# EMPLOYER SANCTIONS VIOLATIONS: TOWARD A DIALECTICAL MODEL OF WHITE-COLLAR CRIME

KITTY CALAVITA

This article examines violations of the employer sanctions provision of the Immigration Reform and Control Act of 1986 as a case study in white-collar crime. Using interviews with 103 "immigrant-dependent" employers in three southern California counties, the study reveals that employer sanctions violations are numerous and that violators feel relatively protected from detection and punishment. It then traces both the prevalence of this crime and the impunity felt by violators beyond a simple cost/benefit analysis on the part of employers to the nature of the law itself. The study shows how legislative and implementation processes produced a low-risk crime, indicating that the shape the law took from the beginning ensured that its effect would be primarily symbolic and that violations would be widespread. This pattern suggests that the symbolic nature of the law and subsequent violations are dialectically linked and that both stem from contradictions inherent in immigration lawmaking. The article concludes that lawmaking and lawbreaking, while analytically distinct processes, must be seen as connecting pieces of the same theoretical puzzle.

## I. INTRODUCTION

For most of this century, employers in the southwestern United States have turned to Mexican immigrants as a major source of cheap labor. In recognition of the importance of this labor source, many of the early restrictions on immigration specifically exempted Mexicans. Periodically, this "back-door" labor supply has been institutionalized, as during the Bracero Program of 1942–64, when Mexican farmworkers were imported into the southwest through bilateral agreements between the United States and Mexico. With the end of the Bracero Program, undocumented

This research is part of a larger study being carried out at the Center for U.S.-Mexican Studies at the University of California, San Diego. I would like to thank Wayne Cornelius for the opportunity to collaborate on that study and the Ford Foundation for its support of the project. In addition, the Law and Social Science Program of the National Science Foundation has supported my ongoing investigation of the implementation strategies of the U.S. Immigration and Naturalization Service and the role of that agency in shaping immigration policy. Finally, I would like to thank Gil Geis, Shari Diamond, and an anonymous reviewer for their many helpful comments on the first drafts of this paper.

LAW & SOCIETY REVIEW, Volume 24, Number 4 (1990)

migration from Mexico increased, as did the dependence of employers on undocumented labor. While the illegal aliens could be deported, their employers were protected under the Texas Proviso (Act of March 20, 1952, Public Law 283) which specifically exempted employment from the definition of "harboring, transporting, and concealing" undocumented immigrants.

On 6 November 1986 President Reagan signed the Immigration Reform and Control Act (IRCA) (Public Law No. 99-603), a centerpiece of which is employer sanctions (§ 101). This provision makes it illegal to knowingly employ anyone not authorized to work in the United States,[1] thus representing a reversal of the long-standing laissez-faire policy, and potentially jeopardizing a major source of cheap labor in the United States.

This article examines employer compliance with this law in southern California, the region that has historically received the bulk of the influx of illegal aliens. The data presented here indicate that employer violations are widespread and that the continued hiring of undocumented workers is a direct consequence of the high benefits that employers derive from this source of cheap labor, coupled with the low risks associated with this "white-collar crime."[2] The article argues, however, that for an adequate understanding of these violations it is necessary to go beyond a narrow cost/benefit analysis to examine the legislative and enforcement processes that provide the *context* for employers' risk calculations. This examination reveals that both the widespread violations of the law *and* the anomalous perception of law enforcers that employers are complying with the law can be explained by reference to the ambiguous definition of "compliance" that is built into employer sanctions and that actively operates to shield employers from prosecution. In other words, while a cost/benefit analysis of employer violations is accurate as far as it goes, it does not go far enough: in order to account for the low risks on which employer calculations are based, it is critical to investigate the law-creation process that not only insulate offending employers from prosecution but in effect redefines them as compliers. Finally, this case study lends confirmation to a dialectical model of lawmaking and lawbreaking in which the essentially symbolic form that the law took from the beginning and subsequent employer violations are

[1] This provision is directed primarily at the employment of undocumented workers (or "illegal aliens") but includes foreign students and others admitted legally on visas that do not permit them to work in the United States. Other components of IRCA include an amnesty program for illegal aliens who had lived in the United States continuously since 1 Jan. 1982 and a Special Agricultural Worker Program under which undocumented farm workers could apply for legal status.

[2] Among the many definitions of white-collar crime, Hartung's (1950: 25) is the most appropriate here. As he defines it, white-collar crime is any "violation of law regulating business, which is committed for a firm by the firm or its agents in the conduct of its business."

linked to structural contradictions that are inherent in the immigration policy arena.

## II. A DUAL APPROACH TO WHITE-COLLAR CRIME: BRINGING LAW BACK IN

This study draws from two sets of literature and attempts to integrate two analytical traditions: theoretical explanations of white-collar crime and dialectical-structural explanations of lawmaking. This bringing together of traditions from criminology and the sociology of law may seem reminiscent of labeling theorists' exhortations in the 1960s to bridge the gap between analyses of rulebreaking on one hand and rulemaking on the other (Becker, 1963; Lemert, 1967). As we will see, however, the model proposed here is quite different from what labeling theorists had in mind. Labeling theory generally focused on the "underdog" and reasoned that laws and their implementation are often a causal factor in the generation of deviance among the powerless. In contrast, this study focuses on white-collar offenders and links their *impunity* to the law's formulation.

Sutherland's work on white-collar crimes (1940, 1949) explains its prevalence as a product of three kinds of factors. At the cultural level, Sutherland links white-collar crime to a mentality within the business community that condones and indeed encourages the violation of regulatory laws. This "ethos of crookedness," as Geis (1988: 23) has called it, is related in turn to a set of economic pressures that are inherent in the competitive nature of the capitalist enterprise and that penalize those who are unwilling or unable to circumvent the constraints imposed by regulations. The final ingredient in this recipe for widespread white-collar crime is the low risk factor. Sutherland is perhaps most noted for his documentation of the lenient treatment of white-collar offenders, focusing both on the attitude of law enforcers that these are not "real" criminals and on the minor penalties meted out—penalties that are by no means sufficient to offset the profitability of the illegal activity.

Much of the subsequent work on white-collar crime follows Sutherland's lead and outlines the economic incentives to engage in regulatory lawbreaking (Lane, 1953; Farberman, 1975; Stone, 1975; Berman, 1978), and/or the relatively lenient treatment of white-collar lawbreakers (Swartz, 1975; Berman, 1978; Mann *et al.*, 1980).[3] Unlike Sutherland, many of these researchers have focused

[3] There are signs that this leniency may be giving way to stepped-up efforts at enforcement and deterrence. In a recent overview of white-collar crime historically, Geis (1988) demonstrates that legislators and law enforcers, responding to crises and a decreased public tolerance for the corporate criminal, are increasingly willing to take a more aggressive stance on white-collar crime. Similarly, Hagan (1985: 286) argues that the revelations surrounding Watergate have triggered a more punitive public attitude toward white-collar crime and more "'proactive' prosecutorial policies."

on offenses that leave their victims maimed or dead, in part to counter claims that white-collar crimes have no definable victims, are not violent or physically injurious, and therefore are not "real" crimes. Equally important, however, this focus is meant to dramatize the power of the balance sheet in the business world: even at the cost of death to consumers or workers, the white-collar criminal follows the course dictated by an analysis of costs and benefits. The impressive body of literature accumulated since Sutherland's pathbreaking work leaves little doubt that white-collar crime is the product of economic calculations concerning risks and potential penalties, that by and large these crimes "pay," and that their prevalence is integrally linked to their profitability.

