

Illegal Entrants: The Wetback Problem in American Farm Labor

Mexican residents who enter the United States illegally to engage in farmwork create one of the most perplexing problems confronting America's farmworkers. Popularly called "Wetbacks" because many swim or wade the Rio Grande River to enter this country, these Mexicans disrupt the efforts of domestic workers to obtain better working conditions, usurp job opportunities, and generally drain the economy of millions of dollars. Although not new, the problem of the Wetback influx has come under attack only in the last two decades, when the number of *Alambristas*, "fence jumpers," as Wetbacks are sometimes called, has mounted to a virtual invasion. The threat of apprehension, deportation, and even prosecution has not overcome the incentive to cross the border illegally. This paper surveys the causes and dimensions of the Wetback problem and examines the success of current efforts to control it.

I. THE INVASION

Although Mexicans have entered this country illegally for over a century, the number of Wetbacks remained insignificant until World War II.¹ At that time, intolerably low wages and widespread unemployment in Mexico combined with a high wartime demand for

¹REPORT OF THE PRESIDENT'S COMM'N ON MIGRATORY LABOR, MIGRATORY LABOR IN AMERICAN AGRICULTURE 69 (1951) [hereinafter cited as REP. OF THE PRESIDENT'S COMM'N].

labor in the United States to create the inevitable meeting of supply and demand. In a short time large numbers of Mexicans took advantage of the opportunity to cross into the Rio Grande Valley of Texas, seeking work with farmers eager for crews.² Between 1944 and 1950, the number of apprehended wetbacks increased from a yearly average of about 10,000 to 565,000.³

In response primarily to the wartime shortage of domestic farmworkers, but also to the illegal Mexican migration across the border, the United States in 1942 initiated the *Bracero* program to provide lawful means for Mexican farmworkers to enter this country temporarily.⁴ Under the initial program, the federal government brought approximately 350,000 Mexican farmworkers into this country.⁵ Contrary to expectations, however, the Bracero program did not curtail the mounting numbers of Wetbacks. Filled with red tape, delay, and expense, the program was generally boycotted by both Mexicans and United States farmers.⁶ In addition, the Mexican government began to insist that the United States "legalize" Wetbacks already in the United States before recruiting additional farmworkers from the interior of Mexico.⁷ As a result, about 142,200 apprehended Wetbacks were transferred to legal contract status between 1947 and 1949.⁸

²*Id.* at 71—74.

³The President's Commission reports the difficulty of measurement: "Although the exact size of the wetback traffic is virtually impossible to determine, the number of apprehensions by immigration officers is a general indicator but far from a precise means of measurement. The same individual may be apprehended several times during the season and therefore would be duplicated in the apprehension count. On the other hand, large numbers enter and leave without being apprehended and hence would not be in the deportation or departure figures at all." *Id.* at 69.

⁴*Id.* at 70.

⁵*Id.* at 40.

⁶Note, *Wetbacks: Can the States Act to Curb Illegal Entry?* 6 STAN. L.REV. 287, 299 (1954).

⁷The consequences of the "legalization" process are described as follows: "Such Wetbacks were given identification slips in the United States by the Immigration and Naturalization Service which entitled them, within a few minutes, to step back across the border and become contract workers. There was no way to obtain the indispensable slip of paper except to be found illegally in the United States. Thus violators of law were rewarded by receiving legal contracts while the same opportunities were denied law-abiding citizens of Mexico." *Wetbacks and American Farm Labor*, 32 INFORMATION SERVICE, No. 38, Nov. 21, 1953, at 2 (Cent. Dep't of Research and Survey, Nat'l Council of Churches of Christ in the U.S.A.).

Since there were already thousands of Mexicans illegally in the United States, our government thought Mexico's request was reasonable. Moreover, Mexican farmers were reluctant to lose even more labor, and American farmers preferred legalized Wetbacks because they were better workers and cheaper to obtain. REPORT OF THE PRESIDENT'S COMMISSION 52. See also TIME, Nov. 1, 1948, at 38.

⁸REPORT OF THE PRESIDENT'S COMM'N, 53. This "legalization" process was discontinued in 1949. *Id.*

By 1950 the Wetback invasion was merely recognized as a fact, with no real efforts being made to resist it. The Immigration and Naturalization Service, pressured by government officials and large truck farmers, frequently “went easy” on Wetbacks, particularly during harvest season,⁹ and employers felt that they had a vested right to tap this supply of cheap labor. In 1951 this attitude was graphically described:

