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## Immigration Reform: Seeking the Right Reasons.

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## IMMIGRATION REFORM: SEEKING THE RIGHT REASONS

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*The last temptation is the greatest treason:  
To do the right deed for the wrong reason<sup>1</sup>*

### I. INTRODUCTION

The legacy of immigration to the United States permeates the debate over current immigration policy. Because our self-defini-

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1. T.S. ELIOT, *MURDER IN THE CATHEDRAL*, Act 1.

tion as a nation is at stake in this debate, the issue of immigration arouses our deepest sentiments regarding the communities in which we live. On the political level, in particular, immigration incites strong partisan, emotional, and ethnic passions. While these passions are befitting of an issue of such fundamental importance, at times they can imperil the process of forthright and honest debate needed to fashion an immigration policy that is in the best interests of the American people as a whole. To address these issues seriously requires courage, prudence, and, in our view, a bedrock conviction that how we write and enforce our immigration laws plays a critical role in determining the type of nation that the United States will be in the twenty-first century. Without such conviction, and unless individuals from across the political spectrum are dedicated to considering the impact of immigration on all aspects of our national life, we risk enacting immigration reform proposals atop an unsure foundation. In short, we risk seeking to do the right deed for the wrong reason and, in so doing, undermining the sound principles that should guide immigration reform.

We do not have to search far back in our history to find examples of such imprudent law-making. As expanded upon below, both the 1924 and 1965 immigration laws,<sup>2</sup> among the most far-

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2. The Immigration Act of 1924, also known as the National Origins Quota Law or the Johnson-Reed Act, set an annual immigration limit of 150,000 for "quota immigrants" and established a set of transitional quotas limiting immigration from any one country to two percent of each nationality's proportion of the foreign-born U.S. population as determined by the census of 1890. Immigration Act of 1924, ch. 190, § 11(a)-(b), 43 Stat. 153, 159-60 (repealed 1952). The permanent quotas (which went into effect in 1929) limited immigration from any single country to a ratio based on the number of residents of the United States in 1920 having the same national origin. *Id.* § 11(b). The ratio was applied as a percentage of the overall 150,000 cap to determine the number of available immigrant visas, with a minimum quota of 100. *Id.* "Non-quota" aliens included the spouse or minor child of a United States citizen, an immigrant born in the Western hemisphere, and certain religious ministers, university professors, and students. *Id.* § 4.

The national origins quota system was carried forward by the Immigration and Nationality Act of 1952. Immigration and Naturalization Act of 1952, Pub. L. No. 82-414, 66 Stat. 163 (1952) (codified as amended in scattered sections of 8 U.S.C. (1994 & Supp. I 1995)) [hereinafter INA], 8 U.S.C. §§ 1101-1555. The Immigration and Nationality Act Amendments of 1965 replaced the quota system. Immigration and Nationality Act Amendments of 1965, Pub. L. No. 89-236, 79 Stat. 911 (1965) (codified as amended in scattered sections of 8 U.S.C.). The 1965 Act established an annual ceiling of 170,000 immigrants from the Eastern Hemisphere with a 20,000 per-country limit and a seven-category preference system with the priority on family unification, employment-based immigration and refugee admissions. *Id.* §§ 201(a), 202(a), 203(a). The 1965 Act also established a 120,000 annual limit for immigration from the Western Hemisphere, with no per-country limitation or

reaching reforms of legal immigration in our nation's history, were motivated in large part by purposes that eventually undermined the principles on which they rested. These acts, therefore, serve as prime examples of how employing erroneous reasons to enact even well-intentioned laws can be a self-defeating proposition.

The 1924 Act traces its origins to the "Great Wave" of immigration that swept across the United States beginning in the 1880s. By the early 1920s, the United States already had engaged in a prolonged debate regarding control of this Great Wave of immigration. In fact, several reform proposals during this period were vetoed by Presidents or narrowly missed passage in Congress.<sup>3</sup> At that time, sound justification was voiced for a "pause" in mass migration to the United States in order to permit the assimilation of the millions of new immigrants (and, by then, their children) into the American culture.<sup>4</sup> In addition, there was legitimate concern that a disproportionate number of the new immigrants were arriving without the skills and education needed to assimilate well into the American society and economy. Leaders of labor unions and African-American organizations argued that the loose labor market brought about by the Great Wave harmed the economic pros-

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preference system. *Id.* § 201(a) (providing that stated numerical limits did not apply to special nonquota immigrants who, as then defined in INA § 101(a)(27), included immigrants born in countries of Western Hemisphere).

The categories and limits in the 1965 Act have been amended several times, most notably in the Immigration Act of 1990. Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (1990) (codified as amended in scattered sections of 8 U.S.C. and 29 U.S.C.). The current system provides for overall worldwide levels of immigration in the following categories: family unification (480,000, subject to increase because of the absence of a numerical limit on the admission of spouses, parents, and minor unmarried children of U.S. citizens); employment-based (140,000); and diversity (55,000). *Id.* §§ 111, 121, 131. This yields a "pierceable" overall cap of 675,000. Refugee admissions, which have averaged more than 100,000 in recent years, are added to this figure, as are smaller categories of special immigrants and others adjusting to immigrant status. *Id.* § 201(b).

3. See SIDNEY KANSAS, *U.S. IMMIGRATION EXCLUSION AND DEPORTATION AND CITIZENSHIP OF THE UNITED STATES OF AMERICA* 6, 10-11 (3d ed. 1948).

4. See JOHN HIGHAM, *STRANGERS IN THE LAND: PATTERNS OF AMERICAN NATIVISM 1860-1925*, at xiv (2d ed. 1963) (noting "aspects of the immigration restriction movement that can not be sufficiently explained in terms of nativism"); *id.* at 301-02 (discussing shift in post-WW I public opinion on ability of American society to assimilate excessive number of immigrants); see also ROY BECK, *THE CASE AGAINST IMMIGRATION* 43-46 (1996) (commenting on effect of restrictionist attitudes on immigration).



pects of native-born workers, encouraged strike-breaking, and perpetuated discrimination against the descendants of slavery.<sup>5</sup>

Thus, rational purposes, soundly rooted in the national interest, existed for curtailing the level of immigration that had persisted from 1880 until the start of World War I in 1914, and which had resumed after the Armistice.<sup>6</sup> Yet, these legitimate concerns regarding the quantity and "human capital" of the immigration flow unfortunately devolved into attacks on the immigrants themselves. Racism, religious and ethnic bigotry, and bogus theories of eugenics infected the debate over immigration, even in the halls of Congress.<sup>7</sup> Similarly, a pernicious streak of nativism, most visibly expressed by the rise of the Ku Klux Klan, further undermined the sound reasons for a "pause" in immigration.<sup>8</sup> This misguided desire to preserve the American nation from perceived degrading foreign influences motivated passage of the "national origins" quotas of the 1921 Act<sup>9</sup> and the 1924 Act,<sup>10</sup> which were designed to limit immigration to those who could rapidly assimilate.

These "national origins" quotas eventually came to be seen as contrary to the American spirit. But, because legal immigration reform in the 1920s was accomplished (at least in part) for the "wrong reasons," it is now commonly thought that there were no

5. See JOHN HIGHAM, *STRANGERS IN THE LAND: PATTERNS OF AMERICAN NATIVISM 1860-1925*, at 163-64, 304-05; ROY BECK, *THE CASE AGAINST IMMIGRATION* 43-47, 169-75 (1996).

6. Immigration to the United States reached the following levels during the decades of the "Great Wave": 5,246,613 (1881-1890); 3,687,564 (1891-1900); 8,795,386 (1901-1910); 5,735,811 (1911-1920). U.S. DEP'T OF JUSTICE, IMMIGRATION AND NATURALIZATION SERV., 1994 STATISTICAL YEARBOOK OF THE IMMIGRATION AND NATURALIZATION SERVICE 25 (1996) (Table 1: Immigration to the United States: Fiscal Years 1820-1994). The crest of the Great Wave was from 1905 through 1914, when just under ten million immigrants were admitted. *Id.* Immigration fell sharply from 1915 through 1919, and then increased to an annual average of approximately 550,000 from 1920 through 1924. *Id.* During the next fifty years, from 1925 through 1974, an average of less than 220,000 new immigrants were admitted each year. *Id.* Beginning in 1976, annual averages in excess of 500,000 per year became the norm. *Id.*

7. See HOUSE COMM. ON THE JUDICIARY, IMMIGRATION AND NATIONALITY ACT, SERIAL NO. 1, 104th Cong., 1st Sess. 585-86 (1995).

8. See JOHN HIGHAM, *STRANGERS IN THE LAND: PATTERNS OF AMERICAN NATIVISM 1860-1925*, at 265-66, 286-99 (2d ed. 1963) (describing growth of Ku Klux Klan in years following World War I and detailing group's role in stirring disillusioned nativist and anti-immigrant sentiments).

9. Immigration Act of 1921, ch. 8, § 2, 42 Stat. 5, 5-6 (repealed 1952).

10. Immigration Act of 1924, ch. 190, § 11, 43 Stat. 153, 159-60 (repealed 1952).

good reasons for those enactments.<sup>11</sup> Even today, *any* form of “restrictionist” legislation on legal immigration carries the unfair burden of being assailed as “nativist.” Thus, we are still haunted by this past.

The enduring legacy of the 1924 Act led directly to the Immigration Act of 1965,<sup>12</sup> and to a similar form of error. Conditions in the 1960s were vastly different from those of the 1920s. Following the Great Wave, immigration had leveled out at an average of 175,000 per year from 1925 through 1964.<sup>13</sup> The national origins quotas, by virtually eliminating immigration from Asia and southern and eastern Europe, proved not to serve the nation’s best interests. Even immigration restrictionists acknowledge that a modest increase in legal immigration, although not a renewed period of mass migration, was consistent with the national interest.<sup>14</sup> During this era, John F. Kennedy well-summarized the case for reform when he wrote:

There is, of course, a legitimate argument for some limitation upon immigration. We no longer need settlers for virgin lands, and our economy is expanding more slowly than in the nineteenth and early twentieth centuries. . . .

The clash of opinion arises not over the number of immigrants to be admitted [then-current law admitted 157,000 quota immigrants

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11. See T. ALEXANDER ALEINIKOFF ET AL., *IMMIGRATION: PROCESS AND POLICY* 50–54 (3d ed. 1995) (providing historical overview of U.S. immigration restrictions in early 1900s). Nathan Glazer puts such criticism in perspective:

Today, we decry the restriction policies of the 1920s, but we should recall that progressives and liberals as well as conservatives and racists generally supported them. Immigration restriction certainly was driven by xenophobia, anti-Semitism, anti-Catholicism, but there was more to it than that. It was national policy, and opposition to it was relatively minor for the first two decades of its existence. Adopted in a time of prosperity, it was maintained in the Depression.

Nathan Glazer, *The Logic of Restriction*, in *THE CENTER FOR THE NEW AMERICAN COMMUNITY, STRANGERS AT OUR GATE: IMMIGRATION IN THE 1990s*, at 18, 18 (John J. Miller ed., 1994).

12. Immigration and Nationality Act Amendments of 1965, Pub. L. No. 89–236, 79 Stat. 911 (codified as amended in scattered sections of 8 U.S.C.).

13. U.S. DEP’T OF JUSTICE, IMMIGRATION AND NATURALIZATION SERV., 1994 STATISTICAL YEARBOOK OF THE IMMIGRATION AND NATURALIZATION SERVICE 25 (1996) (Table 1: Immigration to the United States: Fiscal Years 1820–1994).

14. See *Question & Answer*, in *THE CENTER FOR THE NEW AMERICAN COMMUNITY, STRANGERS AT OUR GATE: IMMIGRATION IN THE 1990s*, at 94, 99 (John J. Miller ed., 1994) (quoting Peter Brimelow as saying that in 1965 “there was a case for a moderate inflow of mainly skilled immigrants who didn’t upset the ethnic balance of the country too much”).

annually], but over the test for admission—the national origins quota system. Instead of using the discriminatory test of where the immigrant was born, the reform proposals would base admission on the immigrant's possession of skills our country needs and on the humanitarian ground of reuniting families. Such legislation does not seek to make over the face of America.<sup>15</sup>

Reform of the legal immigration system was once again the right thing to do, provided that it was done for the right reasons.

Unfortunately, just as the immigration debate in the 1920s had been unduly affected by the rise of nativism, the debate in 1965 was unduly influenced by a very different social movement, that to secure the civil rights of all Americans. The national origins quotas in the 1921 and 1924 Acts were, in fact, discriminatory; and in the climate of the 1960s, this "taint" of discrimination made them doubly suspect. The laudable imperative to build a color-blind society within the United States, however, did not justify a complete renunciation of all discriminatory factors in immigration policy. Immigrants must be selected on the basis of some criteria, if for no other reason, than simply because the United States cannot admit every person who would like to emigrate here. The 1965 Act, in seeking to correct the ideological errors that underlay the quota laws, imposed its own dubious legacy on the immigration debate: the treatment of immigration as a form of "civil right" that is owed to an unspecified portion of the world's population without regard to objective criteria of selection based in the national interest.<sup>16</sup> The effect of the 1965 Act, which called for removing numerical quotas and basing most immigrant admissions on the principle of "family reunification," has been to usher in a new period of mass migration to the United States.<sup>17</sup>

The possibility of triggering a new wave of immigration was vehemently denied by the sponsors of the 1965 Act, most likely in good faith. But pent-up opposition to the restrictive national origins quotas, coupled with the inappropriate linking of immigration policy to the domestic civil rights agenda, essentially prevented an honest debate on whether the United States wanted or needed an-

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15. JOHN F. KENNEDY, *A NATION OF IMMIGRANTS* 80 (1958).

16. See GEORGIE ANNE GEYER, *AMERICANS NO MORE* 205, 250–54 (1996) (discussing abandonment of skills-based immigration policy with enactment of 1965 Act).

17. See table *infra* p. 938.

other period of mass migration. The resulting failure to rigorously identify and examine the right reasons for reforming immigration laws, and the attendant inability to narrowly tailor the legislative reforms to those purposes, led to the enactment of legislation with massive unintended consequences.

Few can deny that ours is an era when reform of immigration laws once again has become a national imperative. The Select Commission on Immigration Reform, chaired by Father Theodore Hesburgh, stated in its 1981 report that “[o]ur policy—while providing opportunity to a portion of the world’s population—must be guided by the basic national interests of the people of the United States.”<sup>18</sup> During the ensuing fifteen years, that basic message was lost. Serious immigration reform was frustrated by our failure to define the national interests that our immigration policy must serve. For example, the public lost faith in the ability of our Government to enforce laws against illegal migration. Yet, as legal immigration continued to climb to close to one million per year in the early 1990s, there was little consideration given to the Hesburgh Commission’s recommendation that the levels be set at approximately 500,000 per year.<sup>19</sup> Two major pieces of legislation, the Immigration Reform and Control Act of 1986 (IRCA)<sup>20</sup> and the Immigration Act of 1990 (IMMACT),<sup>21</sup> attempted to respond to

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18. SELECT COMMISSION ON IMMIGRATION AND REFUGEE POLICY, U.S. IMMIGRATION POLICY AND THE NATIONAL INTEREST 3 (1981).

19. *Id.* at 107. The Select Commission proposed an increase in *numerically limited* immigration from 270,000 to 350,000 per year. *Id.* This figure would not include refugees or immediate relatives of U.S. citizens. *Id.* Including these categories (based on 1980 admissions figures) would have resulted in overall admissions of between 550,000 and 600,000. U.S. DEP’T OF JUSTICE, IMMIGRATION AND NATURALIZATION SERV., 1986 STATISTICAL YEARBOOK OF THE IMMIGRATION AND NATURALIZATION SERVICE 9–10 (1987) (Table 4: Immigrants Admitted by Type and Class of Admission Fiscal Years 1981–87). In addition, the Select Commission recommended that 100,000 additional numbers be made available for five years to clear out backlogs. SELECT COMMISSION ON IMMIGRATION AND REFUGEE POLICY, U.S. IMMIGRATION POLICY AND THE NATIONAL INTEREST 107, 149 (1981).

Unlike the later Jordan Commission, the Select Commission did not, however, recommend any significant curtailment of the family-sponsored immigration categories. Indeed, it recommended the creation of additional categories for the grandparents of U.S. citizens and the elderly parents of lawful permanent residents. *Id.* at 115, 121–22.

20. Immigration Reform and Control Act of 1986, Pub. L. No. 99–603, 100 Stat. 3359 (codified as amended in scattered sections of 8 U.S.C.).

21. Immigration Act of 1990, Pub. L. 101–649, 104 Stat. 4978 (codified as amended in scattered sections of 8 U.S.C. and 29 U.S.C.).

the Hesburgh Commission's objectives, but with mixed success. Both IRCA and IMMACT included some helpful provisions geared toward controlling illegal immigration, but more serious actions either were not taken or were compromised away.<sup>22</sup> Moreover, the cumulative effect of these bills, in addition to that of the Refugee Act of 1980,<sup>23</sup> was to increase significantly the level of legal immigration from a yearly average of 450,000 per year in the 1970s to an average of close to 900,000 per year from 1981 through 2000, and to a projected annual level of more than 800,000 from 2001 onward.<sup>24</sup>

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22. The chief shortcoming of the IRCA was the failure to balance against the generous amnesty provisions (which legalized approximately 2.7 million illegal aliens) any effective measures of immigration enforcement. The enforcement centerpiece of the IRCA—sanctions against employers who hire illegal aliens—failed to include any system whereby employers could reasonably verify the status of their new employees. A booming market in fraudulent documents soon developed. IRCA's sole remaining provision regarding enforcement, section 111, stated the "sense of Congress" that both enforcement and service activities of the INS should be increased, and increased authorizations for appropriations to the INS.

