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# The Political Discourse of Amnesty in Immigration Policy

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## THE POLITICAL DISCOURSE OF AMNESTY IN IMMIGRATION POLICY

[S]hall we refuse to the unhappy fugitives from distress that hospitality which the savages of the wilderness extended to our fathers arriving in this land? Shall oppressed humanity find no asylum on this globe?<sup>1</sup>

### I. INTRODUCTION

Eduardo Sandoval has lived in the United States without legal status for nearly twenty years.<sup>2</sup> He now has a wife and three children who are all U.S. citizens.<sup>3</sup> As the husband of a U.S. citizen, Eduardo would otherwise qualify to adjust his status to that of a legal permanent resident,<sup>4</sup> if not for the fact that he entered without inspection when he

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1. FRANK G. FRANKLIN, *THE LEGISLATIVE HISTORY OF NATURALIZATION IN THE UNITED STATES; REVOLUTIONARY WAR TO 1861* 97 (1906) (quoting Thomas Jefferson's message at the opening of the Seventh Congress, First Session, in 1801).

2. This hypothetical is based on a real case, which I encountered working as a law clerk at an immigration firm in Cleveland, Ohio. The name has been changed to preserve the client's anonymity. The basic premise is a fairly general archetype that typifies an average undocumented immigrant who has resided in the United States for many years.

3. Eduardo married a naturally-born U.S. citizen and his children were born in the United States. See U.S. CONST. amend. XIV, § 1 (stating that "[a]ll persons born . . . in the United States . . . are citizens of the United States and of the State wherein they reside"); see also JEFFREY S. PASSEL, *UNAUTHORIZED MIGRANTS, NUMBERS AND CHARACTERISTICS, BACKGROUND BRIEFING PREPARED FOR TASK FORCE ON IMMIGRATION AND AMERICA'S FUTURE* 19 (Pew Hispanic Center 2005), <http://pewhispanic.org/files/reports/46.pdf> (providing data on the number of families that this scenario represents: "A significant share of unauthorized families can be characterized as 'mixed status' in which there is one or more unauthorized parent and one or more children who are U.S. citizens by birth.").

4. Immigration and Nationality Act, 8 U.S.C. § 1255(i) (West 2006) (hereinafter INA § 245; see Stanley Mailman & Stephen Yale-Loehr, *It isn't an Amnesty, but*, 6 BENDER'S IMMIGRATION BULLETIN 87 (2001) [hereinafter Mailman & Yale-Loehr, *Amnesty*] (explaining "adjustment of status" as an alternative to consular processing).

INA § 245 is the chief vehicle by which persons within the United States adjust their status to become legal residents. Until Congress enacted § 245 in 1952, aspiring immigrants, even those already in the United States on a temporary visa, had to do 'consular processing.' Under that procedure, still available, the immigrant applies for a visa at a U.S. consular office abroad, which is needed to seek admission to the United States for permanent residence (the "green card").

*Id.*; see also IMMIGRATION AND ASYLUM 636 (Matthew J. Gibney & Randall Hansen, eds. 2003)

first came in to the country in 1988.<sup>5</sup> The principal obstacle for Eduardo in his quest for legal status is the requirement that he exit the United States in order to apply for a visa.<sup>6</sup> Once Eduardo leaves the country he will trigger an automatic ten-year bar to reentry.<sup>7</sup>

Despite the fact that Eduardo has lived and worked in the United States longer than he lived in his native country, the Immigration and Nationality Act (“INA”)<sup>8</sup> provides no means for him to remain here legally.<sup>9</sup> Although willing to pay fines and invoke the judicial process,

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(identifying adjustment of status as the most common form of immigration: “Most immigrants are in the United States already when their immigration visas become available. In FY2000, this was true for 52 percent of immigrants receiving immigration visas that year.”); NELLY JEFFERYS & NANCY RYTINA, U.S. LEGAL PERMANENT RESIDENTS: 2005 (2006) *available at* [http://www.dhs.gov/xlibrary/assets/statistics/publications/USLegalPermEst\\_5.pdf](http://www.dhs.gov/xlibrary/assets/statistics/publications/USLegalPermEst_5.pdf); *and infra* note 229 and accompanying text.

5. See Mailman & Yale-Loehr, *Amnesty*, *supra* note 4. A U.S. citizen can petition for an alien spouse to become a legal permanent resident by filing form I-130 with the U.S. Citizenship and Naturalization Services. *Id.*

Many people who overstayed their visas in the last several years, or who eluded inspection and remained, have established strong ties to the United States and are now eligible for an immigrant visa. They are or can be the beneficiaries of a family petition by a U.S. citizen or lawful resident, or a petition or labor certification by a U.S. company.

*Id.*

6. Because Eduardo entered without inspection he has not officially entered the country according to immigration laws. “The terms ‘admission’ and ‘admitted’ mean, with respect to an alien, the lawful entry of the alien into the United States after inspection and authorization of an immigration officer.” 8 U.S.C.A. § 1101(a)(13) (West 2006). “[N]o immigrant shall be admitted into the United States unless at the time of application for the admission he (1) has a valid unexpired immigrant visa or was born subsequent to the issuance of such visa of the accompanying parent.” *Id.* § 1181(a). The issuance of visas is governed by 8 U.S.C.A. § 1201. (West 2006).

7. 8 U.S.C.A. § 1182(a)(9)(B) (West 2006) (known commonly as “the bars”). The three and ten-year bars make adjustment of status a legal imperative for undocumented immigrants. Section 245 adjustment of status applies to undocumented immigrants under subsection (i). *Id.* § 1255(i); see Mailman & Yale-Loehr, *Amnesty*, *supra* note 4.

8. All immigration laws are compiled in a uniform set of laws known as the Immigration and Nationality Act (INA) and incorporated in the United States Code under Title 8.

9. The only section of the INA which would have allowed Eduardo to adjust status was Section 245(i), which expired April 30, 2001. 8 U.S.C.A. § 1255(i) (West 2006); see also Michael D. Cronin, *Adjustment of Status under LIFE*, INS Memoranda, 6 BENDER’S IMMIGRATION BULLETIN 143 (2001) (“Section 245(i) of the Act allows an alien to apply to adjust status under section 245 notwithstanding the fact that he or she entered without inspection, overstayed, or worked without authorization.”). Any immigrant who submitted a valid petition for adjustment of status before April 30, 2001 is still eligible to rely on the provision. *Id.* (“Applications and petitions submitted under section 245(i) of the Act may not be rejected prior to May 1, 2001, as long as they bear the required fee and the applicant’s signature.”).

the only option for Eduardo to remain in the United States is to maintain his illegal status on the fringes of society.<sup>10</sup>

Somewhere between eight million and twelve million undocumented immigrants currently live and work in the United States under circumstances similar to those of Eduardo Sandoval.<sup>11</sup> Many of them have established roots here that include U.S. citizens as close family members.<sup>12</sup> The continually growing population of

10. See Mailman & Yale-Loehr, *Amnesty*, *supra* note 4 (describing adjustment of status as the “only hope” for undocumented immigrants to legalize their status given the three and ten-year bars).

11. The number used for exactly how many undocumented immigrants currently live and work in the United States is subject to interpretation. The very nature of this class’s subverted existence makes calculating an actual number virtually impossible. DEPARTMENT OF HOMELAND SECURITY, STATISTICS-ILLEGAL ALIEN RESIDENT POPULATION, <http://www.dhs.gov/xlibrary/assets/statistics/illegal.pdf> (last visited Jan. 13, 2007) (“Estimating the size of a hidden population is inherently difficult.”); Critics of immigrants tend to inflate the numbers, while advocates are more likely to use lower numbers. DAVID M. REIMERS, UNWELCOMED STRANGERS 28 (Columbia University Press 1998). “Estimating the number of undocumented immigrants has proved to be controversial, with those wanting to halt the illegal flow usually employing high figures to dramatize the numbers.” *Id.* In his staunchly anti-immigrant book, *State of Emergency*, Pat Buchanan estimated the number of so-called “invaders” to be 12 million in 2006. PATRICK J. BUCHANAN, *STATE OF EMERGENCY; THE THIRD WORLD INVASION AND CONQUEST OF AMERICA* 252 (Thomas Dunne Books 2006). An often-quoted source for a generally unbiased number is the Pew Hispanic Center, which estimated the number at 11 million as of March 2005. JEFFREY S. PASSEL, *SIZE AND CHARACTERISTICS OF THE UNAUTHORIZED MIGRANT POPULATION IN THE U.S.* (Pew Hispanic Center, 2006), <http://pewhispanic.org/reports/report.php?ReportID=61>. Numbers were calculated based on a March, 2004 Population Survey, conducted by the U.S. Census Bureau and the Department of Labor. *Id.* At the current rate of growth of half million person a year the Pew Hispanic number would be twelve million by March 2007. *Is the Reid-Kennedy Bill a Repeat of the Failed Amnesty of 1986?: Hearing on Senate-passed Reid-Kennedy Bill Before the H. Comm. on the Judiciary*, 109th Cong. 7, 69 (2006), [hereinafter *Reid-Kennedy Hearing*] (noting Chairman Sensenbrenner’s statement “[o]ur Nation’s broken immigration system has allowed the illegal immigrant population to grow at an unprecedented half million persons a year” and Iowa Senator Chuck Grassley’s asserted one of the highest estimates conceivable: “based on what resulted from 1986 when there were roughly a million people here illegally and with all the legalization and family reunification, it came out three or four times what we had. If you consider the same ratio, then you get into numbers that are very big and more accurately maybe 35 to 45 million.”).

12. Emma O. Guzman, Comment, *The Dynamics of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996: The Splitting Up of American Families*, 2 SCHOLAR 95, 95-100 (2000) (discussing the broad impact of 1996 immigration reform legislation as it would affect families composed of undocumented immigrants and U.S. citizens). Family unification is one of the central arguments used in arguing to reenact Section 245(i). Maria J. Demeo, *Executive Summary of the Policy Recommendations to the Bush-Cheney Administration on Education, Political Access, Employment, Immigrants’ Rights, Public Resource Equity, and Access to Justice by the Mexican American Legal Defense and Educational Fund* 3, 8 (2001), available at [www.maldef.org](http://www.maldef.org) (advocating “to protect and promote the rights of the entire Latino community in the United States” by recommending a reenactment of Section 245(i): “[e]xtension of 245(i) of the Immigration and Nationality Act (INA) will certainly be one of the key legislative items first facing the Bush-Cheney

undocumented immigrants<sup>13</sup> provokes controversy in various aspects of public policy.<sup>14</sup> Within the debate over immigration reform lies the underlying question of what constitutes amnesty, and whether the term itself has prevented meaningful reform measures from taking effect.

The post-September 11th security concerns that have driven U.S. politics in recent years have heavily impacted the amnesty debate.<sup>15</sup> Now more than ever, voters and lawmakers alike are concerned about the risk of maintaining the status quo with respect to an unaccounted for “shadow population.”<sup>16</sup> While some politicians propose legalization as a means of documenting these individuals,<sup>17</sup> others contend that militarizing the border and toughening enforcement of immigration laws will better address the issue.<sup>18</sup> In between these two extremes are those who advocate for broad policy reforms through a comprehensive approach.<sup>19</sup>

This Article attempts to inform the reader on how politics surrounding the term itself has distracted lawmakers, and caused an ineffective backlash against all legalization measures.<sup>20</sup> The deadlock which has prevented George W. Bush’s administration from making any significant changes to the INA can be largely attributed to this fundamental concern over amnesty.<sup>21</sup>

Comprehensive immigration reform has been a key talking point for President Bush, as well as Congress, throughout his term.<sup>22</sup> The issue has inspired repeated attempts to craft a reform measure, and

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Administration. The Administration should support and promote legislation that provides for full and permanent extension of the section 245(i”).

13. See *infra* note 52 and accompanying text.

14. See *e.g. infra* note 83 and accompanying text.

15. See *infra* note 90 and accompanying text.

16. See *infra* note 145 and accompanying text.

17. See *infra* notes 200-206 and accompanying text (discussing Senate Bill 2611). See generally BILL ONG HING, *DEPORTING OUR SOULS: VALUES, MORALITY AND IMMIGRATION POLICY 50* (Cambridge 2006) (including security as one reason to enact a legalization provision: “legalizing undocumented workers coupled with a large worker program is in the interest of our national security and constitutes a step that would aid our country in its efforts to combat terrorism”).

18. For a discussion on mass deportation proposals see *infra* notes 128-132 and accompanying text. For a discussion on the most recent attempt to alleviate this tension through increased border security see *infra* notes 114-121 and accompanying text.

19. See *infra* note 80 and accompanying text.

20. See *infra* notes 37-79 and accompanying text.

21. See *infra* notes 159-211 and accompanying text.

22. See *infra* note 116 and accompanying text (criticizing both President Bush and members of Congress for clamoring for change, but then stalling from putting such changes into effect).

endless amounts of press coverage.<sup>23</sup> Politicians throughout this time have campaigned by taking a stance on the issue, and voters have reacted accordingly.<sup>24</sup> Despite avid attempts by Congress and voters' enthusiastic endorsements for reform, very little progress has been made under the Bush administration's term.<sup>25</sup>

In an effort to resolve the dilemma of how to address the undocumented immigrant problem, this Article proposes two changes to the INA. First, Congress should reenact Section 245(i).<sup>26</sup> This code section provides an opportunity for undocumented immigrants to legalize their status.<sup>27</sup> Section 245(i) applies only to a narrow class of immigrants who meet the specifications prescribed by the code, and it requires applicants to pay a substantial fee.<sup>28</sup> Second, the Article suggests reexamining the three and ten-year bars, which were put into place to deter illegal entry, but in effect have exacerbated the problem by

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23. See *infra* notes 80-158 and accompanying text.

24. *Id.*

25. *Id.*

26. See *infra* notes 212-235 and accompanying text.

27. 8 U.S.C.A. § 1255(i) (West 2006). The original text of the 1994 provision reads:

(i)(1) Notwithstanding the provisions of subsections (a) and (c) of this section, an alien physically present in the United States who--(A) entered the United States without inspection; or (B) is within one of the classes enumerated in subsection (c) of this section, may apply to the Attorney General for the adjustment of his or her status to that of an alien lawfully admitted for permanent residence. The Attorney General may accept such application only if the alien remits with such application a sum equalling five times the fee required for the processing of applications under this section as of the date of receipt of the application, but such sum shall not be required from a child under the age of seventeen, or an alien who is the spouse or unmarried child of an individual who obtained temporary or permanent resident status under section 210 or 245A of the Immigration and Nationality Act or section 202 of the Immigration Reform and Control Act of 1986 at any date, who--(i) as of May 5, 1988, was the unmarried child or spouse of the individual who obtained temporary or permanent resident status under section 210 or 245A of the Immigration and Nationality Act or section 202 of the Immigration Reform and Control Act of 1986; (ii) entered the United States before May 5, 1988, resided in the United States on May 5, 1988, and is not a lawful permanent resident; and (iii) applied for benefits under section 301(a) of the Immigration Act of 1990. The sum specified herein shall be in addition to the fee normally required for the processing of an application under this section. (2) Upon receipt of such an application and the sum hereby required, the Attorney General may adjust the status of the alien to that of an alien lawfully admitted for permanent residence if--(A) the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence; and (B) an immigrant visa is immediately available to the alien at the time the application is filed. (3) Sums remitted to the Attorney General pursuant to paragraphs (1) and (2) of this subsection shall be disposed of by the Attorney General as provided in sections 286(m), (n), and (o) of this title.

*Id.*

28. *Id.*

creating a serious disincentive for undocumented immigrants to exit the country.<sup>29</sup>

This Article reflects on the current state of immigration reform, and specifically dissects the role that amnesty has played in preventing lawmakers from enacting meaningful changes to the INA. Section I provides an overview of the laws at stake in this Article.<sup>30</sup> The Article provides a brief introduction to “the first amnesty” and a detailed chronology of two measures which should be the subject of debate in any immigration reform initiative.<sup>31</sup> Section I concludes with a discussion about how amnesty factors into the current proposals for comprehensive immigration reform.<sup>32</sup> Section II discusses the term amnesty and how it has been used within the context of immigration debates.<sup>33</sup> The Article then applies this knowledge to the proposal for reenacting Section 245(i).<sup>34</sup> Section III specifically addresses the Article’s proposals for reform; reenacting Section 245(i) permanently, and eliminating the bars to reentry.<sup>35</sup> In conclusion, the Article provides an overview of the current debate, and responds to arguments in opposition to the two main proposals set forth in this Article.<sup>36</sup>

## II. AMNESTY-RELATED LEGISLATION

### A. Immigration Reform and Control Act

The first attempt to legalize undocumented immigrants en masse was the Immigration Reform and Control Act (“IRCA”) of 1986.<sup>37</sup> The Act permitted undocumented immigrants to become legal permanent

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29. Gabriela A. Gallegos, Comment, *Border Matters: Redefining the National Interest in U.S.-Mexico Immigration and Trade Policy*, 92 CAL. L. REV. 1729, 1749 (2004) (citing Edward Hegstrom, *A Risky Border Business*, HOUS. CHRON., Aug. 19, 2002, at A1) (“Bars to reentry have encouraged migrant workers and border residents who work in the United States and live in Mexico to stay for longer periods and to send for their family rather than return to their home country.”).

30. See *infra* notes 37-79 and accompanying text.

31. *Id.*

32. See *infra* notes 80-158 and accompanying text.

33. See *infra* notes 159-211 and accompanying text.

34. See *infra* notes 212-238 and accompanying text.

35. *Id.*

36. See *infra* notes 239-257 and accompanying text.

37. Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (1986); Stephen W. Yale-Loehr & Lindsay Schoonmaker, *Basic Immigration Law 2006: Overview of U.S. Immigration Law*, 158 PLI/NY 49, 56 (2006). For a detailed analysis of IRCA with respect to the current immigration debates see Richard A. Johnson, Note, *Twenty Years of the IRCA: The Urgent Need for an Updated Legislative Response to the Current Undocumented Immigrant Situation in the United States*, 21 GEO. IMMIGR. L.J. 239, 267-75 (2007).

residents without leaving the country for the first time since the INA began regulating immigration in 1952.<sup>38</sup> In addition to a legalization program, the law attempted to regulate illegal immigration in various other ways.<sup>39</sup> The law enhanced border security measures, established an employment verification system for employers, and imposed sanctions on employers who hire undocumented immigrants.<sup>40</sup> IRCA is widely recognized as a failed attempt to regulate undocumented immigration.<sup>41</sup>

The failure of IRCA to control illegal immigration now stands as the central hurdle in any campaign for a legalization statute.<sup>42</sup> Known commonly as the “first amnesty,”<sup>43</sup> IRCA has a pervasive legacy.<sup>44</sup>

38. Immigration Reform and Control Act of 1986, Pub.L. No. 99-603, 100 Stat. 3359 (1986); see *U.S.-Mexico Migration Discussions: An Historic Opportunity: Hearing Before the S. Comm. on the Judiciary*, 107th Cong. 98-99 (2001) (statement of Sen. Edward Kennedy, Senator) [hereinafter *U.S.-Mexico Migration Discussions*], available at 2001 WL 1021792 (describing the impetus for change to the INA that culminated when Congress passed IRCA many years later: “The current Immigration and Nationality Act is a generation out of date. It is out of touch with the times, and inadequate to meet modern needs.”).

