The INS No-Work Rider and the Plight of the Undocumented Worker

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Darío de Ávila and Ignacio Robles are cousins. A few years ago they came to the United States from Chihuahua, Mexico without the official knowledge of United States immigration authorities. Undocumented workers, they live in the Chicago area, sharing an apartment with other relatives who also came to this country without papers.[1] From seven in the morning until half past three the cousins work as janitors in a nursing home. From four in the afternoon until midnight they hold second jobs as janitors at a car dealership. Both jobs pay minimum wage. With hope of finding weekend cleaning jobs in private homes, Darío and Ignacio have also placed advertisements in local newspapers. Each month they try to send money home to Mexico to their aging parents and their grandmother, who receive no old age benefits of any kind.

Darío and Ignacio are in many ways typical of undocumented workers arrested by the Immigration and Naturalization Service (INS): they are under thirty, male, single, and citizens of one of Mexico's northern states.[2] They are the working poor. If arrested

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1. Darío de Ávila and Ignacio Robles used to be co-workers of mine. I have changed their names. An undocumented worker is one who enters the United States without the knowledge or permission of the Immigration and Naturalization Service (INS).

2. Ronald Goldfarb, Migrant Farmworkers: A Caste of Despair 122-27 (1981). Goldfarb suggests that 70% of undocumented workers are under 30, 90% are men, and many come from the five poor, rural Mexican states which border the United States. Goldfarb does not explain why the majority of undocumented workers appear to be men. As long as workers remain unregistered, their numbers and characteristics will remain unknown. INS registration and arrest figures are virtually the only source of statistics. Other writers suggest that the undocumented population consists of numerous women—more than INS figures would suggest. *See, e.g.*, Marlene Dixon, Elizabeth Martínez, & Ed McCaughan, *Chicanas and Mexicanas Within a Transnational Working Class: Theoretical Perspectives*, 7 Fernand Braudel Rev. 109 (1983). Due to the lack of reliable data, only speculation explains why only 10% of those arrested by the INS are women. Possibly immigrant women may work at home or in smaller enterprises less vulnerable to INS raids. Or the INS may have an unwritten policy of arresting fewer women than men. For addi-

by the INS, it would prove difficult for them to raise money for release on bond. Money for lawyers is almost out of the question, and their undocumented status disqualifies them from free legal help in any law office funded by the Legal Services Corporation.[3] The cheapest and easiest course of action, if arrested by the INS, would be to leave the country voluntarily and later re-enter the United States as soon as possible.

In 1983, the INS proposed a change in its regulations, requiring appearance and delivery bonds to contain automatic conditions prohibiting those released by the INS from holding jobs in the United States.[4] This proposed change is popularly known as the automatic no-work rider. The no-work rider prohibits employment during the course of deportation proceedings, a process which generally takes more than a year because of INS backlogs.[5] The National Center for Immigrants' Rights, Inc. (NCIR), which provides legal services to undocumented workers, has challenged the new regulation on several grounds: 1) the proposed regulation exceeds statutory authority; 2) it is not reasonably related to the purpose of assuring the alien's appearance at future deportation hearings; 3) the INS promulgated it unlawfully; 4) it violates fifth amendment guarantees of due process and equal protection; and 5) it is inconsistent with and superceded by other laws.[6]

In this argument I outline the current legal challenge to the new regulation and demonstrate how the regulation will hurt individuals facing deportation proceedings. I first examine popular attitudes and current politics surrounding immigration to the United

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tional details on the statistics of undocumented workers, see *infra* notes 25-26. For an excellent discussion of Hispanic migration to the United States, see Douglas Massey & Kathleen Schnabel, *Recent Trends in Hispanic Immigration to the United States*, 17 Int'l Migration Rev. 212 (1983). Massey and Schnabel suggest that the number of men and women is approximately equal in the population of *registered* immigrants.

3. 45 C.F.R. § 1626 (1984). If Darío and Ignacio were to apply for asylum, they might be eligible for such legal services. *Id*. Fortunately, the *pro bono* bar has provided legal services to many undocumented workers. The National Center for Immigrants' Rights, Inc. is one such organization.

4. The Board of Immigration Appeals characterizes appearance and delivery bonds as "formal instruments governed by the general provisions of 8 C.F.R. 103.6(a), (b), and (e). These instruments create a contract between the [Immigration and Naturalization] Service, the bonding agent, . . . and the surety company. There is, however, no contract between . . . the Service and the named alien . . . ." Matter of Allied Fidelity Insurance Co., Interim Decision No. 2972 at 3 (BIA 1984).

5. Brief of Appellees at 15, National Center for Immigrants' Rights, Inc. v. INS, 743 F.2d 1365 (9th Cir. 1984).

6. National Center for Immigrants' Rights, Inc. v. INS, 743 F.2d 1365, 1367 (9th Cir. 1984).

States. I then conclude that the no-work rider represents another illegal posture toward people undergoing deportation proceedings.

I. The Context of the Problem

Because of the wide-scale affluence and isolation in the United States from much of the rest of the world, many of its citizens do not understand the causes of poverty. The United States, with only about five percent of the world's population, consumes over one-third of the world's resources.[7] Those of us who enjoy this unprecedented wealth may ignore the circumstances which have led to the affluence in the United States and adopt an ideology in which we attribute our success solely to our own hard work.[8]

Those of the middle class tend to forget the special privileges of race, class, sex, and physical well-being which many of us have enjoyed throughout our lives. It is easier to blame the poor for their poverty.[9] The hard-core unemployed are called lazy. The homeless who wander our streets become the targets of jokes. Top government officials deny the reality of hunger in the United States.[10] Our current president claims to champion the interests of the poor, but his policies have increased poverty.[11] Such public

7. Lester Brown, World Without Borders 357 (1973).

8. Such special circumstances include vast regions of fertile farmland and reserves of minerals, ore, and oil. European settlers took much of this land away from the Native American nations who once enjoyed it; other land was taken from Mexico through a series of wars. Consequently, many of today's undocumented workers from Mexico dwell in places which once belonged to Mexico. *See* Rodolfo Acuña, Occupied America: A History of Chicanos (2d ed. 1981). Other conditions which led to affluence in the United States include hundreds of years of slavery, which helped the New World accumulate valuable capital. *See* Manning Marable, How Capitalism Underdeveloped Black America 3-10 (1983). Thus, the unprecedented affluence in the United States has been paid for by the suffering of many oppressed groups.

9. *See, e.g.*, Welfare Mothers Speak Out (Milwaukee County Welfare Rights Organization ed. 1972). See also William Ryan, Blaming the Victim (rev. ed. 1976) for an excellent discussion of how such attitudes allow the privileged to maintain their status without examining the causes of privilege.