IMMACT's chief failure was to substantially increase legal immigration at a time when the IRCA legalization provisions already were leading to record-setting annual admissions. "Baseline" legal immigration prior to IRCA and IMMACT was approximately 500,000 per year. See H.R. REP. NO. 101-723, pt. 1, at 137-141 (1990) (dissenting views of Hon. Lamar Smith et al.). Due to IMMACT, that baseline has since moved to approximately 850,000 per year (average actual and projected admissions, not including direct legalization admissions, from 1993 through 1997). The limit for employment-based immigrants was raised from approximately 50,000 to 140,000 and a new category was added for 55,000 "diversity" immigrants. See Immigration Act of 1990, Pub. L. No. 101-649, § 101(a), 104 Stat. 4982 (amending INA § 201(d)-(e)). No corresponding cuts were made to other categories.

23. Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (codified as amended in scattered sections of 8 U.S.C.).

24. A recent report by the Congressional Research Service demonstrates the impact of these bills. Joyce C. Violet, *Immigration: Reasons for Growth* (Cong. Research Serv., Report No. 97-230 EPW, Feb. 12, 1997) (on file with the *St. Mary's Law Journal*). Numerically-limited or "preference" immigration has ranged between 250,000 and 374,000 from 1981 through 1995, which is close to the levels recommended by the Select Committee in 1981. *Id.* at 5 (Table 1: Legal Immigration by Category, FY 1981-FY 1999). The IMMACT raised the numerical limits in preference immigration (chiefly for employment-based immigrants); thus, preference immigration increased from an approximate plateau of 250,000 in the 1980s to a plateau of 350,000 or higher in the 1990s. *Id.* at 1-2.

The most profound impact on growth in legal immigration has resulted from the IRCA's legalization program, followed by the Refugee Act of 1980. *Id.* at 2. The legalization programs established by the IRCA led to 2.8 million admissions from 1989 through 1995, most of these coming in the period between 1989 and 1991. *Id.* at 4. Approximately 1.6 million refugees, primarily from Southeast Asia and the former Soviet Union, were admitted from 1981 through 1995. *Id.* at 2-3. The net result, according to the CRS, "has been that the limits of the formal preference system on the number and types of legal immigrants be-

A decade and a half after the Hesburgh Commission, the members of the Commission on Immigration Reform, chaired by the late Barbara Jordan, returned to two of the same themes enunciated by their predecessors: (1) restoring credibility to the U.S. system of enforcement against illegal migration,<sup>25</sup> and (2) setting priorities for legal immigration that are in accord with the national interest.<sup>26</sup> House Bill (H.R.) 2202, the Immigration in the National Interest Act of 1995, proposed comprehensive reform of both illegal and legal immigration along the lines recommended by the Jordan Commission.<sup>27</sup> Eventually enacted as the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA),<sup>28</sup> this law is by far the most comprehensive immigration reform package of the past generation. The IIRIRA builds upon earlier reforms to control illegal immigration, but takes such efforts in bold new directions, particularly in the areas of deterring illegal migration to the United States, and of apprehending, detaining, and removing those who have illegally entered our country.

The IIRIRA's most significant reforms are analyzed in the course of this Article, with a special focus on how the new law protects the safety of American citizens and legal residents. We also discuss a key opportunity that was missed by the 104th Congress: the chance to increase the percentage of legal immigrants admitted on the basis of skills and education, and to decrease the annual flow of legal immigration to levels that, while still generous, are closer to the historical average. Furthermore, we contend that the Jordan Commission's recommendations on legal immigration re-

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came less significant during the last 15 years." *Id.* at 3. These initial admissions, of course, are not the full story. These aliens, once they have qualified for lawful permanent residence and, eventually, citizenship are eligible to petition for their relatives. This eligibility has led to substantial growth in the numerically-unlimited category of immediate relatives (spouses, minor unmarried children, and parents of U.S. citizens) and to increased backlogs in the numerically limited or preference categories. *Id.* at 5-6.

25. See U.S. COMMISSION ON IMMIGRATION REFORM, U.S. IMMIGRATION POLICY: RESTORING CREDIBILITY 43-46 (1994).

26. U.S. COMMISSION ON IMMIGRATION REFORM, LEGAL IMMIGRATION: SETTING PRIORITIES 1 (1995).

27. See H.R. REP. NO. 104-469, pt. 1, at 280 (1996) (revealing intent of House Committee on Judiciary to propose immigration reform legislation consistent with recommendations of Jordan Commission).

28. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208 (Sept. 30, 1996), reprinted in 1996 U.S.C.C.A.N. (110 Stat. 3009) at 1570 [hereinafter IIRIRA].

form provide an example of public policy decided for the right reasons. Specifically, these right reasons include: giving priority to the preservation of the nuclear family; more closely matching the flow of immigration to the needs of the American economy; protecting vulnerable American workers (including recent immigrants) in the low-skilled sector of the economy; and ending the phenomenon of "chain migration," which, since 1965, has created the impression that immigration is a matter of entitlement, rather than a privilege, and has crippled efforts to select immigrants on the basis of criteria more objectively rooted in the national interest.<sup>29</sup>

In addressing the above points, this Article proposes six principles that should guide efforts to reform immigration:

1. Persons who seek to enter the United States, even illegally, are not the enemy. Instead, they are a tribute to the enduring attraction of our principles of liberty and self-governance, and of the capacity of our society to absorb newcomers from all corners of the globe.
2. The United States must set immigration policy consistent with our national interest. Immigration may be restricted due to anticipated impacts on culture, economics (including the labor market), public institutions (including schools, hospitals, and social services), and our overall quality of life (including the environment). Similarly, in examining our nation's problems in these areas, the opportunities and burdens brought about by continued high levels of immigration must be identified.
3. Legal immigration and illegal migration cannot be bifurcated and treated as completely separate phenomena. First, mass immigration of unskilled workers, whether legal or illegal, has a negative impact on American society. Second, many illegal migrants come here in the hope of attaining legal status, and the current system is plagued by substantial fraud in applications for immigrant visas and other legal documents. Finally, in assessing immigration policy, the total size of the current migration flow, both legal and illegal, must be taken into account.
4. Incentives, both public and private, for illegal migration to the United States must be curtailed and, where possible, eliminated.
5. Controls against illegal migration must be enforced to protect the safety and security of the American people.

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29. U.S. COMMISSION ON IMMIGRATION REFORM, LEGAL IMMIGRATION: SETTING PRIORITIES 35-45, 81-87 (1995).

6. A far higher percentage of illegal aliens resident in the United States should be subject to deportation or removal and exclusion from immigration benefits.

These principles are not without controversy. They are, however, divorced from the type of narrow interests that have driven so much of our immigration policy-making during the past generation. In addition, merely acknowledging these principles does not necessarily dictate specific policy results, for reasonable individuals undoubtedly will disagree on how they can best be implemented in legislation and regulations. Adhering to principles such as these, however, vastly increases the likelihood that our continuing efforts at immigration reform will be grounded in the right type of reasons, and that those reforms, once enacted, will prove enduring.

## II. SIX PRINCIPLES FOR GUIDING IMMIGRATION REFORM

### A. *The Human Face of Immigration*

The first step toward creating a sound and enduring immigration policy entails recognition of what we refer to in this Article as the "human face of immigration." Anyone who has witnessed people attempting surreptitiously to cross the Rio Grande, visited illegal aliens detained in Immigration and Naturalization Service (INS) facilities, or interviewed those who have risked their lives in rickety vessels to reach our shores can agree on certain facts. These are not the faces of hardened criminals. While a small proportion of these individuals do wish us harm, the vast majority of those who seek to enter the United States, even by illegal means, are not our enemies. People are any nation's greatest resource, and the United States has been greatly enriched by the contributions of those who, though not born here, have pledged their lives, allegiance, and human capabilities to building this nation.

Therefore, the problem we face in the realm of immigration is not the people, but the policy. A policy that disregards the basic human dignity of any person, especially one whose violation of the law was motivated by an attraction to the great opportunities this country has to offer, is offensive to American ideals and utterly inconsistent with a system of ordered immigration. Recognizing the human face of immigration, however, should not lead to the formation of policy on the basis of sentiment or emotion, nor should it deter us from the need to see that immigration laws are



enforced. In many instances, it becomes part of humanity's responsibility to make difficult decisions in order to secure the common good. Thus, there is a time to say "yes" and a time to say "no." It serves neither the interests of prospective immigrants, nor the society to which they aspire, to deny this necessity. Indeed, the failure to set clear priorities in immigration policy and to enforce the law effectively leads to a false type of generosity that often harms the very persons whom one might presume it would help. Put another way, it is a false compassion that leads to tolerance of and a lack of enforcement against illegal migration.

The history of our asylum policy offers one example of good intentions gone awry. No aspect of our immigration policy is more closely tied to the history and founding principles of our nation than the practice of offering refuge to those suffering political or religious persecution abroad. However, in the wake of the Refugee Act of 1980,<sup>30</sup> which liberalized U.S. asylum and refugee policy, the INS was flooded with applications, many of them non-meritorious.<sup>31</sup> Criminal syndicates in the business of smuggling aliens to the United States (where the smuggled aliens would often be put to work in inhumane conditions or in carrying out the work of the criminal enterprise) quickly learned how to abuse the system.<sup>32</sup> Aliens would show up at U.S. airports with fraudulent or even no travel documents.<sup>33</sup> Often, due to lack of detention space, these same aliens were released with instructions to return for a later hearing and, in the meantime, were provided authorization to

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30. Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (codified as amended in scattered sections of 8 U.S.C.).

31. See *Asylum and Inspections Reform: Hearing Before the Subcomm. on International Law, Immigration, and Refugees of the House Comm. on the Judiciary*, 103d Cong. 60-65 (1993) (news article from *National Review* submitted for consideration) (spotlighting abuse of U.S. asylum policy); *id.* at 66-68 (news article from *New York Times* submitted for hearing) (recognizing rampant abuse plaguing overburdened U.S. asylum system); *id.* at 328, 334-35 (statement of Michael T. Lempres, former Executive Associate Commissioner for Operations, Immigration and Naturalization Service) (noting abuses that contributed to excessive backlog in asylum system).

32. See *id.* at 77 (statement of Chris Sale, Acting Commissioner, Immigration and Naturalization Service) (stating that "[e]lements of legal protection for refugees are being used by unscrupulous persons or smuggling organizations to gain entrance into the United States for illegal migrants.").

33. *Id.* at 332, 334 (statement of Michael T. Lempres, former Executive Associate Commissioner for Operations, Immigration and Naturalization Service).

work in the United States.<sup>34</sup> Not surprisingly, few appeared at their scheduled hearings.<sup>35</sup> Hundreds of thousands of other aliens, who successfully had made it into the interior of the United States, simply applied for asylum in order to obtain work authorization.<sup>36</sup> The system reeled under the staggering numbers of applications, thus enabling these persons to remain indefinitely in the United States.<sup>37</sup>

By undermining the integrity of the asylum process, these problems threatened public support for what should be a cornerstone of our immigration policy: providing protection to genuine refugees from government-sanctioned political and religious persecution. These problems also encouraged the exploitation of aliens through smuggling, and, furthermore, left hundreds of thousands of aliens residing in the United States with no defined legal status and theoretically subject to deportation if (as will happen in the overwhelming majority of cases) their claims were denied. The old asylum system, therefore, held out a false promise, harmed U.S. national interests, and undermined the goal of true refugee protection.

Two decisions made in the mid-1990s demonstrate the wisdom of making, and sticking to, policy choices that draw clear lines, even at the risk of restricting access to certain immigration benefits. First was the INS's change in detention policy. The previous "revolving door" practice, under which excludable arriving aliens were detained (if at all) for several days and then released, was replaced by a policy under which excludable aliens would be detained until the

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34. See *id.* at 77 (statement of Chris Sale, Acting Commissioner, Immigration and Naturalization Service); *id.* at 334-35 (statement of Michael T. Lempres, former Executive Associate Commissioner for Operations, Immigration and Naturalization Service).

35. *Id.* at 332, 334 (statement of Michael T. Lempres, former Executive Associate Commissioner for Operations, Immigration and Naturalization Service).

36. H.R. REP. NO. 104-469, pt. 1, at 139 (1996); see *Asylums and Inspections Reform: Hearing Before the Subcomm. on International Law, Immigration, and Refugees of the House Comm. on the Judiciary*, 103d Cong. 328, 334 (1993) (statement of Michael T. Lempres, former Executive Associate Commissioner for Operations, Immigration and Naturalization Service) (labeling incentive to obtain work authorization as factor contributing to abuse of asylum system).

37. See *Asylum and Inspections Reform: Hearing Before the Subcomm. on International Law, Immigration, and Refugees of the House Comm. on the Judiciary*, 103d Cong. 77 (1993) (statement of Chris Sale, Acting Commissioner, Immigration and Naturalization Service); *id.* at 332, 334-35 (statement of Michael T. Lempres, former Executive Associate Commissioner for Operations, Immigration and Naturalization Service).

completion of their hearings.<sup>38</sup> In practice, limited resources prevented all excludable aliens from being detained under this new policy, but those who were detained knew that they would have no access to the American job market or public benefits. In addition, the INS, with appropriations from Congress, increased its detention space—a process that is still underway.<sup>39</sup> This expansion of detention facilities adds a further deterrent to those who, under the old system, could have remained indefinitely in the United States.

The second major shift in policy represented the cornerstone of the administrative reforms of the asylum system, and was made effective in January 1995.<sup>40</sup> This second change restricted access to work authorization to those asylum applicants whose cases were pending more than six months.<sup>41</sup> Along with this change, the INS and the Executive Office for Immigration Review (EOIR) set the goal of completing all adjudications within the six-month period.<sup>42</sup> If accomplished, this lofty goal would mean that asylum applicants either would be granted permission to remain in or ordered removed from the United States within that fixed six-month time frame.<sup>43</sup>

The IIRIRA codifies these reforms and adds a requirement that asylum applications be filed within a year of the alien's arrival in the United States.<sup>44</sup> Not only is this addition a reasonable requirement for a person who ostensibly is fleeing persecution, but it also is one that prevents abuse of the system. More significantly, the

38. See William J. Clinton, Presidential Decision Directive 9, at 3 (June 18, 1993) (stating that “[w]ithin available physical and fiscal resources, INS will detain illegal aliens entering the U.S. with the assistance of criminal syndicates. Absent a credible claim for asylum, smuggled aliens will remain in detention pending final determination of asylum status so as to ensure repatriation if asylum status is denied.”) (on file with the *St. Mary's Law Journal*).

39. See *Removal of Criminal and Illegal Aliens: Hearing Before the Subcomm. on Immigration and Claims of the House Comm. on the Judiciary*, 104th Cong. 7–16 (1996) (statement of David A. Martin, General Counsel, Immigration and Naturalization Service).

40. See Rules and Procedures for Adjudication of Applications for Asylum or Withholding of Deportation and for Employment Authorization, 59 Fed. Reg. 62,284, 62,284 (1994) (to be codified at 8 C.F.R. pts. 208, 236, 242, 274a, & 299) (summarizing new rules and noting effective date of January 4, 1995).

41. *Id.*

42. *Id.*

43. *Id.*

44. IIRIRA, *supra* note 28, § 604(a)(2)(B), reprinted in 1996 U.S.C.C.A.N. (110 Stat. 3009) at 1806.

IIRIRA establishes the first system for expedited processing of all asylum claims made by individuals who arrive in the United States with no valid entry documents.<sup>45</sup> The procedure, called “expedited removal,” denies an alien the right to a hearing before an immigration judge or to judicial review of the alien’s right to enter the United States on the basic premise that the absence of a valid entry document establishes the prima facie ineligibility of an alien to enter this country.<sup>46</sup> If such aliens claim asylum, then they will be interviewed by an asylum officer to determine if they have a “credible fear” of persecution.<sup>47</sup> During the interview, the alien does not have to establish full eligibility for asylum in the United States, but only that there is a significant possibility of establishing such eligibility.<sup>48</sup> The interview is non-adversarial, and the alien has the right to seek review by an immigration judge of a negative decision.<sup>49</sup> If a “credible fear” is established, however, then the alien may remain in the United States for the purposes of completing the full asylum adjudication process.<sup>50</sup>

The recent administrative reforms regarding detention and work authorization have shown positive results: “mala fide” arrivals at U.S. airports have decreased and the total number of asylum applications has been cut in half.<sup>51</sup> As a result, the asylum case backlog, while still extant, is not being added to, as case completions now

45. *Id.* § 302, reprinted in 1996 U.S.C.C.A.N. (110 Stat. 3009) at 1620–29 (amending section 235(b)(1) of the Immigration and Nationality Act, 8 U.S.C. 1225(b)(1)).

46. *Id.* § 302(a), reprinted in 1996 U.S.C.C.A.N. (110 Stat. 3009) at 1620–21 (amending INA § 235(b)(1)(A)(i)).

47. *Id.*, reprinted in 1996 U.S.C.C.A.N. (110 Stat. 3009) at 1621–24 (amending INA §§ 235(b)(1)(A)(ii), 235(b)(1)(8)(ii), 235(b)(1)(B)(v)).

48. *Id.*, reprinted in 1996 U.S.C.C.A.N. (110 Stat. 3009) at 1624 (amending INA § 235(b)(1)(8)(v)).

