



# The Declining Enforcement of Employer Sanctions

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# Acknowledgements

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# Brief History of Employer Sanctions

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- 1952 Texas Proviso
- 1973 Sanctions bill introduced in House
- 1986 Passage of Immigration Reform and Control Act



# IRCA: a negotiated compromise

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- Employer Sanctions, plus...



# IRCA: a negotiated compromise

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- Employer Sanctions, plus...
- Legalization programs
- Guest worker programs
- Increased Border Enforcement
- Anti-discrimination provisions



# Employer Sanctions

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- Knowingly Hire/Continue to Employ
- I-9 Verification/"Paperwork"
- Anti-discrimination



# An Effective Deterrent?

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- 1982 GAO Report:  
“employers either were able to evade responsibility for illegal employment or, once apprehended, were penalized too little to deter such acts; or the laws generally were not being effectively enforced because of strict legal constraints on investigations, noncommunication between government agencies, lack of enforcement resolve, and lack of personnel.”



# An Effective Deterrent?

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- Fix & Hill 1990: "A low level of enforcement activity could lead many employers to discount the possibility that violations will be detected and punished, thus weakening the deterrent effect."





# An Effective Deterrent?

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- Papademetriou, Lowell & Cobb-Clark 1991: "the effectiveness of the effort to stem illegal immigration hinges on this nation's ability to devote sufficient resources to enforce all of the law's provisions."



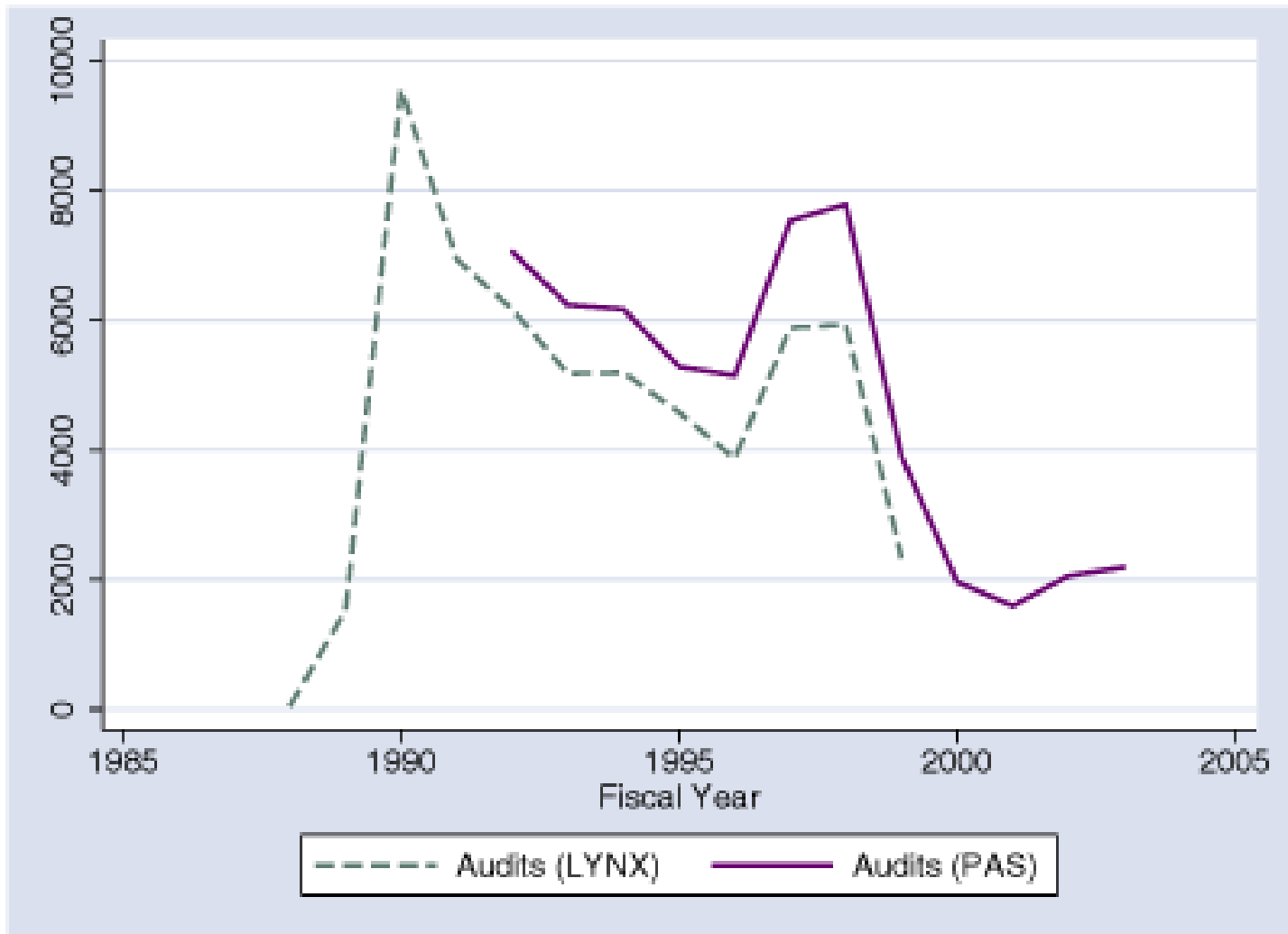
# An Effective Deterrent?