The employment of Wetbacks is so commonplace in the Rio Grande Valley that no stigma of any kind attaches to it. It is recognized as the thing to do. And everyone is amiable about the whole business. The Wetback beams at the Patrol Inspector who apprehends him, knowing that the worst that is likely to happen to him is a day at the detention center (with no lunch provided), a free trip to the bridge, and a long walk back. The employer, if he doesn't exactly beam, is placidly philosophical about the matter and cheerfully pays off the worker, knowing that he will likely return after a short time. And the Patrol Inspector carries out his part of the ritual pleasantly enough knowing that if he chose to take the trouble, he could probably come back to the same place the next day and pick up the same alien again.¹⁰

The *laissez faire* attitude of the government depicted above soon changed. Confronted in the early 1950's with impressive statistics showing that illegal entrants displaced American workers, caused vast increases in crime and disease, and cost state and local governments millions of dollars,¹¹ the Immigration and Naturalization Service implemented “Operation Wetback,” a campaign to rid the country of illegally entering Mexicans.¹² As a result of Operation Wetback, the Border Patrol in 1954 apprehended well over one million Wetbacks, a number never before and never since equaled.¹³

⁹The President's Commission reported: “We find that there have been times when pressure has been successfully exerted upon Washington to have the Immigration and Naturalization Service issue orders to field officers to go easy on deportations until crops have been harvested.” REP. OF THE PRESIDENT'S COMM'N 75—76.

¹⁰SAUNDERS & LEONARD, WETBACKS IN THE LOWER RIO GRANDE VALLEY OF TEXAS 73 (The University of Texas, Inter-American Education Occasional Papers VII, 1951).

¹¹The Report of the President's Commission was the first authoritative analysis of the problems created by the influx of Wetbacks.

¹²“In 1954, Border Patrol officers were apprehending some 3,000 illegal entrants a day, but hundreds were getting through. Commissioner Joseph M. Swing organized a task force to tighten controls and round up those in the country illegally. Known as ‘Operation Wetback,’ this special force apprehended more than 1 million aliens who were in the United States without sanction of law and sent them by truck, train, and airplane to the border, where they were turned over to Mexican authorities.” L. HUSTON, THE DEPARTMENT OF JUSTICE 182 (1967).

¹³*Id.*; see also F. Schmidt, Institute of Industrial Relations, UCLA, After the Bracero: An Inquiry into the Problems of Farm Labor Recruitment 19, Oct. 1964 (an unpublished report submitted to the Dep't of Employment of the State of California).

Since Operation Wetback the federal government has adhered to a policy of strict enforcement but has been unable to reduce the number of Wetbacks to pre-World War II levels. In 1968, for example, the Immigration and Naturalization Service located a total of 151,705 wetbacks,¹⁴ more than a 40 percent increase over 1967.¹⁵ However, those apprehended represent no more than one-half, and perhaps as little as one-tenth, of the total number of illegal entrants from Mexico.¹⁶ More significant is the fact that Wetbacks are currently estimated to comprise 20 percent of the national farm labor work force and as much as 60 percent in some farming belts, such as California's Imperial Valley near the Mexican border.¹⁷

II. CONSEQUENCES OF THE WETBACK INVASION

Like the Wetbacks in the 1950's, today's illegal entrants are coming under severe criticism. They have been blamed for unemployment and low wages among our own farmworkers, the spread of disease and crime, and the expenditure of millions of dollars by federal, state, and local governments. Although the problems of the unlawful migration are particularly serious in the Southwest, they are by no means confined to that area.

A. Competition for Wages and Jobs

Wherever Wetbacks work in large concentrations they tend to depress local wage rates and displace domestic farmworkers.¹⁸ This results not merely from the fact that Wetbacks are accustomed to much lower wages in Mexico, but also from the employers' wage

¹⁴In 1968, border patrol officers apprehended 212,057 deportable aliens, of which 151,705 (72 percent) were Mexicans. Of the total, 121,047 (57 percent) were aliens who had entered illegally, and the remainder were those who became deportable after violating the status for which they were lawfully admitted. The number of adult male Mexicans was 133,024. IMMIGRATION AND NATURALIZATION SERVICE ANNUAL REPORT 10 (1969).

¹⁵In 1967 the border patrol apprehended 108,689 deportable Mexicans. IMMIGRATION AND NATURALIZATION SERVICE ANNUAL REPORT 11 (1968).

¹⁶See SAUNDERS & LEONARD, *supra* note 10, at 84; REPORT OF THE PRESIDENT'S COMM'N 1; see also a series of articles in the *New York Times*, March 25—29, 1951.

¹⁷Memorandum from Robert Gnaizda and Sheldon Green to CRLA directing attorneys, Sept. 2, 1969. This information was compiled in connection with law suits filed against farmers who employ Wetbacks.