49. IIRIRA, *supra* note 28, § 302(a), reprinted in 1996 U.S.C.C.A.N. (110 Stat. 3009) at 1623 (amending INA § 235(b)(1)(B)(iii)(III)).

50. *Id.*, reprinted in 1996 U.S.C.C.A.N. (110 Stat. 3009) at 1622–23 (amending INA § 235(b)(1)(B)(ii)).

51. New asylum claims filed with the INS dropped from over 123,000 in fiscal year 1994, to 75,000 in 1995, and to 49,000 in 1996. *INS Asylum Data Preliminary FY 1996* (U.S. Dep’t of Justice, Immigration and Naturalization Service, Wash., D.C.), Nov. 19, 1996, at 8 (Chart: Asylum Office Workload FY 1992–96) (on file with the *St. Mary’s Law Journal*). These figures do not include claims filed by members of a class of El Salvadorean and Guatemalan nationals who were beneficiaries of a settlement reached in the 1990 class action litigation, *American Baptist Churches v. Thornburgh*, 760 F. Supp. 796 (N.D. Cal. 1991), which challenged INS processing of their original claims. *See id.* (reporting numbers of “non-ABC” asylum applications received in FY 1992–96).

exceed new intakes. These successes have occurred despite the dire warnings of some commentators that the reform measures were "mean-spirited" and "anti-immigrant," and that they would lead to denial of protection to needy individuals. In fact, the implementation of these new policies has shown many of these concerns to be unfounded. The approval rate for asylum claims, for instance, has remained steady, and those entering the system can now expect to receive a decision about their immigration status within a fixed period of time.<sup>52</sup>

We expect similar success from the system of expedited removal established by the IIRIRA. Despite claims that this procedure violates the due process rights of arriving aliens, the procedure, if implemented properly, will be appropriately firm *and* generous. Congress expects that the asylum officers will interview each applicant with care and attempt to solicit all facts that are relevant to the applicant's case. It is similarly anticipated that such officers will be well-trained in relevant legal standards and cognizant of conditions in sending countries. In other words, the procedure should be generous to those aliens whose testimony indicates that they have a valid claim to our protection, while promptly removing from the United States those who do not. Indeed, from the point of view of the alien with a meritorious asylum claim, the policy of expedited removal is quite generous. For example, the screening process will enable the United States to focus its adjudication resources on such aliens. It also allows any alien with a valid claim who can obtain transit to the United States, even through the use of a fraudulent document, full access to our administrative and judicial system for deciding asylum claims. Thus, in keeping with the principle discussed in this section, expedited removal addresses a failure of policy while keeping our focus on the human needs of

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52. INS asylum officers approved 22% of the applications they adjudicated in fiscal year 1996. *INS Asylum Data Preliminary FY 1996* (U.S. Dep't of Justice, Immigration and Naturalization Service, Wash., D.C.), Nov. 19, 1996, at 8 (on file with the *St. Mary's Law Journal*). The same percentage was approved in fiscal year 1994. U.S. DEP'T OF JUSTICE, IMMIGRATION AND NATURALIZATION SERV., 1994 STATISTICAL YEARBOOK OF THE IMMIGRATION AND NATURALIZATION SERVICE 76 (1996). In addition, 98% of new cases are now completed by asylum offices or immigration judges within 180 days. *Asylum Reform: A Year of Success*, Fact Sheet (U.S. Dep't of Justice, Immigration and Naturalization Service, Wash., D.C.), Jan. 4, 1996, at 2 (on file with the *St. Mary's Law Journal*).

those who meet the legal criteria for admission into the United States.

The seemingly intractable nature of many problems regarding immigration understandably leads to a certain pessimism. However, the example of asylum reform should give us heart, for it shows that we can fulfill the highest ideals of our immigration system and still remain committed to the need to prevent abuse of our generosity. The recent asylum reforms also teach another valuable lesson. They show that speaking of the need to maintain a generous immigration policy provides an inadequate description of our mandate. What is needed, more precisely, is a commitment to maintain the conditions in which that generosity can be sustained and exercised within a system of rules that are both understandable and able to be clearly enforced.

#### B. *Setting Immigration Policy in the National Interest*

Having recognized the human face of immigration, policymakers must next focus on the principle of striving to establish an immigration policy that best suits the national interest. While legal immigration reform remains part of the unfinished agenda of Congress, progress has been made toward achieving this second principle. In particular, the significance of the debate during the 104th Congress should not be underestimated. Starting virtually from scratch, the sponsors saw dramatic reforms approved by the House Judiciary Committee on a bipartisan vote of 23-10.<sup>53</sup> Although the prospects

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53. See H.R. REP NO. 104-469, pt. 1, at 204-05 (1996) (reporting Committee vote on final passage of H.R. 2202). Title V of H.R. 2202, as reported by the House Judiciary Committee, would have reformed the legal immigration system to limit admission of aliens to one of these four categories: family-sponsored immigrants, employment-based immigrants, humanitarian immigrants, and diversity immigrants.

Family-sponsored immigrants were defined in H.R. 2202 as: (1) spouses and unmarried children under 21 of U.S. citizens; (2) spouses and unmarried children under 21 of lawful permanent residents; (3) parents of U.S. citizens; and (4) dependent adult sons and daughters of U.S. citizens and lawful permanent residents, who are under age 26, never-married, and childless. There also was a category for admission of disabled adult sons and daughters. An approximate annual ceiling for family-sponsored immigrants was set at 330,000, allocated as follows: for nuclear family of U.S. citizens, no annual limitation; for nuclear family of lawful permanent residents, 85,000; for parents of U.S. citizens, 50,000; and for dependent adult sons and daughters, 10,000. The backlog of spouses and children of permanent resident aliens (the current 2A preference category) was to be reduced by an average of 110,000 per year over a five-year period. H.R. 2202 did not include preference categories for adult brothers and sisters of United States citizens or for adult children of

for extensive reform ultimately died on the House floor, due largely to an amendment to "split" legal immigration reform from H.R. 2202,<sup>54</sup> it is significant to note that a switch of merely thirty votes would have defeated that amendment.<sup>55</sup>

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citizens or lawful permanent residents (other than as described in category (4)). See H.R. REP. NO. 104-469, pt. 1, at 63-68 (§§ 500j, 501, 512). The admission of parents of citizens would have been conditioned on the procurement of insurance to prevent such immigrants from becoming dependent on the government for health care expenses. *Id.* at 68 (§ 512(b)).

Employment-based immigrants were defined as: (1) aliens with extraordinary ability; (2) aliens who are outstanding professors and researchers, or who are multinational executives and managers; (3) aliens who are professionals with advanced degrees, and aliens of exceptional ability; (4) professionals and skilled immigrants, who are either professionals with a baccalaureate degree and experience or skilled workers with training and work experience; (5) investor immigrants, who invest at least \$1 million in a U.S. company that employs at least ten workers (with a pilot program through 1998 allowing for a \$500,000 investment and the hiring of five workers); and (6) special immigrants. The annual limit for employment-based immigrants was set at 135,000. *Id.* at 65, 68-71 (§§ 502, 513).

Humanitarian immigrants were defined as: (1) refugees; (2) asylees; and (3) other humanitarian immigrants. The annual target for such immigrants was set at 70,000 (95,000 in 1997), with the following breakdown: refugees, 50,000 (75,000 in 1997); asylee adjustments, 10,000; and other humanitarian immigrants, 10,000. The limit on refugee admissions could be raised in the event the President declares an emergency. Title V also would have restricted the use of parole authority to allow aliens to enter the United States to specified reasons that are strictly in the public interest or are matters of urgent humanitarian concern. *Id.* at 66 (§ 504).

The diversity immigrant program under Title V would have allowed admission of 27,000 immigrants each year from countries designated as "low admission states" within each of six regions. To be eligible for a diversity visa, the alien would need a verified job offer in the U.S., a high school education or its equivalent, and two years experience in an occupation that requires at least two years of training. *Id.* at 65 (§ 503).

Title V required congressional review and reauthorization of legal immigration levels every five years. *Id.* at 66 (§ 505).

54. See 142 CONG. REC. H2589 (daily ed. Mar. 21, 1996) (setting forth amendment proposing to "[s]trike from title V all except section 522 and subtitle D"). The amendment, sponsored by Representatives Chrysler, Brownback, and Berman, stripped virtually all the provisions from Title V of H.R. 2202 as reported by the Committee on the Judiciary. *Id.* Representative Chrysler argued that he could not "justify voting for drastic cuts in legal immigration because of the problems of illegal immigration," asserting that "[t]hese are clearly two distinct issues that must be kept separate." *Id.* at H2590. While characterized by its proponents as a measure to "split" the issues of legal and illegal immigration, the effort was in reality aimed at killing all prospects for reform of the legal immigration system. Neither the Chrysler-Brownback-Berman amendment, nor the rule for consideration of H.R. 2202, called for separate consideration by the House of Representatives of free-standing legal immigration reform legislation. The proponents of Chrysler-Brownback-Berman also did not propose their own package of legal immigration reforms.

55. The amendment offered by Mr. Chrysler, which removed virtually all of the legal immigration reform provisions from H.R. 2202, passed by a vote of 238-183. 142 CONG. REC. H2602 (daily ed. Mar. 21, 1996).

In the aftermath of this recent debate, one thing is clear. Due to the leadership of Barbara Jordan, the Commission, and many members of Congress, legal immigration reform in the 104th Congress was pursued for the *right* reasons; reasons that would have sustained such reforms over the long term and inspired the support of the American people. The vast majority of the public supports changes in legal immigration.<sup>56</sup> Notably, even 70% of Hispanics recognized the need for some type of immigration reform.<sup>57</sup> The pro-reform efforts in the 104th Congress not only gave voice to this “silent majority,” but also provided solid reasoning and statistics that should keep the issue on the front pages and on the top of the congressional agenda.

If, starting from scratch, we were to design an immigration system to serve our current national interests, we would limit the percentage of immigrants who are selected without regard to their educational levels or work skills. The reasons are readily apparent. Because we are an increasingly technology- and information-driven society, more advanced skills are required in the work force. A significant percentage of our population, however, remains unskilled and unable to partake fully in this changing economy. Along with this transformation of the work force, we also have a welfare state, which we did not have during earlier periods of high immigration. Under such conditions, we would not want to design an immigration system that would bring to America a high percentage of unskilled immigrants who would compete with native workers for the dwindling number of low-skilled jobs, and who would also be more likely to use public benefits.

Yet, our current immigration system does just this, by admitting 80 percent of legal immigrants without regard to their level of education and skill.<sup>58</sup> During the past fifteen years, more than ten mil-

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56. See *infra* p. 940, Table 3: Percentage Responding “Yes” to Whether Legal Immigration Should Be Reduced.

57. See *id.*; see also H.R. REP. NO. 101-723, pt. 1, at 137 (1990) (dissenting views of Rep. Lamar Smith, et al.) (noting that national poll released in June 1990 revealed that 74% of Hispanic-Americans opposed increases in immigration levels).

58. See H.R. REP. NO. 104-469, pt. 1, at 133 (1996). Between Fiscal Year 1981 and Fiscal Year 1987, for example, approximately 3,640,000 out of 4,068,000 total immigrants admitted were admitted without regard to skill or education. See U.S. DEP’T OF JUSTICE, IMMIGRATION AND NATURALIZATION SERV., 1987 STATISTICAL YEARBOOK OF THE IMMIGRATION AND NATURALIZATION SERVICE 8-9 (1988) (Table 4: Immigrants Admitted by Type and Class of Admission Fiscal Years 1981-87). As listed in Table 4 of the 1987 Statis-



lion immigrants meeting this description have been admitted, the vast majority of these solely on the basis of a family relationship.<sup>59</sup> Not surprisingly, wide gaps separate recent immigrants from native-born Americans in the area of education, income, and use of public benefits. In addition, the immigration of such large numbers of unskilled immigrants contributes significantly to the decline in wages among low-skilled native workers. Thus, the economic impact of this flawed immigration system tragically falls on those Americans who can least afford it: our lower-skilled and underemployed workers. Michael Fix and Jeffrey Passell, in a study intended to highlight the *positive* impacts of immigration, nonetheless concluded that “[i]mmigration *has*, on balance, contributed somewhat to the declining fortunes of low-skilled workers.”<sup>60</sup> The authors noted that “less-skilled black workers and black workers in high immigration areas with stagnant economies are negatively affected.”<sup>61</sup> The following statistics illustrate the point:

- Immigrants admitted during the 1980s were disproportionately lower-skilled. According to the Congressional Research Service, 37% of recent (1984–1994) immigrants lack a high school education, compared to 28% of pre-1984 immigrants and 11% of the native-born. The immigrant share of the total work force is 9.4%, while the share of immigrants among high school dropouts is 20%.<sup>62</sup>

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tical Yearbook, the following immigrant classes were admitted without regard to educational or work skills: (1) Total first preference (unmarried children of U.S. citizens); (2) Total second preference (spouses of alien residents); (3) Total fourth preference (married children of U.S. citizens); (4) Total fifth preference (siblings of U.S. citizens); and (5) Total, exempt from numerical limitations. *Id.*

59. See H.R. REP. NO. 104-469, pt. 1, at 133 (1996). These statistics were derived based upon statistics provided in the INS Statistical Yearbook. See U.S. DEP'T OF JUSTICE, IMMIGRATION AND NATURALIZATION SERV., 1994 STATISTICAL YEARBOOK OF THE IMMIGRATION AND NATURALIZATION SERVICE 32 (1996) (Table 4: Immigrants Admitted by Type and Selected Class of Admission Fiscal Years 1987–94); U.S. DEP'T OF JUSTICE, IMMIGRATION AND NATURALIZATION SERV., 1987 STATISTICAL YEARBOOK OF THE IMMIGRATION AND NATURALIZATION SERVICE 8–9 (1988) (Table 4: Immigrants Admitted by Type and Class of Admission Fiscal Years 1981–87).

60. MICHAEL FIX & JEFFREY S. PASSELL, THE URBAN INSTITUTE, IMMIGRATION AND IMMIGRANTS: SETTING THE RECORD STRAIGHT 49 (1994).

61. *Id.* at 50.

62. Ruth Ellen Wasem & Linda Levine, *Immigration Skills: Trends and Policy Issues*, at 7–9 (Cong. Research Serv., Report No. 95-1210 EPW, Dec. 15, 1995) (on file with the *St. Mary's Law Journal*).

- According to the Bureau of Labor Statistics, the high school dropout rate among natives fell from 23.4% to 12.6% between 1980 and 1990. Immigration offset much of this decrease, however, leading to a continued surplus among low-skilled workers and a resulting decline in wages.<sup>63</sup>
- Based upon figures compiled by the Bureau of Labor Statistics, immigration accounted for 40% to 50% of the decline in *real wages* for the lowest-skilled workers (high school dropouts) from 1980 to 1990.<sup>64</sup> Similarly, Professor Borjas estimates that immigration accounts for somewhere between a third and one-half of the decline.<sup>65</sup>
- The impact of immigration is keenly felt by minorities in inner cities. Ronald Steel, writing in February 1997, makes the point bluntly:
 

While the large-scale admission of unskilled immigrants is sold as humanitarianism, its primary effect is to create a cheap labor pool and render unskilled Americans unemployable. The high social cost is hidden behind a smoke screen of sentimentality. It is not mere coincidence that the unemployment crisis of the inner cities has intensified with the massive increase of unskilled immigrants. When the social costs are counted in, cheap immigrant labor is not cheap, and it is not fair.<sup>66</sup>
- The wage gap between recent immigrants and native workers widened from 16.6% in 1970 to 31.7% in 1990. Assimilation can be expected to bridge only 30% to 50% of this gap over a working lifetime, meaning that the wage gap will be permanent and will leave immigrants in a position where they will compete for lower-end jobs.<sup>67</sup>
- Contrary to myth, illegal immigrants compete directly against native-born workers, displacing them from jobs. In Operation SouthPAW (1995), the INS apprehended thousands of illegal

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63. DAVID JAEGER, *SKILL DIFFERENCES AND THE EFFECT OF IMMIGRANTS ON THE WAGES OF NATIVES* 3, 14–17, 19 (National Bureau of Labor Statistics Working Paper No. 273, 1995).

64. *Id.* at 19.

65. George J. Borjas, *The Economics of Immigration*, 32 J. ECON. LIT. 1667, 1699 (1994); George J. Borjas et al., *On the Labor Market Effects of Immigration and Trade, in IMMIGRATION AND THE WORK FORCE* 213, 213–15 (George J. Borjas & Richard B. Freeman eds., 1992).

66. Ronald Steel, *The Hard Questions*, NEW REP., Feb. 10, 1997, at 27, 27.

67. See George J. Borjas, *Know the Flow*, NAT'L REV., Apr. 17, 1995, at 44, 45; George J. Borjas, *The Economics of Immigration*, 32 J. ECON. LIT. 1667, 1677–80 (1994).

aliens who were working at wages averaging \$7 to \$8 per hour. After the illegal aliens were removed, the employers immediately found Americans willing to take these jobs. Thus, the Operation proved that job displacement by immigrants is a reality.