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- Bach & Meissner 1991: "evidence is building that the early effort among employers to comply in response to publicity about the new law and wide-ranging INS contacts is dissolving into complacency as employers experience the low probability of an actual INS visit."

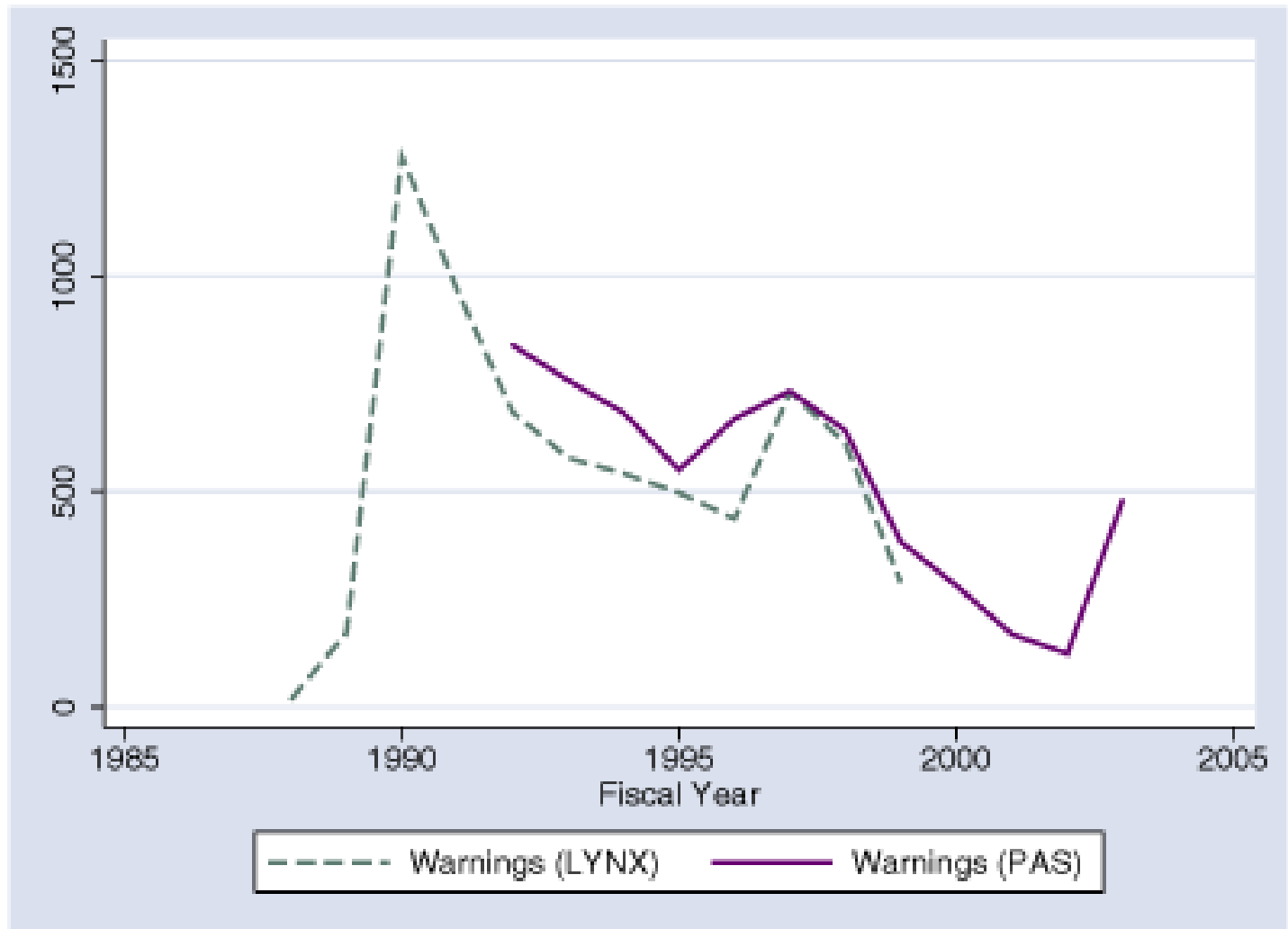
# Figure 1: Employer Sanctions Investigations for FY 1988 to 2003