This interpretation is further corroborated by an extensive literature focusing on the regulatory process. A significant body of data documents the difficulties of using criminal sanctions to secure corporate compliance with government regulations that may be costly or disruptive to production processes (Braithwaite, 1985; Hopkins, 1978; Levi, 1984; Shapiro, 1984, 1985). In light of these data, some researchers have explored such methods of "informal social control" as negative publicity campaigns against offending businesses (Braithwaite and Fisse, 1983), graduated systems of civil and criminal penalties (Braithwaite, 1988), or cooperative strategies that emphasized voluntary compliance and self-regulation (Bardach and Kagan, 1982; Scholz, 1984a, 1984b; Stone, 1975). Others argue that only the steep costs and moral stigma associated with aggressive government supervision and rigorous criminal penalties will ensure business compliance (Hawkins, 1984; Levi, 1984; Snider, 1987, 1990; Watkins, 1977). One observer, noting the improbability of corporate actors compromising their own institutional interests, has even called the concept of self-regulation "oxymoronic" (Lee Berton, financial reporter for the *Wall Street Journal*, quoted in Shapiro, 1987). Despite their substantial differences, however, most of these scholars concur that business behavior responds to the balance sheet and that variations in compliance can be explained in large part by reference to cost/benefit calculations.[4]

The present study at one level confirms the importance of such cost/benefit analyses in the explication of white-collar crime. The behavior of the white-collar lawbreakers cited here is clearly the consequence of the perceived benefits of violating employer sanctions compared to the low risks associated with detection and prosecution, just as the white-collar crime and regulatory reform literature would predict. More fundamental, however, is a paradox

[4] The debate is focused primarily on two remaining issues: (1) How is it most appropriate/effective to make business "pay" for violations—through fines or through less confrontational incentives? (2) How significant are the *external* costs of forcing compliance, for example, in plant closures or transfers and subsequent lost jobs or tax revenues?

emerging from this study that points to the importance of placing white-collar crime and the risk calculations that produce it in legislative context. The employer sanctions law, as we will see, is written so as to label all but a handful of the most blatant violators as "compliers," thus not only shielding them from prosecution but holding them up as examples to be followed. It is not enough, then, to explain the prevalence of this white-collar crime by citing lenient penalties, inadequate enforcement, or lax attitudes on the part of enforcement agents, although these clearly are the *immediate* causes of employer violations. Rather, it is important to trace the low risks associated with this crime to their source in the law itself to arrive at a more complete understanding of the social processes that set the stage for this white-collar crime.

In reconstructing the dynamics of the lawmaking process that ensures the low-risk nature of employer sanctions violations, this analysis draws from literature in the sociology of law that highlights the importance of examining the structural contradictions that confront lawmakers. Chambliss (1979), for example, argues that laws often represent the state's attempt to resolve conflicts derived from deep-seated contradictions in the political economy. Whitt (1982), focusing on public policymaking in the area of transportation, documents the impact of economic and political contradictions on the development of BART in San Francisco. A historical analysis of U.S. immigration laws since the late nineteenth century (Calavita, 1984) reveals that these laws were often hapless attempts to resolve conflicts derived from a fundamental contradiction between the economic utility of immigrants versus political demands to restrict this source of cheap labor. What all these studies have in common is a focus on law and policy as efforts to reconcile conflicts stemming from two or more competing structural forces. While the process through which this reconciliation is sought may at one level resemble the clash between interest groups depicted in the pluralist model, structuralists maintain that the clash is symptomatic of more fundamental underlying structural contradictions in the political economy. Therefore, to account accurately for the nature and substance of those conflicts as well as the form that the legal compromise ultimately takes, the contradictions from which they derive must be explored.[5] The present study, while drawing from this dialectical model of law, goes beyond previous applications, demonstrating that contradictory political/economic pressures not only constrain lawmakers but in turn may generate widespread white-collar crime.

While grounded in a different theoretical tradition, Edelman's

[5] Whitt (1982: 174–210), for example, argues that a straightforward pluralist account of the creation of BART not only provides no "historical-institutional framework" for understanding urban transportation politics, but it cannot even adequately explain the complex alliances that emerged (e.g., between groups within the business community with seemingly disparate interests).

(1964, 1977) elaboration of the concept of symbolic law may be useful in this synthetic endeavor. Edelman generally defines symbolic action as political action that has little impact on prevailing conditions but that serves the purpose of placating certain groups.[6] Noting the gap between rhetoric and reality in the regulatory arena, for example, Edelman (1964: 22) points out: "If the regulatory process is examined in terms of a divergence between political and legal promises on one hand and resource allocations on the other, the largely symbolic character of the entire process becomes apparent." His focus is primarily on the social psychological consequences of symbolic action on an "aroused" public; indeed, nowhere does he systematically address the logically prior issues of exactly why and how symbolic law is created.

This study of employer sanctions incorporates Edelman's notion of symbolic action into the dialectical-structural framework. It not only locates the underlying motive for symbolic action in a set of structural contradictions confronting lawmakers, but it provides as well a detailed look at the evolutionary process by which law is *rendered* symbolic. Finally, it demonstrates the utility of the concept of symbolic action as a link between the criminological and the sociolegal, for it was the subtle redefinition of "compliance" in the lawmaking process that allowed lawmakers to circumvent the contradiction before them and, ironically, guaranteed widespread violations.

## III. METHODOLOGY AND DATA SOURCES

The data for the study come primarily from research carried out in 1987 and 1988 on 103 "immigrant-dependent" firms in Los Angeles, Orange, and San Diego counties. The project is a follow-up of a larger study of 177 such firms begun in 1983. An eclectic sampling procedure was used for the original study, which included the San Francisco Bay area as well as the three southern California counties. Approximately half of the 1983 sample was selected from U.S. Immigration and Naturalization Service (INS) lists of industries raided in their 1982 "Operation Jobs" campaign. The other half—deliberately compiled so as to include types of firms that may have been underrepresented in INS raids in the past—were located on the basis of information provided by labor leaders, local community leaders, newspaper accounts, and industry-specific directories. The response rate for the original study was high, with over half of the firms initially contacted agreeing to

[6] Edelman (1964:7) recognizes the symbolic quality of most legal action: "Practically every political act that is controversial . . . is bound to serve in part as a condensation symbol. It evokes a quiescent or an aroused mass response because it symbolizes a threat or reassurance." However, he generally reserves the concept for action that is *primarily* or *solely* symbolic, with little or no substantive content.

participate.[7] For the present study, efforts were made to contact all of the 85 firms in the original sample that were located in the three southern California counties. Of these, 9 had either gone out of business or moved their operations out of the area; only 8 of the remaining 75 firms declined to be re-interviewed. Thirty-five firms which were not in the original sample, but which are from the same sectors and are similarly immigrant-dependent, were added to the remaining 68 original sample firms. These firms do not, of course, constitute a random sample of immigrant-dependent firms in southern California, nor would it be possible to obtain such a sample, given the absence of a specifiable universe. The eclectic sampling procedure was designed to minimize bias within the context of the daunting sampling constraints of any study of illegal activities or undocumented populations.

