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Introduction

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Introduction

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Immigration has been our heritage. It has largely determined who we are as well as who we will be. It is not merely a cliché — we are indeed a land of immigrants. The legend at the base of the Statue of Liberty tells the world that our nation seeks out the homeless and oppressed. We conjure up visions of teeming masses arriving from Europe and entering the New York Harbor under the peaceful gaze of Lady Liberty.

While these are fond memories of our nation, it is equally true that our attitudes about immigration have often been ambivalent and contradictory. Policies have often been ad hoc responses to changing economic circumstances. For example, Irish immigrants in the second quarter of the 19th century were met with the virulently anti-Hibernian tactics of the Native American party and the Know-Nothings. Similarly, Chinese workers brought in for work in our gold mines and railroads ultimately were faced with the Chinese exclusion laws. The Japanese endured a similar experience. The so-called “Gentleman’s Agreement” between the United States and Japan ultimately limited their opportunity to enter the country.

Despite the de jure restrictions of United States immigration law the economic development of the southwest United States has periodically generated a laissez-faire attitude with respect to enforcement. The result is a historically rooted pattern of migration by Mexican labor back and forth across our southern border, dating back to the late 1800’s.

Whether it be the development of the railroads or mining in the border areas, the demand for labor often subsumed other policy con-

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siderations. Neither the four-dollar head tax or the public charge provisions of the 1907 Immigration Act were enforced along our southern border.¹ Even after the restrictive 1917 Act, which sharply limited immigration from Europe, Mexican laborers were the beneficiaries of a waiver of the eight-dollar head tax and the literacy requirements.² While there were repatriations of Mexican workers in 1920 and 1921, by 1924 a rebounding economy once again revived the demand for Mexican labor. Even in the cases where aliens were apprehended, their employers were merely required to pay the fee for a visa and the head tax.³

However, as was evident from the earlier repatriations, the economic circumstances could just as easily turn off the flow. The onset of the Great Depression ushered in a decade of massive deportation of over half a million Mexican workers.⁴

An outward shift in the demand curve occurred once again with the entry of the United States into World War II. In 1942, a formal arrangement with Mexico, infamously known as the "bracero program," was initiated whereby American employers could contract with Mexican workers for jobs lasting anywhere from forty-five days to six months.⁵ With the exception of the interlude in 1954 known as "operation wetback," in which massive deportations were carried out, an expanding bracero program was generally accompanied by relative calm along the border.⁶

With the expiration of the controversial bracero program the number of apprehensions of undocumented aliens grew exponentially. Apprehensions rose from 55,000 in 1965 to 265,000 in 1970 and to over 1.7 million last year on our southern border alone.⁷ While many individuals are apprehended more than once, the monumental growth in apprehensions is striking and it certainly cannot be attributed to any increased efficiency of the Immigration and Naturalization Service. The erstwhile legally sanctioned flow has merely gone underground. Illegal immigration originates in many nations; yet,

1. Lungren, *Need for Immigration Reform*, J. INST. SOC. ECON. STUD., Summer 1985, at 2.

2. Fogel, *Mexican Migration to the United States*, in THE GATEWAY, U.S. IMMIGRATION ISSUES AND POLICIES 195 (B. Chiswick ed. 1982).

3. See W. CORNELIUS, *Mexican Immigration: Causes and Consequences*, in SOURCEBOOK ON THE NEW IMMIGRATION 70-71 (R.S. Bryce-Laporte ed. 1980); see also Fogel, *supra* note 2, at 193-97.

4. Fogel, *supra* note 2, at 196.

5. *Id.* at 197; see also Current and Future Effects of Mexican Immigration in California 5-9 (Rand Corp. May 1986).

6. See generally J.R. GARCIA, OPERATION WETBACK: THE MASS DEPORTATION OF MEXICAN UNDOCUMENTED WORKERS IN 1954 (1980).

7. Fogel, *supra* note 2, at 199-200. Apprehensions rose from 910,361 in fiscal year 1980, to a record 1,770,000 in fiscal year 1986. Schmidt, *Detention of Aliens*, 24 San Diego L. Rev. 305, 306 n.8 (1987), in this issue.

about ninety percent of all apprehensions take place along our southern border.

As with most immigration classes — legal and illegal — nearly all of these people come here to find work. Nonetheless, our policy in the past has ignored this reality with respect to the undocumented population. It is the disparity in wage rates between the United States and its neighbors that attracts those seeking a better life in America. Any policy seeking to address the challenge of uncontrolled illegal immigration must have this understanding as a basis for its policy prescription.⁸

Statistics on illegal immigration indicate that United States immigration policy has not been a policy at all, but rather ad hoc efforts to physically control our borders. Yet, as hardworking and industrious as our border patrol may be, and whatever sophisticated technology they have to stop the traffic over the borders, the numbers speak for themselves — we have not been successful.

It is an edifying commentary on this nation that we are not a people which employs draconian border enforcement techniques. We do not have a “Berlin Wall” surrounding this country’s borders, nor do we use physical violence or threats to deter border crossings. While we may detain the undocumented alien temporarily, we have not committed funds to detain them in the majority of cases.⁹

Further complicating the problem of controlling our borders are humanitarian concerns surrounding immigration reform that cannot be overlooked. Before passage of the 1986 immigration reform legislation, the undocumented worker was beyond the protection of our labor laws and was afraid to report crimes. Most Americans are undoubtedly familiar with the “underground” existence of undocumented aliens. In hopes of working to survive, they subject themselves to the constant fear of being deported, and live under terrible conditions. Anyone who has seen the “spider holes,” the underground hovels and makeshift cardboard abodes in which undocumented farm workers seek shelter from the outside elements, cannot ignore their existence. It is hard to imagine human beings living under such conditions, much less in the United States.

8. In North and Houston’s sample of apprehended migrants, 74.2% said that they came to the United States to find jobs. D.S. NORTH & M. HOUSTON, *THE CHARACTERISTICS AND ROLE OF ILLEGAL ALIENS IN THE U.S. LABOR MARKET: AN EXPLORATORY STUDY* 66 (1976). In my tour of the southwest border in 1979 from Texas to California, the magnet effect of employment in the United States was underscored by conversations with those who were illegally attempting to enter the United States.

9. For a general discussion of detention issues, see Schmidt, *supra* note 7.

Our past failure to address this crisis entails consequences that decry any attempt by our nation to escape culpability. Congress responded to a problem that had for too long been the product of neglect, some of it benign. Nonetheless, a tardy response is much preferred to no response at all — an alternative which became an increasing possibility in the waning days of the 99th Congress.