Source:  
Office of  
Immigration  
Statistics  
Performance  
Analysis  
System  
G-23.19 and  
author's  
calculations  
from the  
Center for  
Immigration  
Studies  
Employer  
Sanctions  
Database



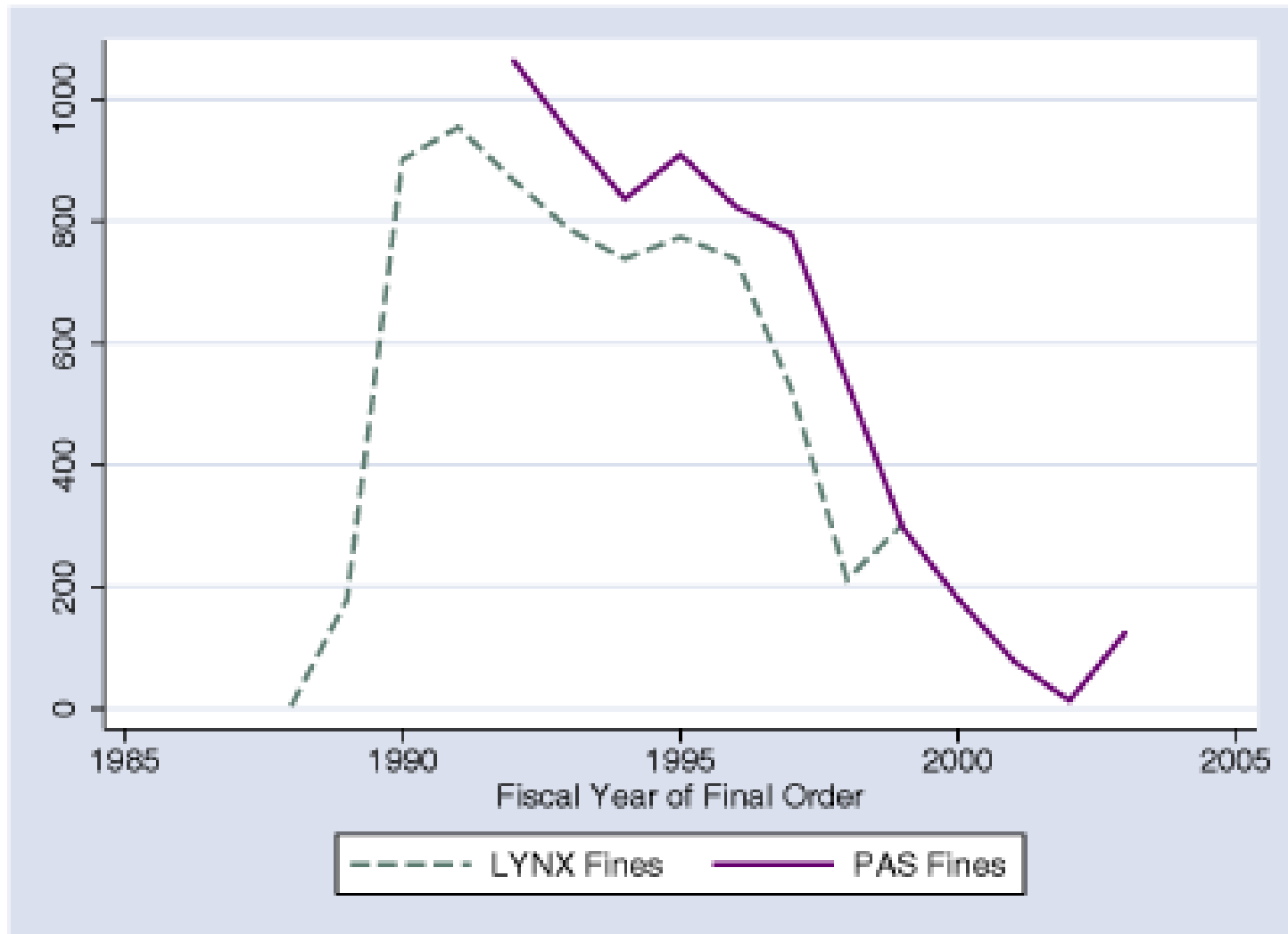
# Figure 2: Employer Sanctions Warnings Issued for FY 1988 to 2003

