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Foreword (Symposium: Challenges in Immigration Law and Policy: An Agenda for the Twenty-First Century).

Carol Buckler
New York Law School, carol.buckler@nyls.edu

Foreword

Carol A. Buckler[*]

On April 8, 1994, the *New York Law School Journal of Human Rights* held a symposium, entitled *Challenges in Immigration Law and Policy: An Agenda for the Twenty-first Century*, the proceedings of which are published here.[1] The symposium brought together scholars, advocates, practitioners, and policy-makers for a day of reflection on some of the most difficult immigration issues facing the nation. As we approach the twenty-first century, which immigrants we should admit, and how many, are questions that are often in the headlines. Reaching the answers, however, will require a rigorous consideration of the issues beyond the headlines. What are the country's goals for an immigration policy? How should internal domestic issues, foreign policy interests, and humanitarian concerns be weighed in shaping the policy?

Even as we consider the issues beyond the headlines, we must remember the impact of headlines in mobilizing constituencies, and limiting practicable achievements. In the discussions that follow, the speakers keep returning to the role of the American public, and its perceptions of immigrants and immigration policy. The participants agree that many misconceptions and distortions prevail in the political dialogue about immigration, and that it is important to begin educating the public about the immigration issues, such as the human rights situations in countries that refugees are fleeing, the administrative challenges in dealing with immigration, and the makeup of the immigrant population.

In his introduction, Arthur Helton reminds us that the United States does not make policy in a vacuum, but operates within the context of growing worldwide migration. The causes of migration

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[*] Professor of Law, New York Law School. I would like to thank Richard Marsico, Professor of Law, New York Law School, for his comments on an earlier draft of this Foreword.

[1] The text following this Foreword represents the transcript of each speaker's presentation. Annotated footnotes were added by the editors of the *New York Law School Journal of Human Rights*.

include economic underdevelopment, armed conflicts, population growth, environmental degradation, and the modern ease of communications and travel. They are interrelated; no single factor can explain the phenomenon. In discussing the solutions that are typically offered to address migration problems, Mr. Helton is pessimistic. Some analysts argue that sustainable development would be the best preventive measure for economically-motivated migration. Developed nations are either unwilling or unable, however, to make the financial investment necessary to make this a viable solution. The limitations of other approaches, such as conflict resolution and humanitarian assistance, are clear from the tragic situations in the Former Yugoslavia and Rwanda.

In contemplating the particular situation of the United States, Mr. Helton is no more optimistic. Efforts to manage unauthorized immigration have been plagued by the inadequacy of resources and the dangers of discrimination. Admissions of refugees and asylees are hampered by a tremendous backlog and inefficiency at the Immigration and Naturalization Service. Mr. Helton concludes that the ongoing policy debate about these and related issues is likely to continue to be rancorous and confused.

The first symposium panel considers recent developments in refugee protection. To begin our consideration of these issues, Arnold Leibowitz, former special counsel to the Select Commission on Immigration and Refugee Policy and former special counsel to the Senate Subcommittee on Immigration and Refugee Policy, provides the historical context for the Refugee Act of 1980.[2] He explains that the intended purposes of the Refugee Act are, in some cases, far from realization. The United States has not accepted refugees in numbers anywhere near the numbers originally anticipated by Congress. To the extent that the Refugee Act intended to codify the international definition of "refugee," it has accomplished this goal only in a literal sense, by including in United States law a provision declaring that an alien qualifies as a refugee if she is unable or unwilling to return to or to avail herself of the protection of her country of nationality or last habitual residence "because of

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[2] Pub. L. No. 96-212, 94 Stat. 102 (1980) (codified as amended in scattered sections of 8 U.S.C. (1988)) (amending the Immigration and Nationality Act, Pub. L. No. 82-414, 66 Stat. 163 (1952)) (codified at 8 U.S.C. §§ 1101-1157 (1988)).

persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion."[3] In practice, this definition is the subject of constant wrangles. Refugee advocates insist that the broad language means what it says. The government, however, balks at their interpretation because if this definition is accepted literally, perhaps 100,000,000 people would be eligible for refugee status. The Act also authorizes the devotion of resources to aid refugees. Mr. Leibowitz joins in Arthur Helton's pessimism in this regard, arguing that as the perception of the scarcity of resources intensifies, the American public is less willing to spend money to aid any immigrants, including refugees.

Dan Kesselbrenner, Director of the National Immigration Project of the National Lawyers Guild, lambasts the government's implementation of the asylum law. He suggests that administrative actions are driven less by commitment to legal principles than by bureaucratic bungling, and government hostility to immigration. He argues that while the INS promotes the impression of rampant fraud among asylum-seekers, the bigger problem is that large numbers of good faith applicants are unable to present their cases because of lack of counsel, language barriers, and the complexity of the application process. Mr. Kesselbrenner predicts that proposed changes in the asylum regulations[4] are likely to worsen the situation. For example, he warns that giving asylum officers the discretion to deny interviews, combined with explicit or implicit "production goals," will engender arbitrariness, and, perhaps, invidious discrimination.

