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The Glass Half-Full: A Rational/Radical Approach to Immigration Reform

Bill Piatt*

I. The Challenge

The problems we face in redirecting our immigration policies cannot be successfully addressed by a quick fix immigration “reform.” The legal, economic, sociological, political, racial, and moral issues are too complex and have been largely unresolved. As a result, it is unrealistic to expect our political leaders now to be able to huddle during a legislative session and come up with an easy solution that will satisfy the myriad of competing and conflicting concerns.

There is some good news, however. From the time of the founding of the republic, immigration concerns have ebbed and flowed and yet we have been able to create and maintain the most successful democracy in the history of the world. We hear urgent calls from all ends of the political spectrum for immigration “re-

form.” We have heard these same calls repeatedly throughout our history. They have arisen in response to economic downturns, perceived lack of assimilation by immigrant populations, in response to external conflicts and threats, or for the other reasons that drive the immigration debate.¹ The challenge now, as always, is to be able to respond to legitimate concerns without damaging or destroying what has enabled us to build a country which attracts more immigrants, with and without documentation, than any other country in the world. We do not want to overreact.

This is not to deny that we must continue to reexamine and refocus our efforts at improving our immigration laws. However, rather than thinking in simple terms of “reform” driven by the narrow political interest of one focus group or the

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1. In general, see BILL PIATT, *Immigration Law: Cases and Materials*, Ch. 1, (Michie 1994).

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other, we should approach this in a cautious manner. There are critical matters which need to be addressed as part of a comprehensive review. Our only real hope to reconstruct an equitable immigration policy in our national interest is to honestly and openly discuss, debate, and analyze the underlying and most often unspoken concerns at the heart of the immigration challenge. There will be no simple solutions. The issues are too important to be left only to discussion and resolution by elected officials. We cannot hope to meet these challenges if we cannot even discuss them in a rational and thoughtful manner. And, as unpleasant as it might be to some, we must be willing to concede that more often than not our system, while far from perfect, might actually be working. We continue to build a stable, secure democracy committed to the freedom of its citizens, and fair treatment for those who wish to live and work in the United States.

Consider how the very complex series of laws that we now seek to reform developed. They are not the result of a deliberative body making unified recommendations to the Congress. Rather, they are essentially the result of ad hoc reactions to actual or perceived dangers resulting from the movement, or in some cases, lack of movement of people into the United States.

Consider why these laws developed. People have always moved to improve their chances of survival. They will con-

tinue to do so. At some points in our history we have officially encouraged wide scale immigration to build our country and to secure its sovereignty. One of the reasons listed in the Declaration of Independence for armed rebellion against the British Crown is the limitation imposed by the King against immigration to the Colonies.² Thereafter, for the first 100 years or so of this country's existence, the laws matched the "Give me your tired, your poor, your huddled masses yearning to breathe free" inscription on the Statue of Liberty.³

Since the late 1800's however, we have officially discouraged wide scale immigration in order to guarantee our sovereignty. Beginning with laws which aimed to restrict Chinese immigration, through the National Origins Act in the 1920's, the Immigration and Nationality Act in the 1950's, amendments in the 1960's and the 1990's, the Immigration Reform and Control Act of 1986, and greater security measures enacted after September 11, 2001, we have assembled an incredibly complex system.

As a result, any new effort to "reform" immigration laws will have to deal with this huge hodgepodge, and more. Important legal enactments such as the 14th Amendment to the Constitution of the United States⁴, which did not originally seek to influence voluntary immigration to this country, would also have to be examined and "reformed" in order to enact

2. DECLARATION OF INDEPENDENCE, para. 9 (U.S. 1776).

3. Emma Lazarus, *The New Colossus* (1883).

4. U.S. Const. amend. XIV, § 1.

a truly comprehensive restructuring of American immigration law and policy.

