1989

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Overview: Domestic Implications of Immigration Policy

Introduction: Immigration Law and Policy in the 1990s

Peter H. Schuck*

Immigration will shape America's future even more than it has shaped her past and present. Consider the following facts:

* During the decade of the 1980s, some 5.8 million people will have been admitted to the United States for legal permanent residence, and some 2.7 million more who had resided here illegally will have been legalized under the various amnesty provisions of the Immigration Reform and Control Act of 1986 (IRCA). The total of approximately 8.5 million will far exceed the 4.5 million admitted during the 1970s and will approach the almost 8.8 million who came here during the first decade of this century when immigration was essentially unrestricted and at the highest levels ever.

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2. 1987 Statistical Yearbook, supra note 1, at table 1. If we include illegal migrants who came during the 1980s but who will not be legalized, the total greatly exceeds that
That turn-of-the-century influx was distinguished from earlier ones not only by its size but also by its geographical and ethnic sources within Europe. The migration of the 1980s, in contrast, has been for the most part from every part of the world except Europe. Current immigration is transforming the demographic profile of the American population, particularly in large cities and in the Sunbelt region. The minority groups, especially Hispanics, from which most of the newer legal migrants come have high fertility rates relative to the population generally and will account for much of America's future population growth. Immigrants tend to be younger than the population generally and more than two-thirds are now women and children, in sharp contrast to the adult male-dominated waves of immigration of the past. Six states—California, New York, Florida, Texas, New Jersey, and Illinois—were the intended residence of more than 71% of legal immigrants in 1987; more than one-fourth planned to live in California, concentrated in six metropolitan areas in the state.

Immigration is also transforming our social institutions and practices. Widespread anxiety about linguistic and cultural fragmentation has prompted referenda establishing English as the official language in California and some other states. Bilingual education is a major curricular issue in public education, and dozens of languages must be used in New York City schools. The influence of Hispanic and Asian voters is growing. Certain sectors of the economy now essentially depend almost wholly upon legal and illegal immigrant workers.

The politics of immigration have grown ever more complex and intense, while the pace of immigration policy formation has greatly accelerated. After enacting the Johnson Act of 1921, it took Congress over 30 years to move to the McCarran-Walters Act of 1952, 13 more years to abandon the national origins-based quota system, historic high. See infra note 50 for a recent estimate of the number who remain in illegal status. Many of them, of course, came before the 1980s.

3. European countries accounted for slightly over 10% of all legal admissions during 1987 and about 8% of the new arrivals that year. Id. at table 6.
5. On age distribution, see 1987 Statistical Yearbook, supra note 1, at chart C. On women and children, see Pear, Men Only Third of U.S. Immigrants, N.Y. Times, Sept. 9, 1985, at B21 (summarizing Labor Department study).
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and 13 more to eliminate the hemispheric quotas in favor of a single, world-wide quota. Just since 1980, in contrast, Congress has enacted the first comprehensive regulation of refugee and asylum admissions, a sweeping set of measures directed at the problem of illegal migration, and a far-reaching scheme for the prevention of admissions based upon so-called "sham" marriages. Moreover, it will almost certainly adopt a fundamental restructuring of the entire system of legal immigration before the decade ends.

* During the 1980s, a cosmopolitan legal culture began to permeate the parochial bureaucratic culture of the Immigration and Naturalization Service (INS) as never before. For reasons not altogether clear, immigration law is shedding its shadowy reputation as a backwater legal specialty, of interest largely to marginal, low-status practitioners and the INS. More lawyers of demonstrated professional competence and high repute have been attracted to the private, "public interest," and government sectors of immigration practice. Some of the elite law schools are offering academic and clinical courses in immigration law for the first time. Legal scholars have begun to scrutinize the INS and immigration law more carefully. Most important, the federal courts are now intimately involved in supervising the INS's administration of the immigration

14. See infra text accompanying notes 70-72.
15. See Trillin, Making Adjustments, The New Yorker, May 28, 1984, at 50. This reputation doubtless was undeserved in many cases and probably says as much about the values of the elite corporate lawyers who increasingly shape the profession's self-image as it does about the quality of the services that immigration lawyers actually render to their clients. As leading corporate law firms increase their immigration practices, we can expect that the reputation of immigration lawyers will improve, quite apart from whether the quality of their services does so.
17. Some of these academic efforts were facilitated and supported by the Administrative Conference of the United States, which commissioned a number of studies of immigration-related issues. See, e.g., Legomsky, A Research Agenda for Immigration Law: A Report to the Administrative Conference of the United States, 25 San Diego L. Rev. 227 (1988); Legomsky, Forum Choices for the Review of Agency Adjudication: A
laws. As a growing number of immigration cases have reached the federal courts in recent years, the courts have invalidated statutory provisions and INS procedures and policies with an alacrity that would have astonished the immigration lawyers of an earlier generation.