In December of 1994, after this symposium was held, the INS issued final asylum regulations.[5] The final regulations differ from the proposed regulations in some significant aspects, partially in response to the objections of refugee advocates. Some commenters, like Mr. Kesselbrenner, had expressed concern that the proposed regulations unduly restricted the opportunities of asylum applicants to have their

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[3] 8 U.S.C. § 1101(a)(42) (1988).

[4] *See* 59 Fed. Reg. 14,779 (1994).

[5] 59 Fed. Reg. 62,284 (1994) (to be codified at 8 C.F.R. pts. 208, 236, 242, 274a, & 299) (streamlining the asylum application and adjudication processes and restricting work authorizations for asylum-seekers).

cases heard in a nonadversarial setting.[6] The final regulations provide that all asylum applicants will have the opportunity for an interview with an asylum officer.[7]

Maryellen Fullerton, Professor of Law at Brooklyn Law School, shares her insight on the contemporary refugee experience in Germany. She believes that examination of the German experience should teach refugee advocates and policy-makers in the United States the importance of educating the public. Several years prior to the recent changes in refugee law, there had been a dramatic increase in the number of asylum-seekers arriving in Germany. The law forbade these asylum-seekers to work; as a result, ever higher numbers of applicants were being housed in reception centers at taxpayers' expense. This came at a time of immense financial and social pressures resulting from the reunification of East and West Germany. It became easy to blame refugees for their own plight, which created an accelerating sense of frustration and resentment against asylum-seekers. Ultimately, it became politically untenable to oppose severe constitutional and legislative restrictions on the availability of asylum. Professor Fullerton concludes that refugee advocates in Germany failed to educate the public about the legitimate needs and claims of refugees, and suggests that, while conditions are quite different in the United States, the human rights and academic community here should take heed of the German experience.

Hiroshi Motomura, Professor of Law at the University of Colorado Law School, raises a series of intriguing questions involving the concept of equality as it relates to refugees. He notes the potentially uncomfortable tension between efforts to apply equal protection doctrine to immigration law, and calls for special treatment of certain refugee categories. The plenary power doctrine, by which the courts have given Congress and the executive broad authority over immigration, has blocked the application of equal protection principles to most immigration issues. But Professor Motomura observes that notions of equality have recently started to creep into cases ostensibly decided on other grounds. Professor Motomura expects this trend to continue, and recommends that we think carefully about how far equality ought to influence immigration law,

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[6] *See* 59 Fed. Reg. 62,284, 62,285 (1994).

[7] 59 Fed. Reg. 62,284 (1994).

and, indeed, about what equality means in the context of immigration.

Following-up on Professor Motomura's discussion of the role of equality in immigration policy, the second panel addresses the role of diversity in immigration. The panel, which itself offers a diversity of perspectives, agrees that diversity is a highly political concept, and that the definition of diversity in immigration has profound implications for the distribution of political power in this country. The speakers on this panel raise the possibility of growing political competition and conflict among various immigrant, non-immigrant minority, and other interest groups.

Daniel Stein, Director of the Federation for American Immigration Reform, leads the discussion by reviewing the history of immigration policy in the United States. He observes that from colonial times, immigration policy has had a variety of restrictions on certain groups, and has continued to be restrictive, even when, as in 1965, the law was ostensibly intended to eliminate discrimination based on race and nationality.[8] In this context, Mr. Stein suggests that we should consider whether we can ever achieve diversity through immigration policy, and asks whether diversity is a goal we should be seeking. He argues that diversity has different meanings for different groups, and that if diversity is a stated goal, the power to define it becomes a political prize that cannot be neutrally distributed.

Jocelyn McCalla, Executive Director of the National Coalition for Haitian Refugees, argues that, in the spectrum of restrictionist immigration policies, Haitians have been singled out for particularly severe treatment. He notes that when large numbers of Haitians began coming to the United States in the 1960s, fleeing the Duvalier regime, they were accepted because they were well-educated, and perceived as social and economic assets. Since that time, efforts to restrict Haitian immigration have become progressively harsher. Mr. McCalla argues that this trend arises not from any rational principles, but rather from a fear of difference.

Stanley Mark, Program Director for the Asian American Legal Defense Fund, considers the long history of restrictionist immigration policy, beginning as early as 1790, with the limitation of naturalization rights to "free white persons." He argues that

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[8] *See* Act of Oct. 3, 1965, Pub. L. No. 89-236, 79 Stat. 911 (1965).

discriminatory state and local laws have worked hand-in-hand with restrictionist immigration policy to the detriment of Asians seeking admission and citizenship.