39. President Ronald Reagan, Statement upon Signing S. 1200, Immigration Reform and Control Act of 1986 (Nov. 6, 1986), at 2 [hereinafter IRCA Signing Statement] (President Reagan introduced the legislation by describing its three basic components: “[i]n 1981 this administration asked the Congress to pass a comprehensive legislative package, including employer sanctions, other measures to increase enforcement of the immigration laws, and legalization. The act provides these three essential components.”); see also Shannon Leigh Vivian, Note, *Be Our Guest: A Review of the Legal and Regulatory History of U.S. Immigration Policy Toward Mexico and Recommendations for Combating Employer Exploitation of Nonimmigrant and Undocumented Worker*, 30 SETON HALL LEGIS. J. 189, 206-08 (explaining the employer sanctions implemented by IRCA and why they failed to deter illegal immigration).

40. See Paul L. Frantz, *Undocumented Workers: State Issuance of Driver’s Licenses Would Create a Constitutional Conundrum*, 18 GEO. IMMIGR. L.J. 505, 519-526 (providing an overview of the various aspects of IRCA).

41. See e.g. Ryan D. Frei, Comment, *Reforming U.S. Immigration Policy in an Era of Latin American Immigration: The Logic Inherent in Accompanying the Inevitable*, 39 U. RICH. L. REV. 1355, 1373 (2005) (“Despite the ‘sweeping changes’ it introduced to immigration law, IRCA had a relatively minor impact that did little to ameliorate the growing problem of illegal immigration.”).

42. *Reid-Kennedy Hearing*, *supra* note 11, at 2. The fifth and final hearing on illegal immigration specifically addressed whether adopting an amnesty provision would cause the same problems that the 1986 legislation provoked. *Id.* The Chairman of the Committee, F. James Sensenbrenner, cast a particularly unfavorable light on the effects of IRCA; “Much of the current immigration chaos is a direct result of the disastrous step Congress took two decades ago in passing the Immigration Reform and Control Act of 1986—without my vote, I might add.” *Id.* Rachel L. Swarns, *Failed Amnesty Legislation of 1986 Haunts the Current Immigration Bills in Congress*, N.Y. TIMES, May 23, 2006, at A20 (explaining how IRCA’s amnesty failure has created skepticism about any future amnesty provisions).

43. BLACK’S LAW DICTIONARY 93 (8th ed. 2004) (defining the term “amnesty” using IRCA as the quintessential example). See also *Border Security and Immigration Issues, Hearing before the Subcomm. on Immigration, Border Security, and Claims of the H. Comm. of the Judiciary*, 109th Cong. 2 (2006) (statement of James R. Edwards, Jr., Hudson Institute) [hereinafter *Border Security*].



Following IRCA, illegal immigration continued to rise, and many undocumented immigrants in the United States remained without legal status when the opportunity to apply expired.<sup>45</sup> The critical failure of IRCA in terms of inspiring sympathetic supporters was the relative ease of the legalization process.<sup>46</sup>

## B. Illegal Immigration Reform and Immigrant Responsibility Act

The Illegal Immigration Reform and Immigrant Responsibility Act (“IIRIRA”) of 1996 made a bold attempt to reduce the growing number of undocumented immigrants.<sup>47</sup> A new code section barring undocumented immigrants from reentry was incorporated as part of this expansive body of law.<sup>48</sup> The bars were draconian measures intended to

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*and Immigration Issues Hearing*] (citing the Black’s definition of amnesty and noting that IRCA is used as an example in the definition as part of his testimony to Congress regarding S. 2611). *Contra* SUSAN GONZALEZ BAKER, *THE CAUTIOUS WELCOME: THE LEGALIZATION PROGRAMS OF THE IMMIGRATION AND CONTROL ACT 26* (The RAND Corporation & The Urban Institute 1990) (refuting IRCA’s label of amnesty and deeming it a “targeted program that balanced the offer of legalization with stringent requirements”).

44. See *This Month in Immigration History: May 1987*, <http://149.101.23.2/graphics/aboutus/history/may1987.html> (relating the connection between IRCA and the current debate: “In the wake of several ongoing programs to adjust the immigration status of other previously illegal migrants, and in light of continuing shortages of labor in many sectors of the U.S. economy, including its technology and service sectors, some, like the AFL-CIO, have called for another general amnesty for some or all of those currently in the United States illegally.”).

45. Kierra LoBreglio, Note, *The Border Security and Immigration Improvement Act: A Modern Solution to a Historic Problem?*, 78 ST. JOHN’S L. REV. 933, 949-50 (2004) (comparing IRCA to the Border Security and Immigration Improvement Act and noting the failure of IRCA); Michael J. Mayerle, Comment, *Proposed Guest Worker Statutes: An Unsatisfactory Answer to a Difficult, if not Impossible, Question*, 6 J. SMALL & EMERGING BUS. L. 559, 571 (2002) (noting statistical data on the ineffectiveness of IRCA: “the percentage of farm workers in the United States who are undocumented increased from seven percent just after the 1986 immigration amnesty law to thirty-seven percent during 1994-95”).

46. See JASON JUFFRAS, *IMPACT OF THE IMMIGRATION REFORM AND CONTROL ACT ON THE IMMIGRATION AND NATURALIZATION SERVICE* 60 (The RAND Corporation & The Urban Institute 1991) (providing results of a 2-year study on the implementation of IRCA, which revealed that the criteria for legalization were generally not enforced: “The INS exempted many immigrants from the English and civics requirement and devised several ways for applicants to demonstrate the minimal competence in English and civics needed for permanent residency. As of January 1990, the Phase 2 denial rate for the general legalization program was approximately 1 in 10,000.”).

47. Illegal Immigration Reform and Immigrant Responsibility Act, Pub. L. No. 104-208, 110 Stat. 3009 (1996). See Press Release, The White House, Office of the Press Secretary, President on Signing Budget and Immigration Bill (Oct. 1, 1996) (referencing President Clinton’s ideals upon signing the law: “[t]his bill also includes landmark immigration reform legislation that reinforces the efforts we have made over the last three years to combat illegal immigration. It strengthens the rule of law by cracking down on illegal immigration at the border, in the workplace, and in the criminal justice system”).

48. See 8 U.S.C.A. § 1182(a)(9) (West 2006) (I.N.A. § 212) (describing the three and ten-year

sanction illegal entry.<sup>49</sup> They did so by imposing a three or ten-year bar to admission or reentry upon any undocumented immigrant who had maintained an unlawful presence within the United States.<sup>50</sup> Much like current proposals to reform immigration, which suggest penalty taxes and criminal convictions to punish the act of illegal entry and stay, the bars were introduced as a means to deter defiance of immigration laws.<sup>51</sup>

The practical effect of the bars has not been deterrence of illegal entry or stay, but rather a disincentive for undocumented immigrants to leave once they have entered without inspection.<sup>52</sup> Because any attempt to exit the country or apply for status might trigger the bars, an undocumented immigrant successfully avoids the bars by remaining in the United States and not applying for any immigration benefit.<sup>53</sup> Given the serious penalties for making their presence known, undocumented immigrants are now more likely than ever to remain undetected.<sup>54</sup>

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bars for lawful immigration once an undocumented immigrant is found to have been present illegally).

49. Zoe Lofgren, *A Decade of Radical Change in Immigration Law: An Inside Perspective*, 16 STAN. L. & POL'Y REV. 349, 355 (2005). While the bars were intended to punish immigrants who had evaded the law through entry or extended stays, imposing the provision on families who had legitimate means to legalize status would punish too harshly. Barbara Hines, *So Near Yet So Far Away: The Effect of September 11th on Mexican Immigrants in the United States*, 8 TEX. HISP. J.L. & POL'Y 37, 39 (2002) (describing the 1996 immigration laws as draconian).

50. 8 U.S.C.A. § 1182(a)(9)(B)(i)(I) (West 2006) (I.N.A. §212); Stephen Yale-Loehr & Brian Palmer, *Unlawful Presence Update*, 6 BENDER'S IMMIGRATION BULLETIN 507, at 1 (2001) (explaining the function of the three-year bar). While there are stiffer penalties for forced removal, these penalties apply to immigrants who leave voluntarily before proceedings begin. *Id.* Unlawful presence of 180 days to one year subjects the immigrant to the three-year bar. *Id.* A stiff penalty of ten years applies to unlawful presence that exceeds one year. *Id.*

51. See Stephen W Yale-Loehr & Miller Mayer, *Basic Immigration Law 2006: Overview of U.S. Immigration Law*, 158 PLI/NY 49, 57 (2006) (explaining the objective of IIRIRA: "In 1996 Congress adopted a get-tough attitude toward out-of-status foreign nationals. . . . The 1996 law increased penalties for many immigration violations.").

52. See PASSEL, *supra* note 3, at 3 (providing speculative data on how the undocumented immigrant population has grown since Congress passed IIRIRA: "the unauthorized population has been steadily increasing in size (and possibly by large increments since the last half of the 1990s)").

53. See *INS Advises Field Offices on Sunset of INA § 245(i)*, 2 BENDER'S IMMIGRATION BULLETIN 847 (1997) (explaining to INS field officers how Section 245(i)'s expiration will affect the bars: "Other persons besides immediate relatives (spouses, parents and children of U.S. citizens) of U.S. citizens who are eligible to immigrate based on an available visa number, but who arrived without inspection or who violated their status can apply for adjustment of status under section 245(i) by paying a penalty. If 245(i) sunsets, they will be required to apply for their immigrant visa abroad, at which time they will be found inadmissible, if they have been unlawfully present in the U.S. for more than 180 days before leaving the U.S.").

54. See Tamar Jacoby, *The United States Should Legalize Illegal Immigration*, in IMMIGRATION 108 (Louise I. Gerdes, ed., 2005) (explaining how current immigration policy contravenes the rule of law: "Undocumented workers fear police and other authorities, thereby

Essentially, the bars are counter-effective, in that they augment the vast population of undocumented immigrants who have every incentive to avoid alerting authorities of their presence.<sup>55</sup>

### C. Section 245(i)

While the bars ran afoul of immigration goals and exacerbated the existing problems, Section 245(i) provided the necessary balance to legitimize immigration policy.<sup>56</sup>

Congress enacted Section 245(i) for the first time in 1994.<sup>57</sup> Originally the provision was implemented to aid applicants who already qualified to adjust status via consular processing.<sup>58</sup> For those applicants who were eligible for adjustment of status at a consulate abroad, Section 245(i) granted domestic INS offices the authority to adjudicate those

undermining law enforcement in their communities. They come to believe the U.S. laws, like the immigration code, are meant to be winked at.”)

55. *Id.*

56. See *Hearing on H.R. 3362 Before the H. Subcomm. on International Law, Immigration, and Refugees of the H. Comm. of the Judiciary*, 103rd Cong. 5 (1994) (statement of Katherine L. Vaughns, submitted prior to hearing). In this testimony given when Congress was considering Section 245(i) for the first time, Professor of Law Katherine L. Vaughns articulated the immigration goal served by Section 245(i):

[S]ection 302 of Title III prohibits the privilege of adjusting one’s status here in the United States to those beneficiaries of immediate relative visa approvals heretofore eligible to receive such benefit. This is a congressional prerogative. However, in light of recent congressional action allowing otherwise ineligible applicants the adjustment of status privilege, perhaps section 302 may prove to be counter-productive. Given the apparent legislative desire to provide an incentive for aliens to adjust their status in the United States instead of going abroad for immigrant visa processing overseas, such a measure would thwart this objective.

*Id.*; see also PASSEL, *supra* note 3, at 16 (identifying Section 245(i)’s disappearance as a possible explanation for the increased undocumented immigrant population: “There is some suspicion that the more-or-less orderly transition process . . . may have been short-circuited by the legislative changes of the late 1990s, especially affecting 245(i). If true, this change should partially explain the buildup in the unauthorized Mexican population.”); but see Steven A. Camarota & Jessica Vaughan, Op.-Ed., *A Loophole in Immigration Law*, WASH. POST, Oct. 21, 1997, available at [http://www.cis.org/articles/1997/sac\\_jfv10-21-97.html](http://www.cis.org/articles/1997/sac_jfv10-21-97.html) (arguing against Section 245(i) in order to give effect to the bars: “The sunset of 245(i) is necessary in order to activate a powerful enforcement tool passed last year. . . . If 245(i) ends as scheduled, any illegal alien who aspires to [sic] a green card will have to return home within six months or be subject to the new bar.”).

57. Pub. L. No. 103-317, § 506(b), 108 Stat 1724 (1994); Stanley Mailman & Stephen Yale-Loehr, *INA 245: How it Works*, N.Y.L.J., Feb. 22, 2001, 3, col. 1, [hereinafter Mailman & Yale-Loehr, *INA*]; Austin T. Fragomen, Jr., Steven C. Bell, & Thomas E. Moseley, *IMMIGRATION LEGISLATION HANDBOOK* § 9:22 (Thomson/West 2006).

58. NICOLE W. GREEN, *IMMIGRATION: CQ’S VITAL ISSUES SERIES* 64 (Ann Chih Lin ed., CQ Press 2002) (“The provision represented a rare opportunity for illegal immigrants to gain legal status, since ordinarily they would have to return to their home countries to apply for a visa and most would not risk leaving the United States with no sure prospect of legal reentry.”).

petitions.<sup>59</sup> Section 245(i) was initially adopted as an efficiency measure that would not have a broad impact on immigration controls, and it was enacted on a provisional basis, set to expire three years after its inception.<sup>60</sup>

Although not intended as an amnesty provision,<sup>61</sup> Section 245(i) had the effect of allowing immigrants who entered without inspection (“illegally”) to legalize status without leaving the country.<sup>62</sup> In 1997 when Congress extended Section 245(i)’s sunset date to January 14, 1998, it did so with full knowledge of the far-reaching application that the provision had enjoyed over the first three-year period of enforcement.<sup>63</sup>

The 1997 reenactment demonstrated that when a provision designed to aid undocumented immigrants is considered without political underpinnings, which attach to any amnesty debate, it garners bipartisan support.<sup>64</sup> While some may characterize the 1997 reenactment as an oversight on the part of the legislature, the legislative history indicates that Congress intended the reenactment as both welcomed and necessary.<sup>65</sup>

59. Legal Immigration Family Equity Act, § 1(a)(2), 8 U.S.C.A. § 1255 (West 2006); Mailman & Yale-Loehr, *Amnesty*, *supra* note 4.

60. Mailman & Yale-Loehr, *Amnesty*, *supra* note 4 (providing background information on Section 245(i): “Its rationale, when initially passed, was to ease the burden on applicants who would eventually get their green card anyway via consular processing. And the State Department approved the provision on grounds of efficiency: it saw little sense in taxing the workload of its consulates overseas with applications that could be done by INS offices at home.”).

61. Lofgren, *supra* note 49 at 363 (providing an inside perspective on Congress’ immigration reform in 1996; “During the mark-up of IIRIRA, I can recall no discussion of Section 245(i).”).

62. GREEN, *supra* note 58 and accompanying text.

63. Lofgren, *supra* note 49 (“Congress voted several times to extend section 245(i), to temporarily avert the problem of 3/10-year bar.”).

64. Similarly, when IRCA passed the term “amnesty” had not yet developed the negative political connotations that it invokes today. While there was debate over whether to adopt such a measure, and some legislators strongly disagreed, those who supported legalization did so without defending the rhetoric used. See 132 CONG. REC. S26,879-01 (daily ed. Oct. 17, 1986) (statement of Sen. Moynihan) (strongly endorsing amnesty: “[f]ortunately, this bill does provide amnesty, for those illegal aliens who entered this country prior to January 1, 1982”); see also *Amnesty for Illegal Immigrants: Hearing Before the Subcomm. on Immigration, Borders, and Claims of the H. Comm. on the Judiciary*, 109th Cong. 6 (2006) (statement of Rep. King) [hereinafter *Hearing on Amnesty for Illegal Immigrants*] (referencing the lack of debate over use of the word amnesty in the IRCA legislative history: “we passed amnesty in 1986 and no one argued whether there was amnesty or not in 1986 because President Reagan declared it to be amnesty . . . .”); IRCA Signing Statement, *supra* note 39 (describing the legalization plan signed in to law without any hedging on the benefit to undocumented immigrants, but not specifically mentioning the term “amnesty”: “[w]e have consistently supported a legalization program which is both generous to the alien and fair to the countless thousands of people throughout the world who seek legally to come to America”).

65. *Joint Memorandum Concerning the Legal Immigration Family Equity Act of 2000 and*

Legislators embraced Section 245(i) as a necessary compliment to the bars. For the majority of undocumented immigrants Section 245(i) was the only section of the INA that allowed adjustment of status without triggering one of the bars.<sup>66</sup> Because Section 245(i) created a means to process adjustment of status applications domestically, it eliminated the threat of the bars for certain undocumented immigrants.<sup>67</sup>

The last extension of Section 245(i) came as part of the Legal Immigration Family Equality ("LIFE") Act, enacted on December 10, 2000.<sup>68</sup> Arguably, this was the first time that Section 245(i)

*The Life Act Amendments of 2000, Proceedings and Debates of the 106th Cong.*, 146 CONG. REC. S11,850-02, S11,851 (2000) (explaining the legislative intent of the amendments, which included an extension of Section 245(i): "Because both the original LIFE ACT and this legislation were developed outside the ordinary Committee process, they were not accompanied by the usual reports elaborating on the background and purpose of their provisions. This memorandum is accordingly submitted on behalf of the Chairman and Ranking Member of the Subcommittee on Immigration of the Senate Committee on the Judiciary to provide such elaboration in somewhat abbreviated form."). The memorandum encourages a liberal application of the extension: "to ensure that all potentially eligible persons have an opportunity to qualify for 245(i), if necessary the INS should accept petitions and applications before the April 30, 2001 sunset date that do not contain all necessary supporting documents, and allow additional documents to be filed after the deadline." *Id.*

66. Senator Kennedy described the function of Section 245(i) when he endorsed a bill, the Uniting Families Act of 2002, which would have reenacted the provision:

This legislation extends section 245(i), a vital provision of U.S. immigration law which allows individuals who already legally qualify for permanent residency to process their applications in the United States, without returning to their home countries. Without 245(i), immigrants are forced to leave their families here in the U.S. and risk separation from them for up to 10 years.