In the remainder of this Overview, I shall explore the significance of these developments for the future. First, I describe the main elements of the setting in which immigration law and policy must now be formulated. Second, I summarize what is known about the effects of IRCA. Finally, I speculate about the shape of immigration law and policy in the 1990s.

I. The Setting for Immigration Law and Policy

It is conventional to ascribe the patterns of legal and illegal migration to a combination of "push" and "pull" factors. Clearly, the conditions propelling people toward the United States have never been stronger. Population pressures in the Third World, most notably in nearby Latin America, are building rapidly. The labor force in Latin America alone will grow by more than 90 million workers between the years 1980 and 2000. This increase of 77% will make it virtually impossible to maintain even the dismal current levels of employment prevailing there. In addition, convulsive civil conflicts in Central America and other immigration source regions, such as Southeast Asia, have swollen the number of refugees to an estimated 14 million worldwide. At the same time, inexpensive

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18. Data on immigration cases proceeding directly from the INS to the courts of appeals are presented in Schuck & Elliott, To the Chevron Station: An Empirical Study of Federal Administrative Law (draft report to the Administrative Conference of the United States) (in preparation 1989).


20. I refer to the "Third World" rather than to the "developing countries" because the economies in some of those countries are actually shrinking rather than expanding.


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transportation has made it much easier for hundreds of thousands of these desperate individuals to reach our borders, where many of them claim asylum. "Pull" factors attracting migration to the United States include the expanding employment opportunities for unskilled labor, the improved prospects for attaining legal status realized in the 1986 legislation, and the critical mass of compatriots that has accumulated in the ethnic enclaves of urban America, especially in Sunbelt communities.

Although most of these migrants are undocumented—and will be unable to establish valid asylum claims or other legal grounds for permanent residence here—legal immigration has also grown steadily during the 1980s. Indeed, this growth in legal immigration is occurring without any increase in the numerical quotas, and the total may soon equal or exceed record turn-of-the-century levels. Several "pull factors" are contributing to this increase. First, Asians and some other beneficiaries of the 1965 reforms that abolished the system of national origins quotas have naturalized at relatively high rates. Naturalization enables them legally to bring their immediate relatives to the United States without regard to quota limitations, a process known as "chain migration." Second, more than 2.5 million undocumented migrants will be granted temporary legal status under IRCA's general, agricultural, and Cuban-Haitian amnesty programs. These individuals must either adjust to permanent legal residence status within a prescribed period of time or face deportation. Finally, refugee and parole admissions are likely to increase to accommodate the larger number of Jews, Armenians, and others who are being permitted to leave the Soviet Union, as well as

23. See, e.g., Schmalz, Nicaraguans Crowd the Miami Welcome Mat, N.Y. Times, Nov. 20, 1988, § 1, at 1 (rapidly growing influx of Nicaraguans); Applebome, South Texas Fears Big Buildup of Aliens, N.Y. Times, Dec. 16, 1988, at A22 (almost 2,000 asylum petitions now being filed each week with INS; 60,736 asylum petitions filed with INS in fiscal 1988, compared with 26,107 in 1987 and 18,889 in 1986). These figures on asylum petitions presumably do not include the thousands of asylum claims filed with immigration judges in the context of exclusion or deportation proceedings.

24. 8 U.S.C. § 1151(a) (1982 & Supp. IV 1986). The annual worldwide numerical quota is 270,000, but this figure does not include immediate relatives, "special immigrants," or refugees.


Nicaraguan “contras” whose efforts to gain refugee status may receive an especially sympathetic hearing in the Bush administration.\textsuperscript{27}

The 1980s have taught us just how difficult it is to control the harsh pressures and magnetic opportunities that drive migratory flows of this size. Immigration law and policy are not entirely helpless in the face of such powerful motivations; they affect the incentives and expectations of aliens and citizens while providing officials with enforcement resources. On the other hand, we must not exaggerate the effectiveness of either law or policy in the immigration context. Both are severely limited by the forces favoring increased migration and by the real constraints of the enforcement system.

