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John A. Scanlan

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Immigration Law and the Illusion of Numerical Control

JOHN A. SCANLAN*

I.

When I began work on this article, at home, I had hoped to quote a legal realist, but instead managed to find only a few lines out of Yeats:

Civilisation is hooped together, brought
Under a rule, under the semblance of peace
By manifold illusion.¹

This proves, I guess, that it is dangerous to try to research a difficult legal question in the privacy of one's own home.

Yet a poet who devoted his entire adult life to mythmaking, but still found time for Irish nationalist politics, may in fact prove to be as worthy a commentator on the twists and contradictions of United States immigration law as Roscoe Pound. For it requires an imagination nurtured on Plato or Wordsworth to accept illusions for what they really are: indispensable social constructs. Although they are lesser versions of the longed-for truth, illusions are quite capable of affecting reality and our perception of it.

I suggest that illusions work, but only to a degree. Their success depends, in the first instance, on the plausibility and comprehensiveness of the social order they hypothecate. In political terms, for illusions to prevail, an initial consensus as to goals must exist. When illusions are objectified in law, however, they are evaluated according to the law's effects. The claims of the imagination cannot escape being tested by manifest fact.

I have devoted these opening remarks to the relationship between "illusion" and "reality"—the sort of concern that law schools systematically expunge from their curricula—because it provides an appropriate basis for discussing both the social and

* Assistant Faculty Fellow, Notre Dame Law School; Assistant Director, Center for Civil and Human Rights, Notre Dame Law School; Visiting Fellow, Center of International Studies, Princeton University 1982-83; A.B., University of Notre Dame; Ph.D., University of Iowa; J.D., Notre Dame Law School.

1. W.B. YEATS, *Supernatural Songs (XII Meru)*, in *THE COLLECTED POEMS OF W.B. YEATS* 282, 287 (1954) (*Meru*).

political determinants of United States immigration policy, and that policy's somewhat skewed relationship to immigration law. My thesis is threefold: First, United States immigration law is rooted in the fundamental premise that the law can and should control the numbers and the characteristics of individuals entering the United States to live, work, and bear children; second, although this premise fosters a degree of regulation, it runs counter to both past experience and our reasonable expectations for the future; and finally, this strong interest in controlling immigration is likely to exert special pressure on the individuals most in need of our generosity, bona fide refugees.

The development over the last century of a complex set of immigrant exclusion categories,² six decades of numerical limitations on annual immigrant flow,³ and the creation of an elaborate admissions-and-border-control bureaucracy,⁴ together have had some effect on the levels of immigrant entry.⁵ But the present agitation for

2. At present, the Immigration and Nationality Act of 1952 (McCarran-Walter Act), ch. 477, 66 Stat. 163 (codified as amended at 8 U.S.C. §§ 1101-1503 (1976 & Supp. V 1981)) [hereinafter cited as INA], contains 33 separate grounds for exclusion. These are set forth in INA § 212(a), 8 U.S.C. § 1182(a) (1976 & Supp. V 1981). Systematic exclusion of specified classes of "undesirable" aliens began in 1875 with an act designed primarily to prevent the entry of prostitutes and to suppress the "Coolie trade." Act of March 3, 1875, ch. 141, 18 Stat. 477 (repealed 1974). Since that time, Congress has proposed and enacted extensive legislation regulating the admission of criminals, individuals likely to become public charges, mental defectives, individuals with serious health problems, illiterates, narcotics violators, and various individuals deemed politically "subversive"—including anarchists, communists, and former Nazis. Other exclusions, such as those forbidding the importation of contract laborers or the admission of most Asiatics, were part of the United States law for many years. Many of these exclusions have been repealed. For a general treatment of excludable classes, see E. HUTCHINSON, LEGISLATIVE HISTORY OF AMERICAN IMMIGRATION POLICY 1798-1965, at 405-40 (1981). See also F. AUERBACH, IMMIGRATION LAWS OF THE UNITED STATES (E. Harper 3d ed. 1975); 1 & 1A C. GORDON & H. ROSENFIELD, IMMIGRATION LAW AND PRACTICE (1980).

3. See *infra* notes 26-39 and accompanying text.

4. For a good study of the Immigration and Naturalization Service (INS), which traces its roots back to the creation of a Commissioner of Immigration in 1864 and its early development as a subunit of the F.B.I., and which details its present structure, see CONG. RESEARCH SERV., HISTORY OF THE IMMIGRATION AND NATURALIZATION SERVICE (1980). For a better and more comprehensive analysis of the INS's recent workload, see CONG. RESEARCH SERV., U.S. IMMIGRATION LAW AND POLICY, 1952-1979 (1979) [hereinafter cited as U.S. IMMIGRATION LAW AND POLICY].

5. That effect, while apparent, cannot be determined with any exactitude without taking into account both levels of "legal" and "illegal" immigration, and levels of refugee flow (which do not always fit neatly into either category). In a fairly recent study, Charles Keely concluded that in the aftermath of the adoption of the unified quota system, Immigration and Nationality Act of 1965, Pub. L. No. 89-236, §§ 1-3, 79 Stat. 911, 911-12 (codified as amended at 8 U.S.C. §§ 1151-1153 (1976 & Supp. V 1981)), annual legal immigration levels, including the immigration of immediate relatives exempt from quota restrictions, rose from

a "tougher" immigration policy and tighter immigration laws clearly shows⁶ the objective of almost absolute control has not yet been met.⁷ That objective, Professor Zolberg recently suggested, has been espoused widely over the past thirty years by liberals and conservatives alike; it indeed may be "the only possible position."⁸

290,000 to 377,000. Keely, *The United States of America* in *THE POLITICS OF MIGRATION POLICIES* (1979). Refugee flow levels, not including most applicants for political asylum, approximated 50,000 per year from 1956 to 1979. See S. REP. No. 256, 96th Cong., 1st Sess. 6, reprinted in 1980 U.S. CODE CONG. & AD. NEWS 141, 146. In fiscal year 1980, Congress allocated 233,700 slots for non-quota refugees, 126 CONG. REC. S3961 (daily ed. April 21, 1980), of which approximately 200,000 were filled. In 1981, the refugee allocation was 217,000 slots, 126 CONG. REC. S12,988 (daily ed. Sept. 19, 1980), of which approximately 180,000 were filled. The 1982 refugee allocation is 140,000. Pres. Determination No. 82-1, 3 C.F.R. § 232 (1981).

Estimating the total annual flow of "illegal" immigrants to the United States is difficult because "there are currently no reliable estimates of the number of illegal residents in the United States or of the net volume of illegal immigration to the United States in any recent past period." Siegel, Passel & Robinson, *Preliminary Review of Existing Studies of the Number of Illegal Residents in the United States*, in SELECT COMMISSION ON IMMIGRATION AND REFUGEE POLICY, U.S. IMMIGRATION POLICY AND THE NATIONAL INTEREST 13, 16 app. E (1981) (Staff Report) [hereinafter cited as U.S. IMMIGRATION POLICY AND THE NATIONAL INTEREST (Staff Report)].

According to one study, which is based on figures that are seven to twelve years old and deal only with Mexican migrants, "estimates of average annual illegal net immigration range from 82,000 to 232,000." *Id.* at 23 (quoting Heer, *What is the Annual Net Flow of Undocumented Mexican Immigrants to the United States?*, 16 *DEMOGRAPHY* 417 (1976)). According to David North, the dramatic rise in the apprehension of undocumented aliens since 1970 suggests that "illegal immigration [is] apparently growing even faster than legal migration." North, *Enforcing the Immigration Law: A Review of the Options*, in U.S. IMMIGRATION POLICY AND THE NATIONAL INTEREST (Staff Report), *supra*, at 274, 288 app. E.

Thus, for 1980, the most recent year in which an overall summary is possible, we can estimate that 800,000 "legal" immigrants and refugees entered the United States. SELECT COMMISSION ON IMMIGRATION AND REFUGEE POLICY, U.S. IMMIGRATION POLICY AND THE NATIONAL INTEREST: FINAL REPORT AND RECOMMENDATIONS 93 (1981) [hereinafter cited as FINAL REPORT: U.S. IMMIGRATION POLICY AND THE NATIONAL INTEREST]. Perhaps another 500,000 "illegal" immigrants entered the United States during that same period. Apprehension of some 1,000,000 illegal entrants per year at the border since 1978 almost certainly has had some limiting effect on total flow. See U.S. IMMIGRATION POLICY AND THE NATIONAL INTEREST (Staff Report), *supra*, at 278 app. E (Table 1).

6. For an illustration of the hard line being taken by the present administration, see Giuliani, *The Immigration Program of the Reagan Administration*, 36 U. MIAMI L. REV. 807 (1981).

7. See *supra* note 5. While "illegal" immigration still may be growing, the total figure for "legal" immigrants and refugees in 1980 (800,000) was inflated by: (1) refugee flow, which will in all probability be reduced by 50% in fiscal 1982; and (2) the extraordinary influx of some 135,000 Cubans and Haitians. Although only moderate levels of Haitian refugee flow continue, the flow of Salvadoran refugees has increased significantly.

8. Zolberg, *Contemporary Transnational Migrations in Historical Perspective: Patterns and Dilemmas*, in U.S. IMMIGRATION AND REFUGEE POLICY: GLOBAL AND DOMESTIC ISSUES 15, 45 (M. Kritz ed. 1983) [hereinafter cited as U.S. POLICY: GLOBAL AND DOMESTIC ISSUES].

It is, at any rate, a position that meets a number of articulated and unarticulated general societal needs. The very generality of these needs, however, frequently conflicts with the more immediate and better defined goals of certain interest groups and policymakers who, for a variety of reasons, favor a relaxed regulatory system to accommodate the admission of particular immigrants not admissible under more rigid statutory controls. By focusing on this conflict as it manifests itself in the lawmaking and legal implementation processes, and by paying special heed to (1) those values that favor flexible limits on immigration, (2) the role that interest groups play in promoting those values, and (3) the role that executive discretion and bureaucratic politics play in enforcing immigration laws, I intend to show that no legislative program now being contemplated reasonably can be expected to "clamp the lid down tight" on future immigrant flow—unless accompanied by stringent enforcement measures directed primarily at those who hire "back door"⁹ immigrants. Behind the present demand for a "tough" immigration policy, however, are emerging regional and equitable concerns that are likely to grow stronger, rather than weaker. These concerns, unless met, are likely to cause an increased clamor for a "closed border" in the near future, accompanied by growing support for more extreme "national security" measures than any employed by the United States since World War II. These measures are likely to be directed with special fervor at refugee applicants entering the United States as a country of first asylum.

II.

The conflict I have described can be traced back at least as far as the 1850's, when the nativism of the Know-Nothing Party, sparked by radically increased Irish immigration, clashed with industry's continuing demand for cheap contract labor.¹⁰ Although the importation of immigrants to supply contract labor remained legal until 1885,¹¹ a series of increasingly restrictive and general statutes enacted after the Civil War enunciated for the first time a clear, *national* policy of immigration control. Initially, that policy was qualitative rather than quantitative.

9. See *infra* note 44 and accompanying text.

10. See E. HUTCHINSON, *supra* note 2, at 37-38; see also F. AUERBACH, *supra* note 2, at 5.

11. Importation of contract laborers was proscribed by the Alien Contract Labor Act of 1885, ch. 164, 23 Stat. 332, as amended by Act of Feb. 23, 1887, ch. 220, 24 Stat. 414 (repealed 1952).

“Qualitative controls” were a way of ensuring that only the best, the brightest, and the most productive immigrants were admitted to the United States. In fact, however, such controls usually were stated in the negative, and were used as a means of keeping entire classes regarded as “undesirable” out. Between 1869 and 1965, the law was quite overt in identifying as undesirable persons those belonging to the “wrong race” (Black¹² or Asian¹³). The law also enunciated a series of exclusions designed to bar, among others, criminals,¹⁴ anarchists,¹⁵ paupers and others likely to be-

12. Regulation of the admission of Blacks was accomplished primarily through the operation of the national origins quota system. See *infra* notes 26-39. That system, almost from its inception, discriminated against Black admissions by excluding descendants of slave immigrants from the United States census population base. Immigration Act of 1924, ch. 190, § 11(d)(4), 43 Stat. 153, 159 (repealed 1952). In 1938, for instance, the total of individual annual quotas for predominantly Black countries or mandates was 700, distributed among the Union of South Africa, Southwest Africa, Togoland, Tanganyika, Liberia, and Rwanda/Urundi. An additional 100 immigration slots were available from Ethiopia. Proclamation No. 2283, 3 C.F.R. 141 (1938) (1936-38 Comp.). Additional Blacks were admissible as non-quota immigrants from Central American and Caribbean countries, but were subject to exclusion under the then-current illiteracy test. In 1958, the addition of Ghana and the Sudan to the list of independent nations created 200 additional quota slots. But the Tanganyika quota was abolished, resulting in a net worldwide gain of 100 slots for Black immigrants. See Proclamation No. 2980, 3 C.F.R. 161 (1952) (1949-53 Comp.), as amended by Proclamation No. 3147, 3 C.F.R. 86 (1956) (1954-58 Comp.); Proclamation No. 3158, 3 C.F.R. 93 (1956) (1954-58 Comp.); Proclamation No. 3188A, 3 C.F.R. 116 (1957) (1954-58 Comp.); Proclamation No. 3206, 3 C.F.R. 133 (1957) (1954-58 Comp.); Proclamation No. 3248, 3 C.F.R. 159 (1958) (1954-58 Comp.); Proclamation No. 3248, 3 C.F.R. 159 (1958) (1954-58 Comp.).

13. The exclusion of Asian immigrants is discussed extensively in E. HUTCHINSON, *supra* note 2, at 58-59, 62, 68-77, 80-82, 304, 308, 478-80. The forms of Asian exclusion methods progressed from measures designed to outlaw the “Coolie trade,” Act of Mar. 3, 1875, ch. 141, 18 Stat. 477 (repealed 1974), to measures designed to exclude Chinese, Act of Apr. 29, 1902, ch. 641, 32 Stat. 176 (repealed 1943); Act of May 5, 1892, ch. 50, 27 Stat. 25 (repealed 1943); Act of Oct. 1, 1888, ch. 1064, 25 Stat. 504 (repealed 1943); Act of Sept. 13, 1888, ch. 1015, 25 Stat. 477 (repealed 1943); Act of July 5, 1884, ch. 220, 23 Stat. 115 (repealed 1943); Act of May 6, 1882, ch. 126, 22 Stat. 59 (repealed 1943), Japanese, and ultimately all Asiatics seeking to enter the United States from a broadly defined “barred-zone.” Immigration Act of 1917, ch. 29, § 2, 39 Stat. 874, 875-76 (repealed 1952). Elimination of these barriers was slow. Absolute discrimination against Asiatics survived until 1946. Act of Aug. 9, 1946, ch. 945, § 2, 60 Stat. 975, 975 (repealed 1952). Significant Asiatic immigration was not permitted until 1965, when all remaining racial and national origins criteria were abolished. Immigration and Nationality Act of 1965, Pub. L. No. 89-236, § 2(a)-(b), 79 Stat. 911, 911-12 (codified as amended at 8 U.S.C. § 1152 (1976 & Supp. V 1981)).

