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# HUMAN RIGHTS AND THE CURRENT IMMIGRATION DEBATE: LEGISLATIVE PROPOSALS' EFFECTS ON THE MEXICAN IMMIGRANT POPULATION

*Linda Bertling Meade* \*

## I. INTRODUCTION

The United States is a nation of immigrants. It is a nation founded by immigrants. The debate over immigration, therefore, is not a new one. While the immigration dispute has been around for over a century, it is during times of high unemployment, economic distress, and national security scares that the immigration issue comes into sharper focus and receives more negative attention.<sup>1</sup>

In 2004, immigration violations surpassed drug offenses and became the primary type of federal prosecutions.<sup>2</sup> Prosecutions under immigration law have doubled between 2002 and 2004.<sup>3</sup> This trend is in part attributable to a deliberate shift in priorities by federal law enforcement agencies in response to the threat of terrorism after September 11, 2001 (9/11).<sup>4</sup> For example, one of the most recent legislative proposals for immigration reform states that “[t]he failure to control and to prevent illegal immigration into the United States increases the likelihood that terrorists will succeed in launching catastrophic or harmful attacks on United States soil.”<sup>5</sup> While almost everyone would agree that the U.S. government’s objective of keeping terrorists from entering the United States is an important one, this note proposes that it is equally

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<sup>1</sup> See, e.g., Peter Schey, *U.S. Immigration Policies and the War on Terrorism*, L.A. LAW., Sept. 2006, at 12, 13 (discussing how the United States’ immigration policies have come under attack in the aftermath of 9/11).

<sup>2</sup> Chris Nwachukwu Okeke & James A.R. Nafziger, *United States Migration Law: Essentials For Comparison*, 54 AM. J. COMP. L. 531, 545.

<sup>3</sup> *Id.*

<sup>4</sup> See Schey, *supra* note 1.

<sup>5</sup> The Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005, H.R. 4437, 109th Cong. § 118 (2005) [hereinafter House Bill 4437].

necessary to prevent the violation of human rights that can so easily occur in the pursuit of this ambitious goal.

This note will evaluate, from a human rights perspective, the most recent legislation proposed in response to the current immigration reform debate. Specifically, this note proposes that because of the U.S. history of blatantly racist and discriminatory immigration laws, the United States should learn from its past mistakes and aim to implement fresh immigration legislation which respects the human rights of immigrants. Even more specifically, it should recognize the deep-seeded ethnic discrimination, specifically against Mexican immigrants, that pervades its way of thinking about immigration and seek to rid itself of such a harmful mindset. Part II of this note will examine the history of U.S. immigration law, focusing on the values that have driven the country's immigration policies, such as assimilation, xenophobia, and economics. Part III will discuss the values that guide the current immigration debate, specifically those of national security, ethnocentrism, and economic worries. Part IV of this note will propose the human rights perspective as a viable alternative framework with which to approach the current debate. Finally, Part V will evaluate the current legislative proposals from this human rights perspective.

Beginning the discussion with an analysis of the history of the U.S. immigration policy, spanning from the late nineteenth-century to the present, can hopefully provide insight into the current debate. With a greater understanding of the choices the United States has made in the past and the harmful consequences that resulted, it can avoid repeating the same mistakes and can contribute intelligently to this important conversation.<sup>6</sup>

## II. HISTORY OF UNITED STATES' IMMIGRATION LAW

Immigration law in the United States is extremely complicated. Recently, an author compared U.S. immigration law to "King Minos's labyrinth in ancient Crete".<sup>7</sup> The same author declared only the IRS tax code is more complex.<sup>8</sup> Given this complexity, this note will only scratch the surface of the complex immigration law of the United States. No matter how limited the understanding may be of the country's existing immigration system, valuable insight into the current debate can be gained by examining the policies and laws promulgated by the U.S. immigration system in the past.

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<sup>6</sup> DESMOND KING, MAKING AMERICANS: IMMIGRATION, RACE AND THE ORIGINS OF THE DIVERSE DEMOCRACY 283 (Harvard Univ. 2000).

<sup>7</sup> Okeke & Nafziger, *supra* note 2, at 532 (quoting *Lok v. Immigr. & Naturalization Serv.*, 548 F.2d 37, 38 (2d Cir. 1977)).

<sup>8</sup> Okeke & Nafziger, *supra* note 2, at 532.

Part of the confusion surrounding U.S. immigration law arises from the fact that numerous agencies and sources of law govern and implement the nation's immigration system. These sources include the United States Constitution, the Immigration and Nationality Act, and international human rights norms, among others. Further, the numerous agencies responsible for implementing immigration laws include the Department of Homeland Security,<sup>9</sup> the Department of State,<sup>10</sup> the Department of Labor,<sup>11</sup> and the Department of Health and Human Services.<sup>12</sup>

The federal government draws its power to regulate immigration from the United States Constitution.<sup>13</sup> Article I, Section 8 of the Constitution appears to give Congress the power to establish a uniform system of naturalization: "The Congress shall have the power . . . [t]o establish an uniform rule of [n]aturalization, and . . . [t]o make all laws which shall be necessary and proper for carrying into [e]xecution [this] power[]." <sup>14</sup> Article I, Section 9 is also seen as a source of federal control over immigration, whereby Congress is given power over "migration or importation."<sup>15</sup> While these clauses do not grant Congress explicit power to remove or deny admission to aliens, the plenary power of the federal government to regulate immigration has been found to be an inherent sovereign power.<sup>16</sup>

Currently, however, the federal government derives its power to regulate immigration from the Commerce Clause.<sup>17</sup> While some might argue that the founders did not originally intend Congress to have such unfettered

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<sup>9</sup> The Department of Homeland Security was established in 2003 in response to the growing threat of terrorism. Prior to this, the Department of Justice was in charge of executing immigration law. *Id.* at 540. Additionally, the Immigration and Naturalization Services ("INS") was dissolved in 2003, and its responsibilities were given to three new agencies under the Department of Homeland Security: Citizenship and Immigration Services ("CIS"), which administers immigration services; Immigration and Customs Enforcement, which performs investigative and enforcement functions; and Customs and Border Protection, in charge of protecting the United States' borders. Schey, *supra* note 1, at 13.

<sup>10</sup> The Department of State is responsible for issuing visas and assisting in refugee matters. Okeke & Nafziger, *supra* note 2, at 540.

<sup>11</sup> The Department of Labor oversees the labor and employment of immigrants, including certifying prospective immigrants' labor petitions. *Id.*

<sup>12</sup> The Department of Health and Human Services enforces the health requirements of prospective immigrants. *Id.*

<sup>13</sup> Okeke & Nafziger, *supra* note 2, at 539.

<sup>14</sup> U.S. CONST. art. I, § 8.

<sup>15</sup> U.S. CONST. art. I § 9.

<sup>16</sup> Andrew B. Ayers, *International Law as a Tool of Constitutional Interpretation in the Early Immigrant Power Cases*, 19 GEO. IMMIGR. L.J. 125, 144 (2004).

<sup>17</sup> *Id.*

authority, Congress continues to direct the country's immigration policies without interruption.<sup>18</sup> Generally, Congress' power to regulate immigration has been accepted.<sup>19</sup> Even further, judicial review by the United States Supreme Court of congressional decisions on immigration policies and procedures has been extremely limited.<sup>20</sup>

In addition to the United States Constitution, the Immigration and Nationality Act (INA) governs United States immigration policy.<sup>21</sup> Established in 1952, the INA consolidated all immigration laws into one comprehensive statute.<sup>22</sup> The INA, as amended, serves as the basis for current immigration laws.<sup>23</sup>

Most importantly, international human rights norms govern the immigration policies of the United States. Very generally, international human rights law requires all nations to comply with "minimum standards of treatment of both citizens and non-citizens."<sup>24</sup> In the early nineteenth century, three important United States Supreme Court cases helped to establish the federal government's plenary power to regulate immigration, with parties on both sides relying on international law to support their claims.<sup>25</sup> The two main sources of international human rights law that govern the modern U.S. immigration policies are treaties<sup>26</sup> and international customary human rights

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<sup>18</sup> Okeke & Nafziger, *supra* note 2, at 540.

<sup>19</sup> "[O]ver no conceivable subject is the legislative power of Congress more complete than it is [over the admission of non-citizens]." *Id.* at 544 (quoting *Oceanic Steam Navigation Co. v. Stranahan*, 214 U.S. 320, 339 (1909)).

<sup>20</sup> Okeke & Nafziger, *supra* note 2, at 544.

<sup>21</sup> Immigration and Nationality Act, Pub. L. No. 82-414, 66 Stat. 163 (1952) (codified as amended in scattered sections of 8 U.S.C. and 18 U.S.C. § 1429).

<sup>22</sup> Rep. 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, 269 (2006).

<sup>23</sup> *Id.*

<sup>24</sup> Okeke & Nafziger, *supra* note 2, at 546.

<sup>25</sup> *Ayers, supra* note 16, at 133. See *Fong Yue Ting v. U.S.*, 149 U.S. 698 (1893) (holding Congress has the power both to deport aliens in the United States and to prescribe the rules accompanying these procedures); *Nishimura Ekiu v. U.S.*, 142 U.S. 651 (1892) (holding Congress has the exclusive power to determine what constituted due process for non-resident immigrants); *Chae Chan Ping v. U.S.*, 130 U.S. 581 (1889) (holding Congress possesses the power to exclude aliens, even during times of peace).

<sup>26</sup> A treaty is "an international agreement concluded between two or more states in written form and governed by international law." BLACK'S LAW DICTIONARY, *infra* note 134. Treaties are given the same weight as United States federal law. U.S. CONST., *infra* note 138. The human rights treaties that the United States has ratified include the following: the United Nations Charter; the Charter of the Organization of the American

law.<sup>27</sup> While some may argue otherwise, it is generally accepted that international customary human rights law is binding on the United States.

### A. *Values Pervading United States' Immigration Laws of the Past*

While the U.S. immigration policies stretch back to the founding of the country, the period stretching from the late nineteenth century to the present has been the most pivotal. Specifically, the values that have historically driven this country's immigration laws include xenophobia, assimilation, and economics.

#### 1. **Xenophobia**

Generally, the first one hundred years of the United States was a period of unrestricted immigration, motivated mainly by the need for labor and the extensive border.<sup>28</sup> Eventually, unhappiness with such a policy grew, as the number of immigrants coming into the United States drastically increased.<sup>29</sup> Specifically, society wanted to restrict certain unwanted groups from entering the United States, and in time the government began addressing these concerns.<sup>30</sup> In 1875, the U.S. federal government passed its first law restricting immigration.<sup>31</sup> The statute barred prostitutes and criminals, the first of several groups to be denied admission based on undesirable characteristics.<sup>32</sup> Later, such "quality control" statutes grew in number and extended discrimination to various classes of people, including "lunatics," "idiots," those "likely to become public charges," the "diseased," "paupers," "polygamists," "epileptics," "insane," "beggars," "anarchists," "feeble-

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States; the International Covenant on Civil and Political Rights; the Protocol Relating to the Status of Refugees; and the Convention on the Elimination of All Forms of Racial Discrimination. Berta Esperanza Hernandez-Truyol, *Reconciling Rights in Collision: An International Human Rights Strategy*, in IMMIGRANTS OUT: THE NEW NATIVISM AND THE ANTI-IMMIGRANT IMPULSE IN THE UNITED STATES 254, 259 (Juan F. Perea ed., 1997).