Fifty-four percent of recent (1984–1994) immigrants are employed in low-skilled service, industrial, or agricultural jobs, compared with 41% of earlier immigrants and 30 percent of native workers. The Commission on Immigration Reform concluded that “[i]mmigrants with relatively low education and skills compete for jobs and public services with the most vulnerable of Americans, particularly those who are unemployed or underemployed.”<sup>68</sup>

Against these arguments, many economists and other commentators still extol both the beneficial impact of immigration on the economy as a whole, and the particular benefits of immigration in revitalizing certain urban centers and neighborhoods. Even if true, these outwardly beneficial trends still raise troubling questions. Positive effects on the economy, for instance, often present a bit of a two-edged sword. Much of the overall economic benefit from immigration results from reduced wages in formerly well-paying industries. Janitorial services in Los Angeles and meat packing in Iowa provide examples of cases where union-scale labor has been displaced by non-unionized immigrant labor (including that performed by illegal migrants) during the past fifteen years.<sup>69</sup> The consumers of such goods and services benefit through lower prices; the displaced workers, however, often have to settle for lower-paying positions. Shouldn't we be questioning whether this “trade off” is desirable? In the case of urban revitalization, we should re-evaluate whether it is healthy to rely on immigration as a form of “urban renewal” policy. Shouldn't we instead be asking what it is that drives native-born Americans (including, largely, the descendants of prior immigrants) away from the cities? Furthermore, these arguments seem to postulate that immigration reform would result in zero immigration, when in fact, the proposal in H.R. 2202 would have resulted in a long-term average of approximately 600,000 per

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68. U.S. COMMISSION ON IMMIGRATION REFORM, *LEGAL IMMIGRATION: SETTING PRIORITIES* 25 (1995).

69. See ROY BECK, *THE CASE AGAINST IMMIGRATION* 105–20, 182–83 (1996).

year.<sup>70</sup> Would the benefits of legal immigration disappear as a result of such modest reductions?

Americans also are entitled to ask, and should ask, about the other social costs of current immigration levels. New York City (whose political leaders seem to have adopted an "open borders" philosophy with regard to both legal and illegal immigration) now deals with heavily overcrowded classrooms and a housing crisis of scandalous proportions. In fact, living conditions for immigrants in some areas of the city rival those that existed at the turn of this century.<sup>71</sup> Students in the Los Angeles school system speak more than seventy native languages, thus exacerbating the demand for bilingual education and other "multicultural" services.<sup>72</sup> Environmental damage, while not simply a function of population size, is likely to become a greater challenge as population increases. Most of the Census Bureau's projected increase in U.S. population during the next five decades will result from immigration.<sup>73</sup> Finally, there exists an inchoate sense among the American people that our culture is changed by immigration and that the pace and direction of that change ought to be debated more openly. Yet this debate is studiously avoided, due to concern that in raising such issues, one will be labeled anti-immigrant, nativist, or worse.

Some commentators rightly argue that *assimilation* is the key to assuaging many of these concerns.<sup>74</sup> We could not agree more, particularly with their contention that the path to assimilation starts with *selection*, and, thus, requires a process that places a premium

70. H.R. REP. NO. 104-469, pt. 1, at 170-71 (1996). The permanent worldwide levels under H.R. 2202 totalled 562,000. *Id.* However, it was anticipated, based upon Department of State projections, that admissions in the numerically unlimited category of spouses and minor children of U.S. citizens would increase the average level to 600,000. *Id.* at 171.

71. See generally Liz Alvarez, *Down from Poverty: Mexico to Manhattan*, N.Y. TIMES, Oct. 9, 1996, at A1 (describing substandard housing of recently-arrived immigrants in New York); Jason De Parle, *The Year That Housing Died*, N.Y. TIMES MAG., Oct. 20, 1996, at 52 *passim* (documenting national housing crisis for the poor); Deborah Sontag, *For Poorest, Life "Trapped In a Cage,"* N.Y. TIMES, Oct. 6, 1996, at A1 (describing over-crowded living conditions of New York City's immigrant residents).

72. See H.R. REP. NO. 104-469, pt. 1, at 133 (1996).

73. See *Legal Immigration Projections: Hearing Before the Subcomm. on Immigration and Claims of the House Comm. on the Judiciary*, 104th Cong. 124-130 (1996) (statement of Nancy M. Gordon, Associate Director, Demographic Programs, Bureau of the Census).

74. See Linda Chavez, *What to Do About Immigration*, COMMENTARY, Mar. 1995, at 29, 33-34; Peter D. Salins, *Toward a New Immigration Policy*, COMMENTARY, Jan. 1997, at 45, 48-49.

on selecting more immigrants on the basis of the skills, education, and other human capital that they would bring to the United States. We disagree, however, with the contention that the *numbers* of immigrants will not matter once we address the problem of assimilation by, for example, abandoning bilingual education and other excesses of multiculturalism. The flaw of this contention is that it incorrectly assumes that the size of the immigrant flow has no effect on the absorptive capacity of our nation or its institutions. Assimilation is a complex phenomenon that is affected, but not ultimately determined, by factors such as the ability of our educational and welfare systems to address the needs of new immigrants. The ability of communities to absorb newcomers, as well as the ability of newcomers to obtain jobs, are key elements as well. In regard to each of the above factors, numbers do play a role. Finally, it should be noted that some of the most rapidly-assimilated immigrants in recent times may be among those who have contributed to excessive growth in the low-skilled labor market. While we applaud their initiative and welcome their contributions to American society, we also must consider whether the assimilation of such large numbers of immigrants is healthy for the remainder of society. The Jordan Commission, which brought the term "Americanization" back into the immigration lexicon,<sup>75</sup> saw the link between immigrant numbers and our capacity to assimilate. In our future thinking about assimilation, we should not forget this link.

C. *Ending the Bifurcated Treatment of Legal Immigration and Illegal Migration*

To ensure that future changes to United States immigration policy are consistent with the national interest, however, several remaining obstacles must be overcome. One of these obstacles is expressed in our third general principle: the need to assess both legal immigration and illegal migration when formulating immigration policies. An unfortunate consequence of the vote to "split the bill" in the 104th Congress is the perpetuation of the erroneous view that legal and illegal immigration are completely separate phenomena, which cannot be addressed together. We want *all* immigration to be legal; but this does not mean that all *legal* immigra-

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75. See U.S. COMMISSION ON IMMIGRATION REFORM, LEGAL IMMIGRATION: SETTING PRIORITIES 37 (1995).

tion is in the nation's best interests. For example, a common complaint against illegal immigration is its negative effect on the job market for lower-skilled American workers. As discussed above, however, current policies of legal immigration have the same deleterious impact. Moreover, the tendency to split legal and illegal immigration is fueled by the common belief that all legal immigrants wait patiently and play by the rules. In fact, many persons who eventually gain legal status have "jumped the line" and entered the United States illegally.<sup>76</sup> In addition, while 98% of temporary visitors to the United States obey the terms of their visa and depart on time, those who do not are very numerous—about 125,000 per year.<sup>77</sup> Forty percent of illegal immigrants, therefore, are individuals who originally entered the United States with legal status. Finally, much like illegal migration, the legal immigration system also is beset by application fraud, meaning that legal resident status and, eventually, U.S. citizenship, are given to people who do not meet the law's criteria for such benefits.

In light of such problems, we must acknowledge that our legal immigration system is broken and no longer meets the needs of the nation. This failure is even more pronounced now than it was at the beginning of the 104th Congress. Legal immigration has grown to the highest annual sustained levels in American history. It has averaged more than 800,000 per year since 1981 (at which time the Hesburgh Commission recommended annual admissions of 400,000), and it shows no sign of abating.<sup>78</sup> An estimated 915,000 immigrants were admitted or given legal status in FY 1996, and INS projects that demands on the system will ensure a steady stream of close to 900,000 new immigrants per year well into the next century.<sup>79</sup> To obtain a complete picture, one must also ac-

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76. The Executive Associate Commissioner for Planning of the INS testified before Congress in May 1996 that "a majority of the spouses and minor children of legalized residents are most likely living in the United States illegally." *Legal Immigration Projections: Hearing Before the Subcomm. on Immigration and Claims of the House Comm. on the Judiciary*, 104th Cong. 116 (1996) (statement of Robert Bach, Executive Associate Commissioner, Policy and Planning, INS).

77. See William Branigan, *Illegal Immigrant Population Grows to 5 Million*, WASH. POST, Feb. 8, 1997, at A3.

78. See *infra* p. 938, Table 1: Legal Immigration for Various Periods During the 20th Century.

79. *Id.*

count for net *illegal* migration, which now is estimated conservatively at 275,000 per year.<sup>80</sup>

These statistics are noteworthy for two main reasons. First, they represent the largest and longest extended period of mass migration in the history of the United States. The fifteen-year peak of the "Great Wave" of immigration, from 1900 through 1914, saw an average of 900,000 legal immigrants admitted each year. However, the average in the previous decade (1890–1899) was 370,000 and in the succeeding decade (1915–1924) was 390,000. And, after 1924, the average dipped to 130,000 until the end of World War II.<sup>81</sup> Thus, the peak of the Great Wave was just that—a peak. In comparison, under current policies, levels at or exceeding the Great Wave's peak would persist indefinitely into the future.<sup>82</sup>

Second, the structure of the current legal immigration preferences, which are tied to family relationships, ensure a never-ending demand that will keep admissions at these record-breaking levels. In other words, the current system contains no built-in breaks or checks that would moderate or reduce numbers after a period of very high admissions. Instead, quite the opposite is true, because the new admittees immediately place new demands upon the sys-

80. See *INS Releases Updated Estimates of U.S. Illegal Population*, NEWS RELEASE (U.S. Dep't of Justice, Immigration and Naturalization Service, Wash., D.C.), Feb. 7, 1997, at 1 (on file with the *St. Mary's Law Journal*).

81. See U.S. DEP'T OF JUSTICE, IMMIGRATION AND NATURALIZATION SERV., 1994 STATISTICAL YEARBOOK OF THE IMMIGRATION AND NATURALIZATION SERVICE 25 (1996) (Table 1: Immigration to the United States: Fiscal Years 1820–1994).

82. See Lamar Smith & Edward R. Grant, *A Permanent Fixture? Analyzing Current Trends in Legal Immigration*, 74 INTERPRETER RELEASES 1065, 1067 (July 14, 1997); *Legal Immigration Projections: Hearing Before the Subcomm. on Immigration and Claims of the House Comm. on the Judiciary*, 104th Cong. 4–8 (1996) (statement of Lamar Smith, Chairman, Subcommittee on Immigration and Claims). Mr. Smith's statement, based on INS projections and recent immigration data, estimated that legal immigration would average 900,000 per year from 1996 through 2000, 830,000 per year from 2001 through 2003, and 850,000 and increasing in the years thereafter. *Id.* at 8. These are all-inclusive figures and thus account for refugee, humanitarian, and miscellaneous admissions with a conservative estimate of 100,000 per year. *Id.* In fact, the admissions in these latter categories have significantly exceeded 100,000 per year in recent years. *Id.* Projected increases in legal immigration were corroborated by several witnesses at the same hearing. See *id.* at 12 (statement of Michael S. Teitelbaum, Vice Chair, U.S. Commission on Immigration Reform) (commenting, "If I may paraphrase Mark Twain, news of declining trends in legal immigration has been greatly exaggerated."); *id.* at 46, 52–53 (statement of Rosemary Jenks, Center for Immigration Studies) (discussing projected increase in immigration levels and estimating average immigration at 863,000 per year from 1994 through 2003).

tem by being able to petition for admission of their own relatives.<sup>83</sup> As a result, annual reports on the level of legal immigration assume the character of a weather report, chronicling “natural” phenomena over which Congress and other policy-makers presumably have no control. Although the American people favor lower levels of immigration, they sense that their political leaders have no more say in the matter than they do regarding the annual amount of rainfall. By their relative silence, politicians contribute to this erroneous perception.

The picture becomes more disturbing when one considers the myriad reasons why Congress *should* worry as much about immigration rates as it does about tax rates. First are the flaws in the system itself. As noted, continued record-breaking levels of admissions spawn an endless cycle of further demand for new admissions. The result is a steady increase in admissions for the unlimited categories (spouses, minor children, and parents of United States citizens), and an almost exponential increase in the backlogs for the numerically limited categories (spouses and minor children of lawful permanent residents; adult children of U.S. citizens and lawful permanent residents; and brothers and sisters of citizens). These backlogs now total more than 3.5 million.<sup>84</sup> More importantly, the cycle of growing demand and growing backlogs skews our immigration priorities. For example, one of the largest backlogs, at more than 1.1 million, is for the spouses and minor children of lawful permanent residents. The *minimum* wait for a visa in this category is now four years.<sup>85</sup> Moreover, for many nationalities the wait is even longer. In the case of Mexico, for example, the waiting period is now close to five years.<sup>86</sup> This backlog means that immediate families are separated for four years, or longer, before the family members can legally come to the United

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83. See Joyce Vialet, *Immigration: Reasons for Growth, 1981–1995*, at 6 (Cong. Research Serv., Report No. 97–230 EPW, Feb. 12, 1997) (on file with the *St. Mary's Law Journal*).

84. See H.R. REP. NO. 104–469, pt. 1, at 134–35 (1996) (reporting backlog of 1.1 million minor children and spouses and 2.4 million other family members).

85. See *Visa Bulletin: Immigrant Numbers for April 1997* (U.S. Dep't of State, Bureau of Consular Affairs, Wash., D.C., April, 1997) (listing priority date of Feb. 22, 1993, for 2A preference category).

86. See *id.* (listing preference date of June 15, 1992, for Mexican immigration visa applicants in the 2A preference category).



States.<sup>87</sup> In all such cases, this wait represents an unconscionably long period of time for members of the nuclear family to remain separated.

By compelling such separation, the legal immigration system also unwittingly encourages *illegal* immigration. Hundreds of thousands of spouses and children of aliens legalized under the 1986 amnesty have resided illegally in the United States for years.<sup>88</sup> Others, who face even longer waits as the adult children of lawful permanent residents or the siblings of U.S. citizens, are not content to "wait in line" for ten years, twenty years, or longer. Many enter illegally, or on a tourist or other temporary visa, and do not leave, hoping to remain in the United States until their visa number becomes available.<sup>89</sup>

These facts also demonstrate that it is not enough to say that "family unification" should be a cornerstone of our immigration policy. Instead, fairness demands that we give highest priority to the closest family relationships and give lower (or no) priority to other, more distant relationships. As the Commission on Immigration Reform concluded, it is difficult to justify the continued admission of more distant relatives such as adult brothers and sisters, and even parents and adult children, when members of the nuclear family remain separated.<sup>90</sup> Yet, our system effectively limits admissions for spouses and minor children of lawful permanent residents (the "2A" preference) to 90,000 per year, while admitting approximately 70,000 adult children, 65,000 adult brothers and sisters, and

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87. See H.R. REP NO. 104-469, pt. 1, at 134-35 (1996) (detailing waits of up to ten years for immediate family members of lawful permanent residents).

88. See *Legal Immigration Projections: Hearing Before the Subcomm. on Immigration and Claims of the House Comm. on the Judiciary*, 104th Cong. 116 (1996) (statement of Robert Bach, Executive Associate Commissioner, Policy and Planning, Immigration and Naturalization Service) (reporting that majority of undocumented spouses and children of legalized aliens were illegally residing in United States as of 1995); see *id.* at 137 (testimony of Cornelius D. Scully, Bureau of Consular Affairs, Department of State) (estimating that more than one million out of 3.3 million aliens in preference backlogs already reside in United States).

89. See *id.* at 116 (statement of Robert Bach, Executive Associate Commissioner, Policy and Planning Immigration and Naturalization Service); see *id.* at 137-38 (testimony of Cornelius D. Scully, Bureau of Consular Affairs, Department of State).

90. See U.S. COMMISSION ON IMMIGRATION REFORM, *LEGAL IMMIGRATION: SETTING PRIORITIES* 70-72 (1995).

approximately 60,000 parents.<sup>91</sup> The Commission recommended,

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91. The best starting point for these numbers is the statute, although the statute deals with allocations, not actual admissions under the categories. Section 203(a)(2) of the INA limits the admission of spouses and sons and daughters of lawful permanent residents (LPRs) to 114,200, of which 77% (or, approximately 89,000) must be allocated to spouses and minor, unmarried children of LPRs. *See* INA § 203(a)(2), 8 U.S.C. § 1153(a)(2) (1994). This category was defined in section 111 of the Immigration Act of 1990 and went into effect in 1992. *See* Immigration Act of 1990, Pub. L. No. 101-649, § 111, 104 Stat. 4986 (1990) (codified at 8 U.S.C. § 1153(a)) (establishing new preferences for family-sponsored immigrants). The admissions in 1992 through 1994 for spouses and children (not counting the INA section 203(a)(2)(B) category for unmarried sons or daughters who are not the children of an LPR) hovered in the 90,000 to 100,000 range. *See* U.S. COMMISSION ON IMMIGRATION REFORM, LEGAL IMMIGRATION: SETTING PRIORITIES 7 (1995) (Chart 1: Immigrant Admissions by Major Category: FYs 1990-1994). In 1995 and 1996, those figures shot upward, due primarily to the temporary availability of visas that had gone unused in previous years or by other categories. *See* IMMIGRATION AND NATURALIZATION SERVICE, IMMIGRATION TO THE UNITED STATES IN FISCAL YEAR 1996, at 1, 3 (1997) (on file with the *St. Mary's Law Journal*).