¹⁸REP. OF THE PRESIDENT'S COMM'N 78—83.

leverage over workers whose status in the country is precarious.¹⁹ In 1951, the President's Commission on Migratory Labor reported that Wetbacks without question "severely depressed" farm wages, citing the fact that wage rates in the Lower Rio Grande Valley of Texas, an area of high influx, were often only one half the amount of wages elsewhere.²⁰ A study made in 1969 in California, moreover, revealed that one farmer who paid Wetbacks four dollars a lug to pick apples was forced to increase his rate to seven dollars immediately after the arrest of his alien employees.²¹

Unable to compete with their foreign counterparts, domestic farmworkers in areas of high Wetback influx are often forced into migration in search of better wages.²² Although the discrepancy in wages accounts for much of the displacement of domestic workers, the mere presence of Wetbacks in the work force has a significant adverse effect, whatever their wage rate. It was recently estimated, for example, that the jobs taken by Wetbacks cost domestic farmworkers from \$105 million to \$205 million in lost wages in California alone.²³

Recent critics of the Wetback accuse him of acting as a strike-breaker at the instance of growers intent on disrupting the farm labor union movement.²⁴ Although there are not yet authoritative statistics supporting this accusation, it has been confirmed that unusually large numbers of Wetbacks have been found in strike-torn areas.²⁵

B. Impact on the Community

Aside from their effects on farmworkers, Wetbacks have a profound influence on the community in general. Linked with the spread

¹⁹6 STAN L. REV., *supra* note 6, at 288—89.

²⁰REPORT OF THE PRESIDENT'S COMM'N 78—79.

²¹This information was obtained from the reporter's transcript of hearings held before the Subcomm. on Migratory Labor of the Sen. Comm. on Labor and Public Welfare on Aug. 8, 1969 and cited with the approval of the witness. At the time of this publication, the hearings had not yet appeared in published form [hereinafter cited as *Hearings*.] See also *Sacramento Bee*, Aug. 9, 1969, at 1, Col. 5.

²²REPORT OF THE PRESIDENT'S COMM'N 81; 6 STAN L. REV., *supra* note 6, at 289. Low wages in communities near the Mexican border have long been recognized as one of the chief causes of migration.

²³*Hearings*, *supra* note 21.

²⁴Arnold Mayer, legislative representative of the Amalgamated Meat Cutter and Butcher Workmen (AFL-CIO), recently said: "I think it is important that we understand that we are not talking about a few individual workers crossing the border to break strikes. We are talking about hundreds of thousands, and perhaps even more than that, workers who regularly cross the border and many of them specifically, in cases of strikebreaking situations." *Hearings on H.R. 12667 Before the Special Subcomm. on Labor of the House Comm. on Education and Labor*, 91st Cong., 1st Sess., at 43 (Hearings held in Wash., D.C., July 16, 1969). See also *TIME*, Oct. 11, 1968, at 24.

²⁵*TIME*, Oct. 11, 1968, at 24.

of crime and disease, they cause high expenditures for law enforcement agencies, public health facilities, and other governmental departments.²⁶ During periods of intense migration across the border, disease and death rates in border communities have reached epidemic proportions,²⁷ and crime waves involving Wetbacks have been commonplace.²⁸

At the height of the Wetback invasion in the 1950's it was estimated that the costs of the problem to taxpayers in one border county alone amounted to between \$200,000 and \$500,000 in health, welfare, and law enforcement expenditures.²⁹ These costs are rising. In 1969 it was estimated that expenditures for Wetback-created problems amounted to \$400,000 in one Northern California county, not a major agricultural area, and \$7,300,000 in California's seven major agricultural counties.³⁰

III. CONTROL OF WETBACK TRAFFIC

Individually or with the help of smugglers, Wetbacks enter this country by crossing the border at unguarded points,³¹ forging

²⁶In this regard, the Immigration and Naturalization Service reports the following: "Early in 1955, after the rate of illegal entry had been forced down some 70 percent through an all-out enforcement effort, a survey was made to determine what effect the operation had had on these welfare and enforcement agencies. It was established that unemployment compensation claims had declined some 8 percent more than the usual seasonal declines of the two preceding years. This reduction amounted to about 8,000 claims and represented an average weekly saving of \$188,000 in one State alone.

"Bookings of aliens by one California sheriff's department dropped from 642 in fiscal year 1954 to 171 in 1955. Police bookings in a California city were made up to 49 percent aliens in 1953, and were reduced to less than 2 percent aliens by 1955 and 1956. Similar reductions were reported by other cities. One county hospital reported savings of \$12,000 a year. Welfare payments were cut in half in another county." U.S. DEPT OF JUSTICE, IMMIGRATION AND NATURALIZATION SERV., THE BORDER PATROL—ITS ORIGIN AND ITS WORK 10 (M—157, 1969).

²⁷"In the areas of Wetback traffic, death and disease assume far more the characteristics of Mexico than of the United States." REPORT OF THE PRESIDENT'S COMM'N 84.