Most of the calls for reform are not issued by individuals completely aware of the extent of immigration regulation and of its impact on American society. Rather, calls come from those with relatively narrow interests from all ranges of the political spectrum.⁵ These calls for reform focus on a few narrow areas, without fully considering the impact on the rest of the immigration law scheme or the rest of the American constitutional scheme for that matter. The following is a more rational approach to analyzing the areas where the calls for reform have been heard the loudest, followed by what some might consider a radical approach to immigration reform.

II. Hot Button Issues

1. Amnesty

No one knows for certain how many undocumented people currently reside in

the United States. The number might exceed 10 million⁶. Some argue that these individuals put an incredible strain on our health care and educational system.⁷ Others urge that these people do the work that Americans refuse to do.⁸ These workers do pay social security taxes although they will likely never benefit from the system;⁹ they pay taxes and spend the majority of their earnings in this country thus boosting the economy.¹⁰ What should we do about these people? “Reformers” from differing perspectives aggressively push alternatives ranging from the granting of universal amnesty for these people, to the physical detention and removal of them from our country.

Those who urge blanket amnesty probably damage their cause politically by conducting public demonstrations while draping themselves in the flag of

5. Judith Bernstein-Baker, *Citizenship in a Restrictionist Era: The Mixed Messages of Federal Policies*, 16 *TEMP. POL. & CIV. RTS. L. REV.* 367, 381–384 (Spring 2007).

6. B. Lindsay Lowell & Richard Fry, *Pew Hispanic Center, Estimating the Distribution of Undocumented Workers in the Urban Labor Force: Technical Memorandum to “How many undocumented: The numbers behind the U.S.-Mexico Migration Talks”* (2002), <http://pewhispanic.org/files/reports/6.1.pdf> (placing the number of undocumented workers in the labor force at 5.3 million); Jeffrey S. Passel et. al., *Urban Institute Immigration Studies Program, Undocumented Immigrants: Facts and Figures* (2004), <http://www.urban.org/publications/10000587.html> (concluding in 2004 that the total number of undocumented people exceeded 9.3 million).

7. *Federation for American Immigration Reform, The Costs to Local Taxpayers for Illegal or “Guest” Workers*, http://fairus.org/site/PageServer?pagename=research_localcosts.html (last visited Oct. 12, 2007); Jack Martin, *Federation for American Immigration Reform, Limited English Proficiency Enrollment and Rapidly Rising Costs*, http://www.fairus.org/site/DocServer/LEP_Special_Report.pdf?docID=1581 (last visited Oct. 12, 2007).

8. *Pew Hispanic Center, The State of American Public Opinion on Immigration in spring 2006: A Review of Major Surveys* (2006), <http://www.pewhispanic.org/files/factsheets/18.pdf>.

9. Shikha Dalmia, *Reason Foundation, Illegal Immigrants Paying a Lot More Taxes Than You Think* (2006), <http://www.reason.org/phprint.php4> (last visited Oct. 12, 2007).

10. Dalmia, *supra* note 24.

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another sovereign.¹¹ (Mexico, of course, enforces stringent immigration controls in its own right.¹²) Those who urge blanket detention and removal run the political risk of appearing to degrade and dehumanize humble people, the vast majority of whom are here to work and lead peaceful lives.

An analysis of whether to grant those without documentation some type of permission to remain could begin by addressing these issues:

- How many undocumented people are in this country?
- What are the costs/benefits of their presence?
- What would it cost to remove them (detentions, hearings, physical removal)?
- What indirect costs would be associated with such a removal effort (increased labor costs, consumer costs)?
- In what areas of the economy do we need more labor?
- What benefits might documented laborers experience by removal of undocumented workers (more jobs, higher pay)?
- Would the legalization of those at the lower end of the pay scale encourage their upward mobility, thus creating a vacuum which would draw others here illegally?
- Would the enactment of an amnesty program by itself draw

others here, who would enter illegally hoping that they would qualify for some future amnesty?

- What about the issue of fairness to those who have waited in line in other countries for the availability of a visa? Should amnesty include some of them as well? Or, is it fairer to those who are waiting in line to deny amnesty to those who chose to skip it?
- What was the experience with the amnesty provisions in the Immigration and Reform Control Act of 1986?¹³ What was the economic, social, and political impact, and what was the extent of fraud in the process?

