



February 2014

The Immigrant First as Human: International Human Rights Principles and Catholic Doctrine as New Moral Guidelines for U.S. Immigration Policy

Kristina M. Oven

Follow this and additional works at: <http://scholarship.law.nd.edu/ndjlepp>

Recommended Citation

Kristina M. Oven, *The Immigrant First as Human: International Human Rights Principles and Catholic Doctrine as New Moral Guidelines for U.S. Immigration Policy*, 13 NOTRE DAME J.L. ETHICS & PUB. POL'Y 499 (1999).

Available at: <http://scholarship.law.nd.edu/ndjlepp/vol13/iss2/11>

This Article is brought to you for free and open access by the Notre Dame Journal of Law, Ethics & Public Policy at NDLScholarship. It has been accepted for inclusion in Notre Dame Journal of Law, Ethics & Public Policy by an authorized administrator of NDLScholarship. For more information, please contact lawdr@nd.edu.

**THE IMMIGRANT FIRST AS HUMAN:
INTERNATIONAL HUMAN RIGHTS PRINCIPLES
AND CATHOLIC DOCTRINE AS NEW MORAL
GUIDELINES FOR U.S.
IMMIGRATION POLICY**

KRISTINA M. OVEN*

INTRODUCTION

In American society, which so guards and upholds the right of the individual, there remains an inconsistency claiming more and more of the forefront of societal interaction, and with increasingly widespread effects throughout our nation as the twenty-first century approaches. It is the confrontation between immigrant and native-born, non-citizen versus citizen.

The United States Constitution has long revered the freedom and rights of the individual. Today, among other rights, it protects an individual's person, privacy, religious beliefs, and speech at almost all costs. For the immigrant, however, there are shockingly few protections or rights given them on American soil. In recent years, immigrants have been stripped of even the most basic of human rights such as food and housing assistance, all while society watches from a safe distance. Indeed, while the American people point in horror to human rights' violations in Central America, Northern Ireland, Rwanda, Bosnia, and, most recently, Kosovo, as soon as these victims seek refuge and opportunity in our neighborhoods, they are treated first and foremost as non-citizens, outsiders, and even enemies. What is it about crossing the United States' border that transforms a person in society's eyes from human into non-person, and that creates the

* B.A., B.S., Santa Clara University, California, 1994; J.D. Candidate, 1999, Notre Dame Law School. I dedicate this article with love to my parents, Stana Oven and the late Louis Oven, both immigrants, who fled Slovenia during World War II in order to escape communism, and entered America at Ellis Island in 1949. My parents' prayers, love, and courageous, faith-filled examples have guided me to become, first and foremost, a compassionate attorney. I would also like to thank Fr. John Pearson, C.S.C., Fr. James McDonald, C.S.C., and Professor Trai Le for their insightful comments on my paper, Luis Jaramillo for providing me with additional sources, and Lucy Payne for encouraging me to pursue a topic that is close to my heart and for her help with my research questions.

“us” against “them?” Why have we allowed artificial borders to mask our “same-ness” as humans?

Increasingly, the United States’ notion of personhood has been understood within the parameters of citizenship. Our judicial history points out that the Supreme Court, in its opinions, has reiterated that non-citizens are excludable from the political community because of the crucial role that citizenship plays in American life.¹ However,

Citizenship was not even defined in the original Constitution, nor was it granted more than a minimal and vague role in subsequent amendments. Moreover, due process and equal protection – those crucial rights guaranteed in the Fourteenth Amendment – are explicitly granted to “all persons” within a state’s jurisdiction. Thus . . . the Court vests citizenship with a significance that is at variance with the language and history of the Constitution. In so doing . . . it jeopardizes a benign tradition in which fundamental rights have been accorded all human beings within the polity irrespective of their citizenship.²

In a world that is ever more global and cosmopolitan, reliance upon judicial definitions equating personhood and individual rights with citizenship is no longer enough. Given that the “problem” of immigration transcends the United States’ borders, it must be addressed by law and policy that goes beyond the mere accident of geography of birth. America must reject the definitional limits of citizenship to embrace the immigrant first as human and as person, and to allow the shared humanity of all, immigrants or no, to illuminate the path toward attitude, policy, and legislation that embraces and emphasizes the dignity and personhood of non-citizens.

The following paper will argue that three national influences on immigrants need to be “humanized”: societal attitudes toward immigration and immigrants, immigration legislation and policy coming from our federal government, and the Immigration and Naturalization Service (INS) Border Patrol agents and their treatment of immigrants at the border. Specifically, this paper will address two recent pieces of legislation that have greatly impacted immigrants by denying them most federal benefits: the Personal Responsibility and Work Opportunity Reconcili-

1. *See, e.g.*, *Cabell v. Chavez-Salido*, 454 U.S. 432 (1982); *Ambach v. Norwick*, 441 U.S. 68 (1979); *Foley v. Connelie*, 435 U.S. 291 (1978); and *Sugarman v. Dougall*, 413 U.S. 634 (1973).

2. ELIZABETH HULL, *WITHOUT JUSTICE FOR ALL: THE CONSTITUTIONAL RIGHTS OF ALIENS* 45-46 (1985) (footnotes omitted).

ation Act of 1996 (PRWORA), and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRAIRA). By cutting off housing assistance and food stamps and enforcing much stricter eligibility guidelines through these two Acts, Congress penalized not the immigrants who allegedly, in the minds of many Americans, cross the border simply to live off the government, but rather the neediest victims of poverty: immigrant women, children, and the elderly. In largely affecting the defenseless, Congress' legislation defied the most basic standard of human dignity and freedom that is the foundation upon which America came into being. Insofar as PRWORA and IIRAIRA "disables" immigrants, it is defeatist legislation which ultimately disables our nation. By boldly assuming, contrary to any historical perspective or proof, that immigrants can and should enter a new country as self-sufficient individuals, Congress instead perpetuates the cycle of poverty, victimization, and the continuing need for federal, state, and private financial assistance. Herein lies the degradation of humanity and of the dignity of the human person.

This paper next presents the international perspective on the immigration question: whether a State's sovereignty allows it to do as it wishes with people inside its borders, or whether a universal, international standard of human rights should govern treatment of immigrants everywhere. This paper argues that the international standard of human rights must be implemented in order to successfully and morally address the immigration question. In doing so, this paper presents the Catholic Church's response to immigrants as an example of the implementation of the human rights approach. It presents, through papal encyclicals and apostolic letters, the Church's call to our country to adopt legislation and attitudes regarding immigration which correspond morally and ethically to the United States' economic and technological leadership position in the world, and which embrace the dignity of the human person. While the Catholic Church is by far not the only religious organization engaged in human rights advocacy for immigrants, the scope of this paper concentrates on the Catholic Church as one such model.

Finally, this paper emphasizes the current disparity on the immigration question between the international human rights view modeled by the Catholic Church and the perspective forthcoming from Congress, our government, and the American people. It concludes with proposals for change which would conform the United States' immigration policy and the American people's perspective with international human rights guidelines and Catholic social policy on immigration reform.

Ultimately, this paper proposes that it is time to address immigrants as members of the universal human community and treat them first as persons. If the United States is to remain a leader on the international front, it must solve its immigration controversy by realizing that "the treatment of noncitizens is a crucial subject because it involves not only [its citizens'] well-being, but also the institutional health and moral stature of the United States itself."³ The United States must move beyond simply looking to domestic legislation and judicial decisions to decide that immigrants are unworthy of federal protection and aid. The universal human rights model based on the inherent dignity of all humans exemplified by the Catholic Church is a proposal worthy of perusal by our government and possibly the only key to a lasting solution for our fellow humans, the immigrants.

I. THE SOCIETAL ATTITUDE TOWARDS IMMIGRANTS IN THE UNITED STATES

With twenty-one million legal immigrants and an estimated four to six million illegal immigrants residing in the United States, the confrontation between the immigrant and the non-immigrant occurs every day hundreds of times over.⁴ The bitter irony in the American attitude toward the immigrant is that each and every American today, excluding some Native American populations, can point to an ancestral immigrant. Even so, the final decades of this century have witnessed an undeniable growth in anti-immigrant sentiment across America. This sentiment is based largely on myths and irrational judgments regarding the immigrant population, and has been the impetus for welfare reform. The correlation between anti-immigrant sentiment and welfare reform is the "belief that undocumented immigrants not only come to the United States illegally, they, either by design or circumstances, take advantage of the various public assistance programs."⁵ This myth is encouraged through stories in print and electronic media which "depict an immigrant population that is parasitic and on state-funded (or partially funded) social welfare programs."⁶

3. *Id.* at 6.

4. See Mark Helm, *Immigrants Pull Their Weight*, S.F. EXAM'R, July 8, 1998, at A-15.

5. Jose R. Hinojosa et al., *Immigrant Use of Public Assistance Programs: AFDC and Food Stamps (Aid to Families With Dependent Children)*, MIGRATION WORLD MAG., Sept. 19, 1996, at 2.

6. LARRY Aubry, *Urban Perspective: Immigrants in California; Then and Now*, L.A. SENTINEL, Aug. 8, 1996, at A7.

The anti-immigrant sentiment in American society is inspired by four factors. First, "a large part of the controversy surrounding illegal immigration stems from the resentment that the federal government is not enforcing its immigration laws."⁷ Americans recognize the wisdom in preventative action—stopping immigrants before they cross our border. Second, the American public "perceives a link between increased crime and the new wave of illegal immigration."⁸ The fear of terrorism also contributes to a general hesitancy towards the increasing number of political asylum applications.⁹

Third, an ugly component of America's attitude toward immigrants is racism. Americans resist the demographic changes brought about by immigration. Today, more than seventy percent of immigrants are from Latin America, and more than fifty percent of all immigrants speak Spanish.¹⁰ The debate continues in many states whether to recognize an additional language other than English: "A number of state and federal courts have refused to enjoin the publication of government documents, such as social security guidelines, printed only in English."¹¹ The ultimate result is blatant discrimination against Hispanic Americans, fifteen million of whom reside legally in the United States. They are among the first assumed to be "not only illegal aliens, but also threats to this country's demographic and cultural integrity."¹² Less than a year ago, a highway billboard leased by the California Coalition for Immigration Reform read: "Welcome to California, The Illegal Immigration State. Don't Let This Happen to Your State. Call Toll Free—(877) NO ILLEGALS."¹³ The billboard prompted plans for a potentially violent rally organized by the president of the Coalition of Hispanic Organizations, Mario Obledo, who considered the sign racist.¹⁴ However, the billboard owner, fearing damage to his property, removed the sign a few days before the rally was scheduled. In response to the sign's removal, Barbara Coe, president of the Coalition for Immigration Reform, stated, "We're studying alternatives right now, but I can tell you one thing, this puppy is going back up as well as

7. HULL, *supra* note 2, at 80-81.

8. EDWIN HARWOOD, IN LIBERTY'S SHADOW: ILLEGAL ALIENS AND IMMIGRATION LAW ENFORCEMENT 11 (1986).

9. See Lydio F. Tomasi, *Introduction* to 16 IN DEFENSE OF THE ALIEN at ix (Lydio F. Tomasi ed., 1994).

10. See HULL, *supra* note 2, at 81.

11. *Id.*

12. *Id.*

13. David Reyes & Robert Ourlian, *Immigration Sign Removed Amid Threats*, L.A. TIMES, June 24, 1998, at A-1.

14. See *id.*

more. So if Mr. Obledo thinks his terrorist tactics have accomplished a great deal, he is very wrong."¹⁵ Despite its removal, the billboard's statement had been made: countless passersby saw the brazen power of anti-immigrant sentiment.

