrants already have a means of obtaining voting rights: by becoming citizens. Daniel Stein, Executive Director of the Federation of American Immigrant Reform, a Washington D.C. based organization that supports stricter immigration controls, puts it in stronger terms: "No one should be given the franchise without taking the Pledge of Allegiance. If you divorce citizenship and voting, citizenship stops having any meaning at all."⁷

Most immigrants want to become U.S. citizens. But the average time it takes to become a citizen is eight to ten years, or longer. Further, despite their desire to naturalize, many immigrants are not eligible. It used to be much easier, faster, and cheaper to become a U.S. citizen. This is not the case anymore.

Instead of diluting the concept of citizenship, immigrant voting can enrich citizenship by encouraging immigrants to participate in the political life of their communities.

Rather than undermining democracy, immigrant voting will lead to more robust policy making and produce more democratic political outcomes.

7 Deborah Sontag, "Noncitizens and Right to Vote," *New York Times*, July 31, 1992, p. A1.

Noncitizens Do Not Have American Interests at Heart

Another objection raised by opponents of noncitizen voting is that since noncitizens have not sworn a loyalty oath to the U.S., they cannot be trusted to vote in the best interests of this country. Opponents also contend that noncitizen immigrants will vote their own interests or those of their country of origin. Ostensible proof of an immigrant's commitment and loyalty to the U.S. would be their naturalization. Again, voting rights should not be granted without citizenship.

Proponents of this argument ignore the fact that people born in the United States are not required to swear allegiance to the Constitution.⁸ Not only is it flawed to assume that native born residents are intrinsically “loyal” but it is equally untrue that noncitizens are not “loyal.” In addition, this argument overlooks that immigrants are, in fact, already community members. A measure of noncitizen commitment and loyalty is evident in their choice of coming to the United States, and perhaps more tellingly, in their continued presence here. Noncitizens demonstrate their commitment and loyalty daily, such as in participating in voluntary organizations or opening a small business. To make their right to participate in the management of public affairs dependent upon renouncing citizenship to their home country—which might preclude their right to return or to hold property there—amounts to a denial of their rights.

Noncitizens Lack Sufficient Knowledge to Make Informed Decisions

Another argument opponents make is that noncitizens lack sufficient knowledge of and feeling for American political institutions and issues to make informed voting decisions. In order to vote, no American citizen is required to be knowledgeable about anything except when and where to do so. Moreover, requiring knowledgeability is similar to requiring literacy or even ideological affinity to exclude people from voting. In any event, the “education” that voters need to participate often occurs in the few weeks and months before an election, not years prior, and is all too often done by the media and candidates anyway. Further, one could argue that because non-citizens have chosen this country rather than being born into it, and are in the process of learning its language and culture, they often pay more attention to the events around them than many disaffected citizens do. Foreign-language television, radio,

8 Jennifer Gordon, “Let Them Vote,” in *A Community of Equals: The Constitutional Protection of New Americans*, edited by Owen M. Fiss, Joshua Cohen, Joel Rogers, and Edwidge Danticat (Boston: Beacon Press, 1999).

and newspapers in many immigrant communities keep people up to date on politics here as well as abroad. But this is beside the point. The crux of the matter is not whether noncitizen immigrants are more or less knowledgeable about American politics than the native-born but rather that since citizens do not have to meet a knowledgeability test, neither should anyone else.

Noncitizens Could Influence Outcomes of Contentious Policy Debates

Opponents of noncitizen voting also argue that noncitizens would tip the political balance in a state or community by voting in their own interest. For example, noncitizens could vote to grant state public assistance to undocumented people, or permit bilingual instruction in the public schools.

While it may be true that many noncitizen immigrants might vote for such policies, native born citizens also vote their own interests. Both groups, however, are not homogeneous. It is not exactly clear how noncitizens would actually vote and what impact they would actually have on the political balance of power. Indeed, this is an area that requires more research. There is some evidence that the voting patterns of newly naturalized U.S. citizens—as well as noncitizen voting in Europe—produce only modest shifts in the balance of power.⁹ However, newly naturalized immigrants do tend to be more sympathetic toward other noncitizen immigrants than native born citizens.¹⁰

On the other hand, the enfranchisement of immigrant voters could invigorate electoral dynamics and produce a general increase in democratic participation of all classes of voters. Indeed, social and political conflicts might be able to be worked out at the ballot box instead of on the streets. This was one of the arguments used in New York's campaign to extend voting rights to noncitizens in the early 1990s. This occurred at a time when protests and rioting swept through Washington Heights, a largely Dominican community. These events propelled a twenty-four member Task Force on New Americans in the New York State Assembly to introduce legislation that would have enabled munic-

9. Louis Desjicic, "Building America. One Person at a Time: Naturalization and Political Behavior of the Naturalized in Contemporary American Politics," in *E Pluribus Unum?: Contemporary and Historical Perspectives on Immigrant Political Incorporation*, edited by Gary Gerstle and John Mollenkopf (New York: Russell Sage Foundation, 2001); Lorraine Minnite, Jennifer Holdaway and Ronald Hoyduk, "The Political Participation of Immigrants in New York," in *In Defense of the Alien*, Volume 23 (New York: Center for Migration Studies, 2001).