Finally, we might consider the result if we choose neither to grant amnesty nor to pursue aggressively the detention and removal of the undocumented persons in our midst. We have created a system limiting legal immigration only to those who follow a very complicated set of rules and procedures. At the same time, we acknowledge that the human desire for physical survival and political freedom will draw people to our shores in greater numbers than our enforcement mechanisms will ever be able to handle. If those who come are strong enough and smart enough to evade our complicated scheme, keep themselves out of trouble, and maintain a low profile, they might avoid all but the most draconian enforce-

11. Amanda Lee Myers, Associated Press, Protestors Defend Carrying Mexican Flag (Apr. 6, 2006), http://breitbart.com/print.php?id=D8GQI66O4&show_article=1 (last visited Oct. 12, 2007).

12. Report for Congress (April 2006), Immigration Law Sanctions and Enforcement in Selected Foreign Countries, LL File No. 2006-02877, at 19–22.

13. S.1200, 99th Cong. (1986).

ment efforts. They would likely occupy the lower end of our economic spectrum, and would probably reduce the number of new positions available that otherwise would draw new immigrants. Although these workers would live in a legally uncertain status, their children born in this country would be U.S. citizens entitled to the full protection of the laws and the educational and social system in place here,¹⁴ At some point, depending upon labor demand, we might increase the non-immigrant work visas, and make these undocumented workers eligible to apply for some of them.

2. How Much Security and Enforcement?

In discussing amnesty, we deal with the issue of how we should treat those who are in this country without legal authorization. Other calls for reform typically focus on keeping out those who have no legal right to enter in the first place. Our borders are porous, in part because of their length. Our enforcement system is porous, and it is relatively easy to overstay a visa and disappear into the population. Once a person is here without authorization, it is difficult and costly to locate, detain, and remove that person

Without effective enforcement, the sovereignty of our nation and the physical safety of our people are threatened. We have the right to ensure that those who come here are committed not just to making a living, but to supporting our Constitution and laws. Yet a clamp down

of the magnitude which would be required to virtually seal off the country from illegal entry and remove immigration offenders would also jeopardize the existence of the constitutional democracy of which we are justifiably proud. These issues are not merely academic discussion points. If we are not able to prevent the entry of those who seek to kill us in terrorist attacks, we might not have a legal system left to reform.

An analysis of these issues should include the following:

- Assuming we cannot keep out all who seek to enter the country surreptitiously, how can we prioritize enforcement efforts to identify the most important threats?
- What physical and technological measures would be most effective at barring entry of the most dangerous aliens?
- What would be the measures of cost, not only in terms of their construction and maintenance, but in indirect terms considering the impact upon the economy and society?
- What steps would need to be implemented to supervise the presence of those in this country legally to ensure that they do not overstay their welcome?
- What impact would this scheme have on the civil liberties of citizens and non-citizens alike? Would we implement national identity cards, stricter employer

14. U.S. Const. amend. XIV, § 1.

scrutiny, surveillance devices and the like?

- How should the administrative and judicial systems be revised to maintain constitutional and statutory safeguards while providing a realistic effort to remove those with no legal right to remain?

3. Federalism

Assuming that we want to enforce our immigration laws, the issue arises as to what role should be played by the federal government, state governments, private groups, and individuals. Because immigration control has traditionally been viewed as a function of the protection of national sovereignty, it was decided early on that the control of immigration would be left exclusively to the federal government.¹⁵ Indirect attempts to regulate immigration, such as the imposition by San Francisco of a “Queue” tax¹⁶ (aimed at Chinese workers), or more recent local government attempts to exclude undocumented workers have been stricken as unconstitutional.¹⁷

Yet, court decisions have not ended the debate. Dissatisfied with the ineffec-

tive control of its borders, the state of Texas recently funded an extensive border control task force.¹⁸ This follows the efforts of other states bordering Mexico to join in a rebuke of federal failures to prevent unlawful border incursions. Private frustration over the lack of federal border enforcement has even led to the creation of The Minutemen¹⁹ and other private efforts to enforce the immigration laws and discourage illegal immigration.²⁰

On the other end of the spectrum, those who feel that the nation’s immigration laws are unjustly harsh have set up public and private efforts to undermine them. The City of New Haven, Connecticut recently announced that it was a sanctuary city.²¹ Private individuals and groups, including some churches, have openly offered “sanctuary” in defiance of federal immigration law.