14. Current exclusions involving criminality are codified at INA § 212(a)(9), 8 U.S.C. § 1182(a)(9) (1976) (persons convicted, or admitting the commission of a “crime involving moral turpitude”); INA § 212(a)(10), 8 U.S.C. § 1182(a)(10) (1976) (convicted of two or more offenses with aggregate prison term of five or more years); INA § 212(a)(31), 8 U.S.C. § 1182(a)(31) (1976) (abetting a violation of immigration laws). The earliest criminal exclusion act dates from 1875. Act of Mar. 3, 1875, ch. 141, 18 Stat. 477 (repealed 1974). See E. HUTCHINSON, *supra* note 2, at 65-66, 407.

come public charges,¹⁶ persons deemed health hazards,¹⁷ mental defectives,¹⁸ and—not surprisingly—individuals regarded as endangering the jobs of United States citizens.¹⁹ Despite the elabora-

15. "Anarchists" currently are excludable under INA § 212(a)(28)(A), 8 U.S.C. § 1182(a)(28)(A) (1976). This exclusion dates from 1917, when "persons who believe in or advocate the overthrow by force or violence of the Government of the United States or of all government or of all forms of law" were first barred. Immigration Act of 1903, ch. 1012, § 2, 32 Stat. 1213, 1214 (repealed 1952). The ban against anarchists followed the public outcry over the assassination of President McKinley. See I C. GORDON & H. ROSENFELD, *supra* note 2, at 1-10. Further significant expansion of the laws excluding "subversives" occurred with the passage of the Alien Registration Act of 1940, ch. 439, § 20(b)(4)-(5), 54 Stat. 670, 672 (repealed 1952); the Internal Security Act of 1950, ch. 1024, § 22, 64 Stat. 987, 1006 (codified as amended at 50 U.S.C. §§ 781-835 (1976 & Supp. V 1981)) (directed primarily toward communists); and the Act of Oct. 30, 1978, Pub. L. No. 95-549, §§ 101-102, 92 Stat. 2065, 2065 (codified as amended at 8 U.S.C. § 1182(a)(23) (Supp. V 1981)) (former Nazis who engaged in persecution prior to dissolution of Third Reich excludable). Provisions excluding subversives presently are codified at INA § 212(a)(28)-(29), (33), 8 U.S.C. § 1182(a)(28)-(29), (33) (1976 & Supp. V 1981).

16. See INA § 212(a)(8), 8 U.S.C. § 1182(a)(8) (1976) (excluding "paupers, professional beggars, or vagrants"). These provisions date back to the passage of the Immigration Act of 1891, ch. 551, § 1, 26 Stat. 1084, 1084 (current version at 8 U.S.C. § 1182(a)(8) (1976)).

17. See INA § 212(a)(6), 8 U.S.C. § 1182(a)(6) (1976) (excluding aliens "afflicted with any dangerous contagious disease"); see also INA § 212(a)(7), 8 U.S.C. § 1182(a)(7) (1976) (excluding aliens certified as having physical defect, disease, or disability that would affect his ability to earn a living). The present concern with "dangerous contagious" or disabling diseases had its origins in legislative language first enacted by the Immigration Act of 1891, ch. 551, § 1, 26 Stat. 1084, 1084 (current version at 8 U.S.C. § 1182(a)(6) (1976)).

18. See INA § 212(a)(1)-(4), 8 U.S.C. § 1182(a)(1)-(4) (1976). These provisions date back generally to the Act of Aug. 3, 1881, ch. 376, § 2, 22 Stat. 214, 214 (repealed 1952).

19. The present "preference" system for granting immigration visas permits specified percentages of those seeking admission under the unified worldwide quota to enter the United States as "members of the professions, or who because of their exceptional ability . . . will substantially benefit . . . the national economy, cultural interests, or welfare of the United States and whose services . . . are sought by an employer in the United States." INA § 203(a)(3), 8 U.S.C. § 1153(a)(3) (1976 & Supp. V 1981). The system also grants preference to those immigrants who can perform work "not of a temporary or seasonal nature, for which a shortage of employable and willing persons exists in the United States." INA § 203(a)(6), 8 U.S.C. § 1153(a)(6) (1976 & Supp. V 1981). Immigrants seeking visas under either of these preferences—the "third" and the "sixth"—are excludable

unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that (A) there are not sufficient workers who are able, willing, qualified . . . and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and (B) the employment of such aliens will not adversely affect the wages and working conditions of the workers in the United States similarly employed.

INA § 212(a)(14), 8 U.S.C. § 1182(a)(14) (1976 & Supp. V 1981).

According to Hutchinson, "Bills for the protection of American labor, including one to prohibit the immigration of both skilled and unskilled foreign manual labor, appeared in the first session (1895-96) of the 54th Congress." E. HUTCHINSON, *supra* note 2, at 493. A certification procedure that affects designated classes of employees and requires the prior approval of the Secretary of Labor has been in effect since 1917. *Id.* at 495.

tion of ever more comprehensive exclusionary criteria—many of which remain in effect until this day—immigration in the late nineteenth and early twentieth century continued to swell. Recorded annual immigration reached one million entrants in 1905,²⁰ and averaged 590,000 entrants per year in the thirty-year period from 1881 to 1910.²¹ Increasingly, these immigrants came from Southern and Eastern Europe; Italians, Russians, and Poles assumed the numerical dominance held only a few years earlier by the Irish and the Germans.²² Moreover, there is reason to believe that significant numbers of unrecorded immigrants also entered the United States across land borders during that period, because they have done so quite consistently since then.²³ Reaction to this continuing high immigration was predictable: labor unions, advocates of continued Anglo-Saxon cultural dominance, and protectionist politicians all expressed continued concern with the immigration “problem.”²⁴

Predictably, pressure to shift from qualitative to quantitative control grew. The initial legislative response was indirect: In 1917, a literacy requirement, which had been proposed for all immi-

20. Keely, *supra* note 5, at 51.

21. Zolberg, *supra* note 8, at 42-43.

22. For a general discussion of the shift in the 1880's and early 1900's from Northern European migration to migration from Eastern and Southern Europe, see M. KRAUS, *IMMIGRATION, THE AMERICAN MOSAIC* 66-79 (1965). This trend was offset to some extent by increased migration from Scandinavia during the same period. *Id.* at 75-76, 79-82.

23. Julian Samora wrote,

As early as 1903, the Commissioner of Immigration recognized the need for guarding the United States-Mexico border. Nevertheless, the initial concern was to prevent the entry of Chinese aliens. As a result of the Chinese Exclusion Law passed in 1882, the primary border problem became the issue of the smuggling of Chinese rather than the entry of Mexicans.

J. SAMORA, *LOS MOJADOS: THE WETBACK STORY* 34 (1971).

According to Samora, competent border control, coupled with a lack of demand for agricultural labor, rendered illegal southern border crossings statistically insignificant until the outbreak of World War I, when the Southwest became “dependent” on Mexican labor. *Id.* at 34-40.

24. The most extensive and influential record of growing restrictionist sentiment during that period is the so-called “Dillingham Commission Report,” a 42-volume report of the Immigration Commission appointed by President Theodore Roosevelt in 1907 and chaired by Sen. William P. Dillingham. U.S. IMMIGRATION COMMISSION, *IMMIGRATION LEGISLATION*, S. Doc. No. 758, 61st Cong., 3d Sess. (1911). The report voiced all of the anti-immigration sentiments of the day, and resulted in the passage of the United States first comprehensive immigration bill. Immigration Act of 1917, ch. 79, 39 Stat. 874 (repealed 1952). For a summary of the Commission's recommendations, see U.S. IMMIGRATION COMMISSION, *ABSTRACTS OF THE REPORTS OF THE IMMIGRATION COMMISSION*, S. Doc. No. 747, 61st Cong., 3d Sess. (1911).

grants since 1893, passed over President Wilson's veto.²⁵ In 1921, the "illiteracy test" was supplemented by legislation that established for the first time a national-origins quota.²⁶ This quota did not apply to entrants from the Western Hemisphere,²⁷ and permitted the entry outside the quota system of minor children of American citizens.²⁸ The quota did bar virtually all immigration from Africa and the Orient.²⁹ For the other geographical areas of the world, the quota system permitted annual immigration at a level equal to three percent of their United States population component, as determined by the 1910 census.³⁰ In 1924, a revised quota formula further reduced overall immigration and, by revising the census base period to 1890, excluded more applicants from Central and Eastern Europe.³¹ Despite considerable pressure from the executive branch,³² Congress incorporated the national-origins quota system into the Immigration and Nationality Act of 1952,³³ which still provides the basic framework of our immigration law. Legislation in 1965, however, replaced the national-origins quota with a

25. See E. HUTCHINSON, *supra* note 2, at 108, 166-67 (discussing the literacy provisions of the Immigration Act of 1917, ch. 29, 39 Stat. 874 (repealed 1952)).

26. Act of May 19, 1921, ch. 8, 42 Stat. 5 (repealed 1952).

27. *Id.* § 2(a)(7), 42 Stat. 5, 5 (repealed 1952).

28. *Id.* § 2(a)(8), 42 Stat. 5, 5 (repealed 1952) (applicable only to "aliens under the age of eighteen who are children of citizens of the United States").

29. See *supra* notes 12-13 and accompanying text.

30. Act of May 19, 1921, ch. 8, § 2(a), 42 Stat. 5, 5 (repealed 1952).

31. Immigration Quota Act of 1924 (Johnson-Reed Act), ch. 190, 43 Stat. 153 (repealed 1952). The Johnson-Reed Act: made the quota system permanent; keyed maximum annual admissions from any country to two percent of their United States population component in 1910; and provided that after July 1, 1927, annual worldwide admissions should not exceed 150,000, with the allocation for each country determined on the basis of 1920 census figures. The formula revision was the intentional result of prejudice against "new" immigrants coming from Eastern and Southern Europe. See E. HUTCHINSON, *supra* note 2, at 484 (quoting H.R. REP. NO. 350, 68th Cong., 1st Sess. 13-14 (1924)).

32. The INA passed over President Truman's veto. In his veto message, Veto of Bill to Revise the Laws Relating to Immigration, Naturalization, and Nationality, 1952-53 PUB. PAPERS 441 (June 25, 1952), Truman delivered a blistering attack on the national-origins quota system, describing it as "deliberately and intentionally" discriminatory, *id.* at 442, violative of "the humanitarian creed inscribed beneath the Statue of Liberty," *id.* at 443, a repudiation of "our basic religious concepts," *id.*, and based on suppositions "false and unworthy in 1924 . . . [and] even worse now." *Id.* Similar sentiments were expressed in the final report of President Truman's immigration commission. PRESIDENT'S COMMISSION ON IMMIGRATION AND NATURALIZATION, WHOM WE SHALL WELCOME? (1953).

33. Ch. 477, 66 Stat. 163 (codified as amended at 8 U.S.C. §§ 1101-1503 (1976 & Supp. V 1981)). The INA revised the quota formula by increasing the statutory numerical maximum immigration slightly and by limiting the annual quota for immigrants from any particular country to one-sixth of one percent of their number in the 1920 United States census. E. HUTCHINSON, *supra* note 2, at 308.

"unified quota" system.³⁴ The 1965 Act set a limit of 170,000 quota entrants per year on Eastern Hemisphere immigration.³⁵ In 1968, congressional inaction³⁶ allowed Western Hemisphere immigration to come within the quota system; annual hemispheric immigration was limited to 120,000. In 1978, the Eastern and Western Hemisphere quotas were combined.³⁷ The system was adjusted a final time in 1981 by slightly reducing quotas to partially compensate for two new categories of entrants created by the new refugee act, but not technically falling within the statutory ceiling.³⁸ Since 1981, the worldwide quota limit has been 270,000 immigrants per year.³⁹ Including immediate relatives of United States citizens who enter outside the quota system,⁴⁰ authorized "main gate"⁴¹ entries since 1981 have totalled approximately 400,000 per year⁴²—a figure fifty percent higher than the total number of *legal* immigrants permitted to enter the United States from the Eastern and Western Hemispheres combined during the last years of the national origins quota.

III.

The term "main gate" is one I have borrowed from Professor Zolberg of the University of Chicago.⁴³ It is distinguishable from the term "back door," which Zolberg uses to describe a mode of entry outside of the quota system, and which explicitly or implicitly permits additional immigration—frequently illegal and ordina-

34. Immigration and Nationality Act of 1965, Pub. L. No. 89-236, § 1, 79 Stat. 911, 911 (codified as amended at 8 U.S.C. § 1151(a) (1976 & Supp. V 1981)).

35. *Id.*

36. The extension of the unified quota to the Western Hemisphere occurred automatically when Congress took no steps to curtail a change prospectively introduced by the Immigration and Nationality Act of 1965, Pub. L. No. 89-236, § 21(e), 79 Stat. 911, 920 (repealed 1976).

37. Act of Oct. 5, 1978, Pub. L. No. 95-412, § 1, 92 Stat. 907, 907 (codified as amended at 8 U.S.C. § 1151(a) (Supp. V 1981)).

38. Refugee Act of 1980, Pub. L. No. 96-212, § 201(b), 94 Stat. 102, 103 (codified as amended in scattered sections of 8 U.S.C.).

39. Refugee Act of 1980 § 203(a) (codified at 8 U.S.C. § 1151(a) (Supp. V 1981)).

40. See INA § 201(b), 8 U.S.C. § 1151(b) (1976).

41. See *infra* note 43 and accompanying text.

42. See Keely, *supra* note 5, at 63; see also Select Commission on Immigration and Refugee Policy, *Immigrants: How Many?*, in U.S. IMMIGRATION POLICY AND THE NATIONAL INTEREST (Staff Report), *supra* note 5, at 14 app. D (125,819 immediate relatives exempt from quotas admitted in 1978).

43. See A. Zolberg, *The Main Gate and the Back Door: The Politics of American Immigration Policy, 1950-1976* (Apr. 1978) (unpublished paper presented at a workshop of the Council on Foreign Relations).

rily Mexican—in order to meet the United States labor market's demand for agricultural labor.⁴⁴ To this pair of concepts I add a third term, the “executive window.” We can visualize it much more concretely than that more famous, but considerably more chimerical aperture, the “window of vulnerability.” The “executive window,” like a pair of trifocal glasses, looks in three directions: toward the State Department, Congress, and a public that is sometimes willing to accept immigrants labelled “refugees” who otherwise would be turned away if regarded as “economic migrants.” When the weather is clear, the “executive window”—which was installed right after World War II⁴⁵ and subsequently enlarged—is opened wide, permitting large numbers of additional immigrants to enter the United States. To the chagrin of policy architects, however, it is impossible to completely shut the window, even during a driving rain.

I present you with this abbreviated blueprint because if we are to understand the genuine, but limited, role that statutory quota levels play, it is first necessary to understand the basic outline of admissions policymaking. In a good summary of the objectives—and failures—of recent United States immigration policymaking, Zolberg makes two key points: First, the “regulatory system,” believed perfected in 1965, and only slightly changed since, was designed to establish an upper limit on immigration both by closing the “back door,” and by permitting immigration only for purposes of “limited family reunion,” recruitment of highly developed “foreign talent,” and “grant[ing] [of] asylum to a limited number of refugees, sufficient to meet the requirements of Ameri-

44. *Id.*

45. After World War II, pressure grew to admit Europeans to the United States who were ineligible under the strictures of the existing quota system, yet were dislocated by postwar political chaos and—in many instances—threatened by the new communist regimes in their countries of origin. This pressure led to the passage of the Displaced Persons Act of 1948, ch. 647, 62 Stat. 1009, as amended by Act of June 11, 1950, ch. 262, 64 Stat. 219; Act of June 28, 1951, ch. 167, 65 Stat. 96 (repealed 1957). Under the provisions of this Act, more than 400,000 displaced persons entered the United States. Subsequent special legislation prior to 1980, the liberal exercise of the executive power to “parole in” refugees under the provisions of INA § 212(d)(5), 8 U.S.C. § 1182(d)(5) (1976) (prior to the 1980 amendments), and the addition of a “seventh” refugee preference to the INA, Immigration and Nationality Act of 1965, Pub. L. No. 89-236, § 3, 79 Stat. 911, 912 (repealed 1980), together resulted in the admission of some 50,000 non-quota refugees per year from 1948 through 1979. The Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (codified as amended in scattered sections of 8 U.S.C.), authorizes the continued entry of at least that number of refugees in years to come. For a more extensive account of the mathematics of refugee flow, see Scanlan, *Regulating Refugee Flow: Legal Alternatives and Obligations under the Refugee Act of 1980*, 56 NOTRE DAME LAW. 618, 620 (1981).

can diplomacy.”⁴⁶ Second, the “dynamic processes” of migration—including processes not amenable to immediate legal control—have led to continuing “back door” immigration far exceeding earlier expectations, and, as a consequence, net immigration “at approximately three times the annual level anticipated in 1965.”⁴⁷

The unified quota system, established in 1965,⁴⁸ was intended to provide overall regulation of immigration flow. The 1965 Act frequently has been regarded as liberal, however, because it abolished both the national-origins system and discrimination against Asian applicants, and also established a new family- and skills-oriented preference system. Yet the 1965 Act also subjected Western Hemisphere immigration for the first time to an annual numerical limitation.⁴⁹ Moreover, for the first time since 1948, the 1965 Act brought *refugee* admissions within the framework of the Immigration and Nationality Act, and subjected those admissions to the new quota system.⁵⁰ In addition, the 1965 Act established a new labor certification process that *required* the Secretary of Labor to find affirmatively that an alien seeking to enter the United States as a skilled or unskilled worker would neither “replace” any worker in the United States, nor adversely affect United States wages or working conditions.⁵¹

The timely coincidence of the passage of the 1965 Act and the contemporaneous termination of the “bracero program”⁵²—which

46. Zolberg, *supra* note 8, at 45.

47. *Id.* at 48.