²⁸In 1954 it was reported that "[r]eliable statistics on Wetback contribution to criminal activity are not available. But reports of individual enforcement officers indicate that it is substantial. The Yuma County, Arizona, court records for a six-month period show that 75 percent of the crimes committed were by or against Wetbacks. Similarly, the district attorney of Hidalgo County, Texas, stated that aliens committed 75 percent of the felonies in his county, 95 percent of the burglaries, and that 50 percent of the murder cases were those of aliens. To such statements can be added a flood of newspaper reports tending to show that the Wetback has aggravated problems of law enforcement wherever he has been encountered." 6 STAN. L. REV., *supra* Note 6, at 291.

²⁹*Id.* at 294.

³⁰Memorandum, *supra* Note 17.

³¹SAUNDERS & LEONARD, *supra* note 10, at 38.

passports,³² and concealing themselves under car seats, false floors in trucks, loads of vegetables, and even in old oil drums.³³ The expanse of the 1,945 mile United States-Mexico border makes enforcement extremely difficult. Once in this country, Wetbacks blend into the domestic labor force, often traveling far north of the border in search of both work and obscurity.³⁴

A. Apprehension: The Role of the Border Patrol

The most formidable obstacle which confronts illegally entering Wetbacks is the Border Patrol.³⁵ A staff of about 1,500 deputies under the direction of the Immigration and Naturalization Service, the Border Patrol apprehends well over a hundred thousand illegal entrants per year.³⁶ To accomplish this task, each Border Patrol officer has statutory authority, without warrant, (1) to interrogate aliens about their status,³⁷ (2) to arrest not only those who cross the border in his presence, but also those whom he reasonably believes to have entered illegally and are likely to escape before a warrant can be obtained,³⁸ (3) to make arrests, upon probable cause, for any felony violation of Immigration law if the violator may escape before a warrant can be obtained,³⁹ (4) to board and search airplanes, railway cars, vehicles, and ships within a reasonable distance of the border,⁴⁰ and (5) to patrol for aliens on private lands within 25 miles of the border.⁴¹

Since it is vastly more difficult to detect Wetbacks once they have blended into the population, the Border Patrol directs its most vigorous efforts toward apprehension at time of entry. With the help of rapid communication networks, it patrols in jeeps, light observa-

³²In recent years the use of forged documents for the purpose of gaining entry and employment has become much more commonplace. See F. Schmidt, *supra* note 13, at 19; and *Hearings on H.R. 12667*, *supra* note 24, at 23, 234.

³³See Biffle, *Growing Tide of Wetbacks Spurs Border Alert*, San Francisco Chronicle, Nov. 24, 1968, Sec. A at 6.

³⁴In 1967 only 68.5 percent of the Wetbacks were apprehended in the Southwest (1967 IMMIGRATION AND NATURALIZATION SERV. ANNUAL REP. 11) and in 1968 only 58 percent (1968 IMMIGRATION AND NATURALIZATION SERV. ANNUAL REP. 10).

³⁵Most of the following information on the Border Patrol was obtained from U.S. DEP'T OF JUSTICE, IMMIGRATION AND NATURALIZATION SERV., THE BORDER PATROL—ITS ORIGIN AND ITS WORK (M—157 1969).

³⁶See text accompanying notes 13—15, *supra*.

³⁷8 U.S.C. § 1357(a)(1) (1964).

³⁸*Id.* § 1357(a)(2).

³⁹*Id.* § 1357(a)(4).

⁴⁰*Id.* § 1357(a)(3).

⁴¹*Id.* The Inspector cannot, however, enter dwellings.

tion aircraft, and on foot. In addition, it has developed techniques of smoothing the ground along vast stretches of the border so that entering Wetbacks will leave clear footprints.

To locate Wetbacks who have escaped detection at time of entry, the Border Patrol checks automobile traffic on major highways, freight train yards, and farms and ranches. Moreover, it frequently cooperates with local law enforcement agencies⁴² and increases the size of its patrol in areas where Wetbacks are likely to be seeking employment, such as California's strike-torn San Joaquin Valley.⁴³

B. Deportation and Voluntary Departure: The Process of Removal

Apprehended Wetbacks may be prosecuted,⁴⁴ formally deported,⁴⁵ or simply allowed to return home with no sanction other than a notation of apprehension.⁴⁶ Since the government rarely invokes its power to prosecute,⁴⁷ the decision is usually between deportation or "voluntary departure," and in the vast majority of cases the latter is chosen.⁴⁸

In general, an alien can be deported only after an investigation, arrest, and hearing.⁴⁹ If found to be here illegally, he may be deported to the country from which he came,⁵⁰ usually at the expense of the United States.⁵¹ The consequences of deportation are severe. The offender loses his right to enter the country legally without special permission.⁵² In addition, if apprehended again, the deportee is guilty of a felony punishable by two years' imprisonment or a \$1,000 fine, or both.⁵³ Most Wetbacks, however, are spared the legal stigma of

⁴²As a result of this liaison, other law enforcement agencies in 1968 apprehended 10,925 illegal aliens and turned them over to the border patrol. 1968 IMMIGRATION AND NATURALIZATION SERV. ANNUAL REP.