Source: Office of Immigration Statistics Performance Analysis System G-23.19 and author's calculations from the Center for Immigration Studies Employer Sanctions Database

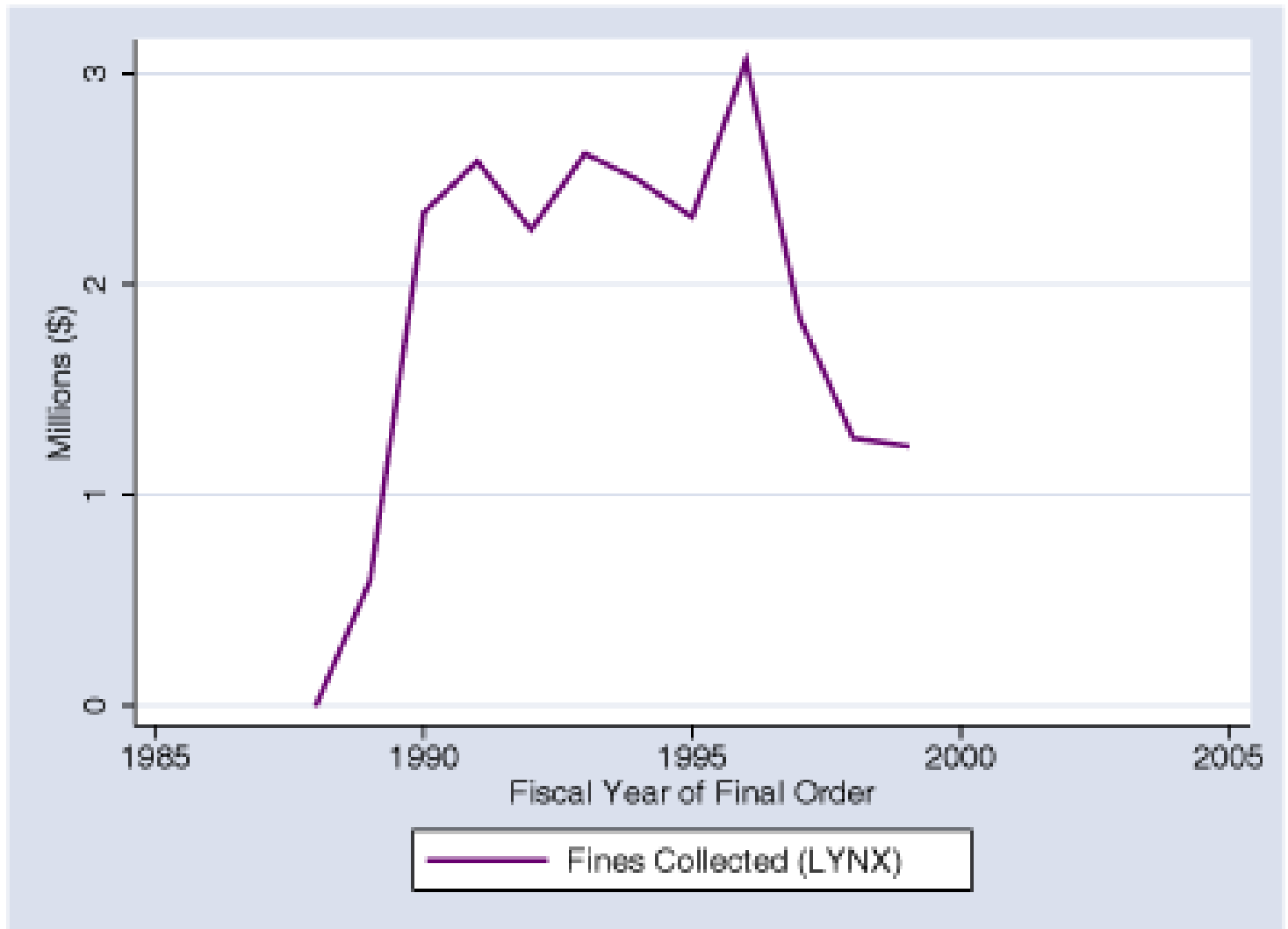


# Figure 3: Employer Sanctions Cases Resulting in Fines for FY 1988 to 2003

Source:  