Adding fuel to this fire are anti-immigrant lobbyist organizations such as Zero Population Growth and the Federation for American Immigrant Reform (FAIR). Zero Population Growth is concerned about the detriment to the environment should illegal immigrants compete for scarce resources.¹⁶ While FAIR worried in the 1980s about the tax burden that illegal immigrants caused by receiving welfare and unemployment benefits for which they were not entitled, their approach has since become decidedly more racist. The chairman of this 70,000-member non-profit organization believes that "unless America's borders are sealed . . . the country will be overrun with people 'defecating and creating garbage and looking for jobs.'"¹⁷ FAIR's executive director espouses the view that the problem "is not simply that there are too many people in the world, but that there are too many of the wrong kind of people. It would be better to encourage the breeding of more intelligent people rather than the less intelligent."¹⁸

Finally, Americans are concerned about their country's economic stability in light of the burden of caring for poor immigrants, coupled with the prospect of dwindling employment opportunities as the working population continues to expand.¹⁹ Because of the instability of immigrants upon entering the United States due to a variety of factors including the language barrier, poverty, illiteracy, and lack of education, the alien is the perfect scapegoat for our nation's economic concerns. "Undocumented migrants have been blamed for everything from unemployment to the country's deteriorating quality of life."²⁰ According to some scholars, making the alien a scapegoat is more a current wave which repeats periodically and may have nothing to do with immigration. In scholar Wayne Cornelius' view, "illegal aliens are convenient scapegoats for collective frustrations . . . because they are seen as a threat to the American way of life."²¹ Cornelius speculates that "politicians worry that aliens

15. *Id.*

16. See HARWOOD, *supra* note 8, at 16.

17. Tucker Carlson, *Nativism's Sinister Intellectual Roots*, ASIAN WALL ST. J., Oct. 8, 1997, at 2.

18. *Id.*

19. See Tomasi, *supra* note 9.

20. HULL, *supra* note 2, at 80.

21. HARWOOD, *supra* note 8, at 11.

will maintain their private cultures, thereby jeopardizing the mainstream culture Americans seek to perpetuate."²² Again, due to the factors above, aliens remain largely defenseless to such accusations.

A. *The Economic Reality About Immigrants*

Accusations of economic harm to the United States appear especially unjust and baseless when studies suggest a positive economic reality regarding immigrants. Numerous studies initiated on local, state, and federal levels have determined both that immigrants are not majority recipients of welfare benefits, and that they pay taxes above and beyond the amount of welfare benefits they do receive, creating a net economic boon to the nation.

On the local and state levels, one California study suggests that "immigrants are anything but a net drain on society."²³ In an analysis of 1980 and 1990 census data on poverty and public assistance, "immigrants were found to have a lower propensity to receive welfare than natives among all households falling below the poverty line."²⁴ Furthermore, the study found that resident immigrants' purchasing power in California is "significant and growing"²⁵ and that they are more likely to start their own businesses than their native-born peers.²⁶ Immigrant workforce participation has not only added to the competitive nature of the economy, but immigrants have contributed to regeneration of communities and have counterbalanced any population movement out of urban areas.²⁷ Another, more specific California study debunked the myth that immigrant women are the primary recipients of welfare benefits.²⁸ The study concluded that both documented and undocumented immigrant women relied on their families and their own earnings in large part, and received approximately as much public assistance as their native-born peers.²⁹

22. *Id.*

23. Aubry, *supra* note 6.

24. *Id.*

25. *Id.*

26. *See id.*

27. *See id.*

28. *See* Leo R. Chavez et al., *Undocumented Latina Immigrants in Orange County, California: A Comparative Analysis*, 31 INT'L MIGRATION REV. 88 (1997).

29. *See id.* This study of 800 documented and undocumented Hispanic women in Orange County showed that while undocumented Latinas earned less and more often had children under the age of eighteen living with them, "their rate of use of public assistance was equal to that of documented immigrants and Latina citizens, and not significantly different from Anglo women." *Id.* at 7. (emphasis added). Furthermore, the study showed that undocumented

National studies on immigrants closely mirror the results found at state and local levels. A 1994 study by the Urban Institute found that after 1970, immigrants in the United States paid taxes of approximately seventy billion dollars to the government while using between forty and forty-five billion dollars in public services.³⁰ Furthermore, the study concluded that while illegal immigrants' welfare use surpassed that of citizens' use, the immigrant group was largely composed of the elderly and refugees. "[W]orking age immigrants (ages fifteen to sixty-four)" make use of welfare at rates lower than the native population.³¹

In July, 1998, the National Immigration Forum, an immigration advocacy group, released a report which calculated that immigrants paid approximately \$133 billion in federal, state, and local taxes in 1997, including taxes on income and purchases.³² The study found that immigrants who become U.S. citizens usually pay more in taxes than native-born Americans because the immigrant population is younger than the native-born population. As a result, immigrant workers have more time to pay into government programs for the elderly before they themselves become eligible to receive those benefits.³³ The study concluded that "over the course of their lifetimes, immigrants pay about \$80,000 more in taxes than they use in services."³⁴

In response to a request by the United States Commission on Immigration Reform, a panel of economists on the National Research Council of the National Academy of Sciences issued a report in 1997 which found that immigration produces net economic gains for its native-born residents:

At the most basic level, immigrants increase the supply of labor and help produce new goods and services. But since they are paid less than the total value of these new goods and services, domestic workers as a group must gain. . . . On the production side, immigration allows domestic workers to be used more productively, specializing in producing goods at which they are relatively more efficient. Specialization in consumption also yields a gain. Immigration thus breaks the rigid link between domestic consump-

Latinas largely rely on the combined financial resources of their own earnings and their families' support. "Undocumented Latinas do not appear to be enmeshed in the government-sponsored social safety net." *Id.* at 11.

30. See Jeffery S. Passel & Michael Fix, *U.S. Immigration in a Global Context: Past, Present, and Future*, 2 *IND. J. GLOBAL LEGAL STUD.* 5, 14 (1994).

31. *Id.* at 15.

32. See Helm, *supra* note 4.

33. See *id.*

34. *Id.*

tion and domestic production. From this perspective, the effects of immigration are comparable to [the effects] of international trade.³⁵

Because immigrants help create new jobs through their entrepreneurial efforts and substantially lower the prices to consumers of products and services to which their labor has contributed, the net benefit to native workers and consumers has been calculated at approximately \$10 billion per year.³⁶

The consensus among economists is that immigration poses only two potential adverse effects on our economy, both of which are temporary in nature. First, there may be an initial dip in wages and available employment for those native-born workers with whom immigrants directly compete for jobs.³⁷ However, this initial impact is not a permanent one and is outweighed by the overarching benefits that immigrants bring to our economy. In addition, when this short-lived negative impact on local labor markets is measured against the effects of other market forces, such as technological progress and women's entry into the labor force, the magnitude of the effect of immigrants lessens in proportion.³⁸

Second, because more than half of all immigrants live in just six states³⁹ and, because the federal government, as discussed below, allocates many funds for social spending to its state and local governments, immigration can have a negative financial impact on those states that draw the most immigrants. Because immigrants are increasingly younger than the native-born population, they use more services provided on a state and local level, such as health care, education, and law enforcement, rather than federal programs such as Social Security and Medicare. In the interim, however, immigrants have many years' opportunity to pay into such federal programs while they are still ineligible to receive them. Thus, while "[t]he federal government tends to receive about two-thirds of the taxes paid by immigrants, with only one-third going to state and local governments, . . . state and

35. NATIONAL RESEARCH COUNCIL, NATIONAL ACAD. OF SCIENCES, *THE NEW AMERICANS: ECONOMIC, DEMOGRAPHIC AND FISCAL EFFECTS OF IMMIGRATION* 5-6 (James P. Smith & Barry Edmoon eds., 1997).

36. *See id.* at 151-52, 220.

37. *See id.* at 140, 219-20; *see also* ORGANIZATION FOR ECON. COOPERATION AND DEV., *OECD ECONOMIC SURVEYS: UNITED STATES* 125-26 (1997); GEORGE J. BORJAS, *FRIENDS OR STRANGERS: THE IMPACT OF IMMIGRATION ON THE U.S. ECONOMY* 84-85 (1990); JEFFERY S. PASSEL & MICHAEL FIX, *IMMIGRATION AND IMMIGRANTS: SETTING THE RECORD STRAIGHT* 49-50 (1994).

38. *See* NATIONAL RESEARCH COUNCIL, *supra* note 35, at 220.

39. *See* Helm, *supra* note 4. The six states are Arizona, California, Florida, Illinois, New York, and Texas.

local governments usually provide about two-thirds of the benefits—such as health care, schools and roads—given to immigrants.⁴⁰ As a result, immigrants may indeed have a negative fiscal impact on state and local governments while conferring an unfair tax windfall to the federal government.⁴¹ Once again, however, because the net economic impact of immigrants is positive, this negative effect has more to do with the way our federal government allocates both responsibility and funds to state and local levels to address immigrants' needs.

Given that study after study shows a positive economic reality about immigrants, why do public opinion polls continue to reveal a profound anti-immigrant sentiment in American society? Putting aside fear of the stranger, racism, and the effectiveness of using the immigrant as a scapegoat for national problems, all mentioned above, American society still believes that immigrants are an economic detriment, even the inevitable downfall, of the United States. One answer may be that it is simply easier to perceive the facially apparent disadvantages of immigration rather than analyzing the economic data to its ultimate positive conclusion.⁴² For example, when an immigrant comes into the United States and takes a job, it is easy to conclude that he or she took a job which is now no longer available to a native-born. Therefore, the immigrant threatens native employment and puts native-borns out of jobs. This is the stopping point for much of the American public regarding the effects of immigration.⁴³ However, to stop there ignores basic truths about economics which lead to a dramatically different conclusion regarding immigrants' effects on our economy.⁴⁴ Our economy is not a static force, providing only a fixed number of jobs which are usurped by immigrants and leaving native-born workers unemployed. Rather, the economy grows and changes, creating new jobs in proportion to the number of immigrants that arrive to our country:

Each immigrant is not only a worker, but also a consumer who must be fed, housed and clothed. Although he may displace a native when he gets a job, he will, by spending his earning on food, housing, and whatever else he buys, expand the economy by the amount of his spending. He will, in effect, create a need to hire some fractional part of an additional farmer, an additional grocery clerk, an addi-

40. *Id.*

41. See NATIONAL RESEARCH COUNCIL, *supra* note 35, at 353.

42. See *id.* at 389-93.

43. See JULIAN L. SIMON, THE ECONOMIC CONSEQUENCES OF IMMIGRATION 208-12 (1989).

44. NAT'L RESEARCH COUNCIL, *supra* note 35, at 156-57.

tional construction laborer, and so forth, until finally, somewhere out in the economy, the ripple effect from his spending will cause at least one additional person to be employed, in effect replacing the job that he took when he first found employment for himself.⁴⁵

Because this ripple effect is indirect, it takes more time and energy to perceive than the average person is willing or able to expend.⁴⁶ Although this may provide some excuse for the incorrect public perception of immigrants, it is all the more reason to disseminate the results of these economic studies in the hope of inspiring a true understanding, through information and dialogue, of the economic benefits of immigration. While the public may be excused in part for its wrongful economic perception of immigration, our government has no similar excuse. In recent years, Congress has been given numerous reports and studies that clearly set forth the benefits that immigrants bring to our nation's economy.⁴⁷ Despite the information provided in such reports, current legislation does not acknowledge or reflect the economic reality regarding immigrants.