48. Immigration and Nationality Act of 1965, Pub. L. No. 89-236, § 1, 79 Stat. 911, 911 (codified as amended at 8 U.S.C. § 1151(a) (1976 & Supp. V 1981)).

49. *See supra* note 36 and accompanying text.

50. Under the “seventh preference,” Immigration and Nationality Act of 1965, Pub. L. No. 89-236, § 3, 79 Stat. 911, 912 (repealed 1980), six percent of the annual numerical limitation on immigration was reserved for “conditional entrants,” who, by definition, were required to be *de facto* refugees, i.e., persons fleeing threatened persecution in a communist or communist-dominated country, or “any country within the general area of the Middle East.” INA § 203(a)(7), 8 U.S.C. § 1153(a)(7) (repealed 1980). As originally enacted, the “seventh preference” applied only to immigrants from the Eastern Hemisphere. On July 1, 1968, when quota limits went into effect for immigration from the Western Hemisphere, Act of Oct. 20, 1976, Pub. L. No. 94-571, § 2, 90 Stat. 2703, 2703 (repealing 8 U.S.C. § 1151(c)-(e) (1976)), the “seventh preference” became applicable worldwide. A total of 10,200 annual “conditional entrant” slots were available when the “seventh preference” was first enacted. *See Scanlan, supra* note 45, at 632. When the “seventh preference” was repealed in 1980, the annual total was only 17,400. *Id.*

51. INA § 212(a)(14), 8 U.S.C. § 1182(a)(14) (1976 & Supp. V 1981); *see supra* note 19 (discussing labor certification required for “third” and “sixth preference” admissions); *see also* E. HUTCHINSON, *supra* note 2, at 372.

52. The “bracero program” terminated on December 31, 1964 when the authority

brought over four million Mexicans and 200,000 Canadians, Bahamians, and British West Indians into the United States over a thirteen-year period as "temporary agricultural workers"⁵³—was hardly accidental. Without such legislative action, policymakers feared that greatly increased Western Hemisphere immigration would have a heavy impact on the United States labor market. As a result, two major restrictionist themes coalesced in the 1965 Act. The first, which had a long history, emphasized the need to protect threatened jobs of United States citizens. This was the position of the labor movement, which had worked long and hard to curtail legal and illegal Mexican migration,⁵⁴ and which had lent its support to the new, more stringent labor certification process.⁵⁵ The second theme, which has manifested itself periodically throughout history—most notably in nineteenth-century agitation for legislation to avert a potential "flood" of Oriental immigrants—was more commonplace after the 1950's than ever before. This theme was keyed to concerns about the worldwide "population explosion," the large carrying capacity of modern transportation systems, and the existence of a sophisticated transnational information network which encourages and directs migration. It contemplated a Malthusian catastrophe as millions of human beings swarmed into the United States and strained its resources to the limit. The dominance of this second theme in the deliberations on the 1965 Act was noted in an excellent study prepared by the Congressional Research Service: "The most compelling reason for placing a numerical ceiling upon the Western Hemisphere relates to the worldwide population explosion and the possibility of a sharp increase in immigration from Western Hemisphere countries. Testimony before the Judiciary Committee identified Latin America as the area of greatest future population growth."⁵⁶ The study also notes that a 1965 Harris poll, which was cited during the congressional hearings, reported a 2 to 1 margin of public opinion against allowing

granted by the Act of Dec. 13, 1963, Pub. L. No. 88-203, 77 Stat. 363 (repealed 1964), expired.

53. See U.S. IMMIGRATION LAW AND POLICY, *supra* note 4, at 39-43. Of particular relevance is Table 3—*Foreign Workers Admitted for Temporary Employment in U.S. Agriculture, by Year and Nationality*. *Id.* at 40.

54. For a discussion of organized labor's objections to the bracero program—in particular, objections to the effect it had on employment of United States nationals and on domestic prevailing wages—see *id.* at 40-43.

55. See *id.* at 58; E. HUTCHINSON, *supra* note 2, at 499.

56. U.S. IMMIGRATION LAW AND POLICY, *supra* note 4, at 54 (quoting H. REP. NO. 745, 89th Cong., 1st Sess. 48 (1965)).

more people into the United States.⁵⁷

The Johnson administration resisted this argument, and instead urged that a Western Hemisphere ceiling not be imposed because of foreign policy considerations, and because it would "muddy the waters of foreign affairs" and "alienate Latin America."⁵⁸ Similar foreign policy considerations clearly underlay the large-scale refugee admissions program previously established.⁵⁹ These considerations were made a permanent part of immigration law by the 1965 Act, which established a sub-quota for entrants whose primary motive for seeking admission was to avoid political persecution at home.⁶⁰

IV.

The 1965 amendments to the Immigration and Nationality Act are the most recent and most complete legislative realization of the regulatory intention Zolberg ascribes to United States immigration policymaking.⁶¹ The difficulty, of course, is that dominant legislative intentions are never self-executing. Instead, they depend on the actual and continued subordination of competing societal interests to the stated major goal, on a programmatic approach that permits progress toward reaching that goal, and on the capacity of legislation to affect economic, political, and social forces that are monumental in their scope and complexity.

57. *Id.* at 54.

58. *Amending the Immigration and Nationality Act, 1965: Hearings on H.R. 2580 Before the House Comm. on the State of the Union, 89th Cong., 1st Sess. 54 (1965)* (statement of Representative Emmanuel Celler). Similar arguments were made by Dean Rusk and George Ball. See 111 CONG. REC. 21,809-10 (1965).

59. An example of the influence of foreign policy considerations on refugee flow to the United States is the period between 1948 and 1952. During these years, refugee flow was largely attributable to the Truman administration's concern over the "destabilizing" effect of a large, rootless, jobless population in a war-torn Europe confronting the spread of communism. See U.S. DISPLACED PERSONS COMMISSION, MEMO TO AMERICA: THE DP STORY, THE FINAL REPORT OF THE U.S. DISPLACED PERSONS COMMISSION 8 (1952). Similar concerns about the stability of Austria during the Hungarian revolution, Carlin, *Significant Refugee Crises Since World War II and the Response of the International Community*, in TRANSNATIONAL LEGAL PROBLEMS OF REFUGEES (1982), and the ASEAN countries in the late 1970's, A. SUHRKE, INDOCHINESE REFUGEES: THE IMPACT ON FIRST ASYLUM COUNTRIES AND IMPLICATIONS FOR AMERICAN POLICY, 96th Cong., 2d Sess. 11-12 (Comm. Print 1981), contributed to the United States receptivity toward refugees fleeing from Hungary and Vietnam. Similarly, the United States willingness to permit Cubans to enter the United States as a country of first asylum from 1959 to 1961 was due largely to our desire to support anti-Castro forces in exile, pending the expected overthrow of his regime.

60. Immigration and Nationality Act of 1965, Pub. L. No. 89-236, § 3, 79 Stat. 911, 912 (repealed 1980).

61. See *supra* notes 7-8 and accompanying text.

The remainder of this article will focus on two topics: immigration of labor from south of the United States-Mexico border and the admission of refugees into the United States. Discussing these topics, I intend to demonstrate eight points: First, the key objective of the 1965 Act—overall numerical control—has not been accomplished, primarily because neither the “back door” nor the “executive window” has been closed. Second, the federal government has displayed little ongoing commitment to sealing the border, though it has made well-publicized and symbolic attempts to stop the immigration of certain disfavored refugee groups, and has periodically “gotten tough” with individuals suspected of being illegally present in the United States. Third, the government’s failure to close the “back door” is attributable to a variety of factors, including a continuing—though perhaps diminishing—demand for cheap foreign labor, ethnic pressures, foreign policy considerations, and widespread concern about the cost-effectiveness and civil rights implications of the enforcement mechanisms necessary to exclude illegal aliens from the United States workforce. Fourth, foreign policy considerations, coupled with the ability of single-issue interest groups to generate sympathy for particular peoples, have played important roles in keeping the “executive window” open. Fifth, the current bleak economic situation, amplified by both a new concern with “equity” issues in the aftermath of Mariel and the “new federalism,” has produced new pressure for strict numerical control. Sixth, as a result of the foregoing conditions, highly public, yet essentially selective, efforts to “interdict”⁶² undocumented aliens at the border are likely to continue. Seventh, currently proposed legislation, including both the Reagan administration’s Omnibus Immigration Control Act⁶³ and the Simpson-

62. “Interdiction” entered the legal vocabulary on September 29, 1981, when President Reagan ordered the Coast Guard to initiate the “High Seas Interdiction of Illegal Aliens.” Exec. Order No. 12,324, 3 C.F.R. 180 (1981), *reprinted in* 8 U.S.C. § 1182, at 819-20 (Supp. V 1981); Proclamation No. 4865, 3 C.F.R. 150 (1981), *reprinted in*, 8 U.S.C. § 1182, at 820 (Supp. V 1981). In the following month, two Haitian vessels were intercepted at sea by Coast Guard vessels. One of the intercepted vessels contained Haitian nationals who apparently intended to enter the United States illegally. The United States remanded these refugees to the custody of Haitian government officials.

Less formal “interdiction” of Salvadoran and Haitian asylum applicants, who have been rounded up and incarcerated pending formal adjudication of their claims, has been occurring since President Reagan took office. For an account of the Salvadoran alien operation, see 128 CONG. REC. 5827 (daily ed. Feb. 11, 1982).

63. Proposed Omnibus Immigration Control Act of 1981 (Reagan administration bill), S. 1765, 97th Cong., 1st Sess., 127 CONG. REC. S11,992 (daily ed. Oct. 22, 1981) [hereinafter cited as Omnibus Bill].

Mazzoli bill,⁶⁴ reflects both renewed pressure for numerical control and—to varying degrees—historical factors that have promoted continuing “back door” and “executive window” admissions beyond authorized quota limits. Eighth, if such new legislation is passed it will moderate the flow of immigrants and allow better regulation; but because it is not designed to do so, it will not bring that flow within any predetermined numerical ceiling.⁶⁵ Despite this shortcoming, the proposed legislation will most likely produce an illusion of control strict enough to satisfy all but the most hardcore restrictionists.

Bringing immigration within politically acceptable boundaries strikes me as an eminently defensible enterprise, even if those boundaries are considerably more flexible than the politicians claim. More often, such boundaries are obscured by demonstra-

64. Proposed Immigration Reform and Control Act of 1982, S. 2222, 97th Cong., 2d Sess., 128 CONG. REC. S10,619 (daily ed. Aug. 17, 1982), H.R. 7357, 97th Cong., 2d Sess., 128 CONG. REC. H10,320 (daily ed. Dec. 18, 1982) [hereinafter cited as Simpson-Mazzoli Bill].

65. The Simpson-Mazzoli bill would amend INA § 201, 8 U.S.C. § 1151 (1976 & Supp. V 1981), to bring all ordinary immigrants (including immediate relatives) within an overall 425,000 annual limit. Simpson-Mazzoli Bill § 201(a). The bill also would tighten up the procedures for granting “H-2” non-immigrant temporary labor visas, *id.* § 211, and substantially alter the current procedures for inspecting and excluding undocumented aliens, *id.* § 121, and processing political asylum claims, *id.* § 124. The effect of these changes, when combined with the bill’s mandate to institute new and more effective “employer sanctions,” would be to tighten border controls and limit the number of undocumented entrants. But the bill leaves intact the open-ended admissions provision of INA § 207, 8 U.S.C. § 1157 (Supp. V 1981), which permits the allocation of refugee slots in a manner designated by the President and agreeable to Congress, without regard to the predetermined numerical ceilings. The bill’s “legalization” provisions for illegal aliens already in the United States at the time of the passage of the act also are relatively generous. Simpson-Mazzoli Bill § 301. See *infra* note 108.

The Omnibus Bill places heavy emphasis on creating new enforcement procedures, particularly those directed toward “boat people” such as the Haitians and Cubans, Omnibus Bill tit. X (“The Emergency Interdiction Act”); *id.* tit. VII (“The Immigration Emergency Act”), other undocumented aliens seeking political asylum, *id.* tit. IV (“The Fair and Expeditious Appeal, Asylum, and Exclusion Act of 1981”), and individuals abetting an illegal entry, *id.* tit. VIII (“The Unauthorized Entry and Transportation Act”). The Omnibus Bill would make it difficult for many aliens to legalize their status and would enhance the possibility of their deportation for up to ten years after their entry. *Id.* tit. III (“Cuban/Haitian Temporary Resident Status Act of 1981”); *id.* tit. I (“Temporary Resident Status for Illegal Aliens Act”). Notably, however, the Omnibus Bill contains no new provisions for an overall numerical limitation on immigration, and its employer sanction provisions, *id.* tit. II (“The Unlawful Employment of Aliens Act of 1981”), contain no mandatory worker identification, without which effective policing of undocumented alien employment is impossible. See, e.g., Strohmer, *A Work Authorization Policy, Enrollment and Verification System: A Technical Working Paper*, in U.S. IMMIGRATION POLICY AND THE NATIONAL INTEREST (Staff Report), *supra* note 5, at 466-67 app. E. Rather than closing the “back door,” the Omnibus Bill opens it wider by establishing a two-year pilot program permitting 50,000 additional non-immigrant entries per year. Omnibus Bill tit. III.

tions of legislative legerdemain that permit significant levels of refugee flow through unofficial apertures while the "main gate" is banged ostentatiously shut. There are widely divergent views about how many immigrants, legal and illegal, are entering the United States each year;⁶⁶ how many are staying;⁶⁷ how many the economy can support without endangering the job prospects of United States residents;⁶⁸ and how many are likely to contribute to the future demographic and ecological well-being of the nation.⁶⁹ It is

66. See *supra* note 42. For a good summary of numerical research on immigration, see Siegel, Passel & Robinson, *supra* note 5, at 13 app. E. The authors of this study conclude that "there are currently no reliable estimates . . . of the net volume of illegal immigration to the United States in any recent past period," *id.* at 32 app. E, and "the number of illegal residents in the United States cannot be closely quantified." *Id.* at 34 app. E.

67. An important variable in determining net immigration to the United States is the level of emigration from the United States. The Immigration and Naturalization Service does not keep this statistic. For a study that takes emigration of selected Hispanic Americans into account, see Heer, *What is the Annual Net Flow of Undocumented Mexican Immigrants to the United States*, 16 DEMOGRAPHY 417 (1979); see also Poitras, *The U.S. Experience of Return Migrants from Costa Rica and El Salvador*, in U.S. IMMIGRATION POLICY AND THE NATIONAL INTEREST (Staff Report), *supra* note 5, at 49 app. E (detailed study of "return" patterns of Costa Rican and Salvadoran migrants).

68. The debate on the impact of immigration on the labor market has centered on whether immigrants—particularly undocumented immigrants—customarily take jobs that would go unfilled but for their presence (the "dual market" theory), or whether they ordinarily compete directly with native workers. Qualified support for the second position is contained in a study conducted for the Department of Labor. See D. NORTH & M. HOUSTON, *THE CHARACTERISTICS AND ROLE OF ILLEGAL ALIENS IN THE U.S. LABOR MARKET: AN EXPLORATORY STUDY 150-55* (1979), reprinted in STAFF OF SENATE COMM. ON THE JUDICIARY, 96TH CONG., 2D SESS., *SELECTED READINGS ON U.S. IMMIGRATION AND REFUGEE POLICY 77* (Comm. Print 1980). Nonetheless, the long-term impact of high levels of immigration on the national economy is not necessarily identical to its impact on the labor market. See, e.g., Johnson & Orr, *The Economic Implications of Immigration: Labor Shortages, Income Distribution, Productivity and Economic Growth*, in U.S. IMMIGRATION POLICY AND THE NATIONAL INTEREST (Staff Report), *supra* note 5, at 83 app. D; Simon, *What Immigrants Take From, and Give to the Public Coffers*, in *id.* at 225 app. D; Teitelbaum, *Right versus Right: Immigration and Refugee Policy in the United States*, FOREIGN AFF., Fall 1980, at 21.

