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Comment

Closing the Open Door: The Impact of the Human Immunodeficiency Virus Exclusion on the Legalization Program of the Immigration Reform and Control Act of 1986

Court E. Golumbic†

Over the past several years, United States immigration law has undergone a significant metamorphosis. Reform measures have been introduced that have substantially altered this country's approach to governing its borders. Foremost among these is the watershed "legalization" or "amnesty" provision of the Immigration Reform and Control Act of 1986 ("IRCA"), the product of one of the longest and most arduous legislative undertakings in recent history. IRCA legalization grants lawful resident status to illegal aliens who have been continuously and illegally present in the United States since January 1, 1982. Although bound up in a larger, more conservative legislative effort to restrict illegal immigration, the provision is designed in significant part to acknowledge a deserving class of undocumented aliens. This humanitarian focus marks a radical departure from traditional immigration policy, and makes legalization an innovative and salutary development. Nevertheless, another reform measure introduced during this period, the rule denying immigrant admission to aliens who test positive for the human immunodeficiency virus ("HIV"), threatens to prevent the realization of the legalization provision's humanitarian goals.

This Comment analyzes the impact that the HIV exclusion will have on the successful implementation of the IRCA legalization provision.

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2. See infra note 31 and accompanying text.

3. See infra note 23 and accompanying text.

4. See infra notes 80-102 and accompanying text.
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Part one discusses the objectives underlying the Act itself, and how these objectives are to be effectuated through the interrelated employer sanctions and legalization schemes. An essential element of this discussion will be an examination of the specific goals of legalization, in order to demonstrate the special humanitarian concerns addressed therein. Part two reviews in some detail the terms of the legalization provision itself, including eligibility, evidentiary requirements, and application procedures. Part three provides a brief overview of the medical knowledge regarding AIDS, HIV, and the relationship between the two. Part four traces the adoption of HIV as a condition of exclusion, noting the hasty and perhaps incomplete process with which it was effected. Part five attempts to assess the full extent of the harm that the exclusion rule will bring upon legalization, in terms of the number of potential amnesty applicants whose lives will be drastically altered. This section will also discount Congress' assumption that the availability of a waiver of excludability will mitigate any deleterious effects that the HIV exclusion might produce. Part six introduces several arguments against the exclusion rule, which fall generally into two lines of reasoning: first, that it is antithetical to the intent underlying legalization; and second, that it will prove ineffective at fighting the spread of AIDS in this country. Given these arguments, the Comment concludes in part seven by recommending that Congress re-evaluate the wisdom of the HIV exclusion, particularly as applied to the legalization context.

I. The Immigration Reform and Control Act of 1986

A. Closing the Back Door on Illegal Immigration So That the Front Door May Remain Open

On November 6, 1986, President Reagan signed IRCA into law, culminating a fifteen year effort to reform United States immigration policy.5 Representing “a delicate balance between widely divergent views

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5. Leiden, *The Immigration Reform and Control Act of 1986: Introduction and Legislative Overview*, 9 IMMIGR. J. 1 (1986). The genesis of this campaign can be traced back to 1971, when dissatisfaction with the state of contemporary immigration law prompted extensive legislative activity on the problem of undocumented aliens, and led the 92d House Judiciary Committee to conclude that “the adverse impact of illegal aliens was substantial, and warranted legislation both to protect U.S. labor and the economy, and to assure the orderly entry of immigrants into this country.” H.R. REP. No. 506, 94th Cong., 1st Sess. 5 (1975). This activity formed the basis for a series of bills prohibiting the knowing employment of undocumented aliens and establishing penalties for employers who violate the prohibition. The rationale for this approach was explained by the House Judiciary Committee during the 94th Congress: “[T]he most reasonable approach to this problem is to make unlawful the ‘knowing’ employment of illegal aliens, thereby removing the economic incentive which draws such aliens to the United States as well as the incentive for employers to exploit this source of
and interests," the Act is designed to "close the back door on illegal immigration" by introducing new initiatives to curtail this phenomenon. At the same time, however, it attempts to open "the front door on legal immigration" slightly more by making limited changes in the current system governing the entry of foreign nationals into the country. Consistent with these objectives, the centerpiece of the legislation is a pair of linked provisions calling for: (1) sanctions against employers that hire unauthorized alien workers; and (2) legalization of certain undocumented labor."

Id. at 6. Hence, from the outset of the modern reform movement, employer sanctions were embraced as the most effective remedy for the problem of undocumented aliens. Indeed, sanctions were the central component of every legislative scheme introduced between 1972 and 1986. H.R. REP. NO. 115, 98th Cong., 1st Sess. 37-40 (1983).

While modern notions of immigration reform have consistently been predicated on the concept of employer sanctions, legalization has also been recognized as an essential element of a revised immigration policy. In 1975, a new version of the earlier illegal alien bills was introduced in both the House and Senate which included, in addition to employer sanctions, an amnesty program allowing for the regularization of status of certain undocumented aliens. Id. In addition, legalization was included among the recommendations of special task forces established by the Ford, Carter, and Reagan administrations to evaluate immigration reform alternatives. Id. at 39-40.

The Select Commission on Immigration and Refugee Policy, a blue ribbon panel charged with studying United States immigration laws and suggesting effective measures to control the country's borders, provided in its 1981 report for an amnesty program, once a system of employer sanctions and other enforcement initiatives had been introduced. S. REP. NO. 62, 94th Cong., 1st Sess. 25 (1975). See also Leiden, supra, at 9. Finally, the "Simpson-Mazzoli" immigration reform bills of 1982 and 1983, which established the blueprint for what was to become IRCA, encompassed most of the Select Committee's recommendations, including the legalization provision. Newton & Landman, Immigration Law: Reform for the Sake of Reform — The Immigration Reform and Control Act of 1986, 7 ST. LOUIS U. PUB. L. REV. 433, 440 (1988).