As a formal and as a practical matter, the conduct of immigration officials is relatively unconstrained by the law. The immigration statute confers exceedingly broad discretion upon the INS, which conducts its activities under the aegis of the Attorney General, ordinarily a close friend of the President. Bureaucratic self-absorption and autonomy are consequences of the striking insularity of the INS. The INS’s autonomy has been reinforced in recent years by the Supreme Court’s insistence that lower courts defer to the agency’s interpretation of its own statutory authority.\textsuperscript{28} Despite much criticism, the State Department’s consular visa decisions remain virtually immune from judicial review.\textsuperscript{29} Approximately 98\% of deportations, and presumably an even higher percentage of exclusions, are effected without formal proceedings of any kind.\textsuperscript{30} The agency’s informal operating norms, particularly those of the paramilitary Border Patrol, are deeply ingrained and highly resistant to change.\textsuperscript{31}

One authoritative measure of this long-standing resistance to law is the series of harsh indictments of INS policies and conduct that federal courts have rendered during the 1980s.\textsuperscript{32} Although the courts’ condemnations might seem to contradict the claim that the

\begin{itemize}
\item \textsuperscript{27} Pear, U.S. Vows to Take Contras Off Honduras’s Hands, N.Y. Times, Oct. 1, 1988, § 1, at 3.
\item \textsuperscript{29} \textit{E.g.}, Li Hing of Hong Kong v. Levin, 800 F.2d 970 (9th Cir. 1986).
\item \textsuperscript{30} E. Harwood, In Liberty’s Shadow: Illegal Aliens and Immigration Law Enforcement 43 (1986).
\item \textsuperscript{31} \textit{See} Harwood, \textit{supra} note 30; informal remarks of Doris Meissner, Senior Associate, Carnegie Endowment for World Peace, at Yale Law School (May 2, 1988).
\item \textsuperscript{32} Schuck, \textit{supra} note 19 (discussing and citing cases); Orantes-Hernandez v. Meese, 685 F. Supp. 1488 (C.D. Cal. 1988) (invalidating INS voluntary departure procedures for detained Salvadorans).
\end{itemize}
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INS is relatively autonomous and recalcitrant, I believe that they confirm it by demonstrating the persistence and systematic nature of INS lawlessness. It is still too early to conclude that even these judicial interventions will succeed in actually conforming the agency's behavior to the law's requirements.

Immigration law's limited effectiveness is paralleled by immigration policy's limited options. The number and character of the constraints under which Congress and the INS operate are so confining that it is only a slight exaggeration to say that all policy innovations that would be politically, fiscally, and administratively practicable have already been tried. If they are found wanting, a verdict that seems a bit premature given the limited data on the results of the 1986 reforms, one is hard-pressed to devise promising policy alternatives.

The major constraint on immigration policy is public attitudes. Contemporary commentators on immigration issues agree that American society harbors ambivalent feelings toward aliens. On the one hand, we think of ourselves, on both a mythic and an emotional level, as a nation of immigrants. We take pride in that communal identity and invoke it as a source of national self-respect. On the other hand, Americans—like all people throughout history—fear strangers and perceive them as threats to settled routines and cherished values, especially if the strangers are poor and ethnically or linguistically distinct.

This ambivalence also assumes two other forms. First, we distinguish between good aliens and bad aliens. Good aliens come here openly and legally. They are hard-working, family-oriented people who add to our national wealth and social diversity. Bad aliens, in contrast, come here surreptitiously and illegally. They demand public benefits and services but have no intention of assimilating. When they work, they take jobs away from American citizens and legal immigrants. During periods of prosperity, we welcome good aliens and do not trouble too much about bad ones. During recessions or other periods of high social anxiety, we blur the distinction and evince hostility toward all of them.

Second, we distinguish between the aliens whom we know personally as friends, colleagues, employees, students, neighbors, or restaurateurs, and those who do not enter our lives in any visible or

33. Professor Aleinikoff has analyzed the Supreme Court's recent immigration decisions according to this distinction. Aleinikoff, Good Aliens, Bad Aliens, and the Supreme Court, in 9 In Defense of the Alien 46 (1987).
palpable way. Americans, sociologist Edwin Harwood has suggested, respond favorably to immigrants as people. This sympathy creates political difficulties for the INS when it seeks to deport them. "[T]he deportable alien," Harwood notes, "is likely to have many more defenders who want to help him stay than antagonists who want to see him leave." 34

Americans' ambivalence about immigrants was perhaps most vividly revealed in the long congressional struggle over the proposals to control illegal migration, which were finally enacted in 1986 as IRCA. IRCA was adopted only after almost a decade of intensive, highly visible public debate punctuated by several bills that passed one or both houses by razor-thin margins only to die without final approval. When IRCA did pass, it did so only in the waning hours of the 99th Congress, after an exceedingly fragile compromise was stitched together, and then only by a very slender margin in the House. 35 Few legislators are anxious to revisit that bloody battlefield soon. These political factors, mediated through the Congress, also constrain the INS policymakers, as the agency's currently unsuccessful efforts to adopt stringent new regulations on asylum procedures and other policy initiatives show. 36

The political stalemate reflects more than ambivalent public attitudes, a sharply divided Congress, and a gun-shy INS. The economic effects of immigration to the United States are not entirely clear or consistent. Legal immigration is almost certainly beneficial in all respects. Legal immigrants tend to be better educated than the American public in general, 37 and they must already have firm family ties or meet labor market needs here in order to qualify for admission. But the educational levels of illegal aliens, including those being legalized under IRCA, are much lower. Furthermore, specialists intensely disagree about the economic impact of illegal migration.