69. Different assumptions about long-term birth and death rates lead to radically different conclusions about what the acceptable level of immigration is, if the appropriate objective is to maintain the United States population at its present level. Organizations such as the Federation for American Immigration Reform and Zero Population Growth (ZPG) argue that total annual immigration must be limited to a level substantially lower than the current level. Thus, ZPG has called for a congressional commitment to an overall population policy at a lower, rather than a higher population level. Phyllis Eisen, Director of Immigration, ZPG, Testimony at the Boston Public Hearing of the Select Commission on Immigration and Refugee Policy (Nov. 19, 1979); see also *Numerical Limits on Immigration: Hearings Before the Subcomm. on Immigration and Refugee Policy of the Senate Comm. on the Judiciary*, 97th Cong., 2d Sess. 168 (1981) (statement of Phyllis Eisen). On the other hand, Charles Keely has argued that, taking net emigration and declining birth rates into account, "the requirements of no growth population do not call for a curtailment of immigration." Keely, *supra* note 5, at 64.

difficult to believe, therefore, that there is a scientifically determinable "best" level of immigration that can or should be expressed in inflexible ceilings. Yet it is clear that there are patterns of immigration that are politically unacceptable, notable as much for the impressions they convey as for their size.

"Back door" immigration of the magnitude suggested by the apprehension of over a million illegal entrants per year and mass asylum crises as large as the one generated by the Mariel boatlift of 1980⁷⁰ are examples of such chaotic immigration patterns. These patterns can be regulated, and immigrant flow reduced significantly, by new legislation; however, because such legislation will inevitably reflect the interests of agriculture and recognize, to some extent, refugee support organizations, it will provide only a semblance of strict numerical control. The danger is that, in its anxiety to make appearances seem more real than is politically necessary, the government will embark on a repressive border control campaign. That possibility, which has already been signalled by some of the Reagan administration's actions,⁷¹ is likely if Congress enacts the administration's Omnibus bill instead of the more moderate Simpson-Mazzoli bill (which will go some distance toward closing the back door and shutting the "executive window").⁷² In such a case, the abrogation of judicial and administrative processes,⁷³ the promulgation of a new statutory underclass of "temporary resi-

70. Mariel was the Cuban port from which 125,000 refugees embarked in 1980.

71. The Haitian interdiction and border detention campaign was initiated in 1981. See *supra* note 62. This campaign was augmented with "Operation Jobs," a coordinated, but short-lived Immigration and Naturalization Service program to round up illegal aliens in various cities across the United States. This program resulted in the well-publicized apprehension of some 5,000 Hispanic-appearing Americans. No existing evidence suggests that more than a miniscule number of native workers obtained employment as a result of this campaign. Nevertheless, the campaign both served the political purpose of attributing at least some of the post-World War II record unemployment in the United States to illegal aliens, and gave the appearance of forceful governmental action. This point was made recently by an Immigration and Naturalization Service spokesperson, who admitted the operation would have little effect on unemployment, but stated that it should be applauded as a symbol of the Reagan administration's commitment to the United States unemployed. See *SOJOURNER'S*, May 12-18, 1982, at 27.

72. For a discussion of the provisions of the Simpson-Mazzoli bill dealing with "back-door" migration, see *infra* notes 107-10 and accompanying text; see also *supra* note 65.

73. The Omnibus Bill proposes, *inter alia*, changing the political asylum application process by abolishing all administrative review of asylum applications, except upon a discretionary certification by the Attorney General, Omnibus Bill § 403; denying all judicial review of political asylum applications, except through a writ of habeas corpus, *id.*; and abolishing even minimal administrative hearings by immigration judges in exclusion cases not involving asylum claims, provided that an "immigration emergency" has been declared, *id.* § 240B(a)(3).

dents,"⁷⁴ the selective harassment of a few highly visible refugee-seeking groups, such as the Haitians and Salvadorans,⁷⁵ and the continuation of Immigration and Naturalization Service roundups aimed at Spanish-speaking or Hispanic-seeming persons, together will mask a continuing and officially countenanced flow of a large number of aliens across our southern border to enter the domestic workforce unhindered by any absolute quota.

V.

In thinking about restricting access to a house with three distinct portals, it is useful to remember the old Warner Brothers cartoons. The thesis they so graphically illustrated, often with images of wolves chasing rabbits, was the difficulty of keeping unwanted visitors from entering through whatever apertures were currently being left unwatched.

Attempts to close the "back door" have never existed in a vacuum; instead, because they relate to a variety of factors that have traditionally encouraged the migration of cheap, primarily agricultural labor, these attempts have always borne a fairly direct relationship to the opportunities provided for the "legal" migration of labor. This relationship manifests itself in the correlation between the opportunities for the legal flow of labor and border apprehensions. History illustrates this point. In 1942, the United States and Mexico signed a treaty authorizing the first bracero program.⁷⁶ Related legislation in 1943 permitted United States agricultural employers to enter into direct contract labor arrangements on a temporary basis with migrants from other countries in the hemisphere, without regard to usual literacy requirements.⁷⁷ These arrange-

74. The "temporary resident status" provisions of the Omnibus Bill, *id.* tit. I, would permit an alien to adjust his status to that of permanent resident only if he had been continuously residing in the United States for 10 years, remained otherwise eligible for admission, and demonstrated competence in the English language. *Id.* § 102. During the pendency of the alien's temporary residence, he would not be permitted to bring his spouse or children to the United States, nor would he be eligible for benefits under any of the following programs: Aid to Families with Dependent Children, Supplemental Security Income, the National Housing Act, Medicaid, and Food Stamps. *Id.* § 101.

75. See *supra* note 62. For a fuller account of the United States policy toward Haitian and Salvadoran asylum applicants, see Scanlan, *Who is a Refugee? Procedures and Burden of Proof under the Refugee Act of 1980*, in *IN DEFENSE OF THE ALIEN* (1983).

76. Agreement Respecting the Temporary Migration of Mexican Agricultural Workers, Aug. 4, 1942, United States-Mexico, 56 Stat. 1759, E.A.S. No. 278.

77. Act of Aug. 29, 1943, ch. 82, § 5(g), 57 Stat. 70, 73, *superseded by* Act of Feb. 14, 1944, ch. 16, §§ 1-5, 58 Stat. 11, 11-14 (repealed 1948).

ments, in general, had been illegal since 1885.⁷⁸ The second and more famous bracero program, which was initiated in 1952, imposed more government controls on the importation of foreign labor.⁷⁹ This program required employers first to attempt to recruit domestic workers at the wages offered to foreign workers.⁸⁰

With the initiation of the second bracero program came a well-publicized effort to halt "illegal" "back door" migration by "sealing the border." This effort, labelled "Operation Wetback," quickly led to the apprehension of over one million undocumented aliens in 1954⁸¹—a figure not approached again until 1976,⁸² and not exceeded until 1978.⁸³ According to one commentator,

Operation Wetback was an overwhelming success. The greater part of what it accomplished was due to cooperation from grower interests. . . . From the operation's inception, [its director] took pains to cultivate grower cooperation. Farmers were promised assistance in securing domestics and legally contracted braceros to replace wetbacks. In return, most of them cooperated.⁸⁴

According to another commentator, "The [illegal] traffic became suppressed only when it became possible to assure farm employers, substantially on their terms, that they could have as many contract laborers as they might demand."⁸⁵ Levels of illegal entry, in other words, are possible to control, as long as "legal" levels of entry (which may be inflated by legislation outside of the standard rubric of the Immigration and Nationality Act) satisfy those who are interested in bringing in migrants from across our southern border.

Operating under such constraints, the United States is far from achieving strict numerical control. The wolf is able to keep the rabbit from coming in the back door only by leaving the main gate wide open. Nevertheless, programs such as the bracero program are not without their political appeal—an appeal that almost certainly ensures that they will continue to be proposed under a variety of "guest worker" guises.

78. Alien Contract Labor Law of 1885, ch. 164, 23 Stat. 332 (repealed 1952).

79. Act of July 12, 1951, ch. 223, § 503, 65 Stat. 119, 120 (repealed 1964).

80. *Id.* This requirement fell significantly short of offering recruited Mexican agricultural laborers the wages prevailing in the United States.

81. U.S. IMMIGRATION NATURALIZATION SERVICE, 1976 ANN. REP. 126.

82. *Id.*

83. See North, *supra* note 5, at 278 App. E.

84. R. CRAIG, THE BRACERO PROGRAM: INTEREST GROUPS AND FOREIGN POLICY 129 (1971).

85. E. GALARZA, MERCHANTS OF LABOR, THE MEXICAN BRACERO STORY 255 (1964).

This appeal derives from several factors: First, it is possible, and indeed universal, to admit "guest workers" as "temporary residents." This permits rigid immigration limits to remain on the books under the theory that guest workers are not immigrants, and that guest worker programs do not increase illegal flow. Evidence compiled from the bracero programs, and from the guest worker programs common in Europe during the 1960's and 1970's strongly suggests that this is not always the case; although return migration of guest workers is common, it is by no means universal.⁸⁶ It reasonably can be expected that a significant number of guest workers will establish roots in the society where they work.⁸⁷ It also can be expected that guest workers will attract significant numbers of relatives and other employment-seekers to join them.⁸⁸ The illusion of immigration control is maintained, however, when the system accords limited tenure to migrants, provided that the formal limits on that tenure are more widely known than are violations of the system. Because guest workers are documented, they lend themselves to highly visible and efficient deportation programs, which even when of temporary duration can appear quite effective before the next wave of "legal" or "illegal" migrants either enters the

86. One commentator describes the United States border policy with Mexico as an extensive farm labor program—an efficient policy representing a consistent desire for Mexicans as laborers rather than as Settlers. This policy stands out as a legitimized and profitable means of acquiring needed labor without incurring the price that characterized the immigration, utilization, and the eventual settlement of European and Oriental immigrants.

J. SAMORA, *supra* note 23, at 57. It is not clear whether those brought in as braceros were difficult to repatriate. Recent studies of "guest worker" programs in Europe suggest that these programs fail to insure that those persons temporarily admitted to perform short-term labor will return to their country of origin. See Tapinos, *European Migration Patterns: Economic Linkages and Policy Experiences* in U.S. POLICY: GLOBAL AND DOMESTIC ISSUES, *supra* note 8, at 53, 62-64. A recent study, North, *Nonimmigrant Workers in the U.S.: Current Trends and Future Implications* (report prepared for Department of Labor) (May 1980), notes that "[n]onimmigrant programs are designed not to have demographic impacts on the host nation. . . . But as the guestworker programs of Western Europe have shown us, many people who enter on a temporary basis often spend the rest of their lives in the host nation." *Id.* at 160. North goes on to note that some 14,000 to 16,000 nonimmigrants adjust their status and become permanent residents each year, and that "a group of unknown size, but one [presumed] to be much larger," overstays its temporary status each year. *Id.* at 162. He also notes, however, that "virtually all" of "the tightly controlled group of rural H-2" nonimmigrants (i.e., current temporary agricultural workers) do return to their country of origin. *Id.* at 163.

87. See Tapinos, *supra* note 86, at 63.

88. The bracero program, at least in its initial stages, probably stimulated additional illegal immigration to the United States. J. SAMORA, *supra* note 23, at 44. For an analysis of the incentives the bracero program provided for illegal immigration, see Hadley, *A Critical Analysis of the Wetback Problem*, 21 LAW AND CONTEMP. PROBS. 334, 344 (1956).

country or is perceived on a national level.

Second, a well-organized guest worker program is probably as efficient a mechanism as any to provide employers with temporary seasonal help. When coupled with restrictions on the social benefits available to migrants—as, for example, would be the case under the Reagan administration's proposed "Temporary Mexican Workers Act,"⁸⁹—such programs have the added benefit of reducing labor costs. Minimizing available benefits may also appeal to broader public concerns about "equity."⁹⁰

Finally, guest worker programs permit greater regularity in our relations with countries that send economic migrants to the United States. It is not accidental that both bracero programs were preceded by broader diplomatic understandings between the United States and the "sending" countries.⁹¹ Yet the attitude of sending countries is typically ambivalent, usually profoundly so. This concept of a mutually interdependent hemispheric system is widely subscribed.⁹² Under this system, the United States, through its control of capital and its favorable relationships with foreign manufacturers, maintains a domestically favorable balance of payments and accelerates movement from Mexico and other Latin and Caribbean nations. The correlative movement of agricultural workers to the United States, and the remittances they send back home, are regarded as economically predictable, perhaps even inevitable. Under this view, deportation campaigns are regarded as opportunistic or racist, and not supported by underlying international economic realities.⁹³ Yet to the extent that guest worker

89. Omnibus Bill tit. VI. For a summary of the proposed program's restrictions on social benefits, see *supra* note 74.

90. See *infra* text accompanying notes 169-75.

91. Preceding the initiation of the first bracero program, the United States and Mexico informally established a *modus operandi* for the temporary entry into the United States of Mexican agricultural labor. The agreement formally went into effect in 1942. Agreement Respecting the Temporary Migration of Mexican Agricultural Workers, Aug. 4, 1942, United States-Mexico, 56 Stat. 1759, E.A.S. No. 278. During the entire period of the second bracero program, "[i]nternational agreements were negotiated with Mexico . . . with more or less difficulty." U.S. IMMIGRATION LAW AND POLICY, *supra* note 4, at 40. For a description of similar agreements between the United States and the Bahamas, Jamaica, Barbados, and British Honduras, see CONG. RESEARCH SERV., THE WEST INDIES (BWI) TEMPORARY ALIEN LABOR PROGRAM: 1943-1977, at 4-6 (1978).

92. See, e.g., Marx, *Forced Emigration*, in IRELAND AND THE IRISH QUESTION: A COLLECTION OF WRITINGS (R. Dixon ed. 1972); Portes, *Toward a Structural Analysis of Illegal (Undocumented) Immigration*, 12 INT'L MIGRATION REV. 469 (1978). I am indebted to Demetrios Papademetriou of the Center for Migration Studies for his salient review of the existing literature evaluating the international economic context of labor migrations.

93. See, e.g., Bustamante, *Undocumented Immigration from Mexico: Research Report*,

programs, through either design or implementation, place foreign nationals in a disadvantaged position as compared to United States citizens, they invite the instant criticism of being "exploitative." The diplomatic consequences of this criticism in the long term are likely to be very negative.

It is doubtful whether Congress will pass any legislation controlling "back door" immigration in the near future unless some sort of guest worker program also is passed. Assuming the present economic downturn in the United States ends, "experiments" limiting migrant entries to 50,000 per year are likely to be superseded by an increasingly large demand for foreign contract labor.⁹⁴ This prediction, if true, will toll the death knell for any possibility of effective numerical control for two reasons: First, control of the border itself is very expensive. According to one General Accounting Office estimate, adequately policing just one-tenth of the United States-Mexico border would cost \$125 million per year.⁹⁵ Securing support for such expenditures from those likely to be deprived of guaranteed cheap labor is unlikely; securing their cooperation in enforcement is even more unlikely. Yet as the history of the second bracero program seems to indicate, illegal immigration is not likely to be stopped without employer cooperation.

Second, the history of recent attempts to stem illegal migration by using a "worker sanction" system suggests that any such system faces a tough political road and is unlikely to be enacted unless given broad support by business interests. Such support, if supplemented by increased pressure from the labor and restrictionist lobbies, eventually might bear legislative fruit. A number of factors militate against passage of a "worker sanction" system, however, which suggests that whatever fruit is picked will be tainted.