10. Before he became attorney general, Edwin Meese made a series of remarks to this effect. Robert McFadden, *Comments by Meese on Hunger Produce a Storm of Controversy*, N.Y. Times, Dec. 10, 1983, at 12, col. 5.

11. Frances Fox Piven & Richard Cloward, The New Class War: Reagan's Attack on the Welfare State and Its Consequences (1982); David Rosenbaum, *How Candidates Erred in the Debate*, N.Y. Times, Oct. 9, 1984, at A29, col. 4. For example, the Reagan administration has cut Medicaid and nutrition programs for mothers and children. The latest figures on infant mortality reveal the tragedy of such cuts. Although the rate for white infants dropped four percent since 1981, the rate for Black infants went up two percent to 20 deaths per 1,000 live births—*almost exactly double the rate for white children*. *See* Alexander Cockburn, *That's Show Business*, 240 Nation 263 (1985); N.Y. Times, Feb. 24, 1985, at A1, col. 1.

and private attitudes reduce the problem of poverty to one of minor consequence. It is no surprise that our nation looks condescendingly on the obstacles that poor nations face to development.[12] Indeed, the United States at times behaves hostilely toward nations already poor.[13] In addition to killing civilians, overt and covert wars devastate the production of crops and other goods necessary for the people to live,[14] thus creating barriers to development.

The traditional measures of economic "growth" in the Americas[15] may be deceptive. Evidence suggests that people living in

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12. Drew Christiansen, *Basic Needs: Criterion for the Legitimacy of Development*, in Human Rights in the Americas: The Struggle for Consensus 245, 252 (Alfred Hennelly & John Langan eds. 1982).

13. The most recent example of this behavior is the current campaign against Nicaragua, the goal of which is to overthrow that country's elected government. *Nicaragua: Can the Sandinistas Survive?*, NACLA Report on the Americas, Jan.-Feb. 1985, at 33-42.

14. For example, the United States aids counterrevolutionaries (contras) who not only kill civilians but also try to disrupt the Nicaraguan economy by bombing farms, agricultural storage facilities, and factories. Beth Stephens, *The Contra War of Terror: Prelude to an Invasion?*, Nicaraguan Persp., Fall 1984, at 21. Two Maryknoll nuns describe the aftermath of a summer 1984 attack on their Nicaraguan village:

> It was an attack against *people*: men, women, and most sadly, children. As we stood in front of the charred and still burning beans and corn from the silos which were attacked, it was impossible for us to imagine how anyone could think they were achieving anything by burning our food supplies. These people have worked so very hard in their fields for the so very little that they have. . . .

Id. at 24.

15. In this essay I focus on the Americas as a hemisphere. Many United States citizens refer to their country as "America," forgetting that others who live in this hemisphere also view their countries as "America." For example, in 1903 Nicaraguan national poet Rubén Darío addressed a poem to then-President Theodore Roosevelt in which the poet contrasted the United States with another America—his Nicaragua.

> Los Estados Unidos son potentes y grandes.
> Cuando ellos se estremecen hay un hondo temblor
> que pasa por las vértebras enormes de los Andes. . . .
> Sois ricos.
> Juntáis al culto de Hércules el culto de Mammón;
> y alumbrando el camino de la fácil conquista,
> la Libertad levanta su antorcha en Nueva-York.
> Mas la América nuestra, que tenía poetas
> desde los viejos tiempos de Netzahualcoyotl, . . .
> que consultó los astros, que conoció la Atlántida . . .
> esa América
> que tiembla de huracanes y que vive de amor, . . . vive.
> Y sueña. Y ama, y vibra, y es la hija del Sol.
> Tened cuidado. ¡Vive la América española!
> Hay mil cachorros sueltos del León Español.
>
> [The United States is big and powerful.
> When it shakes there is a deep tremor
> that passes through the enormous vertebrae of the Andes. . . .

already poor nations have in fact become increasingly impoverished.[16] In addition to unemployment and underemployment rates often in excess of fifty percent,[17] in many countries only a handful possess the wealth and land.[18] This situation, combined with poverty and political oppression,[19] prompts many to seek relief in migration to the United States.[20]

You are rich.
You associate the cult of Hercules with the cult of Mammon;
Liberty raises her torch in New York,
lighting the way of easy conquest.
But *our* America, that had poets
from the ancient times of Netzahualcoyotl, . . .
that consulted the stars, that knew Atlantis . . .
that America
that trembles with hurricanes and lives with love, . . . lives.
And dreams. And loves and is alive and is the daughter of the Sun.
Be careful. Latin America lives!
There are a thousand of the Spanish lion's cubs running loose.]

Rubén Darío, *A Roosevelt*, in Antología de Rubén Darío 45, 46 (Jaime Torres Bodet ed. 1966) (emphasis added). The Americas (North America, Central America, South America, and the Caribbean) are linked economically, politically, and geographically. Since at least 1823, when then-President James Monroe unilaterally declared that the United States would not permit European intervention in the Western Hemisphere, successive United States presidents have treated the area from the Canadian territories to the tip of South America as essentially one geopolitical unit for the purposes of drawing the boundaries of the United States' sphere of influence. Two authors further expose the United States' colonization of the Americas as one of their major themes. Noam Chomsky & Edward Herman, The Washington Connection and Third World Facism (1979).

16. Christiansen, *supra* note 12, at 245.

17. Mitchell Seligson & Edward Williams, Maquiladoras and Migration Workers in the Mexico-United States Border Industrialization Program 55 (1981).

18. Penny Lernoux, Cry of the People 20 (1982).

> Whether the country is Brazil or Guatemala, more or less industrialized, in South or Central America, the statistics are always the same: a tiny minority, usually 1 to 4 percent of the population, owns the majority of the arable land and takes an overwhelming share of the nation's agricultural and industrial wealth. The great majority [of the people], in the slums or impoverished rural villages, owns little or no land, is undernourished, illiterate or semiliterate, and unemployed or underemployed.

Id.

19. Some distinguish between "economic" refugees and "political" refugees. This distinction is misleading. In reality, economic and political oppression often occur together. When the poor attempt to empower themselves through cooperatives or unions, their governments often repress them. Penny Lernoux offers Paraguay as a typical example of a government which attempts to repress self-government among the poor: "[W]henever an attempt is made to establish cooperatives or unions, the government suddenly discovers a 'communist conspiracy' and sends troops into the countryside to destroy the cooperatives, burn the peasants' huts, rape the women, and kill or imprison the men." Lernoux, *supra* note 18 at 20-21.