<sup>27</sup> Customary international law is "law that derives from the practice of states and is accepted by them as legally binding." BLACKS LAW DICTIONARY, *infra* note 134, at 678.

<sup>28</sup> Jackson Lee, *supra* note 22, at 268. During this time in the country's history, individual states were allowed to create their own controls over immigrants. However, most states at this time wanted to attract as many settlers as possible, and were hesitant to exclude anyone, including immigrants. Okeke & Nafziger, *supra* note 2, at 539.

<sup>29</sup> DAVID WEISSBRODT, IMMIGRATION LAW AND PROCEDURE IN A NUTSHELL 5 (3rd ed. 1992).

<sup>30</sup> *Id.*

<sup>31</sup> Act of Mar. 3, 1875, ch. 141, 18 Stat. 477; Jackson Lee, *supra* note 22, at 269.

<sup>32</sup> Jackson Lee, *supra* note 22, at 269.

minded,” and any person “with a physical defect that may affect their ability to earn a living.”<sup>33</sup>

In 1882, the first racially-motivated immigration law was passed in the United States in response to growing tensions between immigrant groups.<sup>34</sup> The Chinese Exclusion Act suspended immigration of the Chinese and forbade the courts from granting them citizenship.<sup>35</sup> In the 1850s, westward expansion in the United States created a demand for labor, particularly in the railroad and mining industries.<sup>36</sup> To fill this need, Chinese immigrants began coming to the United States. Beginning in 1849 and continuing into the late nineteenth century, it is estimated that approximately 400,000 Chinese immigrants came to the United States.<sup>37</sup> Eventually, tension between the new Chinese immigrants and established European immigrants developed.<sup>38</sup> This strain between the two groups arose largely from the fact that the Chinese immigrants “worked too hard, . . . saved too much, . . . spent too little, . . . [and] looked and behaved differently from the majority population.”<sup>39</sup> Basically, the European settlers in the United States were intolerant of the cultural differences between them and the Chinese immigrants. The settlers looked down upon the new Chinese arrivals due to their different skin color, different work habits, and different lifestyle choices.

Due to the unconcealed xenophobic attitude of the settlers, Chinese immigrants endured harsh conditions and poor treatment in the United States. In addition to the sub-par working conditions the Chinese experienced, Chinese immigrants experienced discrimination in their personal lives as well. Legislators, in an attempt to deter Chinese immigration, did their best to ruin any chance of success Chinese business owners might have.<sup>40</sup> This hatred of

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<sup>33</sup> See Act of Aug. 3, 1882, ch. 376, 22 Stat. 214, 214-15; Act of Feb. 23, 1887, ch. 220, 24 Stat. 414, 414-15; Act of Feb. 26, 1885, ch. 164, 23 Stat. 332, 332-33; Act of Mar. 3, 1891, ch. 551, 26 Stat. 1084, 1084-86.

<sup>34</sup> The Chinese Exclusion Act, 22 Stat. 58 (1882) (repealed 1943). This Act was “the first federal immigration statute to single out an ethnic group by name for invidious treatment.” CHARLES J. McCLAIN, *IN SEARCH OF EQUALITY: THE CHINESE STRUGGLE AGAINST DISCRIMINATION IN NINETEENTH-CENTURY AMERICA* 149 (1994).

<sup>35</sup> The Chinese Exclusion Act, *supra* note 34.

<sup>36</sup> Gilbert Paul Carrasco, *Latinos in the United States: Invitation and Exile, in IMMIGRANTS OUT: THE NEW NATIVISM AND THE ANTI-IMMIGRANT IMPULSE IN THE UNITED STATES* 190, 191 (Juan F. Perea ed., 1997).

<sup>37</sup> RONALD TAKAKI, *STRANGERS FROM A DIFFERENT SHORE*, 192-95 (1989).

<sup>38</sup> McCLAIN, *supra* note 34, at 10.

<sup>39</sup> *Id.*

<sup>40</sup> McCLAIN, *supra* note 34, at 47.

the Chinese led to Chinese hate organizations.<sup>41</sup> These groups vowed not to employ Chinese immigrants nor do business with anyone who employed Chinese immigrants.<sup>42</sup> As one man stated, “[t]o an American, death is preferable to life on par with the Chinaman.”<sup>43</sup>

The unrestrained racism hurled upon Chinese immigrants in the mid to late nineteenth-century was not, unfortunately, the only demonstration of racial and ethnic discrimination by the United States toward unfamiliar immigrant groups. For example, in the early 1900s there was a shift in geographic origination of U.S. immigrants from northern and western Europe to southern and eastern Europe.<sup>44</sup> U.S. citizens became anxious about this change in the immigrant population and pressured Congress for stricter immigration laws.<sup>45</sup> In response to these concerns, Congress established a commission to study the impact of immigration on the United States, and the commission found that the “inferior and less desirable” groups from southern and eastern Europe did not benefit the United States.<sup>46</sup> Thus, measures were introduced to curtail the entry into the United States of immigrants from those particular regions. Specifically, this growing racism led to the Immigration Act of 1917, which restricted immigration by establishing literacy requirements, raising the head tax on arriving immigrants, and prohibiting the immigration of persons from certain longitudes and latitudes.<sup>47</sup>

Additional measures were later introduced which were designed to deter particular racial and ethnic groups of immigrants from entering the United States. The growing Americanization movement following World War I led to more extreme measures to curtail immigration.<sup>48</sup> The first of a series of Quota Laws, numerical controls aimed at limiting the number of immigrants from particular disfavored countries came in 1921.<sup>49</sup> The 1929 quotas were

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<sup>41</sup> ELMER CLARENCE SANDMAYER, *THE ANTI-CHINESE MOVEMENT IN CALIFORNIA* 57 (1991).

<sup>42</sup> *Id.*

<sup>43</sup> SANDMAYER, *supra* note 41, at 65.

<sup>44</sup> KING, *supra* note 6, at 23.

<sup>45</sup> WEISSBRODT, *supra* note 29, at 12.

<sup>46</sup> Jim Rosenfeld, *Deportation Proceedings and Due Process of Law*, 26 COLUM. HUM. RTS. L. REV. 713, 734 (1995) (citing DAVID WEISSBRODT, *IMMIGRATION LAW AND PROCEDURE IN A NUTSHELL* 6-7 (3d ed. 1992)).

<sup>47</sup> Jorge A. Vargas, *U.S. Border Control Abuses, Undocumented Mexican Workers, and International Human Rights*, 2 SAN DIEGO INT'L L.J. 1, 35 (2001).

<sup>48</sup> Carrasco, *supra* note 366, at 193.

<sup>49</sup> Chelsea Walsh, Note, *Voluntary Departure: Stopping the Clock for Judicial Review*, 73 FORDHAM L. REV. 2857, 2860-61 (2005). The 1921 Quota Law limited immigration of each country to 3% of those living in the United States according to

the most restrictive, employing a “national origins” formula based on the ethnicity of the U.S. population as a whole.<sup>50</sup> Because the majority of the U.S. population at that time was largely Anglo-Saxon, these new quotas more severely restricted the number of immigrants allowed from countries south and east of Europe.<sup>51</sup> With the passage of the Immigration and Nationality Act (INA) in 1952 came a new quota allowing only 150,000 people from the Eastern Hemisphere to enter the United States.<sup>52</sup> The INA also retained both the racist “national origins” quotas of the past and the “quality control” provisions that excluded particular persons based on unattractive personal characteristics.<sup>53</sup>

In addition to the historical immigration programs discussed above, several recent immigration measures aimed at controlling and curtailing immigration are clearly based on discriminatory and racist purposes. For example, some states dissatisfied with federal immigration laws have proposed drastic anti-immigration measures. California’s Proposition 187, for one, “aims to rid the state of [illegal aliens] by not educating them, not taking care of their health, and generally running them out of the state.”<sup>54</sup> In addition, other states have proposed and are in the process of forming similar discriminatory legislation.<sup>55</sup>

The largest and most recent group to experience the sting of the country’s xenophobic attitude towards immigrants with dissimilar characteristics has been Mexican immigrants. On top of the enormous difficulties many Mexican immigrants face when simply entering the United States, and in addition to the horrible working and living conditions they experience once they arrive in the United States, Mexican immigrants also

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1910 census. *Id.* The 1924 Quota Laws lowered to the allowed number of immigrants to 2% of those living in the United States according to the 1890 census. *Id.* at 2861.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* at 2862. This quota allowed 85% of the total quota of 150,000 incoming immigrants to countries from northern and western Europe, giving only 15% of the total quota to southern and eastern European countries. WEISSBRODT, *supra* note 46, at 12.

<sup>53</sup> Stephen W. Yale-Loehr & Lindsay Schoonmaker, *Overview of U.S. Immigration Law*, 1535 PLI/Corp 49, 158 PLI/NY 49, 56 (2006). The INA also created new quality control provisions. See 8 U.S.C. § 1251 (1994) (setting forth categories of aliens that are deportable). Lora L. Grandath, *Illegal Immigrants and Public Education: Is There a Right to the 3 RS?*, 30 VAL. U. L. REV. 749, 760 (1996).

<sup>54</sup> Hernandez-Truyol, *supra* note 26, at 254.

<sup>55</sup> See, e.g., Georgia Security and Immigr. Compliance Act, which denies state services to undocumented immigrants and bolsters local law enforcement efforts to stop illegal immigration.

suffer discrimination socially, economically, politically, and personally. For example, Mexicans have been negatively stereotyped, randomly murdered, denied wage payments so they are unable to return home, underpaid, separated from their families, fed poorly, charged excessively for housing, and exposed to dangerous chemicals.<sup>56</sup> On top of this inhumane treatment, Mexicans' feelings of political powerlessness and fear of deportation make them especially vulnerable and in need of protection.<sup>57</sup>

As illustrated through the blatantly racist immigration laws described above, the United States historically has been able to carefully control which groups, and how many of each group, are able to enter the country. These laws have been based mostly on concerns about limiting the entry into the United States of foreign, dark-skinned, and otherwise strange and unfamiliar groups of immigrants. Those immigrants that are allowed to enter the United States have had another hurdle to jump, however, before gaining acceptance, equal treatment, or security: the elimination of certain undesirable physical characteristics and personality traits in the pursuit of integration of immigrants into United States society.

## 2. Assimilation

According to one scholar, "[t]he single most important issue about immigration in twentieth-century America has been the assimilation of foreign immigrants."<sup>58</sup> The United States government was largely concerned with making sure that aliens present in the United States adopted, as much as possible, the practices and beliefs of U.S. citizens. In fact, immigration laws enacted in the 1920s were specifically designed to limit immigration to certain groups that were already assimilated into the American culture.<sup>59</sup>

It is interesting to note that these European settlers who preceded the immigrants from Asia and eastern and southern Europe at one point underwent the same assimilation that the United States was attempting to force upon later immigrants. This early assimilation led these European immigrants to gradually become part of the dominant group of society in the United States, which in turn allowed them to look down in disdain on later immigrants.<sup>60</sup>

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<sup>56</sup> Carrasco, *supra* note 36, at 191.

<sup>57</sup> IMMIGRANTS OUT: THE NEW NATIVISM AND THE ANTI-IMMIGRANT IMPULSE IN THE UNITED STATES 3 (Juan F. Perea ed., 1997).

<sup>58</sup> KING, *supra* note 6, at 14.

<sup>59</sup> *Id.*; see also Walsh, *supra* note 499.