II. DOMESTIC LEGISLATION—THE NATIONAL RESPONSE

In response to an increase in anti-immigrant sentiment, the 104th Congress set forth a statement of national policy concerning welfare and immigration on August 22, 1996.⁴⁸ This statement emphasizes that self-sufficiency has been and will continue to be the underlying principle of the United States' immigration policy, that aliens not depend on public benefits but "rely on their own capabilities and the resources of their families, their sponsors, and private organizations,"⁴⁹ and that aliens not view the availability of public benefits as an incentive to come to the United States. To this end, President Clinton signed two bills passed under two separate statutes. On August 22, 1996, he signed the Personal Responsibility and Work Opportunity Recon-

45. Jim Harrington, *The Consensus Among Economists Concerning Immigration* 19 (Summer, 1998) (on file with Luis C. Jaramillo, Director, Migrant Farmworker Project, California Rural Legal Assistance, Inc.) (citations omitted).

46. *See id.* at 20.

47. *See generally* *The Economic and Fiscal Impact of Immigration: Examining the Report of the National Academy of Sciences Before the Subcomm. on Immigration of the Senate Judiciary Comm.*, 105th Cong. (1997); *Impact of Illegal Immigration on Public Benefit Programs and the American Labor Force Before the Subcomm. on Immigration and Claims of the House Judiciary Comm.*, 104th Cong. (1995).

48. *See* 8 U.S.C.A. § 1601 (West 1997).

49. *Id.* § 1601(2)(A).

ciliation Act of 1996 (PRWORA), also known as the Welfare Act.⁵⁰ Approximately one month later, Clinton signed the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRAIRA), also known as the Immigration Reform Act.⁵¹

Together, these bills completely overhaul a welfare system that has been in place since Franklin Delano Roosevelt's New Deal was implemented. They not only end the guarantee of cash assistance to the country's poorest children and give states the power to run their own welfare and "workfare" programs with lump sums of federal funds, they severely restrict the benefits for which legal, and illegal immigrants are currently eligible.⁵²

A. *Personal Responsibility and Work Opportunity Reconciliation Act of 1996*

Before Congress passed PRWORA, legal immigrants who were not yet citizens were eligible for federal benefit programs such as Social Security Income (SSI), the Food Stamps Program, non-emergency Medicaid, and Temporary Assistance for Needy Families (TANF).⁵³ PRWORA denied these benefits to any persons who achieve legal immigrant status from August 22, 1996, forward. For those persons who were already legal immigrants on August 22, 1996, the restriction of benefits began on January 1, 1997.⁵⁴ On that date, any alien not a "qualified alien" was no longer eligible for federal, state, or local public benefits.⁵⁵ Under §§ 401 and 402 of PRWORA, Congress divides aliens into two groups: "qualified aliens" within the meaning of the statute and "not qualified aliens."⁵⁶ Section 431(b) of the Welfare Act defines "qualified aliens" to be lawful permanent residents (LPRs); refugees, asylees, and persons granted withholding of

50. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, 110 Stat. 2105 (codified as amended primarily in scattered sections of 42 U.S.C.).

51. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, 110 Stat. 3009-546 (codified as amended in scattered sections of 42 U.S.C.).

52. Austin T. Fragomen, Jr., *Welfare Bill Severely Curtails Public Assistance to Noncitizens*, 2 INT'L MIGRATION REV. 1087 (1996).

53. See Robert Greenblum, *Exploring the New Restrictions on the Receipt of Public Benefits for Aliens: There's Some Good News—If You're Elderly, That Is*, 2 BENDER'S IMMIGR. BULL. 927, 928 (1997).

54. See Fragomen, *supra* note 52, at 1088.

55. See Law Firm of Fragomen, Del Rey & Bernsen, *Impact of IIRAIRA and Public Assistance*, 16 IMMIGR. L. REP. 43, 44 (1997).

56. See Personal Responsibility and Work Opportunity Reconciliation Act of 1996 §§ 401-02, 8 U.S.C.A. §§ 1611-12 (West 1999).

deportation; persons paroled into the country for at least a year; and aliens granted conditional entry.⁵⁷ Congress also distinguishes, in Title IV of the Welfare Act, between qualified aliens already present in the United States and those who arrive after the passage of the Act. Section 403 states that qualified aliens entering the United States after the passage of the Act will not be eligible for federal public benefits for their first five years in the United States.⁵⁸

Under § 402 of the Welfare Act, Congress specifically narrowed the eligibility for SSI and food stamps, which cut off these services for many lawful permanent residents. This narrowing affected even those LPRs living in the United States prior to the Act who were already receiving SSI and food stamps. Congress narrowed SSI and food stamp eligibility by defining three categories of eligible non-citizens: LPRs who have worked at least forty "qualifying quarters" for social security purposes or can be credited with forty quarters; refugees, asylees, and aliens granted withholding of deportation, but only for the first five years after entry, grant of asylum, or withholding of deportation; and qualified aliens who are active duty service members or veterans, and their spouses and dependent children under the age of twenty-one.⁵⁹

The forty "qualifying quarters" are periods defined by Title II of the Social Security Act that require a certain amount of earnings to constitute one quarter.⁶⁰ Once forty of these quarters have been earned, the worker is eligible for SSI and food stamps.⁶¹ Section 435 of the Act allows the alien to meet the forty-quarter requirement by adding qualifying quarters worked by his or her parents while the alien was under eighteen, and by the alien's spouse if the marriage did not end in a divorce.⁶²

One of the most important changes brought about by PRWORA is that it has given states the prerogative to provide or to deny assistance to immigrants by providing them with lump sums to allocate with their discretion.

Each state will have the authority to prohibit or otherwise limit or restrict the eligibility of an alien or a class of aliens for state-administered federal programs such as TANF,

57. See *id.* § 431(b), 8 U.S.C.A. § 1641 (West 1999).

58. See *id.* § 403, 8 U.S.C.A. § 1613 (West 1999).

59. See *id.* § 402, 8 U.S.C.A. § 1612 (West 1999).

60. Greenblum, *supra* note 53, at 929.

61. See *id.* at 930.

62. Personal Responsibility and Work Opportunity Reconciliation Act of 1996 § 435, 8 U.S.C.A. § 1645 (West 1999).

social services block grants, and Medicaid. No prohibitions, limitations, or restrictions may be more restrictive than those imposed under comparable federal programs.⁶³

The benefits discussed thus far are referred to as "federal public benefits," for which one must be a qualified alien in order to be eligible. A federal public benefit is defined as the following:

Any grant, contract, loan, professional license, or commercial license provided by a federal agency or by appropriated U.S. funds; any retirement, welfare, health, or disability benefits; public or assisted housing; postsecondary education; food assistance; unemployment benefit; or any similar benefits for which payments or assistance are provided to an individual, household, or family eligibility unit by a U.S. agency or by appropriated U.S. funds.⁶⁴

It is clear from the expansiveness of this definition how sweeping Congress intended the bar on unqualified aliens to be.

Benefits outside of this definition which any immigrant may receive include emergency medical assistance; emergency non-cash disaster relief; public health assistance for immunizable and communicable diseases; any program, service, or assistance specified by the Attorney General which does not condition the provision, amount, or cost of assistance on the individual's income, and is necessary for the protection of life or safety; and housing or financial assistance programs to the extent the individual was receiving the benefit as of August 22, 1996.⁶⁵

B. *Illegal Immigration Reform and Immigrant Responsibility Act of 1996*

IIRAIRA, with few exceptions, continues to tighten the United States' immigration policy. In one attempt to ameliorate the sparseness of the "qualified alien" definition, section 501 of IIRAIRA adds certain battered spouses and children to that definition. Qualifying battered spouses and children are those who have sought and been granted protection under the Violence Against Women Act, and who can prove that there is a substantial connection between their battery and the need for benefits.⁶⁶

63. *Id.* § 435, 110 Stat. at 2275.

64. Law Firm of Fragomen, Del Rey, & Bernsen, *supra* note 55, at 44.

65. See Personal Responsibility and Work Opportunity Reconciliation Act of 1996 § 401(c), 8 U.S.C.A. § 1611(c) (West 1999).

66. *Attorney General Determines Situations Allowing Abused Aliens to Receive Public Benefits*, IMMIGR. L. ADV. (CBC), August 18, 1997, at 2.

IIRAIRA changes another significant immigration policy regarding sponsors who petition for aliens' admission into the United States through an affidavit of support. In the past, the sponsor's promise to "maintain and support" the alien and to guarantee that he or she will not become a public charge has been largely a moral obligation.⁶⁷ Section 551 of IIRAIRA is the last of a series of amendments to make the sponsor more accountable for the alien's financial status. Section 421 of the Welfare Act provides that in determining whether an alien is eligible for federal benefits, the alien's income can be "deemed" to include the income and resources of anyone who has signed a legally binding affidavit of support on behalf of him or her.⁶⁸ Section 551 provides that the sponsor's support must maintain the alien at a yearly income which is at least 125 percent of the federal poverty level.⁶⁹ Deeming continues until the alien has become a U.S. citizen or has worked for forty qualifying quarters.⁷⁰ The new affidavit moves beyond a moral obligation and is now legally enforceable in any federal or state court by the federal government, the state, or any organization that provides federal benefits to the alien.⁷¹ Should the alien use public benefits while under the attribution of a sponsor's income and resources, that sponsor may have to reimburse the agency which provided the benefits. If the sponsor does not respond within forty-five days or refuses to pay the disputed amount, he or she can be sued.⁷² IIRAIRA provides two exceptions to this harsh rule under section 552. First, deeming can be discontinued for up to one year if the sponsor is unable to assist the alien and the alien would not have food or shelter without public assistance.⁷³ Second, the alien can be exempted from deeming for up to one year if the alien or his or her child has been battered or subject to extreme cruelty by a spouse or parent or by a family member residing in the same house, and the battery is substantially connected to the need for benefits.⁷⁴

Other IIRAIRA additions include a reimbursement by the government to states supplying emergency medical assistance to