The sectors represented in the sample—garment, construction, electronics, hotels, restaurants, food processing, and building and landscape maintenance—are those in which undocumented workers traditionally have been concentrated. Agriculture was excluded, as growers were not susceptible to fines under employer sanctions until December 1988. The firms in the sample tend to be small and medium-sized, with the average size being one hundred employees. At least 25 percent of the workforce of each firm in the sample was Hispanic, mostly Mexican, and the average proportion of Hispanic workers was 52 percent. While the stereotype of immigrant-dependent firms is that they are primarily "sweatshops" located in the underground economy, the profile of these firms refutes that image. Although the work is arduous and the pay scale is relatively low, the firms seem generally to be complying with minimum wage and other labor standards. None of the workers interviewed in these firms reported receiving less than the legal minimum wage; 99 percent reported that their employer regularly withheld income tax and Social Security contributions; and only 7 percent of the firms reported having been fined by the Department of Labor for labor standard violations.[8] Twenty-eight percent of the firms in the sample are unionized. (For a profile of these firms, see Appendix Table A1.) It seems likely that if there is any systematic bias in this sample, it lies in the fact that the smallest, underground, nonunionized firms may be underrepresented, primarily because such firms are difficult to locate through any but the most labor-intensive sampling procedures. The effect of this

[7] There is no indication that those who refused to participate were systematically distinct in any way from the final sample firms, although there may have been a greater reluctance to participate among those firms that had the most to hide, i.e., those in violation of wage or other labor standards (for a discussion of the implication of this potential bias, see text below).

[8] There may have been some underreporting on this last item, which was asked of employers. However, based on the responses of workers themselves to the other questions regarding wage and labor standards, the firms seem generally to be in compliance.

potential bias is to underscore the findings reported here, as employer sanctions violations may be even more widespread than can be documented by such a case study of firms in the formal economy.

A primary objective was to investigate employers' reaction to the 1986 law, which on its surface threatened to dry up their major source of labor. In-depth, structured interviews were conducted with the owner or manager in charge of hiring in each firm. The interviews, including both closed and open-ended questions, were tape-recorded with the permission of the respondent and generally lasted about two hours. Much of the following analysis comes from the rich narrative responses, interwoven with statistical data where appropriate. Interviews were also conducted with an average of five workers in each firm. These interviews were carried out at the workers' homes to minimize the perceived risks—especially on the part of undocumented workers—of implicating their employers in illegal activity. In general, the responses of the workers confirm the validity of the employer data.

In addition, the article includes data derived from government documents and interviews with immigration officials. Finally, the author draws from direct observation of two employer sanctions inspections. While some details of these two inspections are undoubtedly idiosyncratic to the agents and employers involved, they provide insights into some of the more general difficulties of enforcement at the ground level.

Before proceeding, the issue of generalizability should be addressed. Because of the constraints of the sampling techniques and the nature of the study itself, the findings are clearly not generalizable to all employers, or even to all immigrant-dependent employers. In addition to the underrepresentation of very small firms and underground employers is the obvious geographical limitation. There is of course no pretense that employers in other regions of the United States respond to employer sanctions in exactly the same way as the immigrant-dependent firms in this southern California sample. Indeed, the southern California location was chosen not to be representative of the country as a whole—which it clearly is not—but because it provided a showcase through which to examine the interconnections between legal formulations and risk-free employer violations. To the extent that employers in other regions of the country may be less immigrant-dependent, compliance rates will probably tend to be higher.[9] The primary purpose here, however, is not to estimate compliance rates but to expose the substantial incentives for violation and to trace those incentives to their source in the legal process. The focus on these

[9] Compliance rates are also likely to vary with INS enforcement strategies. For a good summary of regional differences in enforcement, see Fix and Hill (1990).

three southern California counties, which receive the greatest influx of immigrant workers in the United States, seems well-suited for this purpose.

## IV. WHAT EMPLOYER SANCTIONS ENTAILS

Section 101 of IRCA makes it illegal to knowingly employ aliens not authorized to work in the United States. The provision applies to all types of employers, including those who subcontract all or part of their work, and most workers, including day laborers and temporary workers.[10] Further, the law requires that employers ask all new employees for documentation proving their identity and eligibility to work in the United States, that they fill out and sign an "I-9" form for each new hire, listing the specific documents seen and their expiration dates, and that they keep this form on file.[11] Penalties for violations of the "knowing hire" provision range from $250 for the first offense to $10,000 for repeated offenses. A "pattern or practice" of violations may bring criminal penalties, including six months in prison. Fines for paperwork violations related to the I-9 form range from $100 to $1,000 per violation.

The INS published its final Rules and Regulations on IRCA in the *Federal Register* on 1 May 1987 (U.S. Immigration and Naturalization Service, 1987b). These regulations give employers three business days after the date of hire to complete I-9 forms, with those who employ workers for less than three days being required to complete the paperwork within twenty-four hours (8 C.F.R. § 274a.2). Finally, employers are to be given three days' notice before inspections by the INS (8 C.F.R. § 274a.2).

## V. SELF-REPORTED VIOLATIONS

During the debates preceding the enactment of employer sanctions, its advocates in Congress and within the INS maintained that most employers would voluntarily comply with the law. Admitting that the INS would be able to monitor only a tiny fraction of the nation's approximately seven million employers each year, employer sanctions proponents argued that this was of little consequence. The deterrent effect of the law, this argument went, would be based on voluntary compliance and the example set by a few well-publicized fines.

After passage of employer sanctions, INS Commissioner Alan

[10] INS regulations implementing employer sanctions exclude from the definition of employment only "casual employment by individuals who provide domestic service in a private home that is sporadic, irregular, or intermittent" (8 C.F.R. § 274a.I[h]).

[11] Employers who hire individuals referred to them by a state employment service represent the only exception to this I-9 requirement; however, such employers must obtain certification that the state agency has complied with the documentation requirement (IRCA § 101).

Nelson (1988) stated that most employers were abiding by the law simply because it was the law. INS District Counsel in San Diego Martin Soblick spoke enthusiastically of "the success we've had across the board in securing voluntary compliance from employers nationwide" (quoted in the *San Diego Union/Tribune*, 1 Feb. 1989, p. A3). The Western Regional Commissioner of the INS, Harold Ezell, insisted that the fines imposed under employer sanctions operated as a deterrent on those few employers who might not otherwise comply voluntarily (*San Diego Union*, 31 Aug. 1988, p. B-2).[12]

The data derived from our interviews paint quite a different picture. About 48 percent of the employers interviewed said that they "thought" they had undocumented workers on their work force.[13] Close to half of these (45 percent) estimated that 25 percent or more of their work force was undocumented. Another 11 percent said they "did not know" whether any of their workers were undocumented. Eighty percent of respondents said that the new law has not affected "in any way" the type of workers they

[12] Border apprehension statistics in the first three years of the new law at first glance seemed to validate the official optimism concerning employer compliance and the deterrent effect of the law. From fiscal year 1986 to fiscal year 1989, INS Border Patrol apprehensions along the southern border, where the overwhelming bulk of illegal aliens are apprehended, went from 1,615,854 to 854,939 (see Appendix Table A2). However, this overall decline disguises a dramatic reversal in the pattern that began in the second quarter of 1989, so that border apprehensions are now rapidly approaching their pre-IRCA levels. After an initial sharp decline in the first quarter of 1989, apprehensions increased more than 32 percent in the last two quarters of the year compared to the same period in 1988 (U.S. Immigration and Naturalization Service, cited in Dillin, 1989b: 7), leading one usually more circumspect reporter to suggest that the border was "spinning out of control" (Dillin, 1989a: 8). The figures for fiscal year 1990 show an even steeper rise in apprehensions. In the San Diego sector where the greatest number of apprehensions are made, an 89 percent increase over the same month the previous year was registered for December 1989; January 1990 saw an increase of 51 percent and the number for February was up 78 percent (U.S. Border Patrol, cited in Brossy, 1990: B3). Border Patrol officials expect apprehensions for fiscal year 1990 to reach one million for the first time since 1987 (cited in *ibid*, p. B2). Confronted with these statistics, INS spokesperson Duke Austin admits, "[t]he trend is not in the right direction" (quoted in *ibid*, p. B2). The most comprehensive study to date of the effect of employer sanctions on the volume of illegal border crossings (Crane *et al.*, 1990) concludes that the initial reductions in apprehensions were less a product of employer sanctions than they were a consequence of IRCA's legalization provisions, which legalized close to three million immigrants, many of whom had periodically crossed the border illegally prior to their change of status. The study further demonstrates that, when controlling for variations in Border Patrol enforcement strategies and resources devoted to border apprehensions, the three-year apprehension figures do not indicate any substantial deterrent effect from the law.