Some analysts emphasize that undocumented workers fill jobs that Americans are anxious to have performed but are unwilling to

35. Pear, House Approves Immigration Bill Considered Dead Two Weeks Ago, N.Y. Times, Oct. 10, 1986, at A1 (final House vote 230 to 166; crucial amendment to eliminate legalization provision defeated by only seven votes, 199 to 192).
accept themselves; that they pay payroll and sales taxes but do not generally seek public assistance or collect Social Security; that their spending power increases total employment and output; and that they are enthusiastic, productive workers who enable certain marginal industries to survive foreign competition. Other analysts stress that regardless of the effect of undocumented aliens on the national economy, their most important impacts are felt in a small number of urban enclaves where they are concentrated. There, these analysts say, they compete with and displace vulnerable minority group workers; generate high unemployment compensation costs; impose heavy demands upon schools, hospitals and other public services; weaken labor unions; encourage employers to violate fair labor standards; and delay the introduction of more efficient technology in certain industries. Thus, policy advocates on all sides of an immigration issue can and do invoke provocative but ultimately inconclusive studies to buttress their positions.38

Policy options are also constrained by the severely limited resources available for immigration enforcement. The INS’s budget ($800 million for fiscal 1989) has grown substantially in recent years.39 This growth is especially striking in light of the fiscal constraints occasioned by the federal deficit. But the adequacy of INS resources must not be appraised in comparison with previous budget levels, which were traditionally very low, but in light of the growing pressures of legal and illegal migration and the consequent demands on the agency. The great bulk of recent INS budget increases has been earmarked for the Border Patrol. The amounts available for interior enforcement operations, immigration adjudication, education and training, and other important functions continue to be quite restricted.

II. The Effects of IRCA

In a sense it is idle to speak of new immigration policy initiatives when Congress and the INS already have their hands so full implementing the IRCA reforms, adopted just two years ago and only now beginning to be implemented by the agency. The shape of immigration law and policy in the 1990s will depend upon whether the public and policymakers perceive the IRCA reforms to be operating

38. For a discussion of this problem, see Muller, Immigration Policy and Economic Growth, 7 Yale L. & Pol'y Rev. 101 (1989).
effectively. Although it is still too early to reach definitive judgments on the question of IRCA’s effectiveness—indeed, it is difficult even to formulate a definition of effectiveness—it may nevertheless be useful to consider its performance to date.

IRCA was omnibus legislation that adopted four major new programs. These programs concern (1) the legalization of aliens who had entered the United States prior to January 1, 1982, and resided here in unlawful status since that date (general legalization); (2) the agricultural labor provisions; (3) the imposition of civil and criminal penalties on employers of illegal workers (employer sanctions); and (4) the prohibition of employment discrimination based upon national origin or citizenship status (antidiscrimination). As of this writing, these programs are at various stages of implementation.

A. General Legalization

The first phase of the legalization program, during which aliens could apply for lawful temporary resident status, ended on May 5, 1988. The INS recently issued regulations to govern the second phase, during which aliens who have been granted temporary status must either apply for lawful permanent resident status within a certain period, or revert to undocumented and hence deportable status. In order to qualify for permanent status, and thus become eligible for eventual citizenship, they must demonstrate “basic citizenship skills” either by passing INS examinations on English and American history and government, or by “satisfactorily pursuing a course of study” that will lead to such knowledge.

40. For a description of each of these programs, see The Simpson-Rodino Act Analyzed: Part I—Employer Sanctions, 63 Interpreter Releases 991 (1986); Part II—Legalization, 63 Interpreter Releases 1021 (1986); Part III—The Anti Discrimination Provisions, 63 Interpreter Releases 1049 (1986); Part IV—The Agricultural Worker Provisions, 63 Interpreter Releases 1127 (1986).

41. By court order entered in at least one case, that deadline was extended for those aliens who had failed to apply within the statutory time period because of INS eligibility regulations that the court found to be improperly restrictive. See Ayuda v. Meese, 687 F. Supp. 650, 651 (D.D.C. 1988) (Supplemental Order No. VII, “known to the Government” regulations).

42. An alien must apply for this adjustment during the one-year period beginning eighteen months after the grant of lawful temporary resident status. 8 U.S.C. § 1255a(b) (1982 & Supp. IV 1986). The deadline for applications expires on November 4, 1990.