The approximate figure for adult children is derived from the following statutory allotments: the allocations to the adult sons and daughters of LPRs under section 203(a)(2) of the INA; the allocation of 23,400 to unmarried sons and daughters of citizens under section 203(a)(1); and the allocation of 23,400 to married sons and married daughters of U.S. citizens under section 203(a)(3). *See* INA § 203(a)(1)-(3), 8 U.S.C. § 1153(a)(1)(3) (1994). Due to spillover provisions and some underutilization of the preference category in section 203(a)(1) of the INA, the totals admitted in these categories have ranged in recent years from approximately 62,000 in 1994 to somewhat over 85,000 in 1996. *See* IMMIGRATION AND NATURALIZATION SERVICE, IMMIGRATION TO THE UNITED STATES IN FISCAL YEAR 1996, at 14 (1997) (Table: Immigrants Admitted by Major Category of Admission, 1994-96) (on file with the *St. Mary's Law Journal*); U.S. DEP'T OF JUSTICE, IMMIGRATION AND NATURALIZATION SERV., 1995 STATISTICAL YEARBOOK OF THE IMMIGRATION AND NATURALIZATION SERVICE 35-36 (1997) (Table 5); U.S. DEP'T OF JUSTICE, IMMIGRATION AND NATURALIZATION SERV., 1994 STATISTICAL YEARBOOK OF THE IMMIGRATION AND NATURALIZATION SERVICE 35-36 (1996) (Table 5). The preliminary 1996 figures from the INS do not provide a full breakdown of the second preference category as is provided in the *Yearbook*. To calculate the number of *adult* children (and their dependents) admitted under the second preference for 1996, we have taken approximately 22% of the *total* second-preference admissions. This figure is actually lower than the adult children share in either 1994 or 1995. "Normal" demand and conditions suggest that a stable figure for admissions of adult children is approximately 65,000 to 70,000 per year. This range is reflected in the admissions figures for 1994 and 1995, plus a small anticipated growth in demand under the first preference category, which historically has been under subscribed.

The 65,000 figure for adult brothers and sisters is based on the statutory allocation, and is supported by recent statistics. *See* INA § 203(a)(4), 8 U.S.C. § 1153(a)(4) (1994); U.S. COMMISSION ON IMMIGRATION REFORM, LEGAL IMMIGRATION: SETTING PRIORITIES 7 (1995) (Chart 1: Immigrant Admissions by Major Category: FYs 1990-1994).

The final figure of approximately 60,000 parents is based on admissions that have ranged between 48,000 to 66,000 during the years 1990 through 1996. *See* U.S. COMMISSION ON IMMIGRATION REFORM, LEGAL IMMIGRATION: SETTING PRIORITIES 7 (1995) (Chart 1: Immigrant Admissions by Major Category: FYs 1990-1994); IMMIGRATION AND NATURALIZATION SERVICE, IMMIGRATION TO THE UNITED STATES IN FISCAL YEAR 1996, at 14

and H.R. 2202 included, provisions to eliminate the preferences for adult children and adult siblings, and to redistribute a similar number of visas to spouses and minor children for five years in order to clear the 2A preference backlog.<sup>92</sup>

As became clear in the debate over H.R. 2202, no one was willing to defend the 2A preference backlog, but too few were willing to make the difficult decisions necessary to resolve the problem. The Clinton administration contended that the problem would be resolved through naturalization: as lawful permanent residents became citizens, they could petition for their spouses and children in the numerically-unlimited category for immediate family of citizens.<sup>93</sup> The Commission, however, expressed doubts that this process would alleviate the problem. Those doubts are confirmed by recent increases in the minimum wait for visas in the 2A category. The minimum wait for the category in general is now 51 months; for Mexicans, the wait is 60 months. In February 1996, the respective waits were 40 and 46 months.<sup>94</sup> Thus, the problem that the Commission portrayed, and that H.R. 2202 sought to address, is getting worse despite a record pace of naturalizations. As should be crystal clear by now, the current system is not self-correcting, and decisive action by Congress is required if we are to give true priority to the unification of nuclear families.

The skewed priorities in the family preference system, while important, have their most direct impact on recent immigrants themselves. Other reasons for reforming legal immigration are of more far-reaching concern and have, if anything, gained in strength since the debate over H.R. 2202. In examining these reasons, it is critical to recall that the debate is not whether immigration is beneficial to America, but rather, what *type* of immigration will benefit the na-

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(1997) (Table 2: Immigrants Admitted by Major Category of Admission: Fiscal Years 1994-96) (on file with the *St. Mary's Law Journal*).

92. See U.S. COMMISSION ON IMMIGRATION REFORM, LEGAL IMMIGRATION: SETTING PRIORITIES 64-72 (1995).

93. See *Legal Immigration Projections: Hearing Before the Subcomm. on Immigration and Claims of the House Comm. on the Judiciary*, 104th Cong. 115-16 (1996) (statement of Robert Bach, Executive Associate Commissioner, Policy and Planning, Immigration and Naturalization Service).

94. See *Immigrant Numbers for June 1997*, VISA BULLETIN (U.S. Dep't of State/Bureau of Consular Affairs, Wash., D.C.), June 1997, at 2; *Immigrant Numbers of February 1996*, VISA BULLETIN (U.S. Dep't of State/Bureau of Consular Affairs, Wash., D.C.), Feb. 1996, at 2.

tional interest of the United States given present conditions and those anticipated in the future.

D. *Enforcing the Law Against Illegal Immigration: A Fresh Start*

Another necessity for crafting an effective long-term immigration policy is reflected in our fourth suggestion, and requires the vigorous enforcement of this nation's illegal immigration laws. The INS recently revised its estimates of the resident illegal alien population in the United States: a total of 5 million, with a net increase of 275,000 per year.<sup>95</sup> Put into perspective, these numbers mean that the illegal alien population nationwide exceeds the population in all but nineteen of the States,<sup>96</sup> and that every three years, the net increase in the illegal population would be sufficient to populate a city the size of Boston, Dallas, or San Francisco. These statistics also prove that a decade after enactment of the Immigration Reform and Control Act of 1986, which was intended to resolve the crisis in illegal immigration, the problem is as great as it has ever been. Unless we are prepared to surrender control of our borders, which would be tantamount to surrendering our national sovereignty, we must recognize that the time for "half-measures" in legislative reform and enforcement is over.

Fortunately, this message appears to resonate with Congress and the American public. The IIRIRA is by far the toughest legislation against illegal immigration enacted in our lifetimes. A myriad of provisions that would have been impossible to enact as little as three years ago are now the law of the land. The hallmark of these reforms may be summed up in two words: credibility and accountability.

For too long, our enforcement efforts against illegal immigration have lacked credibility. It has been shown repeatedly that our border controls are ineffective to prevent illegal entries, that we have little idea of who is here illegally, and, that once we do apprehend

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95. See *INS Releases Updated Estimates of U.S. Illegal Population*, NEWS RELEASE (U.S. Dep't of Justice, Immigration and Naturalization Service, Wash., D.C.), Feb. 7, 1997, at 1 (on file with the *St. Mary's Law Journal*); William Branigan, *Illegal Immigrant Population Grows to 5 Million*, WASH. POST, Feb. 8, 1997, at A3; see also *infra* p. 939, Table 2: Estimated Resident Illegal Alien Population of the United States, in Millions.

96. See ALMANAC OF THE 50 STATES 424 (Edith R. Hornor ed., 1997) (Table 7) (listing 1995 population estimates for fifty states and District of Columbia).

an illegal alien, numerous "off ramps" in the adjudications system allow the alien to remain in the United States. Similarly, there has been no accountability for these failures, because the system has "processed" a growing number of illegal entrants and overstays without taking ultimate responsibility for the results. Perhaps the starkest indictment of this failure was handed down by the Inspector General of the Department of Justice in March 1996. Of a sample of non-detained aliens who received final orders of deportation or exclusion from the United States, the Inspector General found that only 11% actually departed the country.<sup>97</sup> For the remaining 89%, the labor-intensive process of apprehension and adjudication was a complete waste of time and resources. Reduced to numbers, in FY 1996 alone, the gap between orders of removal entered and orders of removal enforced was approximately 55,000, and a similar gap is projected for FY 1997.<sup>98</sup>

Although restoring credibility and accountability to immigration enforcement is a multi-faceted task, it must begin by ensuring that those illegal aliens whom we catch do not abscond, but actually are removed. In short, it must begin by rapidly closing the gap between removal orders entered and enforced. Neither the INS nor the immigration judges in the Executive Office for Immigration Review are responsible for the illegal behavior of those who violate our immigration laws. However, these officials can be held accountable for those violators who enter the enforcement system. The IIRIRA now gives them the tools to do their job, and along with those tools comes accountability.

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97. See U.S. DEPARTMENT OF JUSTICE, OFFICE OF THE INSPECTOR GENERAL, IMMIGRATION AND NATURALIZATION SERVICE DEPORTATION OF ALIENS AFTER FINAL ORDERS HAVE BEEN ISSUED 6, Report No. I-96-03 (1996).

98. For 1996, the Executive Office of Immigration Review (EOIR) has reported 93,181 orders of deportation and 28,908 orders of exclusion, for a total of 122,089 orders of removal (not including orders of voluntary departure). *Implementation of Title III of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996: Hearing Before the Subcomm. on Immigration and Claims of the Committee on the Judiciary, 105th Cong.* 41 (1996). The INS reported total removals of approximately 68,000, *id.* at 5 (statement of Paul W. Virtue, Acting Executive Associate Comm'r for Programs, Immigration and Naturalization Service), leaving a difference of about 54,000. In the first quarter of 1997, the EOIR reported 31,200 removal orders and the INS reported approximately 19,000 removals under EOIR orders, *id.* at 41; *FY 1997 Final Order Removals Start Strong: INS Announces New Tracking System*, NEWS RELEASE (U.S. Dep't of Justice/INS, Wash. D.C.), Feb. 10, 1997, at 2.

The IIRIRA authorizes massive increases in our capacity for border enforcement by, for example, substantially increasing the number of U.S. Border Patrol agents<sup>99</sup> and requiring the strategic use of fences, barriers, and roads to prevent illegal entries.<sup>100</sup> To address the problem of overstays, the legislation requires implementation within two years of a reliable system for departure controls,<sup>101</sup> so that we can know with greater certainty which nonimmigrants (temporary visitors) have actually left the United States on time. The new law also authorizes the hiring of additional INS investigators for immigration enforcement in the interior of the United States.<sup>102</sup>

The centerpiece of IIRIRA's reforms, however, is the complete restructuring of provisions that were previously unified under Chapter 4 of the Immigration and Nationality Act: inspection, apprehension, examination, adjudication, and removal of illegal aliens. These changes provide a coherent structure and organization to provisions that had been amended in a patchwork fashion since the enactment of the Immigration and Nationality Act of 1952. Redundant and archaic provisions have been eliminated, and procedures have been streamlined. Within this new structure, Congress has imposed several fundamental changes in policy designed to increase the effectiveness of our procedures to remove illegal aliens, and, ultimately, to increase the number of illegal aliens so removed. These changes are as follows:

1. *Expedited Removal*: Section 302 of the IIRIRA requires that aliens arriving in the United States who are inadmissible under INA section 212(a)(6)(C) (fraud or misrepresentation in obtaining a travel document) or section 212(a)(7) (not in possession of a valid travel document) shall be ordered removed from the United States without further hearing or review.<sup>103</sup> An alien claiming to be a lawful permanent resident, or to be a refugee or asylee, is

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99. See IIRIRA, *supra* note 28, § 101(a), reprinted in 1996 U.S.C.C.A.N. (110 Stat. 3009) at 1577-78 (calling for annual increase of at least 1,000 border patrol agents through fiscal year 2001).

100. *Id.* § 102, reprinted in 1996 U.S.C.C.A.N. (110 Stat. 3009) at 1579-80.

101. *Id.* § 110, reprinted in 1996 U.S.C.C.A.N. (110 Stat. 3009) at 1585-86.

102. *Id.* §§ 131, 132, reprinted in 1996 U.S.C.C.A.N. (110 Stat. 3009) at 1592-93.

103. *Id.* § 302(a), reprinted in 1996 U.S.C.C.A.N. (110 Stat. 3009) at 1621 (amending INA § 235(b)(1)(A)(i)).

entitled to a hearing limited to that claim.<sup>104</sup> In addition, an arriving alien who seeks to apply for asylum shall be referred to an interview with an asylum officer to determine if the alien has a credible fear of persecution.<sup>105</sup> The intent of these provisions is to deter alien smuggling and other attempts to enter the United States illegally, and to prevent abuse of the asylum system by providing full hearings only to those applicants who have a reasonable possibility of being granted asylum.

2. *Reform of the "Entry" Doctrine:* Prior to the effective date of the IIRIRA, aliens subject to removal from the United States were accorded separate treatment on the basis of whether they had made an "entry" into the United States.<sup>106</sup> Thus, an alien who had illegally entered the United States was given the same procedural rights as an alien who had lawfully entered the United States, but later became subject to removal due to criminal activity or other violations of the terms of a visa.<sup>107</sup> Section 301 of the IIRIRA replaces this "entry" doctrine with a doctrine of "admission." Henceforth, the aliens are divided on the basis of whether they have been admitted to the United States after inspection by an immigration officer.<sup>108</sup> Aliens who have entered the United States without inspection are now classified as "inadmissible" rather than "deportable." As such, they have the burden of proof in proceedings before immigration judges to establish that they are entitled to be admitted to and remain in the United States.<sup>109</sup>

3. *Consolidation of Proceedings:* Under prior law, there were two forms of proceedings to remove aliens from the United States: exclusion and deportation. Over time, however, the procedural differences between these hearings virtually disappeared. Both hearings were held before immigration judges, and, in each case, aliens had the right to counsel and to cross-examine witnesses.<sup>110</sup>

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104. See IIRIRA, *supra* note 28, § 302(a), reprinted in 1996 U.S.C.C.A.N. (110 Stat. 3009) at 1624 (amending INA § 235(b)(1)(C)).

105. *Id.*, reprinted in 1996 U.S.C.C.A.N. (110 Stat. 3009) at 1621-22 (amending sections 235(b)(1)(A)(ii) and 235(b)(1)(B) of INA).

106. H.R. REP. NO. 104-469, pt. 1, at 225-26 (1996).

107. *Id.*

108. IIRIRA, *supra* note 28, § 301(a), reprinted in 1996 U.S.C.C.A.N. (110 Stat. 3009) at 1613.

109. *Id.* § 304(a)(3), reprinted in 1996 U.S.C.C.A.N. (110 Stat. 3009) at 1640-41 (creating INA § 240(c)(2)).

110. See 8 C.F.R. §§ 236.2, 242.8, 242.10, 242.16 (1996).

Moreover, from an adverse ruling in either type of proceeding, there was the right of appeal to the Board of Immigration Appeals and, from there, to the federal courts.<sup>111</sup> Yet, despite the procedural similarities, substantive differences involving entitlement to certain forms of relief (chiefly voluntary departure and suspension of deportation) remained, leading to prolonged litigation over jurisdiction. This confusing situation truly resulted in a triumph of form over substance. In response to this problem, and consistent with the decision to treat illegal entrants as inadmissible aliens, section 304 of the IIRIRA consolidates exclusion and deportation into one form of proceeding, a removal hearing.<sup>112</sup> Under section 304, eligibility for various forms of relief from removal will be determined on the basis of the alien's status, not on the type of proceeding in which the alien's case is adjudicated.<sup>113</sup>

4. *Limitations on Relief.* Section 304 of the IIRIRA also re-defines the criteria required for aliens to obtain relief from an order of removal.<sup>114</sup> One of the most abused forms of relief under the pre-IIRIRA system was voluntary departure. Aliens who were ordered to be deported typically were granted this relief, which allowed them to depart the United States voluntarily within a set period of time and thereby avoid the bar to readmission imposed upon those who are forcibly deported. Unfortunately, there was no reliable system to determine if such aliens actually departed, and many never left. Section 304 of the IIRIRA limits voluntary departure to a one-time-only delay of not more than 120 days and, depending on when the relief is granted, either permits or requires the Department of Justice to demand that the alien post a bond to secure his or her departure from the United States.<sup>115</sup>

Two additional forms of discretionary relief, suspension of deportation and "section 212(c)" relief, similarly were extended to a broader range of cases than originally intended by Congress under

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111. See *id.* § 3.1(b)(1)–(2) (appeals to BIA); INA, *supra* note 2, § 106(a), 8 U.S.C. § 1105a (1994) (appeals from orders of deportation); *id.* § 106(b), 8 U.S.C. § 1105a (1994) (judicial review of exclusion cases).

112. See IIRIRA, *supra* note 28, § 304(a)(3), reprinted in 1996 U.S.C.C.A.N. (110 Stat. 3009) at 1636 (creating INA § 240(a)).

113. *Id.*, reprinted in 1996 U.S.C.C.A.N. (110 Stat. 3009) at 1644–48 (creating INA § 240A).

114. *Id.*

115. *Id.*, reprinted in 1996 U.S.C.C.A.N. (110 Stat. 3009) at 1648–51 (creating sections 240B(a)(2), 240B(a)(3), 240B(b)(3) of INA).



pre-IIRIRA practice. In order to gain eligibility for these forms of relief, aliens often used dilatory tactics to extend their stay in the United States. Section 304 consolidates suspension of deportation and section 212(c) relief into a single form of relief entitled "cancellation of removal."<sup>116</sup> Under section 304, eligibility for this relief is tightened, thus removing the incentive for aliens to engage in dilatory tactics and avoiding litigation over issues such as the length of the alien's residence in the United States.