*Statements on Introduced Bills and Joint Resolutions*, 148 CONG. REC. S4,147-01, S4,155 (2002) (statement of Sen. Kennedy). Uniting Families Act of 2002:

SEC. 2. LIMITED EXTENSION OF SECTION 245(i) PROGRAM. (a) EXTENSION OF FILING DEADLINE.-Section 245(i)(1)(B)(i) of the Immigration and Nationality Act (8 U.S.C. 1255(i)(1)(B)(i)) is amended by striking "on or before April 30, 2001" and inserting "on or before April 30, 2003." (b) EXCLUSION OF CERTAIN INADMISSIBLE AND DEPORTABLE ALIENS.-The amendment made by subsection (a) shall not apply to any alien who is-(1) inadmissible under section 212(a)(3), or deportable under section 237(a)(4), of the Immigration and Nationality Act (relating to security and related grounds); or (2) deportable under section 237(a)(1)(G) of such Act (relating to marriage fraud). (c) EFFECTIVE DATE.-The amendment made by subsection (a) shall apply to applicants for adjustment of status who are beneficiaries of petitions for classification or applications for labor certifications filed before, on, or after the date of enactment of this Act.

*Id.*

67. *Id.*

68. Legal Immigration Family Equity Act, § 1(a)(2), 8 U.S.C.A. § 1255. President William J. Clinton, Statement upon Signing H.R. 4577 (Dec. 21, 2000), at 2, available at 2000 WL 1871653. This final reenactment differed sharply from the previous versions which had passed without political controversy. The President's signing statement acknowledged that the legislation was not easily agreed upon: "While I am disappointed that the legislation fails to eliminate the disparate treatment under our immigration laws sought for Salvadorans, Guatemalans, Hondurans, Haitians,

was smeared with the label of amnesty.<sup>69</sup> The news release for the Act specifically denied the label, and from that moment it became clear that continued reenactments would no longer pass through Congress without controversy.<sup>70</sup> Although the provision had received enthusiastic support from both President Clinton<sup>71</sup> and President Bush,<sup>72</sup> Section 245(i) expired on April 30, 2001.<sup>73</sup>

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and Liberians and does not provide any relief for deserving individuals affected by changes in the 1996 immigration law, it is the best compromise that could be reached after several rounds of intense negotiations.” *Id.* President William J. Clinton, Message to Congress, Message on Unfinished Work of Building One America (Jan. 15, 2001), at 18. The President asserted that the four-month extension of Section 245(i) was inadequate. He pressed Congress to adopt the provision permanently. *Id.* Courts have interpreted the intent of the statute: “the LIFE Act was written to provide an exception to the general rule that aliens who entered the country without inspection are ineligible to seek adjustment to lawful permanent status.” *Padilla-Caldera v. Gonzales*, 453 F.3d 1237, 1241 (10th Cir. 2005).

69. See News Release, U.S. Department of Justice, Immigration and Naturalization Service, Washington, D.C. 20536, INS Implements § 245(i) Provision of the LIFE Act (Mar. 23, 2001), available at [http://www.uscis.gov/files/pressrelease/Section245iLIFEAct\\_032301.pdf](http://www.uscis.gov/files/pressrelease/Section245iLIFEAct_032301.pdf) (having to defend the law from attracting this label: “it is not amnesty for all persons unlawfully in the United States”).

70. *Id.*; *Espinal v. Pere*, 144 F. Supp. 2d 53, 54 (1st Cir. 2001) (interpreting the “not amnesty for all persons” language of the News Release to mean that it does not apply to all persons unlawfully in the United States, but finding the code section to be an amnesty nonetheless).

71. *Fact Sheet on the Passing of a Fiscally Responsible Budget*, The White House, Office of the Press Secretary, President Clinton Calls on Congress to Act on America’s Education Priorities (Oct. 19, 2000), at 4 (President Clinton ‘s forceful approach gave Congress a clear directive to save Section 245(i) before the impending expiration: “People who have been living in the United States for many years and have developed strong ties to their communities deserve the opportunity to normalize their immigration status, and families should be allowed to stay together while an adjustment of status application is pending. Congress should address these injustices in the immigration system by . . . reinstating Sec. 245(i). The President will insist that Congress enact these commonsense measures, supported by both business and fundamental fairness, this year.”). See also *Fact Sheet on Progress on America’s Priorities*, President Clinton and Vice President Gore: Progress on America’s Priorities (Dec. 15, 2000) (touting the reinstatement of Section 245(i) as one of the administration’s most noteworthy achievements). The release acknowledged the drastic effects of IRRIRA and urged the next Congress to do more to soften the impact. *Id.*

72. Text of a Letter from the President to the Speaker and Democratic leader of the House of Representatives and the Majority and Democratic leaders of the Senate, The White House, Office of the Press Secretary (May 1, 2001), [hereinafter President Bush’s Letter to Congress]. President Bush’s address demonstrated a solid understanding of the three and ten year bars, and acknowledged Section 245(i) as a necessary cushion to those harsh sanctions. *Id.* His approach with Congress focused on an appeal to strengthen families. *Id.* President Bush’s speech to the Hispanic Chamber of Commerce in Washington, DC, Office of the Press Secretary (March 6, 2002), available at <http://www.whitehouse.gov/news/releases/2002/03/20020306-4.html>.

I’ve told the Congress that I want to make sure that the Mexican citizen here is well respected, and we will. We’ll respect people in our country. And one way to do that is to pass 245(i), which will allow for families to be reunited. If you believe in family values, if you understand the worth of family and the importance of family, let’s get 245(i) out of the United States Congress and give me a chance to sign it.

*Id.*

In May of 2001, President Bush urged Congress to extend the filing deadline for Section 245(i) beneficiaries.<sup>74</sup> He acknowledged that the April deadline would be hard-felt by the multitude of undocumented immigrants who had been eligible to apply for adjustment prior to the deadline, but had not acted soon enough.<sup>75</sup>

Once the deadline passed in 2001 the true effect of the bars was felt for the first time.<sup>76</sup> Without Section 245(i) as part of the INA, the possibility of adjusting status domestically disappeared completely for any undocumented immigrant who had failed to submit a visa application before the deadline.<sup>77</sup> In a sense, these individuals were trapped by the system, unable to apply domestically, nor able to leave and return.<sup>78</sup> Suddenly any attempt to legalize status became a catch-22, whereby undocumented immigrants could not submit a visa application without leaving the country and thereby triggering a bar to reentry.<sup>79</sup>

### III. COMPREHENSIVE IMMIGRATION REFORM

Combining a legalization program as one element of a broader reform effort is the basic concept behind “comprehensive immigration reform.”<sup>80</sup> Comprehensive reform has become a catch-phrase which

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73. 8 U.S.C.A. § 1255(i)(1)(B) (West 2005) (requiring that a “petition for classification under section 1154” be filed “on or before April 30, 2001” or “an application for labor certification under section 1182(a)(5)(A) be filed “on or before such date”).

74. President Bush’s Letter to Congress, *supra* note 72 (“I encourage the Congress to consider whether there was adequate time for persons eligible under section 245(i) to apply for adjustment of status before the filing deadline expired yesterday. . . . I would support legislation that temporarily extends the recently expired April 30, 2001 filing deadline”).

75. *Id.* (“Information indicates an estimated 200,000 were eligible to file but did not meet the deadline. Preliminary reports suggest that many applicants were unable to complete their paperwork in time, due in part to the fact that the rules explaining how the provision would be applied were not issued until late March.”).

76. See Charles C. Foster, 1996 *Immigration Act: Its Impact on U.S. Legal Residents and Undocumented Aliens*, 34-FEB HOUS. LAW. 28, 31 (1997) (predicting the effect of the bars). The author provides a useful interpretation of the new law from a senior immigration practitioner’s perspective:

[T]hose who do stay here illegally will have virtually no hope of ever qualifying for legal status. Such three-year and 10- year bar provision [sic] will virtually eliminate their ability, as a practical matter, to ever qualify for legal status by making what is an almost impossible task for many today completely impossible.

*Id.*

77. Mailman & Yale-Loehr, *Amnesty*, *supra* note 4, at 3.

78. Lofgren, *supra* note 49, at 361.

79. *Id.*

80. Tisha T. Tallman, *Liberty, Justice, and Equality: An Examination of Past, Present, and Proposed Immigration Policy Reform Legislation*, 30 N.C.J. INT’L L. & COM. REG. 869, 891 (2005) (concluding that an effective legalization plan must simultaneously consider immigration

subverts the highly politicized issue of amnesty and sets the debate in a somewhat even-handed tone.<sup>81</sup> Despite these avid attempts to keep the focus off of amnesty, the issue has continually resurfaced as the central obstacle preventing reform efforts.<sup>82</sup>

The ebb and flow of immigration laws presents a contentious illustration of political climates.<sup>83</sup> Immigration policy debates surface in times of political and economic hardship.<sup>84</sup> American citizens and

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enforcement). A strategy that combines legalization with law enforcement and border security measures is the central premise of comprehensive immigration reform. *Id.* See also Press Release, Office of the Press Secretary, Fact Sheet: Comprehensive Immigration Reform (May 15, 2006), available at <http://www.whitehouse.gov/news/releases/2006/05/20060515-10.html> (couching the legalization element, while emphasizing enhanced security measures: "There is a rational middle ground between granting an automatic path to citizenship for every illegal immigrant and a program of mass deportation.").

81. See *id.* (noting that the press release makes an obvious attempt to detract from the legalization element, and clearly denounces amnesty, while acknowledging that enhanced security measures alone are inadequate to address the undocumented immigrants currently present within the U.S.: "We Must Deal With The Millions Of Illegal Immigrants Who Are Already Here").

82. Austin T. Fragomen, Jr., *Employment-Based Immigration: Legislative and Administrative Update*, 1566 PLI/Corp 9, 11 (2006) (explaining the current developments in immigration law: "The central issue of the immigration reform debate this past year is whether reform should include stricter enforcement of our laws with greater penalties for violations, or whether reform should include a way to legalize the currently undocumented workforce and provide a future flow of additional low-skilled workers." ). See also, e.g., Rachel L. Swarns, *Failed Amnesty Legislation of 1986 Haunts the Current Immigration Bills in Congress*, N.Y. TIMES, May 23, 2006, at A20 (chronicling lawmakers' focus on enacting amnesty legislation); see also, e.g., Paul Nussbaum, *Across U.S. Ballots Loaded with Issues; The Questions, From Stem Cells to Mourning Doves, May Also Pull in Votes for Candidates*, PHILADELPHIA INQUIRER, Oct. 28, 2006, at A01 (quoting Jeffrey Makin, *Are Ballot Propositions Spilling Over into Candidate Elections?*, 2 INITIATIVE & REFERENDUM INST. REPORT 5 (2006), <http://www.iandrinststitute.org/REPORT%202006-2%20Spillovers.pdf>) ("Gay marriage, stem-cell research, abortion, minimum wage, immigration and affirmative action may be candidate-defining issues."). See also Nicholas R. Montorio, Note, *The Issue of Mexican Immigration: Where Do We Go From Here?*, 6 J. INT'L BUS. & L. 169, 198-200 (2007) (highlighting the amnesty debate as a central aspect of the current dilemma).

83. Linda S. Bosniak, *Exclusion and Membership: The Dual Identity of the Undocumented Worker Under United States Law*, 1988 WIS. L. REV. 955, 1014-15. See also Hines, *supra* note 49, at 39 (stating: "[i]mmigration law is as much an analysis of political, social, and economic trends as the study of a specialized body of law"); see also Senator Edward Kennedy, *Introduction to U.S. Immigration Law and Policy: 1952-1979; A Report Prepared at the Request of Senator Edward Kennedy, Chairman, Committee on the Judiciary, United States Senate, upon the Formation of the Select Commission on Immigration and Refugee Policy*, 3 IMMIGR. & NAT'LITY L. REV. 95, 98 (1979-1980) (prefacing a report on immigration policy by acknowledging the political ramifications of the issue: "One of the oldest themes in our history has now become one of our most contentious issues.").

84. JOHN ISBISTER, *THE IMMIGRATION DEBATE 200* (Kumarian Press 1996) (examining the different elements that factor in to immigration debates: "It is no coincidence that the expansive Immigration Act of 1990 was passed at the end of a decade of steady economic growth, increasing prosperity for many Americans (although not all) and falling employment."). Bosniak, *supra* note 83, at 993 (observing how the current political situation has provoked an acute interest in



political representatives alike have long been divided by this fundamental legal issue of how to treat undocumented immigrants.<sup>85</sup> It strikes at the core of political sentiments because it reflects one's world view, economic status, and racial identity.<sup>86</sup> Given the political significance of the debate, reaching a pragmatic compromise has at times seemed impossible.<sup>87</sup> Instead of compromise, the issue has pushed voters and their representatives in Congress to radical ends.<sup>88</sup> The critical difference in how voters on both sides of the issue have interpreted the concept of amnesty provides valuable insight into the obstacles that have prevented Congress from drafting meaningful immigration reform.<sup>89</sup>

While Americans may be starkly divided on whether to allow undocumented immigrants to adjust status, the need and desire for effective control of our borders is a widely accepted consensus in the

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immigration law: "The tragedy of September 11th and its aftermath further reinforce the political nature of this area of law."); see also Doris Meissner, *Immigration in the Post 9-11 Era*, 40 BRANDEIS L.J. 851, 851 (2002) (discussing immigration from a post 9-11 perspective, in which security issues dominate). Meissner served as the Commissioner of the Immigration and Naturalization Service from 1993-2000. *Id.* at 859. See also Aristide R. Zolberg, *Reforming the Back Door: The Immigration Reform and Control Act of 1986 in Historical Perspective*, in IMMIGRATION RECONSIDERED: HISTORY, SOCIOLOGY, AND POLITICS 336 (Virginia Yans-McLaughlin ed., 1990) (categorizing illegal immigration as the back door and noting how economic conditions inspire political debate: "Movements to close the 'back door' do tend to broaden their base of support in periods of depression and unemployment, when economic insecurity is more widespread.").

85. *U.S.-Mexico Migration Discussions*, *supra* note 38; see *infra* note 92 and accompanying text.

86. See Elizabeth M. Dunne, Comment, *The Embarrassing Secret of Immigration Policy: Understanding Why Congress Should Enact an Enforcement Statute for Undocumented Workers*, 49 EMORY L.J. 623, 639 (2000) (identifying the economic factors that control the political willingness to legislate sensitive immigration issues, particularly enforcement measures for undocumented workers).

87. See JOHN POWELL, IMMIGRATION 48 (Facts on File 2007) ("Given the strong partisan divisions in the American electorate, it is still not clear whether Democrats and Republicans in the U.S. Congress can find enough common ground to pass comprehensive reform.").

88. See, e.g., *infra* note 103 and accompanying text (demonstrating the radical difference between the immigration reform legislation passed in the House of Representatives and the Senate).

89. U.S. Immigration Policy: Restoring Credibility, A Report to Congress (U. S. Gov. Printing, Washington, DC, 1994), Executive Summary, available at <http://www.utexas.edu/lbj/uscir/exesum94.html> [hereinafter U.S. Immigration Policy: Restoring Credibility] (reporting the findings of a nine-member bipartisan body, chaired by former Congresswoman Barbara C. Jordan) ("more needs to be done to guarantee that the stated goals of our immigration policy are met. The immediate need is more effective prevention and deterrence of unlawful immigration."). See *Immigration's Lost Year*, N.Y. TIMES, Sept. 19, 2006, at A24 ("One of the many signs of the hysteria accompanying this election season is the way their moderate approach to immigration [Republican support of the failed Senate Bill S. 2611] has been tarred as wholesale "amnesty" for lawbreakers.").

aftermath of the September 11<sup>th</sup> terrorist attacks.<sup>90</sup> The post-9/11 fear of terrorism incited a mass of legislation introduced by members of both parties to secure our Nation.<sup>91</sup> The present immigration debate is therefore not a question of whether to address the issue.<sup>92</sup> Rather it is a question of how to address the issue.<sup>93</sup> Given the importance of improving security, it remains imperative to any practical solution that we first address the issue of what to do with the unaccounted-for population of immigrants already within the United States.<sup>94</sup>

Fundamental issues such as streamlining a complicated and fragmented bureaucracy, developing efficient and effective services, and determining how to prevent terrorists from passing through our borders undetected will not fairly be addressed until Congress establishes some

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90. HING, *supra* note 17, at 50 (providing a thorough analysis of how legalization would effectively address our national security concerns: “By offering a program that would encourage undocumented workers to come forward, we would be able to conduct background checks on a large group that currently lives underground, while freeing up investigative resources to concentrate on real threats of terror at the border and within our borders.”); see Jeffrey L. Ehrenpreis, Note, *Controlling Our Borders Through Enhanced Employer Sanctions*, 79 S. CAL. L. REV. 1203, 1203-04 (2006) (citing Nightline: Illegal Immigrant Workers (ABC television broadcast Dec. 14, 2004) (transcript on file with the Southern California Law Review) (quoting Senator John McCain on the security concerns posed by undocumented immigrants: “[W]e can’t tell the American people that we’re winning the war on terror if hundreds of thousands or millions of people are coming across our border every year, illegally and undocumented.”). See also Bradley J. Condon & J. Brad McBride, *Do You Know the Way to San José? Resolving the Problem of Illegal Mexican Migration to the United States*, 17 GEO. IMMIGR. L.J. 251, 254 (2003) (“The debate over how to address the issue of migrant Mexican workers in the United States is not new. The literature in this field tends to divide along pro-immigrant and anti-immigrant lines. However, all agree that reforms are needed.”) see also Regina Germain, *PANEL DISCUSSION: Perspectives on the Bush Administration’s New Immigrant Guestworker Proposal: The Time For Immigration Reform Is Now*, 32 DENV. J. INT’L L. & POL’Y 747, 751 (2004) (“A comprehensive immigration reform bill will be enacted in the near future. The question is not if there will be a new law, but when it will pass.”).