44. Controversy has already erupted over how these education requirements are to be met. See Education Requirement Seen as Snag to Program for Aliens, N.Y. Times, Nov. 7, 1988, at A14 (many applicants will be unable to enroll in overcrowded English and civics classes).
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More than 1.75 million aliens applied for amnesty under the general legalization program, and it is expected that almost all of them—perhaps as many as 1.7 million—will ultimately receive it.\(^4\) Virtually all of the legalization applicants come from a few Latin American countries; almost 75% are Mexicans, and only four other countries (El Salvador, Haiti, Guatemala, and the Philippines) supplied more than 1% of the total.\(^4\) Despite some major missteps, including INS misinterpretations of the IRCA statute,\(^4\) the agency has generally received high marks for its implementation of the program’s first phase.\(^4\)

Pressures are already building, however, to establish a second amnesty program.\(^4\) Millions of undocumented workers continue to live and work here under the same troubling circumstances that necessitated the original amnesty.\(^5\) Many of these individuals, some of whom are immediate relatives of legalized aliens, were statutorily ineligible for amnesty either because they arrived after the January 1, 1982, cutoff date or were ineligible for some other reason. Many others might have been eligible but failed to apply out of ignorance, distrust of the INS, erroneous interpretations of the statute, financial barriers, or apathy.

B. Agricultural Labor

In the long debate over immigration reform during the 1970s and 1980s, the agricultural labor provisions became the key element in

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\(^4\) Telephone interview with David S. North, Transcentury (Dec. 9, 1988). These estimates were current as of December 6, 1988. They represent the number of applications filed and a current approval rate of 97%.


\(^4\) See FAIR, Immigration Report, June 1988, at 2 (INS circulating proposal for second amnesty to include 200,000 ineligible relatives of newly-legalized aliens; several members of Congress will introduce new amnesty legislation).

\(^5\) See generally Note, Compromising Immigration Reform: The Creation of a Vulnerable Subclass, 98 Yale L.J. 409 (1988). The INS estimates that there are between 1.5 million and 3 million illegal aliens living in the United States today, not including the more than 2.5 million who will receive amnesty under IRCA. In early 1987, before IRCA really took effect, the number was estimated at between 4 million and 5 million. Telephone interview with Robert Warren, supra note 1.
the political compromise that finally made IRCA possible by assuring a reliable labor supply to western growers. Although special immigration programs addressed to the need for agricultural labor had been on the books for forty years, IRCA made three major changes. First, it revised and expanded the H-2 program for admitting temporary workers to perform agricultural work. Second, it permitted aliens who had worked here on perishable commodities for a specified period of time prior to May 1, 1986, to apply for temporary legal resident status as "special agricultural workers" (SAWs).\textsuperscript{51} Third, it authorized the entrance of additional "replenishment agricultural workers" (RAWs) as temporary residents after 1990 if a farm labor shortage develops. Both SAWs and RAWs may become eligible for permanent residence status.

The SAW program, which was negotiated by a handful of people without hearings, studies, or much debate,\textsuperscript{52} has become the wild card in the IRCA deck. Its eligibility, benefit, and evidentiary provisions are far more liberal than those in the general legalization program; and its relatively lax documentation requirements have led to persistent allegations of widespread fraud, some of which have been substantiated.\textsuperscript{53} No reliable data on the number of SAW eligibles existed when IRCA was enacted. Although the INS expected about 600,000 farm workers to apply, more than 1.1 million had done so by the time the application period closed on November 30, 1988; more than half of them were in California.\textsuperscript{54} Given the way the program is designed, the vast majority of these applications are likely to

\textsuperscript{51} The program divides SAWs into two groups. Group 1 SAWs comprise up to 350,000 aliens who worked for the requisite 90-day period during each of the preceding three years. Group 2 SAWs need only have worked at least 90 days during the year beginning May 1, 1986. Group 1 SAWs become eligible for permanent status sooner than Group 2 SAWs. IRCA, Pub. L. No. 99-603, title III, part A, 100 Stat. 3359, 3411-34 (codified in scattered sections of 8 U.S.C. & 26 U.S.C. (Supp. IV 1986)).

\textsuperscript{52} Mattingly, Fraud Suspected in Farm Jobs Program, 20 Nat'l J. 2410 (1988). The article quotes Philip Martin, an agricultural labor and immigration expert who consulted with Congress in the development of the SAW program, describing it as "probably the least thought-out piece of legislation that's ever been drafted." \textit{Id}.