<sup>60</sup> KING, *supra* note 6, at 22. This option, embraced by the Irish and German immigrants, was unavailable to the Chinese, Japanese, and African-Americans in the United States. *Id.* at 22. This historical assimilation illustrates how the "whiteness" of the American identity came to be: "[t]hose who were visibly or vaguely 'white' eagerly

Separated from later immigrants only by time, these early European settlers relinquished their defining cultural characteristics in exchange for integration into U.S. society and all of the perks that came with it, including the ability to marginalize minority groups.<sup>61</sup>

By discouraging and preventing those immigrants with different and unfamiliar physical characteristics, work ethics, personality traits, and lifestyle habits from entering the country, the United States aimed to remain as homogeneous as possible. In trying to eliminate the variety of races, religions, and viewpoints within the country, the United States could guarantee that it would not have to compete against these varying groups economically, politically, and socially. These exclusionary policies reinforced the predominant view of Americans as "white and protestant,"<sup>62</sup> a view that, unfortunately, continues today and can be recognized in the current immigration debate.

### 3. Economics

In addition to xenophobia and assimilation, economic concerns have historically driven the U.S. immigration laws. Generally, in times of economic distress and instability, immigrants have been discouraged and prevented from entering the United States, while immigrants already present in the United States have been treated poorly and even forced to leave.<sup>63</sup> On the other hand, during times of economic surplus and stability, immigrants have been welcomed, even encouraged, to enter the United States, usually to help fill labor shortages.<sup>64</sup> This is especially true with regard to Mexican immigrants, whose treatment in the United States hinges on the current economic state of the country. This disparate shift in treatment results largely from an attitude that defines immigrants as "takers" who illegally and unfairly seize economic benefits to the detriment of U.S. citizens.<sup>65</sup> This section will trace the history of this ancient, unfounded stereotype in the hopes of replacing it with a more accurate, modern, and humanistic view of immigrants.

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sought membership within the Caucasian chalk circle and were usually welcomed as long as they could prove no trace of African 'blood.'" *Id.* at 23 (quoting O. Patterson, *The Ordeal of Integration: Process and Resentment in America's "Racial" Crisis* (Washington, D.C.: Civitas/Counterpoint, 1997), 69).

<sup>61</sup> KING, *supra* note 6, at 22.

<sup>62</sup> *Id.* at 20.

<sup>63</sup> Carrasco, *supra* note 3656, at 190-91.

<sup>64</sup> *Id.*

<sup>65</sup> Bonne Honig, *Immigrant America? How Foreignness "Solves" Democracy's Problems* 31 (American Bar Association, Working Paper No. 9707).

Early Chinese immigrants were one of the first groups to be discriminated against based on economic concerns. One of the reasons the Chinese immigrants were treated so harshly was the fact that they were seen as a threat to the United States economy.<sup>66</sup> The white European settlers in the United States felt threatened that the new Asian immigrants were going to take their jobs.<sup>67</sup>

In addition, the Immigration Act of 1917 was enacted largely to protect the U.S. labor force from European immigrants.<sup>68</sup> Similarly, the Depression of the 1930s brought with it an even greater desire to limit immigration.<sup>69</sup> With the collapse of the U.S. economy, immigration drastically decreased. Many immigrants lost their jobs to and were displaced by white men.<sup>70</sup> In addition, fewer new immigrants arrived in the United States, due not only to the decrease in available jobs, but due also to the apparent attitude of dismissal and disdain shown by the United States towards immigrants.<sup>71</sup> In 1932, emigration exceeded immigration by 290%, bringing immigration to its lowest level since 1831.<sup>72</sup>

Most significantly, this vacillating treatment of immigrants has been specifically displayed in the treatment of Mexican immigrants. For over 150 years, Mexicans have been the U.S. source of disposable labor.<sup>73</sup> In times of labor shortage, Mexican immigrants have been welcomed, even encouraged.<sup>74</sup> Conversely, in times of labor surplus, Mexican immigrants have been treated harshly and expelled.<sup>75</sup>

The single largest factor in the rise in Mexican immigration in the United States has been and continues to be the country's demand for cheap

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<sup>66</sup> KING, *supra* note 6, at 23.

<sup>67</sup> *Id.*

<sup>68</sup> Jose A. Bracamonte, *The National Labor Relations Act and Undocumented Workers: The Delineation of American Labor*, 21 SAN DIEGO L. REV. 29, 54-55 (1983).

<sup>69</sup> Carrasco, *supra* note 36, at 193.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> Lawrence H. Fuchs, *Immigration Policy and the Rule of Law*, 44 U. PITT. L. REV. 433, 434 (1983).

<sup>73</sup> Carrasco, *supra* note 36, at 191.

<sup>74</sup> *Id.* at 190.

<sup>75</sup> *Id.* The inhumane living and working conditions that Mexican immigrants in the United States historically endured included poor food, excessive housing costs, physical cruelty, and below standard housing. Julian Samora and Patricia Vandell Simon, *A History of the Mexican American People* (University of Notre Dame Press, rev. ed. 1993), 213-14.

labor.<sup>76</sup> Early immigration laws that excluded many Asians and Europeans led to Mexico being the only source to fill the labor vacuum.<sup>77</sup> From the Gold Rush to the early twentieth century, Mexicans satisfied the large labor demand and brought mining knowledge with them.<sup>78</sup> Mexicans were welcomed into the United States because of the economic benefits and labor skills they brought. However, they still encountered anti-Mexican sentiment, harsh working conditions and low paying jobs.<sup>79</sup>

With the economic downswing brought on by the Depression in the 1930s, Mexican immigrants were suddenly unwanted and unemployed.<sup>80</sup> Their jobs were given to white men, and their presence was criticized.<sup>81</sup> Several hundred thousand immigrants were deported to Mexico, many of whom were lawful permanent U.S. residents.<sup>82</sup> In addition, the majority of those who were deported were denied due process.<sup>83</sup>

With the onset of World War II, a labor shortage resulted.<sup>84</sup> The United States looked across its border to Mexico to fill the need for workers. In 1942, the Bracero Program was set up, whereby the United States imported Mexican labor workers under the agreement that the workers would be protected from the harsh living and working conditions that commonly plagued such immigrants.<sup>85</sup> The United States, unfortunately, failed to abide by the agreement, and the immigrant workers were treated poorly and unfairly.<sup>86</sup> After the war, Americans returned to work and the need for Mexican labor ended.<sup>87</sup> In 1947, the Bracero Program ended as well.<sup>88</sup>

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<sup>76</sup> Berta Esperanza Hernandez-Truyol, *Building Bridges – Latinas and Latinos at the Crossroads: Realities, Rhetoric, and Replacement*, 25 COLUM. HUM. RTS. L. REV. 369, 389(1994).

<sup>77</sup> Carrasco, *supra* note 3656, at 191.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Id.* at 193.

<sup>81</sup> *Id.*

<sup>82</sup> Office of Research, Advocacy and Legislation, National Council of La Raza, *Beyond Ellis Island: Hispanics-Immigrants and Americans* (1986), at 4.

<sup>83</sup> Carrasco, *supra* note 3656, at 194.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* at 194-95.

<sup>86</sup> *Id.* at 195.

<sup>87</sup> *Id.* at 196.

<sup>88</sup> *Id.* For several months after the Bracero program ended, illegal immigration skyrocketed in the United States. *Id.* Both Mexican and United States governments became concerned, and a new Bracero agreement was enacted in 1949. Matt Meier and Feliciano Rivera, *The Chicanos: A History of Mexican Americans* (Hill and Wang,

In 1954, the U.S. economy took a downturn, and along with it came a new plan to limit immigration. The United States enacted Operation Wetback, a military plan aimed at controlling the increasing numbers of Mexican immigrants.<sup>89</sup> The plan operated by deporting illegal immigrants and securing the borders to prevent further immigration.<sup>90</sup> Unfortunately, the plan extended far beyond its lawful reach and deported many American citizens of Mexican descent.<sup>91</sup> Furthermore, most of those deported were expelled without the required formal proceedings.<sup>92</sup> In a matter of a few years, over 3.7 million Latinos were deported, with only an estimated 63,000 receiving the required formal deportation proceedings.<sup>93</sup>

In addition to the historical mistreatment of Mexican immigrants based on the ever-changing economic situation of the United States, there are modern immigration measures in place which take advantage of Mexican immigrants for the purpose of economic gain. For example, currently U.S. companies may obtain Mexican labor by bringing the jobs directly to Mexican citizens in Mexico. The recent Border Industrialization Program permits U.S. manufacturing plants to set up shop in border towns located in northern Mexico, while exporting the resulting products to the United States.<sup>94</sup> Essentially, such a program allows American companies to exploit Mexican workers while providing cheap labor and exemptions from labor regulations.<sup>95</sup>

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1972), 224. When this Bracero program ended in 1951, yet another Bracero program was enacted in response to the Korean War. *Id.*, at 225-26.

<sup>89</sup> Kevin R. Johnson, *The Forgotten "Repatriation" of Persons of Mexican Ancestry and Lessons for the "War on Terror"*, 26 PACE L. REV. 1, 10 (2005).

<sup>90</sup> JUAN R. GARCIA, OPERATION WETBACK: THE MASS DEPORTATION OF MEXICAN UNDOCUMENTED WORKERS IN 1954 183 (Greenwood Press 1980). The derogatory term "wetback" initially referred to stolen horses from Mexico that got their backs wet while crossing the Rio Grande, but it was later used to refer to Mexicans who illegally entered the United States. A DICTIONARY OF AMERICANISMS 1853 (Mitford M. Mathews ed. 1951).

<sup>91</sup> U.S. Commission on Civil Rights, *The Tarnished Golden Dorr: Civil Rights Issues in Immigration* (Sept. 1980), II.

<sup>92</sup> Carrasco, *supra* note 3656, at 197.

<sup>93</sup> Office of Research, Advocacy and Legislation, *supra* note 8282, at 4.

<sup>94</sup> Manuel Garcia y Griego, *The Importation of Mexican Contract Laborers to the United States, 1942-1964: Antecedents, Operation, and Legacy*, in THE BORDER THAT JOINS: MEXICAN MIGRANTS AND U.S. RESPONSIBILITY 65 (Peter G. Brown and Henry Shue eds., Rowman and Littlefield 1983).

<sup>95</sup> Carrasco, *supra* note 3656, at 199. Under the Border Industrialization Program, Mexican workers suffer substandard working conditions, low wages, poor treatment, and a lack of any available legal recourse against their employers. Joan M. Smith, *North American Free Trade and the Exploitation of Working Children*, 4 TEMP. POL. & CIV. RTS. L. REV. 57, 74 (1994).

As evident from the above discussion, historically the U.S. immigration laws and policies have been driven by xenophobia, assimilation concerns, and economic pressures. Specifically, Mexican immigrants have felt the brunt of these racist and discriminatory measures, and they continue to be the group most affected by modern immigration laws.

### III. CURRENT UNITED STATES IMMIGRATION DEBATE

Nearly everyone today, Republicans and Democrats alike, agree that the current immigration system is failing. Roughly 11 million undocumented immigrants are presently living and working in the United States, and that number will continue to grow.<sup>96</sup> Studies show that nearly 70% of Americans are concerned about the presence of illegal immigrants, while over 50% of Americans want the government to act to correct these immigration problems.<sup>97</sup> As President Bush stated in his January 2004 remarks on U.S. Immigration Policy:

As a nation that values immigration, and depends on immigration, we should have immigration laws that work and make us proud. Yet today we do not. Instead, we see many employers turning to the illegal labor market. We see millions of hard-working men and women condemned to fear and insecurity in a massive, undocumented economy. Illegal entry across our borders makes more difficult the urgent task of securing the homeland. The system is not working. Our nation needs an immigration system that serves the American economy, and reflects the American Dream. . . . We must make our immigration laws more rational, and more humane.<sup>98</sup>

Currently, the immigration debate in the United States centers on two main concerns: managing undocumented aliens already in the United States, and protecting the U.S.-Mexico border to prevent further undocumented immigration. The best solution to these concerns will not only establish more effective border controls and create a fair and effective system to handle the currently-present undocumented aliens, but it will respect international human rights laws and guarantee the protection of immigrants' basic human rights.

