The Effect of Employer Sanctions on Employment Discrimination and Illegal Immigration

Susan H. Welin

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I. INTRODUCTION

The Immigration Reform and Control Act of 1986 (IRCA)\(^1\) brought major changes in United States immigration policy. IRCA addresses the problem of increasing numbers of illegal aliens in three ways. First, the Act grants amnesty to certain aliens who have been in the United States illegally since January 1, 1982.\(^2\) Second, IRCA revises procedures for temporary entry into the United States for certain agricultural workers,\(^3\) and grants permanent residence to some of these workers.\(^4\) Third, the Act imposes sanctions on employers who knowingly hire illegal aliens.\(^5\)

This note focuses on one of IRCA's most controversial provisions — the provision creating employer sanctions. Employers have opposed this provision because they believe it puts too great of a

\(^3\) IRCA § 302, 8 U.S.C. § 1210.
\(^4\) *Id.*
burden on them. Civil rights advocates have similarly opposed the provision because they fear it will lead to increased employment discrimination against certain minorities.

After two years, evidence of the effectiveness of employer sanctions remains inconclusive, and the debate over this provision continues. This note contends that the social cost of applying employer sanctions far outweighs any effect the provision will have on illegal immigration. The sanctions, coupled with an unreliable and cumbersome system of verifying work eligibility, will promote discrimination against certain minorities and nationalities. Furthermore, employer sanctions will only minimally deter aliens from entering this country illegally, because other sections of the IRCA encourage illegal immigration. Thus, the overall effect of IRCA will be to perpetuate the permanent class of underground aliens in the United States, and to increase discriminatory employment practices against certain minorities and nationalities within the United States.

Part II provides background information on how the immigration process in the United States works, and gives a brief history of the legislative history of immigration law, focusing on past efforts to impose sanctions on employers who hire illegal aliens. Part III addresses the possible impact of employer sanctions on employment discrimination. Part IV examines the effectiveness of IRCA in deterring illegal immigration.

II. BACKGROUND AND OVERVIEW

A. The Structure and Process of United States Immigration Law

Before discussing specific provisions of IRCA, it is necessary to understand some general aspects of United States immigration law. The Immigration and Nationality Act of 1952 (INA)\(^6\) is the principal legislation setting out the current system of immigration in the United States.\(^7\) Title I of the Act outlines the administrative duties of different governmental bodies. Title II contains numerical limits on the number of people allowed to immigrate to the United

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States and establishes entry requirements for both immigrants and non-immigrants. Title III contains naturalization requirements.

Most aspects of the immigration process are handled by the Immigration and Naturalization Service (INS), which is a branch of the Department of Justice. However, the State Department issues visas to both immigrants and non-immigrants, and advises the INS on political issues involved in asylum and refugee petitions. Additionally, the Labor Department, in a process called labor certification, reviews applications of aliens applying to enter the United States to work.

There are two categories of aliens seeking legal entry into the United States: immigrants and non-immigrants. Immigrants are commonly defined as aliens who intend to stay permanently in the United States. The INA places quota limits on the number of aliens allowed to immigrate, and establishes a seven category preference system which determines an immigrant’s place on the visa waiting list. If the number of aliens in the preference categories is less than the yearly quota, then non-preference aliens are allowed to immigrate.

Non-immigrants plan to return to their home country after visiting, studying or working in the United States for a limited period of time. There are currently thirteen categories of non-immigrants, and each category has different requirements for obtaining permission to enter the United States. These aliens are not subject to the numerical limitations placed on immigrants, but they must leave the country when their visas expire or they may be deported by the INS.

10 8 C.F.R. § 208.7 (1987).
12 C. GORDON AND E.G. GORDON, IMMIGRATION LAW AND PROCEDURE, § 2.4 (1986). However, the Immigration and Nationality Act defines immigrants as “every alien except an alien” within one of the special non-immigrant classes. 8 U.S.C. § 1101(a)(15). Thus technically, the law presumes that every alien is an immigrant until an immigration official is satisfied that the alien is entitled to non-immigrant status. 8 U.S.C. § 1184(b).
13 However, there is no numerical limit on the number of unmarried children less than twenty-one years old or spouses of United States citizens or legal permanent residents allowed to immigrate. 8 U.S.C. § 1151.
16 GORDON & GORDON, supra note 12, at § 2.4.
18 GORDON & GORDON, supra note 12, at § 2.4.
19 Id. at § 2.5.
B. Historical Background of Immigration Law and Employer Sanctions

The United States placed few restrictions on the type or number of people who could enter its borders during the 1700’s and early 1800’s.20 Congress imposed the first real limits on immigration shortly after the Civil War.21 As the number of immigrants increased through the 1800’s, and the composition of immigrants shifted from Western Europeans to less educated Eastern Europeans, Asians, and Irish Catholics, resentment towards and suspicion of immigrants heightened.22 The depressed economy of the country in the 1870’s “was blamed on aliens who were accused of driving wages to a substandard level as well as taking away jobs that ‘belonged’ to white people.”23 This growing sentiment expressed itself through laws restricting the type of people allowed to immigrate to the United States. For example, the Chinese Exclusion Act of 1882 suspended all immigration of Chinese laborers for ten years, and prohibited Chinese immigrants already in the United States from becoming citizens.24 Other laws enacted during this time period excluded convicts, prostitutes, lunatics, “public charges”25 and “idiots.”26