Thus, it appears that few are willing to give the federal government the exclusive role in immigration control. Rather, borrowing the words of the late Jimmy Durante²², “Everybody wants to get into the act.” Reformers will have to determine how to develop an immigration system acceptable to enough of the body politic that local and private efforts won’t

15. See PIATT note 1, *supra*. See also *Nishmura Ekiu v. United States*, 142 U.S. 651 (1892).

16. See, e.g., *Ho Ah Kow v. Nunan*, 5 Sawy. 552, (C.C.D. Cal. 1897).

17. *League of United Latin American Citizens v. Wilson*, 908 F.Supp. 755 (1995).

18. Officer of the Governor Rick Perry, Border Security Plan for Texas, http://www.governor.state.tx.us/priorities/other/border/border_security/view (last visited Oct. 11, 2007).

19. The Minuteman Project, About Us, http://www.minutemanproject.com/organization/about_us.asp (last visited Oct. 11, 2007).

20. For a listing of many local anti-illegal immigration organizations see generally, The Minutemen Civil Defense Corps, MCDC Local Chapters, <http://www.minutemanhq.com/hq/local.php> (last visited Oct. 11, 2007).

21. Office of the Mayor, June 4, 2006 Press Release, <http://cityofnewhaven.com/Mayor/Press-Releases.asp> (last visited Oct. 11, 2007).

22. Eve Golden, Jimmy Durante- That Well Dressed Man, Films of the Golden Age, <http://www.filmsofthegoldenage.com/foga/1998/fall98/durante.shtml>, (last visited Apr. 06, 2008).

arise to undermine the scheme. Assuming that some local participation in immigration enforcement is desirable, discussions will have to center around how to avoid the unfair “double tax” burden placed on the taxpayers of the Border States. No one would seriously argue that each state or municipality should be free to develop its own immigration system, just as no one reasonably would argue that states or municipalities should print their own currency. The ultimate challenge will be to continue to convince our citizenry and those who seek to join us that we must respect and follow the rule of law in order to prevent chaos.

4. Citizenship by Birth

Although the enactment of the 14th Amendment was aimed at protecting the civil rights of recently freed slaves, the provision granting citizenship by birth in this country has become the focus of one aspect of the immigration debate.²³ Some express the concern that there is too great an incentive for individuals to enter illegally or overstay a visa in order to give birth to a child in the United States.²⁴ That child is a citizen by virtue of the

14th Amendment.²⁵ Then, the argument goes, that child is able to bring in other family members further rewarding the illegal behavior that brought the child’s parents or parent to the United States.²⁶

The suggestions of reform in this area are not new. Minority individuals faced years of litigation even after the ratification of the 14th Amendment in 1868 to establish with certainty that the provision means what it says.²⁷

More recently, academics have urged the reinterpretation of the 14th Amendment so as to preclude the automatic awarding of citizenship by birth to children whose parents are in this country illegally.²⁸ Still others support the view that even though children born in this country are citizens, the state can draw a distinction when considering the issue of public assistance, and treat citizen children of undocumented parents more harshly than the citizen children of citizen parents.²⁹ This author successfully represented a citizen child denied social service benefits by the state of Kansas, when Kansas denied assistance to the child for the sole reason that the child’s parents were not able to demonstrate their lawful presence in this country.³⁰

23. U.S. CONST. amend. XIV, § 1 (“All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.”).

24. Charles Wood, *Losing Control of America’s Future—the Census, Birthright Citizenship, and Illegal aliens*, 22 HARV. J.L. & PUB. POL’Y 465, 497 (1997).