Office of  
Immigration  
Statistics  
Performance  
Analysis  
System  
G-23.19 and  
author's  
calculations  
from the  
Center for  
Immigration  
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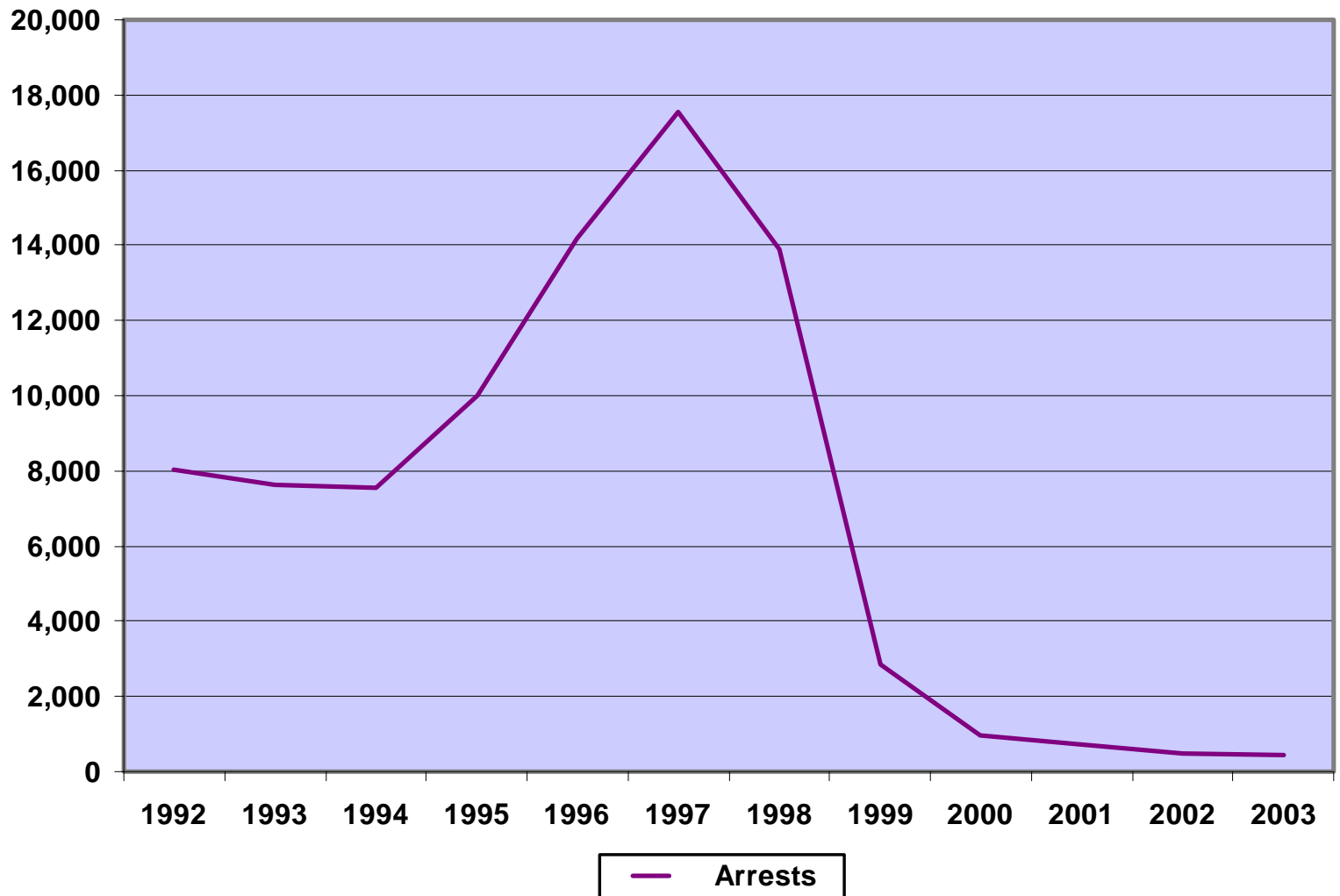