67. See Fragomen, *supra* note 52, at 1092.

68. See Personal Responsibility and Work Opportunity Reconciliation Act of 1996 § 421, 8 U.S.C.A. § 1631 (West 1999).

69. See Illegal Immigration Reform and Immigrant Responsibility Act of 1996 § 551(a), 8 U.S.C.A. § 1183a (West 1999).

70. See Law Firm of Fragomen, Del Rey & Bernsen, *supra* note 55, at 47.

71. See Fragomen, *supra* note 52, at 1093.

72. See *id.*

73. See Illegal Immigration Reform and Immigrant Responsibility Act of 1996 § 552(e), 8 U.S.C.A. § 1631(e) (West 1999).

74. See *id.* § 552(f), 8 U.S.C.A. § 1631(f) (West 1999).

illegal immigrants in serious physical condition and to those injured while crossing the border, but only if their immigration status has been verified through established procedures.⁷⁵ IIRAIRA also provides stricter admission and deportation grounds and removal procedures.⁷⁶

C. *The Effects and Implications of PRWORA and IIRAIRA*

The many effects following the enactment of PRWORA and IIRAIRA have been discouraging from the point of view of the preservation of human dignity by the government. Congress has enthusiastically estimated the financial reward to our economy as a result of the two bills: "The Congressional Budget Office (CBO) has estimated that the alien eligibility changes in the welfare law will save almost \$23.7 billion over 6 years . . ." ⁷⁷ Before the Welfare Act was passed, over ninety elected officials from California urged President Clinton to ease the harshness of the bill as it would affect California more significantly than any other state. California "would lose about \$10 billion in federal welfare funding for immigrants, or roughly 40 percent of the nearly \$25 billion expected to be lost to all states over six years under the legislation according to the officials."⁷⁸ Such statistics have led many to believe that the Welfare Act appears "to be driven more by an interest in reducing costs than by any coherent set of principles regarding immigrant access to public benefits."⁷⁹ While the real financial impact of PRWORA and IIRAIRA will not be ascertainable for several more years, Congress also hopes that the increased difficulty of obtaining benefits will discourage immigration in general.

The effect of the federal government giving lump sum amounts to states and giving them discretion as to how or if they provide aid to immigrants is also worrisome. A Seattle city councilwoman believes that block grants to states are not a viable solution to the immigration problem:

It doesn't take into consideration the particular needs of each state. We are left scrambling to figure out how to take over particular responsibilities. The federal govern-

75. See *id.* §§ 562-63, 8 U.S.C.A. §§ 1369-70 (West 1999).

76. See generally Law Firm of Fragomen, Del Rey & Bernsen, *Removal, Detention, and Judicial Review Under the IIRAIRA*, 18 IMMIGR. L. REP. 51, 55 (1997).

77. Larry M. Eig & Joyce C. Violet, *Alien Eligibility for Benefits Under the New Welfare and Immigration Laws*, MIGRATION WORLD MAG., Mar. 1, 1997, at 33.

78. *Clinton Urged to Veto Welfare Bill*, L.A. SENTINEL, Aug. 1, 1996, at A1.

79. Michael Fix & Wendy Zimmerman, *When Should Immigrants Receive Public Benefits?*, MIGRATION WORLD MAG., Nov. 1, 1995, at 16.

ment has all the mechanism for giving out money. For example, with legislators, how many are actually from King County, Seattle, Washington? Yet, they are the decision-makers, deciding our needs.⁸⁰

Is the immigration question too large a question for states to answer? The federal government may believe that giving discretion to states allows each state to address its immigrants in its own way. However, this view does not face the immigration issue realistically, because the government, in effect, is attempting to localize an international concern and place the onus upon individual states to solve the immigration problem by and for themselves. One of the many risks with state allocation of funds is that states, at a loss for an effective way to use the lump sums of money, will simply not make the effort to allocate it justly.

A resulting implication of the lump sum policy is that the federal government does not care enough about immigrants to address their needs as a nation. The message sent to the public at large is clear: the federal government does not want to take responsibility for its immigrants, and the issue of their basic needs—food, clothing, shelter, and medical attention—is not important enough to solve on a national level. The federal government has also started a slippery slope of default. First, it “grants” responsibility to states to solve immigrant’s needs. Next, the states may default on that responsibility simply because of the scale of such responsibility and because states lack the capacity to effectively deal with immigration. This default will lead to a greater burden on social service agencies who assist immigrants which, in turn, will not be able to bear the financial and sheer numerical burdens alone. To whom do *they* look for assistance?

One of the most obvious effects of PRWORA and IIRAIRA is that they primarily affect two of the most needy and marginalized immigrant populations: the elderly and children.⁸¹ While, in general, immigrants make up only five percent of all welfare recipients, they will bear the brunt of forty-four percent of the cuts in the Welfare Act.⁸² “Welfare use by elderly immigrants is concentrated in the SSI program. Although immigrants are only 9 percent of the total elderly population, they make up 28 percent of SSI recipients aged 65 and over.”⁸³ This is because elderly immigrants have not worked long enough in the United

80. Lan Pham, *APIs Speak Out on Welfare*, INT’L EXAMINER, Sept. 17, 1996, at 2.

81. *See id.* at 1.

82. *See id.*

83. Fix & Zimmerman, *supra* note 79, at 14.

States to be eligible for Social Security, and because it is difficult for them to obtain health insurance, elderly immigrants may use SSI to qualify for Medicaid.⁸⁴ As mentioned earlier, while the Congressional Budget Office estimates saving \$23.7 billion because of the changes in welfare eligibility, "56 percent of [these savings] will result from changing the eligibility rules for Supplemental Security Income (SSI) for the Aged, Blind, and Disabled."⁸⁵

Immigrant children are also the victims of this legislation. Former White House Press Secretary Mike McCurry admitted less than a month before the President signed PRWORA that denying benefits to legal immigrants as well as cutting off food stamps poses the "greatest risk for poor children."⁸⁶ Child nutrition programs are also affected by the law. Aside from the school breakfast and lunch programs, states now have the option "to provide or deny all other child nutrition programs, including WIC (Women, Infants, and Children) to undocumented immigrants and certain other categories of legal immigrants."⁸⁷

The effects resulting from the sponsorship provision are also unduly harsh. Because the income of the sponsor and his or her spouse are added to the immigrant's resources to determine eligibility for benefits, "even if an immigrant and the sponsor each barely earns poverty level incomes, the two salaries combined will be twice that of the poverty line, disqualifying the immigrant from a program limited to persons in poverty."⁸⁸ Furthermore, as Frank Sharry, head of the National Immigration Forum believes, "It's a backdoor way to try to keep Americans from sponsoring their loved ones. . . . It's contrary to our tradition as a nation of immigrants."⁸⁹ "You're going to see an increasing number of hard-working, tax-paying, law-abiding Americans finding that they are unable to sponsor their spouses and their children and their parents merely because they are not wealthy enough."⁹⁰

A further implication of PRWORA is that it makes the immigrant sink deeper into non-personhood. The United States is legislating against a class of people that are "politically power-

84. *See id.* at 15.

85. Eig & Vialet, *supra* note 77, at 33.

86. *Clinton Urged to Veto Welfare Bill*, *supra* note 78.

87. Fragomen, *supra* note 52, at 1091.

88. Pham, *supra* note 80, at 3.

89. Michelle Mittelstadt, *New Rules Take Effect Friday on Sponsoring New Immigrants*, AP, Dec. 18, 1997, available in WESTLAW, ASSOCPR file.

90. Michelle Mittelstadt, *Financial Requirements Increased for Immigrant Sponsors*, AP, Oct. 18, 1997, available in WESTLAW, ASSOCPR file.

less."⁹¹ In the eyes of American society, they are of a suspect status, a suspect race or ethnicity, and from the lowest economic class. They are helpless to fight the stereotype of the lazy welfare recipient, and even more helpless to contest any of the measures being passed against them. Before PRWORA was passed, opponents realized that "[i]t would have the effect of creating two classes of citizens. . . . In the past, laws that discriminated between native born and naturalized citizens have been struck down as unconstitutional."⁹²

Finally, the majority of the restrictions enacted by PRWORA affect legal immigrants, since undocumented immigrants are rarely eligible for public benefits. There is a basic unfairness in a law that strips benefits from legal residents who pay taxes and must serve in the United States military if they are drafted. These are the two basic responsibilities of citizens, and it is manifestly unjust to "remove rights that have traditionally accompanied these responsibilities."⁹³

III. BEYOND LEGISLATION TO CRIMINAL CONCERNS AND ETHICAL QUESTIONS.

If the government were to seize individuals suspected of a crime, detain them indefinitely without bail, deny them appointed counsel and the right to compel witnesses in their own behalf, subject them to self-incrimination, prosecute them for an offense perfectly legal when committed, and finally banish them forever from the country, the American public would be outraged: The government would have flaunted half a dozen rights that comprise the bedrock of this country's constitutional system. The government's action would be perfectly legal, however, if the suspects were aliens, facing deportation.⁹⁴

The silence of constitutional and judicial guidelines regarding treatment of non-citizens allows the foregoing scenario to take place daily across our country. For many an illegal immigrant, this brutality begins at the border, where he or she first comes into contact with the Immigration and Naturalization Service through the United States Border Patrol. Beyond congressional legislation that dehumanizes immigrants within our

91. Paul Meehan, *Combatting Restrictions on Immigrant Access to Public Benefits: A Human Rights Perspective*, 11 GEO. IMMIGR. L.J. 389, 399 (1997).

92. Peter Slevin, *Immigrants May Lose Benefits*, MIGRATION WORLD MAG., Sept. 1, 1995, at 32.

93. Fix & Zimmerman, *supra* note 79, at 16.

94. HULL, *supra* note 2, at 33.

borders, the attempt to cross the United States' border itself leaves the immigrant exposed to criminal and grossly inhumane treatment.

Immigrant abuse at the border has been documented in large part by Human Rights Watch, an agency established in 1981 to monitor and promote internationally recognized human rights. The following stories come from interviews they have conducted with immigrants, and paint a horrifying picture of the cruel and senseless violence that so unnecessarily takes place at the border.