20. Goldfarb, *supra* note 2, at 120-26. No consensus, however, exists on whether or not unemployment and poverty alone lead immigrants to enter the United States in search of work. *See* Jorge Bustamante, *The Mexicans are Coming: From Ideology to Labor Relations*, 17 Int'l Migration Rev. 323, 324 (1983) ("there is not a direct

In nineteenth century Europe, during a period of industriali-

causal relationship between poverty and emigration to the United States . . . .") (citing Wayne Cornelius, Building the Cactus Curtain: Mexican Migration and U.S. Responses, from Wilson to Carter (1980)). The United States' policies in the Americas discourage and sometimes prevent balanced agricultural and industrial diversification, which might benefit the poor. *See* Mario Barrera, Race and Class in the Southwest 191 (1979). Indeed, United States and multinational corporations have profited by consistently exploiting Latin America's labor and non-renewable natural resources. *See* Theodore Moran, Multinational Corporations and the Politics of Dependence: Copper in Chile 3 (1974); Michael Turner, *Stealing the Third World's Nonrenewable Resources: Lessons from Brazil*, Monthly Rev., April 1984, at 26-35. Pablo Neruda, the late Chilean poet and winner of the 1971 Nobel Prize for Literature, expressed this reality thus:

> Cuando sonó la trompeta, estuvo
> todo preparado en la tierra,
> y Jehová repartió el mundo
> a Coca-Cola Inc., Anaconda,
> Ford Motors, y otras entidades:
> la Compañía Frutera Inc.
> se reservó lo más jugoso,
> la costa central de mi tierra,
> la dulce cintura de América.
>
> [When the trumpets had sounded and all
> was in readiness on the face of the earth,
> Jehovah divided his universe:
> to Coca-Cola, Inc., Anaconda,
> Ford Motors, and similar entities:
> the most succulent item of all,
> the United Fruit Company Incorporated
> reserved for itself:
> the central coast of my country,
> the soft waist of America.]

Pablo Neruda, *La United Fruit Co.*, in Canto General 246 (1950). As Noam Chomsky and Edward Herman have noted, profits become more important than human rights:

> Human rights have tended to stand in the way of the satisfactory pursuit of U.S. economic interests—and they have, accordingly, been brushed aside, systematically. U.S. economic interests in the Third World have dictated a policy of containing revolution, preserving an open door for U.S. investment, and assuring favorable conditions of investment. Reformist efforts to improve the lot of the poor and oppressed, including the encouragement of independent trade unions, are not conducive to a favorable climate of investment.

Chomsky & Herman, *supra* note 15, at 53. Furthermore, many of our past and present policy makers have decided that our national security requires support for the status quo. Lars Schoultz, Human Rights and United States Policy Toward Latin America 379 (1981). Again, as Noam Chomsky and Edward Herman have noted:

> The basic *fact* is that the United States has organized under its sponsorship and protection a neo-colonial system of client states ruled mainly by terror and serving the interests of a small local and foreign business and military elite. . . . Since 1960 over 18 Latin American regimes have been subjected to military takeovers—a "domino effect" neglected in the West. U.S. influence has been crucial in this process, in some cases by means of deliberate subversion or even direct aggression, but invariably important given the substantial economic and military penetration and presence of the superpower.

zation and related enclosure of lands, hundreds of thousands of people emigrated to North America.[21] Today, when industrialization and enclosures are combined with even greater population pressures in Latin America and the Caribbean, it is often the descendents of those very European immigrants who protest the most loudly. They fail to see that the new immigrants are responding to the problem in ways not dissimilar to their own ancestors'. In fact, they make the undocumented worker the scapegoat for the failure to reach the goal of full employment in the United States.[22] Abundant evidence shows, however, that non-citizens, particularly the undocumented, contribute more than their share of taxes and help create jobs in many sectors.[23]

Undocumented workers come from many parts of the world.[24] Because of their status, they are hidden from the public view. They are the source of much controversy. Thus, their exact numbers are unknown.[25] A substantial percent of the undocu-

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Chomsky & Herman, *supra* note 15, at ix. Similarly, past and present United States administrations have viewed indigenous struggles to combat oppression as manifestations of Soviet expansionism. *Editors' Introduction* to El Salvador: Central America in the New Cold War at 4 (Marvin Gettleman, Patrick Lacefield, Louis Menashe, David Mermelstein & Ronald Radosh eds. 1982).

21. *See* Brown, *supra* note 7, at 62-63; 1 Karl Marx, Capital 786-87, 1080-82 (Ben Fowles trans. 1977).

22. Bustamante, *supra* note 20, at 323 ("[T]he political use and publicity given to the issue of Mexican migration to the United States varies with the appearance and disappearance of economic crises [in the United States], particularly those which involve marked increases in unemployment."). *See also* Acuña, *supra* note 8, at 155-89 (massive roundups of undocumented workers occur most frequently in times of economic crisis).

23. Julian Simon, Nine Myths About Immigration, Heritage Found. Backgrounder, Feb. 1, 1984, at 1, 4-5.

24. The number of individuals seeking to enter the United States exceeds immigration quotas. Two groups of visas subject to numerical limitation are limited by statute to 270,000 visas per year. 8 U.S.C. § 1151(a) (1982). These are available on a worldwide basis of 20,000 visas per year to certain independent countries as identified by the State Department. In the case of Mexico, the annual quota is 40,000. The number of people wishing to emigrate from Mexico, however, greatly exceeds 40,000 per year. Thus many people come to the United States without immigrant visas. Non-immigrant visas, which include certain classes of tourists, students, and business people, are not subject to any numerical limitation. These visas are, however, sometimes difficult to obtain.

25. Goldfarb, *supra* note 2, at 124. "Experts guess that the total is over 8 million, though many . . . stay only temporarily." *Id.* at 125. Courtenay Slater, former chief economist at the Commerce Department, estimates the total at slightly over two million. For her calculation, she used both census estimates and other sources to develop a profile of the undocumented worker population. The United States Census Bureau's methodology, used by Slater, consisted of taking the number of foreign-born people identified by the census and subtracting the number of immigrants who have registered with the INS. *Illegal Aliens Aid Economy, Study Finds*, Chicago Tribune, Dec. 28, 1984, § 1, at 3, col. 4 [hereinafter cited as *Illegal Aliens Aid Economy*].

mented, though seldom mentioned, are Europeans. Mexicans comprise roughly fifty percent of the total, but are the focus of most of the debate and the activities of the INS.[26] Mexicans constitute approximately ninety percent of those arrested by the INS.[27] These statistics on apprehension suggest an INS preoccupation with arresting Spanish-speaking workers, especially Mexicans.[28] Spanish-speaking workers are vulnerable targets for INS agents.[29] Pan-his-

26. Bustamante, *supra* note 20, at 329. Courtenay Slater describes the undocumented population as follows: 50% come from Mexico, 25% come from Central and South America, 10% come from Asia, and the remaining 15% come from Europe, Canada, Africa, and Oceania. Thus, about 75% of immigrants to the United States come from the Americas. *Illegal Aliens Aid Economy*, *supra* note 25, § 1, at 3, col. 4.