91. See, e.g., H.R. 10, 108th Cong. (2004); H.R. 5024, 108th Cong. (2004); H.R. 5040, 108th Cong. (2004); H.R. 5161, 108th Cong. (2004); S. 2774, 108th Cong. (2004); S. 2845, 108th Cong. (2004) (each addressing the recommendations put forth by the 9/11 Commission Report).

92. *U.S.-Mexico Migration Discussions*, *supra* note 38 (asserting the need for Congressional action: “The status quo is not acceptable. It must be replaced with sound immigration reforms that provide a manageable and orderly system where legality is the prevailing rule.”). See also Christopher J. Walker, *Border Vigilantism and Comprehensive Immigration Reform*, 10 HARV. LATINO L. REV. 135, 173 (2007) (asserting: “‘Comprehensive immigration reform’ is on the mind of federal, state, and local lawmakers, and changes to the current system will be made.”)

93. *Id.* (“These are complicated issues, and they deserve careful consideration and debate.”)

94. See Hines, *supra* note 49, at 28 (recognizing the need for a legalization program to address security concerns). See also Meissner, *supra* note 84, at 852 (identifying a shift in immigration policy post-9/11: “Seeing immigration as fundamentally an economy-driven phenomenon and looking to economics as the conceptual model through which we should be making changes for the future is, at least for the moment, on the sidelines.”). The “security lens” through which Meissner examined immigration in 2002 has continued to dominate these debates. See Hines, *supra* note 49, at 28

level of understanding on how to approach the twelve million undocumented immigrants<sup>95</sup> currently living and working in the United States.<sup>96</sup>

Congress' recent attempts to draft comprehensive immigration reform measures<sup>97</sup> have provided a welcome look at a flawed system.<sup>98</sup> In anticipation of the 2006 mid-term elections, politicians seized the opportunity to distinguish themselves by taking a stance on immigration reform.<sup>99</sup> The media inflamed the debates and protesters marched in large numbers to oppose the proposals<sup>100</sup> considered by Congress.<sup>101</sup>

95. See *supra* note 11 and accompanying text.

96. See generally Lenni B. Benson, *Breaking Bureaucratic Borders: A Necessary Step Toward Immigration Law Reform*, 54 ADMIN. L. REV. 203, 205-332 (2002) (proposing procedural reforms to immigration laws); see also *infra* note 185 and accompanying text (recommending comprehensive immigration reform to fix the myriad of problems with the current system).

97. LoBreglio, *supra* note 45 at 952-54 (commenting on a 2004 directive to revise immigration laws and concluding that meaningful reform requires a comprehensive approach). The author examined the history of immigration reform bills and noted similarities with the 2004 legislation. *Id.*

98. See *Immigration Enforcement: Hearing Before the Subcomm. on Immigration, Border Security and Claims of the H. Comm. on the Judiciary*, 108th Cong. (2003) (statement of Richard M. Stana).

99. E.g., Carl Hulse, *In Bellweather District G.O.P. Runs on Immigration*, N.Y. TIMES, Sept. 6, 2006, at A1; see also Mercedes Olivera, *Latino Voters May Color State Blue – In Time*, DALLAS MORNING NEWS, Oct. 28, 2006, at 2B (observing the potential impact of Latino voters on the 2006 mid-term elections and identifying immigration as a key issue: “Republican hard-liners have led the immigration debate around the country.”).

100. For pro-immigrant groups, much of the House Bill seemed outrageous. National Immigration Law Center (NILC), *How H.R. 4437 Would Criminalize Immigrants*, [http://www.nilc.org/immlawpolicy/CIR/hr4437immcriminalized\\_2006-2-28.pdf](http://www.nilc.org/immlawpolicy/CIR/hr4437immcriminalized_2006-2-28.pdf) (last visited January 21, 2007). Two of the most objectionable measures were the ones which would have made it a crime to provide humanitarian aid to an undocumented immigrant and the provision which would have made undocumented immigrants automatic felons. *Id.*; Allen Thomas O'Rourke, Note, *Good Samaritans, Beware: The Sensenbrenner-King Bill and Assistance to Undocumented Migrants*, 9 HARV. LATINO L. REV. 195, 197-201 (2006). The NILC website pronounces the mission of the organization is to “protect and promote the rights and opportunities of low-income immigrants and their family members.” NILC Home, <http://www.nilc.org/index.htm> (last visited January 21, 2007).

101. HING, *supra* note 17, at 8-9 (chronicling the media coverage that propelled the “furor over illegal immigration”); Allan Chernoff, *Rallies across U.S. call for illegal immigrant rights; Hundreds of thousands join 'national day of action' in towns, cities*, Apr. 10, 2006, <http://www.cnn.com/2006/POLITICS/04/10/immigration/index.html>; see, e.g., *Senate Passes Two Immigration Measures*, N.Y. TIMES, May 18, 2006, at A25, and *A G.O.P. Split on Immigration Vexes a Senator*, N.Y. TIMES, May 26, 2006 (providing examples of the extensive media coverage of the issue and commenting on the protestors who marched outside the capitol); see, e.g., Carl Hulse & Jim Rutenberg, *The Immigration Debate: Congress; Divisions Remain As Bush Presses on Immigration*, N.Y. TIMES, May 17, 2006, at A1 (discussing the ensuing debates over amnesty and identifying resistance from conservatives on Bush's proposals).

Unfortunately, the 109<sup>th</sup> Congress abandoned the project.<sup>102</sup> Legislation put forth by the House of Representatives has differed sharply from measures proposed by the Senate.<sup>103</sup>

In December 2005, the Sensenbrenner Bill, passed by the House of Representatives, provided the catalyst for the most recent wave of immigration reform.<sup>104</sup> The Sensenbrenner Bill took an enforcement-only approach, which did not include any legalization or guest worker provisions.<sup>105</sup> For immigrants and their advocates, this legislation was purely xenophobic.<sup>106</sup> In response, masses across the country marched

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102. See *Hearing on Amnesty for Illegal Immigrants*, *supra* note 64, at 5-7 (statement of Rep. Berman). Even before Congress failed to pass a comprehensive immigration reform bill Representative Berman predicted that the hearings were designed to delay such action: "I am convinced by virtue of what has happened here, both in treating the House-passed bill, what it went through, and in the way people are titling and talking about the hearings in the Senate on the Senate bill, that this is simply a well-orchestrated effort to have this Congress recess before the election without having dealt with one of the country's most serious national crises." *Id.* at 7. Even President Bush, who has been an avid advocate of comprehensive immigration reform, has been accused of stalling action for political gain. *Judicial Nominations: Hearing Before the H. Comm. on Senate Judiciary*, 109th Cong. 4 (2006) (statement of Patrick Leahy, Ranking Member, Comm. on Senate Judiciary). Senator Leahy said of the President, "Instead of urging his party to take early and decisive action to pass comprehensive immigration reform, as he signaled he would in February 2001, the President began his second term campaigning to undercut the protections of our Social Security system." *Id.*; *cf.* Frei, *supra* note 41, at 1358 (coming to President Bush's defense by acknowledging his consistent push for immigration reform: "In the months following the election, President Bush has made clear that his guest-worker proposal was not simply election-time rhetoric by continuing to lobby Congress to approve a system that would dramatically change the face of United States immigration law and policy toward Latin Americans.").

103. Compare S. 2611, 107th Cong. (2006) with H.R. 4437, 107th Cong. (2006). The House bill focused exclusively on law enforcement and enhanced border security without any legalization plan. H.R. 4437, 107th Cong. (2006). The Senate bill, while also including increased border security and law enforcement, also proposed a path to citizenship as part of a temporary guest worker program. S. 2611, 107th Cong. (2006). This effort to pass a legalization provision stood out as the critical difference between the two bills. Fragomen, *supra* note 82 and accompanying text. See generally ISBISTER, *supra* note 84, at 200 (observing that "in times of economic hardship, politicians can advance their careers by striking out against immigrants.").

104. Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005, H.R. 4437, 109th Cong. (2005). For a summary of the proposed law see American Immigration Lawyers Association, *The Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005 (H.R. 4437), as Amended and Passed by the House on 12/16/05, Section-by-Section Analysis*, <http://www.aila.org/content/default.aspx?docid=18258> (last visited January 21, 2007).

105. H.R. 4437, 107th Cong. (2006); O'Rourke, *supra* note 100, at 197-201 (providing background information and explanation of the basic provisions in H.R. 4437).

106. See Edwin R. Rubin, *Toward an Immigration Policy for the 21st Century: A Plea for a Thoughtful, Fact-Based Debate*, 167 N.J.L.J. 51, 52 (2005) (identifying the xenophobic nature of contemporary immigration discussions). The policies narrowly tailored towards those entering from the Southern Border seemed to target Latinos. *Id.* For those most deeply troubled by the bill it resembled the Chinese Exclusion Act of 1882. See generally Frei, *supra* note 41 (identifying the Chinese Exclusion Act as the first immigration law to exclude a specific race of people because of their failure to assimilate).

in large numbers, drawing attention to some of the particularly radical aspects of the bill.<sup>107</sup>

In March 2006, a compromise bill passed in the Senate, advancing a more liberalized approach to immigration reform.<sup>108</sup> This measure incorporated President Bush's recommendations by adopting a guest worker program and a means for undocumented immigrants to legalize

107. O'Rourke, *supra* note 100, at 201 (describing one of the most radical parts of the Act: "[w]hile many sections of House Bill 4437 have created controversy, the most troubling portion directly affects not undocumented migrants but the millions of ordinary citizens and residents who treat them like neighbors. Section 202 prohibits assisting an undocumented migrant to reside in the United States and carries severe criminal penalties."). H.R. 4437 § 202, 107th Cong. (2006).

SEC. 202. ALIEN SMUGGLING AND RELATED OFFENSES. Section 274 of the Immigration and Nationality Act (8 U.S.C. 1324) is amended to read as follows: 'ALIEN SMUGGLING AND RELATED OFFENSES' SEC. 274. (a) Criminal Offenses and Penalties-(1) PROHIBITED ACTIVITIES- Whoever--(A) assists, encourages, directs, or induces a person to come to or enter the United States, or to attempt to come to or enter the United States, knowing or in reckless disregard of the fact that such person is an alien who lacks lawful authority to come to or enter the United States; (B) assists, encourages, directs, or induces a person to come to or enter the United States at a place other than a designated port of entry or place other than as designated by the Secretary of Homeland Security, regardless of whether such person has official permission or lawful authority to be in the United States, knowing or in reckless disregard of the fact that such person is an alien; (C) assists, encourages, directs, or induces a person to reside in or remain in the United States, or to attempt to reside in or remain in the United States, knowing or in reckless disregard of the fact that such person is an alien who lacks lawful authority to reside in or remain in the United States; (D) transports or moves a person in the United States, knowing or in reckless disregard of the fact that such person is an alien who lacks lawful authority to enter or be in the United States, where the transportation or movement will aid or further in any manner the person's illegal entry into or illegal presence in the United States; (E) harbors, conceals, or shields from detection a person in the United States knowing or in reckless disregard of the fact that such person is an alien who lacks lawful authority to be in the United States; (F) transports, moves, harbors, conceals, or shields from detection a person outside of the United States knowing or in reckless disregard of the fact that such person is an alien in unlawful transit from one country to another or on the high seas, under circumstances in which the person is in fact seeking to enter the United States without official permission or lawful authority; or (G) conspires or attempts to commit any of the preceding acts, shall be punished as provided in paragraph (2), regardless of any official action which may later be taken with respect to such alien. (2) CRIMINAL PENALTIES- A person who violates the provisions of paragraph (1) shall-- (A) except as provided in subparagraphs (D) through (H), in the case where the offense was not committed for commercial advantage, profit, or private financial gain, be imprisoned for not more than 5 years, or fined under title 18, United States Code, or both.

*Id.*

108. S. 2611, 107th Cong. (2006); POWELL, *supra* note 87, at 48 (identifying the Senate bill as a compromise measure: "By the time the Senate opened debate on March 31, it appeared that a compromise measure was within reach, potentially legalizing millions of illegal immigrants who had been in the United States for more than two years and including a guest-worker program.").

status.<sup>109</sup> Senate Bill S.2611 demonstrated Congressional support for the concept of legalizing the existing population of undocumented workers already in the country.<sup>110</sup> The immigration debates that emerged in response to the proposal centered around the political divide over legalization.<sup>111</sup>

After months of front-page headlines, the Comprehensive Immigration Reform Bill envisioned by President George W. Bush quietly disappeared from major news streams.<sup>112</sup> Congressional determination to reform immigration was a campaign selling point,<sup>113</sup> which proved to be a false promise when Congress adopted the Secure Fence Act of 2006.<sup>114</sup> This legislation fails the millions of undocumented immigrants who anticipated significant changes to immigration laws.<sup>115</sup> The Secure Fence Act narrowly addresses the

109. S. 2611, 107th Cong. (2006); Fragomen, *supra* note 82, at 16 (explaining the three-tiered system of legalization which passed as part of the Comprehensive Immigration Reform Act of 2006, S.2611). The bill has been heavily criticized for its complexity. *Id.* The first tier comprises guest workers, working on a temporary basis, but with the possibility of permanent legal status after five years. *Id.* The second tier would apply to immigrants who have been in the country for two to five years. *Id.* The third tier would permit undocumented workers who have lived in the United States for five years or more. *Id.*

110. *Id.*

111. See Rachel L. Swarns, *A G.O.P. Split on Immigration Vexes a Senator*, N.Y. TIMES, May 26, 2006, at 11 (noting legalization as the central issue: “The legislative battle has pitted Republican against Republican, with conservatives deriding guest worker programs as an amnesty for lawbreakers and calling for a wall to be built along the border with Mexico, and with business leaders pushing for legalization of the illegal workforce. . .”).

112. See e.g., *Immigration’s Lost Year*, *supra* note 89 and accompanying text.

113. Makin, *supra* note 82 and accompanying text.

114. See Hearing on Amnesty for Illegal Immigrants, *supra* note 64, at 7-8. Rep. Berman objected to the hearings on the grounds that no legitimate purpose was served by them:

These hearings are a con-job on the American people. The Republican majority in the House is trying to convince the American public that they want very badly to enact immigration reform and they just need to study it a little bit more in these hearings before they can get the job done.

*Id.* at 8 (statement of Rep. Berman, Member, Judiciary Committee). Rep. Logren echoed these concerns: “I believe we are talking a lot once again. We are going to talk all over the country once again, but I think it is all talk and no action. Talk is cheap, but I think that the American public is going to see through this sham . . .” *Id.* at 11 (statement by Rep. Lofgren, Member, H. Judiciary Comm., Subcomm. on Immigration, Borders and Claims). Rep. Sanchez explained how the process itself would have to take a different direction to produce results: “[i]n the history of Congress, the House has never held hearings on a Senate-passed bill before going to conference. If this body is truly serious about enacting much-needed border enforcement plus immigration reform legislation, they should convene a conference that is fair and bipartisan.” *Id.* at 13 (statement by Rep. Sanchez, Member, H. Judiciary Comm., Subcomm. on Immigration, Borders and Claims).

115. While the 109th Congress did pass immigration legislation, it can hardly be said to have addressed the concerns that had been debated in the hearings. See *infra* notes 117 and 126 (illustrating the difference between the Secure Fences Act and comprehensive immigration reform). See also Makin, *supra* note 82 and accompanying text.

issue of border security while ignoring the interrelated immigration issues that effective border security demands.<sup>116</sup> Entirely contrary to the comprehensive reform urged by President Bush and echoed by Congress,<sup>117</sup> the resulting legislation focuses on measures that have proven ineffective over the last two decades.<sup>118</sup>

Without additional measures, this attempt to secure the physical border is unlikely to achieve the desired result of controlling illegal immigration.<sup>119</sup> The forces that compel illegal entry and stay have historically continued to exert considerable influence over immigration patterns regardless of border enforcement.<sup>120</sup> If the massive border

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116. See *Immigration Reform in Pieces*, N.Y. TIMES, Sept. 26, 2006, at A22 (noting the contradiction between President Bush's resolve to reform immigration comprehensively and the "pre-election lineup of narrow enforcement measures packaged to give voters a false impression of resolve"); see also *It Isn't Amnesty*, N.Y. TIMES, March 29, 2006, at A22 (criticizing the idea of abandoning comprehensive immigration reform for an enforcement-only approach: "[t]he alternatives to the Specter bill are senseless. The enforcement-only approach – building a 700-mile wall and engaging in a campaign of mass deportation and harassment to rip 12 million people from the national fabric – would be an impossible waste of time and resources. It would destroy families and weaken the economy.”).

117. *Compare* Fact Sheet: Comprehensive Immigration Reform: Improving Worksite Enforcement, The White House, Office of the Press Secretary, U.S.C.C.A.N., (emphasizing the importance of comprehensive reform that addresses the entire range of issues, rather than individual aspects exclusively), *with* Fact Sheet: The Secure Fence Act of 2006, The White House, Office of Comm'cns, [hereinafter Secure Fence Act Fact Sheet] (accepting a single piece of legislation as a starting point: “Earlier this year, the President laid out a strategy for comprehensive immigration reform. The Secure Fence Act is one part of this reform, and the President will work with Congress to finish the job and pass the remaining elements of this strategy.”).

118. *The Budgetary Impact of Current and Proposed Burden Security and Immigration Policies: Hearing Before the S. Comm. on the Budget*, 109th Cong. 8 (2006) (statement of Paul R. Cullinan, Chief, Human Resources Cost Estimates Unit). The report concludes that funding alone cannot solve the flow of illegal immigration:

In recent years, funding for border security has risen sharply, but it has not kept sizable numbers of illegal migrants from entering the country or many legal migrants from overstaying their visas. Although the United States has nearly doubled the number of its border patrol agents over the past decade, a large flow of immigrants continues to enter the United States illegally.

*Id.* See also *infra* note 204 and accompanying text (criticizing an enforcement-only approach by positing it as the antithesis of comprehensive reform).

119. Dunne, *supra* note 86 at 640 (identifying four possible explanations for why there is a recognized gap between proposals and practical effects of immigration policies).