[13] Because of the potentially sensitive nature of this information, the question was posed in this way: "I realize you have no way of knowing this for sure, but do you think that some of your employees may be undocumented immigrants?" In most cases, these employers appeared to be remarkably candid with the interviewer. A few employers even volunteered information, once the tape recorder was turned off, about additional illegal activity regarding their employment of undocumented workers. It is of course likely that some underreporting occurred, in which case the statistics presented here represent conservative estimates of actual violations.

currently hire, and twelve employers (11 percent) volunteered that they *knew* that they had hired undocumented workers since employer sanctions went into effect. Seventy-eight percent anticipate no future changes in the way they hire workers. (See Appendix for sample questions.)

Interviews with workers tend to validate these findings. Fifty-eight percent of the sample said that they thought there were undocumented workers at their work place. Thirty percent were themselves undocumented at the time of the interview (another 30 percent were in the process of applying for amnesty), and fifty-one of these, or 35 percent, had purchased or borrowed fraudulent documents in order to secure employment.[14] Six of the undocumented workers reported having been told by their *employer* to obtain false papers. Furthermore, these undocumented workers were not confined to firms that had been subject to INS raids in the past. Of the workers interviewed, 17 percent reported that their work place had been raided in the preceding year. In these "raided" firms, 26 percent of the workers interviewed were undocumented; in the firms that had not been subject to a raid, 31 percent of the respondents were undocumented. Overall, 15 percent of the undocumented workers interviewed worked in firms that had been raided in the previous years, while 85 percent worked for employers who had not been subject to a raid.

Several employers were outspoken in their intentions to continue to hire undocumented workers as they are needed. The owner of a landscaping company said matter of factly, "The majority of people who do this work don't have papers, but . . . I will employ them eventually when I need them." And later, "People have a need to work and we need workers; sooner or later we will employ them [the undocumented] again."

## VI. A COST/BENEFIT ANALYSIS

To understand the continued hiring of undocumented workers in spite of the employer sanctions law, it is critical to address the long standing role of immigrant workers in the southern California economy and the perceived benefits of utilizing this work force. A wealth of data documents the centrality of immigrant labor in a number of important sectors of the California economy (Maram, 1980; Cornelius *et al.*, 1982; McCarthy and Valdez, 1985; Muller and Espenshade, 1985). In the past, undocumented workers were disproportionately concentrated in agriculture; today, they increasingly play a critical role in urban sectors as well, providing a low-wage work force for the labor-intensive service sector and

[14] This figure is consistent with a U.S. General Accounting Office (1988) estimate derived from a survey of undocumented workers who had been hired between September 1987 and October 1988. Thirty-nine percent of the unauthorized workers in that study had used, or were suspected of having used, counterfeit documents.

light manufacturing such as garment, electronics assembly, and food processing (Cornelius, 1988; Fernandez-Kelly and Garcia, 1990). Undocumented workers are particularly prevalent in industries where competition is intense. It was estimated in the 1970s that 90 percent of the workers in Los Angeles garment shops were undocumented (Danny Perez, International Ladies' Garment Workers' Union, cited in the *Los Angeles Times*, 30 Jan. 1975, pt. 2, p. 1). The garment industry operates on the contracting system and is highly competitive and labor intensive. Typically, the garment manufacturer cuts the garments and contracts the assembly to small shops. Because such sewing shops require little capital to start up, they are in chronic oversupply and compete intensely for contracting bids. In the desperate effort to cut costs, undocumented workers become central. As a former Secretary of Labor (Marshall, 1978: 169) put it, "Illegal aliens are preferred . . . because they tend to work scared and hard." But the undocumented are not confined to marginal industries. Evidence suggests that the restaurant and hotel-motel industries—a mainstay of the California economy—constitute a major source of employment for undocumented Mexicans (Maram, 1980). So valuable has this source of cheap labor been that the Chambers of Commerce in U.S. border cities of the Southwest used to advertise its availability in an attempt to lure industries to the area (Bustamante, 1978: 187).

The employers I studied are well aware of the benefits of using this work force. A number of employers spoke glowingly of the immigrants' "work ethic." A restaurant manager told us, for example, that "[a]liens have a strong work ethic; they need a job; they are good workers. . . . Other workers will be less motivated." The vice president of a light assembly operation claimed, "it's been proven to us that an ethnic workforce works better than we do. . . . I don't care what you call it, reverse prejudice or whatever; they work better." Another employer concurred, "When you hire undocumented workers, you can get more out of them."

A few made the link between the "work ethic" of the undocumented and their desperation. "Those people [the undocumented] are very reliable," said one employer. "They're here every day; they need the job." The vice president of a light manufacturing firm spoke enthusiastically of the undocumented workers and their need for work: "Undocumented workers are hard workers. They're more hungry for jobs than Americans. . . . They're just good workers."

Many employers recognize that the jobs they are offering are not particularly desirable and that were it not for immigrant labor, it would be difficult for them to maintain a work force. The general manager of a food-processing firm described work at his plant and the difficulties of attracting a domestic workforce:

> These girls come in at four o'clock in the morning, and it's cold out there in the room that they're working in. There's chicken meat all over the place, and it's not real desirable work. . . . It's hard to find people that will do that. All the girls that we have out there are either resident aliens or of Mexican heritage, and . . . ah . . . they're willing to do it. Consequently, if that's the type of people we have to get to do that type of work . . . we would have to hire them to get the work done.

A garment shop owner, noting the competitive pressure to violate the employer sanctions law, complained, "When you have someone who's bidding against you and using illegals and paying them under the table, it's not really right." Another said simply, "There's a lot of pressure right here not to comply." Indicative of this pressure, over half (57 percent) of the employers interviewed said that they think "other firms in this line of work use undocumented workers."

The apparent benefits of undocumented labor contrast markedly with its perceived costs. Most employers who continued to hire the undocumented expressed very little fear of getting caught. The personnel director of an electronics firm, who earlier had admitted that he still employed some undocumented workers, was unconcerned: "I think the whole thing is a lot of hype about nothing." A food-processing company executive said nonchalantly, "We'll continue to go about hiring those people [Mexican immigrants] the way we always have." Another echoed the sentiment, "I'm open to hiring anyone looking for work. Why not?"