Peter Schuck, Professor of Law at Yale Law School, explores, in greater depth, the connections between civil rights and immigration policy. He observes that while conflicts between natives and immigrants are permanent features of American history and politics, these conflicts, in the long run, have been resolved satisfactorily. He argues, however, that immigration has caused demographic, legal, socio-economic, and ideological changes, which have significantly disadvantaged one group in this country—African Americans. To the extent that immigrants have increasing political power, because of their increasing numbers and short-term residential concentration, the political power of African Americans, as a group, may be diluted. If immigrants militate for more public benefits, they may engender taxpayer resentment and resistance, and the total pool of resources available for such benefits may diminish. African Americans are themselves a diverse group, socially and economically, but the politics of group identification, promoted by affirmative action, tends to erase the differences within the group. Professor Schuck notes that attention to group identity encourages a comparison of group "performance," and that such a comparison with new immigrant groups may make it more difficult for African Americans to put forth their claims for just treatment. Professor Schuck laments that this unpleasant kind of politics is an increasing reality, but cautions that it is a reality that we ignore at our peril.

The final panel considers the issue of immigration's effect on social policy. This issue has become even more timely since the symposium was held, in light of California's passage, in November, 1994, of Proposition 187, a measure which denies public education, non-emergency health care, and social services to undocumented immigrants. Although as of this writing, certain provisions of the law have been temporarily enjoined by a federal court, the apparently overwhelming popular support for Proposition 187 and similar measures would seem to guarantee that the issue will remain in the

forefront of political discourse for some time.[9] Voters and policy-makers will value reasoned discussion and analysis such as that presented at this symposium.

Rebecca Clark, of the Urban Institute's Population Studies Center, emphasizes that, in order to understand the impact of immigrants on our society, it is important to distinguish among the three distinct immigrant groups: Regularly admitted immigrants, refugees and asylees, and undocumented immigrants. Failure to distinguish among these three groups leads to misleading depictions of immigrants, and consequent distortions of policy. If "quality" is measured by education and income, the "quality" of the immigrant stream differs dramatically by group. Similarly, usage of welfare benefits differ depending on the group. The effects of immigrants on the labor market also bears more careful scrutiny. For example, the level of job displacement of natives by immigrants depends on the health of the economy. Finally, the effects of immigrants on government resources differ drastically depending on the level of government one considers. Ms. Clark's conclusion is that, by almost every measure, regularly admitted immigrants are a net gain to society, particularly when comparing taxes paid by immigrants to government benefits enjoyed by them. There is an important refinement to this conclusion, however. While the federal government achieves a net gain, local governments, which provide services like schools and hospitals, must support infrastructures used by the public as a whole. Her recommendation is that the federal government, which sets immigration policy, redistribute the costs of immigration.

Mark Lewis, Associate Commissioner of the Office of Refugee Assistance and Rehabilitation Services in the New York State Department of Social Services, discusses the effect of immigration on

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[9] *See* Stanley Mailman, *California's Proposition 187 and Its Lessons*, N.Y. L.J., Jan. 3, 1995, at 3. Major provisions of Proposition 187 were temporarily enjoined by Judge Mariana R. Pfaelzer of the Federal District Court for the Central District of California. *Id.* Similarly, a California state court judge temporarily enjoined provisions that would have denied higher-education benefits to undocumented immigrants. *California Judge Limits Reach of Illegal Immigrant Initiative*, N.Y. TIMES, Feb. 10, 1995, at A20. The only part of Proposition 187 that remains in effect, as of this writing, is the provision that would increase criminal penalties for making, selling, or using false immigration documents. *Id.*

communities and social policies in New York. He points out that, contrary to public perception, undocumented immigrants make up the minority of immigrants that come to New York, and that they do not receive welfare benefits, either legally or fraudulently. He suggests that recent immigrants have been responsible for the revitalization of many New York City communities. He warns that federal efforts to impose additional restrictions on granting benefits to immigrants will only shift more of the burden, which is already unequally distributed, to the state and local levels. Commissioner Lewis concludes that it would be wrongheaded to try to cure the ills of the welfare system by attempting to deny benefits to immigrants. The answer, according to Commissioner Lewis, lies in reforming the welfare system itself.

Thomas Fox, of the Immigrants' Rights Project of the American Civil Liberties Union, argues that attempts to discriminate in the distribution of benefits on the basis of alienage are not only misguided, but are unconstitutional. The Supreme Court has already struck down a variety of state and local laws that discriminated on the basis of alienage in areas such as welfare benefits, state education aid, and job eligibility. He acknowledges that the Court has not resolved the issue of whether discrimination against undocumented immigrants is constitutional. Mr. Fox argues, however, that such discrimination contradicts the basic notions of fairness and justice that underlie constitutional protections. He also argues that efforts to deny citizenship to children of undocumented immigrants are unconstitutional, and would unwisely create a permanent underclass in this country. Finally, he urges that additional statutory protections for undocumented immigrants be enacted to eliminate, for example, abuses of the undocumented in the workplace.

These presentations represent a thoughtful starting point for the consideration of difficult issues in immigration policy. Together they argue for a sensitive study of the issues, and for a careful explication of the issues to the public, before far-reaching policy decisions are made.