⁴³SATURDAY REVIEW, Aug. 17, 1968, at 62.

⁴⁴8 U.S.C. § 1325 (1964).

⁴⁵8 U.S.C.A. § 1251 (Supp. 1968).

⁴⁶*Id.* § 1254(e).

⁴⁷See text accompanying notes 59, 62—64, *infra*.

⁴⁸See note 55, *infra*.

⁴⁹8 U.S.C. § 1252 (1964). Instead of arrest, however, the Immigration and Naturalization Service may simply serve upon the alien an order to show cause and notice of hearing. For the procedure in deportation, see generally C. GORDON & H. ROSENFELD, IMMIGRATION LAW AND PROCEDURE §§ 5.1—5.21 (1966) [hereinafter cited as GORDON & ROSENFELD].

⁵⁰As a general rule, the alien is deported to the country from which he came. However, he may be returned to a number of other countries. 8 U.S.C. § 1253 (1964). See GORDON & ROSENFELD § 5.17.

⁵¹8 U.S.C. § 1253(c) (1964). See GORDON & ROSENFELD § 5.21.

⁵²A deported alien is "ineligible to receive visas and shall be excluded from admission to the United States" unless the Attorney General has authorized re-entry. 8 U.S.C. § 1182(a)(16) (1964).

⁵³*Id.* § 1326.

deportation,⁵⁴ since immigration authorities frequently exercise their statutory power to allow aliens simply to depart voluntarily without the entry of a formal deportation order.⁵⁵ Unless the apprehended alien is guilty of an offense other than illegal entry, he is almost always extended the opportunity to depart voluntarily. In 1968, for example, the number of aliens allowed to depart voluntarily amounted to 179,952, dwarfing the total of 9,130 deported aliens.⁵⁶

To remove the hundreds of thousands of Wetbacks who are deported or allowed to voluntarily depart each year, the United States cooperates with Mexico in the operation of buses, trains, and airplanes to return apprehended Wetbacks to the interior of Mexico. In 1968, a total of 83,546 Wetbacks were returned under this removal program.⁵⁷ Those who pay their own departure expenses suffer no penalty for their illegal entry except a record of apprehension, but those who voluntarily depart at the expense of the U.S. government may suffer consequences, in the discretion of immigration authorities, similar to those of deportation.⁵⁸

C. Criminal Penalties

Federal statutes prescribe penalties for Wetbacks, their smugglers, and persons who transport, harbor, or conceal them.⁵⁹ In terms of preventing unlawful entries, however, these penalties are not effective. Few Wetbacks are punished criminally, and farmers who hire

⁵⁴If the opportunity is extended after the entry of a final deportation order, however, the alien is deemed to have been deported, with the consequent stigma, "irrespective of the source from which the expenses of his transportation were defrayed or of the place to which he departed." 8 U.S.C. § 1101(g) (1964). Nevertheless, even in this situation voluntary departure places the alien in a somewhat favored position. See GORDON & ROSENFELD § 7.2b(3).

⁵⁵8 U.S.C. § 1254(e) (1964). Voluntary departure may be accorded before any formal proceedings are commenced, during the proceedings but before a final expulsion order, and even after the entry of a final deportation order. GORDON & ROSENFELD § 7.2.

⁵⁶1968 IMMIGRATION AND NATURALIZATION SERV. ANNUAL REP. 19 (1969).

⁵⁷*Id.* at 14. The transportation lines operate between Mexican cities near the border and points deep in the interior of Mexico. The program is designed, at least in part, to prevent removed Wetbacks from merely stepping back across the border into the United States. See *Wetbacks and American Farm Labor*, *supra* note 7, at 2—3. In 1968, 21,000 of the apprehended Wetbacks had been previously removed under this program.

⁵⁸Telephone Interview with Mr. Seitz, Public Information Officer of the Southwest Regional office of the Immigration and Naturalization Service, San Pedro, California.