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<sup>96</sup> Jackson Lee, *supra* note 22, at 267.

<sup>97</sup> *Id.* at 271 (citing National Public Radio, Public Immigration Concerns Contrast with Policy, Oct. 7, 2004, <http://www.npr.org/templates/story/story.php?storyID=4075602>).

<sup>98</sup> Remarks by the President on Immigration Policy (Jan. 7, 2004), <http://www.whitehouse.gov/news/releases/2004/01/20040107-3.html>.

### A. Values Driving Current Immigration Debate

As discussed in the previous section, the U.S. immigration laws have historically been driven by such values as xenophobia, assimilation, and economics. Unfortunately, it seems the United States has not learned from its past mistakes, as it continues to rely on some of these same values in shaping current immigration law and proposing legislative reforms. In fact, many of the current U.S. immigration laws and recent reform proposals appear specifically aimed at controlling and preventing further Mexican immigration, based on the values of national security, ethnocentrism, and economics.

#### 1. National Security

In light of the current “war on terrorism,”<sup>99</sup> many U.S. citizens, leaders, and legislators believe that the country is in need of a more restrictive immigration policy that is less tolerant of illegal entry into and presence in the United States. In fact, one of the most recent legislative reform proposals itself explicitly states that “[t]he failure to control and to prevent illegal immigration into the United States increases the likelihood that terrorists will succeed in launching catastrophic or harmful attacks on United States soil.”<sup>100</sup> This idea has gained increasing popularity since 9/11, and it continues to grow. The focus on a need for tighter national security measures, specifically regarding immigration laws, certainly will be a topic of debate in the upcoming Presidential elections.

While virtually everyone would agree that the goal of keeping terrorists out of the United States is an extremely important one, it is imperative to keep in mind the equally important goal of protecting society from human rights violations. That is, in the fight against terrorism, the country must not forget to preserve those rights so fundamental to the ideals of freedom for which it stands. Unfortunately, quantitative studies have shown that in times of war, human rights violations significantly increase.<sup>101</sup> This springs in part from the unfounded idea that attention to human rights somehow hinders the war on terrorism.<sup>102</sup> However, as former Secretary of

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<sup>99</sup> The term “war on terrorism” has been criticized, largely due to its unwieldy scope and its use in justifying controversial political actions. Historically, the word “terrorism” has been criticized for being “employed with a total lack of discrimination.” THE INTERNATIONAL BILL OF HUMAN RIGHTS xix (Williams, ed., Entwhistle Books 1981) (1948).

<sup>100</sup> House Bill 4437, *supra* note 5, § 118.

<sup>101</sup> Randall Peerenboom, *Human Rights and Rule of Law: What's the Relationship?*, 36 GEO J. INT'L L. 815, 838 (2005).

<sup>102</sup> THE INTERNATIONAL BILL OF HUMAN RIGHTS, *supra* note 99, at xviii. Governments have been particularly successful in “convincing otherwise decent people

State Madeline Albright once famously declared, "the best way to defeat terrorist threats is to increase law enforcement capabilities while at the same time promoting democracy and human rights."<sup>103</sup> For in fact, "violations of basic human rights are the essence of terrorism whether the violations are perpetuated by private entrepreneurs of atrocity or by governments themselves."<sup>104</sup> Therefore, when faced with the threat of war, a government must choose "the path of respect for the rule of law, or . . . the descent into state terrorism."<sup>105</sup>

## 2. Ethnocentrism

The same ethnocentrism that was present throughout the history of U.S. immigration law is evident in the current immigration debate. Basically, the national debate about immigration today has become a way for a large part of society to express its anger and dissatisfaction with the demographic and cultural changes brought about by immigration.<sup>106</sup> As the United States continues to become more ethnically and racially diverse, American identity necessarily changes.<sup>107</sup> Those unhappy with such a change often look to stricter immigration laws for recourse against this unwanted change in American society.

Not surprisingly, this "rhetoric of exclusion"<sup>108</sup> that pervades the current discourse seems to be aimed chiefly at Mexican immigrants. The current anti-Mexican sentiment echoes the words of John Calhoun of South Carolina, former U.S. Vice-President and Congressman, who long ago declared that:

[the United States government] . . . is the government of a white race. The greatest misfortunes of Spanish America are to be traced to the fatal error of placing these colored races on an equality with the white race. That error destroyed the social arrangement which formed the basis of society. I

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that concern for rights is an insupportable luxury in an era haunted by terrorism." *Id.* at xviii-xix. While, indisputably, certain emergency situations may compel governments to temporarily suspend certain rights, *Id.* at xix, it is doubtful that the current situation in our country demands such harsh restrictions as have been imposed.

<sup>103</sup> Peerenboom, *supra* note 101, at 933-34.

<sup>104</sup> THE INTERNATIONAL BILL OF HUMAN RIGHTS, *supra* note 99, at xx.

<sup>105</sup> *Id.*

<sup>106</sup> Leo R. Chavez, *Immigration Reform and Nativism: The Nationalist Response to the Transnationalist Challenge*, in IMMIGRANTS OUT: THE NEW NATIVISM AND THE ANTI-IMMIGRANT IMPULSE IN THE UNITED STATES 61, 61 (Juan F. Perea ed., 1997).

<sup>107</sup> KING, *supra* note 6, at 283.

<sup>108</sup> Chavez, *supra* note 106, at 61.

never dreamt of incorporating in our Union any but the free white race.<sup>109</sup>

Even further, these same bigots proudly proclaimed that the “[Anglo-Saxon] language and laws are destined to pervade this continent. Our race has never yet put its foot upon a soil which it has not only kept but has advanced.”<sup>110</sup> Characterizing Mexicans as “lazy, ignorant, . . . vicious and dishonest,” these anti-immigration proponents held that “the Indian race of Mexico must recede before us.”<sup>111</sup>

As shocking and bigoted as these words sound today, we unfortunately need only look to the contemporary immigration discourse and the resulting legislative reform measures to see how this attitude continues to manifest itself.

### 3. Economics

As previously discussed, the U.S. treatment of Mexican immigrants has varied drastically with the state of the country’s economy.<sup>112</sup> If Mexicans are perceived as helping the U.S. economy, they are welcomed. Mostly, however, Mexican immigrants are seen as a drain on the U.S. economy, and thus they are criticized, blamed and unwanted. Mexicans within the United States have come to recognize the American perspective that they are dispensable, thus their struggle for human dignity continues.<sup>113</sup>

Generally, those that view Mexican immigration as detrimental to the U.S. economy argue that the presence of undocumented immigrants depresses the job market and raises taxes.<sup>114</sup> However, statistics show that even if U.S. citizens filled all low-level jobs, there would still be a need for foreign workers.<sup>115</sup> Realistically, however, U.S. citizens will probably continue in their refusal to take these low-level positions, and Mexican immigrants will continue to steadily fill them. Therefore, the argument that Mexican immigrants displace U.S. citizen workers is unfounded and unsupported by evidence. For example, during the 1990s, when the unemployment and

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<sup>109</sup> Cong. Globe, 30<sup>th</sup> Cong., 1<sup>st</sup> Sess. 96 (Jan. 4, 1848).

<sup>110</sup> REGINALD HORSMAN, RACE AND MANIFEST DESTINY 212 (1981) (quoting Waddy Thompson of South Carolina).

<sup>111</sup> *Id.*

<sup>112</sup> See Carrasco, *supra* note 36.

<sup>113</sup> Carrasco, *supra* note 36, at 199-200.

<sup>114</sup> Elizabeth J. Sweeney Yu, *Addressing the Economic Impact of Undocumented Immigration on the American Worker: Private Rico Litigation and Public Policy*, 20 NOTRE DAME J. L. ETHICS & PUB. POL’Y 909, 909 (2006).

<sup>115</sup> *Id.* at 917.

poverty rates in our country were extremely low, the United States received the largest number of immigrants in its history.<sup>116</sup>

Even further, statistics have shown the economic benefits that immigrants, both legal and undocumented, provide. Studies indicate that over the next several years, immigrants will pay almost two trillion dollars more in social security taxes than they will actually receive from social security payments.<sup>117</sup> Illegal immigrants alone contributed roughly \$2.7 billion towards Social Security, none of which they are entitled to based on their illegal status.<sup>118</sup> In addition, the Social Security Administration reported that almost 75% of illegal immigrants pay payroll taxes.<sup>119</sup> These illegal immigrants paid \$168 million towards taxes for unemployment insurance, another benefit they will not be able to receive based on their illegal status.<sup>120</sup>

Finally, some argue that without the over five-million undocumented immigrants who came to the United States in the 1990s, the United States "would have created fewer jobs, experienced slower economic growth and maintained a lower standard of living for everyone".<sup>121</sup> Research has also shown that without the presence of undocumented aliens, the agriculture, beef and poultry industries might have suffered huge losses when faced with shortages of labor and surging prices.<sup>122</sup> Population experts predict that the United States will suffer a severe shortage of workers in the decades to come, and that immigrants will be an important source of labor for the country.<sup>123</sup> Therefore, it is imperative that the country formulates more consistent, immigrant-friendly laws which will provide adequate opportunities for immigrants to fulfill such a labor demand.<sup>124</sup>

In light of this wealth of empirical data that reveal the economic benefits that immigrants provide to the United States, it is surprising that such insidious anti-immigrant sentiment still persists. However, the same discriminatory attitude that pervaded the country's past immigration laws can still be found in its current immigration system.

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<sup>116</sup> *Id.*

<sup>117</sup> *Id.* at 918.

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> *Id.* at 919.

<sup>122</sup> *Id.*

<sup>123</sup> Daniel Eisenberg, *The Coming Job Boom*, TIME, May 6, 2002.

<sup>124</sup> The current United States Immigration system provides few legal opportunities for foreign workers to fulfill this labor demand, thus creating an incentive for undocumented migration to the United States. Sweeney Yu, *supra* note 11414, at 922.

As briefly discussed above, the modern immigration debate focuses on such values as national security, ethnocentrism, and economics. This Note proposes the application of an alternative, more humanitarian value to the current debate. Specifically, the next section will discuss how the human rights framework can positively contribute to the development of a workable and humane legislative measure aimed at combating the problems plaguing the country's immigration system today.

#### IV. HUMAN RIGHTS PERSPECTIVE AS AN ALTERNATE FRAMEWORK IN THE CURRENT IMMIGRATION DEBATE

##### A. *Why Human Rights Framework?*

There are many important frameworks available from which to approach the evaluation of the current immigration reform proposals, including economics, national security, race, and citizenship. The current immigration debate in the United States, as discussed in the previous section, focuses mostly on issues of economics and national security. This note will focus, instead, on the human rights aspect of immigration reform, which unfortunately has not received as much attention in the media.