Congress passed a major piece of immigration legislation in 1917 (the 1917 Act) which codified all existing immigration laws, and imposed new restrictions on immigration.27 The 1917 Act attempted to stem the flow of immigrants from southern and eastern Europe by making illiterates ineligible to immigrate.28 The legislation also created an “Asiatic barred zone designed to exclude Asians completely from immigrating to the U.S.”29 Additionally, the 1917 Act attempted to control the numbers of illegal aliens within the country — which had increased correspondingly with the length of the list of people ineligible to immigrate legally — by prohibiting...

22 See J. Patterson, America in the Twentieth Century 15 (1976).
23 Civil Rights Report, supra note 21, at 8.
24 Id.
25 A public charge is someone who is not financially independent or able to work, who would have to be supported by the government if allowed to immigrate.
26 Weissbrodt, supra note 20, at 6–9.
27 Civil Rights Report, supra note 21, at 9.
28 Id.
29 Id.
the acts of harboring, transporting or smuggling illegal aliens into the United States.\textsuperscript{30}

Because of the Supreme Court's ruling in \textit{U.S. v. Evans},\textsuperscript{31} the provision prohibiting the act of harboring, transporting or smuggling illegal aliens proved to be ineffective in controlling illegal immigration. In \textit{Evans}, the Court held that because of the wording of the 1917 Act, only the smuggling or transporting of illegal aliens was a punishable offense; therefore those who harbored or concealed illegal aliens could not be punished under the 1917 Act.\textsuperscript{32} Because employers could not be punished for hiring illegal aliens, they continued to do so. Consequently, the number of illegal aliens, especially from Mexico, continued to increase.

As their numbers increased, the quality of the living conditions for illegal immigrants deteriorated. The Mexican government became concerned about the squalid living conditions of its citizens and the low pay they received while living and working illegally in the United States.\textsuperscript{33} President Truman also became concerned about the negative effect that these illegal aliens would have on United States workers' wages and living conditions.\textsuperscript{34} The President joined together with the Mexican government to exert pressure on Congress to amend the harboring and transporting provision of the 1917 Act.\textsuperscript{35}

President Truman advocated that a provision imposing sanctions on employers who hire illegal aliens should be added to the harboring sanctions of the 1917 Act.\textsuperscript{36} In 1952, Senator Douglas introduced such a provision to the Immigration and Nationality Act (INA),\textsuperscript{37} which was the immigration legislation under consideration at that time. This amendment was overwhelmingly defeated after a heated debate.\textsuperscript{38} In fact, due to a perceived lack of temporary

\begin{enumerate}
\item U.S. v. Evans, 333 U.S. 485 (1948).
\item Id. at 495.
\item \textsc{Senate Judiciary Committee, 96th Cong., 2nd Sess., Temporary Worker Programs: Background and Issues 38 (Comm. Print 1980) [hereinafter Temporary Worker Programs].}
\item Id.
\item Id.
\item Id.
\item The Immigration and Nationality Act of 1952 [hereinafter INA] was a major piece of legislation which set out the United States immigration system. See \textit{supra} notes 6--7, and accompanying text.
\item Temporary Worker Programs, \textit{supra} note 33, at 40.
\end{enumerate}
agricultural workers in certain parts of the country, the final version of the Act explicitly exempted employers from sanctions for harboring illegal aliens in a provision which has come to be known as the "Texas Proviso." 39

Until IRCA was passed, the Texas Proviso gave employers the benefit of hiring illegal aliens at less than minimum wage rates without being subject to the harsh penalties imposed on others who assisted illegal aliens. 40 Under the INA, while illegal aliens discovered at a place of employment faced deportation, the only punishment an employer faced was the loss of the employee. Due to the low risk involved, employers continued to hire illegal aliens, thus providing an incentive for people from economically depressed countries to continue to enter the United States illegally.

C. The Legislative History of IRCA

IRCA is the first major reform of United States' immigration law since Congress passed the Immigration and Nationality Act. The impetus for the reforms contained in IRCA began in 1971 when the Subcommittee on Immigration of the House Judiciary Committee held hearings on the problem of undocumented aliens. 41 The subcommittee concluded that illegal aliens had a substantial adverse impact on the United States economy and labor market, and that legislation "to assure the orderly entry of immigrants into this country" and to protect this country's own labor market was needed. 42

39 Select Commission on Immigration and Refugee Policy to the Congress and the President of the United States, U.S. Immigration Policy and the National Interest 473 (1981) [hereinafter Select Commission Report]. Records of the congressional debate over the Texas Proviso indicate that the provision was only meant to exempt employers who unknowingly hired illegal aliens. Employers who knowingly hired illegal aliens were supposed to be subject to penalties under the provision. 123 Cong. Rec. 794 (1952). Interestingly, the INS has interpreted the provision to give "full authority to employers to contract for and use illegal entrants with impunity." Schwarz, Employer Sanctions Laws, Worker Identification Systems, and Undocumented Aliens: The State Experience and Federal Proposals, 19 Stan. J. Int'l L. 371, 374 (1983) (quoting Greene, Public Agency Distortion of Congressional Will: Federal Policy Toward Non-Resident Labor, 40 Geo. Wash. L. Rev. 440, 454 (1972)).