These factors are well described in a Congressional Research Service study that summarizes the attempts to curb illegal immi-

11 INT'L MIGRATION REV. 149, 174 (1977).

94. Significantly, even as the Simpson-Mazzoli bill is being reported out of committee, and after extensive work has been done to reconcile it better with the proposed Omnibus Bill, critics on the Senate floor have complained that the omission of a guest worker program permitting the short-term entry "of several million" agricultural workers—a figure "large enough to provide legal workers for the jobs that are currently held by undocumented workers"—would impair the United States ability to deal meaningfully with illegal Mexican aliens. Interview with Senator Hayakawa, *reprinted in* 128 CONG. REC. S7607 (daily ed. June 29, 1982) [hereinafter cited as Hayakawa Interview].

95. U.S. COMPTROLLER GENERAL, PROSPECTS DIM FOR EFFECTIVELY ENFORCING IMMIGRATION LAWS: REPORT TO THE CONGRESS OF THE UNITED STATES iii (1980).

gration from 1971 to 1979.⁹⁶ This study identified the prevailing approach, apparent in the bills introduced or proposed during the Nixon, Ford, and Carter administrations, as one which would "make unlawful the 'knowing' employment of illegal aliens, thereby removing the economic incentive which draws such aliens to the United States as well as the incentive for employers to exploit this source of labor."⁹⁷

Much of the activity of President Carter's Select Commission on Immigration and Refugee Policy was devoted to designing an effective and politically acceptable "worker sanctions" system that would provide the means of imputing the necessary knowledge to employers and establish meaningful penalties for violation of the law. The heart of the original proposed system was a "foolproof" work-authorization identification card that every individual, American citizen or not, would have to present to an employer before being put on a payroll.⁹⁸ The Select Commission was unwilling to endorse such a card, however, and instead recommended "that legislation be passed making it illegal for employers to hire undocumented workers."⁹⁹ The Reagan administration's immigration bill also was expected to include a worker identification program. But although that bill modifies the labor certification process,¹⁰⁰ creates new penalties for knowingly misrepresenting one's own employment status,¹⁰¹ and modestly strengthens employer penalty provisions,¹⁰² it contains no specific provision for a new identification system.

In summarizing the failure of earlier bills to pass a Senate vote, the Congressional Research Service's study provides some in-

96. U.S. IMMIGRATION LAW AND POLICY, *supra* note 4, at 71-76.

97. U.S. IMMIGRATION LAW AND POLICY, *supra* note 4, at 74 (quoting H.R. REP. NO. 506, 94th Cong., 1st Sess. 6 (1975)).

98. The key issue before the Select Commission was how any employer-sanction enforcement mechanism could work, absent a better means of demonstrating that employers were knowingly hiring undocumented workers. The Commission concluded that "an effective employer sanctions system must rely on a reliable means of verifying employment eligibility." FINAL REPORT: U.S. IMMIGRATION POLICY AND THE NATIONAL INTEREST, *supra* note 5, at 66. Much of the Commission's early efforts was devoted to considering various verification techniques, the most prominent being "counterfeit-resistant social security card[s]" and a "call-in data bank." *Id.* at 68; *see also* U.S. IMMIGRATION POLICY AND THE NATIONAL INTEREST (Staff Report), *supra* note 5, at 377 app. E.

99. FINAL REPORT: U.S. IMMIGRATION POLICY AND THE NATIONAL INTEREST, *supra* note 5, at xvii. The Select Commission did not reach a consensus on what type of identification system to employ for the determination of legal employment status. *Id.* at 61, 68-69.

100. Omnibus Bill tit. II.

101. *Id.* § 202.

102. *Id.* § 201.

sight into why neither the Select Commission nor the Reagan administration got far with proposals for an identification system: "[O]pponents of those and subsequent related bills have argued that employer penalties would unduly and unjustly burden U.S. employers, would be difficult and expensive to enforce, would lead to discrimination against Mexican-Americans, and would result in the separation of families."¹⁰³ Partly to counter arguments such as these, almost all recent immigration proposals have both advocated the allocation of a larger portion of the worldwide immigration quota to migrants from Mexico and Canada,¹⁰⁴ and subscribed to some sort of "legalization" for immigrants illegally in the United States for a significant period. The Reagan administration's proposal, however, does nothing to meet the family reunification problem, but instead would intensify that problem by barring Mexican guest workers from bringing their spouses and children with them to the United States.¹⁰⁵ The Reagan administration's proposal for the treatment of "temporary residents" are so rigorous¹⁰⁶ that receiving support for the bill from any segment of the Mexican-American community will be virtually impossible.

Despite the difficulties Congress has faced in passing any significant employer-sanction legislation, the Simpson-Mazzoli bill's employer sanction proposal stands a better chance of passing than the Omnibus bill's proposal because it is part of a more broadly acceptable immigration reform package. That package contains no guest worker program per se. Instead, the Simpson-Mazzoli bill proposes "H-2" visa program revisions that may serve much the same purpose by attempting to better balance protectionist and labor market interests.¹⁰⁷ As compared to the Reagan administra-

103. U.S. IMMIGRATION LAW AND POLICY, *supra* note 4, at 74.

104. For example, the Simpson-Mazzoli bill would raise the per-country annual limit for immigration from "foreign state[s] contiguous to the United States" to 40,000, Simpson-Mazzoli Bill § 201(b)(2)(A)(ii), with special provision made for augmenting this limit in the following fiscal year should a "contiguous foreign state" not meet its full quota. *Id.* § 201(b)(2)(C). The Omnibus bill grants similar favoritism to immigrants from neighboring countries. Omnibus Bill tit. II. ("The Immigrant Visas for Canada and Mexico Act"). For example, the Omnibus bill provides that each of the contiguous foreign states be given an allocation of 40,000 immigration slots a year, and that slots not used by one state in any particular year may be allocated to any of the other contiguous states. *Id.*

105. Omnibus Bill § 601(g).

106. *See supra* note 74.

107. Some members of Congress have criticized the Simpson-Mazzoli bill's failure to include any specific quotas for guest worker admittees. *See supra* note 94. The bill's proposed revisions of the "H-2" visa procedures include: (1) new limitations on the amount of time "H-2" nonimmigrant laborers can remain in the United States during particular calendar years, with special flexibility permitted in the admission of certain agricultural laborers,

tion's bill, the Simpson-Mazzoli bill contains considerably more liberal provisions for legalizing the status of aliens illegally in the United States;¹⁰⁸ stronger penalties for "knowingly" hiring illegal aliens;¹⁰⁹ and a clear commitment to the development of a new, universal worker identification system, within three years of the bill's passage.¹¹⁰

The Simpson-Mazzoli bill is not a radical piece of legislation; rather, it is a middle ground between some of the more restrictionist and more permissive stances toward labor admissions in the immigration legislation proposed over the last decade. If it does not pass Congress this term, something similar to it will stand a good chance of passing after the 1982 congressional elections. The prospect for the eventual passage of this legislation should not blind us to certain continuing problems, either now while the issue is being debated, or later when we will be faced with new legislation. Several considerations are likely to make the promised harvest less than rewarding. First, a worker sanction system depends on en-

Simpson-Mazzoli Bill § 211(b)(1); (2) new labor certification requirements designed to provide greater protection for native workers, *id.* § 211(b)(2)(A); (3) labor certification ineligibility for aliens and employers who, over a five-year period, have violated time limitations, terms or conditions of employment, *id.* § 211(b)(2)(B); and (4) the establishment of programs to recruit "domestic workers for temporary labor and services which might otherwise be performed by nonimmigrants" and monitor "terms and conditions under which such nonimmigrants are employed in the United States." *Id.* § 211(b)(5). Counterbalancing these generally restrictive provisions is a new and detailed set of procedures for expediting the processing of "H-2" applications. *Id.* § 211(b)(3)(B). These procedures, if adopted, could be used to permit the easy entry of large numbers of seasonal workers.

108. The original version of the Simpson-Mazzoli bill provides "permanent residence" status for most immigrants illegally in the United States as of the date of the bill's eventual passage, Simpson-Mazzoli Bill § 301, provided that they have been present continuously in the United States from January 1, 1978 and entered the United States prior to January 1, 1980. *Id.* The bill also permits other illegal entrants who arrived in the United States prior to January 9, 1980, and Cuban or Haitian entrants who entered after that date, to adjust their status to "that of an alien lawfully admitted for temporary residence." *Id.* These "temporary residents" would have limited eligibility for federal assistance, *id.*, but would be permitted to work and to travel abroad. *Id.* These "temporary residents" also would be able to adjust their status to that of a permanent resident after twenty-five months of continuous residence in the United States. *Id.* Before such adjustment occurred, however, temporary residents would be required to demonstrate either a "minimal understanding of ordinary English," or that they are satisfactorily pursuing a course of study designed to achieve that understanding. *Id.* Compare *id.* with Omnibus Bill, tit. I (adjustment of status only after 10 years continuous residence).

109. Compare Simpson-Mazzoli Bill § 101(a)(1) (providing for fines of up to \$1000 imposed on employers for each alien unlawfully employed in violation of the Act, and for the possible imprisonment of repeat offenders) with Omnibus Bill § 201 (providing for maximum fine of \$1,000 on employers for each alien unlawfully employed; no provision for imprisonment).

110. See Simpson-Mazzoli Bill § 101(a)(1).

forcement in the marketplace rather than at the border. Such enforcement, no matter what identification mechanism is employed, depends on the willingness of employers to identify all of their workers. Substantial resistance to government regulation already exists in the business community, which also includes a major underground economy. In that underground economy, existing statutes, such as those requiring the payment of a federal minimum wage, or adherence to OSHA standards, are largely ignored. In addition, it will be particularly difficult to obtain employee identification from the proprietors of widely scattered farms and orchards who choose to withhold this information. Enforcement also will be impossible without the establishment of a costly bureaucracy, which may in any event prove *less* effective—if that is possible—than an understaffed border patrol. Thus, it remains a distinct possibility that a large number of undocumented aliens will continue to enter the United States to work here as fugitives with no legal rights and, consequently, be forced to work at cutthroat wages. Given the confluence of two factors, a large disparity in wealth between the United States population and that of the large, mobile Mexican and Caribbean basin populations¹¹¹ and a demand for cheap labor in the United States that is likely to persist even in periods of recession,¹¹² this scenario cannot be ignored.

Nor, for that matter, can we ignore the logical alternative to that scenario, in which current restrictionist pressures yield genu-

111. For an excellent discussion of future potential migration from the Caribbean Basin, see Pastor, *Migration in the Caribbean Basin: The Need for an Approach as Dynamic as the Phenomenon*, in U.S. POLICY: GLOBAL DOMESTIC ISSUES, *supra* note 8, at 95, 101-10.

112. For example, Senator Hayakawa stated that "California farmers write to me continuously describing labor shortages for a multitude of crops." Hayakawa Interview, *supra* note 94, at S7607. In response to a question about the effect of a large-scale guest worker program on the domestic labor market, Senator Hayakawa said,

The important thing to remember about Hispanic workers is that we need them desperately from an economic point of view. We have an enormous class of people in this country who are accustomed to very, very generous welfare, food stamps, Medicare and other benefits. The amount for many of these people is up to \$15,000 to \$17,000 a year. You can get all this without having to work. Now to work in the hot sun, breaking your back, stooping over, taking care of strawberry and boysenberry crops, and climbing trees to harvest fruits and nuts is just damn hard work. A lot of Americans just don't want to do that.

Id.

At the time this interview was published in the Congressional Record, the United States unemployment rate stood at nine and one-half percent. One need not accept Senator Hayakawa's interpretation of why unemployed United States residents are leery of working as seasonal agricultural laborers to appreciate that there is no simple correlation between domestic employment and domestic willingness to work in fields and orchards at the wages, and under the working conditions, that currently prevail there.

inely effective measures to seal the border and enforce employment sanctions. Concern over this eventuality usually has centered on the nature of the proposed identification systems themselves, with civil libertarians expressing strong reservations about either compulsory national identity cards or a national employment data bank.¹¹³ As a person familiar with past administrations' collection of data about "enemies," and the illegal uses to which such data was put,¹¹⁴ I share some of those reservations. Yet a greater cause for concern is the likely proliferation of enforcement personnel who are more interested in "cleansing" the labor market of suspect members than in careful fact finding and the protection of individual rights. In the light of current governmental practices directed primarily at Haitian and Salvadoran migrants, and in light of a long tradition of disproportionate harassment of Hispanics generally, this concern does not seem unrealistic.

VI.

I have waited until now to discuss the issues presented by the "executive window," through which most refugees and refugee applicants reach the United States, for several reasons. First, I wanted to emphasize that, despite large scale refugee flows since 1975,¹¹⁵ many of the migrants who have entered the United States outside the unified quota system have entered through the "back door"¹¹⁶—an aperture not likely to be shut, though it may be nar-

113. See, e.g., Institute for Public Representation, Georgetown University Law Center, *Discriminatory Effects of Employer Sanctions*, in U.S. IMMIGRATION POLICY AND THE NATIONAL INTEREST (Staff Report), *supra* note 5, at 489 app. E; Center for the Study of Human Rights, Notre Dame University Law School, *Employer Sanctions*, in *id.*, at 568 app. E.

114. For a good account of President Nixon's use of "enemies lists," see E. DREW, *WASHINGTON JOURNAL* 152-53, 327-28 (1975).

115. Well over one million people entered the United States as refugees, displaced persons, or refugee-parolees from 1956 through 1979. See S. REP. No. 256, 96th Cong., 1st Sess. 6, reprinted in 1980 U.S. CODE CONG. & AD. NEWS 141, 146 (Table 1—*Historical Summary of Refugee Parole Action*). With the evacuation of over 130,000 Indochinese to the United States in 1976, a new era began. This period was characterized by a nearly constant flow of refugees that put a visible strain on the United States resettlement programs. See Anker & Posner, *The Forty Year Crisis: A Legislative History of the Refugee Act of 1980*, 19 SAN DIEGO L. REV. 9, 30-32 (1981). In 1980, the arrival of at least 140,000 Cuban and Haitian "boat people," the arrival of miscellaneous nationals from other countries seeking asylum in the United States, plus the previous allocation of 234,500 refugee slots brought an unprecedented 375,000 recognized and potentially recognizable "refugees" to the United States. Scanlan, *supra* note 45, at 620-21. For more recent refugee flow levels, see *supra* note 5.

116. The apprehension of over a million undocumented aliens at the border each year, see *supra* note 5, suggests that even in years of record refugee flow to the United States, the number of legal and illegal "back door" immigrants far exceeds the number of legally admit-

rowed. This generalization clearly holds true today, although the metaphors break down when examining the situations of Haitian and Salvadoran immigrants, who frequently enter the United States illegally across land borders and sometimes enter the work force. In many cases, these immigrants have been impelled to migrate by an uncertain mix of economic and political motives. Second, I wanted to show that a certain combination of factors—including ethnic pressures, bilateral relations with Mexico, concern over government overregulation, and, most importantly, patterns of labor recruitment—have contributed to continuing “back door” immigration. Finally, I wanted to indicate that the currently proposed legislation, if passed, has the potential for amplifying certain civil liberties problems associated with immigration enforcement.

My great concern about refugees is that they will become scapegoats, sacrificed to the unrealizable ideal of strict numerical control. This concern is based on several factors, including their comparatively few numbers, and the effective regulation of their mode of entry. Moreover, the coalition of groups that supports their entry is frequently more transitory and less powerful than the coalition that supports the entry of migrant labor. Tempering—but not alleviating—my concern is a belief that our foreign relations policymakers will continue to support substantial refugee flow, even in the face of significant restrictionist pressure.

Refugees are a special sort of migrant because they stand outside the quota system, and because their chief qualification for admission by *definition* is unrelated to their economic utility.¹¹⁷ Also, the government has the unique ability to select refugees, although that ability has been undermined since the beginning of 1980 by the arrival of several hundred thousand asylum applicants. For these reasons, among others, the practical, political, and even legal questions affecting the admission of refugees arise from a

ted refugees.