The issue of human rights has grown in importance recently. The human rights movement has become "an increasingly powerful force capable of affecting government policies."<sup>125</sup> In particular, the U.S. treatment of human rights in its domestic law influences the foreign policy of countries around the world.<sup>126</sup> It is especially important that the United States fully endorse the human rights movement and encourage other countries to do the same. Historically, however, the U.S. immigration laws have been inadequate. The international human rights community has continuously criticized the United States for failing to ratify human rights treaties and failing to align its domestic laws with international human rights norms.<sup>127</sup> Specifically, the U.S. discrimination against immigrants can create a negative image of the United States in the eyes of the world. Other countries may view the United States as hypocritical and unfair. The current immigration reform debate provides the United States with an opportunity to improve its international image by promoting human rights protections among its immigrants.<sup>128</sup>

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<sup>125</sup> Peerenboom, *supra* note 101, at 815.

<sup>126</sup> THOMAS BUERGENTHAL, INTERNATIONAL HUMAN RIGHTS IN A NUTSHELL (3rd ed. 2002).

<sup>127</sup> Jack Goldsmith, *Should International Human Rights Law Trump U.S. Domestic Law?*, 1 CHI. J. INT'L L. 327, 329 (2000).

<sup>128</sup> *Id.*

In addition, the human rights framework seems better-suited than other alternatives to address the current immigration problem, given the current international unrest and its negative effects on human rights all over the world. The United States, for example, has been fervent in attempting to protect its citizens from terrorism, and it specifically has attacked the immigration system as contributing to terrorism: “[i]f illegal aliens can enter and remain in the United States with impunity, so, too, can terrorists enter and remain while they play, rehearse, and then carry out their attacks.”<sup>129</sup> While this certainly is a valid concern that needs to be addressed, the proposal of stricter immigration laws poses the risk of trampling the human rights of immigrants. In this post-9/11 era, where anti-terrorism laws are at risk of becoming out of control, we must be careful that overly-strict protection-driven laws do not encroach on civil liberties and human rights. Therefore, the promotion of human rights through the adoption of fair and immigrant-friendly legislation offers the United States an opportunity to prove to the world that it is serious in its often-touted goal of establishing a more democratic, humanitarian international community.

There are, some would argue, problems with international human rights law, such as the lack of access for adjudication and problems in implementation and enforcement.<sup>130</sup> Specifically, these problems include a lack of accountability under the United Nations for those accused of violating human rights law and a general lack of awareness of human rights laws and procedures available for securing those rights.<sup>131</sup> In addition, human rights issues often elicit deep moral convictions within members of society, including commitments to particular religious views, political philosophies, government functions, gender roles, and ideas of freedom and autonomy.<sup>132</sup> Discussions about human rights, then, necessarily lead to conflicts between opposing groups and individuals. However, as the human rights movement continues to grow and evolve, many of these problems will be worked out. Therefore, this Note will continue on the assumption that the international human rights movement offers a positive, viable framework from which to approach the following analysis.

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<sup>129</sup> House Bill 4437, *supra* note 5, § 118.

<sup>130</sup> Hernandez-Truyol, *supra* note 26, at 268.

<sup>131</sup> *Id.*

<sup>132</sup> Peerenbrom, *supra* note 101, at 817.

***B. Are International Human Rights Norms Binding on the United States?***

There are two main sources of international human rights law: customary human rights law and treaties.<sup>133</sup> This Note will focus on both sources of human rights law and their application to the current immigration reform proposals. It is important to first briefly note the differences between international customary human rights law and international treaties.

A treaty is “an international agreement concluded between two or more states in written form and governed by international law”.<sup>134</sup> The U.S. Constitution designates treaties as the “supreme [l]aw of the land”.<sup>135</sup> Executed treaties, then, have the same weight as U.S. federal law.<sup>136</sup> Perhaps this is why the United States has been so hesitant to enter into treaties, given the significant, wide-ranging consequences of their adoption. Historically, the United States has been unwilling to ratify certain human rights treaties. The list of human rights treaties that the United States has ratified is small, and includes the following:<sup>137</sup> the Charter of the United Nations;<sup>138</sup> the Charter of the Organization of American States;<sup>139</sup> the International Covenant on Civil and Political Rights;<sup>140</sup> and the Convention on the Elimination of All Forms of Racial Discrimination.<sup>141</sup>

It is important to note the distinction between self-executing and non-self-executing treaties. Treaties are ratified when signed by the President of the United States; once ratified, the United States is internationally responsible for abiding by the Treaty. The United States, however, does not become domestically responsible for following the treaty until it is approved by the Senate.<sup>142</sup> That is, ratified treaties are non-self-executing. Therefore, many of

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<sup>133</sup> Christopher P. Cline, *Pursuing Native American Rights in International Law Venues: A Jus Cogens Strategy After Lying v. Northwest Indian Cemetery Protective Association*, 42 HASTINGS L.J. 591, 598 (1991).

<sup>134</sup> BLACK'S LAW DICTIONARY 1257 (8th ed. 2005).

<sup>135</sup> U.S. CONST. art. VI, § 2.

<sup>136</sup> Article 7 of United States Constitution holds that “all treaties made . . . shall be the supreme Law of the Land.” U.S. Const. art. VI.

<sup>137</sup> Hernandez-Truyol, *supra* note 26, at 259.

<sup>138</sup> U.N. Charter, Oct. 24, 1945, 59 Stat. 1031, T.S. No. 993.

<sup>139</sup> Charter of the Organization of the Americas, Dec. 13, 1951, 2 U.S.T. 2394, 119 U.N.T.S. 3.

<sup>140</sup> International Covenant on Civil and Political Rights, June 8, 1992, 999 U.N.T.S. 171.

<sup>141</sup> Convention on the Elimination of All Forms of Racial Discrimination, June 24, 1994, 660 U.N.T.S. 195.

<sup>142</sup> Hernandez-Truyol, *supra* note 26, at 259.

the treaties that the United States has ratified are still, technically, not domestically enforceable.<sup>143</sup>

Despite the fact that a treaty may not be self-executing and thus not technically binding on the United States, the rights set forth in the treaty may still be considered binding domestic law if they constitute customary international law.<sup>144</sup> International customary human rights law can be defined as “law that derives from the practice of states and is accepted by them as legally binding.”<sup>145</sup> Such human rights norms are considered “nonderogable and suprasovereign.”<sup>146</sup> For example, certain parts of the Geneva Conventions are considered customary international law, and thus binding on all states, even those that are not formally parties to the treaties.<sup>147</sup> More specifically, the Universal Declaration of Human Rights, the authoritative interpretation of human rights as proclaimed in the United Nations Charter,<sup>148</sup> is considered fully binding on the United States.<sup>149</sup> Thus, in the same way that treaties are equated to U.S. federal law,<sup>150</sup> international customary law is equated to U.S. common law.<sup>151</sup>

Historically, international human rights law has been used by the United States in addressing immigration problems. For example, in the late nineteenth-century, three seminal Supreme Court cases established Congress’ plenary power to regulate immigration.<sup>152</sup> In all three cases below, the parties relied on the “law of nations” in their arguments and the Court relied on the

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<sup>143</sup> These include: the Covenant on Economic, Social and Cultural Rights; the Convention on the Elimination of All Forms of Discrimination against Women; and the Convention on the Rights of the Child. *Id.*

<sup>144</sup> *Filartiga v. Pena-Irala*, 630 F.2d 879, 884 (2d Cir. 1980).

<sup>145</sup> BLACK’S LAW DICTIONARY 678 (8th ed. 2005).

<sup>146</sup> *Hernandez-Truyol*, *supra* note 26, at 262.

<sup>147</sup> William Bradford, *Barbarians at the Gates: A Post-September 11<sup>th</sup> Proposal to Rationalize the Laws of War*, 73 MISS. L.J. 639, 765 (2004).

<sup>148</sup> The United Nations Charter was drafted by the international community in 1945 following the atrocities of WWII. Nancy J. King, Sukanya Pillay, & Gail A. Lasprogata, *Workplace Privacy and Discrimination Issues Related to Genetic Data: A Comparative Law Study of the European Union and the United States*, 43 AM. BUS. L.J. 79, 101 (2006). The U.N. Charter proclaims that “[w]e the people of the United States determined . . . to reaffirm faith in human rights, in the dignity and worth of the human person . . .” U.N. Charter, *supra* note 138, pmb1.

<sup>149</sup> *Hernandez-Truyol*, *supra* note 26, at 260.

<sup>150</sup> U.S. CONST., *supra* note 135.

<sup>151</sup> *Filartiga v. Pena-Irala*, 630 F.2d 879, 884 (2d Cir. 1980).

<sup>152</sup> *Ayers*, *supra* note 16, at 126.

“law of nations” in its opinion.<sup>153</sup> The “law of nations” relied on in these cases can be defined as the forerunner to the modern human rights movement.<sup>154</sup>

The first case in this historical trilogy is famously known as the Chinese Exclusion Case.<sup>155</sup> In *Chae Chan Ping*, the Court held that Congress possesses the power to exclude aliens, even during times of peace.<sup>156</sup> While the Court’s holding does not discuss international law to a great extent, both parties explicitly relied on international law in their arguments. International law was used in *Chae Chan Ping*’s arguments to show that such an exclusion power did not exist.<sup>157</sup> The government went even further in its use of international law to justify its propositions.<sup>158</sup>

The second case in the trilogy is *Nishimura Ekiu v. United States*.<sup>159</sup> In this case, the Court held that Congress had the exclusive power to determine what constituted due process for non-resident immigrants.<sup>160</sup> The Court explicitly based its holding on the “accepted maxim[s] of international law.”<sup>161</sup> Even further, the entire first half of the government’s brief discussed only international law.<sup>162</sup>

The third and final case in this trilogy gave to Congress the power both to deport aliens in the United States and to prescribe the rules accompanying these procedures.<sup>163</sup> In *Fong Yue Ting*, the Court relies on the same “accepted maxims of international law” referred to in the *Nishimura* case.<sup>164</sup> However, the court in *Fong Yue Ting* goes even further, at one point citing international law even before the U.S. Constitution.<sup>165</sup>

Some might argue that the Court in these three cases was simply citing international human rights law because it was dealing with the international issue of immigration.<sup>166</sup> Thus, international law should not be considered a viable source of authority for the United States. However, it is

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<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

<sup>155</sup> *Chae Chan Ping v. U.S.*, 130 U.S. 581 (1889).

<sup>156</sup> *Id.* at 609.

<sup>157</sup> Ayers, *supra* note 16, at 135.

<sup>158</sup> *Id.* at 136.

<sup>159</sup> *Nishimura Ekiu v. U.S.*, 142 U.S. 651 (1892).

<sup>160</sup> *Id.* at 660.

<sup>161</sup> *Id.* at 659.

<sup>162</sup> Ayers, *supra* note 16, at 138.

<sup>163</sup> *Fong Yue Ting v. U.S.*, 149 U.S. 698 (1893).

<sup>164</sup> Ayers, *supra* note 16, at 139.

<sup>165</sup> *Id.*

<sup>166</sup> *Id.* at 142.

clear that the Supreme Court continued to use international human rights law to justify its immigration policies well into the twentieth-century. For example, in the 1936 case of *Curtiss-Wright*, the United States explicitly named the source of immigration law as “powers of external sovereignty”, or international law.<sup>167</sup> Therefore, it is argued, if the principle source of early immigration law was international human rights law, then modern immigration law should change just as international human rights law changes.<sup>168</sup>

Some would argue further that the United States is sovereign in its ability to create and enforce domestic foreign policy, specifically its immigration laws.<sup>169</sup> These people would argue that the modern human rights movement impermissibly infringes upon the U.S. autonomy.<sup>170</sup> However, the more accepted view of international law holds that a state’s “sovereignty . . . is limited by the Law of Nations.”<sup>171</sup> International human rights law, in providing broader protection than many of the U.S. domestic laws, serves as a means of preventing the oppression of sovereignty.<sup>172</sup> Specifically, human rights law seeks to “eradicate invidious distinctions based on race, color, language, and national origin.”<sup>173</sup>

## V. CURRENT LEGISLATIVE IMMIGRATION REFORM PROPOSALS

Recently, both houses of Congress have proposed legislation to address the problems with the U.S. immigration policies. Unfortunately, disagreements among and within both houses have prevented any measures from passing. It is uncertain how long the debates will continue before Congress passes legislation that will address the current immigration problems in the United States.