40 The INA provides penalties of up to $2000 and up to five years imprisonment for each offense of smuggling, harboring or transporting an illegal alien. INA § 274, 8 U.S.C. § 1324.


42 Id. (quoting H.R. Rep. No. 94-506, at 3).
During the 1970's, immigration reform bills were introduced into the House and Senate almost every year. Because of the controversial nature of the proposed reforms, most bills were either held up in lengthy committee hearings, or did not pass if actually considered by the House or the Senate. In 1978, President Carter attempted to focus further attention on the issue of illegal aliens by establishing the Select Commission on Immigration and Refugee Policy (the Commission). The Commission held extensive hearings on immigration problems over the span of several years and issued its final report of findings and recommendations in 1981. The Commission's report underscored the economic and social importance of controlling the flow of illegal immigrants into the United States. Among its major recommendations on how to control illegal immigration was the imposition of sanctions against employers that knowingly hire illegal aliens.

The bills containing the basic structure of IRCA were first introduced to Congress in 1982. For almost six years, Congress debated and considered these reforms under legislation commonly referred to as the "Simpson-Mazzoli Bills." The Act was controversial, and several groups were particularly concerned about the employer sanctions provisions. Civil rights groups were against sanctions because they feared that they would result in employers refusing to hire recent legal immigrants, or anyone who looked foreign or spoke with an accent. Because of the lack of a standard and reliable system to determine employment eligibility, employers did not want to shoulder the responsibility of trying to determine whether or not a potential employee would be eligible to work.

\[43\] See id. at 52-53.
\[44\] The report included a final report, and ten supplementary volumes of appendixes. Select Commission Report, supra note 39.
\[46\] Id.
\[48\] 5 IMMIGR. L. REP. 73 (1986).
Congress attempted to address both of these concerns. By requiring employers to obtain uniform documentation and keep records on all employees, regardless of nationality, Congress hoped to eliminate potential discrimination problems. As an additional safeguard, Congress included in IRCA a prohibition against discriminatory employment practices, and created a Special Counsel to investigate charges of discrimination. To satisfy employers' concerns, Congress stipulated that an employer who complies with recordkeeping and documentation requirements will not be fined provided that any document accepted by the employer "reasonably appears on its face to be genuine."

D. Employer Requirements Under IRCA

IRCA prohibits employers from knowingly hiring illegal aliens. The legislation requires that employers verify the work eligibility of every employee hired after November 6, 1986. Regulations issued by the INS under authority of the Act require employers to complete an I-9 form. The form lists documents that prove employment eligibility, and the employer must indicate which documents the employee presented, and testify that the documents were valid. IRCA contains a "good faith" clause providing that an employer will not be fined for knowingly employing an illegal alien if the documents presented by the employee look valid. The employer could be fined however, if the documents presented are obviously false.

The Act requires employers to keep a completed I-9 form for every employee for at least "three years after the date of hire," or "one year after the date of termination of employment, whichever is later." The form must be presented to INS officials upon their

52 IRCA § 102, 8 U.S.C. § 1324b.
54 IRCA § 102, 8 U.S.C. § 1324a(1).
55 IRCA § 101(a)(3).
56 8 C.F.R. § 274a.2.A.
58 IRCA § 102, 8 U.S.C. § 1324b(a)(5)(1).
request, and will apparently be used to determine whether an employer has knowingly hired an illegal alien. Employers are not required to keep copies of the documents they rely on to determine an employee's work eligibility, but obviously, keeping such copies "provides strong support for the employer's" decision, and "makes good sense."

Both civil and criminal penalties are created by the Act. The INS is authorized to issue civil penalties ranging from $100 to $1,000 for failure to comply with recordkeeping requirements, and penalties from $250 to $10,000 for each illegal alien hired by the employer. Before imposing civil penalties, the INS must issue a Notice of Intent to Fine the employer, and the employer then has 30 days to request a hearing before an administrative law judge (ALJ). If the employer does not contest the notice within 30 days, then he or she automatically receives a fine. Additionally, an employer could face up to $3,000 or six months imprisonment as a criminal penalty for continuing a "pattern or practice" of knowingly employing illegal aliens.

The Act also prohibits discriminatory practices in hiring based on national origin, and authorizes the creation of a Special Counsel for Immigration-Related Unfair Employment Practices to investigate charges of discrimination. A person who believes she or he has been discriminated against may file a claim with the Special Counsel, which investigates the charge and files a complaint with an ALJ if the charge is justified. If the Special Counsel fails to file a complaint within 120 days, the person charging discrimination may file a complaint directly with an ALJ. The complaint will

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61 Since employers are not required to keep copies of documents, they can easily complete the form without actually checking documentation. It is therefore difficult to know how useful this form will be in catching employers who hire illegal aliens. However, penalties can be imposed on employers who do not comply with the recordkeeping requirements, even if they have not hired illegal aliens. Additionally, when the INS discovers an alien without proper documentation working somewhere, the form could be used to show their lack of good faith in completing the form.