\textsuperscript{53} See, \textit{e.g.}, Applebome, Farm Law Abused by Illegal Aliens, N.Y. Times, Nov. 17, 1988, at A1; U.S. Amnesty Ends for Farm Workers, N.Y. Times, Dec. 1, 1988, at A25; Mattingly, \textit{supra} note 52; FAIR, Information Exchange, Oct. 1988. The government has also interpreted eligibility requirements quite broadly; for example, it has defined labor on perishable crops to include the harvesting of clarinet reeds and the shaping of Christmas trees. \textit{See} memorandum from David S. North (July 18, 1988), in FAIR, \textit{supra}, at 5.

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be granted.\textsuperscript{55} Beginning in 1990, this number will be further enlarged by the influx and eventual legalization of RAWs, who can be brought into the United States to replace the many SAWs who will have left the agricultural sector for more remunerative, less arduous work.

C. Employer Sanctions

The centerpiece of IRCA's immigration control policy is the employer sanctions program. Modeled on similar programs in some states and foreign countries, employer sanctions were intended to eliminate the principal "pull" factor attracting undocumented workers to the United States. The program was also designed to economize on scarce INS enforcement resources by conscripting employers and recruitment and referral agencies to perform the task of verifying employees' identities and authorization to work.

Implementation of the employer sanctions provision is far from being either complete or effective. More than a year after IRCA's enactment, employer noncompliance due to ignorance and other reasons remained widespread: an estimated 22\% of the employers were not aware of the law; many more did not clearly understand one or more of IRCA's major provisions; and half of those who were aware of the law and had hired one or more employees under it had failed to complete the verification documents required for those hires.\textsuperscript{56} Unauthorized workers' use of counterfeit documents also appeared to be rampant.\textsuperscript{57}

It is difficult, if not impossible, to appraise the effectiveness of employer sanctions in reducing unauthorized alien employment and

\textsuperscript{55} As of November 28, 1988, 93\% of the SAW applications that had been acted upon were granted, although a significant number of suspected fraudulent applications were still pending. \textit{65 Interpreter Releases} 1257 (1988). In addition, litigation overturning the INS's administration of the program may increase even this high success rate among aliens. \textit{E.g.,} Haitian Refugee Center v. Nelson, 694 F. Supp. 864 (S.D. Fla. 1988) (invalidating INS's standard of proof for adjudicating SAW applications); United Farm Workers of America v. I.N.S., Civ. No. S-87-1064-LKK/JFM (E.D. Cal., Nov. 17, 1988) (upholding INS's demand for corroborating evidence but liberally defining "corroborating documentation").


\textsuperscript{57} The GAO estimated that 39\% of the employed unauthorized aliens used or were suspected of using counterfeit documents. The other 61\% failed to complete the required forms. \textit{Id.} at 30.
migration. INS enforcement activity has not yet reached a significant level.\textsuperscript{58} Quite apart from that fact, however, one cannot readily determine how many did not migrate or were not hired because of the sanctions' existence. And much fraud in documenting employment authorization and identification doubtless goes undetected. The effectiveness question will probably always remain unanswerable.\textsuperscript{59}

\section*{D. Antidiscrimination}

In the debates over IRCA, many groups predicted that the new law's employer sanctions would encourage employers to discriminate against job applicants, especially Hispanics, whose national origin or citizenship status made them more likely, as a statistical matter, to be undocumented. These groups also argued that existing remedies for such discrimination, notably Title VII of the Civil Rights Act of 1964\textsuperscript{60} and 42 U.S.C. Section 1981,\textsuperscript{61} were inadequate. To mollify them and address their concerns, IRCA established a Special Counsel for Immigration-Related Unfair Employment Practices in the Justice Department, which was empowered to investigate and prosecute claims that employers, referrers or recruiters had engaged in such discrimination.

The anti-discrimination provisions generated a storm of controversy literally before the ink on the new law was dry. In signing IRCA, President Reagan stated that complainants would have to prove employers' discriminatory intent, not just discriminatory effects, in order to invoke the new remedies.\textsuperscript{62} In the regulations implementing these provisions, the Justice Department reaffirmed that

\footnotesize{\textsuperscript{58} As of October 20, 1988, the INS had issued 720 notices of intent to fine businesses for employer sanctions violations, mostly in service industries in the South and West. Only a few criminal prosecutions have been initiated; the first guilty plea was entered on November 2, 1988. Recent Developments: Employer Sanctions Turn Serious With Criminal Fines, Housekeeper Case, 65 Interpreter Releases 1227, 1228 (1988).

\textsuperscript{59} GAO, supra note 56, at 65-71. One very imperfect measure of effectiveness—alien apprehensions per 10-hour shift on the Border Patrol linewatch—suggests that illegal border crossings decreased after IRCA. \textit{Id.} at 66-67. This apparent decrease might be due to a number of factors other than employer sanctions, such as the effect of the legalization programs.