In general, the House of Representatives’ most recent proposal, House Bill 4437, aims for stricter immigration laws to help curtail both economic strain and terrorism in the United States. In general, the assumptions underlying many anti-immigration measures, reflected in some of the provisions in the House’s current proposal, include the following: immigrants

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<sup>167</sup> U.S. v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 318 (1936).

<sup>168</sup> Ayers, *supra* note 16, at 145.

<sup>169</sup> “The government of the United States is one of limited and delegated powers. It takes nothing from the usages or the former action of European governments, nor does it take any power by any supposed inherent sovereignty.” Fong Yue Ting, 149 U.S. 698, 757 (Fields, J., dissenting).

<sup>170</sup> Peerenbrom, *supra* note 101, at 824.

<sup>171</sup> Ayers, *supra* note 16, at 135 (quoting Chae Chan Ping’s brief which argued that the law of nations should limit a state’s sovereignty).

<sup>172</sup> Hernandez-Truyol, *supra* note 26, at 268.

<sup>173</sup> *Id.*

displace U.S. citizens in the limited job market; increased immigration will negatively affect the economic standard of living for U.S. citizens; and cultural fragmentation resulting from immigrants' refusal to assimilate will destroy the U.S. national identity.

The Senate's proposals are less harsh in their treatment of immigrants. The Senate's most recent proposal, Senate Bill 2611, proposes creating a way for certain illegal immigrants to obtain citizenship. The fundamental assumptions underlying the more immigrant-friendly measures, evident in several provisions of the Senate's current proposal, include the following: the U.S. cultural identity will not be destroyed by immigrants, but will be enriched by them; a large immigrant workforce is necessary for future economic growth in the United States; and current U.S. citizens, most of whom have benefited from immigration, have no right to exclude future immigrants.

**A. House Bill 4437: Border Protection, Antiterrorism and Illegal Immigration Control Act**

The House of Representatives' most recent proposal for immigration reform is the Border Protection, Antiterrorism and Illegal Immigration Control Act ("House Bill 4437"). The controversial House Bill 4437 served as the catalyst for the massive immigration protests in early 2006. Presented to the House by Senator Jim Sensenbrenner of Wisconsin on December 6, 2005 and passed by the House on December 16, 2005, House Bill 4437 contains several provisions aimed at controlling current illegal immigrants and preventing further illegal immigration, many of which appear to be specifically aimed at Mexican immigrants.<sup>174</sup> Many aspects of the House's legislative proposal evoke the discriminatory values embedded in the country's past immigration laws.

**1. Increased fencing along U.S./Mexico border**

Title I of House Bill 4437 outlines the objective of obtaining "operational control"<sup>175</sup> over the U.S. borders within eighteen-months of the Act's enactment. In achieving this ambitious goal, the Act authorizes the Secretary of Homeland Security to take whatever action necessary to secure the "entire international land and maritime borders" of the United States.<sup>176</sup> Specifically, the Act authorizes: increased surveillance of the borders using

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<sup>174</sup> House Bill 4437, *supra* note 5.

<sup>175</sup> *Id.* The term "operational control" means the prevention of all unlawful entries into the United States, including entries by terrorists, other unlawful aliens, instruments of terrorism, narcotics, and other contraband. *Id.* § 101(b).

<sup>176</sup> *Id.* § 101(a).

technology such as sensors, satellites, radars and cameras;<sup>177</sup> additional infrastructure measures such as checkpoints and barriers to prevent illegal entry of aliens; employment of additional Border Patrol agents; and increased presence of Customs and Border Protection agents in areas where illegal entry into the United States is most prevalent.<sup>178</sup>

Title X of House Bill 4437 authorizes the construction of fencing along the Southwestern U.S. border, in an effort to “sav[e] lives, stop[] illegal drug trafficking, and halt[] the flow of illegal entrants into the United States.”<sup>179</sup> Specifically, the Act proposes two layers of reinforced fencing in border area from the Pacific Ocean to the Gulf of Mexico, including additional security measures in certain priority areas.<sup>180</sup> Additionally, title V of the Act provides for the coordination of the various agencies within the Department of Homeland Security in enforcing the proposed border security measures.<sup>181</sup>

While technically the House’s legislation proposal is aimed at controlling immigration from all countries around the world, it is obvious that the border enforcement provision is aimed directly at keeping Mexican immigrants out. By reinforcing the fencing along the Mexico-U.S. border, the United States can ensure that unwanted, illegal immigrants from Mexico do not illegally enter the country.

## 2. Undocumented Immigrants Defined as Felons

Title II of House Bill 4437 defines the illegal entry by an alien into the United States as a felony with a maximum punishment of a fine and twenty-year imprisonment.<sup>182</sup> Section 201 of the Act amends the definition of “aggravated felony” to include all offenses with a penalty of one-year imprisonment or more.<sup>183</sup> Section 203 then amends the Immigration and Nationality Act to make all first-time immigration offenses punishable by one-year in prison, thus classifying all first-time immigration offenses as felonies.<sup>184</sup>

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<sup>177</sup> *Id.* Title III of House Bill 4437 authorizes the Department of Homeland Security to use the surveillance equipment of the Department of Defense. *Id.* § 301(a).

<sup>178</sup> *Id.* § 101(a).

<sup>179</sup> *Id.* § 1004.

<sup>180</sup> *Id.* § 101.

<sup>181</sup> *Id.* § 501.

<sup>182</sup> *Id.* § 203(3)(e)(1).

<sup>183</sup> *Id.* § 201.

<sup>184</sup> The Senate’s most recent legislative proposal makes first-time offenses punishable by only a maximum of six months in prison, and thus not a felony. Senate Bill 2611, *infra* note 212.

This provision seems to be aimed at Mexicans. When voting on this legislation, one would probably be hard pressed to find any legislator who honestly considered the illegal entry of, for example, Italians or Ukrainians or even Canadians as a problem that could be solved by this provision. It is more likely that the legislators were thinking largely of Mexicans, given the large number of Mexicans that enter the United States illegally, and that this provision making illegal entry a felony was directed entirely at Mexicans.

### 3. Employing or Assisting Undocumented Aliens is a Crime

Title II of House Bill 4437 also imposes a maximum punishment of twenty-year imprisonment and a fine on anyone who “assists, encourages, directs or induces” a person to illegally enter or remain in the United States.<sup>185</sup> Further, Title II imposes a fine and imprisonment upon any person who knowingly employs illegal immigrants.<sup>186</sup> Section 702 of House Bill 4437 describes the procedures to be followed by employers in verifying the identity and work eligibility of alien employees and the penalties imposed for failing to do so.<sup>187</sup> Finally, Title II allows for the seizure of any property used in the commission of these immigration crimes, along with the forfeiture of any proceeds of such crimes.<sup>188</sup>

In the same way that the provision above defines illegal entry into the United States a felony, this provision deeming the employment or assistance of an illegal immigrant a felony is also clearly aimed at the Mexican immigrant population. Given that Mexican immigrants, many of them undocumented, comprise a large part of the American work force, it seems highly likely that this provision was aimed at punishing those who employed undocumented Mexican immigrants.

#### *B. Senate Bill 2611: Comprehensive Immigration Reform Act*

The Senate’s most recent proposal for immigration reform is the Comprehensive Immigration Reform Act (“Senate Bill 2611”), proposed by Senator Alan Specter of Pennsylvania on April 7, 2006 and passed by the Senate on May 25, 2006.<sup>189</sup> In addition to striking several of the discriminatory provisions of the House’s Border Protection Act, Senate Bill

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<sup>185</sup> House Bill 4437 § 202(a).

<sup>186</sup> *Id.* § 202(b).

<sup>187</sup> *Id.* § 702 (describing the employment verification procedures to be followed by employers of aliens, which includes identifying identity and work eligibility of aliens).

<sup>188</sup> *Id.* § 202(c).

<sup>189</sup> Comprehensive Immigration Reform Act of 2006, S. 2611, 109th Cong. (2006)[hereinafter Senate Bill 2611].

2611 contains many new measures aimed at dealing with the U.S. immigration problem in a fairer, more humane manner. This Note will examine a few of the most important provisions Senate Bill 2611 before moving onto a discussion of how it better protects the human rights of immigrants, particularly Mexican immigrants, in the United States.

### 1. Path to Citizenship for Qualified Undocumented Immigrants

Perhaps the most important provision of Senate Bill 2611, the "Immigration Accountability Act" provides that certain qualified undocumented aliens may be granted permanent resident status.<sup>190</sup> Specifically, section 601 allows such a status adjustment when an individual meets the following requirements: payment of a fine; proof of continuous physical presence for the five years preceding April 5, 2006; proof of employment for at least three years during the five years preceding April 5, 2006 and for at least six years after the enactment of this provision; proof that alien is admissible under U.S. Immigration Laws; payment of any outstanding Federal Income Tax liabilities; and demonstration of competency in "basic citizenship skills."<sup>191</sup> Once an alien has fulfilled the above requirements and submitted an application, he or she will be granted certain rights pending final determination of the application, including employment authorization, permission to travel abroad, and protection against detention or deportation.<sup>192</sup>

In anticipation of arguments by opponents who claim that the "path to citizenship" might be available to criminals or others who are a danger to society, CIRA places a limit on those persons eligible to receive such status adjustment. Section 245 of Senate Bill 2611 provides that an alien is ineligible for such adjustment of status if he or she has received an order or removal from the United States, has been convicted of three misdemeanors or a felony, or has committed a serious crime and is considered a danger to the United States.<sup>193</sup> In addition, the Immigration Accountability Act provides criminal penalties for false statements or misrepresentations in applications for status adjustment.<sup>194</sup>

This path to citizenship provision is clearly addressed at the large undocumented Mexican immigrant population in the United States. In fact,

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<sup>190</sup> *Id.* § 601. Note also that if aliens meet the requirements, then their children or spouse are eligible too. *Id.*

<sup>191</sup> *Id.* These "basic citizenship" skills include English language proficiency and knowledge of United States history and Government. *Id.*

<sup>192</sup> *Id.*

<sup>193</sup> *Id.*

<sup>194</sup> *Id.*

when President Bush proposed a similar temporary guest worker program in 2004, he specifically acknowledged the Mexican immigrant population throughout his speech. "I have known many immigrant families, mainly from Mexico."<sup>195</sup> And further, in discussing those to be affected by such a provision, he refers to those undocumented immigrants who arrive via "dangerous desert border crossings."<sup>196</sup> It is obvious, then, that in developing such proposals, the government specifically has Mexican immigrants in mind.