62 5 IMMIGR. L. REP. 76 (1986).
65 8 C.F.R. § 274a.9(c).
66 Id.
68 IRCA § 102, 8 U.S.C. § 1324b(a)(1).
69 IRCA § 102, 8 U.S.C. § 1324b(c).
70 IRCA § 102, 8 U.S.C. § 1324b(a)(2).
71 IRCA § 102, 8 U.S.C. § 1324b(d)(2).
initiate an administrative hearing, where the ALJ is authorized to impose a civil penalty, and award back pay and attorney's fees to the prevailing party where appropriate.  

III. THE EFFECT OF EMPLOYER SANCTIONS ON EMPLOYMENT DISCRIMINATION

IRCA prohibits "unfair immigration-related employment practices," which are defined as "discrimination against any individual, other than an illegal alien in the hiring of an individual for employment or the discharging of an individual from employment because of the individual's national origin, or citizenship status." This prohibition against discrimination does not apply to employers of three or fewer employees, or to discrimination based on citizenship "which is otherwise required in order to comply with the law, . . . required by a . . . government contract, or which the Attorney General determines to be essential for an employer to do business with an agency or department of Federal, State or local government," or to discrimination which is covered under the Civil Rights Act of 1964.

The effectiveness of the antidiscrimination provision is doubtful for two reasons. First, INS raids in the past have often focused on employers with large numbers of Hispanic or other minority workers. The raids tended to be disruptive, time consuming and costly to employers in terms of lost work hours. Now that employers face civil and criminal penalties for hiring illegal aliens, as well as the threat of costly and time consuming INS raids, many employers may decide to hire only workers that do not appear to be foreign rather than run the risk of drawing the attention of the INS. Second, despite evidence of widespread discriminatory employment practices induced by the threat of employer sanctions, few people have filed discrimination complaints against employers. Since employers face harsh consequences for employing illegal aliens, and face little chance of being penalized for discrimination, employers will continue to discriminate against foreign-looking people.

A. INS INVESTIGATION TACTICS DISCOURAGE EMPLOYERS FROM HIRING MINORITIES

Courts generally uphold the authority of INS officials to interrogate any person at his or her place of employment if the INS has
a reasonable suspicion that the person is an illegal alien, and if the employer consents.\textsuperscript{75} Additionally, the INS contends that its agents can conduct extensive searches at business establishments without an employer's permission if they obtain a general search warrant.\textsuperscript{76} The courts have not conclusively ruled on this issue.\textsuperscript{77} Typically, INS officials target their searches, or raids, at businesses with high numbers of Hispanic and West Indian employees.\textsuperscript{78} During a raid, officials roam through the facility, stopping and questioning those employees who look "foreign," which often means Hispanic.\textsuperscript{79} Employers desiring to avoid these time consuming and disruptive raids may decide that the best way to do so is not to hire "foreign-looking" people.\textsuperscript{80}

A good illustration of the discriminatory investigative practices used by the INS is "Project Jobs." This operation, which took place from April 26 to April 30, 1982, in nine cities across the United States, was designed to locate and arrest illegal aliens who held high paying positions that could be filled by United States citizens.\textsuperscript{81} Of the 5,440 aliens arrested during the operation, 4,900 were Mexican nationals, while only one citizen each from Canada, the United Kingdom, and Australia were arrested.\textsuperscript{82} The average salary of those arrested was approximately $190 a week.\textsuperscript{83}

The threat of INS raids, now coupled with IRCA's stiff sanctions, are strong incentives for employers to discriminate against foreign-looking people in the hiring process. Additionally, the lack of an accurate, quick way to verify an employee's eligibility will further encourage employment discrimination. As discussed in Sec-

\textsuperscript{75} See \textit{Lau v. INS}, 445 F.2d 217, 223–24 (D.C. Cir. 1971), cert. denied, 404 U.S. 864; Ojeda-Vinales v. INS, 523 F.2d 286, 287 (2d Cir. 1975); Avila-Gallegos v. INS, 525 F.2d 666, 667 (2d Cir. 1975).
\textsuperscript{76} \textit{Civil Rights Report}, supra note 21, at 88–90.
\textsuperscript{77} Id. at 85.
\textsuperscript{78} Id.
\textsuperscript{79} Id.
\textsuperscript{80} See \textit{Employment Hearings}, supra note 49, at 21 (statement of Arnoldo S. Torres).
\textsuperscript{81} Id. at 42 (statement of E. Richard Larson, ACLU).
\textsuperscript{82} Id.
\textsuperscript{83} J. CREWDSON, \textit{The Tarnished Door: The New Immigrants and the Transformation of America} 244 (1983). Operation Jobs has been criticized as an example of the ineffective investigation tactics used by the INS. Instead of identifying illegal aliens in high-paying jobs that could be filled by unemployed American citizens, the INS spends its resources raiding "steel mills, light factories, shoemakers, fisheries, canners [and] poultry farms," which tend to employ uneducated and low-paid Mexican workers. \textit{Id.} at 245. The illegal immigrants who pose the biggest threat to the American labor market are the well-educated "Asians, Europeans, and Middle Easterners" who work in "banks and brokerage houses and aerospace firms," and get into the United States by using false documentation or overstaying a legitimate visa. \textit{Id.} at 245.
tion II, IRCA requires that an employee present documentation to an employer establishing both the identity and the work eligibility of the employee, and the employer must verify the validity of the documents. 84 Although the provision contains a good faith clause, 85 many employers may find it easier not to hire a person that could draw the attention of the INS, despite the validity of their documents. 86