Why not, indeed. Thirty-two percent of these employers are convinced that the INS does not have the ability to enforce the law. A number of employers cited the lack of INS resources, reasoning, as one restaurant manager did, "It's going to be a nightmare for them [the INS]. I suspect that they will probably spotcheck. . . There are just too many companies that use undocumented workers."

Such perceptions are at least partially validated by enforcement statistics. In its first report to Congress on employer sanctions, the U.S. General Accounting Office (GAO) noted that the INS expected to audit approximately 20,000 employers in fiscal year 1988—in other words, one-third of 1 percent of the approximately seven million employers in the United States (U.S. General Accounting Office, 1987: 27). INS records showed that it fell short of even this goal, having completed 12,319 inspections, or less than one-fifth of 1 percent of the nation's employers (U.S. Immigration and Naturalization Service, 1988a). Nor has the pace picked up: In the first five months of fiscal year 1989, the INS conducted 5,000 inspections, almost exactly replicating the 1988 figures (Bean *et al*, 1989: 43). The selection procedure for inspections reduces even further the chances of an offending employer being detected. In order

to "demonstrate that the Service is not engaging in selective enforcement of the law" (U.S. Immigration and Naturalization Service, 1987a: § IV-9), a substantial portion of inspections is initiated on the basis of a random selection process (referred to as the General Administrative Plan, or GAP) generated by a listing of five million employers across the country. By early 1989, 25 percent of employer sanctions had been based on this random procedure, while 75 percent were based on leads that suggested the possibility of employer violations (Bean *et al*, 1989: 43). By 1990, the proportion of GAP inspections had risen to 35 percent (U.S. General Accounting Office, 1990: 94). Even though the GAP procedure nets far fewer offenders than lead-based inspections, the goal is to increase to 40 percent the number of inspections based on random selection (Bean *et al*., 1989: 43).[15]

Even in the face of these inspection statistics, it could be argued that the threat of substantial fines might be enough to deter employers of illegal aliens. But the violators in this study expressed very little fear of potential fines. Usually, this lack of fear was tied to a (probably realistic) perception of their slim chances of being caught. However, a few employers added that, given the size of potential fines, violations were an acceptable risk. According to the general manager of a restaurant, "the fines are a reprimand, not a serious threat." The owner of a garment shop in Los Angeles said light-heartedly that if he were caught in a violation, "they're [the INS] going to hit my hands and say I've been naughty." Summarizing this mentality, a personnel director likened the situation to that of a freeway speeder:

> [It's] like saying if you go 56 on the freeway and the speed limit's 55, you're in violation of the law. No foolin'. But, everyday I go 70 until I get caught and when I get caught I say, "Well, I've been doing this for two years and I got nailed for a $100 fine. That's not too bad. That's ten cents a day. I'll continue to go 70."

This employer's analysis of the costs attached to violations is substantiated by the low rate and size of INS fines in the three years following the law's enactment. By September 1989, the INS had recorded 39,594 violations of employer sanctions— 36,354 of which were for "paperwork" offenses (U.S. General Accounting

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[15] It might be argued that the random selection process is designed to reduce the spread of illegal alien employment to sectors not traditionally dependent on this labor source and therefore serves a preventive purpose. The evidence, however, suggests that it was neither formulated with this preventive purpose in mind, nor is it likely to have such an effect. INS documents make it clear that the agency is primarily concerned with avoiding legal charges of employer "harassment" and that the random selection process is designed to guarantee an impartial and "neutral" enforcement of the law (U.S. Immigration and Naturalization Service, 1987a: § IV-9). Furthermore, it is unlikely that GAP procedures will have much of a deterrent effect, given the tiny percentage of the nation's seven million employers that are singled out for inspection.

Office, 1990: 88).[16] The overwhelming majority of these cases resulted in a warning or citation, with fines actually imposed on 3,532 employers. While the average fine initially assessed was approximately $4,840, extensive use of out-of-court settlements has reduced the average to less than $2,500 per employer (*ibid.*, p. 88). Furthermore, fines vary substantially from region to region, with the high-impact western and southern regions imposing the lowest average fines (Fix and Hill, 1990: 109). Although IRCA provides for criminal sanctions in cases of a "pattern or practice" of knowingly hiring unauthorized aliens, criminal prosecutions have been extremely rare (*ibid.*, pp. 106–8).

The final, and most potent, ingredient in employers' risk analyses is their perception of the protection accorded them by the I-9 form. This component goes far beyond the simple mathematical calculation of the chances of being inspected, times the size of a potential fine, and adds a dimension to violators' sense of security that virtually ensures widespread violations. Remember that IRCA requires employers to request documentation from all new hires and to fill out I-9 forms attesting to having seen these documents. All but five of the employers interviewed systematically request such documentation and complete the required paperwork. Rather than seeing the paperwork requirement as burdensome, many of these employers view the I-9 form as an effective barrier between violations and prosecution. The director of human resources at a large plant who later told the interviewer, "Evidently, we have people who are illegal," pointed out that "It [the I-9] would help protect us."

These employers have tapped the source of a paradox that lies at the heart of this analysis. As we have seen, almost half of these employers suspect that they employ undocumented workers, and 11 percent admit outright that they have violated the law. Yet, not only is it unlikely that either group will be subject to fines under employer sanctions, but those who have completed the paperwork (the vast majority) are for all practical purposes labeled "compliers." A garment shop personnel director who confided to the interviewer that he had instructed his undocumented workers to "fix" their patently false documents, explained the paradox this way: "The I-9," he said, "takes a lot of responsibility off of me and puts it back on the employee."

To understand fully the prevalence of this illegal activity and employers' relative impunity, it is necessary to untangle the dynamics of this shift of responsibility via the I-9 form, a shift that has its source in the law itself.

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[16] The number of offending employers involved was far lower, since most employers were cited for multiple violations.

## VII. THE DIALECTICS OF IMMIGRATION POLICYMAKING AND THE "MAGNIFICENT SHUNT"

Since the Irish migrations of the mid-1800s, the appreciation of the critical role played by immigrant labor has been accompanied by anti-immigrant backlashes. Alternately motivated by racism, cultural and political protectionism, visions of tax increases, and organized labor's concerns over bargaining power, public pleas for immigration restriction have generally intensified during economic downturns and/or economic upheavals and transformations. The historical variation of restrictionism with unemployment rates and recessions has been well documented (Higham, 1955; Cornelius, 1982). Equally important, and less often addressed, is the more complex role of economic dislocations in generating anti-immigrant backlashes. During the period between 1840 and 1860 in the United States, for example, the industrializing economy was undergoing rapid expansion, yet working-class nativism surged, triggered by the mechanization and deskilling of production combined with the influx of hundreds of thousands of unskilled European immigrants, who often replaced skilled native workers at reduced wages (Higham, 1955; Lipset and Raab, 1970; Montgomery, 1972).

The early 1970s witnessed the beginnings of a new round of nativism in the United States as a series of recessions racked the economy. The media, as well as immigration policymakers, referred to undocumented migration as a "silent invasion" and blamed U.S. economic woes on the loss of control over the border (Austin, 1971; INS Commissioner Leonard Chapman, 1976). As in the past, it is largely *because* immigrants are a cheap labor force (i.e., exactly that which employers and policymakers have most appreciated) that they are an easy target of backlash by wary taxpayers and organized labor.