10. Minnite, Holdaway and Hoyduk, "The Political Participation of Immigrants in New York..."

palities to extend voting rights to noncitizens.¹¹ In the case of New York, a multi-racial coalition of legislators and advocates sponsored the legislation.

Granting Noncitizens Voting Rights Would Increase Election Fraud

Opponents of noncitizen voting raise another objection: they contend that allowing immigrants to vote would open doors to electoral fraud. Critics argue that unethical immigrants or dishonest politicians might use corrupt voting practices to compromise the integrity of the ballot.

This argument assumes that noncitizen immigrants are more likely to be bought or sold than citizens. Yet, there is little hard evidence of voter fraud on their part, both historically and contemporarily.¹² Furthermore, strong anti-fraud measures are already in place that can detect and deter fraud. To be sure, there are practical administrative problems of managing the simultaneous registration and voting of different classes of electors while preventing potential double voting or other fraud. But this is not an insurmountable problem. Jurisdictions can require voters to provide identification at poll sites and/or during the registration process. Also, voting could be restricted to legally admitted noncitizens who have been residing in a jurisdiction for a certain period of time (such as Amherst, Massachusetts did; Cambridge and towns in Maryland extended voting rights to all noncitizens).

Thankfully, existing systems that allow noncitizens to vote illustrate the viability of such reforms. For example, Takoma Park, Maryland, allows all noncitizens—legal permanent residents and undocumented immigrants—to vote in local elections. Maryland’s election administrators keep two separate lists: one for both citizens and noncitizen voters to vote in local elections; and a separate list for citizens to vote in state and national elections. Election administrators have developed two types of voter registration forms and use them to draw up the two different lists. For local elections—where both citizens and noncitizens vote—the clerks merge the two lists. In this way, the only people who know citizens from noncitizen voters are the election clerks. From the vantage point of an observer all voters look the same. After a local election, however, noncitizen voter cards are removed from the voter lists and kept separately. Only citizens appear

¹¹ *Ibid.*

¹² Ron Hayduk, “Non-Citizen Voting: Pipe Dream or Possibility?” New York: Drum Major Institute, 2002. <http://www.drummyoinstitute.org/llbrar/v/article.php?ID=5519>; Lorraine Minifie and David Calahan, “Securing the Vote: An Analysis of Election Fraud,” *Demos: A Network for Ideas and Action*, 2003. (<www.demos-usa.org>)

on the voter lists for elections of state and federal offices. Europe also provides viable examples.¹³

Restoring Immigrant Voting Rights

New York City was the first major city to restore noncitizen voting rights in 1969, when New York State established community school boards, which allowed noncitizens to vote and run in community school board elections. In 1988, Chicago changed its law to allow noncitizens to vote in school elections; during the 1980s and 1990s, six towns in Maryland moved to allow noncitizen voting in all local elections.

Campaigns to restore immigrant voting rights have been launched in a dozen cities and states from coast to coast over the past decade, including in New York City; Washington D.C.; Cambridge and Amherst, Massachusetts; Portland, Maine; San Francisco and Los Angeles, California; Miami, Florida; Minnesota; Connecticut; North Carolina; Texas; New Jersey; and Wisconsin.

The movement to expand voting rights is not particular to the U.S.; it is a global phenomenon. More than forty countries on nearly every continent allow resident noncitizens to vote at various levels in the host countries' elections, with most countries adopting such legislation during the past three decades.

All New Yorkers would benefit from the political inclusion of noncitizen immigrants. We all have interests in safe streets, good schools, affordable housing, health care, and good jobs, whether newcomers arrive from Delaware or the Dominican Republic. We are a stronger society when everyone participates because we all benefit when decisions are made democratically. Non citizen voting would help insure that government is truly representative, responsive, and accountable to all its members.

¹³ Jan Rath, "Voting Rights," in *The Political Rights of Migrant Workers in Western Europe*, edited by Henry Zig Layton (Newbury Park, Calif.: Sage Publications, 1990); David Earnest, "Noncitizen Voting Rights: A Survey of an Emerging Democratic Norm," Paper prepared for delivery at the 2003 annual convention of the American Political Science Association, Philadelphia, Pennsylvania, August 28-31, 2003.

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