In 1989, Francisco Ruiz Chavez and his wife, Evelyn, both Salvadoran nationals, attempted to illegally enter the United States west of San Ysidro, California. A Border Patrol agent spotted Evelyn, seven months pregnant at the time, and pulled her down to the ground by her hair and slammed her head against the ground. Francisco, worried about the safety of his wife, reached for a rock and called to the Border Patrol agent to arrest his wife if necessary but not hurt her. The agent placed his boot onto Evelyn's enlarged stomach, prompting Francisco to hurl the rock at the agent. The agent immediately fired at Francisco, shooting him in the stomach and left buttock. The two bullets were fired from the distances of seven and twenty feet respectively. At Francisco's trial for assaulting a federal agent, the agent fabricated a story about being struck in the eye by Francisco's rock, causing him to fire in self-defense. The jury found for Francisco; meanwhile neither the U.S. Attorney's office nor the San Diego District Attorney's office made any move to prosecute the agent.⁹⁵

On September 8, 1990, Victor Mandujano Navarro, a seventeen year-old Mexican was shot and killed by an out-of-uniform Border Patrol agent. Victor, his brother, and several friends had made it successfully over the border when an agent appeared, announced he was from the *migra*, or INS, and caused the group to disperse. Victor was climbing over the border cyclone fence when the agent knocked him down, hit him, and shot him twice in the stomach. An autopsy showed that one bullet had exploded in Victor's heart. The officer alleged that he had been engaged in a violent struggle with Victor during which Victor tried to wrestle the gun away from the agent. During this struggle, the agent shot twice in self-defense. Amazingly, the agent emerged unscathed from this "violent struggle." Again, neither

95. See AMERICAS WATCH, HUMAN RIGHTS WATCH, BRUTALITY UNCHECKED: HUMAN RIGHTS ABUSES ALONG THE U.S. BORDER WITH MEXICO 16 (1992).

the U.S. Attorney's office nor the District Attorney prosecuted the agent.⁹⁶

While the documented examples of brutality against immigrants at the border are endless, the similarity among all of them is the clear human rights violations that occur at the border, and the impunity with which each agent often escapes. While the Immigration and Naturalization Service must exist to enforce immigration laws and curb immigration, it can accomplish its goal not only without murdering or abusing immigrants, but also while respecting each immigrant's human dignity. "Undocumented migrants who enter or are living in the United States may be deportable or excludable, but their immigration status does not lessen their entitlement to respect for their basic human rights."⁹⁷ The onus is upon each resident of the United States to join Human Rights Watch in calling upon the government "to honor its legal obligation to ensure that the human rights of everyone in its territory, including those who enter without authorization, are protected from abuse by the INS."⁹⁸

In addition to concerns about the inhumane treatment of immigrants at the border, the means employed and the ends reached by the United States in enforcing its immigration policy raise fundamental ethical questions. In 1994, the Clinton administration implemented Operation Gatekeeper, "an unprecedented buildup of law-enforcement manpower and technology in San Diego County [California] to stop illegal immigrants."⁹⁹ The purpose, says INS Commissioner Doris Meissner, is to "secure the border."¹⁰⁰ "By preventing the entry of undocumented immigrants, the jobs of U.S. workers, presumably, will be safeguarded."¹⁰¹ Operation Gatekeeper is intended to prevent the criminal activities of illegal aliens by stepping up border security at the most popular crossing points and creating a stricter prosecution policy of criminal activities. The increase in border security entails:

militarization of a 66 mile stretch of the U.S.-Mexico border—know as the San Diego sector—that runs eastward from the Pacific Ocean into desert and mountain areas. This has included erecting a wall, deploying intensified fortification and surveillance techniques, increasing the

96. *See id.* at 10.

97. *Id.* at 77.

98. *Id.* at 7.

99. Robert Kahn, *Operation Gatekeeper: Keeping Illegal Workers Male, Young, and Fit*, L.A. TIMES, July 6, 1997, at M1.

100. *Id.*

101. *Id.*

number of Border Patrol agents and inspection officers assigned to the border, and coordinating joint actions involving the Border Patrol with local, state and federal agencies, as well as the main branches of the U.S. military and the National Guard.¹⁰²

The intensified surveillance techniques include image enhancement vehicles, electronic ground sensors, infrared night scopes, sophisticated surveillance helicopters, low-level-light television cameras, and high-power stadium style lighting.¹⁰³ In light of this intense militarization of our border, the United States appears to be waging a war against an enemy of its own creation: illegal immigrants.

The intended effect of this militarization appears to be to discourage immigrants from crossing such a secured border and to remain in their native countries. However, long-standing countervailing forces affecting immigrants, such as unsatisfactory economic and labor conditions in their native countries combined with the escalating demand for cheap labor in the United States, provide an even stronger incentive. As a result, the border crossings continue despite Operation Gatekeeper.¹⁰⁴

What Operation Gatekeeper *has* changed is how immigrants now cross the border. In order to avoid the extensive surveillance and border security sure to lead to arrest and criminal prosecution, immigrants are channeled eastward by the militarization to the desert and mountain areas where surveillance is disproportionately mild. Unlike crossing the border near San Diego, the journey across the border through desert and mountain areas is extremely dangerous. Immigrants, most of whom do not travel with adequate provisions, face a much longer and more perilous trek over the border, during which they must now withstand snake bites, freezing temperatures in winter, and mountain fires, extreme heat, and dehydration in summer.¹⁰⁵ In 1996, thirty-eight aliens are known to have died during border crossing attempts through the desert. Some froze to death in the winter, while others died of thirst in the heat of summer.¹⁰⁶ At

102. Michael Huspek, Production of State and Citizen: The Case of Operation Gatekeeper I (1997) (on file with California State University, San Marcos, San Marcos, CA 92096-0001).

103. *See id.* at 8.

104. *See Kahn, supra* note 99, at M6.

105. *See Huspek, supra* note 102, at 12.

106. *See id.*

least 100 illegal aliens lost their lives along the U.S.-Mexico border between January and August 1998.¹⁰⁷

While many women, children, and elderly have been discouraged by the harsh conditions from even attempting border crossings to the east, those that do try often perish in the attempt. In August 1998, seven decomposed corpses of illegal immigrants—four men, one woman, and a teenage boy—were found in a part of the southern California desert where summer temperatures can rise to 120 degrees.¹⁰⁸ The seven literally roasted to death in what must have been an agonizing end. They sought refuge under a tree and gradually removed articles of clothing in a desperate attempt to survive “the blast-furnace heat.”¹⁰⁹ In death, “the lone woman, still wearing blue jeans and a halter top, had nestled herself against her male companion. . . [a] tragic image—and, for a Border Patrol desperate to stem the human tide, one that’s all too common.”¹¹⁰

Similarly, Operation Gatekeeper has not significantly stemmed the work of coyotes, or alien smugglers, who continue to help illegal immigrants cross the border for pay. However, Operation Gatekeeper has caused coyotes to resort to desperate measures and risk their own lives as well as the lives of the immigrants they transport in their cars and vans in order to escape apprehension by the Border Patrol:

On 13 June, 1996, a fleeing van carrying suspected illegal aliens crashed, killing one and injuring 12; on 26 April, 1996, a fleeing van carrying suspected illegal aliens crashed, killing 2 and injuring 19; on 6 April, 1996, a fleeing pick-up truck carrying suspected illegal aliens crashed, killing 8 and injuring 17; in September of 1995, a fleeing car carrying suspected illegal aliens crashed, leaving 1 dead and several others injured; on 19 April, 1995, a fleeing van carrying suspected illegal aliens smashed into a pick-up truck, leaving 3 dead and 16 injured.¹¹¹

While the scope of this paper cannot adequately address all the nuances of Operation Gatekeeper and its implications and effects on immigrants, this much is clear: two results of Operation Gatekeeper, whether intended or unintended, should raise

107. See Joshua Hammer, *Death in the Desert Heat*, NEWSWEEK, Aug. 24, 1998, at 29.

108. *See id.*

109. *Id.*

110. *Id.*

111. Huspek, *supra* note 102, at 13 (citing M. Hunt, *One Killed in Latest Crash of Suspected Smuggler Van*, SAN DIEGO UNION-TRIB., June 13, 1996, at B-5).

fundamental ethical questions about the United States government's implementation of this particular immigration policy. First, by militarizing the San Diego border to the extent reminiscent of a full-scale war, Operation Gatekeeper channels immigrants eastward to inevitable death by freezing, dehydration, and other hazards of the treacherous terrain. A similar result is reached by Operation Gatekeeper's heightened prosecution record for border arrests. Both coyotes and immigrants take greater risks to escape apprehension and, in the process, lose their lives. The means used by Operation Gatekeeper to rid the United States of illegal immigrants—disproportionate militarization against unarmed fathers, mothers, children, and the elderly—and channelization of immigrants into harsh terrain, are unethical. Through disguised ends of controlling immigration, the United States forces immigrants into inhumane alternatives which ultimately lead to torturous deaths of innocent human beings. The now-commonplace deaths of illegal immigrants point to the inconsistent moral leadership of the United States: while American soldiers battle for Albanian refugees in Europe, refugees of a different type, with the help of our immigration policies, die in large numbers on our own soil.

Second, by channeling immigrants away from relatively manageable border crossings, Operation Gatekeeper controls the type of immigrant that makes it across the border. Since women, children, and the elderly either do not attempt the eastward crossings or perish in the process, the immigrant who succeeds to the other side is most often young, fit, and male. "This shift in the type of worker gaining entry into the U.S. amounts to a strengthening of the labor pool available to U.S. employers while restricting access to those who have been likeliest to draw upon the state's social relief programs."¹¹²

Furthermore, in contrast to the harsh punishment of imprisonment faced by immigrants for attempting to cross the border, "U.S. employers who hire undocumented workers face penalties that are laughable," usually a phone call from the INS, followed by a visit days later when the employer has had an opportunity to get his paperwork in order.¹¹³ The disparity between sanctions for immigrants and sanctions for their employers, both of which violate federal law equally, is as unjust as it is unethical. Channeling, which weeds out the non-worker population, in combination with the blind eye the INS turns to employers of illegal aliens, results in a clear advantage to the United States' capitalism and

112. Kahn, *supra* note 99, at M6.

113. *Id.*

its economy.¹¹⁴ The United States and its employers get fit, young, male workers without having to support, through welfare benefits, the elderly relatives, female spouses, or non-working-age children of such workers. Indeed, through this well-crafted operation, the United States appears to get what it wants, cheap labor, while keeping out what it does not want, immigrants dependent on benefits.

Finally, the young, male immigrant who survives the border crossing and finds employment in the United States is arguably “the perfect worker.”¹¹⁵ Because of his illegal status, an employer can use the undocumented worker “not only to keep wages depressed but also to stave off any movement toward unionization.”¹¹⁶ The illegal immigrant worker represents a cheap labor source, and can demand nothing in return: he is “[i]solated by language, hidden from the government by employers who also are breaking the law, without social or legal recourse, and increasingly—and unfairly—criminalized in the public mind by high-ranking officials of both political parties.”¹¹⁷

In defense of the measures employed by Operation Gatekeeper and their ineffective results thus far in stemming the immigration tide, the United States attempts to rely on the “enemy” status of the illegal immigrant:

It is because the villainized, criminalized alien has been cast as such a formidable adversary that the state has been able to tactically admit to its own failing while simultaneously escaping public criticism. If the number of apprehensions in the San Diego sector has not been significantly reduced, this is because the aliens continue to press forward in droves; if the number of fatalities is staggeringly high, this is because of the greed and desperate cunning of the coyote . . . if the jails have not offered sufficient detainment, this is because what were thought to be “minimum security risks” have turned out to be “thugs and hoodlums” of much greater moral degeneracy than was previously thought. All of the failures of the state’s operation only verify the cunning menace of the illegal alien and, thus, the need to further beef up Gatekeeper’s legal, military, and police apparatuses.¹¹⁸

114. *See id.*

115. *See id.*

116. *Id.*

117. *Id.*

118. Huspek, *supra* note 102, at 24.

From leading immigrants without adequate provisions toward cruel deaths in the deserts of California to the procurement of a chosen and ideal workforce which boosts the U.S. economy, the means and ends of Operation Gatekeeper are unethical and must be challenged by the American public. The United States should be expected to implement a humane immigration policy which can control the flow of immigrants while treating them first as human members of our global community. Operation Gatekeeper is not an acceptable answer to the immigration question for human rights reasons, nor as an ethical or moral response from a country that prides itself as a leader among nations. It is time to look for a new and moral answer to the immigration question.