## 2. Creation of New "Blue Card" Visa Program

Title VI of Senate Bill 2611 establishes a "Pilot Program for Earned Status Adjustment of Agricultural Workers."<sup>197</sup> Section 613 provides that certain qualified aliens will be eligible for "blue card status" upon fulfilling the following requirements: employment in an agricultural field for at least 150 days of a twenty-four-month time period ending December 31, 2005, application for such status during the allotted eighteen-month application period, and proof of admissibility otherwise.<sup>198</sup> Once aliens have received this "blue card status" they are conferred with certain rights, including the right to travel abroad, the ability to continue working in the United States, and the prohibition of termination of blue card status, except in circumstances where deportation is mandated.<sup>199</sup>

Most importantly, section 613 of Senate Bill 2611 allows for the adjustment of a "blue card status" alien to a permanent United States resident, should the alien fulfill the additional following requirements: agricultural employment for at least five years with at least one-hundred work days a year and agricultural employment for at least three years with at least 150 work days a year.<sup>200</sup> Further, Senate Bill 2611 provides that the children of an alien granted such status adjustment will be granted permanent resident status as well, upon application.<sup>201</sup>

Additionally, Senate Bill 2611 offers protection against fraud by prohibiting dishonesty in the application process and by requiring all blue cards to be encrypted, machine-readable, and tamper-proof.<sup>202</sup> Title VI of Senate Bill 2611 also provides penalties, including termination of blue card

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<sup>195</sup> Remarks by the President, *supra* note 98.

<sup>196</sup> Senate Bill 2611, *supra* note 189.

<sup>197</sup> *Id.* § 613.

<sup>198</sup> *Id.*

<sup>199</sup> *Id.*

<sup>200</sup> *Id.*

<sup>201</sup> *Id.*

<sup>202</sup> *Id.*

status and denial of permanent resident adjustment, for violations of the above prescribed procedures.<sup>203</sup>

Unlike the House Bill 4437 which seeks to limit the availability of certain types of visas,<sup>204</sup> Senate Bill 2611 seeks to expand those visas already available, in addition to creating a new visa category. This proposal of a new "blue card" visa for agricultural workers is most likely aimed at recruiting Mexican immigrants, who comprise a large portion of the U.S. agricultural work force.

### 3. Improvement and Expansion of Availability of Certain Visas

Title IV of Senate Bill 2611 reforms the H-2C visa program to apply to: aliens performing a "special occupation"; aliens performing services as registered nurses; aliens performing seasonal agricultural labor or services; and aliens performing seasonal nonagricultural work, should no one in the United States be able to fill the position.<sup>205</sup> In order to receive the temporary H-2C visa, an alien must prove they are eligible to work and have received a valid job offer, pay a \$500 fee, undergo a medical examination at their own cost, and testify as to their health, criminal history, and truth of their application.<sup>206</sup>

Section 404 of Senate Bill 2611 sets forth the procedures that employers of H-2C visa holders must follow, including filing a petition and paying a fee. First, however, an employer must actively seek eligible U.S. workers to fill the position.<sup>207</sup> Should such efforts prove unfruitful, the employer may then file a petition, demonstrating that U.S. workers will not be adversely affected by the employment of an H-2C visa holder, and that H-2C visa holders will receive adequate wages and working conditions.<sup>208</sup>

In addition to amending the H-2C visa program, Senate Bill 2611 reforms the H-2A visa program as well. Section 615 simplifies the procedural requirements for employment of certain agricultural and temporary or seasonal

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<sup>203</sup> *Id.*

<sup>204</sup> Amendment 13 to House Bill 4437, introduced by Virginia Representative Bob Goodlatte and passed by the House on December 16, 2005, eliminates the Visa Lottery Program. H.AMDT.650 (A013).

<sup>205</sup> *Id.* § 402(a).

<sup>206</sup> *Id.* § 403(a).

<sup>207</sup> *Id.* § 404(a). Note that an exception from this requirement is permitted where there is a shortage of United States workers in a particular occupation for which the H-2C visa is sought. *Id.*

<sup>208</sup> *Id.*

workers.<sup>209</sup> Specifically, section 615 mandates the replacement of the current labor certification requirements with a more lenient labor attestation procedure. It also requires that all applications be approved, except upon incompleteness or obvious mistakes.<sup>210</sup>

Just as the provision above creating the new “blue card” visa is aimed at encouraging the legal employment and immigration of Mexican immigrants, so too do these provisions improving and expanding the availability of certain visas promote an increase in the legal employment and immigration of Mexican immigrants. Given that these provisions increase the number of agricultural workers allowed to enter the United States, and in addition to simplifying the process of obtaining the visas, they help certain Mexican immigrants enter the United States legally and more easily.

#### 4. Undocumented Entry Not Classified as a Felony

Title II of Senate Bill 2611 redefines “aggravated felony” to include illegal entry or re-entry crimes where the sentence is at least one-year imprisonment.<sup>211</sup> Section 206 sets the maximum penalty for first-time offenders at a fine and/or six months imprisonment.<sup>212</sup> Thus, aliens found to be in the United States illegally, if their first offense, will not be classified as felons. This differs from a felony as defined under the House’s Border Protection Act, which deems *any* illegal entry of an alien a felony.<sup>213</sup>

Again, it is obvious, given the large number of undocumented Mexican immigrants that enter the country, that this provision will primarily affect the Mexican immigrant population. For while there are, no doubt, individuals from countries all over the world who attempt to illegally enter the United States, it is the Mexican immigrant population whose fate is affected the most by this provision.

#### 5. Less-harsh Penalties for Employment of or Aid to Undocumented Aliens

Section 205 of Senate Bill 2611 states that certain groups and individuals will be exempt from penalties related to harboring or transporting an illegal immigrant.<sup>214</sup> Those excluded include “bona fide nonprofit, religious organization[s] . . . that encourage[], invite[], or enable [] an alien to

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<sup>209</sup> *Id.* § 615.

<sup>210</sup> *Id.* § 615.

<sup>211</sup> *Id.* § 203.

<sup>212</sup> *Id.* § 206.

<sup>213</sup> House Bill 4437, *supra* note 5182.

<sup>214</sup> Senate Bill 2611, *supra* note 189, § 205.

serve as a volunteer minister or missionary"; and "individual[s] or organization[s] not previously convicted of a violation of such provisions" that give humanitarian aid to aliens.<sup>215</sup>

In addition, Title III of Senate Bill 2611, like the House Bill 4437,<sup>216</sup> seeks to deter employers from hiring undocumented immigrants. Title III of Senate Bill 2611 sets forth the steps employers are required to follow when employing an alien.<sup>217</sup> These steps require employer verification of the immigrant's employment eligibility through the examination of specified identification documents, the attestation by the immigrant that he is eligible to work in the United States, the retention of such statements for a specified time period, and other specified record-keeping requirements.<sup>218</sup>

However, unlike the Border Protection Act, CIRA does not impose such harsh crimes on employers for failing to follow the above requirements under certain conditions. For example, penalties for first-time and second-time violations of the above provisions by employers results in civil penalties.<sup>219</sup> Criminal penalties are only imposed for pattern violations by employers.<sup>220</sup> Finally, Title VI of CIRA protects employers from liability for employing "adjusting aliens" under the path to citizenship provision.<sup>221</sup>

Once again, this provision seems aimed at protecting both Mexican immigrants and their employers from the imposition of overly harsh civil and criminal penalties.

## 6. Increases Security Along U.S./Mexico Border

While Senate Bill 2611 also proposes increased border control measures, it differs in scope from the House's border control proposals. Title I of Senate Bill 2611 provides for an increase in immigration and border enforcement inspectors, investigators, agents, and other personnel.<sup>222</sup> Senate Bill 2611 also provides for greater technology to assist in securing the border, including the use of unmanned aerial vehicles and other surveillance equipment.<sup>223</sup> Additionally, Title I proposes the construction and

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<sup>215</sup> *Id.* § 205.

<sup>216</sup> House Bill 4437, *supra* note 5.

<sup>217</sup> Senate Bill 2611, *supra* note 189, § 301.

<sup>218</sup> *Id.*

<sup>219</sup> *Id.*

<sup>220</sup> *Id.*

<sup>221</sup> *Id.*

<sup>222</sup> *Id.* § 101. *See also*, House Bill 4437, *supra* note 5 § 101(1), which proposes the use of the same technology.

<sup>223</sup> *Id.* § 102.

improvement of existing ports of entry, vehicle barriers and checkpoints, as necessary to improve border control.<sup>224</sup> One of the most commonly discussed provisions of the Senate's proposal, however, concerns the construction of a fence along the southwestern Mexico-U.S. border. Section 106 calls for the construction of over four-hundred miles of triple-layered fencing in areas where illegal immigration occurs the most, in addition to the improvement of existing fences that are damaged.<sup>225</sup>

Most importantly, Senate Bill 2611 directs the Secretary of State to coordinate its border control efforts with Mexico, including the share of information and immigration law education.<sup>226</sup> Therefore, instead of clinging to an ancient "us" versus "them" approach found in the House's legislative measure, Senate Bill 2611 promotes collaboration between United States and Mexican officials to create a more safe, secure border for U.S. citizens and Mexican citizens alike.

### 7. Receipt of Social Security Benefits for Past Work

Once an alien is granted permanent resident status adjustment, Senate Bill 2611 provides that he or she may collect social security benefits, both for their future employment and for their past work. Title VI of Senate Bill 2611, which sets forth the controversial "path to citizenship" program, not only protects these newly-legal immigrants from prosecution for past social security fraud, but it allows them to collect benefits for their work completed in the past.<sup>227</sup> While many have attacked this provision as unfair and detrimental to the Social Security system,<sup>228</sup> others argue that, given the fact that undocumented immigrants paid into the Social Security system, they should be able to collect these benefits.<sup>229</sup> This Social Security provision will mainly affect the large Mexican immigrant population, to whom the path to citizenship provision is addressed.<sup>230</sup>

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<sup>224</sup> *Id.* §§ 103-06.

<sup>225</sup> *Id.* § 106.

<sup>226</sup> *Id.* § 117.

<sup>227</sup> *Id.* § 601.

<sup>228</sup> *See, e.g.,* S.AMDT.3985 (Senator Ensign arguing that "the [Senate] bill will place a significant cost on American taxpayers . . . this bill will impose a heavy strain on our Social Security system.")

<sup>229</sup> *Id.* (Senator Kennedy arguing that "the only reason for the Ensign amendment is to deny the legal residents the Social Security benefits they have earned and paid for. . . . Once those workers establish eligibility, how, in all fairness, can we deny them credit for their past contributions?")

<sup>230</sup> President's Remarks, *supra* note 98.

### *C. Human Rights Framework Applied to Current Reform Proposals*

There are two main types of human rights laws: laws that prohibit discrimination and laws that create affirmative rights.<sup>231</sup> With respect to both types of laws, the U.S. Senate Bill 2611 most adequately respects international human rights norms, specifically in its protection of the Mexican immigrant population.

#### **1. International Human Rights Laws that Prohibit Discrimination**

The Universal Declaration of Human Rights states that “everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as *race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, or other status*”.<sup>232</sup> In addition, the International Covenant on Civil and Political Rights<sup>233</sup> (“ICCPR”), places a heavy emphasis on non-discrimination and provides protection against “discrimination on any ground such as *race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, or other status*.”<sup>234</sup> Even further, the International Covenant on Economic, Social and Cultural Rights, (“ICESCR”), prohibits discrimination on these same grounds.<sup>235</sup> These nondiscrimination provisions alone provide several apparent bases upon which current anti-immigration legislative proposals might be challenged.<sup>236</sup> Given the U.S. history of discrimination against immigrants generally and Mexican immigrants in particular, it is important that we closely and seriously examine the current immigration reform proposals in light of these human rights principles.