⁵⁹See text accompanying notes 65—73, *infra*.

them, thus indirectly encouraging their entry, cannot be prosecuted merely for the act of employment.⁶⁰

1. Unlawful Entry

Upon the first offense, persons who enter the United States illegally are subject to imprisonment for up to six months and to a fine of \$500. Second offenders are guilty of a felony punishable by imprisonment for up to two years and a fine of \$1,000, or both.⁶¹ As mentioned earlier, however, the United States may forego criminal prosecution in favor of the more expedient remedies of deportation or voluntary departure.⁶² A few Wetbacks, primarily those who have committed other crimes while in the United States,⁶³ are prosecuted for illegal entry. The vast majority, however, escape even formal charges, apparently because of time and manpower limitations.⁶⁴

2. Smuggling

Most Wetbacks come here on their own initiative, but substantial numbers are smuggled into the country or induced to cross the border with promises of work and concealment. In 1968, the government apprehended 1,210 smugglers and 6,662 smuggled aliens, both figures representing substantial increases over previous years.⁶⁵

A risky but lucrative business,⁶⁶ smuggling of aliens is a felony punishable by imprisonment for up to five years or a fine of \$2,000, or both, for each smuggled alien.⁶⁷ This crime is defined broadly enough to encompass persons who merely encourage or induce Wetbacks to enter this country, or attempt to do so.⁶⁸

⁶⁰See text accompanying notes 70—73, *infra*.

⁶¹8 U.S.C. § 1325 (1964).

⁶²See text accompanying notes 44—48, *supra*.

⁶³In 1968, the number of prosecutions for *all classes* of apprehended aliens amounted to only 3,212, 1968 IMMIGRATION AND NATURALIZATION SERV. REP. 19 (1969).

⁶⁴Interview with Mr. Seitz, *supra* note 58.

⁶⁵1968 IMMIGRATION AND NATURALIZATION SERV. ANNUAL REP. 11 (1969).

⁶⁶Wetbacks take the biggest risk, since not infrequently they have been found asphyxiated in air tight containers used by the smugglers to avoid apprehension. See TIME, Oct. 11, 1968, at 24; and San Francisco Chronicle, Nov. 24, 1968, sec. A at 6. The smugglers ordinarily charge each Wetback anywhere from \$50 to \$250. 1967 IMMIGRATION AND NATURALIZATION SERV. ANNUAL REP. 11 (1968).

⁶⁷8 U.S.C. § 1324 (1964).

⁶⁸*Id.* § 1324(a)(4).

3. Transporting, Concealing, and Harboring

In addition to punishing Wetbacks and their smugglers, the federal statutes establish penalties for persons who “willfully or knowingly” transport, conceal, harbor, or shield Wetbacks from detection.⁶⁹ However, this section specifically provides that employment and the “usual and normal practices incident” to employment are deemed not to constitute harboring.⁷⁰ Because of this statutory exemption, neither farmers nor farm labor contractors who merely hire Wetbacks can be found guilty of harboring, although employers are not immune from prosecution for transportation, shielding, or concealment of illegal aliens.⁷¹

In debating the employment exemption in Congress, proponents justified it on the ground that it was needed to protect an employer “who unwittingly or unknowingly, or thoughtlessly hires a man he does not know to be a Wetback”⁷² Although it is far from clear, the exemption apparently extends further than its proponents indicated, preventing conviction even of employers who *know* they are hiring Wetbacks. Although it is arguable that employers were merely seeking insurance against prosecution for the innocent employment of Wetbacks, it is hard to explain the addition of the exemption in a statute which already requires evidence of knowledge or willfulness.⁷³ To interpret the Statute to allow prosecution for knowingly hiring a Wetback would render the exemption nugatory.

D. The Effect of Present Law

Under present law, less than six percent of all apprehended Wetbacks suffer the legal consequences flowing from deportation,⁷⁴ and less than two percent are prosecuted.⁷⁵ Over 90 percent, there-

⁶⁹8 U.S.C. § 1324(a)(2), (3) (1964). The crime is a felony punishable by imprisonment for up to five years or a fine of \$2,000, or both, for each alien involved.

⁷⁰*Id.* § 1324(a)(4).

⁷¹Herrera v. United States, 208 F.2d 215, 218 (9th Cir. 1953); *see also* GORDON & ROSENFELD § 9.23c.

⁷²98 CONG. REC. 793—94 (1952).

⁷³8 U.S.C. § 1324(a)(3) (1964). This interpretation is by no means conclusive. *See* 6 STAN. L. REV., *supra* note 19, at 318—19. Any doubt about the scope of the employment exemption, however, has apparently been tacitly resolved in favor of the employer. *See Hearings, supra* note 21.

⁷⁴This figure represents the percentage of Mexicans deported which the number of apprehended Mexicans bears to the total number of aliens apprehended.

⁷⁵This figure represents the percentage of Mexicans prosecuted which the number of apprehended Mexicans bears to the total number of aliens apprehended.

fore, are allowed to return to Mexico voluntarily, incurring no penalty whatsoever except possibly the burden of paying the return fare to Mexico.⁷⁶ Moreover, without the threat of prosecution of employers,⁷⁷ the only pressure to be exerted upon Wetbacks comes from the Border Patrol, whose staff is dwarfed by the size of the Wetback influx.⁷⁸

As one might expect, current laws have had little impact in terms of reducing illegal entries. In fact, recent figures show that the number of Wetbacks has been increasing steadily for several years.⁷⁹ Although it is arguable that much of the increase is attributable to more energetic enforcement activities, it is more likely caused from increased numbers of Wetbacks. The termination of the *Bracero* program in 1965 under which hundreds of thousands of Mexican farmworkers had previously entered this country legally each year,⁸⁰ farm labor turmoil and strikes creating a need for outside labor,⁸¹ and a low standard of living in Mexico⁸² all create an irresistible temptation.