# Figure 4: Employers Sanctions - Total Fines Collected for FY 1988 to 1999



Source:  
Author's  
calculations  
from the  
Center for  
Immigration  
Studies  
Employer  
Sanctions  
Database

# Figure 5: INS/ICE Worksite Arrests



Source:  
Office of  
Immigration  
Statistics  
Performance  
Analysis  
System  
G-23.19



# Legislative Proposals for Reform

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- Beef up enforcement budget & staff.
- Improve & Require verification via phone or computer.





# Proposals for Reform

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- Beef up enforcement budget & staff.
- Improve & Require verification via phone or computer.
- Reconcile IRCA and labor standards.
- Give Dept. of Labor primary responsibility for sanctions.
- Lower the bar for prosecuting sanctions violations.



# Enforcement Resources and Competing Missions

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- 1994 Southwest Border Strategy
- 1999 Interior Enforcement Strategy
- 2001 National Security Focus
- 2003 Reorganization into ICE



# Explaining the Shift of Resources from Sanctions Enforcement

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- Agency history of targeting aliens and seeking cooperation from employers.
- Other enforcement areas (smuggling, border, national security) more politically popular while employers lobby against sanctions/worksite enforcement.
- High standard for successful “knowingly employ” cases.



# Employment “Verification”

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- Employers are presently required to request identity and work authorization documents.
- If employers examine documents that “appear on their face” to be valid, they have an affirmative defense against charges of knowingly hiring unauthorized workers.



# Employment “Verification”

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- In the most extreme cases, some employers tell unauthorized applicants they must get fake documents to be hired.
- Ironically, the process gives employers both better *knowledge* about their employees' true status, and an affirmative defense against charges of *knowingly* hiring the unauthorized.



# Proposed Verification Improvements

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- Could close some loopholes that currently lead to unauthorized employment.
- Short of requiring all job applicants submit to some sort of biometric scan, document abuse will likely shift to other forms, such as the “renting” of valid identities.

# Hoffman Plastic Compounds v. NLRB

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- Employee acknowledged being unauthorized *in writing* on employment application.
- Employer then completed I-9 form after employee presented US birth certificate and Drivers License.