At least for the purposes of this Note, perhaps the most important aspect of the anti-discrimination standards set forth by both the Universal Declaration of Human Rights and the ICCPR is the prohibition of discrimination on the basis of national origin. The fact that immigrants in the

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<sup>231</sup> Hernandez-Truyol, *supra* note 26, at 262.

<sup>232</sup> Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc A/810 (emphasis added).

<sup>233</sup> THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS (Sarah Joseph, Jenny Schultz, & Melissa Castan, eds., Oxford Univ. Press 2000). The ICCPR is the most inclusive and legally recognized treaty by the UN on political and civil rights. In 1966, the ICCPR was adopted by the UN General Assembly, and in 1992, it was ratified by the United States. Supplementing the ICCPR are two Optional Protocols, the first one establishing certain procedural rights and the second one outlawing the death penalty. *Id.* at 4-5.

<sup>234</sup> *Id.* at 518 (emphasis added).

<sup>235</sup> THE INTERNATIONAL BILL OF HUMAN RIGHTS, *supra* note 99, at 15.

<sup>236</sup> Hernandez-Truyol, *supra* note 26, at 264.

United States have been and continue to be discriminated against based on their national origin cannot be questioned. Most recently, Mexican immigrants have borne the brunt of this harsh and unfair treatment. Nowhere else is this more evident than in the U.S. immigration laws and recent legislative reform proposals. As these measures stand, Mexican and non-Mexican immigrants alike will continue to suffer such discrimination unless the United States chooses to adopt legislative reforms that will protect their rights against discrimination based on their national origin.

As discussed in the preceding section, the immigration reform proposals set forth by the House and the Senate differs in many respects. After reviewing several of the major provisions set forth in each proposal, it seems that the Senate's proposal offers the most protection against discrimination based on national origin. Perhaps the most important provision of CIRA, which insures that undocumented immigrants will be offered the same treatment as U.S. citizens once certain requirements are met, is the "path to citizenship" provision.<sup>237</sup> In offering U.S. citizenship to all qualified immigrants, largely Mexicans, this provision guarantees that these immigrants will receive the same legal rights and protections as other citizens of the United States, such as the right to travel freely in and out of the United States, protection against detainment and deportation, and eligibility for certain public benefits.<sup>238</sup>

The House's Bill 4437<sup>239</sup> does not contain any provisions offering such equal treatment to immigrants. In fact, House Bill 4437 contains several provisions which further discrimination against immigrants, particularly Mexican immigrants, based on their national origin. Generally, the Act imposes unduly harsh measures to prevent undocumented aliens from entering or remaining in the United States.<sup>240</sup> While technically House Bill 4437 would apply to aliens from every country in the world, it is easy to decipher the anti-Mexican sentiment, especially due to the fact that the proposal of the Act incited nation-wide protests, largely by Mexican immigrants.

Overall, House Bill 4437 is discriminatory against immigrants and is extraordinarily harsh on undocumented Mexican immigrants. It is easy to conclude that this discrimination is based on xenophobia, given the country's history of discriminatory immigration laws, and the current anti-immigration trend that continues to flow through certain sectors of the U.S. population.<sup>241</sup>

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<sup>237</sup> Senate Bill 2611, *supra* note 189, § 601.

<sup>238</sup> *Id.* §245B(c).

<sup>239</sup> House Bill 4437, *supra* note 5.

<sup>240</sup> *See supra* notes 177, 182, 185.

<sup>241</sup> *See, e.g., supra* note 55.

Indeed, such anti-immigration measures seem to be nothing more than a “smokescreen for legislating hate”.<sup>242</sup> This Note seeks to show how international human rights norms can be used to prevent such xenophobic measures and put an end to the discrimination against Mexican immigrants in the United States.

## 2. International Human Rights Laws that Grant Affirmative Rights

The Universal Declaration of Human Rights,<sup>243</sup> in addition to prohibiting discrimination in general, also grants specific rights applicable to immigrants in general, and Mexicans specifically. For example, Article 23 of the Declaration states that every individual has the right “to just and favourable conditions of work, . . . to equal pay for equal work, . . . [and] to just and favourable remuneration, . . . supplemented, if necessary, by other means of social protection.”<sup>244</sup> Given that Mexicans historically have been paid less than American citizens for the same work, in addition to being paid below the legal minimum wage in some cases, this provision of the Declaration is particularly of interest to the Mexican immigrant population.

Upon examination of the bills presented by the two houses of Congress, the Senate’s Bill 2611 best promotes the Declaration’s right of just working conditions and equal pay. Whereas House Bill 4437 seeks to minimize the number of Mexican immigrants living and working within the United States,<sup>245</sup> Senate Bill 2611 seeks to extend both the availability of visas and the protections afforded Mexican immigrants once they arrive to work.<sup>246</sup> By promoting and extending the opportunities available to Mexican immigrants for legal, documented employment, it insures that Mexican immigrants will be treated humanely, will receive equal pay for equal work, and will benefit from the protections and regulations of the U.S. government.

The Universal Declaration of Human Rights also sets forth a prohibition against retroactive criminal laws. That is, “[n]o person shall be held guilty of any penal offense on account of any act . . . which did not constitute a penal offense . . . at the time when it was committed.”<sup>247</sup> After assessment of the proposals made by both the House and the Senate, CIRA

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<sup>242</sup> Hernandez-Truyol, *supra* note 26, at 266.

<sup>243</sup> Universal Declaration of Human Rights, *supra* note 232.

<sup>244</sup> *Id.* at. art. 23.

<sup>245</sup> House Bill 4437, *supra* note 5.

<sup>246</sup> Senate Bill 2611, *supra* note 189.

<sup>247</sup> Universal Declaration of Human Rights, *supra* note 243. In addition, the International Covenant on Civil and Political Rights sets forth a prohibition against retroactive criminal laws. International Covenant on Civil and Political Rights, *supra* note 140, at 340.

once again proves to be the reform measure most aligned with this particular standard set forth by the Universal Declaration of Human Rights.

Generally, undocumented aliens in the United States who entered into and remain in the United States illegally realize that they are subject to deportation and other penalties under the country's current immigration laws. This is particularly true with regard to the Mexican immigrant population. It might come as a big surprise to these Mexican immigrants, however, should they suddenly learn that new immigration policies deem such an illegal entry and presence a felony, and that these new provisions apply retroactively. This is exactly what the House's Bill 4437 proposes to do. Section 201 of the House Bill 4437 revises the definition of "aggravated felony" to include any attempt to illegally enter the United States and any assistance offered to an alien attempting to illegally enter the United States.<sup>248</sup> Aside from the fact that this provision seems unusually harsh in that it labels first-time offenders as felons, House Bill 4437 makes this provision retroactive. Section 201(b) states that the proposed amendment "shall apply to offenses that occur *before*, on, or after the date of the enactment of this Act."<sup>249</sup>

Therefore, Section 201 of House Bill 4437 is in direct opposition to the prohibition against retroactive criminal laws set forth in the Universal Declaration of Human Rights. Unfortunately, the illustration just discussed is not the only example of such a provision. These retroactive provisions are present throughout House Bill 4437. In contrast, Senate Bill 2611, which also amends the definition of "felony",<sup>250</sup> does not apply retroactively to offenses occurring before its enactment. Section 203 specifically states that "the amendments . . . shall . . . apply to any act that occurred on or after the date of the enactment of this Act."<sup>251</sup> Therefore, once again, the Senate's immigration reform proposal best supports the human rights principles set forth in the Universal Declaration of Human Rights.

In addition to the rights set forth by the Universal Declaration of Human Rights, the ICCPR also grants specific affirmative rights applicable to Mexican immigrants.<sup>252</sup> For example, article 24 of the ICCPR prohibits discrimination against children on the bases of "*race, colour, sex, language, religion, national or social origin, property or birth.*"<sup>253</sup> In addition, Article 24

<sup>248</sup> House Bill 4437, *supra* note 5. Section 203 of House Bill 4437 then makes first-time offenses punishable by up to one year imprisonment, and thus a felony. *See supra* note 18383.

<sup>249</sup> House Bill 4437, *supra* note 5, § 201(b) (emphasis added).

<sup>250</sup> Senate Bill 2611, *supra* note 189.

<sup>251</sup> Senate Bill 2611, *supra* note 189, § 203.

<sup>252</sup> The International Covenant on Civil and Political Rights, *supra* note 140.

<sup>253</sup> *Id.* at art. 24 (emphasis added).

states that "every child has the right to acquire a nationality."<sup>254</sup> While House Bill 4437 does not list any provision specifically denying such rights to children of aliens, Senate Bill 2611 affirmatively protects such rights of children in more than one provision. First, section 245 of Senate Bill 2611 directs that the children of undocumented aliens who are eligible for the "path to citizenship" may receive such status adjustment as well.<sup>255</sup> In addition, section 504 amends the definition of "immediate relative" to include not only the child of a U.S. citizen, but also any children of such child.<sup>256</sup> Thus, the Senate's reform proposal appears to best uphold the right of the children of Mexican immigrants to be free from discrimination, as specifically set forth in the ICCPR.

The ICESCR<sup>257</sup> sets forth specific affirmative rights that are applicable to immigrants in the United States. For example, Article 9 of the ICESCR grants to aliens the right "to social security, including social benefits."<sup>258</sup> As previously pointed out in this note, the Senate's reform measure grants such benefits to immigrants who have received resident status adjustment.<sup>259</sup>

In summary, after briefly surveying the two legislative proposals offered by Congress, it is clear that the Senate's immigration reform measure best protects the international human rights of immigrants in general, and Mexican immigrants specifically. While it certainly is not perfect, Senate Bill 2611 offers a more humane approach to the country's current immigration problem, specifically concerning the Mexican immigrant population.

## VI. CONCLUSION

Thus far, Congress has yet to agree on a mutually satisfactory immigration reform measure to address the problems currently plaguing the country's immigration system. When considering legislation, Congress should not only examine the economic and national security impacts that the proposals will have on the United States, but should also consider the human rights implications of such legislation, particularly regarding the Mexican immigrant population. Most importantly, the country should consciously attempt to free itself of the ancient prejudices against ethnic and racial

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<sup>254</sup> *Id.*

<sup>255</sup> Senate Bill 2611, *supra* note 189, § 245(B)(a)(2).

<sup>256</sup> *Id.* § 504(a)(2).

<sup>257</sup> International Covenant on Economic, Social and Cultural Rights, 993 U.N.T.S. 3 (Dec. 16, 1966).

<sup>258</sup> *Id.* at art. 9.

<sup>259</sup> *See supra* note 230 and accompanying text.

minorities, specifically towards Mexicans, has historically driven its immigration policies.

The United States has long been a beacon of freedom and equality, and its laws and ideals have influenced countries around the world in forming their own policies. In the U.S. post-9/11 fight to stop human rights abuses by certain foreign governments, it must make sure its domestic policies themselves respect human rights and reflect these oft-touted ideals for which the country is famous. By incorporating open and explicit discussion of international human rights norms into the current immigration reform debate, the United States will not only guarantee more just and humanitarian domestic laws, but it will effectively promote the protection of human rights around the world.<sup>260</sup> For, as Eleanor Roosevelt once proclaimed, “[w]ithout concerned citizen action to uphold [human rights] at home, we shall look in vain for progress in the larger world.”<sup>261</sup>

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<sup>260</sup> THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, *supra* note 233, at ix.

<sup>261</sup> THE INTERNATIONAL BILL OF HUMAN RIGHTS, *supra* note 99, at xxiii.