Compounding the effect of the recessions of the 1970s and early 1980s were fundamental transformations and dislocations in the U.S. economy. As the heavy manufacturing sector contracts and the service sector expands, an increasing proportion of new jobs are located in the less desirable secondary labor market. In the past when increased levels of unemployment precipitated immigrant scapegoating, the need for immigrant workers was simultaneously reduced and immigration tended to slow down.[17] In contrast, the economic transformations under way in the United States, particularly the proliferation of minimum-wage, unskilled jobs in the service sector, increase the demand for immigrant

[17] The depression of the 1930s, when immigration was reduced to a trickle and thousands of Mexicans in the United States were "repatriated," is the most recent and dramatic example of this pattern. However, immigration consistently fluctuated with the business cycle throughout the nineteenth century, and net *decreases* (i.e., the number os immigrants who returned to their home countries exceeded the number of new arrivals) were registered during the worst recession years (U.S. Congress, 1901: 308–9).

workers *and* enhance anti-immigrant backlashes. Cornelius (1989: 36–42) has argued that the increased use of Mexican labor in California is primarily the consequence of automation and deskilling, an expansion of the service sector in proportion to manufacturing, international competition, and a general economic restructuring.[18] As U.S. workers feel the impact of these economic forces, and watch their standard of living decline, it is easy to place the blame on the immigrant workers who are an integral part of that restructuring. In other words, the structural changes in the economy that fuel undocumented migration and maximize its benefits to employers are the same transformations that contribute to restrictionist fervor and political demands for increased control of the border. The employer sanctions law must be seen in this context of a contradiction between economic and political factors.

The possibility of a federal employer sanctions law was first seriously debated in 1971 when Representative Peter Rodino began a lengthy series of hearings on illegal aliens (U.S. Congress, 1971). By the time the Select Commission on Immigration and Refugee Policy (SCIRP) recommended employer sanctions as the centerpiece of its reform package in 1981, this restrictionist approach was overwhelmingly supported by the majority of the American people (Gallup, 1980). Immigration policymakers faced an apparently irresolvable dilemma grounded in the political-economic contradiction referred to above. Confronted on one hand by the political pressure for an employer sanctions law, and on the other by the impossibility of passing such a law over the objection of employers who derived significant economic benefits from undocumented migration, the outcome was an employer sanctions law that would be easy to comply with. As we will see, this was done by redefining "compliance," a feat accomplished during congressional debates.

When the Simpson-Mazzoli Bill was first introduced in 1982, it confronted the bitter opposition of a wide range of business groups led by the Chamber of Commerce and the Western Growers' Association. By 1983, the Chamber of Commerce had withdrawn its opposition (Montwieler, 1987: 7), and the growers had turned their attention to securing a generous temporary farmworker program. This decreasing concern on the part of the employers was no accident. Rather, it was the product of a concerted effort by its sponsors to demonstrate that employer sanctions was not "anti-employer."

This effort focused most visibly on the problems associated with fraudulent document use among immigrant workers. In its *Final Report* in 1981 SCIRP had highlighted the problem of false documents, pointing out that in the absence of a counterfeit-proof

[18] See Fernandez-Kelly and Garcia (1990) for an excellent discussion of economic restructuring in the garment and electronics industries in southern California and of the role of Hispanic women in this process.

identification card, "employers would have to use their discretion in determining [worker] eligibility" (U.S. Select Commission, 1981: 66). The ostensible concern was that innocent employers could be accused of hiring undocumented workers who showed them false documents. This concern was enhanced by Congress's rejection of the SCIRP recommendation to establish a counterfeit-proof identification card, which in Congressional debates was compared to an "internal passport" associated with "nations more willing to tolerate repression in their political system" (U.S. Congress, 1985: 12).

The alternative was deceptively simple. A "good faith" clause was inserted in the Simpson-Mazzoli Bill of 1982. This clause stipulated that if employers check workers' documents, regardless of the validity of those documents, they will be assumed to have complied with the law. During the debate of the final Simpson-Rodino bill in the Senate, Senator Alan Simpson reiterated the theme that had pervaded the lengthy proceedings. "I can assure my colleagues," he said, "that an innocent employer will be protected by following the verification procedures" (quoted in Montwieler, 1987: 255). By the time the Immigration Reform and Control act was passed in 1986, this protection was spelled out carefully. It included a provision that the required document check, conducted in "good faith" (§ 101) would constitute an "affirmative defense that the person or entity has not violated [the 'knowing hire' clause]." Equally important, it released employers from the responsibility for detecting fraudulent documents, stating that "a person or entity has complied with the [document check] requirement . . . if the document reasonably appears on its face to be genuine."

There is no doubt that these protections were designed to minimize employer opposition to the law. As early as 1981, when the Senate Subcommittee held hearings on "The Knowing Employment of Illegal Aliens," the acting Commissioner of the INS, Doris Meissner, stressed that "[i]mplementation of the law is not designed to be and will not be antiemployer. . . . Unlike a number of State statutes concerning employer sanctions,[19] the Federal law relative to the knowing hiring of illegal aliens will not require employers to make judgments concerning the authenticity of documentation" (U.S. Congress, 1981: 5). At the same hearing, Senator Simpson repeated, "It [employer sanctions] must be the type of program which does not place an onerous burden upon the em-

[19] Eleven states and one city had employer sanctions laws on the books prior to the enactment of IRCA. Although not all of these laws included "good faith" clauses (hence, Meissner's reference to employers making authenticity judgments), they generally tended to be less stringent than the Simpson-Rodino version. Some did not even require employers to ask for documents certifying worker authorization, and without exception the specified fines were far less than provided for in the federal measure. Enforcement machinery was minimal, and in many states, not even token enforcement efforts were undertaken. Not surprisingly, only a handful of convictions were obtained under these state laws (for a summary of these laws, see Schwartz, 1983).

ployer with respect to what he has to do to avoid a penalty" (p. 86). In 1985, the Chamber of Commerce, convinced that employer sanctions would not pose an "onerous burden," officially *endorsed* the measure.

The affirmative defense clause and the "good faith" document check not only guaranteed that employers would not be "burdened" by sanctions; for all practical purposes, they redefined compliance. Gerald Riso, Deputy Commissioner of the INS at the time, unwittingly summarized this de facto transformation in the meaning of compliance before the House subcommittee in 1983 when he said, "We have made some assumptions that most employers will voluntarily comply *if we make compliance pragmatically easy for them*" (U.S. Congress, 1983: 265; emphasis added). The Senate Judiciary Committee was more specific, stating confidently: "The Committee believes that the affirmative defense which results from compliance . . . will encourage the majority of employers to elect to comply" (U.S. Congress, 1985: 32).

During the legislative process, a semantic transformation had taken place in which compliance with the paperwork requirement had come to stand in for compliance with the real heart of the employer sanctions law—the "knowing hire" provision. This transformation in the definition of compliance was critical in eliminating employer opposition to the law and hence in resolving legislators' catch-22. Simultaneously appeasing both the public that demanded an employer sanctions law and employers who desired economic benefits from immigrant workers, the Simpson-Rodino bill was a carefully crafted response to an underlying contradiction between political and economic forces.

The rhetoric of employer compliance with the spirit of the law facilitated this sleight of hand. The important role played by the expressed assumption of voluntary compliance is revealed by the fact that the move to "protect" employers was often couched in terms of the discrimination potential of the law. The concern was regularly expressed that without an "affirmative defense," well-intentioned employers in their effort to comply with the law might refuse to hire those who "look or sound foreign" (U.S. Select Commission 1981: 67). The Senate Judiciary Committee explained the need for a "good faith" clause based on a similar assumption of employer compliance: "If employers, recruiters, and referrers are given no protection, they will feel insecure and seek to avoid penalties by avoiding persons they suspect might be illegal aliens, in other words, those who 'look or sound foreign' to them" (U.S. Congress, 1985: 8–9).