IV. WHERE TO TURN FOR A JUST IMMIGRATION POLICY

Concern for immigrants and their unjust treatment due to national immigration legislation and the implementations of U.S. immigration policy continues to be voiced to the legislative, executive, and judicial branches of our government. Appeal to these branches has brought about few heartening results, and any potential improvements have been tempered almost immediately with vetoes and restrictions that have prevented substantive reform. Thus, it is time to adopt a policy toward immigrants that does not rely merely on the limits of our Constitution and its interpretation, the particular inclinations of the current president in office, or on case law created by judges. It is time to globalize our attitude toward the stranger by utilizing the international law and human rights approach. The result in doing so is an immigration policy that, first and foremost, honors the human dignity of aliens at the border and within our country.

A. *The International Perspective on The Immigration Question*

International law consists of a series of principles that can be found in charters of international organizations, such as the United Nations, in treaties signed by states, in the rulings of international tribunals and, to a lesser extent, customary practices of states.¹¹⁹ There are no specific provisions of international law that set forth binding rules for the treatment of immigrants,¹²⁰ but there is customary international law mandating that states treat their aliens decently following "universal principles of justice."¹²¹ The debate continues as to what "uni-

119. See HULL, *supra* note 2, at 59.

120. See Meehan, *supra* note 91, at 399-403.

121. HULL, *supra* note 2, at 60.

versal principles of justice” are, as to the meaning of “decently,” and whether or not states are bound to these two concepts.

The United Nations Charter sets forth the purpose of the United Nations in Article 1.¹²² Paragraph 3 of Article 1 says that one purpose is “promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion.”¹²³ Noticeably missing as a characteristic is nationality. Despite this omission,

a “common sense” understanding of the law of human rights suggests that a nation has a responsibility to respect the needs and interests of all its residents. The common sense understanding appealed to here is an understanding that human rights are rights possessed by human beings as human beings, and not as citizens of any particular nation state or members of a particular group or class.¹²⁴

The Universal Declaration of Human Rights, read broadly, comes closer to protecting the illegal immigrant. Paragraph 1 of Article 25 states:

Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.¹²⁵

While this paragraph’s language and intent is clear, it and other paragraphs like it have not been used thus far to advocate for protection or aid to immigrants. This is because “principles of international law are neither unambiguous, universally accepted, nor self-enforcing. They frequently embody lofty ideals that provide countries with a valuable norm, but these ideals are readily sacrificed to the demands of political expediency.”¹²⁶ When international documents with a significant potential impact are drafted, not every state is a signatory. If all states do not abide by the same principles, it is virtually impossible to enforce those principles. The international system currently has much “law” but very little enforcing power. Furthermore, international documents may conflict with individual states’ customary law, or usual practices. In that case, which law supercedes?

122. U.N. CHARTER art. 1.

123. U.N. CHARTER art. 1, para. 3.

124. Meehan, *supra* note 91, at 402-03.

125. U.N. UNIVERSAL DECLARATION OF HUMAN RIGHTS, art. 25, para. 1.

126. HULL, *supra* note 2, at 59.

While international law has many of the salient concepts needed to develop an international immigration solution, including a commitment to human rights for every person, there is a significant barrier to the implementation of that solution in the United States. This barrier is the juxtaposition of the United States' international role as an equal member of all nation states against its national sovereignty. The United States continues to maintain that United Nations Charter obligations are not enforceable within its territory without mirroring legislation from Congress.¹²⁷ It has refused to ratify the majority of human rights treaties with the exception of agreements such as the Universal Declaration of Human Rights. That agreement is not binding law and thus imposes no obligations upon its signatories.¹²⁸

There is one commanding reason why the United States has failed to ratify many international conventions: By so doing it would thereby forfeit a modicum of its sovereign authority. That other nations should participate even marginally in the country's internal affairs is as unacceptable to Congress as is the specter of the country's compulsory submission to the judgments of an international tribunal.¹²⁹

While this self-righteous attitude might have been admirable decades ago when the United States was establishing itself as a world power, current worldwide problems of "scarcity of resources and unemployment, overpopulation and political turbulence . . . [giving] rise to human migration staggering in scope,"¹³⁰ demand a multinational solution. "Multinational institutions alone are capable of forestalling or at least palliating this phenomenon, but only if they are endowed with sufficient resources and authority."¹³¹ The United States, in contrast to other countries, refuses to compromise its sovereignty and continues to insist on handling the immigration crisis "without unsolicited interference from any supranational authority."¹³²

The issue of the United States' international role clashes most profoundly with its national sovereignty regarding immigration in the following manner. While emigration is a right of all individuals under Article 13, Paragraph 2 of the Declaration of Human Rights,¹³³ immigration is strictly a matter of national sov-

127. *See id.* at 152-53.

128. *See id.* at 153.

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.*

133. U.N. UNIVERSAL DECLARATION OF HUMAN RIGHTS, art. 13, para. 2.

ereignty. The irony is that while a person has an individual right to emigrate, he or she does not have a corresponding right to immigrate. By continuing to address migration solely on a national level, the United States is working with only half of the equation: the reasons people are emigrating are vital to the solution of why they are immigrating.

Until the United States becomes the chief proponent rather than the main opponent in making international human rights law self-executing (when the obligation created by the treaty is enforceable without further legislation), its stubborn adherence to national sovereignty will continue to prevent a multinational solution to immigration.¹³⁴ Our judicial system has likewise contributed to the success of the national sovereignty perspective by holding, over the last fifty years, that human rights clauses are non-self executing.¹³⁵ The Supreme Court, additionally, continues to abide by the common-law plenary power doctrine that "over no conceivable subject is the legislative power of Congress more complete than it is over the admission of aliens."¹³⁶ One hope for immigrants is the eventual debunking of the plenary power doctrine, which would open the door to a greater emphasis on international human rights norms. These norms are likely to be inconsistent with the historical "rational basis type review of federal alienage classifications."¹³⁷ Assuming that the judicial branch would want to reconcile the international norms with the level of scrutiny, it might apply a higher degree of scrutiny under the Equal Protection Clause. Given this assumption, the restriction of benefits under the Welfare Act might not survive that scrutiny.¹³⁸

Several incentives should encourage the United States to adopt an international perspective on immigration and abandon its strict notion of national sovereignty. First, international law is the proper arena for the immigration problem. Article 1, Paragraph 3 of the United Nations Charter lists as a purpose of the U.N. "to achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character."¹³⁹ Furthermore, international human rights law is primarily concerned with protecting the human dignity of all, which is an element missing from national immigration policy.

134. See Meehan, *supra* note 91, at 406.

135. See *id.*

136. *Fiallo v. Bell*, 430 U.S. 787, 792 (1977) (quoting *Oceanic Steam Navigation Co. v. Stranahan*, 214 U.S. 320, 339 (1909)).

137. Meehan, *supra* note 91, at 410.

138. See *id.*

139. U.N. CHARTER, art.1, para. 3.

What is needed to activate an international response is state support from the United States, because "its pre-eminent status thereby [will encourage] other nations to respond in kind."¹⁴⁰ In addition, from the perspective of the emigration/immigration dichotomy, the immigration phenomenon is clearly a two-way street. Trying to regulate only half of it is a band-aid rather than a cure. In order to regulate all of it, international teamwork and cooperation is necessary. While it is argued that "the great variation in government policies toward migration" makes immigration a matter of "politically defined national interests and values, that is, in the broadest sense, national sovereignty,"¹⁴¹ that variation is the very reason to begin international dialogue about the immigration. National sovereignty has not brought about a solution to this growing concern, and the time is ripe for exchanging ideas and proposals as a worldwide force.

Finally, an international solution is mandated by the fact that immigration touches every country in the world. "[I]mmigrants will continue to cross our borders so long as unstable social, political, and economic conditions persist in their countries of origin"¹⁴² It is time to realize that countries' actions and needs have global effects. As nations, we are all connected. Therefore, although a central tenet of sovereignty is that every nation has the right to exclude whomever it chooses, this self-serving doctrine is increasingly ineffectual today:

[S]elf-righteousness is an indulgence developed nations can no longer afford. . . any more than they can afford a policy of indifference to the plight of their neighbors. . . . Given the demographic realities of the twentieth century, is it ethically justifiable for any country to close its borders for reasons that are less than compelling? These are telling questions, because in answering them both individuals and nations reveal whether or not they are willing to become responsible members not only of the family of nations, but also of the family of man.¹⁴³

140. HULL, *supra* note 2, at 152.

141. Myron Weiner, *Ethics, National Sovereignty and the Control of Immigration*, 30 INT'L MIGRATION REV., Mar. 22, 1996, at 171, 179.

142. Cardinal Roger Mahony, *Statement by Cardinal Roger Mahony on the Impact of Welfare and Immigration Reform* (May 29, 1997) <<http://ojp.la-Archdiocese.org/cardinal.htm>>.

143. HULL, *supra* note 2, at 154.

B. *The Moral Implications of the Human Rights Approach*

Congress' policy statement on immigration specifically states that immigrants rely on their families, sponsors, and private organizations.¹⁴⁴ Families and sponsors aside, placing the burden upon private organizations to be the primary caretakers and providers for immigrants is a manifestly unjust one because it completely disregards any moral and ethical leadership on the part of the government. Cardinal Roger Mahony of Los Angeles, California, has petitioned Congress "to recognize both the potential and limitations of private and religious charity."¹⁴⁵

The single largest area for impending cuts under the federal welfare law is food assistance with many of the cuts to be borne by the working poor. Churches and private groups cannot make up the difference in the amount to be cut from federal food aid. With the federal government renegeing on its responsibility to ensure basic nutritional support to families, we call on the State government to adequately fund food aid.¹⁴⁶

As Americans, it is probably accurate to say that we are proud of our country and its leadership in the world. Every citizen wants the United States to continue to be the economic and technological world leader, to be the most financially stable, and to produce the brightest and best young Americans through the highest quality of education. To be an effective world leader, however, America must be an ethical leader as well, motivated by a set of morals. We are the strongest, most stable country and have the capacity to assist those less fortunate. Does that capacity not bring with it a moral duty to use that capacity to its fullest? Furthermore, nations look up to America and emulate it because of its history of leadership. If America recognizes a duty to care for humans in need, other countries will follow. Not only does this duty encompass legal immigrants, but it also touches those who have gotten past the Border Patrol Agents undetected. As human beings in our country, we have at least some basic moral and ethical responsibility to them, not as illegal immigrants, but as humans in need. Surely America, whose "strength and foundation has been built upon generation after generation of immigrants"¹⁴⁷ has not become so callous as to deny any responsibility to those very immigrants. To recognize this responsibility is the mark of a true world leader. In light of the heretofore missing

144. See 8 U.S.C.A. § 1601 (West, Supp. 1996) (emphasis added).

145. Mahony, *supra* note 142.

146. *Id.*

147. Pham, *supra* note 80, at 1.

component of moral leadership by the American government, the burden that Congress has placed upon private organizations, for example the Catholic Church, is an unfair one.