27. Gilbert Cardenas, *Los Desarraigados: Chicanos in the Midwest Region of the United States*, 7 Aztlán 153, 165 (1976).

28. Bustamante, *supra* note 20, at 329. Bustamante attributes this apparent preoccupation with arresting Spanish-speaking workers, especially Mexicans, to xenophobia. *Id.* at 328. Mexicans as a class have been blamed for a variety of social ills, especially unemployment in the United States. *See supra* note 22.

29. The probable cause standard for INS arrest is broader than it is in the criminal context. For example the speaking of a foreign language may constitute reasonable cause. The Immigration and Nationality Act empowers immigration agents to arrest, without a warrant, "any alien . . . if [she or] he has reason to believe that the alien so arrested is . . . in violation of any such law . . . and is likely to escape before a warrant can be obtained. . . ." 8 U.S.C. § 1357(a)(2) (1982). In practice, this standard is quite broad. United States v. Rodriguez, 532 F.2d 834, 836 (2d Cir. 1976) (in view of the information received from an informant that "illegal aliens" were living in two houses, an INS agent who noticed a male of "Hispanic appearance" seated in an "old" car was justified in questioning the suspect concerning his right to be in the United States).

Identity documents have been proposed which would quickly identify citizenship status. Many ethnic organizations oppose proposals for identity documents which would verify citizenship, arguing that they would result in discrimination on ethnic and perhaps racial grounds. Presumably, such proposed regulations would appear neutral on their face. Nevertheless, INS agents likely would continue their practice of arresting Hispanics disproportionately.

Discussions of legal challenges to selective prosecution often begin with Yick Wo v. Hopkins, 118 U.S. 356 (1886), a case in which a municipal licensing ordinance, neutral on its face, was held unconstitutional because the city enforced it largely against Chinese business establishments. Similarly, criminal prosecutors may not, in theory, prosecute based on the exercise of first amendment rights. In contrast to criminal prosecutors, the INS may investigate those who criticize it. For example, the INS recently raided the offices of El Diario, a Spanish language daily newspaper in New York which has openly criticized the Simpson-Mazzoli bill and conditions at INS detention facilities. INS agents "visited" the offices of El Diario to check the immigration status of three reporters and an editor. The editor, Manuel de Dios Unanue, claimed that the visit was in retaliation for criticism of the INS: "I don't accept their excuse for coming in here. It was too much of a coincidence that three of the people they wanted to talk to wrote the articles on Hispanics confined by the I.N.S." Jesus Rangel, *Immigration Agents Visit Offices of Spanish-Language Newspaper*, N.Y. Times, Oct. 13, 1984, at L31, col. 5. The agents checked, were satisfied that the four employees were lawfully here in the United States, and the case was closed. *Id.*

More recently, using evidence gleaned by the INS, the Justice Department has also begun to arrest those who openly give sanctuary to Central American refugees

panic organizations complain of raids in which workers are arrested in the middle of the night and detained.[30] Even in their sleep, undocumented workers find no respite from the threat of discovery and deportation.

On the other hand, government officials appear to tolerate the presence of undocumented laborers in the United States at certain times and in certain regions. In such cases, the government may act under pressure from agribusiness and industry, which demand a source of cheap labor.[31] Lower labor costs for industry increase competitiveness. In reality the flow of Mexican workers between the United States and Mexico is part of an international labor migration. This migration is sometimes described as a "push-pull" phenomenon.[32] Poverty in their homelands "pushes" workers to emigrate. Relative economic stability in the United States, in turn, "pulls" them here. Another less recognized "pull" factor, however, arises out of the many advantages of using foreign workers. For example, agricultural employers can legally pay workers and their children[33] sub-minimum or low wages. If workers live in housing that is incident to their employment, as do many farmworkers, they do not enjoy benefits currently accorded to legal tenants.[34] Finally, undocumented workers' fear of discovery

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who fear death or persecution if they return to their homelands. *See* Tom Morganthau, *No Hiding Place Here*, Newsweek, March 4, 1985, at 14. Perhaps such incidents are not the fault of the INS. It is a common conclusion that the INS is understaffed and nearly overwhelmed by statutory obligations. *See* David Weissbrodt, Immigration Law and Procedure in a Nutshell 396 (1984).

30. Goldfarb, *supra* note 2, at 121. This practice, however, may occur infrequently.

31. Acuña, *supra* note 8, at 163.

32. Goldfarb, *supra* note 2, at 121 ("The fundamental problem lies in the profound causes of illegal immigration, not in the inadequacy of the stopgap of enforcement. In the parlance of those who analyze our country's immigration policies, illegal aliens in the agricultural labor market pose a 'push-pull' problem of international policies.").

33. Many assume that child labor has been eradicated. This is false. Laws permit child labor in the agricultural sector. *See, e.g.*, Ronald Taylor, Sweatshops in the Sun (1973); Paula DiPerna, *Child Labor and Pesticides: The Lethal Cloud of Indifference*, 232 Nation 786 (1981); *Expanding the Kiddie Work Force*, 147 America 44 (1982).

34. Traditionally, "a farm laborer, occupying a house on a farm, does so as a servant, and not as a tenant." Turner v. Mertz, 3 F.2d 348, 350 (D.C. Cir. 1925). Undocumented workers who work on farms have little bargaining power and little freedom of movement. If they complain about living or working conditions, their employers may retaliate by reporting them to immigration authorities. In recent years, however, a few federal district courts have recognized that migrant farmworkers can be "tenants." Folgueras v. Hassle, 331 F. Supp. 615 (W.D. Mich. 1971); Franceschina v. Morgan, 346 F. Supp. 833 (S.D. Ind. 1972). In reaching this result, both courts recognized the fiction of "free" housing for the workers, noting that they paid rent in the form of extremely low wages.

and deportation discourages them from organizing.[35] Thus, in examining migration, one cannot discount these less recognized "pull" factors that encourage employers to hire undocumented workers.