5. *Detention and Removal*: Prior to passage of the IIRIRA, the law provided no clear mandate to restrain and promptly deport those aliens who had been ordered removed from the United States. It is perhaps not surprising, therefore, that only 11% of non-detained aliens ordered deported actually left the country. To address this problem, section 305 of the IIRIRA mandates the detention of aliens who have been ordered removed and generally requires that removal be completed within 90 days after the order.<sup>117</sup> Moreover, those aliens who are released due to a lack of detention space must now be placed under a form of supervision to ensure that they do not abscond.<sup>118</sup> Section 305 also requires the INS to detain criminal aliens from the time of their apprehension until they are removed from the United States.<sup>119</sup>

6. *Limitations on Appeals*: The Department of Justice has developed a sophisticated system of administrative tribunals under the Executive Office of Immigration Review (EOIR) to adjudicate issues relating to the removal of aliens. Decisions of the EOIR may be referred to the Attorney General.<sup>120</sup> Appeals to the federal courts, therefore, should be extraordinary and limited to situations in which there is a likelihood of a contested issue of law or fact relating to an alien's right to remain in the United States. Hence, section 306 of the IIRIRA reserves appeal of an order of removal to the issue of whether the alien is inadmissible or deportable.<sup>121</sup>

116. *Id.*, reprinted in 1996 U.S.C.C.A.N. (110 Stat. 3009) at 1644-48 (creating section 240A of INA).

117. IIRIRA, *supra* note 28, § 305(a)(3), reprinted in 1996 U.S.C.C.A.N. (110 Stat. 3009) at 1651-52 (creating section 241(a)(1)).

118. *Id.*, reprinted in 1996 U.S.C.C.A.N. (110 Stat. 3009) at 1652 (creating section 241(a)(3)).

119. *Id.* (creating section 241(a)(2)).

120. See 8 C.F.R. § 3.1(h) (1996).

121. IIRIRA, *supra* note 28, § 306(a)(2), reprinted in 1996 U.S.C.C.A.N. (110 Stat. 3009) at 1667 (amending section 242(a)(2)).

In contrast, issues pertaining to purely discretionary relief, including cancellation of removal and voluntary departure, should remain within the sole discretion of the Attorney General and, thus, are no longer appealable to the federal courts.<sup>122</sup> In addition, there is no right of judicial review in the case of an alien who is removable on the grounds of a criminal conviction.<sup>123</sup> On the other hand, asylum, which is not purely a discretionary form of relief, remains appealable.<sup>124</sup> Finally, section 306 also places new time limits on appeals and provides, in the case of an alien who has not been admitted to the United States, that the filing of an appeal does not automatically stay the order of removal.<sup>125</sup>

*7. Strengthening Penalties for Violations:* The IIRIRA also ensures that those who violate our immigration laws will not easily be able to attain immigration benefits in the future. Aliens who depart under an order of removal will have to remain outside of the United States for between five to twenty years, depending on their status at the time of removal.<sup>126</sup> Aliens who have resided illegally in the United States for more than one year may be inadmissible for up to ten years.<sup>127</sup> In addition, those who fail to depart under an order of removal or in compliance with a grant of voluntary departure will be barred from future immigration benefits and subject to civil penalties.<sup>128</sup> By strengthening the penalties for viola-

122. *Id.*, reprinted in 1996 U.S.C.C.A.N. (110 Stat. 3009) at 1667 (amending section 242(a)(2)(B) of INA).

123. *Id.*, reprinted in 1996 U.S.C.C.A.N. (110 Stat. 3009) at 1667–68 (amending section 242(a)(2)(C) of INA).

124. *See id.*, reprinted in 1996 U.S.C.C.A.N. (110 Stat. 3009) at 1667 (amending section 242(a)(2)(B)(ii) of INA) (providing that “the granting of relief under section 208(a)” [of INA] is not exempted from judicial review).

125. *Id.*, reprinted in 1996 U.S.C.C.A.N. (110 Stat. 3009) at 1668 (amending sections 242(b)(1) and 242(b)(3)(B) of INA).

126. IIRIRA, *supra* note 28, § 301(b), reprinted in 1996 U.S.C.C.A.N. (110 Stat. 3009) at 1614 (creating section 212(a)(9)(A)).

127. *Id.*, reprinted in 1996 U.S.C.C.A.N. (110 Stat. 3009) at 1615 (creating section 212(a)(9)(B)(i)(II)). In addition, aliens who resided illegally in the United States for a period of greater than six months but less than one year may be inadmissible for a term of three years. *Id.* (creating section 212(a)(9)(B)(i)(I)).

128. *Id.* § 304(a)(3), reprinted in 1996 U.S.C.C.A.N. (110 Stat. 3009) at 1650 (creating section 240B(d)) (civil penalty—voluntary departure); *id.* § 307(a), reprinted in 1996 U.S.C.C.A.N. (110 Stat. 3009) at 1676 (amending section 243(a)(1)) (criminal penalty—removal); *id.* § 380, reprinted in 1996 U.S.C.C.A.N. (110 Stat. 3009) at 1738–39 (creating section 274D) (civil penalty—removal).

tions, these provisions aim to provide a much greater incentive in the future for compliance with our immigration laws.

The legislative reforms outlined above provide a detailed framework for the Administration and the INS. Their point is not to eliminate all discretion, but to place the focus of the system where it most belongs: the removal of illegal aliens. Our immigration courts erroneously have come to be viewed as courts of equity in which the government's effort to remove illegal aliens must be weighed against the alien's interest in remaining in the United States. The growing use of discretionary relief—the pace for grants of suspension of deportation has more than quadrupled in just two years<sup>129</sup>—has contributed to this impression. To curtail illegal immigration effectively, however, the courts should return to determining issues of inadmissibility and deportability and to ensuring that those who are found to be removable from the country remain in custody or are paroled under tight restrictions. Implicit in this mission is the role of the immigration courts in guarding against the removal of any alien from the United States under procedures that are contrary to law. Thus, the courts must ensure that adequate evidence supports the government's charge of inadmissibility or deportability, and that aliens who are entitled to such relief are either granted asylum or have their orders of removal withheld under new section 241(b)(3) of the INA. Furthermore, discretionary relief such as cancellation of removal under new section 240A or voluntary departure under new section 240B should not be viewed as an entitlement, but as a privilege granted in truly extraordinary cases.

The effectiveness of these provisions does not rest upon the shoulders of the immigration judges alone, for the INS bears primary responsibility for apprehending illegal aliens and bringing them into the adjudications system. The most important aspect of this task is the strategic use of detention, which is now mandated by law, to ensure that illegal aliens can easily be found when it is

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129. Grants of suspension of deportation totaled 2,200 in FY 1994; 3,168 in FY 1995; and 5,811 in FY 1996. See IMMIGRATION AND NATURALIZATION SERVICE, IMMIGRATION TO THE UNITED STATES IN FISCAL YEAR 1996, at 1, 3 (1997) (on file with the *St. Mary's Law Journal*). During the first quarter of FY 1997 alone, a total of 2,500 grants were made. See *Implementation of Title III of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996: Hearing Before the Subcomm. on Immigration and Claims of the Committee on the Judiciary*, 105th Cong. 41 (1996).

time for them to be removed. Perhaps the most fundamental change under the reformed system is found in new section 241 of the INA, which requires the INS to detain an illegal alien once an order of removal against the alien becomes administratively final, and, then, to remove the alien within 90 days.<sup>130</sup> The key to implementing this new requirement is to change what typically transpires at the end of an immigration court proceeding, after an order of removal is entered. Usually, a non-detained alien who is ordered removed faces no greater restraint on his or her liberty than existed prior to entry of the order. This lack of restraint is the critical reason why only 11% of these aliens actually depart from the United States. What should happen, even if the alien has reserved the right to appeal and, thus, the order is not yet administratively final, is the immediate detention of the alien. A hearing on parole and conditions of bond could follow within several days, provided that the order is not yet final. In those cases in which the order is final, the alien ordinarily should remain in custody.

This single change would send a clear message that the days of lax enforcement of removal orders have ended. Granted, the change would require more resources. Detention officers would have to be available at the end of hearings, immediate transportation to detention facilities would have to be arranged, and INS attorneys would have to be prepared to deal with a greater volume of custody and bond redeterminations. In addition, more detention space likely would be needed, although short-term "leases" of space in state and local detention facilities might bridge the gap.

These changes are profound, but essential. Under the current system, an order of removal is analogous to entry of a civil judgment against an impecunious defendant: there is no expectation of compliance, but the judgment remains on the record should enforcement become possible. The new system is designed to bring that reality closer to that of the criminal justice system. Thus, when it is clear that an alien no longer has the liberty to remain in the United States, there should be no hesitation to restrain that alien's liberty and to bring about the result mandated by law and the court's order.

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130. IIRIRA, *supra* note 28, § 305(a)(3), *reprinted in* 1996 U.S.C.C.A.N. (110 Stat. 3009) at 1651-52 (creating sections 241(a)(1)-(2)).

### E. *Removing the Incentives for Illegal Immigration*

As discussed above, effective measures to remove illegal aliens who are already in the United States must be taken. The consistent application of the tools provided in title III of the IIRIRA, coupled with the deployment of adequate resources, will greatly increase the number of illegal aliens removed, and by so doing, dampen the incentive for illegal aliens to remain here. The longer-term challenge, however, is to remove the economic and social incentives that have caused the illegal alien population to again spiral above five million. This challenge is reflected in our fifth suggestion for principles to guide immigration reform.

A flattering measure of the success of the American economy and of American society is that so many individuals from around the world desire to come here. Of course, a not-so-flattering measure of the failure of the federal government's immigration policy is that so many individuals manage to come here in violation of our laws. But, an equally important measure of this failure is the fact that, once here, so many of these illegal migrants are able to partake of the benefits that originally enticed them. If we were more successful in denying illegal aliens the benefits of American life, then the pressures on our borders might ease. With this goal in mind, we would like to explore the benefits that make America so attractive for those who choose to come here illegally.

The most powerful magnet for illegal immigration has always been the availability of well-paying jobs in America. The great engine of the U.S. economy has produced wages standing orders of magnitude above those available directly below our southern border and in the many other third-world and former second-world economies. Moreover, the U.S. unemployment rate has for years been well below that of European high-wage countries. As a result, millions of illegal aliens from all over the world have come to settle in this country. Most have come here knowing that they probably will have to work in relatively low-skilled jobs<sup>131</sup> and in

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131. A study looking at the occupational characteristics of illegal aliens found that only 2.9% were professional/technical or managerial/administrative workers, while 55.2% were blue collar workers (39.9% semi-skilled or unskilled), 20.6% were service workers, and 18.8% were farmworkers. See DAVID S. NORTH & MARION F. HOUSTON, U.S. DEP'T OF LABOR, *THE CHARACTERISTICS AND ROLE OF ILLEGAL ALIENS IN THE U.S. LABOR MARKET: AN EXPLORATORY STUDY S-9* (Mar. 1976) (Table V-3: Distributions of Occu-

the secondary labor market, where labor protections are scarce, job security low, and social status nil. However, even these conditions are preferable to those at home, and the illegal immigrant workers usually end up making *more* than the minimum wage.<sup>132</sup>

A decade ago, Congress realized that the best way to discourage illegal immigration was to make it as difficult as possible for illegal aliens to work here. The Immigration Reform and Control Act of 1986 (IRCA) prohibited employers from knowingly hiring or employing illegal aliens and required employers to check the identity and work eligibility documents of all new employees.<sup>133</sup> Hoping to increase the effectiveness of IRCA, Congress mandated and the INS carried out a massive educational campaign soon after its passage to let employers know of the new requirements.<sup>134</sup> In addition, both civil fines and possible criminal penalties were available as enforcement mechanisms under this act.<sup>135</sup>

Unfortunately, the easy availability of counterfeit documents, from birth certificates to drivers' licenses, has made a mockery of the law. Fake documents were produced in mass quantities—in Southern California alone, federal agents seized 2.5 million bogus documents from 1989 to 1992.<sup>136</sup> As a result, even the vast majority of employers who wanted to obey the law had no reliable means of identifying illegal aliens; and, adding further to the problem, such employers actually risked being found guilty of discrimination on the basis of national origin if they asked for additional docu-

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pation of Apprehended Illegal Alien Respondents in Their Country of Origin and in Their Most Recent U.S. Jobs, and of U.S. Employed Persons). Even if skilled, "they are usually precluded from using their credentials due to their illegal status . . ." *Impact of Illegal Immigration on Public Benefit Programs and the American Labor Force: Hearings Before the Subcomm. on Immigration and Claims of the House Comm. on the Judiciary*, 104th Cong. 96 (1995) (statement of Vernon M. Briggs, Cornell University).

132. A study of apprehended illegal aliens in Chicago in 1983 found that the average wage was \$4.42 for Mexican nationals and \$4.73 for other nationals, with 16% earning less than the then-mandated minimum wage of \$3.35. BARRY R. CHISWICK, *ILLEGAL ALIENS: THEIR EMPLOYMENT AND EMPLOYERS* 98-99 (1988).

133. See 8 U.S.C. §§ 1324a(a)(1), 1324a(b) (1994).

134. See INA, *supra* note 2, § 274A(i)(1), 8 U.S.C. § 1324a (1994).

135. See 8 U.S.C. § 1324a(e)-(f) (1994).

136. See *Worksite Enforcement of Employer Sanctions: Hearing Before the Subcomm. on Immigration and Claims of the House Comm. on the Judiciary*, 104th Cong. 8 (1995) (statement of James A. Puleo, Executive Associate Commissioner, Programs, Immigration and Naturalization Service).

ments.<sup>137</sup> At the other extreme, rogue employers could easily collude with illegal alien employees to avoid the provisions of IRCA. The employers could hire the illegal aliens despite knowing they were unauthorized to work, comfortable in the knowledge that they were presented with "genuine" documents. These problems have been compounded in recent years by a flagging enforcement effort by the INS. In fiscal year 1990, the INS logged 14,311 investigations of illegal employment and collected \$5.78 million in fines.<sup>138</sup> In the first eleven months of fiscal year 1996, however, these figures dropped drastically, to only 4,629 investigations and to collections totalling just \$1.12 million.<sup>139</sup>

Title IV of the IIRIRA was enacted to fulfill the promise of the IRCA and significantly weaken the job magnet. First, the IIRIRA reinvigorates INS enforcement efforts by authorizing at least 150 new INS investigators to pursue illegal aliens in the workplace in each of the fiscal years 1997, 1998, and 1999.<sup>140</sup> Second, the IIRIRA clarifies that employers are guilty of discrimination only if they ask for additional documentation with the intent of discriminating against an employee on the basis of national origin, thus removing any disincentive to ask.<sup>141</sup>

Third, the IIRIRA creates three employment eligibility verification pilot programs designed to make fraudulent documents useless.<sup>142</sup> The programs will be available to private employers on a voluntary basis, and will operate for four years.<sup>143</sup> Under the basic pilot program, an employer will verify the employment eligibility of a new employee by contacting a verification office—usually by toll-free telephone call—and providing the employee's social security number and, if applicable, INS-issued number.<sup>144</sup> The verification office then will check these numbers against records

137. See 8 U.S.C. § 1324b(a)(6) (1994).

138. See Memorandum from INS Press Office to Rep. Lamar Smith, *Employer Sanctions Activity: FY 1988–FY 1996* (Oct. 16, 1996) (on file with the *St. Mary's Law Journal*).

139. *Id.*

140. See IIRIRA, *supra* note 28, § 131(a)–(b), reprinted in 1996 U.S.C.C.A.N. (110 Stat. 3009) at 1592–93 (budgeting funds for INS to hire 300 additional investigators per year for 1997, 1998, and 1999, of which one-half shall be assigned to investigate unlawful employment of aliens in violation of section 274A of INA).

141. *Id.* § 421, reprinted in 1996 U.S.C.C.A.N. (110 Stat. 3009) at 1771–72.

142. *Id.* §§ 401–405, reprinted in 1996 U.S.C.C.A.N. (110 Stat. 3009) at 1748–64.

143. *Id.* § 401(b), reprinted in 1996 U.S.C.C.A.N. (110 Stat. 3009) at 1748.

144. *Id.* § 404(a), reprinted in 1996 U.S.C.C.A.N. (110 Stat. 3009) at 1762.

maintained by the Social Security Administration and the INS to ensure that they are not fraudulent and that they authorize the employee to work.<sup>145</sup> The two other pilot programs are variations on this theme. These pilots will give employers the tools they need to hire legal workers. Similar but more rudimentary verification systems have been successfully tested in recent years by the Social Security Administration<sup>146</sup> and the INS.<sup>147</sup>

Benefits provided at all levels of government are the other great magnet that attracts illegal immigrants. The most powerful of these attractions is undoubtedly public education. It is hard to overestimate the value of giving a child the “leg up” on life that is provided by an American education. The availability of such an education for one’s children is a major inducement for many illegal immigrants to stay in America, even if times are hard here and employment is available back home. This availability was guaranteed by the Supreme Court in *Plyler v. Doe*,<sup>148</sup> in which the Court held that, without explicit congressional authorization, illegal alien children residing in the United States cannot be denied a free public elementary and secondary school education.<sup>149</sup>

Serious policy concerns certainly attend the denial of an education to illegal alien children—fears have been raised that we would create a permanent underclass and leave such children with little else to do but commit crimes.<sup>150</sup> On the other hand, the great enticement that public education offers to prospective illegal immigrants must be taken into consideration, along with the immense costs it places on U.S. taxpayers. The State of California, for example, estimated that in academic year 1994–95, state and local costs

145. IIRIRA, *supra* note 28, § 404(b), *reprinted in* 1996 U.S.C.C.A.N. (110 Stat. 3009) at 1762.

146. See SOCIAL SECURITY ADMINISTRATION, DEPARTMENT OF HEALTH AND HUMAN SERVICES, A SOCIAL SECURITY NUMBER VALIDATION SYSTEM: FEASIBILITY, COSTS, AND PRIVACY CONSIDERATIONS *passim* (1988).