B. Employers Face Little Risk of Being Penalized for Employment Discrimination Under IRCA

The imposition of employer sanctions, the investigative tactics of the INS, and the lack of an easy system of verification of employment eligibility all provide strong incentives for employers not to hire certain groups of people. The antidiscrimination provisions of IRCA were included to counteract these incentives. Unfortunately, despite evidence of employment discrimination related to IRCA, few individuals have filed complaints against employers. Additionally, under the Reagan administration’s interpretation of the Act, the standard of proof required to show discrimination is difficult for complainants to meet. Thus, even if the number of complaints filed increases, few complainants would actually prevail in a dispute. The low risk employers face of being penalized for discrimination under IRCA will do little to counteract the Act’s strong incentives to discriminate against certain minority groups.

Few people have filed discrimination complaints under IRCA. The General Accounting Office (GAO) is required to issue a yearly report on the number of discrimination complaints filed under IRCA. 87 The GAO reported that as of September 1987, only sixty-seven IRCA-related employment discrimination complaints were filed with federal agencies. 88 By September 1988, the number of complaints filed increased to 434. 89 The Office of Special Counsel,

84 See supra notes 55–57 and accompanying text.
which received 286 of these 434 complaints, initially estimated that
only 180 complaints would be filed in 1988.90 The actual number
of complaints filed in 1988 was fifty-nine percent higher than origin­
ally estimated.91 Despite this figure, the GAO concluded that the
number of complaints filed did not indicate a "pattern of discrimi­
nation."92
Other figures indicate that this conclusion may be misguided.
For example, in 1987 the GAO reported that as of September 1, 1987, the city of Chicago had received thirty IRCA-related charges
of discrimination.93 As of March 1, 1987, the New York State In­
teragency Task Force on Immigration had documented sixty-four
cases of IRCA-related discrimination.94 Additionally, the Office of
Special Counsel has "identified about 500 job advertisements in
newspapers containing possible discriminatory wording, such as limit­ing which work authorization documents are needed for the I-9 or
limiting employment to U.S. citizens only."95
The GAO's 1988 report96 contains even more alarming statis­
tics. A survey conducted by the GAO found that approximately
sixteen percent of responding employers admitted to engaging in
discriminatory practices such as "asking only foreign-looking per­
sons for work authorization or hiring only U.S. citizens."97 These
facts indicate that IRCA may be encouraging employment discrimi­
nation, but that the victims of such discrimination are not seeking
redress through the channels provided in IRCA.
Even if more individuals filed discrimination complaints, under
the Reagan administration's interpretation of the provision, few
claimants could prevail. Upon signing IRCA, President Reagan
urged that the Act's antidiscrimination provision be interpreted to
require claimants to prove an employer "knowingly and intention­
ally" discriminated against them.98 The Justice Department has fol­
lowed this interpretation.99 Under IRCA, a complainant must pre­
sent evidence that an employer specifically intended to discriminate

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90 Id. at 43.
91 Id.
92 Id. at 39.
94 Id.
95 Id. at 34.
97 Id. at 46.
98 Statement by Ronald Reagan upon signing S. 1200, 22 WEEKLY COMP. PRES. DOC.
against an employee or applicant because of that person's race or nationality. The employer can refute this evidence by providing any rational reason for not hiring the individual.\textsuperscript{100} Absent a showing of intent, an employer is not even obligated to give a reason for not hiring the complainant.\textsuperscript{101}

This standard is essentially the same as one of the standards used in employment discrimination cases under Title VII of the Civil Rights Act of 1965 (Title VII).\textsuperscript{102} Under the "disparate treatment" theory, a plaintiff must prove intentional discriminatory treatment by an employer, and refute all of the employer's articulated nondiscriminatory reasons for the treatment.\textsuperscript{103} The standard used in disparate treatment cases is similar to the standard for IRCA cases which President Reagan advocated. The second standard in Title VII cases is the "disparate impact" theory. The disparate impact theory focuses on the "consequences of employment practices."\textsuperscript{104} Therefore, the intent of an employer is irrelevant.\textsuperscript{105} To prevail under a disparate impact theory, a plaintiff must use statistics to establish that a "facially neutral employment practice has a substantial disparate impact on a protected class of which he is a member."\textsuperscript{106}