Immigration expert Jorge Bustamante argues that business, which helps create a demand for undocumented labor, also influences the rules governing migration.[36] This influence reflects the imbalance of power between United States employers and immigrant workers.[37] Government and business tolerate undocumented labor's presence because it fills the "secondary labor market."[38] Many critics posit the existence of two labor markets to explain the persistence of poverty among minority peoples in the United States.[39]

The primary market offers jobs with security, good pay, and possibility for advancement. The secondary market offers jobs with opposite conditions.[40] It is in the secondary labor market that Africans, Latin Americans, and other minorities and their descendents are disproportionately employed. Employers in marginal industries and services who are able to employ minorities, particularly the undocumented, have much to gain from this system. The imbalance of power between employer and undocumented employee is most clearly manifested by regulations which penalize employees for accepting work, rather than the employers, the source of the "pull," who do the hiring. While it is generally illegal for an alien[41] to accept employment in this country without special authorization, it is *not* illegal for an employer to hire such a person under federal law.[42]

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35. In theory, undocumented workers have the right to be protected from retaliation for union activity. Sure-Tan, Inc. v. NLRB, 104 S. Ct. 2803 (1984). In practice, an employer could leave an anonymous tip with INS agents.

36. Bustamante, *supra* note 20, at 324.

37. *Id.*

38. Barrera, *supra* note 20, at 209-12.

39. *Id.*

40. *Id.* at 209.

41. The INA defines an alien as "any person not a citizen or national of the United States." 8 U.S.C. § 1101(a)(3) (1982).

42. Goldfarb, *supra* note 2, at 121. Both versions of the Simpson-Mazzoli bill, proposed last congressional term, would have imposed sanctions on employers. S. 529, 98th Cong., 1st Sess. (1983); H.R. 1510, 98th Cong., 1st Sess. (1983). This may explain why Congress has not yet passed the bill, despite persistent calls for "immigration reform." Several senators, however, plan to re-introduce a "streamlined" version of the bill in the 99th Congress. The heart of this bill still involves employer sanctions. John Dillin, *U.S. Immigration-reform Backers Plan Early Push*, Christian Sci. Monitor, Feb. 20, 1985, at 1, col. 3. Twelve states have employer sanction laws. Cal. Lab. Code § 2805 (West Supp. 1985); Conn. Gen. Stat. Ann. § 31-51k (West Supp. 1985); Del. Code Ann. tit. 19, § 705 (1979); Fla. Stat. Ann. § 448.09 (West Supp. 1981); Kan. Stat. Ann. § 21-4409 (1981); Me. Rev. Stat. Ann. tit. 26,

Since the 1920's, immigration officials have engaged in publicized campaigns to deport undocumented Mexican workers. The campaigns usually coincide with hard economic times: for example, the early 1930's, the recession of 1954, and the recessions of the 1970's and early 1980's.[43] The better publicized the deportations, the more they placate the xenophobia of some sectors of the United States public[44] who favor a "get tough" policy toward undocumented workers.[45] Mass investigatory stops of workers are therefore likely to be politically popular. The INS regularly conducts farm and factory raids in which armed agents block worksite exits and question employees about their immigration status.[46] The constitutionality of such raids was recently upheld by the United States Supreme Court.[47]

Undocumented workers already face a massive governmental apparatus that restricts their civil and political rights. Because they cannot vote, they are not represented in government. They encounter state-sanctioned discrimination every day. In particular the undocumented live in fear day and night of deportation—a civil penalty in theory, a quasi-criminal punishment in reality.[48] Now the INS has proposed a new legal tool to exert an even higher degree of control over undocumented workers.

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§ 871 (West Supp. 1984); Mass. Ann. Laws ch. 149, § 19C (Michie Supp. 1985); Mont. Code Ann. § 39-2-305 (1983); N.H. Rev. Stat. Ann. § 275-A:4-a (Supp. 1983); N.J. Stat. Ann. § 34:9-1 (West 1965); Vt. Stat. Ann. tit. 21, § 444a (1978); Va. Code § 40.1-11.1 (1981).

43. Acuña, *supra* note 8, at 163.

44. *See, e.g.*, Barrera, *supra* note 20, at 213 ("To the extent that employers have been successful, . . . [white and] Anglo workers have seen their enemies as the manipulated minority workers, rather than the manipulators.").

45. *See* Dillin, *supra* note 42.

46. Elizabeth Hull, Without Justice for All 100-05 (1985).

47. INS v. Delgado, 104 S. Ct. 1758 (1984). Justice Rehnquist, writing for the majority, found that raids did not constitute searches or seizures within the meaning of the fourth amendment. Instead, he characterized mass interrogations of workers by armed INS agents as "classic consensual encounters." *Id.* at 1765. Justices Brennan and Marshall, dissenting, took the majority to task for its "studied air of unreality." *Id.* at 1767.

> Although none of the respondents was physically restrained by the INS agents during the questioning, it is nonetheless plain beyond cavil that the manner in which the INS conducted these surveys demonstrated a "show of authority" of sufficient size and force to overbear the will of any reasonable person. . . .
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> . . . .
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> . . . As a final reminder of who controlled the situation, one INS agent remarked as they were leaving Delgado that they would be coming back to check him out again *because he spoke English too well*.

Id. at 1769-70 (emphasis added).

48. Like a criminal conviction, deportation may result in "loss of both property and life; or of all that makes life worth living." Ng Fung Ho v. White, 259 U.S. 276, 284 (1922).

II. The Proposed Regulation: The INS No-Work Rider

On November 7, 1983, the INS revised its regulations governing appearance and delivery bonds.[49] In general, persons detained by the INS pending deportation or exclusion hearings may be released on bond if they agree to fulfill the bond conditions, typically payment of a sum of money and a promise to appear at the hearing.[50] Under the revised regulation, the INS District Director automatically imposes a no-work rider on the bond.[51] This rider prohibits the released person from holding a job. It allows the District Director, at her or his sole discretion, to grant special work authorization in certain instances, upon the alien's filing an application for relief. The alien has the burden of showing special hardship before the work authorization is granted. Among the factors which may be considered when an application is made (by the alien to the District Director) are the following:

(a) Safeguarding employment opportunities for United States citizens and lawful permanent resident aliens;

(b) prior immigration violations by the alien;

(c) whether there is a reasonable basis for considering discretionary relief; and

(d) whether a United States citizen or lawful permanent resident spouse or children are dependent upon the alien for support, or other equities.[52]

A. *A Legal Challenge:* National Center for Immigrants' Rights, Inc. v. INS

On December 6, 1983, one day before the regulation was to become effective, the National Center for Immigrants' Rights, Inc.

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49. 8 C.F.R. §§ 103.6, 109.1 (1985). *See supra* note 4 for an explanation of appearance and delivery bonds.