147. See OFFICE OF INFORMATION RESOURCES MANAGEMENT, RECORDS SYSTEMS DIVISION, SAVE PROGRAM BRANCH, IMMIGRATION AND NATURALIZATION SERVICE, TELEPHONE VERIFICATION SYSTEM (TVS) PILOT: REPORT ON THE DEMONSTRATION PILOT-PHASE I *passim* (1993).

148. 457 U.S. 202 (1982).

149. *Plyler*, 457 U.S. at 226, 230.

150. See *id.* at 230 (recognizing fear that denial of education to illegal alien children would promote creation of “subclass of illiterates” and add to “the problems and costs of unemployment, welfare, and crime”).



of educating illegal alien children were \$1.53 billion; the U.S. General Accounting Office put the cost at \$1.60 billion and the Urban Institute at \$1.29 billion.<sup>151</sup> In Texas, the Governor's Office estimated that state and local government costs in academic year 1993–94 were \$299 million, while the Urban Institute estimated a higher cost of \$419 million.<sup>152</sup>

In contrast to education, most federal public benefits programs have been unavailable to illegal aliens. The major exception is for Medicaid, an entitlement program providing medical assistance to low-income persons, which is funded jointly by the federal government and the states. The federal government has mandated that benefits be provided under Medicaid to illegal aliens for medical emergencies.<sup>153</sup> Some states, such as California, choose to provide additional services such as prenatal care and long-term care, which are funded solely by the state. The costs of Medicaid benefits to immigrants are not insignificant. California estimated that total Medicaid costs for illegal aliens in the state were \$637 million in 1992; Texas estimated a cost of \$33 million.<sup>154</sup> In addition to Medicaid, other exceptions to the general unavailability of federal benefits to illegal aliens also existed, such as the "Women, Infants and Children" nutrition program (WIC).

The Personal Responsibility and Work Opportunity Reconciliation Act of 1996,<sup>155</sup> however, bars illegal aliens from almost every federal public benefit. The only exceptions under the Act are for emergency medical care, certain kinds of emergency disaster relief, immunizations, testing and treatment for communicable diseases, and certain in-kind assistance specified by the Attorney General as long as it is non-means tested and is necessary for the protection of life or safety.<sup>156</sup> Even grants, contracts, loans, and professional or

151. U.S. GENERAL ACCOUNTING OFFICE, *ILLEGAL ALIENS: ASSESSING ESTIMATES OF FINANCIAL BURDEN ON CALIFORNIA* (GAO/HEHS-95-22) 9 (1994).

152. REBECCA L. CLARK ET AL., *IMPACTS OF UNDOCUMENTED ALIENS: SELECTED ESTIMATES FOR SEVEN STATES*, tab. 4.18 (1994).

153. See 42 U.S.C. §§ 1395dd, 1396b(v) (1994).

154. REBECCA L. CLARK ET AL., *IMPACTS OF UNDOCUMENTED ALIENS: SELECTED ESTIMATES FOR SEVEN STATES*, tab. 5.2 (1994).

155. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193 (Aug. 22, 1996), *reprinted in* 1996 U.S.C.C.A.N. (110 Stat. 2105).

156. *Id.* § 401, *reprinted in* 1996 U.S.C.C.A.N. (110 Stat. 3009) at 2261-62.

commercial licenses provided by a U.S. agency or "by appropriated funds of the United States" are barred.<sup>157</sup>

An important corollary must be made to any conclusion that federal public benefits are by and large not available to illegal aliens. It must not be overlooked that the U.S.-born children of illegal aliens are U.S. citizens.<sup>158</sup> The number of children born to illegal alien parents in the United States is not negligible. In California, for instance, at least 16% of all births are of such children.<sup>159</sup> These children are eligible for public benefits on the same basis as other citizens. While this does not make their parents eligible, eligibility for many public benefits, such as Aid to Families with Dependent Children (AFDC), is dependent on the status of the child. The U.S. General Accounting Office estimated that the cost of providing AFDC benefits to the citizen children of illegal aliens was \$479 million in fiscal year 1992.<sup>160</sup> Since the parents are living and eating with these children, they will obviously benefit from aid provided to the children. In fact, aid checks most often will be sent to the parents.

"Birthright" citizenship encourages illegal immigration not just by providing parents with indirect access to federal welfare programs, but also by providing the very citizenship that allows it. Professor Helen Wallace of the Graduate School of Public Health at San Diego State University and professor Judith Fullerton of the School of Medicine at the University of California, San Diego con-

157. *Id.* § 401(c)(1)(A), reprinted in 1996 U.S.C.C.A.N. (110 Stat. 3009) at 2262.

158. It is widely, though not universally, assumed that the Fourteenth Amendment to the U.S. Constitution requires that these children be granted U.S. citizenship. The Amendment provides that "[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." U.S. CONST. amend. XIV, § 1.

159. The California Department of Health Services estimated that of the 232,101 Medi-Cal (the California Medicaid system) funded deliveries in California in 1993, 91,596 were to illegal alien mothers. See CALIFORNIA DEP'T OF HEALTH SERVS., MEDICAL CARE STATISTICS SECTION, DISTRIBUTION OF MEDI-CAL FUNDED DELIVERIES BY AGE AND AID CATEGORY 5 tab. 3 (1993) (on file with the *St. Mary's Law Journal*). Included in this figure are births to aliens with temporary visas. *Id.* The assertion that children of illegal aliens account for 16% of all births in California is derived by comparing this figure with the 584,483 total live births in California during 1993. (This figure was provided in a telephone conversation by the California Department of Health Services, Vital Statistics Division).

160. *Hearing Before the Task Force on Illegal Immigration of the House Republican Research Comm.*, 103d Cong. 5 (1993) (statement of Joseph Delfico, Director, Income Security Issues, Human Resources Division, General Accounting Office).

ducted a study in which 83 Hispanic women who crossed into the United States in order to receive prenatal care or to deliver their babies were interviewed within the first 72 hours after childbirth.<sup>161</sup> Sixty-five percent of these women said that ensuring that their babies were born U.S. citizens was a compelling reason for their coming to America.<sup>162</sup> Indeed, one can think of fewer gifts more precious to a newborn than that of U.S. citizenship. In considering this issue, it should be remembered that, unlike the United States, most other countries do not confer citizenship on the children born of illegal aliens.<sup>163</sup>

Finally, state and local governments generally do not make illegal aliens eligible for many public benefits.<sup>164</sup> The bigger problem, however, is the lack of an adequate means for state and local officials to verify an alien applicant's legal status.<sup>165</sup> However, in issuing an injunction against certain portions of California's Proposition 187, federal district court judge Patricia Pfaelzer found that states can deny benefits to illegal aliens if "based on determinations by federal authorities that those individuals are deportable

161. See HELEN M. WALLACE ET AL., *PRENATAL CARE FOR HISPANIC WOMEN: OPPORTUNITIES FOR IMPROVEMENT* 81 (1994). The study was conducted in the five hospitals in San Diego with the largest number of Hispanic deliveries. *Id.* at 80-81.

162. *Id.* at 82.

163. See Ruth Ellen Wasem & Kersi Shroff, *Immigration and Naturalization Laws: A Nine Country Comparison*, at CRS-10 to CRS-13 (Cong. Research Serv., Report No. 93-755 EPW, Aug. 24, 1993) (on file with the *St. Mary's Law Journal*) (revealing that only four out of nine countries selected in study grant citizenship to children born within their borders without regard to parents' immigration status).

164. See Larry M. Eig, Congressional Research Service, *Overview of State Expenditures for Public Benefits for Aliens*, at 2-6 (Cong. Res. Serv. Mem., Sept. 28, 1994) (reporting that, with the exception of emergency health care, states typically deny public benefit to illegal aliens) (on file with the *St. Mary's Law Journal*); see also *Regents of the Univ. of Cal. v. Superior Court*, 276 Cal. Rptr. 197, 201 (Cal. Ct. App. 1990) (writing, "We are unaware of any authority forbidding a state, on equal protection grounds, to provide services to its lawful residents that it denies to others.").

165. Eligibility for many federal means tested benefits is verified through the "SAVE" (Systematic Alien Verification for Entitlement) Program, in which aid-providers check an alien applicant's immigration status with the INS. See 42 U.S.C. §§ 1320b-7(d) (1994) (detailing procedures to be followed by states when verifying immigration status). However, this system is not foolproof. See *Verification of Eligibility for Employment and Benefits: Hearing Before the Subcomm. on Immigration and Claims of the House Comm. on the Judiciary*, 104th Cong. 2 (1995) (statements of Rep. Lamar Smith). No similar system exists for verifying an alien's eligibility for state and local means tested benefits.

pursuant to federal law.”<sup>166</sup> The Personal Responsibility and Work Opportunity Reconciliation Act of 1996 also bars illegal aliens from almost every state and local public benefit, unless a state passes a law after enactment which affirmatively provides for such eligibility.<sup>167</sup>

In conclusion, even those who come to America illegally are able to enjoy many of the benefits of American life. These benefits act as powerful lures for potential illegal migrants. Therefore, any viable strategy to combat illegal immigration must address them.

#### F. *The Safety of the American People: Targeting Criminal Aliens*

Our sixth and final suggested principle for building a strong foundation for U.S. immigration policy involves protecting American citizens from immigrants who commit crimes. In the early 1980s, approximately 1,000 inmates in federal prison facilities were foreign-born, a share of four percent.<sup>168</sup> Currently, there are more than 24,000 sentenced, non-citizen inmates in federal prisons, out of a total foreign born population exceeding 34,000.<sup>169</sup> An additional 62,000 inmates in state and local facilities are deportable aliens out of a total population of 78,000 foreign-born nationals.<sup>170</sup> In FY 1996, the INS removed approximately 37,000 criminal aliens

166. *League of United Latin American Citizens v. Wilson*, 908 F.Supp. 755, 771 (C.D. Cal. 1995). However, if states make “independent determinations of who is and who is not ‘lawfully admitted’ in this country, based on state-created criteria,” *League of United Latin American Citizens*, 908 F. Supp. at 772, the states are engaged in the regulation of immigration (something only the federal government can do), *see id.* (construing Proposition 187 as impermissible regulation of immigration because California had “created its own scheme setting forth who is, and who is not, entitled to be in the United States”). In fact, states are impermissibly engaged in the regulation of immigration even if they make independent determinations according to criteria set out in federal law. *Id.* at 773.

167. *See* Pub. L. 104-193, § 411, 110 Stat. 2105, 2269 (1996) (requiring state to enact state law before it is permitted to provide benefits to illegal aliens).

168. H.R. REP. NO. 104-469, pt. 1, at 118 (1996).

169. *Id.* at 118 n.4; U.S. Dep’t of Justice, INS, Testimony of Paul Virtue, Acting Executive Associate Comm’r for Programs, Immigration and Naturalization Service, Regarding the Institutional Hearing Program: Before the Subcommittee on Immigration and Claims House Judiciary Committee 5 (July 15, 1997) (unpublished manuscript, on file with the *St. Mary’s Law Journal*) (reporting figure for sentenced noncitizens of 24,470 as of May 1997, or 23% of Bureau of Prison population).

170. U.S. Dep’t of Justice, INS, Testimony of Paul Virtue, Acting Executive Associate Comm’r for Programs, Immigration and Naturalization Service, Regarding the Institutional Hearing Program: Before the Subcommittee on Immigration and Claims House Ju-

from the interior of the United States.<sup>171</sup> If we are seriously interested in reducing crime and securing the safety of the American people, a very good place to start would be to increase the number of removals, to detain all serious criminal aliens from the time of their apprehension to removal, and to target other enforcement efforts against criminal aliens. In this regard, Congress has provided the INS with several tools in recent years.

### 1. The Institutional Hearing Program

The first of these tools is the Institutional Hearing Program (IHP), which has been described as "a joint effort between the INS, the Executive Office for Immigration Review (EOIR), and [s]tate and [f]ederal correctional officials to ensure that alien inmates receive orders of deportation prior to the end of their criminal sentences."<sup>172</sup> The goal of the IHP is "to conclude exclusion and deportation hearings against criminal aliens before they complete their prison terms, [thereby] making them amenable to deportation [immediately] upon release."<sup>173</sup>

The program began in 1986 after the passage of the Immigration Reform and Control Act (IRCA).<sup>174</sup> It has since expanded so that hearings can be held in a number of federal facilities, and in every state, the District of Columbia, and Puerto Rico. The IHP expedites hearings in federal prisons primarily by centralizing the alien inmate populations in six designated facilities. In the states, IHP hearings have been expedited through similar patterns of centralizing inmates at particular facilities.

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diciary Committee 5 (July 15, 1997) (unpublished manuscript, on file with the *St. Mary's Law Journal*).

171. See *Illegal Alien Removals Set Record*, UPI, Oct. 29, 1996 (reporting that 37,063 criminal aliens were removed in fiscal year 1996), available in LEXIS, News Library, CURNWS File.

172. H.R. REP. NO. 104-469, pt. 1, at 124 (1996); see *Removal of Criminal and Illegal Aliens: Hearing Before the Subcomm. on Immigration and Claims of the House Comm. on the Judiciary*, 104th Cong. 22 (1996) (statement of Anthony C. Moscato, Director, Executive Office for Immigration Review).

173. H.R. REP. NO. 104-469, pt. 1, at 124 (1996). The hearings are procedurally similar to other deportation hearings. *Id.*

174. The IHP was established to implement section 701 of the IRCA. See *Removal of Criminal and Illegal Aliens: Hearing Before the Subcomm. on Immigration and Claims of the House Comm. on the Judiciary*, 104th Cong. 22 (1995) (statement of Anthony C. Moscato, Director, Executive Office for Immigration Review) (discussing plans to handle increased caseload resulting from new immigration regulations).

In FY 1995, the completion of IHP proceedings in federal, state, and county facilities resulted in the removal of a total of 9,557 criminal aliens from the United States.<sup>175</sup> A larger number were interviewed and processed for a final removal order. In FY 1995, the INS and EOIR also moved to expand the IHP in the five states with the largest criminal alien populations: California, Florida, Illinois, New York, and Texas.<sup>176</sup> The expansion included the permanent assignment of immigration judges and INS trial attorneys to IHP hearing sites.<sup>177</sup> However, as noted in recent congressional testimony by the General Accounting Office, the INS has failed to identify many deportable criminal aliens in custody, including serious felons, and has failed to complete the Institutional Hearing Program (IHP) process by the time of prison release for the majority of criminal aliens it did identify.<sup>178</sup>

## 2. Expedited Administrative Deportation

Section 130004 of the Violent Crime Control and Law Enforcement Act of 1994<sup>179</sup> amended section 242A of the INA to provide for expedited deportation procedures for aliens convicted of aggravated felonies who are not lawfully admitted for permanent residence to the United States and are not eligible for any relief from

175. See H.R. REP. NO. 104-469, pt. 1, at 124 (1996) (providing statistics on criminal aliens removed from United States). This figure is based on information provided by the Department of Justice in response to queries from the Chairman of the Subcommittee on Commerce, Justice, State, and Judiciary of the House Committee on Appropriations. See also *Removal of Criminal and Illegal Aliens: Hearing Before the Subcomm. on Immigration and Claims of the House Comm. on the Judiciary*, 104th Cong. 8-10 (1995) (statement of T. Alexander Aleinikoff, General Counsel, Immigration and Naturalization Service); *id.* at 23-25 (statement of Anthony C. Moscato, Director, Executive Office for Immigration Review).

176. See *Removal of Criminal and Illegal Aliens: Hearing Before the Subcomm. on Immigration and Claims of the House Comm. on the Judiciary*, 104th Cong. 8 (1995) (statement of T. Alexander Aleinikoff, General Counsel, Immigration and Naturalization Service).

177. See *id.* at 23 (statement of Anthony C. Moscato, Director, Executive Office for Immigration Review) (discussing Congress's response to expected caseloads).

178. See U.S. Dep't of Justice, INS, Testimony of Paul Virtue, Acting Executive Associate Comm'r for Programs, Immigration and Naturalization Service, Regarding the Institutional Hearing Program: Before the Subcommittee on Immigration and Claims House Judiciary Committee 8-10 (July 15, 1997) (unpublished manuscript, on file with the *St. Mary's Law Journal*).

179. Pub. L. 103-322, 108 Stat. 1796, 2026-28 (codified as amended at 8 U.S.C. §§ 1105a, 1252a (1994)).

deportation. Under these procedures, an INS district director will be able to issue an order of deportation without the need for a hearing before an immigration judge.<sup>180</sup> The alien shall be provided notice of the grounds for deportation and of his or her right to contest the deportation, and shall have the opportunity to inspect the evidence.<sup>181</sup> The alien may not be deported for a period of 30 days, in order to provide him or her with time to contest the order or to seek judicial review.<sup>182</sup> However, judicial review is limited to a determination of whether the alien: (1) has been correctly identified, (2) has been convicted of an aggravated felony, and (3) has been afforded the limited procedural rights under this new provision.<sup>183</sup>

### 3. Judicial Deportation

Section 224 of the Immigration and Nationality Technical Corrections Act of 1994,<sup>184</sup> which was enacted on October 25, 1994, amended section 242A of the INA to provide that federal judges may, at the time of sentencing of a criminal alien, order the alien to be deported.<sup>185</sup> This amendment thus obviates the need for a separate deportation proceeding. Under the amended section 242A, a United States Attorney now must give notice to the defendant and the INS stating his or her intention to seek judicial deportation, and the INS must concur with the United States Attorney's intention to seek an order of deportation.<sup>186</sup> In addition, the alien must be provided notice of the grounds for deportation and the opportunity to examine the evidence and rebut the charges.<sup>187</sup>

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180. See 8 C.F.R. § 242.25 (1996) (providing procedures to be followed by deciding service officer in deportation procedures).