117. INA § 101(a)(42), 8 U.S.C. § 1101(a)(42) (Supp. V 1981), defines “refugee” exclusively in terms of an individual’s motives for departing a country of origin. The only motive it recognizes is “persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.” *Id.* Refugee allocations under INA § 207, 8 U.S.C. § 1157 (Supp. V 1981), and decisions to grant asylum under INA § 208, 8 U.S.C. § 1158 (Supp. V 1981) or withhold deportation under INA § 243(h), 8 U.S.C. § 1253(h) (Supp. V 1981), are keyed to none of the traditional grounds for extending preferences to particular immigrants. These traditional grounds were family relationships with a United States citizen or permanent resident, or qualifications to perform a particularly needed job. See INA § 201(a), 8 U.S.C. §§ 1151(a)-(b), 1153(a)(1)-(6) (1976 & Supp. V 1981).

unique context.

That context is best summarized by looking at the Refugee Act of 1980¹¹⁸ and the concerns leading up to its adoption. The Act arose from a long history of ad hoc decisionmaking to admit particular groups of refugees, congressional reaction to the executive's domination of that decisionmaking process, and a desire to better coordinate admissions decisions with follow-up resettlement and welfare programs. Immediately after World War II, the United States began admitting large numbers of refugees and displaced persons to its shores.¹¹⁹ Significantly, the pattern that developed almost immediately thereafter included direct State Department involvement in the decision as to which refugees to admit. The result was that the United States admitted refugees almost exclusively from intermediate countries of first asylum. This pattern was modified somewhat when Cubans fleeing from Castro first began coming to the United States, but was reasserted in the handling of refugees from Indochina. The pattern indicates that geopolitical concerns predominated in refugee admissions decisions, and also that enough genuine regulation of flow could be asserted to keep negative domestic reaction within acceptable limits.

The basic foreign policy considerations in refugee admission decisions have always been leavened with genuine humanity. But apparently, the United States has had greater concern for the ideological context of refugee flow and the destabilizing effect of large refugee populations in "sensitive" parts of the world. The United States willingness to accept over 400,000 displaced persons from Central Europe between 1948 and 1952,¹²⁰ over 38,000 Hungarian refugees from Austria and Yugoslavia in 1956 and 1957,¹²¹ and over 600,000 Indochinese refugees¹²² owed as much to our concern for

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

119. See Displaced Persons Act of 1948, ch. 647, 62 Stat. 1009, as amended by Act of June 16, 1950, ch. 262, 64 Stat. 219; Act of June 28, 1951, ch. 167, 65 Stat. 96 (repealed 1957).

120. See F. AUERBACH, *supra* note 2, at 17.

121. S. REP. NO. 256, 96th Cong., 1st Sess. 6, reprinted in 1980 U.S. CODE CONG. & AD. NEWS 141, 146 (Table 1—*Historical Summary of Refugee Parole Action*).

122. This figure is an estimate. It is based on the following sources: (1) an estimate by the House Judiciary Committee that, by the end of fiscal year 1980, Indochinese refugee flow to the U.S. totalled 416,000, *Refugee Admissions and Resettlement Program—Fiscal Year 1981: Hearings Before the House Comm. on the Judiciary*, 96th Cong., 2d Sess. 38 (1980) [hereinafter cited as *Refugee Hearings*]; (2) the allocation of 168,000 additional Indochinese refugee slots for fiscal year 1981, 126 CONG. REC. S12,988 (daily ed. Sept. 19, 1980); and (3) the allocation for fiscal year 1982 of 100,000 refugee slots for Asia, nearly all

immigrant strain on countries with whom we were allied, or whose neutrality we hoped to preserve, as it did to our aversion to "slavery" behind the Iron Curtain. Obviously though, "cold war" polarization played a major role in determining which refugees the United States accepted. "Cold war" propaganda also helped make those refugees who were admitted "acceptable" to the American public. Thus, the United States not only put up with, but indeed encouraged, "destabilization" in Chile, but felt no obligation to resettle those persons endangered by the overthrow of Allende.¹²³

It is no accident that pre-1980 law¹²⁴ and extra-legal practice¹²⁵ led to the admission or "parole" of a refugee cohort drawn overwhelmingly from such communist countries as Cuba, Vietnam, Cambodia, and the Soviet Union. At the same time, however, the appeals of those seeking refuge from brutal regimes in the Philippines, Korea, Haiti, and Iran were virtually ignored.¹²⁶ I do not endorse the political philosophy that led to these choices, but it should be emphasized that this philosophy served two distinct functions. The first function was regulatory. By adopting a small

intended for the admission of Indochinese, 127 CONG. REC. S8545 (daily ed. Nov. 18, 1981). The shortfall in the actual number of refugee admissions, as compared to authorized refugee allocations, was significant in fiscal year 1981, and may recur in fiscal year 1982.

123. See G. Loescher, J. Scanlan, M. Rowe, & S. Kruk, Responses to Persecution in Non-Communist Countries, reprinted in CENTER FOR CIVIL AND HUMAN RIGHTS, ADMISSION OF REFUGEES AND ASYLEES UNDER THE LAW: REPORTS ON CURRENT UNITED STATES PROCEDURES AND POLICIES, AND THEIR ORIGINS, WITH RECOMMENDATIONS FOR CHANGE NCC-15 (1980) (unpublished) (on file at the University of Miami Law Review) [hereinafter cited as Responses to Persecution].

124. Prior to the Refugee Act of 1980, the only provision for the admission of refugees was the so-called "seventh preference." INA § 203(a)(7), 8 U.S.C. § 1153(a)(7) (1976) (repealed 1980). Under this section, a maximum of 17,400 immigrants per year, restricted only by the overall numerical limitations of the INA, could enter the United States as "conditional entrants," provided that they were fleeing persecution in "communist" or "communist-dominated" lands. *Id.*

125. That practice manifested itself (1) in Immigration and Naturalization Service proceedings governed by 8 C.F.R. § 108.1 (1975) (rescinded), which, despite the lack of statutory authority, permitted discretionary grants of political asylum for those either fleeing communism or claiming refugee status under article 32 or 33 of the Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150; and (2) in the executive branch's widespread use of administrative parole, which was technically authorized by INA § 212(d)(5), 8 U.S.C. § 1182(d)(5) (1976). For a discussion of the use of parole to admit large refugee populations, see Scanlan, *supra* note 45, at 629-35; see also Anker & Posner, *supra* note 115, at 15-16, 26.

126. Two excellent studies of how the United States has made refugee determinations in the past are Evans, *The Political Refugee in United States Immigration Law and Practice*, 3 INT'L LAW. 204 (1969), and Hanson, *Behind the Paper Curtain: Asylum Policy Versus Asylum Practice*, 7 N.Y.U. REV. L. & SOC. CHANGE 107 (1978); see also Responses to Persecution, *supra* note 123, at NCC-1 to -56, CC-1 to -58. For a discussion of more recent practices toward Salvadoran and Haitian refugee applicants, see Scanlan, *supra* note 75.

“seventh preference” applicable only to those refugees fleeing either communist-dominated countries or from persecution in the general area of the Middle East,¹²⁷ and by adhering to the same ideological and geographical limits in parole decisions, under which over ninety percent of all post-1956 refugees actually entered the United States,¹²⁸ the “executive window” was kept partially shut. The second function was consensus-building. Despite the limits stated in the “seventh preference,” refugee flow was substantial enough both before and after its adoption in 1965 to evoke criticism about its undermining of statutory “quotas.”¹²⁹ Public opinion polls taken during a number of refugee migrations, including the influx of Vietnamese “boat people” and the early stages of the Mariel flow, indicated widespread reservation about immigration policies that had the potential to admit several hundred thousand non-quota refugees.¹³⁰ Concern about similar resistance to a large-scale influx of Hungarians in 1957 prompted the Eisenhower administration to launch a public relations campaign supportive of an “open door” policy.¹³¹ Similar, privately conducted campaigns

127. INA § 203(a)(7), 8 U.S.C. § 1153(a)(7) (1976) (repealed 1980).

128. See S. REP. No. 256, 96th Cong., 1st Sess. 6, reprinted in 1980 U.S. CODE CONG. & AD. NEWS 146 (Table I—*Historical Summary of Refugee Parole Action*; Table II—*Conditional Entries of Refugees Under Section 203(a)(7)*).

129. Because the “seventh preference” created no new immigration slots, it was hardly mentioned in the lengthy Congressional debate on the 1965 Act. Prior special legislation admitting particular refugees, including the Act of July 25, 1958, Pub. L. No. 85-559, 72 Stat. 419 (repealed 1965) (according permanent resident status to refugees from the Hungarian revolution), the Refugee Relief Act of 1953, ch. 336, 67 Stat. 400, amended by Act of Aug. 31, 1954, ch. 1169, 68 Stat. 1044, and the Displaced Persons Act of 1948, ch. 647, 62 Stat. 1009, amended by Act of June 16, 1950 (repealed 1957) all followed considerable debate about the wisdom of admitting refugees outside of the ordinary quota system. Similar, but generally less intense debate accompanied the numerous instances of legislative parole granted before and after the passage of the 1965 Act.

130. According to one commentator:

A Columbia Broadcasting System-*New York Times* [1980] poll . . . found that almost half of those sampled nationwide opposed admitting more Cubans. Lack of jobs was a primary reason. The State Department received calls and telegrams that ran heavily against the boatlift, and Senator Lawton Chiles (Democrat-Florida) reported an 80 percent negative constituent response.

Bach, *The New Cuban Immigrants: Their background and Prospects*, MONTHLY LAB. REV., Oct. 1980, at 39, 39-40, reprinted in HOUSE COMM. ON THE JUDICIARY, 96TH CONG., 2D SESS., OVERSIGHT HEARINGS ON CARIBBEAN MIGRATION 305, 305-06 app. 5 (Comm. Print 1980).

A Roper Poll conducted in September 1979, indicated substantial public support for lowering Indochinese admissions (46% approved), rather than raising them (12% approved); the primary reason for this support was the notion that refugees were “too great an economic burden” (37% agreed) and that the “needy in our country” should be helped first. See 125 CONG. REC. S12,905 (daily ed. Sept. 19, 1979).

131. For example, Tracy Vorhees, who was in charge of the Hungarian resettlement program between 1956 and 1957, hired a private public relations firm to “sell” Hungarians

played a dominant role in eliciting support for the admission of large numbers of Indochinese.¹³² Significantly, until 1979-80, when the flow of Cambodian refugees began in earnest, a key part of the public relations effort—and the part emphasized most by successive administrations—centered on granting asylum to “freedom fighters” and permitting opponents of communism to “vote with their feet.” This was also the characteristic response to Cuban migrants entering the United States from late 1959 until May 1980.¹³³ President Carter’s “open arms” remarks of May 5, 1980 strike many of us as ill-advised in retrospect;¹³⁴ yet these remarks arose

to the United States.

132. For example, an elaborate public relations campaign in 1980, conducted by a number of private voluntary organizations (PVOs) under the umbrella of the Cambodian Crisis Center, generated thousands of pages of advertisements, editorials, news stories, and information circulars apprising the American public of the plight of the Cambodians. In 1979, a similar campaign launched by a number of PVOs generated widespread publicity about the Vietnamese “boat people.” Campaigns such as these contributed to the United States willingness to admit substantial numbers of Indochinese refugees. The Carter administration’s decision in June, 1979, to double the Indochinese admission rate from 7,000 to 14,000 per month clearly was influenced by the public’s reaction to the plight of the “boat people.” See *Refugee Hearings*, *supra* note 122, at 39. Continuing commitment to high—although substantially reduced—refugee admissions levels from Indochina has undoubtedly been influenced by the extensive and generally sympathetic coverage that Cambodian and Laotian refugees have received in the national and international press.

133. The author has reviewed all of the Miami newspaper coverage of the various Cuban migrations to the United States since the Castro regime took office. Not all of the stories dealing with those arriving before the Mariel refugee crisis ascribed political motives to the migrants; indeed, during the later years of the “Freedom Flights,” which continued from 1966 into the early months of 1972, editorial opinion and news stories alike expressed strong reservations about continuing large-scale flow, partly because the flights supported an immigration policy not clearly motivated by humanitarian concerns. See, e.g., *Cuban Airlift: Si or No?*, *The Miami Herald*, Aug. 22, 1970, at 8A, col. 3; *Airlift: Castro Gets Rid of Foes, Aged*, *The Miami Herald*, Mar. 20, 1970, at 1B, col. 2; *It’s Time to Ground the Airlift from Cuba*, *The Miami Herald*, Feb. 18, 1969, at 6A, col. 1. (editorial).

Despite these express reservations about allowing the flow of refugees from Cuba to continue, the great bulk of the news coverage prior to the Mariel influx was positive. This demonstrated a general willingness to regard Cubans—and particularly those fleeing in small boats—as people suffering under Castro and deserving of special treatment. Thus, two weeks before the Mariel crisis began, the Mayor of Miami indicated that he would welcome to the United States any Cuban refugees fleeing their homeland. *Commissioners Join Cry for U.S. To Accept Cubans*, *The Miami Herald*, Apr. 7, 1980, at 8A, col. 1 (“Either we admit [the Cubans] or we take down the Statue of Liberty.”).

134. In a press conference on May 5, 1980, President Carter first stated his administration’s position on the Mariel influx, which had begun on April 21. In response to a reporter’s question, he indicated that over 10,000 Cubans had already arrived by sea, that “literally tens of thousands of others will be received in our country with understanding,” and that “we’ll continue to provide an open heart and open arms to refugees seeking freedom from communist domination and from economic deprivation, brought about primarily by Fidel Castro and his government.” *League of Women Voters—Remarks and a Question-and-Answer Session*, 16 WEEKLY COMP. PRES. DOC. 828, 835 (May 5, 1980).

from the same context that prompted President Johnson to welcome Cuban refugees at the foot of the Statue of Liberty,¹³⁵ and prompted the major weeklies to applaud the new "freedom flotilla."¹³⁶

Emphasizing the political reasons for the typical pre-1980 refugee's flight did not entirely defuse resistance to large-scale flow. It did, however, tip the balance of influence in favor of certain ethnic groups that supported increased admissions levels, such as the Jewish-American lobby, which advocated increased migration from the Soviet Union, and the Cuban-American lobby, which advocated more migration from Cuba. It also strengthened the position of such humanitarian groups as the International Rescue Committee and the Cambodian Crisis Center, which were able to organize highly visible support for particular refugee groups by enlisting the aid of church leaders, business magnates, bankers, and even labor union officials. The characteristic resistance to large-scale refugee migrations manifested itself in the form of legislative inertia. This inertia evolved over the course of time from a negative political strategy to something more cynical—an institutional abdication of power for the purpose of avoiding political responsibility. For example, when Congress refused to enact special legislation, Eisenhower resorted to his parole power to admit Hungarian refugees in 1956.¹³⁷ Congress's response to Eisenhower was negative; it waited for over a year before enacting follow-up legislation to adjust the status of those who had been paroled.¹³⁸ Subsequent decisionmak-

135. On Oct. 3, 1965, "speaking in the shadow of the Statue of Liberty," President Johnson announced that the United States would accept all Cubans wanting to escape and "seek freedom" in the United States." Semple, *U.S. to Admit Cubans Castro Frees; Johnson Signs New Immigration Bill*, N.Y. Times, Oct. 4, 1965, at 1, col. 2 (Int'l ed.); see also *Signing of the Immigration Bill*, 1 WEEKLY COMP. PRES. DOC. 364 (Oct. 11, 1965).

136. Thus, in the initial stages of its coverage of the Mariel boatlift, *Newsweek* described the Cuban influx as a "voyage to freedom." *Sea Lift from Cuba to Key West*, NEWSWEEK, May 5, 1980, at 59. But see *The Cuban Tide is a Flood*, NEWSWEEK, May 19, 1980, at 29; *Open Heart, Open Arms*, TIME, May 19, 1980, at 14 (rapid turnabout in attitude as number of arrivals grew unmanageable, and reports of misfits among the Mariel refugees began).

137. From the beginning of the Hungarian refugee crisis, President Eisenhower was convinced of the necessity of acting quickly; as a consequence, he was willing to see "the tough restrictive Refugee Relief Act . . . bent, if not broken." *Eisenhower Acts—Plans Special Steps to Speed Machinery of Refugee Law*, N.Y. Times, Nov. 9, 1956, at 1, col. 4. He thus began the practice of "paroling" refugees into the United States under the limited authority granted him by INA § 212(d)(5), 8 U.S.C. § 1182(d)(5) (1952), pending amendment of the immigration laws to legitimize the Hungarian admissions. Attorney General to Parole Refugees Until Congress Acts, 36 U.S. DEP'T ST. BULL. 96 (Jan. 21, 1957).