Generally, it is easier for a plaintiff to prevail under a disparate impact theory, because "it does not require a plaintiff to prove that an employer acted with discriminatory intent in [making] an employment decision."\textsuperscript{107} Under the Reagan administration's interpretation of IRCA, plaintiffs could not use this theory.\textsuperscript{108} Evidence that an employer consistently hires white applicants over more qualified immigrants or foreign-looking applicants would not be sufficient to show discrimination.\textsuperscript{109}

Preliminary evidence shows that employers are using discriminatory practices in response to the threat of employer sanctions. Additionally, there is little incentive for employers to stop discrim-

\textsuperscript{100} Statement by Ronald Reagan upon signing S. 1200, 22 \textit{supra} note 98.
\textsuperscript{101} \textit{Id}.
\textsuperscript{103} McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-04 (1973).
\textsuperscript{105} \textit{Id}.
\textsuperscript{106} \textsuperscript{107} \textit{Id}.
\textsuperscript{107} \textit{Id} at 1042.
\textsuperscript{108} \textit{Id}.
\textsuperscript{109} \textit{Id}.
inerting because few victims have filed complaints. Furthermore, since the standard of proof is so difficult to meet in these cases, few complainants will prevail in these cases.

IV. IRCA's Effectiveness in Controlling Illegal Immigration

One of the primary purposes of IRCA is to "control illegal immigration in the U.S." The principal means... of doing so... is through employer sanctions." The rationale behind the imposition of sanctions is that "[e]mployment is the magnet that attracts aliens [to the United States] illegally." However, the effectiveness of employer sanctions may be negated by other provisions of IRCA, and by economic and political factors in other countries which continue to encourage illegal immigration into the United States.

Social scientists have identified two categories of factors that encourage immigration. "Push" factors are circumstances within a country that cause people to emigrate, such as political unrest, large-scale unemployment, a repressive government, and high population growth rates. "Pull" factors are circumstances within a country that attract people to that country, such as political and economic stability, a high standard of living, and the availability of jobs. The stronger these factors are, the greater the number of people that want to immigrate to the country with the pull factors. If legal channels cannot accommodate the number of people desiring to immigrate, then illegal immigration will increase.

Employer sanctions attempt to lessen the strength of the pull factors which attract people to the United States. However, push factors in other countries, as well as IRCA's legalization, registry, and seasonal agricultural worker programs, continue to encourage illegal immigration. Additionally, a growing black market has made

111 Id. at 46.
112 Id.
114 MEXICAN MIGRATION, supra note 113, at 22.
115 Id.
116 Id.
117 See id. at 22–24.
it relatively easy for aliens to obtain false documents needed for work eligibility.\textsuperscript{119} When all of these factors are combined with the extremely low probability that the INS can effectively monitor every employer in the country,\textsuperscript{120} aliens have little incentive to stop entering the United States illegally.

A. **Push Factors in Other Countries Encourage Illegal Immigration to the United States**

Economic and political problems within a country often cause large numbers of people to emigrate to places with better economies and less political strife. For example, almost 200,000 people left Ireland in the five years following the potato famine of 1864.\textsuperscript{121} The present economic and political climate of Mexico — the source of a large number of apprehended illegal aliens in the United States\textsuperscript{122} — similarly pushes people to the United States.

In 1982, Mexico "began a slide into a severe recession that left rising unemployment and declining real wages in its wake."\textsuperscript{123} During that year, unemployment rates doubled in Mexico's three major metropolitan areas.\textsuperscript{124} By 1983, average real earnings had declined to seventy percent of the 1981 average real earnings.\textsuperscript{125} The Mexican government has been beset by rising inflation within the country, and the decreasing value of oil in international markets. As the government attempts to deal with its large debt burden, it has continued to employ austerity measures on its citizens.\textsuperscript{126}

The House Judiciary Committee, in its report on IRCA, recognized that employer sanctions alone will not completely eliminate

\textsuperscript{120} The General Accounting Office reports that by the end of Fiscal Year 1988 the INS will create 500 new positions specifically dedicated to investigating compliance with IRCA. GAO 1987 \textit{Report}, supra note 88, at 27. Additionally, the INS plans to conduct 20,000 I-9 inspections using the Investigations and Border Patrol, and the Department of Labor plans to conduct 60,000 I-9 inspections during Fiscal Year 1988. \textit{Id.} at 26–27. However, the INS sent copies of the Employer Handbook which detailed IRCA's new provisions to over 7 million employers. \textit{Id.} at 26. Thus, despite the seemingly large number of inspections that the federal government is planning to conduct, the INS will only be inspecting a small percentage of the number of employers in the United States.
\textsuperscript{121} \textit{Ehrlich, The Golden Door} 24 (1979).
\textsuperscript{122} Of the 1,767,400 deportable aliens apprehended by the INS in 1986, 1,671,458 were Mexican citizens. \textit{U.S. Dept. of Justice, 1986 Statistical Yearbook of the Immigration and Naturalization Service} 96 (1986).
\textsuperscript{123} \textit{P. Gregory, The Myth of Market Failure} 269 (1986).
\textsuperscript{124} \textit{Id.} at 271.
\textsuperscript{125} \textit{Id.} at 272.
\textsuperscript{126} \textit{Mexican Migration, supra note 113}, at 102.
illegal immigration. The Committee stated that "[a]s long as there is an economic imbalance between the sending countries and the United States, the pressure to migrate to this country will continue."127 In addition to employer sanctions, the Judiciary Committee advocated "generous bilateral programs to assist Mexico in reducing the economic pressures to emigrate — temporarily or permanently — to the U.S."128