50. The conditions of a delivery bond are specific. They are violated if the obligor fails to cause the alien to appear upon each and every request until deportation proceedings in the case are finally terminated. Matter of Smith, 16 I. & N. Dec. 146, 151 (R.C. 1977).

51. The new regulation provides in part: "A condition barring employment shall be included in an appearance and delivery bond in connection with a deportation proceeding. . . . Only those aliens who upon application . . . establish compelling reasons for granting employment authorization may be authorized to accept employment." 8 C.F.R. § 103.6(a)(2)(ii)-(iii) (1985). The previous INS regulations provided that the District Director, with the prior approval of the Regional Commissioner, could include a condition barring unauthorized employment in an appearance and delivery bond in connection with deportation proceedings. 8 C.F.R. § 103.6(a)(2)(ii) (1983). In contrast, the new regulation does away with individualized determinations: the INS imposes the no-work rider automatically.

52. 8 C.F.R. § 103.6(a)(2)(iii) (1985).

(NCIR) brought suit to prevent implementation of the INS rider.[53] After a hearing on December 8, 1983, the United States District Court for the Central District of California denied a temporary restraining order and scheduled a hearing on the NCIR's motion for a preliminary injunction.[54] On December 16, 1983, after hearing evidence and testimony, the court granted a nationwide preliminary injunction against enforcement of the regulation.[55] The court based its decision on only two of the NCIR's theories. First, it concluded that the NCIR has a probable chance of proving the regulation inconsistent with the Immigration and Nationality Act. Second, the court found it likely that the regulation violates due process guarantees.[56] In addition, the court found that the harm to the plaintiffs would be irreparable if the regulation were applied to them.[57] It further observed that individuals subject to the no-work condition would be unable to support themselves and their dependents pending their deportation hearings and consequently would have more difficulty obtaining bonds[58] and counsel.[59] The court therefore held that the harm to the plaintiffs clearly outweighed the government's harm from delay in implementing the regulation.[60]

The INS appealed the injunction to the United States Court of Appeals for the Ninth Circuit. The Ninth Circuit remanded the case back to the district court for class certification.[61]

On March 7, 1985, United States District Judge David Kenyon, Jr. granted summary judgment to the NCIR.[62] First, the court found that the automatic no-work rider went beyond the statutory authority of the INS. Second, the court found that the regulation was not reasonably related to ensuring an alien's appearance at future hearings.[63] The INS plans to appeal the

53. National Center for Immigrants' Rights, Inc. v. INS, 743 F.2d 1365, 1367 (9th Cir. 1984).

54. *Id.* at 1367-68.

55. *Id.* at 1368.

56. *Id.*

57. *Id.*

58. *Id.* For some plaintiffs in detention, the employment prohibition was the *only* factor preventing their release with the assistance of bonding companies. Brief of Appellees at 6, National Center for Immigrants' Rights, Inc. v. INS, 743 F.2d 1365 (9th Cir. 1984).

59. 743 F.2d at 1368.

60. *Id.*

61. *Id.* at 1371-72. The NCIR framed its complaint as a class action, but did not move for class certification prior to the preliminary injunction. The district court enjoined the INS from applying the regulation without making any findings as to class membership.

62. No. 83-7927-KN, slip op. at 15 (C.D. Cal. March 7, 1985).

63. *Id.* at 8.

ruling.[64]

In the interim, although the automatic no-work rider regulation appears in the 1985 Code of Federal Regulations, the rider has not gone into effect. Only the appeals process will determine whether the regulation will ever be implemented.

The Board of Immigration Appeals in *Matter of Shuen*[65] ruled that the injunction against enforcement of the automatic no-work rider does not automatically cause the original version of that regulation to be revived. In other words, the INS cannot enforce the case-by-case no-work rider which appeared in the 1983 Code of Federal Regulations. Thus, while appeals are pending, neither the case-by-case nor the automatic no-work rider will be imposed in appearance and delivery bonds—unless, of course, the INS re-promulgates the 1983 version of the no-work rider.

B. Bond Conditions Under Earlier INS Regulations

Previous INS practices and Attorney General opinions evince a demand for limits on the imposition of no-work riders. Congress delegates major responsibility for enforcement of the Immigration and Nationality Act to the Attorney General,[66] who in turn discharges his duties through the INS, a division of the Department of Justice. Congress authorizes the Attorney General to set a variety of bond conditions. The Attorney General and the INS exercise wide discretion over bond conditions. The government may generally enter into contract arrangements or take any bonds not prohibited by law, even though not expressly mandated by statute.[67] In the immigration context, courts do not limit the government's recovery on a bond to the damages flowing from the alien's breach of a bond condition.[68] Nevertheless, bond conditions must be reasonable.[69] Courts have upheld bail amounts as high as $25,000 where the INS deemed the detainee a poor bail risk.[70] In keeping with the INS's purported policy of keeping detention periods at a minimum,[71] courts have concluded that no bond should be required at all unless the alien is a threat to national security or a

64. Miami Herald, March 11, 1985, at A4, col. 1.

65. Interim Decision No. 2977 (BIA 1984).

66. 8 U.S.C. § 1103(a) (1982).

67. United States v. Wolper, 86 F.2d 715, 717 (2d Cir. 1936).

68. United States v. Goldberg, 40 F.2d 406, 407 (2d Cir. 1930). In other words, the government's monetary recovery is not limited to damages the government can show it suffered because the alien violated a condition of the bond.

69. Matter of Toscano-Rivas, 14 I. & N. Dec. 523, 527 (BIA 1972, AG 1974).

70. Hernandez-Avila v. Boyd, 294 F.2d 373 (9th Cir. 1961).

71. Matter of Kwun, 13 I. & N. Dec. 457, 464 (BIA 1969).

poor bail risk.[72]

Earlier INS regulations did not always permit no-work riders. As in the criminal context, certain double or multiple bond conditions, such as admission of the undocumented alien as a non-immigrant *and* his or her promise to depart promptly, have been enforceable in federal court.[73] In the early 1970's a respondent[74] in deportation proceedings challenged the authority of the INS to impose no-work conditions in *Matter of Toscano-Rivas*.[75] In *Toscano-Rivas*, the Board of Immigration Appeals and later the Attorney General found that the INS had the authority in *some* circumstances to impose such a condition. The Attorney General expressed preference, however, for appropriate substantive safeguards with respect to the imposition of such a no-work rider: "[B]efore a condition of that nature is imposed, there should be a regulation of the [Immigration and Naturalization] Service dealing specifically with the subject."[76]