138. Despite Eisenhower's request in his State of the Union address for Congress to regularize the status of the Hungarians, legislation for this purpose was not passed until

ing—including that affecting those now labeled as “Cuban-Haitian entrants”—has followed a similar pattern: the President admits significant numbers of refugees outside of the generally-applicable statutory scheme, and Congress ratifies the President’s decision after the fact through special legislation.¹³⁹

This scheme permitted Presidents to make decisions on broad foreign relations grounds (taking due regard of influential voices); at the same time, Congresses could discount their part in the process to constituents not enthralled with, yet not violently opposed to, large-scale refugee admissions. By linking parole admission to anticommunist sentiment, successive administrations managed to defuse restrictionist concerns. Yet, because these refugees entered the United States in the name of the “national interest” under reasonably controlled circumstances, their admission posed no seriously perceived political liability to the President. From a government perspective, then, the pre-1980 admissions policymaking process was effective, as long as the number of entering refugees did not overload the resettlement system, triggering broader public concern—and as long as the executive determination of national interest escaped serious challenge.

By 1979, however, serious strains on that process already were showing. A vision of “national interest” that regarded Cubans as welcome, but Haitians as automatically excludable, and that paid no real regard to the relative hardships and dangers members of each group faced if repatriated, was under attack. This attack was strengthened by the disparity between the refugee definition implicit in the “seventh preference” and the more liberal, nonideological definition promulgated by international law¹⁴⁰ and recognized by United States treaties.¹⁴¹ The entry of Indochinese

1958. Immigration and Nationality Act of 1958, Pub. L. No. 85-700, 72 Stat. 699 (codified as amended at 8 U.S.C. § 1255 (1976 & Supp. V 1981)).

139. See Scanlan, *supra* note 45, at 629-35, 631 n.123.

140. Article 1, § A(2) of the Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150, as modified by the Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, T.I.A.S. No. 6577, 606 U.N.T.S. 267, defines a refugee as [Someone who] owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

141. The United States acceded to the terms of the Protocol Relating to the Status of Refugees in 1968. 19 U.S.T. 6223, T.I.A.S. No. 6577, 189 U.N.T.S. 150.

refugees into the United States at the rate of 14,000 per month put considerable strain on the resettlement process. This strain was aggravated by the ad hoc, executive-dominated refugee admissions pattern that had been established, since admissions decisions frequently were made before federal funding commitments were in place.¹⁴² Congress was growing more restive about the continued use of "parole" to admit large groups of refugees, both because it conferred a power on the executive not statutorily intended¹⁴³ and because it helped defeat coordinated planning for resettlement purposes.¹⁴⁴ The Act that emerged on March 17, 1980¹⁴⁵ attempted to meet these concerns. For example, the Act liberalized the definition of a refugee;¹⁴⁶ attempted to restrict the use of executive parole;¹⁴⁷ provided for formal "consultation" between the executive and legislative branches in arriving at a yearly "allocation" for refugee admissions;¹⁴⁸ and provided ongoing authorization for substantial federal aid to refugees, largely through reimbursement to

142. Prior to the passage of the Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (codified as amended in scattered sections of 8 U.S.C.), Congress used ad hoc legislation to finance the federal government's share of refugee resettlement costs. This legislation was responsive to the needs of particular refugee groups, the members of which previously had been admitted as "parolees." Of these ad hoc acts, the two most important were the Indochina Migration and Refugee Assistance Act of 1975, Pub. L. No. 94-23, 89 Stat. 87 (codified as amended at 22 U.S.C. § 2601 (1976 & Supp. V 1981)); and the Migration and Refugee Assistance Act of 1962, Pub. L. No. 87-510, 76 Stat. 121 (codified as amended at 22 U.S.C. § 2601 (1976 & Supp. V 1981)). These acts provided benefits to particular refugee groups and offered little assistance for new groups of parolees or others seeking refugee status and aid not covered by their original or amended terms.

143. See *Refugee Act of 1979: Hearings on H.R. 2816 Before the Subcomm. on Immigration, Refugees, and Int'l Law of the House Comm. on the Judiciary*, 96th Cong., 1st Sess. 20-22 (1979) (statement of Griffin Bell, Attorney General).

144. See S. REP. No. 256, 96th Cong., 1st Sess. 2-3, 10-13, reprinted in 1980 U.S. CODE CONG. & AD. NEWS 142-44, 150-53.

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

146. Refugee Act of 1980 § 201(a), 94 Stat. 102 (Supp. 1981) (adding INA § 101(a)(42), 8 U.S.C. § 1101(a)(42) (Supp. V 1981)); *id.* 203(c), 94 Stat. 107 (repealing the "seventh preference").

147. Refugee Act of 1980 § 203(f), 94 Stat. 107-08 (amending INA § 212(d)(5), 8 U.S.C. § 1182(d)(5)). This section restricts the Attorney General's authority to "parole" refugees by imposing the following limitation:

The Attorney General may not parole into the United States an alien who is a refugee unless the Attorney General determines that compelling reasons in the public interest with respect to that particular alien require that the alien be paroled into the United States rather than be admitted as a refugee under [8 U.S.C. § 1157].

Id.

148. Refugee Act of 1980 § 201(b), 94 Stat. 103 (adding INA § 207(d)-(e), 8 U.S.C. § 1157(d)-(e) (Supp. V 1981)).

the states for welfare and social service costs incurred.¹⁴⁹

With the passage of the Refugee Act of 1980, the United States began a new stage in the regulation of refugee flow, marked by increased intergovernmental coordination, executive accountability, and congressional input into admissions decisions. By expanding the refugee definition,¹⁵⁰ Congress broadened the universe of potential entrants. Yet, by instituting a formal allocation process for determining refugee numbers and countries of refugee origin, and by establishing a 50,000 entrant per year baseline refugee flow figure,¹⁵¹ Congress also asserted its ability to regulate the number of yearly admittees, thus maintaining—and indeed strengthening—the illusion of numerical control. For example, while the Act was in committee, its proponents asserted that it would provide for better regulation and coordination of flow,¹⁵² and that, despite its lack of an overall cap on refugee admissions, the Act would not increase refugee flow above average post-World War II levels, except during periods of emergency.¹⁵³ Whether the Act could be used to reduce refugee flow below historically countenanced levels, however, was not considered.

VII.

During the first year of the new Refugee Act the government allocated 234,500 refugee slots¹⁵⁴—a figure considerably in excess

149. See Refugee Act of 1980 § 311(a), 94 Stat. 110-16 (adding INA §§ 411-414, 8 U.S.C. §§ 1521-1524 (Supp. V 1981)).

150. See *supra* note 146.

151. INA § 207(a)(1), 8 U.S.C. § 1157(a)(1) (Supp. V 1981), provides that, except in cases of certain "unforeseen emergency refugee situation[s],"

[T]he number of refugees who may be admitted . . . in fiscal year 1980, 1981, or 1982, may not exceed fifty thousand *unless* the President determines, before the beginning of the fiscal year and after appropriate consultation . . . that admission of a specific number of refugees in excess of such number is justified by humanitarian concerns, or is otherwise in the national interest.

Id. (emphasis added). This provision, added by the Refugee Act of 1980 § 201(b), 94 Stat. 103, was intended to provide for "a normal flow of refugees" based on admission averages since 1956. See S. REP. NO. 256, 96th Cong., 1st Sess. 5-6, reprinted in 1980 U.S. CODE CONG. & AD. NEWS 145-47. Although this section permits the President to allocate fewer than 50,000 annual refugee slots, the likelihood of this occurrence was not seriously addressed by either house. After fiscal year 1982, all refugee admission levels are governed by the "consultation" provisions, and all reference to the 50,000 "normal flow" figure is dropped.

152. H. REP. NO. 608, 96th Cong., 1st Sess. 1, 6 (1979); S. REP. NO. 256, 96th Cong., 1st Sess. 6 (1979), reprinted in 1980 U.S. CODE CONG. & AD. NEWS 146.

153. See *supra* note 151.

154. 126 CONG. REC. S3961 (daily ed. Apr. 21, 1980).

of any previous levels of refugee flow. During the second year, the allocation was slightly reduced, to 217,000 slots.¹⁵⁵ The willingness of the executive branch to admit refugees at record levels, of Congress to accede to these admissions levels, and of both branches to make no specific tie-in of refugee flow to overall migration levels, was due to the following stated and unstated suppositions.

First, a genuine and creditable humanitarian impulse led to the adoption of the Refugee Act of 1980. It was deemed inappropriate, therefore, to set rigid "quota" limits that would bar those fleeing persecution. Second, foreign policy considerations, such as those governing our relations with Thailand, made rigid quotas unacceptable to the Carter administration.¹⁵⁶ Third, Congress genuinely believed that the traditional mode of regulating refugee flow through countries of first asylum remained viable. As a result, Congress did not seriously consider the possibility that the United States would become a country of first asylum for tens of thousands of entrants each year.¹⁵⁷ Fourth, because opposition to high levels of refugee flow was broad, but not deep, and because organized pressure groups, including some representing significant ethnic constituencies, intensely supported such high levels, there appeared to be little political risk in continuing to admit large numbers of refugees. Fifth, policymakers regarded problems as lo-

155. 126 CONG. REC. S12,988 (daily ed. Sept. 19, 1980).

156. The sorts of foreign policy concerns I have in mind were effectively summarized by Professor Astri Suhrke in her testimony before the Subcommittee on Immigration, Refugee and International Law on Sept. 16, 1981:

The first-asylum countries—principally the ASEAN countries—could probably tolerate some reduction in the U.S. resettlement rate, provided—and this is important—provided they are confident that the camp population will be drawn down. Substantial reductions in the U.S. intake—especially if new arrivals keep coming in large numbers—will inevitably create pressures in the ASEAN countries to take drastic measures. They may well push people back to sea.

U.S. Refugee Program: Oversight Hearings Before the Subcomm. on Immigration, Refugees, and International Law of the House Comm. on the Judiciary, 97th Cong., 2d Sess. 190 (1981).

157. That Congress did not foresee substantially increased levels of direct flow of asylum-seekers is amply illustrated by the special adjustment of status provision for "asylees" incorporated in the Refugee Act of 1980 § 201(b), 94 Stat. 106 (adding INA § 209(b), 8 U.S.C. § 1159(c) (Supp. V 1981)). This section permits only 5,000 persons granted asylum each year to adjust their status to that of "permanent resident." *Id.* No such limit applies to out-of-country refugees admitted under the provisions of INA § 207, 8 U.S.C. § 1157 (Supp. V 1981). In an interview with Gilbert D. Loescher and me on May 18, 1980, an officer in the State Department who helped draft the Refugee Act of 1980 indicated that this 5,000 figure was regarded as "liberal" because it was in excess of the number of asylum-seekers who had made application in any previous year. Later interviews with other State Department officers and officers of the Immigration and Naturalization Service indicated that there were substantially more than 5,000 pending asylum claims at the beginning of 1980.

cal, rather than national in scope, and unconnected to the problems associated with the unregulated flow of immigrants across the southern border, which also were regarded as predominantly local. Finally, the Act's new provisions for the ongoing authorization of federal aid were regarded as likely to alleviate existing resettlement problems. Each of these suppositions was seriously challenged by the massive Mariel boatlift that began in April 1980, and the simultaneous arrival of over 10,000 Haitian "boat people."

Little need be said concerning the humanitarian goals of the Refugee Act of 1980 and their fate. Contrary to much of the usual rhetoric, the United States history of admitting immigrants expressly for humanitarian purposes is not a long and glorious one. Prior to the end of World War II, we did little as a nation to provide a safe haven for those threatened with persecution or death because of their race, religion, nationality, or political views.¹⁵⁸ Since World War II, however, the United States has joined with other western industrial democracies and many of the more generous Third World countries in providing refuge. This has partially been inspired by United States guilt over both its refusal to aid Jews fleeing Hitler's Germany and its responsibility for at least some of the hardships suffered by hundreds of thousands of Indochinese, especially those fleeing Cambodia. The Refugee Act of 1980 was designed, in large part, to bring the United States criteria for refugee admissions more fully in line with international standards.¹⁵⁹ Previous provisions for granting permanent residence or immigrant status to aliens entering the United States as a country of first asylum left a great deal of discretion in the hands of the immigration authorities. That discretion was inconsistent with the 1967 Protocol Relating to the Status of Refugees,¹⁶⁰ and was often

158. The most penetrating accounts of the United States pre-1948 refugee admissions policy are those dealing with the United States response to the Jewish refugee population in Europe during the Nazi era. See, e.g., A. MORSE, *WHILE SIX MILLION DIED: A CHRONICLE OF AMERICAN APATHY* (1968); D. WYMAN, *PAPER WALLS: AMERICA AND THE REFUGEE CRISIS: 1938-41* (1968). For a summary of the United States refugee admissions policy from 1917 to the present, see Scanlan, *The Roots of Current Refugee Asylum Policy*, in U.S. IMMIGRATION POLICY AND THE NATIONAL INTEREST (Staff Report), *supra* note 5, at 165 app. C.

159. See S. REP. No. 256, 96th Cong., 1st Sess. 4, *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS 141, 144.

160. 19 U.S.T. 6223, T.I.A.S. No. 6577, 606 U.N.T.S. 267. This inconsistency resulted in significant litigation, most of which was decided in favor of the Immigration and Naturalization Service, which had argued that the more limited provisions of INA § 243(h), 8 U.S.C. § 1253(h) (1976) (prior to the 1980 amendments) took precedence over article 33 of the Convention, as incorporated in the 1967 Protocol Relating to the Status of Refugees. See Pierre

exercised arbitrarily. At least for these asylum seekers, the Refugee Act of 1980 depoliticized the admissions process and provided them with more absolute protection.

In the aftermath of Mariel, some legislators have attempted to bring asylum seekers within an overall numerical limit.¹⁶¹ More importantly, currently proposed legislation significantly devalues the importance of international humanitarian standards. For example, the Reagan administration has provided legislation that would make the granting of asylum a completely discretionary act.¹⁶² This proposed legislation also would deprive asylum seekers of rudimentary due process, in direct contravention of international law.¹⁶³ Concern over numerical control, in other words, would justify in the Reagan administration's eyes both the repeal of some of the most important provisions of the Refugee Act of 1980 and behavior that is totally unacceptable under international law. Thus, for ex-

v. United States, 525 F.2d 933 (5th Cir. 1976); *In re Dunar*, 14 I. & N. Dec. 310 (Bd. Imm. App. 1973); cf. *Coriolan v. INS*, 559 F.2d 993 (5th Cir. 1977) (deportation order remanded for consideration in light of report of conditions in Haiti).

161. See, e.g., S. Con. Res. 94, 96th Cong., 2d Sess. (1980) (would place absolute limitation of 650,000 on fiscal year immigration irrespective of type of entrant).

162. See *supra* note 72.

163. Article 32(2) of the Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150, 174, provides,

The expulsion of [a refugee lawfully in the country of asylum] shall be only in pursuance of a decision reached in accordance with due process of law. Except where compelling reasons of national security otherwise require, the refugee shall be allowed to submit evidence to clear himself, and to appeal to and be represented for the purpose before competent authority or a person or persons specially designated by the competent authority.

Id.

Article 33(1) of the Convention prohibits the expulsion or return of any refugee, whether or not lawfully in the country of asylum, "in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion." *Id.* art. 33(1), 189 U.N.T.S. 176 (emphasis added). The Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, T.I.A.S. No. 6577, 606 U.N.T.S. 267, makes both provisions applicable to the United States.

At a minimum, international law as interpreted by the United Nations High Commissioner for Refugees (U.N.H.C.R.) requires that (1) asylum applicants be interviewed by individuals aware of the rights of refugees under international law; (2) they be given a "competent interpreter" and the right to contact a U.N.H.C.R. representative; (3) applicants refused refugee status be permitted an appeal, and a reasonable time to perfect their appeal; and (4) an applicant be permitted to remain in the country of asylum pending final disposition of the appeal. 33 U.N. GAOR Supp. (No. 12) para. 53(6)(e), U.N. Doc. A1321/121/Add.1 (1977), reprinted in UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS 46 (1979).