# Hoffman Plastic Compounds v. NLRB

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- Employer illegally laid off worker for union organizing.
- Employer then interrogated worker regarding his immigration status at a hearing, resulting in the admission that the documents belonged to someone else.
- The Supreme Court struck down the award of backpay for wages lost due to the illegal layoff.



# Do Labor Rights for Unauthorized Immigrants Conflict with IRCA?

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- “Congress, this Court, and the Board have all recognized that employers may have an economic incentive to employ undocumented aliens, because such employees are more willing to work for substandard wages and in subpar working conditions and are unlikely to complain about such wages and conditions in the absence of legal protections. Including undocumented aliens within the protection of federal labor law counteracts that incentive, because it minimizes the danger that employers will obtain a competitive advantage from employing unauthorized workers.” -US Government Brief in *Hoffman Plastics v. NLRB*

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- “As *all* the relevant agencies (including the Department of Justice) have told us, the National Labor Relations Board's limited backpay order will *not* interfere with the implementation of immigration policy. Rather, it reasonably helps to deter unlawful activity that *both* labor laws *and* immigration laws seek to prevent.” –Justice Breyer, Dissenting in *Hoffman Plastics v. NLRB* (Emphasis in original)

# Do Labor Rights for Unauthorized Immigrants Conflict with IRCA?

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- *Application of the NLRA helps to assure that the wages and employment conditions of lawful residents are not adversely affected by the competition of illegal alien employees who are not subject to the standard terms of employment. If an employer realizes that there will be no advantage under the NLRA in preferring illegal aliens to legal resident workers, any incentive to hire such illegal aliens is correspondingly lessened.* –Justice O’Conner, delivering Court’s Opinion in *Sure-Tan v. NLRB* (on which *Hoffman* is based)

# The Effects of The Hoffman Plastics Decision on other Federal Labor Standards

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- Unauthorized workers' rights to receive pay for work already performed have been affirmed.
- Backpay for unauthorized workers in cases of discriminatory termination or termination in retaliation for FLSA claims is an open question.
- Except *Rentería v. Italia Foods Inc*: Retaliation for overtime claim – US District Court in IL denies backpay but allows compensatory damages under FLSA

# The Effects of The Hoffman Plastics Decision on New York Labor Standards

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- *Ulloa v. Al's All Tree Service, Inc*: NY Court rules worker not paid for work performed is due minimum wage, but not the wage promised by employer.
- *Majlinger v. Casino Contracting, et al.*: NY Court rules injured worker not eligible for lost wages.
- *Balbuena v. IDR Realty LLC, et al.*, and *Sanango v. East 16th St. Housing Corp., et al*: NY Court rules injured workers lost wages awards are limited to what they would have earned in their own country.



# The Effects of The Hoffman Plastics Decision on State Labor Standards

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- *Crespo v. Evergo Corp*: Pregnancy Discrimination case – NJ court denied lost wages and other damages.
- In PA and MI, policies now restrict the rights of injured unauthorized workers to receive lost wages.



# Congress could Reinstate Backpay Penalties for Unauthorized Workers

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- Given the *Hoffman* decision, Congressional action would be required to authorize lost wage remedies or other meaningful penalties in cases involving illegal termination of unauthorized aliens under the NLRA.
- Clarification is needed regarding the FLSA, Title VII and the ADA.



# Give Department of Labor Primary Sanctions Enforcement Responsibility

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- DOL is already responsible for enforcement of other labor standards.
- DOL has history of enforcing laws targeting employers and may be better insulated from political backlash.
- DOL is unlikely to move resources away from worksites to other enforcement.





# Lower the Bar for Sanctions Prosecution

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- Unscrupulous employers can knowingly employ unauthorized immigrants, but protect themselves using the verification process.



# A Proposal to Lower the Bar

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- Often it is the same employers who knowingly employ unauthorized immigrants and violate labor standards.
- Therefore, we could discourage both by creating an “enhancement,” an additional penalty for labor standards violations in cases involving unauthorized immigrants.



# Proposals for Reform

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- Improve verification via phone or computer.
- Reconcile IRCA and labor standards.
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