In response to the Attorney General's opinion, the INS altered its regulations to provide for prior approval by the Regional Commissioner of any condition barring the alien's employment,[77] creating the "case-by-case" no-work rider. The revised regulation set forth nine factors to be considered before imposing a no-work condition. The factors included the existence of a financially dependent spouse or children or "other equities."[78] In addition, these no-work riders were not automatically upheld by the Board of Immigration Appeals, in light of the serious concern expressed by the Attorney General in *Toscano-Rivas* for utmost care in im-

72. Matter of Vea, 18 I. & N. Dec. 171, 174 (BIA 1981); Matter of Patel, 15 I. & N. Dec. 666, 666 (BIA 1976). In practice, as the Board of Immigration Appeals recognized in *Patel*, the alien should be granted release on personal recognizance unless she or he poses a risk to national security or is likely to flee the jurisdiction. The INS has discretion to determine whether the alien threatens national security and may base its decision on undisclosed security information. United States *ex rel*. Barbour v. District Director of the INS, 491 F.2d 573 (5th Cir. 1974), *cert. denied*, 419 U.S. 873 (1974). The factors considered relevant by the Board of Immigration Appeals in *Patel* to determine bail risk include: prior arrests, convictions, illegal entry into the United States, participation in "subversive activities," employment status, and the presence of relatives in the United States. The bail or parole decision is reviewable by any court of competent jurisdiction. 8 U.S.C. § 1252(a) (1982).

73. Earle v. United States, 254 F.2d 384 (2d Cir. 1958), *cert. denied*, 358 U.S. 822 (1958).

74. A respondent is a person facing deportation proceedings.

75. 14 I. & N. Dec. at 523 (BIA 1972, AG 1974).

76. *Id*. at 556.

77. Matter of Leon-Perez, 15 I. & N. Dec. 239, 240 (BIA 1975).

78. *Id*.; Matter of Chew, 18 I. & N. Dec. 262 (BIA 1982). Those factors resemble the factors in the current regulations that may be considered before *not* imposing the bond condition.

posing bond conditions prohibiting employment.[79] Thus, under earlier regulations immigration judges imposed no-work riders on a case-by-case basis, subject to further administrative review.

On November 7, 1983, the INS revised its regulations to provide for the *automatic* inclusion of the no-work rider—the regulation at issue in *National Center for Immigrants' Rights, Inc. v. INS*. Incredibly, a decade earlier, during the oral arguments for *Toscano-Rivas*, attorneys for the INS assured the members of the Board of Immigration Appeals that *no-work riders would not be imposed on a massive scale.*[80] The revised regulation, however, does just that.

C. Legal Arguments

The legal arguments at issue in *National Center for Immigrants' Rights, Inc. v. INS* find several bases in the Constitution. First, the revised regulation may exceed the statutory authority of the Immigration and Nationality Act. Nowhere in the Immigration and Nationality Act does Congress explicitly authorize the Attorney General to impose a no-work rider.[81] Although the Attorney General has wide discretion in setting conditions for release on bond from INS custody, the statute requires that conditions be reasonable.[82] Furthermore, due process requires that government acts pass at least a rational basis standard of review.[83]

The Board of Immigration Appeals and the Attorney General agree that a bond serves two purposes. A bond may assure the appearance of the allegedly deportable individual at a forthcoming hearing *and* "protect American workers."[84] The INS concedes, however, that the revised regulation may not have any net effect on the number of individuals permitted to work.[85] Theoretically, the District Director of the INS could grant discretionary relief to every applicant who applies. Thus, the automatic no-work rider

79. Matter of Leon-Perez, 15 I. & N. Dec. 239, 241 (BIA 1975).

80. Counsel [for Toscano-Rivas] asserted that . . . if we permit the Service to impose this no-work condition the Immigration Service will exact a similar bond from every alien arrested inside the United States. The appellate trial attorney [for the INS] denied that the Service has such an intention. *He stated that the result of such action would be great hardship, that large numbers of dependents would be forced onto relief rolls pending processing of immigration cases, and that this is not what the Service wants.*

14 I. & N. Dec. at 537 (emphasis added).

81. 8 U.S.C. § 1252(a) (1982).

82. Matter of Toscano-Rivas, 14 I. & N. 523 (BIA 1972, AG 1974).

83. Hampton v. Mow Sun Wong, 426 U.S. 88 (1976).

84. Matter of Toscano-Rivas, 14 I. & N. 523 (BIA 1972, AG 1974).

85. 48 Fed. Reg. 51,143 (1983).

may not have the effect of safeguarding employment opportunities for United States citizens. It also does not assure the appearance of the respondent at forthcoming hearings. Undermining a person's ability to work discourages her or him from maintaining the stable life within the jurisdiction which insures her or his appearance at hearings. The regulation coerces people to leave the country rather than exercise their right to a deportation hearing. Because the regulation is not rationally related to its two articulated purposes, it cannot satisfy the minimum requirements of due process.

Moreover, the proposed regulation may violate liberty and property interests within the meaning of the fifth and fourteenth amendments: no person shall be deprived of "life, liberty, or property, without due process of law."[86] Loss of a job calls into question both liberty and property interests.[87] The regulation violates these interests without a due process hearing.[88]

In recent decades, federal courts have expanded the definition of property to include such diverse interests as welfare benefits,[89] drivers' licenses,[90] attendance at public schools,[91] and many other important interests. Wages, in particular, are afforded protection by the courts.

The Supreme Court in *Sniadach v. Family Finance Corp.*[92] recognized that wages are a "specialized type of property presenting distinct problems in our economic system." When a creditor uses government-enforced procedures to garnish the wages of an alleged debtor, the government deprives the debtor of an important property interest. Because of the special role that wages play in our society, the Court in *Sniadach* invalidated the garnishment of a portion of a wage earner's salary to safeguard the interests of an alleged creditor, *absent a prior hearing.*[93]

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86. U.S. Const. amend. V, XIV.

87. Bishop v. Wood, 426 U.S. 341 (1976).

88. No hearing of any type is held either before imposing the no-work rider or in conjunction with the application for relief to the District Director. Although persons can seek review of the no-work rule before immigration judges in bond-redetermination "hearings," these are informal proceedings in which no testimony is taken, no opportunity for cross-examination exists, and no verbatim record is kept. Also, exhaustion of administrative remedies is a lengthy process during which people subject to the no-work rider have to go without access to the basic necessities of life. Brief of Appellees at 14-15, National Center for Immigrants' Rights, Inc. v. INS, 743 F.2d 1365 (9th Cir. 1984).

89. Goldberg v. Kelly, 397 U.S. 254, 262 (1970).

90. Bell v. Burson, 402 U.S. 535 (1971).

91. Goss v. Lopez, 419 U.S. 565 (1975); Plyler v. Doe, 457 U.S. 202 (1982).

92. 395 U.S. 337, 340 (1969).