25. U.S. CONST. amend. XIV, § 1.

26. Wood, *supra* note 52, at 494.

27. See for example, *Elk v. Wilkins*, 112 U.S. 94 (1884); *United States v. Wong Kim Ark*, 169 U.S. 649 (1898).

28. John C. Eastman, *Politics and the Court: Did the Supreme Court Really Move Left Because of Embarrassment over Bush v. Gore?*, 94 GEO. L.J. 1475, 1484 (2006).

29. See generally Bill Piatt, *Second Class Citizens in the U.S.A.: Children of Undocumented Parents*, 63 NOTRE DAME L. REV. 35 (1988).

30. *Fuentes v. White*, 709 F., Supp. 1026 (D. Kan 1989) (mem.).

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Many other such instances are likely not receiving public attention, because as many as 3 million citizen children might have a parent or parents in this country illegally.³¹

Denying citizenship by birth would appear to unjustly visit condemnation upon children for the wrongs of their parents³². On the other hand, most Western democracies do not recognize the right to acquire citizenship merely as a function of birth within a particular country³³. If we decide to make this change, the change should occur honestly and openly and not through the sophistry of reinterpretation of the 14th Amendment. Those advocating this reform should follow the constitutional process for amending the Constitution of the United States set out in Article V. They should obtain the approval of a two-thirds vote of both the House and Senate, and then obtain ratification by the legislatures of three-fourths of the states, if they truly wish to make life more difficult for children who had no voice in the location of their birth.

5. Black/Brown Tensions³⁴

Due in large part to immigration, it is generally accepted that Hispanics have

now surpassed African-Americans as the largest minority group in this country³⁵. The picture is not completely clear because it is not possible to pigeonhole human beings into narrowly defined racial, ethnic, or national origin groups. Many Hispanics can trace “Moorish” ancestry because of the occupation of Spain by Africans for centuries. The Spanish explorers brought this ethnic mix in their own blood, along with Africans, to their colonization of the New World. Many immigrants to the U.S. from the Caribbean speak Spanish and are the descendants of Africans who were brought as slaves to this hemisphere. Hence, the data regarding the numbers of Blacks and Hispanics is questionable. In any event, it is not clear why it is in anyone’s interest to try to pick a largest minority group.

The reality is that immigration pressures have added to the tensions between African-Americans and Hispanics, particularly in the competition for jobs at the lower end of the pay scale.³⁶ There is also a simmering cultural conflict between

31. Sonia Nazario and David Pierson, *Immigrant Activist Deported to Mexico*, L.A. TIMES, Aug. 20, 2007, at B1.

32. Piatt, *supra* note 57.

33. Patrick Weil, *Access to Citizenship: A Comparison of Twenty-Five Nationality Laws*, in *CITIZENSHIP TODAY: GLOBAL PERSPECTIVES AND PRACTICES*, 17-35 (T. Alexander Aleinikoff & Douglas Klusmeyer eds., 2001).

34. In general see BILL PIATT, *BLACK AND BROWN IN AMERICA: THE CASE FOR COOPERATION* (New York University Press 1997).

35. U.S. Census Bureau, *Nation’s Population One-Third Minority* (2006), available at <http://www.census.gov/Press-Release/www/releases/archives/population/006808.html>.

36. Teresa Watanabe, *Immigration Crusade Enlists Few Blacks*, L.A. TIMES, April 10, 2006, at A1.

these groups and communities.³⁷ One recent example is the public action in New Orleans to ban taco stands³⁸. A large influx of Latino workers assisting in the clean up efforts following hurricane Katrina have dramatically changed the demographics of New Orleans, and have brought differing cultural symbols including taco stands, to New Orleans. This has prompted African-American leaders to join with some Anglo leaders to ban taco stands. (No group has a monopoly on virtue or vice in any area, including the immigration debate. Many prominent Latinos decry the presence of large numbers of undocumented Hispanics in their midst as well.³⁹) Occasionally the tensions between Blacks and Latinos have reached the point of violence.⁴⁰ The bottom line is that any attempt to engage in immigration reform is going to have to deal with the sensitive nature of inter-ethnic relations, including particularly the growing tension between African-Americans and Hispanics.