Not only did the rhetoric of employer compliance facilitate the transformation in what "compliance" meant in practice, but it allowed congressional sponsors to counter an increasing volume of data that employer sanctions have never worked. Two U.S. General Accounting Office studies (1982, 1985) documented the diffi-

culties of employer sanctions enforcement in nineteen countries around the world, and concluded that only in Hong Kong had sanctions actually reduced undocumented migration. Futhermore, in the states that had already experimented with sanctions during the 1970s, there had been no discernible effect (for California, see Calavita, 1982). The international and state experiences with sanctions highlighted the myriad logistical and legal restraints on effectively enforcing employer sanctions. Immigration policymakers, committed to this law that effectively reconciled conflicting demands, countered the mounting evidence with the assurance that U.S. employers would voluntarily comply with employer sanctions simply because it was the law.

The move to make compliance easy for the employer was based on political necessity and justified on the grounds that "most employers, as generally law-abiding citizens, will uphold the law" (U.S. Congress, 1981: 4). This assumption of the law-abiding nature of employers not only made it important to protect the employer through the affirmative defense provision in order to minimize discrimination; it also apparently made it unnecessary to worry lest this protection become a loophole through which offending employers could avoid detection—a possibility that was left virtually unexplored through five years of congressional debate. The employer sanctions law that resulted, grounded as it was in assumptions about voluntary compliance, guaranteed widespread employer violations. Facing a contradiction between political and economic forces, legislators produced a law whose effect was to be solely symbolic.[20] The point here is not simply that Congress passed a toothless law by making compliance easy through the incorporation of loopholes. Rather, the law in effect made *violations* "pragmatically easy." Through the affirmative defense and good faith provisions, Congress guaranteed that conformity with the paperwork requirements would be taken as an indication of compliance, thereby ensuring that violations of the "knowing hire" provision—the real meat of the law—would be virtually risk-free.

Senator Simpson once complained that those who attempted to divert discussion of employer sanctions by focusing on employment discrimination were performing a "magnificent shunt" (quoted in Montwieler, 1987: 256). It might well be argued that a parallel "shunt" had occurred as Congress responded to the political mandate to pass employer sanctions while simultaneously accommodating important economic interests, by redefining compliance for all practical purposes as a cursory check of worker documents and the filing of an I-9 form.

[20] Given the nature of this contradiction, it is probable that legislators and policymakers in other countries have struggled with a comparable catch-22. Case studies of the employer sanctions laws in the countries studied by the GAO might reveal, for example, that the constraints associated with enforcement in those countries are traceable to such a catch-22.

The accommodation to economic interest through regulatory emasculation is of course not new. In fact it could be argued that such emasculation *prevailed* in the deregulatory zeal of the 1980s.[21] However, the employer sanctions legislation represents a dramatic aberration from the deregulatory trend in at least one respect. For it was precisely during this period of "regulatory relief" for industry and the dismantling or rolling back of extant regulations that Congress drafted a whole new set of provisions regulating the employment relationship, in effect shifting the "burden" of immigration enforcement to the employer. It is not just the emasculation of this law then that must be explained, but the forces behind its creation in the first place. Faced with the political imperatives of restrictionism on one hand and the economic utility of immigrant workers on the other, the deregulatory Congress shunted—enacting a new regulation but dooming it to failure.

## VIII. IMPLEMENTATION PROCEDURES: LOOPHOLES AND BLACK HOLES

Implementation decisions of the INS, echoing the concerns expressed in Congress, have been similarly guided by the political necessity not to "harass" employers[22] and the operating assumption of employer compliance. INS Commissioner Nelson previewed the agency's focus on voluntary compliance in 1983 before the House Subcommittee on Immigration, Refugees, and International Law. "We are absolutely convinced," he said confidently, "that there will, in fact, be very substantial voluntary compliance. We look forward to working closely with employers to insure that there is maximum voluntary compliance to meet their needs" (U.S. Congress, 1983: 244).

This spirit of cooperation was institutionalized by Nelson with the opening of a new division within the INS—the Department of Employer-Labor Relations—devoted to establishing rapport with employers and encouraging voluntary compliance with employer sanctions. According to one INS investigator in the Washington office at the time, a significant portion of the resources allocated for sanctions enforcement was "drained off" to this department, resulting in allegations by some INS investigators that their budget had been "raped" by the new unit (interview, 12 Nov. 1987).

At the level of day-to-day enforcement activities, the regula-

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[21] For a good summary of the deregulatory movement and its implications, see Harris and Milkis (1989).

[22] The success of this effort not to alienate employers is revealed in recent comments by Representative Howard Berman of California (1989). Addressing a New York City Bar Association conference on employer sanctions and discrimination, Berman warned immigrant advocates interested in launching a campaign to have employer sanctions repealed that they should not count on businessmen or the Chamber of Commerce as allies, as they apparently have very little interest in the matter.

tions and implementation procedures developed by the INS compound the effects of the "affirmative defense" and "good faith" clauses. First, employers have three business days from the date of hire to complete the I-9 form (U.S. Immigration and Naturalization Service, 1987b: § 274a.2), essentially allowing employers of day labor to slip through the cracks of enforcement.[23] More important, employers are given a minimum of three days' notice before employer sanctions inspections (*ibid.*). A main purpose of this regulation, as explained by an upper-level INS official in Washington, was to avoid inconveniencing the employer or interrupting business (interview, 8 June 1987). Its consequence is to give those employers who have not compiled the required I-9 forms three days in which to prepare this "affirmative defense." A recent INS inspection of one employer's files, witnessed by the author, revealed that a significant portion of the employer's I-9 forms had been completed the day before the inspection.[24]

In addition, the three-day notice gives employers the opportunity to lay off their undocumented workers. When the author asked the officer in charge of sanctions enforcement in a southwestern city if the three-day warning might not provide an opportunity for employers to "clean up shop," he replied with a smile, "That's the way *we* feel about it. No, really, but the emphasis is on compliance. We are telling the employer 'We want you to comply, so we're giving you this time.' Our lawyers want to avoid court injunctions. . . . We want employers to comply voluntarily" (interview, 19 Nov. 1987).

Finally, the INS *Immigration Officer's Field Manual for Employer Sanctions* (1987), the official handbook of internal operating procedures, highlights the "good faith" clause and emphasizes, indeed expands on, the lack of employer responsibility for verifying the validity of documents. An entire section in the manual deals with "Requests for Verification of Employment Status" (§ III-G), and instructs service officers "to decline routine requests [by employers] for verification of employment status of employees or other forms of screening," most notably validating documents (§ III-G-2). It explains: "The reasons for this policy . . . emanate from the statute's provisions mandating the employer's verification responsibilities. . . . Further, the standard created by the statute is

[23] Technically, an employer who hires a worker for less than three business days must complete the form within the first twenty-four hours; however, in practice this provision is virtually impossible to implement since an employer can always argue that they "intended" to employ a worker for longer than three days, but after the first or second day had to terminate them. Not surprisingly, no employer of temporary day labor has been fined under employer sanctions.