The Catholic Church specifically, and non-profit organizations generally, are doing an admirable job of providing services of all types to the immigrant population. What is often forgotten is that these services take finances, many volunteers, and employees who must forego anything but a meager salary. The ongoing cuts in federal funding of non-profit organizations simply exacerbate financial concerns. While all non-profit organizations depend upon donors, and the Catholic Church in particular funds many services through the collection plate, the funding of immigrant services through mere private donations raises a fundamental ethical question: Why is the strongest and most financially stable nation abdicating its moral responsibility for humane treatment of the stranger within its borders to private organizations such as the Catholic Church?

1. Why Immigrants Turn to the Catholic Church

Given that the immigrant population continues to increase while federal benefits have significantly decreased, immigrants are turning to non-profit, social service organizations to meet their basic needs.¹⁴⁸ While this category includes service providers of all kinds, the Catholic Church has particularly committed itself to providing immigrants with everything from basic survival needs to free legal assistance and advocacy as well as to pastoral care of the immigrant.

There are specific reasons why the immigrant turns to the Catholic Church in time of need. First, the Church has existed for almost two thousand years and has remained consistent in preaching and putting into action Christ's gospel: "I was a stranger and you welcomed me."¹⁴⁹ At a time when the United States is reneging bill by bill on its welcoming immigration policy of old, the Church's continuous support and stability provides a safe haven to immigrants.

Second, the Church literally follows the gospel which calls each member of the human family to feed the hungry, clothe the naked, and help those in need. By doing so, the Church actively creates change. It has established organizations such as the Catholic Migrant Farmworker Network which provides housing, health assistance, and child care to the migrant farmworker community. The Network also educates farmworkers on pesticides

148. See Fix & Zimmerman, *supra* note 79, at 15.

149. *Matthew* 25:35.

and works to increase the median educational level of the farmworker head of household.¹⁵⁰ The Church has established the Campaign for Human Development, which is its domestic anti-poverty program funded largely by collections from parishioners. In March and May, 1997, the Campaign for Human Development awarded \$500,000 and \$169,150 respectively to low-income groups and coalitions who work together "to positively affect the implementation of federal welfare reform laws at the state and local level."¹⁵¹ Another offshoot of the Catholic Church is Catholic Charities, which not only has local branches to assist with basic needs of the poor, but also has a national Immigration and Refugee Division and local immigration legal services offices nationwide.

Third, the Church is present everywhere; it is both national and international. In the brutality often experienced at the border by aliens, the wounded with nowhere to go ultimately seek aid from local churches. One example is Pedro García Hernandez, a fifteen-year-old who was shot in the stomach by a Border Patrol agent in 1989. Upon his release from the hospital, he was given five dollars spending money by the INS and sent back to Tijuana. Pedro was a homeless orphan and had nowhere to go. After spending one night in an abandoned house, he ultimately sought help from the local church.¹⁵² On the international front, the Catholic Church recently intervened on behalf of Vietnamese boatpeople. Because the Vietnamese are not eligible for government amnesty programs for illegal aliens, the Church persuaded the Philippine government both to allow the boatpeople to remain in an abandoned asylum camp and not to forcibly return them to Vietnam.¹⁵³ Because the Church is present in some capacity wherever immigrants are present, its national and international roles make it an authority on the immigration question.

Fourth, a large number of immigrants come to the United States from Mexico and Latin American countries, which are

150. See *Catholic Migrant Farmworker Network: Issues* (visited Jan. 19, 1998) <<http://www.cmf.n.org/issues.html#housin>>.

151. National Conference of Catholic Bishops/United States Catholic Conference, *Campaign for Human Development Awards \$169,150 in First Round of Welfare Reform Initiative* (May 23, 1997) <<http://www.nccbuscc.org/comm/archives/97-110.htm>>. See National Conference of Catholic Bishops/United States Catholic Conference, *CHD Commits \$500,000 for Innovative Welfare Reform Initiatives* (Mar. 21, 1997) <<http://www.nccbuscc.org/comm/archives/97-065.htm>>.

152. See AMERICAS WATCH, HUMAN RIGHTS WATCH, *supra* note 95, at 39.

153. See *Philippine Immigration Chief Wants Vietnamese Boatpeople Legalized*, Agence Fr.-Presse, Jan. 31, 1997, available in WESTLAW, INTNEWS file.

predominantly Catholic. In seeking assistance from Catholic agencies, immigrants are going to places of trust and familiarity. Furthermore, many immigrants are aware that Catholic agencies, as non-profit organizations, do not have to report the immigration status of the people they serve.

Fifth, immigrants realize that the Catholic Church is not just satisfied with taking care of their immediate needs, but rather advocates for change in immigration policy with Congress and the administration in office. The National Conference of Catholic Bishops at the United States Catholic Conference is active in calling for welfare reform. The Chairman of the Bishops' Committee on Migration, Bishop John Cummins of Oakland, California, sent a letter to all 535 members of Congress in April of 1997, when fewer than 100 days remained until all immigrant provisions of PRWORA would be fully implemented.¹⁵⁴ Bishop Cummins urged Congress to address "the most vulnerable legal immigrants among us: children, the elderly, the disabled, and those who have sought our protection from persecution abroad."¹⁵⁵ Bishop Cummins advocated for "a definitive solution" to immigration and gave four examples of legal immigrants who would face severe hardship when the provisions terminating benefits were implemented. He referred specifically to "a 92-year-old woman who, unless Congress acts swiftly, will soon face homelessness and destitution. She suffers from dementia and cannot provide any information about her place of birth . . . she has no family here who can verify information about her."¹⁵⁶ More recently, on November 12, 1997, Bishop Cummins and Bishop William Skylstad of Washington called on the Clinton Administration to be mindful of the hunger of legal immigrants as it drafts the 1999 Federal Budget.¹⁵⁷ The leaders of the Catholic Church continue to show a willingness to advocate for the rights and the dignity of immigrants.

Finally, immigrants turn to the Church in time of need because the Church has committed itself to going beyond meeting the mere physical, daily needs of the immigrant. The

154. See National Conference of Catholic Bishops/United States Catholic Conference, *92-Year Old Immigrant Faces Homelessness Due to Welfare Law; Bishop Urges Corrective Legislation* (Apr. 25, 1997) <<http://www.nccbuscc.org/comm/archives/97-091.htm>>.

155. *Id.*

156. *Id.*

157. See National Conference of Catholic Bishops/United States Catholic Conference, *Bishops Call on Administration to Add More Money for Hungry Immigrants* (Nov. 12, 1997) <<http://www.nccbuscc.org/comm/archives/97-252.htm>>.

Church treats the immigrant not only as a person worthy of dignity and respect, but also as one with spiritual, mental, and emotional needs. To this end, the Office of Migration & Refugee Services has established the Pastoral Care of Migrants and Refugees (PCMR) to welcome the newcomer into the Church.¹⁵⁸ The welcoming purpose of PCMR is manifested in two programs: first, the Ministry with Ethnic Apostolates “supports and strengthens Catholics from diverse countries and cultures living in this country” and second, Ministry with People on the Move, works with people “in occupations that require constant travel, including migrant farmworkers”¹⁵⁹ PCMR provides language and culturally appropriate liturgical and religious education materials, assists in leadership development within communities, assists exchanges of clergy from other countries, serves as a resource center to dioceses, and trains pastoral ministers.¹⁶⁰

C. *The Catholic Church's Response to Immigrants*

The Catholic Church has consistently recognized immigration as the salient issue of the current and upcoming decades. The Church, as an “expert in humanity,”¹⁶¹ has not been silent on the question of immigration reform, but has called worldwide for a new attitude towards immigrants which recognizes their inherent human dignity. In doing so, the Church has specifically criticized United States’ immigration legislation for its betrayal of the poorest and neediest members of the human race. The Church emphasizes love for the immigrant, an acknowledgment and respect of his or her human dignity, the commonality of the human condition and the inherent same-ness of the immigrant and non-immigrant, and the moral duty of each member of the human race to treat immigrants first as humans.

Immigration is one of the pressing social questions of the decade. Pope John Paul II, in his encyclical letter *Centesimus Annus*, quotes Pope Leo XIII when he says that “there can be no genuine solution of the ‘social question’ apart from the Gos-

158. National Conference of Catholic Bishops/United States Catholic Conference: Office of Migration & Refugee Services, *Pastoral Care of Migrants and Refugees (PCMR)* (visited Jan. 19, 1998) <<http://www.nccbuscc.org/mrs/pcmr/index.htm>>.

159. *Id.*

160. *See id.*

161. John Paul II, *Sollicitudo Rei Socialis* (para. 41) (Dec. 30, 1987), reprinted in ORIGINS NC DOCUMENTARY SERVICE, Vol.17: No.38, Mar. 3, 1988.

pel.”¹⁶² An emphasis of the Gospel that Pope John Paul challenges us to read is love:

[L]ove of people, of all men and women without any exception or division: without difference of race, culture, language, or world outlook, without distinction between friends and enemies. This is love for people—it desires every true good for each individual and for every human community, every family, every nation, every social group, for young people, adults, parents, the elderly—a love for everyone without exception.¹⁶³

Bishop Anthony M. Pilla of Cleveland addressed his fellow bishops in June, 1996, with the same theme: love one another as I love you.¹⁶⁴ He challenged his audience: “You shall treat the alien who resides with you no differently than the natives born among you; have the same love for him as for yourself”¹⁶⁵ The basic love for the stranger helps each person realize and respect the human dignity inherent within that stranger.

The Catholic Church teaches that, when God created us in His likeness, He “confer[red] upon [us] an incomparable dignity.”¹⁶⁶ Furthermore, while there are rights earned by each person through work or contribution to society, “there exist rights which do not correspond to any work he performs, but which flow from his essential dignity as a person.”¹⁶⁷ That dignity was robbed by the recent reform measures.¹⁶⁸ The recognition of every person’s human dignity must occur both on a personal level and on a legislative level. In his 1998 Message for World Migration Day, Pope John Paul II called every member of the human race to work together for the human dignity of each member: “The Church invites all people of goodwill to make their own contributions so that every person is respected and discriminations that debase human dignity are banned.”¹⁶⁹ To Congress, the Church asks that “The principles of human dignity and

162. John Paul II, *Centesimus Annus* (para. 5) (May 1, 1991) reprinted in ORIGINS NC DOCUMENTARY SERVICE, Vol.21: No.1, May 16, 1991 [hereinafter *Centesimus Annus*].

163. John Paul II, *Dives in Misericordia* (para. 15) (Nov. 30, 1980) reprinted in THE PAPAL ENCYCLICALS: 1958-1981 at 295 (Claudia Carlen ed., 1990).

164. See *John* 15:12.

165. Bishop Anthony M. Pilla, *Love One Another As I Love You* (June, 1996) <<http://www.nccbuscc.org/mrs/pilla.htm>> (quoting *Leviticus* 19:33-34).

166. *Centesimus Annus*, *supra* note 162, at para. 11.