93. *Id.* at 342.

For those who have jobs when arrested by the INS, the new regulation is even harsher than the procedure challenged in *Sniadach*. The garnishment statute at issue in that case only allowed creditors to take a certain percentage of a worker's wages. The revised INS regulation takes away a worker's entire livelihood automatically, even though deportability has not yet been established. Employment, even more than the welfare benefits at stake in *Goldberg v. Kelly*, helps a worker meet the "basic demands of subsistence."[94] To terminate an individual's employment automatically, without a due process hearing, is to take away her or his means of subsistence. Not until the deportation hearing occurs is the respondent's deportability actually adjudicated.[95]

Liberty interests are also a concern. The NCIR further contends that detained persons have a protected liberty interest in working *until their deportability is determined*. Among the liberties that the due process clause protects is the right to pursue a profession.[96] Liberty interests that the Supreme Court has recognized include a prisoner's right to freedom upon release on parole[97] and a high school student's interest in freedom from "unjustified intrusions on personal security" (corporal punishment).[98] The loss of a job is an equally severe deprivation and intrusion into a worker's life.

In order for a respondent in deportation proceedings to lead a stable life within the jurisdiction, she or he must be allowed to continue working until deportability has been adjudicated. The automatic termination of employment means the automatic termination of a livelihood.

D. The Effect of the Regulation

As did the attorney for the INS in *Toscano-Rivas*,[99] the NCIR predicts that respondents will experience extreme hardship if the regulation ever goes into effect. First, the regulation conflicts with the INS policy of keeping detention periods at a minimum.[100] The INS has conceded that the regulation will result in fewer bonds being written and more people being detained for longer periods of

94. 397 U.S. 254, 265 (1970).

95. The Second Circuit held in United States *ex rel*. Bishop v. Watkins, 159 F.2d 505, 506 (2d Cir. 1947), *cert. denied*, 331 U.S. 839 (1947), that the government has the initial burden of proving, with clear and unequivocal evidence, that the alleged alien is indeed an alien.

96. Ludtke v. Kuhn, 461 F. Supp. 86, 96 n.7, 98 (S.D.N.Y. 1978).

97. Morrissey v. Brewer, 408 U.S. 471, 479-82 (1972).

98. Ingraham v. Wright, 430 U.S. 651, 673 (1977).

99. 14 I. & N. Dec. at 537.

100. Matter of Kwun, 13 I. & N. 457, 464 (BIA 1969).

time.[101] As a practical matter, individuals prohibited from working find it difficult to obtain bonds.[102] As a consequence, many respondents will remain in detention centers.

Second, the typical undocumented worker, having no money for a lawyer and ineligible for most free legal services,[103] may be detained in an isolated rural area, far from *pro bono* immigration attorneys. Thus the respondent may be unaware of her or his legal options upon detention: bond re-determination hearings, habeas corpus petitions, application for the removal of the no-work rider itself, and other types of discretionary relief.

Respondents who manage to secure release from detention may fall deeper into poverty, as will domestic and foreign relatives relying on respondents' earnings in the United States. Without employment, people without documents have no legal means to supplement or maintain their income. They will be unable to afford food, housing, and medical care. Due to recent trends limiting non-citizen participation in such programs, many respondents are essentially ineligible for public benefits and welfare programs.[104] Worse yet, persons *lawfully* present in the United States may be erroneously arrested, detained, and prohibited from working.

Many workers will simply ignore the no-work rider and continue to hold jobs clandestinely. If the breach is discovered, the workers will be detained. This additional penalty ultimately increases the power differential between employer and worker: the latter would have an even greater incentive not to organize or cause other trouble for the employer.

Ultimately, perhaps, the number of persons affected by this regulation might be relatively small, as release on recognizance rather than bond is the general practice in many parts of the country. Nonetheless, the regulation codifies a callous attitude toward respondents facing deportation, who are often poor. The migration of undocumented workers to the United States is largely a consequence of the economic inequality between people living in the United States and the Third World. Many people seek to escape poverty and oppression by entering the United States. A plethora of laws compels them to accept inequality when dealing with employers and government agencies. The no-work rider is not a fair way to control the INS's caseload. The automatic no-work rider il-

101. *See* Matter of Toscano-Rivas, 14 I. & N. Dec. at 537.

102. *Court Suit Filed on Alien Job Issue*, Nuestro, Jan.-Feb. 1984, at 13.

103. *See* Amy Novick, *An Update of Alien Restrictions for Public Benefits*, 13 Immigration Newsletter, July-Aug. 1984, at 8.

104. *See supra* note 3.

legally interferes with respondents' property interests, liberty interests, and rights to full and fair deportation hearings.

III. Conclusion

In modern society, employment often provides a person's sole means of support and subsistence. Access to the necessities of life, through employment, lays the basis for the actualization of such human values as friendship, love, skill, art, knowledge, and pleasure. Because employment is fundamental, it should not be taken away absent a due process hearing. Under current immigration laws, issues such as alienage, unauthorized employment, and deportability are not actually adjudicated until the deportation hearing itself.

Furthermore, a solution to the so-called "illegal immigration problem" does not lie in regulations such as the automatic no-work rider which attempts to coerce respondents to leave the country voluntarily and forgo the right to a deportation hearing. The threat of expulsion is a feeble deterrent for people who lack jobs in their own land[105] or who fear persecution for political reasons if they return to their country. Theirs is a life or death problem: survival. Many risk death in order to come here.[106] Many prefer indefinite detention to deportation.[107]

United States citizens should begin to analyze critically the causes of migration to the United States. One of the causes is United States foreign policy, which has the effect of draining the Third World's resources. Those who wish to decrease migration to the United States should look for ways in which our policies could decrease poverty and encourage true development in the Americas. Any such change, however, will require vigorous popular and congressional resistance to the policies of a United States administration which has ignored equity for the poor and the oppressed peoples of the Americas, both those outside and those within the borders of the United States.

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105. Oscar Martínez, *Chicanos and the Border Cities: An Interpretive Essay*, 46 Pac. Hist. Rev. 85, 106 (1977).

106. Rev. Gérard Jean-Juste, a Haitian activist in Miami, was quoted as saying, "[T]he teeth of the shark are sweeter than the life we leave behind." Minneapolis Star & Tribune, *Frail boats again bringing exodus of Haiti's poor to U.S.*, April 3, 1985, at A1, col. 2. Rev. Jean-Juste was referring to Haitian refugees whose boats sink before they reach the United States.

107. *Id.* at A11.