B. Other Provisions of IRCA Encourage Illegal Immigration

The purpose of employer sanctions is to discourage illegal immigration.129 However, by making exceptions to previous immigration laws, the legalization program, the registry program, and the new seasonal agricultural workers program all implicitly encourage illegal immigration. These programs will act as pull factors, making illegal immigration to the United States more attractive. The effectiveness of employer sanctions in counteracting these pull factors will depend upon how strictly and how often the provision is enforced, and upon increased enforcement and inspections along the United States border and at ports of entry.

The problem of illegal aliens living within the United States can be approached in several ways. First, the status quo can be maintained. Second, the internal enforcement of immigration laws can be intensified, and apprehended illegal aliens deported. Third, Congress can admit to past failures in the enforcement of immigration laws and legalize those illegal aliens within the United States, and concentrate resources on keeping new illegal aliens from entering the country.

As previously discussed, the United States' past meager efforts at controlling illegal immigration has depressed wages and increased unemployment in areas of the country with high concentrations of illegal aliens.130 The second approach was rejected by Congress in discussions about immigration because it would be too costly and inhumane to uproot people who have become fully integrated into American society.131 Thus, in reforming immigration law, through IRCA, Congress adopted the third approach.

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128 Id.
129 Supra notes 110-11 and accompanying text.
130 See supra note 127, at 47.
131 Id. at 49.
The legalization program authorizes the grant of legal permanent residence to eligible illegal aliens. To be eligible, an alien must have lived illegally within the United States since January 1, 1982. An alien who has legally resided in the United States since 1982 would not be eligible for legalization. An alien who legally resided in the United States in 1982, and later became illegal because his or her visa expired, would also not be eligible for legalization. Aliens must have applied for legalization before May 4, 1988 to be eligible, and they must have documentation proving their continuous presence in the United States.

Proponents of the legalization program believe that it is a compassionate way to deal with illegal aliens who have “set down roots” in the United States, and “become productive members of American society.” Opponents argue, however, that under the program, those willing to break the law to enter the United States illegally are given preference over those “would-be immigrants who have waited patiently to come here.” Because the program “is unfair to [people] who have respected the legal immigration system,” it will attract “even more illegal migrants in the belief that they would somehow secure legal status now or in the future.” Thus, the legalization program may encourage people to enter the United States illegally despite the difficulty they may encounter in finding employment once they arrive.

The registry program is similar to the legalization program, in that it grants legal permanent residence to aliens who have lived in the United States since January 1, 1972. However, the registry program grants legal permanent residency to both illegal and legal aliens. Additionally, the process of obtaining legal status through the registry program is less lengthy and complex than the process under the legalization program. Like the legalization program,
registry gives preference to aliens residing within the United States over those waiting to immigrate. Thus, registry may also encourage people to enter the United States illegally in hopes of evading authorities long enough to obtain legal residence.

IRCA contains several provisions concerning seasonal agricultural workers. The Act creates a new non-immigrant category, called the H2-A category, specifically for agricultural workers desiring to work in the United States during harvest seasons. Additionally, the Act will allow up to 350,000 aliens who can prove they performed agricultural services for at least ninety days between May 1, 1985 and May 1, 1986 to be granted temporary resident status. Those aliens may then obtain legal permanent resident status after one year.

The United States and several European countries created similar temporary worker programs during wartime or post-war labor shortages. Historians who have analyzed these past programs have identified several factors as crucial to the success of these programs. First, a country must make a concerted effort to find illegal aliens and keep them out of the country. Second, the number of aliens allowed into the country through legal channels must be realistic in meeting the labor needs of the country. Third, the legal procedure should be fairly simple, and not involve a great deal of paper work. Most countries which failed to take these factors into account when instituting temporary worker programs experienced an increase in the number of illegal aliens.

be granted eighteen months after the alien gains temporary resident status, if the alien meets certain requirements, including a minimal understanding of English and of United States history and government. Under the registry program, an alien is immediately granted permanent resident status, and the program does not contain any language or history or civic knowledge requirements. Registry is a discretionary form of relief, because the INS can decide not to grant someone resident status. Legalization is a mandatory form of relief because the INS must legalize an alien who meets the requirements under the statute. Gordon & Gordon, supra note 12, at § 7.5b. Thus, the individual circumstances of each alien should be taken into account when deciding to apply under the legalization program or the registry program.