\textsuperscript{60} 42 U.S.C. § 2000(e) (1982).


\textsuperscript{62} \textit{See} Pear, Immigration Law Sets Off Dispute Over Job Rights for Legal Aliens, N.Y. Times, Nov. 23, 1986, at A1.}
position. The coverage of the new law is also the subject of litigation; in the first decided case, a court has ruled that aliens who have not applied for amnesty are not protected by the new provisions.

The extent of actual job discrimination resulting from the employer sanctions remains a matter of some dispute. In November 1988, several government agencies issued reports on this question. Governor Cuomo's Task Force on Immigration Affairs found that some New York employers were refusing to accept legally valid proof of residency, denying employment to those who experience minor delays in gathering documentation of status, and screening out applicants who look or sound foreign. Testimony to that effect was also heard by New York City's Commission on Human Rights. On the other hand, the United States General Accounting Office concluded from a survey it conducted in early 1988 that no pattern of discrimination caused by employer sanctions had been established, although it did find widespread violations.

III. Immigration in the 1990s

In certain respects, the challenges confronting immigration law and policy in the 1990s can be readily predicted. One set of concerns grows out of IRCA's effects upon the administration of immigration enforcement generally, quite apart from how the legalization, employer sanctions, and antidiscrimination programs are implemented. The INS's adjudication burdens will grow as IRCA, which essentially deputizes millions of employers as immigration enforcers, generates a large volume of new cases and novel legal claims. Now that the period for legalization application has ended, the INS will presumably return to its traditional enforcement activities with an aggressiveness no longer restrained, as it has been since IRCA became effective, by concerns that alien mistrust of the agency might thwart the success of the legalization programs.
IRCA also alters the incentives of undocumented workers who are already working here. With employer sanctions now in place, those who have worked for the same employer since November 1986 have a much more powerful reason to resist deportation than they did before: once they are deported, they cannot readily return to the United States and recover their old jobs or find new ones, as they previously could. If they leave their pre-IRCA jobs, by reason of deportation or otherwise, they lose their "grandfather" status and become legally unemployable. IRCA, of course, was designed to create just such a dilemma for them. But if a large number of undocumented workers apprehended by the INS respond by demanding formal deportation hearings instead of simply accepting voluntary departure as almost all now do, the INS's adjudicatory process may grind to a halt, seriously weakening the credibility of the agency's enforcement posture.

Illegal migration, then, will continue to haunt our immigration policy. Even if IRCA's combination of legalization and employer sanctions reduces the number of aliens living and working in the United States illegally, that number will still be large. Moreover, the rigors of employer sanctions and the growing impatience of a public that grudgingly approved the legalization program will surely exacerbate the very conditions and abuses that originally made such a program necessary. Whatever Congress and the INS may say now, the possibility of another amnesty cannot be ruled out. Yet the prospect of a new round will attract still more illegal migrants. Perhaps more important, IRCA's legalization of approximately 2.7 million individuals is certain to spawn large-scale chain migration by their family members. Some of this migration will be illegal.

Future migratory flows to the United States are certain to intensify for other reasons as well. I have already noted the most important causes: the explosive demographic, economic, political, and military pressures that are propelling people here. These pressures, however, will be greatly magnified by restrictions on the entry of asylum seekers that have recently been instituted by Canada, France, West Germany, and other countries that traditionally welcomed refugees. These restrictions reflect anxieties and political

68. See supra text accompanying notes 20-23.
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values that may extend beyond the relatively narrow concern about possible abuses of the asylum process, thus aggravating a more general (but often latent) hostility to all immigrants. Many would-be migrants to these countries will respond to the new barriers by seeking to enter the United States instead.

Another set of challenges concerns the reform of legal immigration. Several issues are especially pressing. The first involves the level of immigration that should be permitted in the future. There seems little doubt that the United States could readily absorb legal immigration well above current levels. Declining overall fertility rates, looming labor shortages, the aging of the population, and the social and economic dynamism associated with population growth all argue strongly for additional immigration. So long as illegal migration seems out of control, however, the case for larger quotas will be difficult to sustain politically. Thus, much will depend upon IRCA’s perceived effectiveness.

Even more far-reaching than the issue of what level should be permitted is the issue of which immigrants should be favored, assuming that the demand for visas continues vastly to exceed the supply. Recently, a remarkable bipartisan consensus seems to have formed around the principle that the existing preference system, which reserves approximately 90% of the numerical quotas for family members, should be replaced by a new system that, while preserving priority for family unification, accords greater weight to labor market considerations. Although the details and numbers remain controversial, Congress will probably adopt a point system that favors would-be “independent” or “new seed” immigrants who possess desired occupational, educational, and English language skills but lack preferential family links in the United States. This development, which would also reduce or eliminate the present competition for visas between the family and economic categories while increasing the total level of legal immigration, will be a welcome one. The ceiling for refugee admissions, which has already been

1986, § 1, at 34 (growing public opposition to lenient admission of refugees); Anti-Immigrant Group on the Rise in Geneva, N.Y. Times, Nov. 10, 1985, § 1, at 8 (Switzerland toughening policy on refugees); Nigerians Order 700,000 Aliens to Leave Country Within a Week, N.Y. Times, May 4, 1985, at A1.