167. *Id.*

168. Mahony, *supra* note 142.

169. John Paul II, *Message for World Migration Day 1998* (visited Jan. 19, 1998) <http://www.vatican.va/holyfather/john_p...111997/world-migration-day-1998.htm> [hereinafter *World Migration Day 1998*].

human solidarity, which the Church has long taught, should be factors in shaping the goals of public policy, including immigration."¹⁷⁰ Human dignity is recognized on a personal level when everyone respects the differences and gifts of the stranger, and welcomes him or her into the community. On the legislative level, the immigration debate "has taken on a punitive tone which seems to seek to diminish the basic human dignity of the foreign born."¹⁷¹ Targeting the most vulnerable immigrants, the children, the sick, and the elderly, and denying them food and health care violates human dignity. "Overreaching and restrictive" legislation that makes it "almost impossible for legal taxpaying immigrants to seek assistance when confronted with [the] vicissitudes of life" likewise is an affront to all humanity.¹⁷² The new sponsorship restrictions, by preventing family unification and by requiring largely impossible financial tests also violate human dignity.¹⁷³

A central message of the Catholic Church is that each and every person shares in the human condition and must be moved by empathy to help the immigrant. Pope John Paul II writes, "Over and above 'all the differences which distinguish individuals and peoples, there is a *fundamental commonality*. For different cultures are but different ways of facing the question of the meaning of personal existence."¹⁷⁴ Bishop Pilla next reminds us that "[a]ll of us at some point may be affected by hunger, poor health, housing needs, family crises, and aging."¹⁷⁵ Therefore, just as each of us would want a fellow human being to reach out to us during such crisis, we are called to reach out to the immigrants who are now living that crisis. To bring this message home to his listeners, Cardinal Mahony said that nearly 2.1 million people in Los Angeles County received some type of aid from a major assistance program in 1995. This means 25% of the County's residents were some type of beneficiary.¹⁷⁶ "With a beneficiary base of this magnitude, welfare and immigration reform will profoundly affect all of us. In one way or another, each of us will be touched."¹⁷⁷

170. Pilla, *supra* note 165.

171. *Id.*

172. *Id.*

173. *See id.*

174. *World Migration Day 1998*, *supra* note 169 (quoting *Address to the 50th General Assembly of the United Nations* (Oct. 5, 1995), L'OSSERVATORE ROMANO, at n.9 (English ed., Oct. 11, 1995)).

175. Pilla, *supra* note 165.

176. *See* Mahony, *supra* note 142.

177. *Id.*

Finally, the Catholic Church recognizes a moral duty on the part of each and every member of the human race to ameliorate the harsh treatment of immigrants, a moral duty that the United States has ignored. Bishop Pilla asks that “[a]ll people, and particularly those who have been entrusted with leadership, are given the moral charge to build up the ties between individuals and nations.”¹⁷⁸ Our elected officials must especially “measure the human and moral impact of each proposal” before passing new legislation.¹⁷⁹ The foundation for this duty, according to Pope John Paul II, is that “[n]o one can say that he is not responsible for the well-being of his brother or sister.”¹⁸⁰ Therefore, the “duty is not limited to one’s own family, nation or State, but extends progressively to all mankind, since no one can consider himself extraneous or indifferent to the lot of another member of the human family.”¹⁸¹ The moral implications of our nation’s treatment of immigrants extend beyond individual duties, however. “When innocent human beings are declared inconvenient or burdensome, and thus unworthy of legal and social protection, grievous damage is done to the moral foundations of the democratic community.”¹⁸² Our democracy can only be strengthened by taking care of the needs of the immigrant.

V. A SYNTHESIS AND PROPOSAL

As America approaches the twenty-first century, there should remain no doubt that the issue of immigration reform is one of worldwide importance and universal impact. The United States, as a world leader and country which harbors the majority of immigrants, must recognize immigration as a challenge of more than national scope which must be addressed using international and universal principles. To deal successfully and compassionately with immigrants, the United States must incorporate moral guidelines in immigration policy from both the ever-growing arena of international law as well as the Catholic Church, which has led its people for almost two thousand years. As a leading power among nations, the United States has an additional obligation heretofore unrecognized: to provide a moral and ethical leadership comparable with its economic and technological

178. Pilla, *supra* note 165.

179. Mahony, *supra* note 142.

180. *Centesimus Annus*, *supra* note 162, at para. 51.

181. *Id.*

182. John Paul II, *Excerpts From the Homily at Giants Stadium, October 5, 1995*, (visited Jan. 19, 1998) <<http://www.nccbuscc.org/mrs/pope.html>>.

leadership. Other countries will follow our lead and our directives on immigration if we address the issue as a universal one.

A lasting and humane solution to immigration needs a united front nationally as well as internationally. The non-profit organization working alone, the states distributing lump sums, and even the federal government are no longer enough. The seriousness of the immigration problem dictates that the world unite to solve it together. To this end, both attitudinal and practical changes are necessary on the part of the United States and the American people.

An attitudinal change must come from the American people regarding their xenophobic view towards immigrants. Because "much of the unease over migration and refugee policies. . . result[s from] inconsistent, often arbitrary, acts by policymakers or by those who administer policies,"¹⁸³ consistency must be a central characteristic of immigration reform. However, to the extent that America fears the racial, cultural, and ethnic impact of immigration, its attitude must change. Simply put, racism can no longer be an acceptable coping mechanism in the twenty-first century. The Church calls us to see and treat immigrants as humans rather than aliens. This call is not entirely a religiously based conviction but also a practical and common sense response towards humans with whom we share the living space that is our global society. The Church's challenge is not a question only of faith and belief but of recognizing a universally applicable concept of human dignity not based on race, sex, nationality, gender, or any other limiting factor. Spreading this "gospel" is not preaching a religion but rather a way of life. With compassion, an awareness of every human's dignity, and a passionate pursuit of human rights at the forefront of our relations with the immigrant, American society will take the first and most important step toward lasting immigration reform.

The United States government must change its attitude toward immigration as well. It must first seek to solve the immigration problem for the sake of the immigrants rather than to reduce the national deficit. Once it is prepared to address immigration for immigration's sake, the country must experience "a fundamental institutional and philosophic reorientation":¹⁸⁴ the United States as well as every other country "must cease to revere, and indeed genuflect before, the twin altars of 'citizenship' and 'sovereignty'" and move toward an immigration policy based

183. Weiner, *supra* note 141, at 196.

184. HULL, *supra* note 2, at 147.

upon our shared humanity with the immigrant.¹⁸⁵ Finally, the government must set an example, both nationally for Americans and internationally for other States, because its power and success as a government make it a force to be respected and, on the international front, emulated. The example should be one of moral responsibility, of concern for the immigrant first as human, and one of openness towards participating fully in an international human rights answer to the immigration question.

Suggestions for practical changes to the United States' current immigration policy are numerous and have come from every imaginable critic. Practical change is badly needed and must be implemented immediately. On the legislative level, two overarching changes must be made to the Welfare Act of 1996. First, "[I]t is difficult for new immigrants . . . to find work. Lacking language skills and job training, they need a transition period."¹⁸⁶ The Welfare Act not only provides no such transition period, but instead establishes a five-year wait for benefit eligibility. Thus, instead of giving immigrants a helping hand to start off in a new country through benefits and job and language training, then discontinuing benefits when the immigrant has had ample opportunity to become self-sufficient, the Welfare Act works conversely. It would have the immigrant suffer for lack of food and no way to earn it for five years, and become eligible for benefits when he or she is accustomed to living on the street and no longer wishes to make good in a country that has disappointed him. "[T]he Welfare Reform Law only creates more poverty, pushes impoverished people deeper into poverty, and forces needy people out into the streets."¹⁸⁷

The Welfare Act must undergo another practical change. While the Act is a lengthy series of detailed provisions addressing eligibility for virtually every alien facing unique circumstances, as to every set of rules there will be exceptions for which the Act fails to provide. In expectation of those cases, the Welfare Act must include a provision for a financial safety net for immigrants. "A safety net of benefits for the poorest of the poor, for cases that fail to fit neatly into any categories, at a level adequate for basic health and sustenance is essential to any revision in welfare policy."¹⁸⁸ Immigrants, like all people, will fall on hard times brought about by illness, death, financial loss, and any of a host of other unexpected life events. This is simply a commonality of

185. *Id.* at 148.

186. Pham, *supra* note 80, at 1-2.

187. *Id.* at 4.

188. Mahony, *supra* note 142.

the human condition. Our country needs to "provide a safety net for legal immigrants and their sponsors who fall on hard times and require transitional assistance."¹⁸⁹

Second, the government must analyze the effectiveness of its training of the Border Patrol. While the Welfare Act provided for an additional 1,000 Border Patrol agents to be added each year for the next five years, the INS admits that 700 agents is the maximum number they can safely recruit and train per year.¹⁹⁰ The practical change is that Border Patrol agents must be reoriented in their perception of the immigrant so that they enforce our borders without unnecessary violence and brutality. There is simply no excuse for a nation as advanced and intelligent as ours to employ, and even encourage, agents who, under color of law and the authority of the federal government, abuse, degrade, and even kill illegal immigrants. The United States' deployment of Operation Gatekeeper must likewise undergo serious scrutiny as a grossly disproportionate militarization against a defenseless "enemy," and as an unethical and inhumane pursuit of our nation's perceived economic needs.

Third, our Supreme Court is another potential source of policy change toward immigrants. "[T]he Supreme Court must assume greater responsibility for the rights of non-citizens, and thus abandon the notion that its role is minimal whenever it examines federal policy that affects their well-being."¹⁹¹ The Supreme Court also has the authority to begin paving the way toward an international human rights policy on immigration by allowing into its deliberations international law as an external source. Additionally, the Court should recognize the importance of what is said in dicta in international court opinions in order to gradually shift the judicial perspective from a hands-off policy to one of greater initiative and responsibility for human rights violations within our borders.

Finally, a practical change the United States must implement is the inclusion of every country into the planning and carrying out of immigration reform and of a human rights emphasis. This inclusion may begin and end with dialogue and proposals to address the migration issue at its source as well as at its destination. Ideally, however, the United States would sacrifice a small portion of its national sovereignty to be held account-

189. Fix & Zimmerman, *supra* note 79, at 16.

190. See *The Illegal Immigration Reform and Immigrant Responsibility Act of 1996: A Summary Prepared by the National Immigration Forum*, 24 *MIGRATION WORLD MAG.*, Jan. 1, 1997, at 47.

191. HULL, *supra* note 2, at 148.

able by fellow nations. An international treaty legislating immigration policy for all nations would protect immigrants from being treated like non-persons and emphasize the human dignity and respect merited by immigrants and non-immigrants alike. The final step would be to create an international tribunal to enforce such a treaty, thereby promoting international accountability for all immigrants.

The road towards immigration reform for the United States is both tortuous and unprecedented. Sometimes the most courageous action a nation can take is to seek partnership and community in implementing reform. Because the immigration crisis is a global one, the solution must likewise be global. The result will be a more lasting and morally sound solution that encompasses all nations. While the moral guidelines regarding treatment of the immigrant suggested by both basic human rights principles and the Catholic Church complement each other, there is an undeniable chasm between Catholic and human rights policy towards immigrants and the current attitudes and actions of both the people and the government of the United States. The task of bridging that chasm seems formidable, but the most important thing is that we begin.