181. *Id.* § 242.25(c).

182. *Id.* § 242.25(f).

183. Final regulations to implement the administrative deportation process were issued in August 1995. See ADMINISTRATIVE DEPORTATION PROCEDURES FOR ALIENS CONVICTED OF AGGRAVATED FELONIES WHO ARE NOT LAWFUL PERMANENT RESIDENTS, 60 Fed. Reg. 43,954, 43,961-62 (1995) (establishing administrative procedures for deportation of aliens convicted of aggravated felonies); see also 8 C.F.R. §§ 242.25, 299.1 (1996) (codification of administrative procedures).

184. Immigration and Nationality Technical Corrections Act of 1994, Pub. L. No. 103-416, 108 Stat. 4305 (codified as amended in scattered sections of 8 U.S.C.).

185. *Id.* at 4322 (codified as amended at 8 U.S.C. § 1252a(d)(1)).

186. *Id.* at 4322-23 (codified as amended at 8 U.S.C. § 1252a(d)(2)(A)-(C)).

187. *Id.* at 4323 (codified as amended at 8 U.S.C. § 1252a(d)(2)(D)(i)).

Despite these and other initiatives, criminal aliens are too often able to abscond. The weak link in the chain, as in enforcement against illegal aliens generally, has been our unwillingness to use detention. A numerically smaller problem, but still important, is the abuse of relief from deportation available to criminal aliens. Another problem is that certain aliens who have admitted to serious criminal activity nevertheless escape deportation because their admission has not met the definition of "conviction" contained in the INA. Finally, federal judges have been limited in their ability to order removal as part of the sentencing when an alien has been convicted of a deportable offense.

The 104th Congress addressed these issues in two separate bills: the IIRIRA, and the previously-enacted Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA).<sup>188</sup> In some cases, the IIRIRA amended provisions of AEDPA to conform them to the overall reforms made in title III of the IIRIRA or to make certain substantive changes. The overall effect, however, should be to maximize the number of criminal aliens who remain in detention and to minimize the number who avoid removal through the granting of discretionary relief or through legal technicality.

First, the 1996 legislation expanded the categories of criminal aliens subject to removal. Along these lines, section 435 of the AEDPA amended section 241(a)(2) of the INA to render deportable an alien who is convicted of a crime involving moral turpitude for which a sentence of one year or longer may be imposed.<sup>189</sup> Similarly, section 440(e) of the AEDPA expanded the definition of "aggravated felony,"<sup>190</sup> while section 321 of the IIRIRA further expanded this definition by including convictions for serious crimes that are accompanied by a sentence of one year or longer.<sup>191</sup>

Second, the legislation ensured that all aliens guilty of such crimes actually will be deportable. Section 322 of the IIRIRA expanded the INA's definition of "conviction" to include all instances in which a judge or jury has found a defendant guilty, the alien has

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188. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132 (Apr. 24, 1996), *reprinted in* 1996 U.S.C.C.A.N. (110 Stat.) 1214 [hereinafter AEDPA].

189. AEDPA, *supra* note 188, § 435, *reprinted in* 1996 U.S.C.C.A.N. (110 Stat. 3009) at 1274.

190. *Id.* § 440(e), *reprinted in* 1996 U.S.C.C.A.N. (110 Stat.) at 1277.

191. IIRIRA, *supra* note 28, § 321, *reprinted in* 1996 U.S.C.C.A.N. (110 Stat. 3009) at 1701.



pleaded guilty or *nolo contendere*, or *the alien has admitted sufficient facts to warrant a finding of guilt*.<sup>192</sup> This amendment will enhance the ability of the INS to deport criminal aliens in many jurisdictions, but its impact is being most keenly felt in Texas. Prior to this provision, criminals who were granted “deferred adjudication” in lieu of a conviction were able to escape deportation because the judgment against them did not meet the INA’s definition of a conviction. Since the enactment of the IIRIRA, however, INS agents in Texas have been empowered to apprehend and begin deportation proceedings against dozens of serious criminals, including child molesters, who previously escaped deportation because of this loophole.

Third, the new laws provide measures that allow detention to be used more effectively against criminal aliens. Section 440(c) of the AEDPA required that all aliens who were deportable on criminal grounds remain detained from the point of apprehension until removal.<sup>193</sup> Section 303 of the IIRIRA retains this mandate in an amended section 236 of the INA, but creates up to a two-year window for the limited release of deportable criminal aliens who have not been convicted of an aggravated felony, if they have been lawfully admitted to the United States, and if their release will not pose a danger to persons or property.<sup>194</sup> After this two-year transition period (which must be activated by a letter from the Attorney General stating that there is insufficient detention space to hold *all* criminal aliens), the broader mandate in section 440(c) of AEDPA will go into effect. One reason to provide this transition period is to accommodate the other detention mandate in title III of the IIRIRA, which calls for the detention of *all* aliens (not only criminals) who have been ordered removed. New section 241(a)(2) of the INA provides that under no circumstances shall

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192. *Id.* § 322(a), reprinted in 1996 U.S.C.C.A.N. (110 Stat. 3009) at 1703 (creating section 101(a)(48)(A) of INA).

193. AEDPA, *supra* note 188, § 440(c), reprinted in 1996 U.S.C.C.A.N. (110 Stat.) at 1277.

194. IIRIRA, *supra* note 28, § 303(b) (1)–3), reprinted in 1996 U.S.C.C.A.N. (110 Stat. 3009) at 1629–33 (providing for either one- or two-year transition period and creating transition period custody rules that allow Attorney General to release criminal aliens under certain limited conditions).

any alien deportable on criminal grounds be released once an order of removal has been entered against that alien.<sup>195</sup>

Fourth, the legislation limits the eligibility for relief from deportation that is available to criminal aliens who previously had been admitted as lawful permanent residents. Under section 212(c) of the INA, this relief was available to lawful permanent residents with seven years of uninterrupted domicile in the United States.<sup>196</sup> In the past, aliens were able to accrue the required seven-year domicile even after they had been convicted of their crimes and placed into deportation proceedings, thus providing an incentive to delay proceedings, file appeals, or otherwise avoid a final order of deportation. H.R. 2202 terminated the accrual of domicile when the alien was served with notice of deportation proceedings, and also required actual continuous residence in the United States, not merely domicile, to ensure that relief would be available only to those resident aliens with the closest ties to the United States. In the meantime, section 440(d) of the AEDPA amended section 212(c) of the INA to make virtually all categories of criminal aliens ineligible for this relief.<sup>197</sup> The conference report on the IIRIRA merged these provisions, maintaining the time-in-residence restrictions of the immigration bill while prohibiting the relief to all aggravated felons. Thus, eligibility for this relief, which comes under the heading of "cancellation of removal" in section 240A of the revised INA, is limited to less serious criminals who have lengthy periods of residence in the United States.<sup>198</sup>

Fifth, the legislation treats immigration-related crimes, chiefly alien smuggling and document fraud, with the degree of severity they deserve. Section 434 of the AEDPA and section 201 of the IIRIRA expand the authority under existing federal wiretap statutes to allow investigations of alien smuggling and document fraud.<sup>199</sup> Section 433 of the AEDPA and section 202 of the

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195. IIRIRA, *supra* note 28, § 305, reprinted in 1996 U.S.C.C.A.N. (110 Stat. 3009) at 1652 (creating section 241(a)(2) of INA).

196. INA § 212(c), 8 U.S.C. 1182(c) (1996).

197. AEDPA, *supra* note 188, § 440(d), reprinted in 1996 U.S.C.C.A.N. (110 Stat.) at 1277.

198. IIRIRA, *supra* note 28, § 304, reprinted in 1996 U.S.C.C.A.N. (110 Stat. 3009) at 1644 (creating INA § 240A).

199. AEDPA, *supra* note 188, § 434, reprinted in 1996 U.S.C.C.A.N. (110 Stat.) at 1274; IIRIRA, *supra* note 28, § 201, reprinted in 1996 U.S.C.C.A.N. (110 Stat. 3009) at 1596.

IIRIRA make such crimes indictable under the Racketeer Influenced and Corrupt Organizations Act (RICO).<sup>200</sup> In addition, sections 203 and 211 of the IIRIRA increase the criminal penalties for alien smuggling and document fraud,<sup>201</sup> while other provisions of the IIRIRA establish new civil penalties for document fraud.<sup>202</sup> Increasingly, these immigration-related crimes are carried out by sophisticated criminal enterprises, which also are often involved in drug smuggling, prostitution, illegal labor practices, and other major crimes. This trend will likely increase because increased enforcement efforts mandated elsewhere in this legislation will impel those seeking to enter the country illegally to rely to a much greater degree on highly-organized smuggling enterprises. The 1996 legislation, however, also provides federal law enforcement the tools necessary to meet the challenge of greater sophistication on the part of alien smugglers and their criminal confederates.

The issue of immigration and crime, which is the topic of this Symposium Issue, must always be kept in proper focus and perspective. It is true that the vast majority of legal immigrants are law-abiding and even that most *illegal* immigrants do not commit crimes other than immigration-related offenses. This does not mean that Congress has gone overboard, as some suggest, in getting tough on those immigrants who do commit crimes and on the major immigration-related crimes such as alien smuggling. Rather, it means precisely the opposite. These measures are not driven by vindictiveness, but by idealism. When immigration is accompanied by lawlessness, the American people suffer through loss of life, health, and property. In addition, when accompanied by crime, immigration comes to be seen not as a source of pride and renewal for all Americans but as a contributor to our problems. In the end, therefore, it is the immigrants themselves who pay for our failure to be decisive in our treatment of criminal aliens.

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200. AEDPA, *supra* note 188, § 433, *reprinted in* 1996 U.S.C.C.A.N. (110 Stat.) at 1274; IIRIRA, *supra* note 28, § 202, *reprinted in* 1996 U.S.C.C.A.N. (110 Stat. 3009) at 1597.

201. IIRIRA, *supra* note 28, §§ 203, 211, *reprinted in* 1996 U.S.C.C.A.N. (110 Stat. 3009) at 1598-1600, 1603-05.

202. *Id.* § 212, *reprinted in* 1996 U.S.C.C.A.N. (110 Stat. 3009) at 1605.

## III. CONCLUSION

*“[W]hen, on the basis of legitimate and nonracist judgments, a majority of Americans think the scale of immigration is too large, then there is a good reason to consider ways of reducing it.”*<sup>203</sup>

The United States is a nation of immigrants. Unlike many developed nations just coming to grips with the impact of immigration in their societies, the debate over immigration in this country is relatively advanced. It is well to remember, however, that the vast majority of us are native-born citizens. We come into the world no longer “hyphenated Americans” or persons who bear the memory of discarding one set of loyalties and attachments for a new life in a new land. We are Americans, regardless of our ancestry, and we thus bear a collective responsibility for the heritage we will leave to future generations.

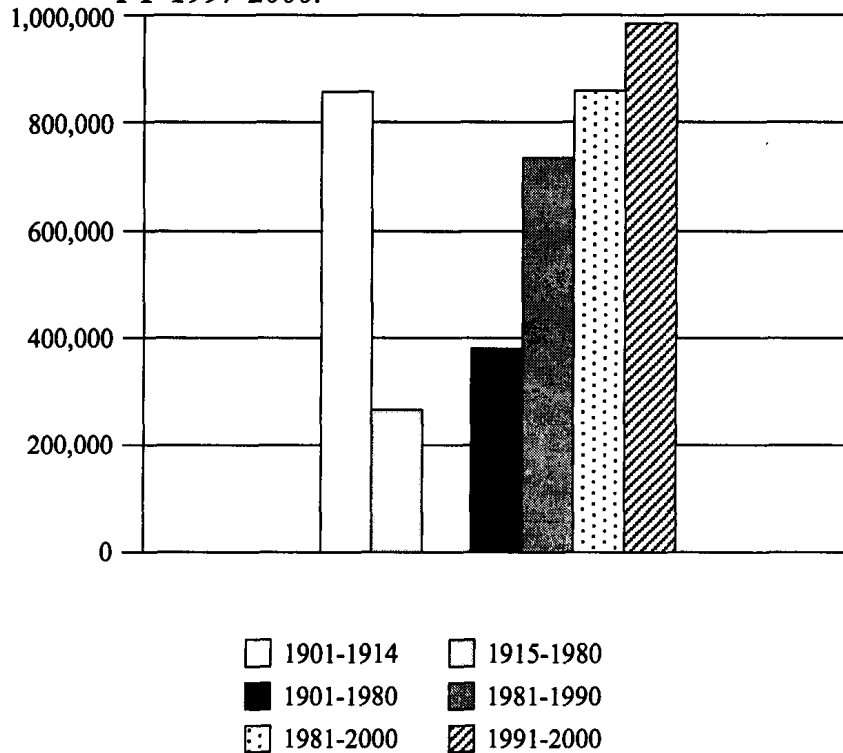
Immigration will continue, as it has in the past, to play a decisive role in forming that heritage. Whether immigration will strengthen our nation and otherwise serve our national interests is not a matter of accident or coincidence. Rather, it will depend on the type of policies *and the reasons for the policies* that we enact or ratify. In 1996, the nation’s lawmakers took important steps in restoring credibility to our system of immigration enforcement and in beginning the debate regarding our overall immigration priorities. Just as important as the specific legislative provisions that have been enacted, however, is the fact that we are moving to an ever greater consensus on the principles that should guide immigration reform. The task is far from finished, but the legacy of 1996 inspires confidence that future efforts at reform will be guided by reasons that are sound, sustainable, and firmly grounded in the national interest.

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203. Nathan Glazer, *The Logic of Restriction*, in THE CENTER FOR THE NEW AMERICAN COMMUNITY, *STRANGERS AT OUR GATE: IMMIGRATION IN THE 1900s*, at 18, 24 (John J. Miller ed., 1994).

TABLE 1: LEGAL IMMIGRATION FOR VARIOUS PERIODS DURING THE 20TH CENTURY

Source: 1996 INS Statistical Yearbook and INS Estimates for FY 1997-2000.



EXPLANATORY NOTE TO TABLE 1 ON LEGAL IMMIGRATION NUMBERS

Source for figures from 1901 through 1995 is Table 1, 1995 INS Statistical Yearbook 27. Source for 1996 (915,000 total admissions) is unpublished release, April 1997. Source for 1997 through 2000 are projections set forth in *Legal Immigration Projections: Hearing Before the Subcommittee on Immigration and Claims*, May 16, 1996, at 52-53 and 68, with revisions. The INS projections (set forth on page 68) do not include estimates for refugee and asylee adjustments or for other miscellaneous categories (Amerasians, parolees, discretionary relief from deportation). These categories are hard to estimate with precision, but refugee and asylee adjustments have averaged 110,000 per year from 1988 through 1996, and admissions in other miscellaneous categories have fluctuated between 35,000 and 80,000. A reasonable baseline estimate for such admis-

sions is 10,000; this lower figure is chosen because many of the programs which increased admissions in these categories in recent years show a marked declining trend. Thus, the total estimate for refugee/asylee/other is 120,000.

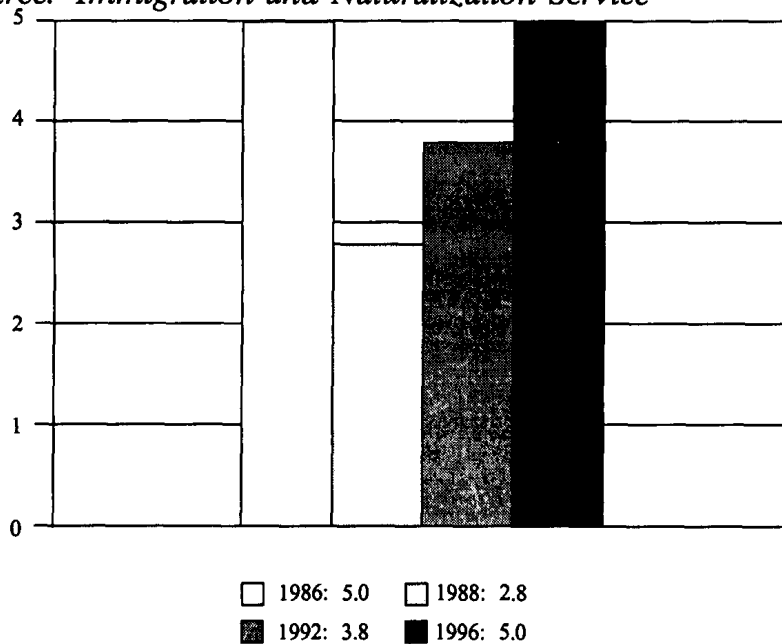
The INS estimates include employment-based immigration, but at a figure of 100,000. Available visa numbers in this category were increased by the Immigration Act of 1990 from 54,000 to 140,000. Actual admissions in this category were skewed upward by the inclusion of beneficiaries of the Chinese Student Protection Act. When admissions under the CPSA are backed out of the totals, employment-based admissions for the past five years averaged 108,000. Accordingly, we estimate average admissions in this category at 100,000 per year.

The total estimates for 1997 through 2000 are thus as follows:

1997	983,000
1998	950,000
1999	904,000
2000	880,000

TABLE 2: ESTIMATED RESIDENT ILLEGAL ALIEN POPULATION OF THE UNITED STATES, IN MILLIONS

Source: *Immigration and Naturalization Service*



**Table 3: Percentage Responding "Yes" to Whether Legal Immigration Should Be Reduced**