70. Because of other admissions outside the preference system, 72% of total legal immigration in 1987 was family-related. Refugees constituted 16%, occupational preferences 9%, and “other” 3%. These figures are based upon data in the 1987 Statistical Yearbook, supra note 1, at table 4.

71. See, e.g., two such bills that were considered during the 100th Congress: S. 1611, 100th Cong., 1st Sess. (1987); H.R. 5115, 100th Cong., 2d Sess. (1987) (as introduced).
raised to 94,000 for fiscal year 1989, may have to be increased further. This is especially likely if the Soviet Union decides to permit large-scale emigration of Jews, Pentacostals, Armenians, and other groups that may be attracted to resettlement in the United States and enjoy strong political support here.\textsuperscript{72}

But some "reforms" are really throwbacks. Congress exemplified this possibility recently when it extended and enlarged what had previously been characterized as a "one-time" special preference for immigrants from those countries, notably the British Isles, that were "adversely affected" by the 1965 law abolishing the system of national origins quotas.\textsuperscript{73} This change—which reflects little more than the political influence of Senator Kennedy, former Speaker of the House Tip O'Neill, and Irish-Americans—is most unfortunate. It represents a thinly-veiled return to that long-discredited system, albeit one that is limited in scope.

New social priorities will also shape immigration law and policy in the 1990s. For example, Congress has begun to involve the INS more deeply in the difficult task of drug enforcement.\textsuperscript{74} One can readily predict that as public anxiety over the drug problem increases, these demands on the INS will grow and will assume new forms. Also, as multinational enterprises expand, the need for greater mobility of labor across national borders will become more evident. Public concerns about the United States' international competitiveness will increase the pressures on the INS to overhaul its cumbersome administrative machinery for the processing of non-immigrant and labor preference visa petitioners.

In the 1990s, the backwater of immigration law will be pressed to join the mainstream of contemporary public law. The long-term project of domesticating immigration law is still in an embryonic stage. During the 1980s, litigants, courts, and politicians have undertaken systematic efforts to subject it to the kinds of constitutional and administrative law norms and political controls that limit other governmental threats to personal liberty. Yet these efforts, remarkable as they are, have achieved only partial success. Important hallmarks of immigration law's traditional insularity remain, such as

\textsuperscript{72} See \textit{supra} text accompanying notes 26 & 27.

\textsuperscript{73} IRCA § 314 (NP-5 program), as amended by Pub. L. No. 100-658, § 2, 102 Stat. 3908 (1988). The new law also created a "temporary" complement of 10,000 additional slots for would-be immigrants from "underrepresented" countries. \textit{Id.} at § 3.

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the refusal to accord excludable aliens constitutional protection, the vagaries of the “entry doctrine,” the insistence that deportation is not punishment, and the Administrative Procedure Act’s incomplete applicability to immigration proceedings. Still, immigration law’s exceptionalism will be increasingly difficult to sustain in the face of the rationalizing, universalizing, liberalizing dynamics of American public law.

A final set of challenges concerns the future shape of American society. The high fertility rates of the relatively young, newly-legalized aliens, coupled with the chain migration of their families, will increase the future size and geographic concentration of the United States population beyond what would otherwise exist. These migrants will contribute their labor skills and purchasing power to an American economy that increasingly needs them—especially if employer sanctions prove to be effective. Most of the newly-legalized will be Mexicans. Although Mexicans tend to naturalize at lower rates than other groups, those who do naturalize will acquire citizenship and voting power, thereby altering the balance of political forces in their local communities and regions. Emerging from the shadows of their illegal status, they will be freer to openly affirm their traditions, languages, and values.

These developments present American society with great opportunities and great dangers. The opportunities are obvious: social invigoration, faster population growth, a more dynamic and competitive economy, and an increasingly cosmopolitan perspective on the interdependent world beyond our borders. The dangers are perhaps less obvious because they are often more diffuse: cultural and linguistic fragmentation, displacement of low-income workers in some local labor markets, a renewed spur to nativist impulses, and a less cohesive national identity. If past is prologue, immigration law and policy in the 1990s will be profoundly controversial, far-reaching and revealing of the type of society that we aspire to be. Immigration law and policy will mirror America even as they transform her.