120. President Ronald Reagan in 1986 and President Bill Clinton in 1996 dramatically enhanced border security efforts to no avail. JoAnne D. Spotts, *U.S. Immigration Policy on the Southwest Border From Reagan Through Clinton, 1981-2001*, 16 GEO. IMMIGR. L.J. 601, 614-17 (2002). In 1986, President Reagan signed IRCA, which authorized fifty percent increases in personnel for the consecutive years of 1987 and 1988. *Id.* In 1996, President Clinton signed the Illegal Immigration Reform and Immigration Responsibility Act (“IIRIRA”), which authorized hiring an additional 1,000 Border Patrol agents every year until 2001. *Id.* In addition, Attorney General Janet Reno’s five-part border enforcement plan, announced in 1994, provided for a massive

security overhauls of the 1980's and 1990's had any effect at all it was to propel illegal immigration further.<sup>121</sup>

One explanation for this phenomenon is that the increased border security deterred immigrants from exiting the country.<sup>122</sup> Many of the immigrants who enter the United States for work perpetually return home, continuing a pattern of entering and exiting in a cyclical fashion.<sup>123</sup> Undocumented immigrants who are currently present are less likely to leave even temporarily if they know that exiting will jeopardize their opportunity to return.<sup>124</sup>

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overhaul of the border security tactics. *Id.* Despite these concerted efforts to curtail unreported border traffic, the population of undocumented immigrants doubled during President Clinton's term. *Id.*

121. LoBreglio, *supra* note 45, at 949-53 (analyzing the Border Security and Immigration Improvement Act, a proposed immigration reform bill, by comparison to earlier attempts to revise the law). The author commented on the failure of IRCA: "In 1992 . . . the Commission on Agricultural Workers reported that, despite the IRCA amendments to the INA, illegal immigration had continued to rise, working conditions for farm workers had continued to decline, and the rate of unemployment for domestic agricultural workers remained high." *Id.* at 949-50. The author also summarized the ineffectiveness of IIRIRA: "Despite an increase in arrests along the border, the IIRIRA, like so many other reforms before it, failed to produce a dramatic downturn in illegal immigration. Immigration and naturalization statistics approximate that during Clinton's presidency the number of illegal aliens coming to the United States had increased at a rate of 300,000 per year and that by July of 2000, there were six million illegal immigrants residing here." *Id.* at 952.

122. Camille J. Bosworth, Note, *Guest Worker Policy: A Critical Analysis of President Bush's Proposed Reform*, 56 HASTINGS L.J. 1095, 1106 (2005). Bosworth summarizes how increased border security can cause the number of undocumented immigrants to grow:

Whereas in the beginning migrants came seasonally and then returned home with their earnings, workers now stay longer and often settle permanently in the United States. This is largely a result of the increasing risk associated with crossing the border. As the costs of crossing the border illegally rise, temporary workers remain in the United States longer rather than risk being apprehended at the border when they decide to return.

*Id.*

123. See Richard C. Jones, *Macro-Patterns of Undocumented Migration between Mexico and the U.S.*, in PATTERNS OF UNDOCUMENTED MIGRATION; MEXICO AND THE UNITED STATES 34 (Richard C. Jones ed., Rowman & Allanheld 1984) (describing the characteristics of a typical undocumented migrant: "He spends six months to a year in the U.S. before returning to Mexico, and makes four or five such trips in a lifetime."); see also Nicole Jacoby, Note, *America's De Facto Guest Workers: Lessons From Germany's Gastarbeiter for U.S. Immigration Reform*, 27 FORDHAM INT'L L.J. 1569, 1608 (2004) (commenting on the cyclical pattern of Mexican migration: "Mexican workers rarely migrate to the United States with the intent of becoming permanent settlers."). Mexican migrants comprise the majority of undocumented immigrants in the United States. Francine J. Lipman, *The Taxation of Undocumented Immigrants: Separate, Unequal, and Without Representation*, 9 HARV. LATINO L. REV. 1, 10 (2006) (defining undocumented immigrants as a class of people: "Undocumented immigrants that enter the United States without authorization are primarily Mexicans and Central Americans that cross into the United States from Mexico. Between 70 to 85% of Mexican immigrants that entered the United States since 1990 did not have valid documentation in 2004.").

124. Dr. Demetrios G. Papademetriou, President of the Migration Policy Institute, Address before the Senate Foreign Relations Committee (Mar. 23, 2004),



The most compelling flaw of the Secure Fence Act, which focuses exclusively on increased border security, is that efforts to augment border security will do nothing to remove or incorporate the twelve million undocumented immigrants<sup>125</sup> who currently live and work throughout the United States.<sup>126</sup> The mere existence of these undocumented persons presents an obvious security challenge for the U.S. government.<sup>127</sup> While mass deportation is often suggested as a remedy to this problem,<sup>128</sup> realistically it is not an option that will ameliorate the situation.<sup>129</sup>

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<http://foreign.senate.gov/testimony/2004/PapademetriouTestimony040323.pdf>, at 3. The Congressional address identifies this critical failure in immigration policy: "it is Mexico's (and to a much lesser extent, Central America's) tradition of circular migration that can be most accurately described as having been most directly 'disrupted' by the US border enforcement policies of the past 10 or so years." *Id.*

125. See *supra* note 11 and accompanying text.

126. See Brian R. Wahlquist, Note, *Slamming the Door on Terrorists and the Drug Trade While Increasing Legal Immigration: Temporary Deployment of the United States Military at the Borders*, 19 GEO. IMMIGR. L. J. 551, 552 (2005) ("Border security and immigration are two separate issues."); see also Secure Fence Act Fact Sheet, *supra* note 117, at 2 (explaining that while President Bush supported the increased border security measures, he made clear that it failed to address the undocumented immigrants already in the country: "Comprehensive immigration reform requires that we face the reality that millions of illegal immigrants are here already."). See, e.g., H.R. 4437, 107th Cong. (2006) (noting this proposed legislation is just one of many attempts to regulate immigration through law enforcement strategies). In addition to increased deportations, a law enforcement strategy may also take an indirect approach via the employers who hire undocumented immigrants. H.R. 4437 is an example of such combined efforts to stop illegal immigration. This strategy reflects the push-pull philosophy of illegal immigration. See Senator Alan K. Simpson, *The Immigration Reform and Control Act: Immigration Policy and the National Interest*, 17 U. MICH. J.L. REFORM 147, 154-55 (1984). See also U.S. Immigration Policy: Restoring Credibility, *supra* note 89. By closing off the forces that pull undocumented immigrants into the country, legislators believe they can deter them from entering and/or staying in the United States. *Illegal Immigration Enforcement and Social Security Protection Act of 2005: Hearing Before the H. Subcomm. On Immigration, Border Security, and Claims of the H. Comm. On the Judiciary*, 109th Cong. 7 (2005) (statement of John N. Hostettler, Chairman) [hereinafter *Illegal Immigration Enforcement and Social Security Protection Act Hearing*]. "The legislation is based upon the understanding that we will only be able to assert control over illegal immigration when we can turn off the 'job magnet' that draws most illegal aliens to our country. As almost half of all illegal aliens resident in the U.S. came to the U.S. legally on temporary visas, border controls alone will never be sufficient." *Id.*

127. Tallman, *supra* note 80 at 890 ("Common sense dictates that integrating 9.3 million undocumented, unknown immigrants into our society will address any existing national security concerns regarding their presence. Introducing or passing legislation that seeks to limit their access to services, benefits, or privileges does nothing in regards to knowing who they are or integrating them into our society.").

128. See Rajeen Goyle & David A. Jaeger, *Deporting the Undocumented: A Cost Assessment* (Center for American Progress, Washington, D.C. 2005) at 1, available at [http://www.americanprogress.org/kf/deporting\\_the\\_undocumented.pdf](http://www.americanprogress.org/kf/deporting_the_undocumented.pdf). The report prefaces the findings by outlining the competing approaches on how to impact the number of undocumented immigrants:

Several practical problems restrict the government from actually removing all undocumented immigrants from the United States.<sup>130</sup> The geographic expanse of the country, the number of undocumented immigrants present, and the limited financial resources available do not permit an undertaking of such magnitude.<sup>131</sup> Even if undocumented immigrants are returned to their home countries, they are likely to return regardless of increased border security measures.<sup>132</sup>

Developing a comprehensive solution to the rising population of undocumented immigrants requires a compassionate understanding of the root causes that feed the problem.<sup>133</sup> In addition to the disparity in

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The political debate over immigration reform remains stymied over the question of illegal immigration. . . . [r]esolving the status of the undocumented has become the principal obstacle to achieving consensus on reform.

Most legislative proposals address the situation by providing some form of legal recognition for the undocumented. Yet a number of people, including members of Congress, favor a more draconian solution to the problem — a severe crackdown on illegal immigration not only against those attempting to cross the border, but also the deportation of the entire undocumented population currently living in the United States.

*Id.* at 1.

129. *This Month in Immigration History: May 1987*, <http://149.101.23.2/graphics/aboutus/history/may1987.html>. The United States Citizenship and Immigration Service website describes mass deportation as an impractical solution to the undocumented immigrant population:

At the beginning of the 21st Century, it is not at all clear that it is possible or even desirable to try to find and then deport all undocumented migrants currently in the U.S., nor to adopt and then implement the stringent measures that would be needed to prevent the continued arrival of additional undocumented aliens each year and deter others from over-staying their legal authorizations.

*Id.*

130. Representative Sheila Jackson Lee, *Why Immigration Reform Requires a Comprehensive Approach that Includes Both Legalization Programs and Provisions to Secure the Border*, 43 HARV. J. ON LEGIS. 267, 273 (2006) (projecting that it would take centuries for the Board of Immigration Appeals (“BIA”) to deport the entire population of undocumented immigrants currently present in the country at the present rate of 3,000 appeals adjudicated per month and acknowledging the limitations of the “already strained” immigration budget). Representative Sheila Jackson Lee is the ranking member of the House Judiciary Subcommittee on Immigration, Border Security and Claims. *Id.* at 267, n. a1.

131. *Id.*; Goyle & Jaeger, *supra* note 128, at 1 (estimating the cost of a mass deportation at \$206-230 billion over five years). The report provides an objective analysis of the cost using publicly available data. *Id.*

132. *See Illegal Immigration Enforcement and Social Security Protection Act Hearing, supra* note 126 and accompanying text. A vast number of undocumented immigrants are overstays who entered legally, but failed to achieve legal status before their visas expired. *Id.*

133. U.S. Immigration Policy: Restoring Credibility, *supra* note 89. The Executive Summary urges immigration reform to concentrate on the root causes of undocumented immigration:

Migrants enter and remain unlawfully in the United States for a variety of reasons. Few migrants take the decision to leave their countries lightly. Generally, a combination of “push” and “pull” factors contribute to these movements. Many of the recommendations

wealth between the United States and the countries where undocumented immigrants originate,<sup>134</sup> there is the problem of bureaucratic borders.<sup>135</sup> Any foreign national desiring to reside permanently in the United States faces serious legal obstacles.<sup>136</sup> Even professional athletes and multimillionaires face immigration challenges.<sup>137</sup> An immigration system that remains difficult and unpredictable for this elite population is even less approachable for economically dependent immigrants.<sup>138</sup> Processing an application for legal permanent residence is simply too complicated and costly to realistically serve undocumented immigrants as a credible alternative to unlawful border crossings or visa overstays.<sup>139</sup>

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in this report aim to reduce the pull of both jobs and of ineffective immigration enforcement. On the push side, lack of employment, low wages and poor working conditions, separation from family members, political, social and religious repression, civil conflict, and other problems motivate people to leave their homes. Any effective strategy to prevent unlawful migration must address these causes.

*Id.* See also Amanda E. Schreyer, Note, *Human Smuggling Across the U.S.-Mexico Border: U.S. Laws Are Not Stopping It*, 39 SUFFOLK U. L. REV. 795, 814 (2006) (opining that human smuggling from Mexico to the United States must be addressed by focusing on the underlying causes).

134. Condon & McBride, *supra* note 90, at 256 (“There is significant evidence that additional guest worker programs, as well as broad-based amnesties and legalization of illegal immigrants already in the destination country, serve to stimulate further illegal immigration if there is not a simultaneous and significant improvement of living standards in the originating country.”).

135. Benson, *supra* note 96, at 206 (“In part, our ‘illegal immigration’ problems result from the prospective immigrant’s inability to understand and rely upon our legal immigration system.”).

136. See Raymond E. Wiest, *External Dependency and the Perpetuation of Temporary Migration in the United States*, in PATTERNS OF UNDOCUMENTED MIGRATION; MEXICO AND THE UNITED STATES 110-35 (Richard C. Jones ed., 1984) (explaining how undocumented migration perpetuates an economic dependency that feeds itself).

137. See 8 U.S.C.A. § 1182(a)(5)(A)(iii) (West 2006) (I.N.A. § 212) (outlining the complicated set of restrictions on labor certification for professional athletes), and 8 U.S.C.A. § 1153(b)(5)(A) (West 2006) (I.N.A. § 203) (requiring a significant investment of capital and an assurance of job creation for an immigrant investor visa); see also Ronald R. Rose, *Fixing the Wheel: A Critical Analysis of the Immigrant Investor Visa*, 29 SAN DIEGO L. REV. 615, 621 (1992) (explaining the ineffectiveness of visas that target multimillionaire investors: “Less than ten percent of the available visas are being issued.”).

138. See Yale-Loehr & Palmer, *supra* note 50, at 9 (guiding attorneys on unlawful presence and concluding: “Unlawful presence remains as confusing as ever. Four years after enactment, the INS still has not published implementing regulations to explain definitively when the three- and ten-year bars do and don’t apply. In the meantime, practitioners must muddle along, making do with various memos and administrative cases they can find.”).

139. REFORMING IMMIGRATION; HELPING MEET AMERICA’S NEED FOR A SKILLED WORKFORCE: A STATEMENT ON NATIONAL POLICY BY THE RESEARCH AND POLICY COMMITTEE OF THE COMMITTEE FOR ECONOMIC DEVELOPMENT 2 (Committee for Economic Development 2001). The report summarizes its findings on immigration policy by acknowledging that a failed system creates a disincentive for immigrants to enter legally:

[T]he current permanent visa system, with its predominant emphasis on family unification, fails to address our long-term workforce needs for permanent and higher

Immigrants who risk their lives to cross the border without inspection are usually reacting to an immediate economic need.<sup>140</sup> Compliance with extremely complicated and unpredictable immigration laws<sup>141</sup> is not an option for immigrants who lack the financial means to even begin the process.<sup>142</sup> For these immigrants the choice is not whether to follow the law, but whether or not to enter.<sup>143</sup>

Optimal immigration laws must take account of the effect they have on illegal immigration.<sup>144</sup> If the laws themselves compel circumvention, then lawmakers have a duty to correct these barriers.<sup>145</sup> Restrictionist efforts to decrease the number of undocumented immigrants inflate the problem by creating a more deeply subverted class of people unrecognized by the law.<sup>146</sup>

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skilled workers. Administrative backlogs prevent the issuance of as much as half the employment green cards authorized each year, forcing immigrants and employers alike to turn to temporary visas as the makeshift rout to eventual permanent status. As a result, both the permanent and temporary admission systems have become dysfunctional. Employers and immigrants alike have strong incentives to 'game the system' instead of playing by the rules.

*Id.*

140. See Simpson, *supra* note 126, at 154-55 (describing the "push" and "pull" factors that drive illegal immigration). The main "push" factor that compels these immigrants to leave their home countries are economic instability and a lack of jobs. *Id.* See also U.S. Immigration Policy: Restoring Credibility, *supra* note 89 and accompanying text.

141. Yale-Loehr & Schoonmaker, *supra* note 37, at 73 (determining immigration to be one of the most complicated areas of law, and adding that recent changes have sincerely increased the complexity).

142. See James R. Edwards, Center for Immigration Studies, *Two Sides of the Same Coin: The Connection Between Legal and Illegal Immigration* (2006), available at <http://www.cis.org/articles/2006/back106.html> (noting that the estimated illegal immigration population has tripled since 1980, in spite of the adoption of IRCA in 1986).

143. Benson, *supra* note 96, at 206 ("In part, our 'illegal immigration' problems result from the prospective immigrant's inability to understand and rely upon our legal immigration system.").

144. *Id.*; see Peter H. Schuck, *The Transformation of Immigration Law*, 84 COLUM. L. REV. 1, 41-42 (1984) (describing how our society's values shape immigration law and delineating the rising population of undocumented immigrants as a key issue influencing a policy shift: "Perhaps the central fact about immigration with which social policymakers must deal today is the presence of an immense population of aliens in the United States in apparent violation of the immigration laws.>").

145. See Plyler v. Doe, 457 U.S. 202, 218-19 (1982). See *infra* note 168 and accompanying text (recognizing the existence of a "shadow population" as a violation of core democratic principles); see also U.S. COMM'N ON IMMIGRATION REFORM, BECOMING AN AMERICAN: IMMIGRATION AND IMMIGRANT POLICY (Report to Congress, 1997) 104, available at <http://www.utexas.edu/lbj/uscir/becoming/full-report.pdf> (providing guidance on the direction of immigration policy: "As a nation committed to the rule of law, our immigration policies must conform to the highest standards of integrity and efficiency in the enforcement of the law.>").

146. See Richard A. Boswell, *Racism and U.S. Immigration Law: Prospects for Reform After '9/11?'*, 7 J. GENDER RACE & JUST. 315, 332-33 (2003) (citing IIRIRA to demonstrate the undesirable outcome of increasing immigration restrictions: "[I]mmigration legislation has taken a decidedly restrictionist position, resulting in the institutionalization of a permanent class of 'illegal'

Although motivated by different objectives, the U.S. government, U.S. citizens, and undocumented immigrants themselves share a common desire to decrease the population of persons deemed “illegal” in the United States.<sup>147</sup> Given the common purpose of these interest groups, the question of whether to allow the present population of undocumented immigrants to legalize status must be fairly addressed.<sup>148</sup> While critics of legalization are firmly grounded in the moral obligation to punish undocumented immigrants,<sup>149</sup> a pragmatic approach recognizes that the immigrants themselves need an incentive to come out of the shadows.<sup>150</sup> Comprehensive immigration reform measures attempt to balance these competing objectives by incorporating punishment mechanisms alongside the benefit of adjusting status.<sup>151</sup>

While lawmakers have full discretion to expand or retract

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persons and placing them outside protection of the law.”).

147. Hearing on *How Illegal Immigration Impacts Constituencies: Perspectives From Members of Congress (Part II) Before the Subcomm. on Immigration, Border Security, and Claims of the H. Comm. on the Judiciary*, 109th Cong. 40 (2005), at 2 [hereinafter *Hearing on How Illegal Immigration Impacts Constituencies, Part II*] (statement of Rep. John N. Hostettler, Chairman, Subcomm. on Immigration, Border Security and Claims, New Mexico) (“I think the members of Congress can agree on one thing on this issue: The illegal alien situation must be brought under control.”).