IV. EFFORTS FOR CHANGE: THE DILEMMA

Recognizing the ineffectiveness of present law, reformers have sought far-reaching changes, both in Congress and in the courts. Some have suggested more prosecutions of Wetbacks,⁸³ but most seek to impose liability on growers who hire illegal entrants.⁸⁴

A. Congressional Activity

A bill now under consideration in Congress, H.R. 12667, amends § 8 of the National Labor Relations Act to make the hiring

⁷⁶See text accompanying notes 54—56, *supra*.

⁷⁷See text accompanying notes 69—73, *supra*.

⁷⁸See text accompanying notes 35—36, *supra*.

⁷⁹For the years 1961—64, a total of 280,000 aliens were deported or required to depart. For the years 1965—1968, however, the total increased to 579,000. U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 92 (90th ed., 1969).

⁸⁰For the problems of farm labor recruitment after the termination of the *Bracero* program, see generally F. Schmidt, *supra* note 13.

⁸¹See text accompanying notes 24—25, *supra*.

⁸²Although the economic condition of Mexico has greatly improved in recent years, it is still far below that of the United States. See Lewis, *The Tender Violence of Pedro Martinez*, HARPER'S, Feb., 1964, at 54—60.

⁸³See note 21, *supra*.

⁸⁴See 6 STAN. L. REV., *supra* note 19, at 319; see also text accompanying notes 85—86, *infra*.

of an illegal entrant an unfair labor practice.⁸⁵ This amendment, therefore, would make an employer found to have hired Wetbacks subject to a cease and desist order enforceable by federal court injunction.⁸⁶ Vigorously opposed by the American Farm Bureau Association,⁸⁷ the bill applies to all employers whether or not they have knowledge of their employee's illegal entry.

B. Civil Actions

In an attempt to accomplish judicially a result somewhat similar to that proposed by H.R. 12667, the California Rural Legal Assistance (CRLA), on behalf of farmworkers as a class, has recently filed numerous lawsuits throughout the San Joaquin Valley against farmers who employ Wetbacks.⁸⁸ Basing their actions on California's unfair competition law,⁸⁹ the plaintiffs seek damages or mandatory injunctions, or both. If granted, the injunctions would force farmers to inquire into the status of Mexican job applicants.

In general, defendant employers have resisted the CRLA complaints on the grounds that class actions are inappropriate, that

⁸⁵H.R. 12667, 91st Cong., 1st Sess. (1969).

⁸⁶NLRA §§ 10(c), (e); 29 U.S.C. 160(c), (e) (1964).

⁸⁷After outlining the difficulty of distinguishing between various "classes" of legal and illegal Mexican workers, Matt Triggs, Assistant Legislation Director of the American Farm Bureau Federation, declared: "It is, we would submit, unreasonable and arbitrary to declare a person liable for doing what it is impossible for him to avoid doing." *Hearings on H.R. 12667, supra* note 24, at 105—106.

⁸⁸*Richard Cobos v. Mello-Dy Ranch*, Civil No. 43104 (Sup. Ct. of Santa Cruz County, filed Oct. 24, 1969); *Lorez Alejandro v. Oberti Olive Co.*, Civil No. 16637 (Sup. Ct. of Madera County, filed Oct. 29, 1969); *Cunningham v. Bidassha*, Civil No. 16260 (Sup. Ct. of Sutter County, filed Oct. 9, 1969); *Manriques v. Mosesion*, Civil No. 105175 (Sup. Ct. of Kern County, filed July 25, 1969); *Epitacio Rios v. Don Blaser*, Civil No. 20480 (Sup. Ct. of Yuba County, filed July 10, 1969); *Pedro Hernandez v. Zuckerman farms*, Civil No. 98486 (Sup. Ct. of San Joaquin County, filed July 18, 1969); *George Breunig v. Donald G. Orr*, Civil No. 62387 (Sup. Ct. of Sonoma County, filed Aug. 5, 1969); *Juan Zabala v. Steak-Mate*, Civil No. 225897 (Sup. Ct. of Santa Clara County, filed Aug. 19, 1969); *Livingston Community Action Council v. Cella Vineyards*, Civil No. 142460 (Sup. Ct. of Fresno County, filed Sept. 18, 1969).