[24] Such employers can be fined only for paperwork violations, i.e., failure to complete the form within three business days of hire. To the extent that employers are willing to predate the form, they can of course avoid even this penalty.

that the employer examine the documents and determine whether they appear on their face to be genuine. Employers who complete the verification process in accordance with that standard are entitled to a rebuttable "good faith" defense to the knowingly hiring provisions. . . . *Officers are encouraged to discuss those provisions when responding to routine requests for screening*" (*ibid.*; emphasis added.) In other words, INS agents are officially instructed to stress to employers who are uncertain about the validity of workers' documents that they have a "good faith" defense against prosecution, as long as those documents "appear on their face to be genuine." When asked by the author how leniently the phrase "appear on their face to be genuine" is to be interpreted, one upper-level INS official in Washington replied that the employer should be suspicious if there is "five tons of white-out" on a worker's document (interview, 8 June 1987). Another official said the employer should be concerned if the identification showed the photo of a gorilla (interview, 3 Dec. 1987).

The INS emphasis on voluntary compliance and the self-imposed restrictions that the agency codified in its *Field Manual* and federal regulations are in part the consequence of legislative imperatives handed down by Congress. However, they also reflect a parallel decisionmaking process in which a primary administrative concern is not to be perceived as harassing employers—a perception that would jeopardize the legislative solution painstakingly achieved in Congress. The GAP inspection procedures discussed above are one piece of this effort to contain employer hostility to the law through a "neutral" selection process. But it is still the case that the majority of inspections (65 percent in fiscal year 1989) are based on specific leads and thus involve employers whom the INS suspects may be in violation.[25] In conducting these inspections, the INS is not only stymied by the loopholes built into the law but further expands those loopholes with strategies designed to minimize employer complaints.

Under these circumstances, there are only two ways for the INS to detect a violation of the "knowing hire" clause. The first is to catch the employer red-handed. This involves an initial workplace raid (which requires no advance notice), during which undocumented workers are rounded up and processed for "voluntary departure."[26] Following the raid, the employer is told that those particular workers are undocumented. At a later date, and after the required three-day warning, the employer is subject to an I-9

[25] The INS *Field Manual* emphasizes that lead-based inspections must be carried out only where there is an "ability to articulate logical reasons to suspect a violation" (U.S. Immigration and Naturalization Service, 1987a: § III-2).

[26] Most deportable aliens are not put through deportation proceedings but are encouraged to opt for "voluntary departure," meaning that they sign a form admitting to their illegal status and return "voluntarily" to their country of origin. Much like plea bargaining, this system saves the government time and resources and is critical to the survival of the enforcement system.

inspection. If this inspection reveals that the specified undocumented workers are still on the payroll, the employer can be cited or fined for "knowingly" continuing to employ undocumented workers. This initially was the primary strategy in the San Diego District of the INS but has since lost favor. One inspector who continues to use the strategy periodically told the author that he no longer relies on it exclusively because, not surprisingly, "I wasn't catching anybody" (interview, 29 Sept. 1988). The alternative strategy is to elicit sworn statements from undocumented workers to the effect that their employer actively "knew" of their illegal status, and/or conspired to cover up that status (for example, by telling them to "fix" their documents). Aside from the question of how these statements will hold up in court, particularly since the workers in question are likely to have been removed from the country by time of trial, this strategy at best will net only the most blatant violators.

The loopholes opened in the legislative process and stretched by implementation decisions are now wide enough and deep enough to satisfy the needs of all but the most stubborn or ill-informed of employers. Curiously, it was the very assumption of voluntary compliance that resulted in the semantic transformation of "compliance" in the first place; once this newly defined compliance was made "pragmatically easy" for the employer, widespread and risk-free violations were a foregone conclusion.

## IX. CONCLUSION

The INS enthusiastically applauds "across the board. . . voluntary compliance" with employer sanctions (INS San Diego District Counsel, quoted in the *San Diego Union/Tribune*, 1 Feb. 1989). Yet close to half of the employers in this study told the interviewers that they "think" they have undocumented workers on the work force, and a significant portion of these respondents "know" in the most meaningful sense of the word that these workers are unauthorized. Eleven percent of the sample volunteered that they continue to knowingly employ the undocumented. Others intend to hire the undocumented in the future.

It has been argued here that the widespread violations documented among these employers, as well as the anomalous perception of compliance on the part of the INS, can be explained through a synthetic approach that combines the criminological and the sociolegal traditions. Studies of white-collar crime have generally focused on the frequency and severity of such crimes and/or on their differential treatment as compared to street crime. Explanations of white-collar crime often emphasize this differential treatment and the consequent calculation by employers that "this crime pays." This study follows in that tradition, in that it confirms the prevalence of white-collar crime (in this case employer

sanctions violations), as well as the importance of cost/benefit analyses in explaining this illegal activity. But it suggests that such a strictly criminological approach is incomplete. For it was the lawmaking process itself that ensured that employer violations would entail very little risk.

In an effort to make sense of this legislative process and the semantic ambiguities permeating it, the article has drawn on dialectical models of lawmaking which place the conflicts confronting policymakers within the context of contradictory structural forces. It has argued that an inherent contradiction underlies immigration policymaking—a contradiction that is grounded in the economic role played by immigrant labor versus the political backlash against this cheap labor supply. The resulting dilemma for immigration policymakers in the early 1980s was that they were pressed on one hand by a public demand for employer sanctions and on the other by the impossibility of passing such a law over the objections of employers. An employer sanctions law that satisfied employers by making it easy for them to "comply" was the solution to this dilemma. By de facto redefining compliance as conformity with the paperwork component of the law, Congress constructed a law that made employers virtually immune to the "knowing hire" clause and simultaneously guaranteed widespread violations.

A personnel director interviewed as part of this study, noted, with no sarcasm apparently intended, "We have people who are illegal. We don't *know* that because they've shown us documents." His ingenuous observation underlines the need to go beyond a narrow criminological explanation of these white-collar crimes, to probe the legislative sources of such transparent—but no less effective—semantic alibis. This study, in making these connections between risk-free employer violations, definitional defenses, and the legislative process, represents an effort to construct such an integrated explanation of lawbreaking and lawmaking.

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## APPENDIX

**Table A1.** Profile of Firms Interviewed in 1987–1988

| | |
|---|---|
| Number of employees (median) | 100 |
| Gross sales of firm previous year (median) | $2 million |
| Entry level wages for unskilled/semiskilled work (median) | $4.20 |
| Proportion of work force Hispanic (mean) | 52% |
| Proportion unionized | 28% |
| Fined for labor standards violations | 7% |

**Table A2.** Apprehensions of Undocumented Aliens by U.S. Border Patrol along U.S.-Mexico Border

| | | | |
|---|---|---|---|
| 1982 | 743,830 | 1986 | 1,615,854 |
| 1983 | 1,034,142 | 1987 | 1,122,067 |
| 1984 | 1,056,907 | 1988 | 943,063 |
| 1985 | 1,185,795 | 1989 | 854,939 |

SOURCE: U.S. Immigration and Naturalization Service.

## SELECTED EMPLOYER INTERVIEW QUESTIONS

1. I realize you have no way of knowing this for sure, but do you think that some of your employees may be undocumented?
2. [If yes] About what proportion?
3. Has the new immigration law affected in any way the types of workers you hire?
4. Do you anticipate any future changes in how you hire workers as a result of the new law?
5. Do you think other firms in this line of work use undocumented workers?
6. Are you currently filling out I-9 forms for your new employees?
7. [If yes] Why is it important to fill out this form?
8. Do you anticipate any problems complying with the new immigration law?
9. [If yes] What kind of problems?