148. See *Hearing on Amnesty for Illegal Immigrants*, *supra* note 64, at 9 (statement of Rep. Berman) (urging the necessity of a legalization measure: “[w]ithout some process that deals with the legalization of the millions and millions of people in this country now working, and working under false identifiers, working in many cases in outrageously inhumane conditions, unless some process exists for them to come forward, that kind of a system will never work.”).

149. Marah Carter Stith, *Immigration Control: A Catholic Dilemma?*, 84 U. DET. MERCY L. REV. 73, 93 (2007) (relating the desire to punish as a religious ideal: “they may wish to restrict benefits to undocumented aliens in order to discourage illegal immigration.”).

150. See Neda Mahmoudzadeh, Comment, *Love Them, Love Them Not: The Reflection of Anti-Immigrant Attitudes in Undocumented Immigrant Health Care Law*, 9 SCHOLAR 465, 494 (2007) (addressing the denial of health care to undocumented immigrants and concluding: “For national security purposes, it is crucial to keep count of all non-citizens that enter or are within the United States border. However, further isolation and criminalization of those who live in this country illegally will certainly not help the process of identifying them.”). Coercive measures designed to propel voluntary departures have historically proven to be the most effective and efficient means of decreasing the undocumented immigrant population. Ehrenpreis, *supra* note 90, at 1221 (recommending that immigration laws encourage undocumented immigrants to leave willingly: “[t]he most effective way to control illegal immigration is to truly eliminate the pull factor – employment opportunities.”).

151. See Dennis J. Loiacono & Jillian Maloff, Note, *Be Our Guest: Synthesizing a Realistic Guest Worker Program as an Element of Comprehensive Immigration Reform*, 24 HOFSTRA LAB. & EMP. L.J. 111, 143 (2007). The authors attempt to synthesize various approaches to the current debate. In concluding that “[a] comprehensive solution is essential to effective and fair immigration reform,” the term “comprehensive” appears to be used as a term of art that means a combination of enforcement along with legalization. *Id.*

immigration benefits as they see fit,<sup>152</sup> constructing a workable immigration system requires creating laws that serve their intended purpose.<sup>153</sup> A complicated and costly immigration bureaucracy that drives illegal immigration is counterproductive<sup>154</sup> and not in the best interest of our society.<sup>155</sup>

Comprehensive immigration reform acknowledges and addresses the interdependent relationship between legal and illegal immigration.<sup>156</sup>

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152. *Contra* MICHAEL DUMMETT, *ON IMMIGRATION AND REFUGEES* 46 (Routledge 2001) (arguing that all nations have an affirmative duty to grant immigration benefits to migrants who enter due to economic necessity: “the idea that its duty is only to its citizens stems from a faulty conception of the purpose of the state’s existence . . .”).

153. Kevin R. Johnson, *Open Borders?*, 51 *UCLA L. REV.* 193, 252 (2003) (illustrating the ineffectiveness of immigration through a comparison to prohibition: “In sum, strict immigration controls that run counter to migration pressures simply cannot be enforced. As Prohibition has shown, law cannot be effectively enforced when it faces social and economic resistance and the governed do not view as criminal what the law criminalizes. Moreover, rampant violation of the immigration laws undermines their very legitimacy.”); Jennifer Bosco, Comment, *Undocumented Immigrants, Economic Justice, and Welfare Reform in California*, 8 *GEO. IMMIGR. L.J.* 71, 89-90 (1994) (identifying the futility of immigration laws when there are strong incentives to immigrate illegally: “without addressing the factors that push people to immigrate illegally, any immediate legal remedies will not be fully effective.”).

154. *See* Katherine L. Vaughns, *Symposium: Broken Fences: Legal and Practical Realities of Immigration Reform in the Post-9/11 Age: Restoring the Rule of Law: Reflections on Fixing the Immigration System and Exploring Failed Policy Changes*, 5 *U. MD. J. RACE, RELIG., GENDER & CLASS* 151, 167 (2005) (addressing the ineffectiveness of current immigration policy: “At present, the legislative initiatives enacted since 1996 have rendered immigration laws so harsh and tough, it is not surprising that they are hard to enforce and virtually ignored.”).

155. *See* Bosco, *supra* note 153, at 81 (arguing that U.S. immigration policy must compensate for the unintended effects of the disparity in wealth).

The United States must also bear responsibilities that go beyond national borders. Economic development within the United States frequently has a disastrous effect on the natural resources and the stability of so-called developing nations. Political philosopher Judith Lichtenberg argues that we owe an affirmative duty to those whom we make worse off: “[I]t has been persuasively argued that economic underdevelopment is, paradoxically, in part a result of economic development; for the transformation to a modern economy, in which the developed nations and the multinational corporations have had a crucial role, erodes traditional means of livelihood for much of the rural population of the developing nations. To the extent that this is so, many (perhaps a majority) of those in the developing nations are absolutely harmed by relations with advanced countries.”

*Id.* (quoting Judith Lichtenberg, *National Boundaries and Moral Boundaries: A Cosmopolitan View*, in *BOUNDARIES, NATIONAL AUTONOMY AND ITS LIMITS* 79, 91 (1981)).

156. *See generally* ISBISTER, *supra* note 84, at 201 (finding that illegal immigration is an inevitable product of regulating immigration: “As long as the United States places any restrictions at all on immigration, it will automatically have undocumented immigrants.”). *See also* Simpson, *supra* note 126, at 154-55 (1984) (endorsing IRCA as a co-sponsor of the legislation by detailing the connection between illegal and legal immigration). Senator Simpson’s disdain for illegal immigration focuses on how it hinders legal immigration: “illegal immigration endangers a fair and generous policy of legal immigration . . .” *Id.* *See also* POWELL, *supra* note 87, at 154 (citing the

The notion of forgiving previous wrongs is a central element in many comprehensive reform initiatives.<sup>157</sup> Rather than castigate undocumented immigrants with costly deportation programs, comprehensive reform focuses on viable solutions.<sup>158</sup>

#### IV. AMNESTY AS A POLITICIZED TERM

The strongest criticism that Section 245(i) has received is the label of amnesty.<sup>159</sup> Appreciating the argument against readopting this measure requires a full understanding of the political stigma that attaches to an amnesty provision.<sup>160</sup>

At the onset, Section 245(i) received little attention because it was not yet deemed an amnesty provision.<sup>161</sup> Because the meaning of the

relationship between legal and illegal immigration as a central tenet of a comprehensive approach: “As international migration becomes more common and terrorism a greater threat, the study of illegal immigration will become increasingly important to a comprehensive understanding of the nature and process of immigration.”).

157. See Vaughns, *supra* note 154, at 182 (arguing for comprehensive immigration reform: “A regularization or legalization component, however, is critical to a major overhaul of the immigration system.”).

158. Goyle & Jaeger, *supra* note 128, at 9 (revealing the impracticability of mass deportation: “The cost assessment in this report hopefully illustrates the false allure of adopting a mass deportation policy as a response to the challenges threatening our immigration system.”).

159. See JON E. DOUGHERTY, *ILLEGALS: THE IMMINENT THREAT POSED BY OUR UNSECURED U.S.-MEXICO BORDER* 228-29 (WND Books 2004) (labeling Section 245(i) as amnesty and expressing strong disdain for the general concept of legalization). Hearings in the House over comprehensive immigration reform acknowledged that using the term amnesty distracts from the issue: “what we have is a country that is up in arms about the fact that there is an amnesty bill out there and no real decent, considered, thoughtful conversation and discussion about what we do to deal with the problem of immigration in this country.” Hearing on Amnesty for Illegal Immigrants, *supra* note 64, at 18 (statement of Rep. Waters, Member, H. Judiciary Subcomm. on Immigration, Border Security and Claims).

160. *It Isn't Amnesty*, N.Y. TIMES, March 29, 2006, at A22 (commenting on S. 2611 and relating the political consequences of attaching the word amnesty to a proposed piece of legislation: “Attackers of a smart, tough Senate bill have smeared it with the most mealy-mouthed word in the immigration glossary – amnesty – in hopes of rendering it politically toxic.”).

161. See Statement by President William J. Clinton Upon Signing H.R. 4603, Departments of Commerce, Justice and State, the Judiciary and Related Agencies Appropriations Act (Aug. 26, 1994) (referencing the effect the Act would have on illegal immigration without commenting on Section 245(i)). The portion of the President’s statement relating to immigration, in its entirety, is as follows:

The Act will enable the Justice Department to escalate its efforts to secure the border and to control illegal immigration. Resources are provided to expand the number of agents at high-risk crossing points to deter illegal immigration, improve the equipment available to agents to increase their effectiveness, expedite deportations of criminal illegal aliens, and increase asylum adjudications. The Act also provides, for the first time, a funding source to help States that are burdened by large numbers of criminal illegal aliens in their prisons. This \$130 million initiative highlights the Federal Government’s commitment

term “amnesty” varies depending on one’s political stance, the question of whether Section 245(i) is an amnesty provision becomes a threshold legal question for anyone hoping to readopt the measure.<sup>162</sup>

Amnesty is perhaps the most controversial term in the immigration lexicon.<sup>163</sup> For many the term signifies a complete forgiveness of illegal immigration.<sup>164</sup> The concept compels harsh criticism from those who feel that it would unfairly reward illegal entry.<sup>165</sup> Implicit in this argument is the concern for how condoning illegal immigration may taint the legitimacy and efficacy of legal immigration.<sup>166</sup>

On the other hand, for undocumented immigrants and their families immigration reform that includes amnesty provides a glimmer of hope that their lives may eventually stabilize.<sup>167</sup> Undocumented populations in the United States are for the most part resigned to live in the shadows of society.<sup>168</sup> Given that no provision of law currently allows

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to share the responsibility for reducing the fiscal impact of illegal immigration with affected States.

*Id.*

162. *Reid-Kennedy Hearing*, *supra* note 11, at 6 (statement by F. James Sensenbrenner, Chairman, H. Judiciary Subcomm. on Immigration, Border Security and Claims). Chairman Sensenbrenner opened the proceedings by cautioning the Representatives: “This is a very emotional subject, there are going to be some statements that are made that people enthusiastically agree with or violently disagree with.” *Id.*

163. See Mark Krikorian, *Amnesty, in English; The Debate Over Amnesty Ought to be Waged in Plain English*, NATIONAL REVIEW ONLINE (Center for Immigration Studies, Washington, D.C., 2001), available at <http://www.nationalreview.com/comment/comment-krikorian090401.html> (acknowledging the political ramifications of using the word amnesty and criticizing lawmakers for using euphemisms rather than utter the term).

164. John L. Martin, *The Five Years War: Public Safety v. Special Interests*, (Fed’n for American Immigr. Reform, Washington, D.C., 2005), at 2-3, available at <http://www.fairus.org/site/DocServer/911report.pdf?docID=1141> (last visited Feb. 2, 2007) (rejecting the “earned legalization” and “out of the shadows” justifications for amnesty); *The Amnesty Trap*, N.Y. TIMES, April 5, 2006, at A22 (explaining why some Senators were unwilling to support an amnesty provision: “[a]nything other than punishment and border enforcement smacks unforgivably of forgiveness.”).

165. Mayerle, *supra* note 45, at 576 (chronicling the criticisms of proposed guest worker programs: “[a] principal argument against both of the amnesty options is that they reward individuals that have committed a crime by entering the country illegally.”).

166. See generally, *supra* note 156 and accompanying text.

167. Guzman, *supra* note 12, at 135 (humanizing the immigration debate with examples of how legalization affects immigrants personally and affirming: “With a legalization program similar to the 1986 IRCA program, many immigrants who now seem without hope, will have a chance to gain permanent residency.”).

168. *Hearing on Amnesty for Illegal Immigrants*, *supra* note 102 and accompanying text. The U.S. Supreme Court defined the undocumented immigration population in these terms and expressed a compassionate plea for justice on their behalf in *Plyler v. Doe*:

Sheer incapability or lax enforcement of the laws barring entry into this country, coupled with the failure to establish an effective bar to the employment of undocumented aliens,



undocumented immigrants to legalize their status, any discussion of amnesty is eagerly embraced by these populations and those who rely on their presence.<sup>169</sup>

Amnesty, as it is defined in Black's Law Dictionary, addresses "political offenses with respect to which forgiveness is deemed more expedient for the public welfare than prosecution and punishment."<sup>170</sup> For those who strongly oppose amnesty, accepting it as a necessary evil to a vexing problem is not an easy choice to make,<sup>171</sup> especially when previous amnesty attempts have failed and produced lasting consequences.<sup>172</sup> Nonetheless, a blanket refusal to consider any provision of law that resembles amnesty blindly forecloses realistic solutions.<sup>173</sup>

While a true amnesty, like the one enacted in 1986, has the

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has resulted in the creation of a substantial 'shadow population' of illegal migrants-- numbering in the millions--within our borders. This situation raises the specter of a permanent caste of undocumented resident aliens, encouraged by some to remain here as a source of cheap labor, but nevertheless denied the benefits that our society makes available to citizens and lawful residents. The existence of such an underclass presents most difficult problems for a Nation that prides itself on adherence to principles of equality under law.

457 U.S. 202, 218-19 (1982).

169. See, e.g., *Enhanced Border Security and Visa Entry Reform Act of 2002, Proceedings and Debates of the 107th Cong., 2nd Sess.* (2002) 148 CONG. REC. S2,916-01, S2,929 [hereinafter *Enhanced Border Security Act*] (statement by Sen. Tom Daschle, South Dakota) ("I remain strongly committed to a meaningful 245(i) extension-one that gives long-time, tax-paying residents a genuine opportunity to remain in this country-with their families-while they wait to become permanent legal residents."); see also *Interfaith Statement in Support of Comprehensive Immigration Reform, October 14, 2005 available at* <http://www.justiceformigrants.org/files/Interfaith%20Statement.pdf> (endorsing an amnesty provision on behalf of a wide range of organizations and community leaders).

We call on our elected officials to enact legislation that includes...[a]n opportunity for hard-working immigrants who are already contributing to this country to come out of the shadows, regularize their status upon satisfaction of reasonable criteria and, over time, pursue an option to become lawful permanent residents and eventually United States citizens.

*Id.*

170. BLACK'S LAW DICTIONARY 93 (8th ed. 2004).

171. Frei, *supra* note 41, at 1388 ("The main concern voiced by conservatives has been over what Republicans perceive as an amnesty component to the President's plan, effectively rewarding illegal aliens for their unlawful presence in the United States.").

172. See *supra* notes 42-46 and accompanying text (demonstrating how criticism of IRCA shapes the current amnesty debate).

173. *Reid-Kennedy Hearing, supra* note 11, at 22 (prepared statement by Alan K. Simpson, former U.S. Sen., Wyoming) (acknowledging the perils of enacting an amnesty provision, but finding it to be a necessary consideration: "History shows us . . . that relying on attrition alone will not be successful for the majority of this cohort. Some form of amnesty must therefore at least be considered, for practical reasons if for no other.").

potential to cause more problems than it solves,<sup>174</sup> a more subtle attempt to soften immigration laws should be considered as an experimental middle-ground alternative.<sup>175</sup> The all-or-nothing approach<sup>176</sup> to immigration, which has driven politics for the last quarter century,<sup>177</sup> has proven itself to be unworkable.<sup>178</sup> Effective immigration reform requires some compromise between punishing undocumented immigrants and uncovering their existence.<sup>179</sup>

#### V. REJECTING AMNESTY: PRESIDENT BUSH'S STANCE

President Bush's explicit condemnation of amnesty reflects the severe political consequences of proposing any concept that may be labeled as such.<sup>180</sup> In his radio address on April 8, 2006 the President

174. See *supra* notes 42-46 and accompanying text (discussing IRCA).

175. President George W. Bush, Pres. Messages, 109th Cong., 2nd Sess., 2006 U.S.C.C.A.N. D60, at 3 ("There is a rational middle ground between granting an automatic path to citizenship for every illegal immigrant, and a program of mass deportation.").

176. Meissner, *supra* note 84. The 1990's was an era of political extremism in nearly all facets of government, including immigration policy. *Id.* Immigration laws enacted in the 1990's reflect this perspective: "We have all experienced a period of tremendous polarization on too many issues including immigration." *Id.*

177. See, e.g., Reimers, *supra* note 11 (explaining the trend of restrictive immigration positions among voters in the United States between 1970-1998: "As revealed in public opinion polls, when immigration increased and changed Americans reasserted their traditional ambivalence or hostility toward immigrants").

178. *Reid-Kennedy Hearing*, *supra* note 11, at 90 (statement by Chairman F. James Sensenbrenner, Wisconsin) ("I'm afraid that a lot of what has gone on this year in terms of the public discourse on immigration on both sides of the question has further polarized the public. And instead of going toward the middle, we have gone further apart. And that's going to make our job as elected representatives of the people a lot more difficult in terms of reaching something that can get a majority vote in both the House and the Senate and the President's signature . . .").

179. See Comprehensive Immigration Reform, <http://www.aila.org/issues/issue.aspx?docid=18635> (last visited January 21, 2007) (giving the American Immigration Lawyer's Association recommendations for immigration reform).

AILA believes that any workable immigration reform proposal must be comprehensive. Specifically, it must simultaneously create legal avenues for people to enter the U.S.; allow people already here an opportunity to earn legal status; address backlogs in family and employment-based immigration; and create and implement a smart border security and enforcement regime.

*Id.*

180. See Carl Hulse & Jim Rutenberg, *Senate Passes Two Immigration Measures*, N.Y. TIMES, May 18, 2006, at A25 (quoting Representative F. James Sensenbrenner Jr., Republican of Wisconsin, in his blanket refusal to consider President Bush's approach to immigration reform: "[r]egardless of what the president says, what he is proposing is amnesty"); see also Germain, *supra* note 90, at 749-50 ("The President and his advisors were careful to avoid any mention of the 'A' word or 'Amnesty.' This word is taboo for anyo [sic] proposing any sort of immigration reform, so it is often referred to using other names.").

proposed a temporary worker program.<sup>181</sup> In his discussion he clarified repeatedly that his plan specifically rejected amnesty.<sup>182</sup> Nonetheless, those who stand firmly against any notion of amnesty are critical of President Bush's position.<sup>183</sup>

In May of 2001 President Bush wrote to Congress in an effort to save Section 245(i).<sup>184</sup> In his plea to extend the provision for those undocumented immigrants who were eligible, but missed the deadline, he advised Congress that "[i]t remains in our national interest to legitimize those resident immigrants, eligible for legal status, and to welcome them as full participants of our society."<sup>185</sup> The immigrants whom President Bush referred to were immigrants who had either entered illegally or overstayed their visas, and then remained in the United States for years without legal status.<sup>186</sup>

Political opponents have heavily criticized President Bush for supporting legalization statutes such as Section 245(i), while rejecting amnesty.<sup>187</sup> Such critics assert that President Bush's hard-line convictions against amnesty are deceptive.<sup>188</sup> In 2006 President Bush appeared to make his position on amnesty clear to the American people:

A new temporary worker program should not provide amnesty.