When asylum applicants are either interdicted at sea or summarily returned at the border, to the extent that automatic review of their rejected claims is curtailed, they will be denied the minimum protection provided by international law.

ample, the interdiction of Haitian vessels on the high seas, though in violation of international law, was technically legal under United States law. The Reagan administration's proposed "Immigration Emergency Act"¹⁶⁴ would reserve the right to interdict ships though it would refrain from doing so "except in the most compelling of circumstances."¹⁶⁵

It is both easy and morally necessary to criticize the Reagan administration's willingness to devalue a humanitarian response to refugees for the sake of expediency. Yet the reasons for this shift must be understood. The Mariel influx shattered the illusion that the United States can, under all circumstances, select its own refugees. It revealed, as no other event has, our proximity to a politically unstable part of the world capable of producing hundreds of thousands of refugees and displaced persons. It made the United States realize that it had become a place of first asylum, similar to Austria, Somalia, or Hong Kong. That revelation should not have been so shocking, since the situation had been brewing for a long time. At the latest, it can be traced back to Castro's takeover in Cuba, and the nascent boatlift from the harbor of Camorica that was prevented only by a negotiated agreement permitting a series of freedom flights that brought more than 250,000 Cubans to the United States over the next several years. Iranian and Ethiopian students have sought political asylum in the United States for years; significant numbers of Haitians have sought asylum since at least 1976. Tens of thousands of Nicaraguans were spared deportation from the United States in the late 1970's because of political turmoil back home. Perhaps 60,000 potential asylum applicants

164. Omnibus Bill tit. VII.

165. Document accompanying letter of transmittal of Omnibus Immigration Control Act of 1981 from Office of the Attorney General to Vice President Bush and Speaker of the House, Representative O'Neill 8 (Oct. 20, 1981).

There are customary international law limitations which restrict the ability of the United States to interdict foreign flag vessels absent the consent of the foreign flag state As a matter of domestic law, this emergency legislation would thus permit the halting of a foreign flag vessel, in the absence of foreign state approval, if there was reasonable suspicion that the vessel was transporting visaless aliens to the United States in violation of our civil or criminal laws. Such action would, however, be inconsistent with international law, and it is not anticipated that the United States would violate those customary rules . . . except in the most compelling of circumstances.

Id.

The "customary rules" referred to above are in fact rules of law to which the United States has acceded through treaty. See Convention on the High Seas, Apr. 29, 1958, arts. 2, 22-23, 13 U.S.T. 2313, T.I.A.S. No. 5200, 192 U.N.T.S. 82.

were on file when the Refugee Act of 1980 was passed.¹⁶⁶ Yet most of these applicants were invisible people, widely dispersed, and had received little publicity. When Congress passed the Act, it was probably unaware of the existence of the great majority of these applicants. The Mariel influx created a highly visible population of asylum seekers. It changed the whole context of refugee decision-making, bringing it into the mainstream of immigration policy.

This change was attributable: first, to the size and speed of the flow; second, to public perception of its nature; third, to its intense, localized impact; and fourth, to the broader equity concerns it raised. Approximately 130,000 Cubans arrived in South Florida in five months; 88,000 arrived in May of 1980 alone.¹⁶⁷ These refugees arrived in an area badly torn by interethnic suspicions and strife; an area where the black community was seething, conflicts between the Anglo and Hispanic communities had erupted into a bitter fight over bilingualism, and the poor and uneducated of all races and nationalities were having an increasingly difficult time finding jobs and affordable shelter. The immensity of the flow quite simply overwhelmed the capacity of the community to cope. Difficulties were visible for all to see. The housing saga was perhaps the most dramatic and the most publicized. The spectacle of hundreds of refugees lodged in the Orange Bowl, lodged in tents under the interstate overpass, or lodged in resort hotels in Miami Beach illustrated the proposition that these were people for whom we had no use.¹⁶⁸ The concurrent spectacle of hundreds of Haitians incarcer-

166. Internal memoranda of the Immigration and Naturalization Service reported 19,000 pending asylum claims as of November 30, 1979. This figure did not include tens of thousands of asylum claims filed by Iranians, Nicaraguans, and Ethiopians with respect to whom the Carter administration was taking no official action, or was granting "extended voluntary departure." Interview with Harry J. Klajbor, former Deputy Assistant Commissioner of Adjudications, Immigration and Naturalization Service (June 5, 1980).

167. According to the State Department's Cuban-Haitian Task Force, as of June 1, 1980, 117,572 Cubans had arrived in the United States, up from 7,665 as of April 30, 1980. CUBAN-HAITIAN TASK FORCE, A REPORT OF THE CUBAN-HAITIAN TASK FORCE 101, 104 (1980) [hereinafter cited as CUBAN-HAITIAN TASK FORCE REPORT]. Later estimates from other sources suggest that the actual figures for May 1980 were slightly higher than this.

168. In using the phrase "for whom we had no use," I am being purposely callous. Mario Rivera, a former student, recently brought to my attention the view of Alejandro Portes that "factually unfounded media allegations during the Liberty City riots of 1980, [attributing the motive for] violence by black Americans in large part [to] the Cuban exodus, [was] part of an effort to turn the tide of public opinion against a migration that was economically and politically dysfunctional." M. Rivera, *An Evaluative Analysis of the Carter Administration's Policy Toward the Mariel Influx of 1980*, at n.96 (Dec. 1982) (unpublished) (information drawn from presentations by, and conversation with, Professor Alejandro Portes). I do not know what motivated such press and television coverage, which was fortunately minimal.

ated in an abandoned Nike missile site illustrates the point even more graphically.

Much of the backlash associated with the Cuban and Haitian influx has been prompted by the view that those who arrived were "dysfunctional" people, i.e., not readily assimilable into the labor market or society generally. This view was strengthened by reports that a percentage of the Cuban migrants were criminals and mental defectives selected by Castro for expulsion, rather than relatives of Cuban-Americans voluntarily seeking freedom or family unification. Qualitative considerations, which historically have been as significant as quantitative concerns, spurred restrictionist sentiment. Well-publicized difficulties in the temporary resettlement camps established in Florida, Arkansas, and Wisconsin also contributed to the negative public image of the new arrivals.

It is unlikely that the Mariel influx, once it began in force, could have been handled in a manner that would have obviated its impact. In retrospect, it is clear that stronger steps should have been taken to control the flow. Negotiations with Castro for an orderly departure program were singularly ineffective. Federal agencies, such as the Immigration and Naturalization Service and the Coast Guard were slow in announcing their intention to enforce United States immigration law.¹⁶⁹ It is also clear that the Carter administration's delay in supporting both federal reimbursement of state and local expenses¹⁷⁰ and federal funding of governmental

169. In the early days of the Mariel boatlift, the Coast Guard, rather than actively seeking out United States-based boats sailing to Cuba to pick up refugees, issued sailing instructions to the captains of these vessels so that the roundtrip journey could be accomplished easily. *Only Imagination Limits Cuban Exodus*, *The Miami Herald*, Apr. 23, 1980, at 1A, col. 1. Not until May 14, 1980, after the arrival of some 80,000 Cubans, did President Carter order the interception of boats. Remarks to Reporters Announcing Administration's Policy Toward the Refugees, 1980-81 PUB. PAPERS 912, 913-14 (May 14, 1980). The Coast Guard established its "blockade" on May 29, 1980, exactly one month after the first vessel departed Mariel Harbor. CUBAN-HAITIAN TASK FORCE REPORT, *supra* note 164, at 103.

170. On August 5, 1980, Senator Kennedy introduced, by request, an administration bill dealing with Cuban-Haitian entrants. See S. 3013, 96th Cong., 2d Sess., 126 CONG. REC. 10,825 (1980). That bill provided for the reimbursement of 75% of local expenditures for cash and medical services. *Id.* § 4(b). At the same time, Senator Kennedy introduced amendment No. 1962, his own substitute for the administration's bill; this amendment would have treated Cuban and Haitian entrants as refugees for the purposes of the public assistance provisions of the 1980 Refugee Act. See 126 CONG. REC. 10,829 (1980). A proposal similar to Senator Kennedy's eventually was enacted as title V (the "Fascell-Stone Amendment") of the Refugee Education Assistance Act of 1980, Pub. L. No. 96-422, 94 Stat. 1799, 1809-10 (1980). Informal administration support of the Fascell-Stone approach, which was totally at variance with the administration's prior position, emerged slowly, but was apparent by late August or early September.

agencies¹⁷¹ immensely aggravated the resettlement problem. Yet, aid, however necessary to the institutions handling refugee flow, is by no means a panacea. If the federal government had provided full medical and welfare benefits, the immediate problems of cities like Miami might have been alleviated,¹⁷² but the national backlash arising from the current concern over "equity" would have intensified. These "equity issues" are paradoxical, since they reflect a distrust of governmental largesse and "the welfare state" at a time when millions of traditionally hard-working, responsible people are incapable of finding jobs, and must rely on government benefits to survive. Recent polls suggest that this paradox is understood by a large percentage of the American people, and that there is little public support for further general welfare cuts.¹⁷³ That general sentiment, however, probably does not extend to those who are regarded as taking advantage of the system.

Refugees, like "back door" migrants, are often regarded as taking advantage of the United States generosity. This is because public attention tends to focus more on the expenses of feeding, caring for, and educating them, than on their motives for leaving their homeland, the United States reasons for accepting them, or the possible contributions they can make to American society. Miami's concerns about how to deal with thousands of new Spanish-speaking school children¹⁷⁴ is similar to the concern Texas expressed when it refused to allocate state aid to local school districts for the purpose of educating undocumented aliens.¹⁷⁵ Miami's concern is more understandable; in Texas, regional economic interests have been largely responsible for a federal border policy that has consistently encouraged "back door" migration. The benefits of

171. Interviews with officials of the Department of Health and Rehabilitative Services of Florida, in Tallahassee and Miami, Florida (June 1982).

172. *Id.*

173. In a recent *New York Times*/CBS poll, respondents rejected by a two-to-one margin further reductions in federal aid programs designed to aid the poor, such as Aid to Families with Dependent Children and Food Stamps. Yet a majority of those who expressed an opinion thought that existing federal programs encouraged welfare dependency. *Reagan Evoking Rising Concern, New Poll Shows*, *N.Y. Times*, Mar. 19, 1982, at 1, col. 5.

174. From the earliest period of large-scale Cuban migration to Miami and Dade County, Florida, the most difficult problem confronting Dade County has been the education of large numbers of Spanish-speaking children who arrived unexpectedly. That problem is detailed in hundreds of newspaper articles appearing in *the Miami Herald* and *Miami News* from 1960 to the present.

175. TEXAS EDUC. CODE § 21.031 (Vernon Supp. 1981) barred state aid to local school districts for the education of children not "legally admitted" to the United States. In *Plyler v. Doe*, 102 S. Ct. 2382 (1982), the Supreme Court of the United States held that this statute violated the equal protection clause of the fourteenth amendment.

this policy have accrued largely to that state; therefore, it seems fair that Texas should bear the reasonable educational costs that are incidental to these benefits. But in the case of Florida, California, Washington, Oregon, New Jersey, Minnesota, and a number of other states, a national refugee policy has increased local welfare and social service costs for reasons bearing little relation to local interests. Under such circumstances, local resentment is likely to continue to burgeon, contributing in turn to continued refugee backlash.

VIII.

Despite severe refugee backlash, refugees are not likely to be excluded entirely. Foreign policy considerations and the power of special interest groups representing ethnic and humanitarian concerns are likely to keep the "executive window" at least partially open. Yearly refugee allocations will probably continue to fall, dipping below this year's 140,000,¹⁷⁶ but actual authorized admissions are not likely to be fewer than the 50,000 baseline figure in the Refugee Act of 1980.¹⁷⁷ By reducing refugee allocations further, some reduction in overall immigration will be achieved, although not enough to counteract the predictable increase from continued illegal crossings at the southern border. One essential concern here is that the United States will attempt to achieve further reductions by continuing to harass those seeking to enter the United States as a country of first asylum, and by returning individuals who genuinely fear persecution or death to regimes where their fears are likely to be realized.

This remains a distinct possibility, not because we seriously believe that Haitians, Salvadorans, or others entering the United States to escape intolerable conditions at home are likely to be deterred in large numbers (though if the camps we establish are harsh enough, that may be the result).¹⁷⁸ Rather, it is possible be-

176. See *supra* note 5.

177. Pub. L. No. 96-212, § 201(b), 94 Stat. 102, 103 (codified at 8 U.S.C. § 1157 (Supp. V 1981)).

178. No reliable evidence suggests that there has been any diminution in the number of Salvadorans entering the United States to seek refuge since the Reagan administration's detention policy was established. According to one report, "The Immigration Naturalization Service estimates that there are 400,000 to 500,000 Salvadorans living in the United States. Many, if not most, have entered the country since January 1980, when a civil war swept much of their homeland." Lindsey, *Salvadoran's Status at Issue on Coast*, N.Y. Times, June 26, 1982, at 9, col. 1.

This estimate, if correct, is considerably higher than any earlier estimate. On the other

cause the Mariel influx has underlined the fact that refugees are immigrants; public sentiment seems to demand in this present unfortunate time that immigrants be strictly limited. The pressures that produce refugees, like the pressure that produce economic migrants, make such limitation over the long run difficult, perhaps impossible. Revolutionary ferment is likely to continue in the Caribbean and Latin America. Our neighbors and allies are likely to continue to be hard-pressed by large populations of refugees and displaced persons they cannot support. We will find, therefore, that we can close our borders only at the peril of creating economic and political chaos in a region that arguably is vital to our national interests.¹⁷⁹ By maintaining the illusion of numerical immigration control, however, we are likely to continue to make public examples of unfortunate Haitians and Salvadorans, and to parade our determination to master the immigration problem by slashing the public benefits available to legally admitted refugees and undocumented asylum-seekers alike. By doing so, we will shift a greater burden to the few discrete areas where the great majority of refugees live.

Depriving Haitians and others of authorization to work in the United States produces no great social benefit. Instead, it strengthens the underground economy, adds to hidden welfare costs, and produces considerable misery. Current administrative cutbacks of refugee aid will produce more secondary migration and more backlash, but will not lead to true immigration control. The desirability of such control, and its extent, must be determined on the basis of a number of economic and political factors. The most important of these factors relate to continuing "back door" migration. Thus, the nation must take a hard look at its need for cheap migratory labor, at the effects that the continued importation of such labor are likely to have on the domestic workforce and on domestic conditions of employment, and on future population trends in the United States.

It is against considerations such as these that we must balance the interests of agriculture, the interest of millions of undocumented aliens already in the United States, and the foreign policy implications of a stringent border enforcement policy. It may prove necessary to work, as successive administrations have, toward the

hand, Haitian flow has slowed, which may be due as much to action by the Haitian government as to any steps taken by the United States government.

179. See Scanlan & Loescher, *Mass Asylum and Human Rights in American Foreign Policy*, 97 *POL. SCI. Q.* 29, 39 (1982).

multiple goals of better border control, carefully limited "temporary worker" programs, legalization of existing undocumented populations, and more effective employer sanctions. To do so fairly, with the full knowledge that none of these measures will insure complete numerical control, and that each entails substantial dangers of exploitation or overly intrusive governmental interference with the lives of citizens and residents, will prove difficult. In the face of burgeoning worldwide refugee populations and the coincidental backlash directed at all refugee flow, it will also be difficult to strike the proper balance in the annual allocations between generous admissions and the course of greatest political expediency.

Yet, failure to make these difficult decisions will not overcome either the perceived or the genuine problems associated with continuing large-scale immigration to the United States. Nor will a policy that turns asylum applicants into scapegoats suffice for very long. We would do better to stop blaming our immigration problems on groups such as the Salvadorans and Haitians and to stop laying the burdens of such migrants on state and local units of government. Better methods of evaluating the claims of those seeking refuge and attempts to improve and more generously integrate true refugees into American society and the American workforce by pursuing a truly national welfare and employment policy would help immeasurably to dissipate some of the negative myths of Mariel.