139 IRCA § 301(a), 8 U.S.C. §§ 1101(a), 1216(a).
140 IRCA § 302, 8 U.S.C. § 1210(a).
141 Id.
142 See Temporary Worker Programs, supra note 33, at 6 and 87–95.
143 Id. at 87.
144 Id.
145 Id.
146 Id.
147 Id.
Past United States temporary agricultural worker programs have usually stimulated illegal immigration. The United States instituted its first major temporary worker program in 1917.148 This program allowed workers into the country solely to perform agricultural services and railroad labor.149 An employer applied for such workers through the Department of Labor, and had to pick up the workers at the Mexican border and pay for their return to Mexico.150 Employees and their families were given cards, which identified them as participants in the temporary worker program.151 Although workers could change employers, they were only allowed to hold agricultural or railroad jobs.152

Due to the amount of time, money and effort needed to obtain workers through the program, employers viewed using illegal aliens as the more attractive alternative.153 Additionally, employers who did participate in the program were lax in keeping records, and often allowed workers to "desert in droves" once their work was complete, rather than pay for their return to Mexico.154 Consequently, in 1921, of the 72,862 aliens admitted through the program between 1917 and 1921, 21,400 had deserted their employers and were presumed to be living in the United States illegally.155

The second major temporary worker program sponsored by the United States was the Bracero program.156 This program ran from 1942 to 1964, and its success in diverting the flow of immigrants into legal channels varied. In response to the Mexican government's concern over the discrimination and abuse Mexicans suffered during the 1917 program, the Bracero program protected Mexican workers by requiring minimum wages and setting standards for living accommodations.157 At its inception, the Bracero program stimulated illegal immigration, because more Mexicans desired to immigrate than were legally allowed.158 Additionally, farmers disliked the added worker protections, and found it

148 Id. at 6.
149 Id.
150 Id. at 9-11.
151 Id. at 9.
152 Id.
153 Id. at 11.
154 Id.
155 Id.
156 Id. at 17.
158 TEMPORARY WORKER PROGRAMS, supra note 33, at 26.
cheaper and easier to hire illegal aliens. Consequently, illegal immigration continued to rise until Congress increased border enforcement, and expanded the numbers allowed in under the program in the mid-1950s. A Senate Judiciary report on temporary worker programs concluded that “history appears to indicate that the Bracero program only served to reduce illegal immigration when it was combined with both a massive law enforcement effort, and an expansion of the farm labor program to the point where it almost certainly had an adverse impact on the wages and working conditions of domestic workers in certain ‘dominated’ areas.”

Since World War II, European countries have also sponsored temporary worker programs, commonly known as “guestworker programs.” These programs were initiated because of labor shortages after the war. Although designed to be temporary, most programs continued into the 1970s. Like the programs in the United States, the guestworker programs tended to stimulate illegal immigration and encouraged aliens to stay permanently in the host countries.

An examination of the experiences of other temporary worker programs suggests that the new H2-A program will encourage illegal immigration. However, the value of analogizing to other programs may be questioned, because these earlier programs did not include employer sanctions. Strict enforcement of IRCA’s employer sanctions provision and increased enforcement along the United States borders may decrease the incentives for illegal immigration.

V. Conclusion

The employer sanctions provision of IRCA is a costly one. The cost of the provision in increased employment discrimination far outweighs any minimal deterrent effect that the provision will have on illegal immigration. A society that has made a conscious effort to eliminate race discrimination cannot tolerate such a cost.

Employer sanctions encourage employment discrimination against certain minority groups. Preliminary data collected by the

159 *Id.* at 58.
160 *Id.*
161 *Id.*
162 *Id.*
163 *Id.* at 96.
164 *Id.*
165 *Id.* at 98.
General Accounting Office suggest that employers are increasingly using discriminatory practices against people who are either eligible for legalization or are already legal aliens. The low number of people filing discrimination complaints under IRCA may be misleading for two reasons. First, people may be reluctant to file claims because they do not want to cause trouble, or they think it is not worthwhile to do so. Second, applicants may not realize that they have been discriminated against, and may not know that they can file a claim of discrimination against an employer. Additionally, under the Reagan administration's interpretation of the provision, those who do file complaints will find it extremely difficult to prove discrimination.

Employer sanctions are not effective in controlling illegal immigration, because other portions of the Act implicitly encourage illegal immigration. The registry program, the legalization program and the temporary worker program all provide incentives for people to enter the United States illegally. Drawing from past experiences with temporary worker programs, the strength of these incentives will depend on how strictly the employer sanctions provisions are enforced, and how well United States borders are patrolled. Additionally, the economic and political situations in other countries will continue to have an effect on the number of people desiring to immigrate to the United States.

The words of one critic of the provision aptly summarizes the heavy cost of employer sanctions:

The elusive national commitment to equal opportunity is a dream that is only beginning to be realized by minorities in many sectors of the U.S. economy . . . . [E]mployer sanctions threaten that national commitment and do so in order to implement a regulatory scheme that can neither function fairly or effectively nor accomplish its principal objective in controlling illegal immigration. 166

The social cost of employer sanctions outweighs any effect the provision may have on illegal immigration. In light of the cost, Congress should consider repealing the provision.

Susan H. Welin