181. President George W. Bush, President's Radio Address, The White House, Office of Commc'ns, at 1 (Apr. 8, 2006) [hereinafter President Bush's Radio Address] (recommending a three-part plan for comprehensive immigration reform that would include increased border security, enhanced law enforcement, and finally a temporary worker program). This excerpt is one of many speeches President Bush has given in support of a guest worker program. See, e.g., *President Bush Proposes New Temporary Worker Program*, (Jan. 7, 2004), available at <http://www.whitehouse.gov/news/releases/2004/01/20040107-3.html>.

182. *Id.* at 1-2 (President Bush dismissed amnesty in the first sentence of his guest worker proposal: "comprehensive immigration reform must include a temporary worker program that relieves pressure on our borders, while rejecting amnesty."). While President Bush had previously urged Congress to adopt a guest worker program that would include a legalization component, this proposal clearly rejected any form of legalization. *Id.*

183. *Buchanan*, supra note 11, at 252 ("Though President Bush may declare, 'I oppose amnesty!' every time he speaks, his guest worker program *is* amnesty, both for the illegals and for the businesses that hired them.").

184. President Bush's Letter to Congress, supra note 72.

185. *Id.*

186. *Id.*

187. See Krikorian, supra note 127 (criticizing similar statements that President Bush made in 2001: "In August, President Bush said, 'There's going to be no amnesty,' though he immediately contradicted himself by saying he favors a plan 'that will legalize the hard work that's taking place now in America.'"); see also William Norman Grigg, *The United States Should Not Legalize Illegal Immigrants*, in IMMIGRATION (Louise I. Gerdes ed., Thomson Gale 2005), at 114-21 (strongly criticizing President Bush for supporting a legalization approach and finding his position on amnesty to be deceptive).

188. *Id.*

Granting amnesty would be unfair to those who follow the rules and obey the laws. Amnesty would also be unwise, because it would encourage others to break the law and create new waves of illegal immigration. We must ensure that those who break our laws are not granted an automatic path to citizenship.<sup>189</sup>

There are two ways to interpret President Bush's seemingly contradictory statements concerning amnesty. One would be to draw no distinction, and conclude that President Bush's endorsement of Section 245(i) is entirely consistent with his firm stance against amnesty.<sup>190</sup> The other approach would be to find that his position necessarily contradicts itself by condemning amnesty, and then endorsing it at the same time.<sup>191</sup>

Amnesty opponents argue that if President Bush were against amnesty then he would not have encouraged Congress to legitimize undocumented immigrants by any means.<sup>192</sup> Meanwhile amnesty proponents contend either that Section 245(i) is not amnesty, or if it is amnesty, it was harmless with respect to the issues raised by President Bush, and therefore constituted an "amnesty" far different from any legalization proposed today.

## VI. LEGALIZATION VERSUS AMNESTY

The conflicting interpretations of amnesty assume different definitions of the term. In one sense the term "amnesty" represents any provision which would allow undocumented immigrants to become legal residents.<sup>193</sup> This approach frames amnesty as any law which does not effectively punish the undocumented immigrant population.<sup>194</sup> Anti-

189. President's Radio Address, *supra* note 134.

190. *See, e.g.*, MICHAEL C. LEMAY, U.S. IMMIGRATION: A REFERENCE HANDBOOK 33 (ABC-CLIO, Inc. 2004) (recapitulating Bush's policy as entirely against legalization: "The administration of President George W. Bush opposes legalization, favoring instead achieving some migration accord with Mexico and perhaps an expanded guest-worker program."). While the text provides information on Section 245(i) and other legalization programs, there is no mention of President Bush's endorsement. *Id.* at 32-34, 73-75, 175.

191. *See* Krikorian, *supra* note 127 (accusing the Bush administration of deceptively supporting amnesty, but calling it by a different term: "there's been a mad rush to come up with alternative descriptions for what is plainly an amnesty.").

192. Hulse & Rutenberg, *supra* note 42 (quoting Republican Senator Tom Coburn as saying "[w]hether they say it is amnesty or not, it is amnesty when somebody here illegally gets a path to citizenship without going back to their home country").

193. *See id.* (providing insight on Republican skepticism of amnesty: "[Senator Saxby Chambliss, Republican of Georgia] and other Republicans said Mr. Bush's plan would be viewed as amnesty by many Americans, even if illegal immigrants had to pay fines and meet other requirements, because they would still be rewarded with legal status.").

194. For a criticism of this approach *see* Jacoby, *supra* note 97, at 113. Jacoby provides

immigrant lobbyists generally define the term in this over-inclusive manner.<sup>195</sup> Those who approach undocumented immigrants with condemnation reject amnesties on the grounds that they encourage unlawful activity.<sup>196</sup>

A narrow construction of amnesty distinguishes between a law that serves alternative policy objectives and one that merely forgives the evasion of immigration laws.<sup>197</sup> Under this approach, a law allowing undocumented immigrants to legalize their status is only considered amnesty when it rewards illegal entry by removing all sanctions.<sup>198</sup> This more specific interpretation of amnesty differentiates the negative connotation of rewarding the offense from the practical, efficient enforcement of immigration laws.<sup>199</sup>

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impassioned commentary on why this political stance is ineffective:

Conservatives who criticize the Bush proposal as an unprincipled 'amnesty' assume that there are alternatives—that we can simply crack down harder on the border and enforce any quota we like, no matter how unrealistic. But we can't. Mexican workers want to fill jobs in the United States, and they will continue to find ways to enter the country. Without immigration reform, it will be business as usual on our southern frontier: more futile law enforcement, more migrant deaths, and more crime.

*Id.*

195. *See, e.g.*, DIRK CHASE ELDREDGE, *CROWDED LAND OF LIBERTY* 82 (Bridge Works Publishing 2001) (strongly criticizing any notion of amnesty: "Amnesty for illegals in this country should be renamed 'acquiescence.'").

196. *Id.* at 83 (finding amnesty to encourage undocumented immigration: "amnesty actually invites further illegal immigration. It sends the message to potential illegal immigrants everywhere that America is not really serious about keeping you out, so come on in, keep a low profile for a few years, and another amnesty will soon appear on the horizon."); Rachel L. Swarns, *House Negotiator Calls Senate Immigration Bill "Amnesty" and Rejects It*, N.Y. TIMES, May 27, 2006, at A9 (quoting Representative F. James Sensenbrenner Jr., Republican of Wisconsin and chairman of the House Judiciary Committee, as saying "Amnesty is wrong because it rewards someone for illegal behavior.").

197. The debate over whether 245(i) constitutes amnesty illustrates this ideological conflict. *Compare, e.g.*, Kennedy, *supra* note 83 ("Section 245(i) does not provide amnesty to immigrants") with Numbers USA, [http://www.numbersusa.com/interests/amnesty\\_print.html](http://www.numbersusa.com/interests/amnesty_print.html) (last visited Jan. 14, 2006) (an anti-immigration website listing Section 245(i) and the two extensions of the provision as amnesties) and, *Border Security and Immigration Issues Hearing, supra* note 43, at 5 (labeling Section 245(i) as "rolling amnesty" and stating that it was "responsible for legalizing at least 1.5 million illegal aliens").

198. Pro-immigrant advocates argue that a legalization program does not constitute amnesty when it requires some form of quid pro quo in exchange for the benefit of adjusting status. *See* President George W. Bush, Pres. Messages, 109th Cong., 2nd Sess., 2006 U.S.C.C.A.N. D60, at 3-4 (distinguishing a proposed legalization program from amnesty: "I believe that illegal immigrants who have roots in our country and want to stay should have to pay a meaningful penalty for breaking the law, to pay their taxes, to learn English, and to work in a job for a number of years. People who meet these conditions should be able to apply for citizenship, but approval would not be automatic and they will have to wait in line behind those who played by the rules and followed the law. What I've just described is not amnesty . . .").

199. *Id.*

The hard-line approach, which refuses any form of relief to undocumented immigrants, was recently articulated by James R. Edwards, Jr. in his presentation to the House of Representatives at a 2006 hearing on immigration reform.<sup>200</sup> According to Edwards, any relief afforded to these immigrants in obtaining legal status would amount to amnesty:<sup>201</sup> “As a rule, amnesties should be employed sparingly and carefully. They indeed do affront the rule of law because amnesty is an act whereby the civil government overlooks lawbreaking. Amnesty in effect rewards lawbreakers for their lawbreaking. Amnesty lets off certain lawbreakers.”<sup>202</sup> Edwards’ approach to amnesty represents one side of a heated debate, that of strict opposition against any provision of law that would allow undocumented immigrants to legalize status.<sup>203</sup> This approach rejects a central component of comprehensive immigration reform, and opts instead for enforcement-only.<sup>204</sup>

On the other side of the debate are those who support a legalization process.<sup>205</sup> While there is a strong tendency to define amnesty as

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200. *Border Security and Immigration Issues Hearing*, *supra* note 43. Edwards testified on Senate Bill S. 2611. *Id.* He compared the bill to the Immigration Reform and Control Act (“IRCA”) and found both pieces of legislation to be amnesties. *Id.*

201. *Id.* (“the legalization provisions in S. 2611 and similar arrangements in other legislation can only be described as amnesty”).

202. *Id.* at 3 (Edwards’ strong disdain for amnesty is evident in his connections between illegal and legal immigration: “amnesty of illegal aliens rewards their dishonorable, disorderly, lawless conduct in a highly public manner that effectively insults legal immigrants.”). The notion that amnesty rewards lawbreakers is the dominant argument used by critics to oppose such legislation. *See* Mayerle, *supra* note 45; *see also* Frei, *supra* note 41.

203. *See, e.g.*, Buchanan, *supra* note 11, at 252 (projecting a strong anti-amnesty stance that pronounces President Bush’s guest worker plans as deceptive amnesties).

204. For criticism on the enforcement-only approach see National Immigration Law Center, *Enforcement-only approach to immigration reform will give boost to the most unscrupulous employers, EJC & NILC testify*, 20 IMMIGRANTS’ RIGHTS UPDATE (2006), available at <http://www.nilc.org/immlawpolicy/CIR/cir018.htm>. The article summarizes the Congressional testimony of Bill Beardall: “If anything, the U.S.’s experience with the provisions of the Immigration Reform and Control Act of 1986 have taught us that an enforcement-only approach actually creates incentives for employers to hire unauthorized workers . . .” *Id.* Beardall’s actual testimony states: “The enforcement-without-reform policy of the last 20 years, including the initiation of employer sanctions, has been a resounding and obvious failure.” *Field Hearing on Immigration: Enforcing Employee Work Eligibility Laws and Implementing a Stronger Employment Verification System, Before the Subcomm. on Employer-Employee Relations of the H. Comm. on Education and the Workforce*, 109th Cong 2 (2006) (statement of Bill Beardall, Executive Director, Equal Justice Center); *see also* Gallegos, *supra* note 29, at 1772-73 (providing examples to illustrate the ineffectiveness of an enforcement-only approach: “Because current laws are inadequate, heightened enforcement may compound already existing harms.”).

205. *See, e.g.*, *It Isn’t Amnesty*, *supra* note 160, at A22 (supporting S. 2611’s proposed legalization provision: “Senate Judiciary Committee under its chairman, Arlen Specter, has

Edwards has, advocates of a legalization process often do not consider their proposals to constitute amnesty.<sup>206</sup> For these supporters illegal entries or stays in the United States are not necessarily crimes that need to be punished by a denial of immigration benefits.<sup>207</sup>

While the illegal entry and stay are clear violations of the INA,<sup>208</sup> the question of whether to punish such violations need not presume

approved [a] smart, tough immigration that does not, as its detractors charge, confer amnesty on [an] estimated 12 million people living in [the] country illegally; [the] bill addresses enforcement, but also, unlike [the] House counterpart, takes on [the] hard job of trying to sort out immigrants who want to stay and follow rules from those who do not.”)

206. *Id.* (defending S. 2611 against the title of amnesty: “[t]he path to citizenship laid out by the Specter bill wouldn’t be easy. It would take 11 years, a clean record, a steady job, payment of a \$2,000 fine and back taxes, and knowledge of English and civics. That’s not ‘amnesty,’ with its suggestion of getting something for nothing”); *but see* Martin, *supra* note 164, at 6 (characterizing S. 2611 as amnesty regardless of what criteria the bill requires undocumented immigrants to fulfill as preconditions to legalization). Perhaps the most well-known spokesman for this position is President George W. Bush. Fact Sheet: Fair and Secure Immigration Reform, (Jan. 7, 2004), available at <http://www.whitehouse.gov/news/releases/2004/01/print/20040107-1.html>. At various stages in his presidency, Bush encouraged Congress to enact legislation that would allow undocumented immigrants to legalize their status. *See, e.g., id.* While promoting measures which critics would deplore as amnesty, the President’s statements and press releases affirmatively rejected any notion of amnesty. *Id.* In 2004, President Bush proposed a temporary guest worker program for the population of undocumented immigrants then-present in the United States. *Id.* The press release for this guest worker initiative described a legalization program that would apply to “undocumented men and women,” while disclaiming “President Bush does not support amnesty . . . .” *Id.* In 2006, President Bush proposed a similar temporary worker program as part of his Comprehensive Immigration Reform plan. Fact Sheet: Comprehensive Immigration Reform: Securing Our Border, Enforcing Our Laws, and Upholding Our Values (Mar. 2006), available at <http://www.whitehouse.gov/news/releases/2006/03/20060327-1.html>. Although this suggestion differed from the earlier proposal enough to appear less like amnesty, the President’s release asserted that it was not amnesty five times. *Id.*

207. Amnesty provisions would change the law itself, rather than create an exception to the law. *See* Jean v. Nelson, 727 F.2d 957, 964 (11th Cir. 1984) (advancing the wide latitude that Congress has to design immigration laws) (citing *Chae Chan Ping v. U.S. (The Chinese Exclusion Case)*, 130 U.S. 581, 609 (1889); 1 C. Gordon & H. Rosenfield, *Immigration Law and Procedure* § 2.2a (rev. 1982); *cf. Wong Wing v. United States*, 163 U.S. 228, 237 (1896) (noting that powers of the federal government with regard to aliens are more limited outside the immediate context of regulating entry: “there are apparently no limitations on the power of the federal government to determine what classes of aliens will be permitted to enter the United States or what procedures will be used to determine their admissibility.”).

208. 8 U.S.C.A. § 1227(a)(1)(B) (West 2005) (I.N.A. § 237) (stating the consequence of unlawful presence: “Any alien who is present in the United States in violation of this chapter or any other law of the United States, or whose nonimmigrant visa (or other documentation authorizing admission into the United States as a nonimmigrant) has been revoked under section 1201(i) of this title is deportable”); 8 U.S.C.A. § 1182(a)(6)(A)(i) (West 2005) (I.N.A. § 212) (defining an illegal entrant: “An alien present in the United States without being paroled, or who arrives in the United States at any time or place other than as designated by the Attorney General, is inadmissible”); 8 U.S.C.A. § 1227(a)(1)(A) (West 2005) (I.N.A. § 237) (stating the consequence of unlawful entry: “Any alien who at the time of entry or adjustment of status was within one or more of the classes of aliens inadmissible by the law existing at such time is deportable.”).

amnesty.<sup>209</sup> Contrary to the criticism that amnesties “reward lawbreakers”<sup>210</sup> and “allow illegal immigrants to cut in line,” most legalization proposals impose significant penalties for having initially broken the law, and require beneficiaries to earn the privilege to adjust status on a schedule behind that of non-lawbreaking applicants.<sup>211</sup>

## VII. PROPOSALS FOR REFORM

Absent from the recent debates on immigration reform has been any discussion of reenacting Section 245(i) of the INA.<sup>212</sup> Reincorporating this simple piece of legislation<sup>213</sup> presents a workable resolution to the

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209. *Hearing on Amnesty for Illegal Immigrants, supra* note 64. Representative Jackson Lee took issue with the premise of the hearing, as she refuted the label of amnesty for S. 2611: “the question of this hearing uses the word ‘amnesty,’ which has been infused with negative connotations by the opponents of the Senate’s bill, the Comprehensive Immigration Reform Act of 2006, S. 2611. The Senate bill in fact would not grant amnesty.” *Id.* at 4.

210. *See, e.g.,* Daniel Kanstroom, *Judicial Review of Amnesty Denials: Must Aliens Bet Their Lives to Get Into Court?*, 25 HARV. C.R.- C.L. L. REV. 53, 54 (1990) (characterizing IRCA’s amnesty as a reward: “The amnesty provision is generous and liberal, essentially rewarding those who have violated United States law for at least six years.”).

211. *See, e.g., Hearing on How Illegal Immigration Impacts Constituencies, Part II, supra* note 147, at 39 (statement of Rep. Gutierrez, Witness, Illinois). In his presentation urging Congress to enact a legalization provision, Mr. Gutierrez identified the full extent of sanctions that undocumented immigrants are willing to endure before earning legal status:

Let’s fine them a thousand five hundred bucks . . . . Let’s put them in to a program for 7 years and say you don’t get anything for 7 years unless you work, you pay taxes, you follow all the laws. Let’s put them into indentured servitude programs, but let’s give them hope at the end of the day that after they’ve proven to us, they already are hard-working, committed people to America, that we say at the end of the day, okay, you’ve earned it. You get to join the rest of us, as our history has always allowed us to do in our immigration policy. So I join the Congresswoman in seeking that earned legalization.

*Id.*

212. *Compare* President George W. Bush, *Remarks to the City Club of Cleveland and a Question-and-Answer Session in Cleveland, Ohio*, 42 WKLY. COMPILATION PRESIDENTIAL DOCUMENTS 12 (March 27, 2006) (averting the issue entirely when asked directly about his position on extending Section 245(i)) *and* President Bush’s Letter to Congress, *supra* note 72, *and* accompanying text (demonstrating President Bush’s enthusiastic support for reenacting Section 245(i) in 2002). In 2006 two bills were introduced that would have extended Section 245(i), but neither prompted a debate in Congress. *See Rep. Rangel Introduces Effort to Ease Path to Permanent Residency*, US FED NEWS, June 30, 2006, (Rep. Charles B. Rangel, New York, introduced H.R. 5741 on June 29, 2006, which would have reenacted Section 245(i)) *and Rep. Cleaver Introduces Bill to Amend U.S. Immigration Emanuel Cleaver*, US FED NEWS, July 12, 2006, (Rep. Emanuel Cleaver, Missouri, introduced H.R. 5747 on July 10, 2006 to extend Section 245(i)).