6. Official English Provisions

No one would seriously challenge the notion that to be successful in the United States one must speak English and speak it well.⁴¹ However, that is not to say that individuals should be denied the ability to use a second or third language in their dealings with each other, in commerce, and perhaps even in certain aspects of governmental relations. This country has never had an official language.⁴² Recent concerns relating to the influx of Hispanic immigrants have led to attempts to enact such statutes.⁴³ Although English proficiency is generally required to obtain permanent resident alien status,⁴⁴ and even though a number of states and municipalities have passed official English statutes,⁴⁵ there continues to be an ongoing debate about the role of language in the assimilation or non-assimilation of those who would enter our country.⁴⁶

III. Don't Throw the Baby Out with the Bathwater

The discussion to this point is not an exclusive listing of the matters which

37. Miguel Bustillo, Big Easy in an Ethnic Food Fight, *SOUTH FLORIDA SUN SENTINEL*, August 12, 2007, at F1.

38. *Id.*

39. Thaddeus Herrick, Most Hispanics in Poll Support Illegal-Immigration Crackdown, *HOUSTON CHRONICLE*, November 11, 1994, at A1.

40. Richard Webster, N.O. – Area Race Relations Deteriorate Despite Pace of Recovery, *NEW ORLEANS CITY BUSINESS*, July 16, 2007, available at <http://www.neworleansbusiness.com/viewStory.cfm?recID=19563>.

41. Bill Piatt, *Toward Domestic Recognition of a Human Right to Language*, 23 *HOUS. L. REV.* 885, 898 (1986).

42. BILL PIATT, *¿ONLY ENGLISH? 1* (Univ. N.M. Press 1990).

43. *Id.* at 20.

44. Immigration and Nationality Act of 1952, 8 U.S.C. § 1423 (1952).

45. See PIATT, *supra* note 76, at 21.

46. See PIATT, *supra* note 76, at 28–30.

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would need to be addressed in any effort at immigration reform. Rather, these are the issues most often raised by those calling for reform. Many times the calls focus on hot button issues to charge up the political base of the reform advocate. The emotional calls then generate counterattacks, and the resulting conflict ends up being addressed by shouts on talk radio, television, and in marches in the streets. Democracy is messy, of course, but it does not have to be counterproductive.

Here is a radical suggestion for a starting point for true reform: Instead of shouting at each other about what is wrong with the immigration picture, let's figure out first what is right about it. This approach is not going to satisfy the blood lust of those who would humiliate and punish the most vulnerable who seek only to better their own lives and those of their families by immigrating to this country. Nor would it satisfy those who hold such deep seated resentment against this country that they would invoke the symbol of another sovereign on this soil in an angry denunciation of this nation. The approach I suggest would not serve the short term political interests of demagogues.

What it might do, however, is set the tone for a revision, where needed, of an immigration system that, like all other human institutions, is not perfect. It could serve to better educate the public so that any resulting reform would be more widely accepted. It would require a lengthy analysis, drawing upon the expertise of many people and institutions in the areas of law, education, economics, labor, religion, sociology, national secur-

ity, history, and the like. It would provoke a national debate starting with the premise that we must be doing something right or why else would this country attract more immigrants, legally and illegally, than any other nation in the world? The conversation could begin with the perspective; "Here are the strengths of our current system, and here is how it can be improved." If the loudest voices in the current debate take this lead, others will follow.

Our immigration system does need to be improved, but the costs of unthinking, knee-jerk change could be devastating. Wide-scale opening of our borders to virtually anyone who wants to enter or remain almost guarantees that terrorists will enter and damage us or that our social service network will be overburdened. Overly vigorous attempts to seal off our borders will likely deprive us of the labor force needed to maintain our growing economy and would send a damaging human rights signal to the rest of the world which would be exploited by our enemies. The ends of immigration reform are not justified by the means of destruction of the constitutional principles that have made this country a beacon of liberty and human rights.