⁸⁹CAL. CIVIL CODE § 3369 (West Supp. 1969):

"1. Neither specific nor preventive relief can be granted to enforce a penalty or forfeiture in any case, nor to enforce a penal law, except in a case of nuisance or unfair competition.

2. Any person performing or proposing to perform an act of unfair competition within this State may be enjoined in any court of competent jurisdiction.

3. As used in this section, unfair competition shall mean and include unlawful, unfair or fraudulent business practice and unfair, untrue or misleading advertising and any act denounced by Business and Professions Code Sections 17500 to 17535, inclusive."

they conflict with federal immigration law and anti-discrimination legislation, and that the employment of Wetbacks is not "unfair competition" within the meaning of § 3369.⁹⁰ The basis of the last argument is that, by definition, there can be no unfair competition between employers and employees, persons not themselves in competition. The anti-discrimination objection is based on the argument that inquiry into the nationality of Mexicans would conflict with state and federal legislation prohibiting job discrimination on the basis of race or national origin. Having no precedents, the suits have naturally met with varied results in rulings on demurrers, which have been used to raise the various arguments. Trial judges have split widely on all the issues.⁹¹ It is interesting to note, however, that two judges have overruled general demurrers on the ground that the complaints state causes of action under the court's "general equitable power."⁹²

At the time of this writing, there have been no final decisions on the merits of the lawsuits which have survived demurrers. In one case, however, a consent decree was entered in which the defendant agreed to require all job applicants to display proof of citizenship, to keep records of the information obtained from the applicants, and to allow plaintiffs to inspect the records.⁹³

C. Some Suggestions

The assumption upon which the NLRA amendment and the CRLA lawsuits are based--namely, that Wetbacks are lured across the border by the hope of finding work--is hard to dispute. The argument that legal pressure on employers will be transferred to the Wetback job applicant also has merit. Left unresolved, however, is the question of the type of pressure to be exerted on employers.

The most severe form of pressure, strict criminal or civil liability for the employment of Wetbacks, is felt by some to be the only viable solution. Even disregarding the burden of strict liability on

⁹⁰*See, e.g.*, the trial judges rulings on demurrers in *Pedro Hernandez v. Zuckerman Farms Co.*, Civil No. 98486 (Sup. Ct. of San Joaquin County, decided Oct. 31, 1969); *Livingston Community Action Council v. Cella Vineyards*, Civil No. 142460 (Sup. Ct. of Fresno County, decided Dec. 22, 1969); *George Breunig v. Donald G. Orr*, Civil No. 62387 (Sup. Ct. of Sonoma County, decided Oct. 9, 1969).

⁹¹*Id.*

⁹²*Pedro Hernandez v. Zuckerman Farms Company*; and *Livingston Community Action Council v. Cella Vineyards*, *supra* note 90.

⁹³*Juan Zabala v. Steak-Mate*, Civil No. 225897 (Sup. Ct. of Santa Clara County, Aug. 28, 1969).

employers, however, a law such as this may be undesirable. First, the imposition of strict liability may have no significant long-term effect in terms of reducing the number of illegally entering Mexicans. Since Wetbacks personally have very little at stake, even if apprehended, they are likely to seek work here even though their employers become liable. To gain employment, Wetbacks may increase their use of skillfully forged identification documents, an already common practice.⁹⁴ Not having the expertise to distinguish lawful from unlawful documents, farmers cannot be expected to detect the unlawful entrant. Second, the imposition of strict liability may inadvertently result in discrimination against workers of Mexican descent lawfully in the United States. It is unlikely, of course, that employers would refuse work to all persons of Mexican heritage, but under the threat of strict liability they may deny significant numbers of jobs if the status of their applicants is the least bit doubtful.

Although strict liability is difficult to justify in terms of its doubtful benefit, a number of changes in current law are tenable. First, the present employment exemption for harboring should be repealed to make it clear that employers who knowingly hire Wetbacks are violating the law. Second, a new provision should be enacted requiring employers to make a reasonable inquiry into the status of their job applicants, such as demanding some proof of United States citizenship. Third, Wetbacks allowed to depart voluntarily should be deemed to have been deported for purposes of applying the strict re-admission and felony re-entry provisions.⁹⁵ Fourth, within manpower limitations, greater numbers of Wetbacks should be prosecuted.

Since the imposition of strict liability is probably not a cure, the changes made by these proposals are even less likely to have any significant effects. Indeed, it is doubtful whether the Wetback problem is capable of solution by either legislative or judicial changes. As long as the United States and Mexico have such divergent living standards the problem is likely to remain. Nevertheless, these proposals should be adopted, not merely as the elimination of rather unjustifiable policy, but also as evidence of the government's good faith in dealing with the problem.

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⁹⁴See note 32, *supra*.

⁹⁵See text accompanying note 53, *supra*.