213. *See supra* note 27 *and* accompanying text (providing the full text of the law as stated in the INA); *compare* Stephen Yale-Loehr & Daniel M. Kowalski, *Cut Through the Noise: Key Trends in Immigration Law*, Miller Mayer, attorneys at law, available at [http://www.millermayer.com/new/key\\_trends.html](http://www.millermayer.com/new/key_trends.html) (last visited January 22, 2007).



current impasse.<sup>214</sup> Because it is a relatively straightforward and time-tested alternative to enacting a complicated new law,<sup>215</sup> Section 245(i) could potentially alleviate some of the United States' post 9/11 security concerns, by allowing certain undocumented immigrants to become official, registered residents.<sup>216</sup>

Reenacting Section 245(i) presents a viable solution to the current amnesty debate because the Act serves competing objectives.<sup>217</sup> First, the provision has proven to be an effective means for undocumented immigrants to legalize status.<sup>218</sup> Legalization is only effective when the potential beneficiaries trust the system enough to come forward out of the shadows.<sup>219</sup> While in effect between 1994 and 2001, Section 245(i)

214. See generally Mailman & Yale-Loehr, *Amnesty*, *supra* note 4 (explaining the origin, significance and practical usage of INA Section 245 in the practice of law); see also Lofgren, *supra* note 61 and accompanying text (stating her personal recollection that the House of Representatives did not discuss Section 245(i) when it was reenacted as part of the Illegal Immigration Reform and Immigrant Responsibility Act).

215. Yale-Loehr & Kowalski, *supra* note 213. Immigration practitioners have characterized S. 2611 as an exacerbation of the existing problems because it adds complexity:

This complexity will only increase if Congress enacts immigration reform. The bill the U.S. Senate passed in December 2005 is 796 pages long. As just one example, the Senate bill would not grant blanket 'amnesty' for undocumented workers. Instead, the bill divides the undocumented into three groups, depending on how long they have been in the United States. Each group has its own eligibility requirements and restrictions.

*Id.*

216. See Kennedy, *supra* note 83 ("Extending 245(i) does not provide any loopholes for potential terrorists. Instead, it will improve the monitoring of immigrants already residing in this country. Individuals who qualify for permanent residency and process their applications in the U.S. are subject to rigorous background checks and interviews. This process provides the government a good opportunity to investigate individuals who are in this country and determine whether they should be allowed to remain here."); but see *Immigration in the National Interest Act of 1995*, *Proceedings and Debates of the 104th Cong.*, 2nd Sess. (1996), 142 CONG. REC. H2,589-01, H2,603 [hereinafter *Immigration in the National Interest Act of 1995*] (statement by Rep. Dana Rohrabacher, California) ("This loophole also has serious repercussions for the security of our Nation. Under the Kennedy loophole, certain people who sneak across our border or illegally overstay their visas can apply for permanent resident status at the local INS office.").

217. See *Barbara Jordan Immigration Reform and Accountability Act of 2002: Proceedings and Debates of the 107th Cong.*, 2nd Sess. (2002), 148 Cong. Rec. H1,632-03, H1,643 (statement by Rep. Udall, Colorado) (offering support for reenacting Section 245(i): "this provision does not grant an amnesty, give immigrants the right to work, or protect them from deportation if they are living in the U.S. illegally. What it does do is keep families together and encourage those who qualify for permanent residency to continue filling an economic need and to become part of a regulated system.").

218. Section 245(i) effectively incorporated many undocumented immigrants into the legal process by promising not to arrest immigrants who filed applications. GREEN, *supra* note 58, at 64 ("The government promised it would not arrest illegal immigrants for deportation on the basis of their 245(i) applications.").

219. See Juffras, *supra* note 46 and accompanying text.

proved capable of meeting this challenge.<sup>220</sup> Hundreds of thousands of undocumented immigrants flocked to immigration attorneys during the brief period when Section 245(i) was in effect.<sup>221</sup> When the Act expired there were still many more immigrants who would have qualified for adjustment, but failed to meet the deadline.<sup>222</sup> Immigration practitioners' familiarity with the law, and settled case law that provides guidance on how the section works within the entire body of immigration laws, indicate that Section 245(i) has established credible reliance interests which will carry forward to a new reenactment.<sup>223</sup>

Second, Section 245(i) effectively punished immigrants who had skirted the law initially, and hence was not a "free pass" or an incentive to break the law.<sup>224</sup> Immigrants, who relied on this alternative to consular processing, paid a premium fee for the privilege, which was five times in excess of the standard fee. In addition, the law did not benefit all undocumented immigrants.<sup>225</sup> Rather, it selectively served only the most deserving members of our society, those whose claim to legal status was already supported by another existing code section.<sup>226</sup>

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220. Carlos Alcala, *Many Try to Beat Residency Deadline: Extension is Likely but Lines Long at INS*, SACRAMENTO BEE, Oct. 1, 1997, at B3 (chronicling the masses of immigrants who were eager to take advantage of Section 245(i) before it expired: "Would-be immigrants lined up by the hundreds at Sacramento immigration offices Tuesday - and the same scene played out around the country.").

221. See GREEN, *supra* note 58, at 64 ("The INS estimated that about 540,000 immigrants would be eligible under the act.").

222. See President Bush's Letter to Congress, *supra* note 72.

223. See, e.g., Deborah F. Buckman, Annotation, *Validity, Construction, and Application of Legal Immigration Family Equity Act (LIFE Act), and Regulations Promulgated Thereunder*, 10 A.L.R. FED. 2D 435 (2006) (providing explanatory information on the application of Section 245(i) and citing relevant case law to guide practitioners).

224. Legal Immigration Family Equity Act, § 1(a)(2), 8 U.S.C.A. § 1255 (West 2006); see *Padilla-Caldera v. Gonzales*, 453 F.3d 1237, 1240 (2005) ("The Legal Immigration Family Equity (LIFE) Act allows certain persons who entered without inspection or otherwise violated their status, and thus are ineligible to apply for adjustment of status in the United States, to seek adjustment nonetheless if they pay a \$1,000 penalty."); see also JAMES G. GIMPEL AND JAMES R. EDWARDS, JR., *THE CONGRESSIONAL POLITICS OF IMMIGRATION REFORM* 313 (1999) (referencing the penalty, which at the time was \$1,000 and stating that "245(i) had raised millions of dollars for the INS").

225. *Flores v. Ashcroft*, 354 F.3d 727, 731 (8th Cir. 2003) (establishing that adjustment of status under Section 245(i) does not apply to an immigrant who has prior orders of removal); INS on Amendment and Extension of Section 245(i), INS Memoranda, 2 BENDER'S IMMIGRATION BULLETIN 1067 (1997) ("Under the amended section 245(i), aliens who do not meet the adjustment requirements of section 245(a) are eligible to apply for adjustment of status only if they are beneficiaries of a visa petition filed with the Attorney General under section 204 or a labor certification which was filed pursuant to Department of Labor regulations.").

226. *Id.*; see also Kennedy, *supra* note 83 (providing the following statistic in support of reenacting comprehensive immigration reform: "[s]eventy-five percent of the people who have used 245(i) are the spouses and children of U.S. citizens and permanent residents."); Immigration in the

Section 245(i) meets the demands of skeptics who argue that “amnesties should be employed sparingly and carefully.”<sup>227</sup> As compared to IRCA, which legalized approximately three million undocumented immigrants in six years,<sup>228</sup> Section 245(i) had a much more modest impact.<sup>229</sup>

Third, Section 245(i) does not send a message to foreigners that undocumented immigration is an effective alternative to applying for entry.<sup>230</sup> A principal criticism of legalization is that it will inspire new immigrants to enter illegally.<sup>231</sup> In the final reenactment of Section 245(i) Congress specifically addressed this concern by adding a physical presence requirement.<sup>232</sup> Following this additional requirement, any immigrant who entered after the law went into effect could not access the benefit.<sup>233</sup>

National Interest Act of 1995, *supra* note 201, at H2,604 (statement by Rep. Xavier Becerra, California) (lending his support for the provision: “Section 245(i) . . . does not permit anyone to gain lawful permanent residence who would otherwise be disqualified.”).

227. *Border Security and Immigration Issues Hearing*, *supra* note 43 and accompanying text.

228. MEI LING REIN, *IMMIGRATION AND ILLEGAL ALIENS: BURDEN OR BLESSING?* 16 (The Gale Group eds., Thompson Learning 2002).

229. *See* GREEN, *supra* note 58 and accompanying text (citing the number of immigrants which the INS anticipated would be affected by the provision); *see also Yearbook of Immigration Statistics*, Department of Homeland Security, Legal Permanent Residents, Data Tables, <http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2005/table01.xls>; Legal Permanent Resident Flow: Fiscal Years 1820 to 2005, Table 1, *available at* <http://www.dhs.gov/ximgtn/statistics/publications/LPR05.shtm> (showing a significant increase in the number of adjustments between 1989-1991 when the bulk of IRCA applications were processed, but no comparable increase after 1994 when Section 245(i) first passed). The report does show that numbers rose to the IRCA levels following the cut-off date of Section 245(i) in 2001. *Id.* This lends support to the argument that Section 245(i) should be reenacted permanently in order to avoid this unmanageable swell in applicants. *See also* Nelly Jefferys & Nancy Rytina, *supra* note 4 (providing data on the total number of immigrants who have adjusted status). Unfortunately, the report does not identify how many immigrants adjusted status using Section 245(i). *Id.* The report does state: “In 2005, a total of 1,122,373 persons became LPRs [lawful permanent residents] of the United States . . . . The majority (66 percent) lived in the United States when they became LPRs.” *Id.* at 1.

230. *See* Alcala, *supra* note 220 and accompanying text (because Section 245(i) does not apply to immigrants with prior orders of removal, it will not incite a wave of new undocumented immigrants).

231. Don Feder, *Illegal Immigrants Should Not Be Given Amnesty*, in *ILLEGAL IMMIGRATION; OPPOSING VIEWPOINTS* (William Dudley ed., 2002), at 125 (“Extending blanket amnesty tells inhabitants of the impoverished Third World that if they can sneak past the Border Patrol, Uncle Softie will eventually welcome them with open arms.”).

232. 146 CONG. REC. S11,850-02, S11,851 (2000) (explaining the nature and purpose of Congress’ revisions to Section 245(i): “They also add a new requirement that for all beneficiaries whose application was filed after January 14, 1998, the principal beneficiary must have been physically present in the U.S. on the date of enactment of the LIFE Act Amendments of 2000. The function of this last requirement is to make sure that the renewed availability of section 245(i) does not operate to encourage anyone to violate our immigration laws.”).

233. *Id.*

In addition to reenacting Section 245(i), Congress should also consider removing the three and ten-year bars.<sup>234</sup> After careful consideration of whether the bars serve their intended purpose, and whether reenacting Section 245(i) would alone be an adequate safeguard to prevent the deterrence to exit, a decision to remove the bars could reduce the number of undocumented immigrants currently in the United States.<sup>235</sup> Now that exceptional amounts of resources have been dedicated to improving border security, it makes sense to remove the disincentive for undocumented immigrants to cross back into their home countries.

The arguments in support of legalization either deny that the definition of amnesty should apply, or reject the notion that amnesty is undesirable.<sup>236</sup> The two lines of argument are merely a difference in semantics, but they illustrate the strong political clout the word evokes.<sup>237</sup> Those who support amnesty and those who refute the idea that a legalization process constitutes amnesty both agree that a well-drafted legalization statute can effectively address the undocumented immigration population, and serve the objectives of comprehensive immigration reform.<sup>238</sup>

#### VIII. CONCLUSION

Amnesty proponents readily concede that undocumented immigration is not a problem to be solved.<sup>239</sup> So long as there is no

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234. See Foster, *supra* note 76 and accompanying text.

235. *Id.*

236. American Friends Service Committee, 'Legalization' or 'Amnesty'? *Understanding the Debate*, <http://www.afsc.org/immigrants-rights/policy/legalization-amnesty.htm> (last visited Feb. 17, 2007) (explaining how the term amnesty is used among legalization advocates: "Within the immigrants' rights community, others argue that, although they also support granting LPR [lawful permanent resident] status to undocumented immigrants, legislators in Congress are unwilling to even begin a conversation if the term 'amnesty' is used. Therefore, they prefer the term 'legalization.'").

237. See *Hearing on How Illegal Immigration Impacts Constituencies, Part II*, *supra* note 147, at 24 (statement of Rep. Howard L. Berman, California) (identifying the linguistic distortion of the term: "You can call anything an amnesty and defeat everything by doing it.").

238. *Id.* at 5. Representative Jackson Lee explained that S. 2611 is not amnesty because it does not "forget or overlook immigration law violations." *Id.* at 4. She detailed how the Senate bill is not an escape of responsibility: "[t]he Senate bill clearly asks those to get in line, to be able to be documented, whether or not they can meet the standards of status or citizenship, keep their records clean, employed for six years, to establish eligibility for permanent resident status and pay a substantial fine." *Id.* at 5.

239. MILTON D. MORRIS & ALBERT MAYIO, *CURBING ILLEGAL IMMIGRATION* 36 (The Brookings Institution 1982) ("In view of the long history and powerful forces behind illegal

realistic opportunity to enter legally at the onset, nor regularize once here illegally, undocumented immigrants will continue to risk deportation by averting the law.<sup>240</sup> Congress should nonetheless feel a pressing duty to address the issue by crafting a functional immigration code.<sup>241</sup> Immigration practitioners and the undocumented population that seek their assistance need an outlet to engage the legal process.<sup>242</sup> In order to prove successful, immigration reform should focus on those needs, rather than on constituents who have politicized the amnesty debate.<sup>243</sup>

In the current era of immigration policy, legalization efforts are justifiably plagued by the legacy of IRCA.<sup>244</sup> Amnesty, as it is understood in the immigration context, suffers from this unavoidable correlation with a failed attempt to fix a vastly complex social dilemma in one broad stroke.<sup>245</sup>

The negative connotation which the term amnesty carries reflects both myth and reality.<sup>246</sup> The reality is that full-scale amnesty, as implemented in 1986, failed to rectify a broken immigration system.<sup>247</sup> The myth is that because of this failure all legalization attempts should be subjected to heightened scrutiny and skepticism.<sup>248</sup> Rather, predicting the success or failure of immigration reform measures demands a tempered analysis.<sup>249</sup> Whether the concept is referred to as

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immigration, no single act or set of actions by the United States will eliminate it. Illegal immigration will always be part of American life.”).

240. *Id.*

241. *See supra* note 145 and accompanying text (discussing lawmakers’ duty to address the undocumented immigrant population).

242. *It is Time to Reform Our Immigration Laws*, Posted on AILA InfoNet at Doc. No. 02101071 (Oct. 10, 2002), Inman and Associates, <http://www.igvlaw.com/system/newimmigrationlaw/> (last visited Feb. 28, 2007) (demonstrating immigration lawyers’ support for legalization in general, and specifically for an extension of 245(i)).

243. *Cf.* Kevin R. Johnson, *Los Olvidados: Images of the Immigrant, Political Power of Noncitizens, and Immigration Law and Enforcement*, 1993 BYU L. REV. 1139, 1207 (describing how immigration services focus on enforcement in order to appease constituents).

244. *See* notes 42-46 and accompanying text (connecting IRCA with the current amnesty debate). *See also* Pia M. Orrenius & Madeline Zavodny, Working Paper, *Do Amnesty Programs Encourage Illegal Immigration? Evidence from the Immigration Reform and Control Act (IRCA)*, 12 Fed. Res. Bank of Atlanta (2001), available at <http://www.frbatlanta.org/frbatlanta/filelegacydocs/wp0119.pdf> (using the effects of IRCA as data to conclude that amnesty programs do not incite additional waves of immigration).

245. *Id.*

246. *See generally supra* notes 159-179 and accompanying text.

247. *See* note 42 and accompanying text.

248. *See* note 173 and accompanying text.

249. *See* Lofgren, *supra* note 49, at 378-79 (concluding that radical changes to immigration law will not produce the desired results of immigration reform).

amnesty or legalization should be of no consequence to the utility of its design.<sup>250</sup> Incorporating a provision in the INA that would enable immigrants already within the United States to adjust their legal status must be approached with reasoned analysis instead of fear or disdain.<sup>251</sup>

The political dogma that drives criticism of amnesty must give way to even-handed reform initiatives before Section 245(i) will have an opportunity to resurface.<sup>252</sup> Despite proven success in attaining immigration goals,<sup>253</sup> Section 245(i) is at the mercy of public opinion.<sup>254</sup> Once immigration policy debates shift from polarized factions to a solution-oriented approach, Section 245(i) may eventually escape the amnesty misnomer that currently prevents reenactment.<sup>255</sup>

Without Section 245(i) in place to soften the effect of the bars, the three and ten-year sanctions to reentry are simply too harsh to serve their intended purpose.<sup>256</sup> So long as the bars act to trap undocumented immigrants in the country, rather than deter illegal entry in the first place, they are counter effective and therefore should be repealed.<sup>257</sup>

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250. See notes 236-238 and accompanying text.

251. *Enhanced Border Security Act*, *supra* note 169 (statement by Sen. Tom Daschle, South Carolina) (addressing criticism while urging Congress to extend Section 245(i): “Within hours after the twin towers collapsed, we heard some people say that America should close its doors to immigrants. Some people even said we should force out immigrants who are already here, working and contributing to our society. People who say such things need to understand that our enemy is not immigrants, it is intolerance and hatred.”).

252. *Reid-Kennedy Hearing*, *supra* note 11, at 24 (prepared statement of Alan K. Simpson, Former U.S. Sen., Wyoming) (“IRCA’s lesson on guestworkers . . . is to make certain that the terms of the program are dictated by sound practical policy, and not by coalition politics.”).

253. See Lofgren, *supra* note 49, at 363.

254. See note 162 and accompanying text.

255. See HING, *supra* note 101, at 43 (drawing the distinction between objective and subjective rationales: “Any policy related to ‘solving’ the undocumented migration issue will be debated with value-laden rhetoric and overtones of what is the morally right thing to do. Policymakers may act on personal impulse and intuition or may look for objective guidance to help make a decision.”).

256. See *supra* note 49 and accompanying text.

257. *Id.*