Unlike employer sanctions, however, amnesty did not meet with uniform acceptance. On the contrary, legalization was the topic of intense, protracted legislative controversy. Many members of Congress found it paradoxical to adopt a policy granting legal status to resident illegal aliens while at the same time supporting efforts to severely restrict legal immigration. For example, Senator John East fought the legalization provisions of the Simpson-Rodino bills of 1982 and 1983, arguing:

Mass amnesty would undercut enforcement of our laws and contribute to future illegal immigration. By rewarding and protecting foreigners who have intentionally violated the criminal law of this nation, Congress would be perceived by many citizens as abetting law breaking and failing to uphold and defend the law of the land.


These legislators vehemently opposed the inclusion of amnesty provisions in prospective legislation. Yet despite this opposition, amnesty was consistently viewed by the majority as a pragmatic, equitable solution to the problems that a resident illegal alien population presented to immigration reform. Thus, amnesty has been incorporated into every major proposal for revising immigration law and policy submitted to Congress since 1975. H.R. REP. NO. 115, 98th Cong., 1st Sess. 37-40 (1983). Notwithstanding a certain level of Congressional antipathy, then, legalization has traditionally been regarded as both a necessary and significant instrument of immigration reform.


8. Id.
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mented aliens who have been continuously present in the United States since January 1, 1982." The following is a brief analysis of these provisions.

B. Employer Sanctions

The primary purpose of IRCA is to reduce the influx of illegal immigration to the United States, and the mechanism for effecting this reduction is a system of employer sanctions. The Act makes it illegal for any employer to knowingly hire, recruit, or refer for a fee, an unauthorized alien. It also proscribes the continued employment of such a worker upon discovery that he is an unauthorized alien. Employers who violate these prohibitions are subject to civil and criminal penalties, the imposition of which are to be governed by an elaborate set of administrative procedures.

The employer sanctions provision was predicated on Congress' conclusion that the lure of American jobs was a "magnet" enticing aliens to enter the United States labor force illegally. The presence of vast numbers of illegal aliens in turn generated problems such as worker exploitation, reduced wages, and depressed working conditions. In implementing legislation that penalizes employers who hire undocumented aliens, therefore, Congress sought to remove the incentive for illegal immigration by eliminating the employment opportunities that draw aliens into this country in the first place.

C. Legalization

In addition to employer sanctions, IRCA contains a provision authorizing the legalization of certain undocumented aliens who have resided

10. "[T]he first element of immigration reform was to eliminate the illegal flow of aliens." Mazzoli, supra note 6, at 42.
14. Fragomen, Del Rey & Bernsen, supra note 9, at 74.
16. See Mazzoli, supra note 6, at 42.
continuously in this country since before January 1, 1982. This initial-
itive was prompted by two concerns: practicality and humane treatment.

Regarding practicality, Congress realized that the large population of un-
documented aliens currently living in the United States posed a serious
threat to its efforts to control illegal immigration through employer san-
tions. The legislative scheme for a revitalized, sanctions-oriented en-
forcement program depended upon the removal of these aliens in order
to provide the Immigration and Naturalization Service ("INS") with a
clean slate on which to proceed. Congress also recognized, however, that
actual physical removal would be economically and logistically untena-
ble, since mass deportations or intensified interior enforcement "would
be costly, ineffective, and inconsistent with our immigrant heritage." In
this light, legalization appeared to be the only viable option. By
accordng legal status to certain qualified aliens, Congress would effect-
ively "remove" these individuals, and in so doing "[free the] INS to tar-
get its enforcement efforts on stopping new flows of undocumented
[foreigners]." Thus, the primary purpose of the amnesty program was
to promote the objective of employer sanctions, or, more specifically, to
stem the flow of illegal aliens into this country. But since, as Congress-
man Romano Mazzoli observed, "[y]ou can't just boot . . . out" the
existing population of resident aliens, this objective had to be realized
through an effective, "one-time legalization program."

Regarding humane treatment, a second purpose underlying the am-
nesty provision was to grant legal status to a "shadow population" of un-
documented workers who had proven themselves worthy of formal
recognition. Congress acknowledged the fact that these individuals had
lived in the United States for a significant period of time and, by their
economic and social contributions, had demonstrated their value to the

23. In outlining the Reagan Administration's position on immigration reform, Attorney General Edwin Meese III stated, "[w]e have to deal realistically with people whose longstanding presence here has demonstrated an abiding commitment to this country as productive and law abiding residents." Immigration Control and Legalization Amendments: Hearings on H.R. 3080 Before the Comm. on the Judiciary, 99 Cong., 1st Sess. 8 (1977) (statement of Edwin Meese III).
country. Yet despite their positive impact, many of these people were forced by their illegal status to live clandestine lives, subject to the exploitation of employers, landlords, and criminals. Legalization was thus designed to bring this population out of hiding and provide them "access to many of the benefits of a free and open society." 

To accomplish this goal, Congress mandated that the amnesty program "be implemented in a liberal and generous fashion." Recognizing that exceedingly "rigid demands for proof of eligibility . . . could seriously impede the success of the legalization effort," the legislature instructed the INS to maintain flexible standards of qualification to ensure the highest level of participation. In this vein, the agency was instructed to "take into consideration the special circumstances relating to" an applicant when making an assessment of qualification. Thus, by liberally granting legal status to long term illegal aliens, Congress satisfied the dual objectives of the legalization program: ensuring that amnesty would be an isolated, sweeping measure clearing the way for more effective enforcement of illegal immigration; and recognizing that years of residence and employment in the United States imply membership in the community and an entitlement to remain in the country.

II. Examination of the Legalization Provision of IRCA

IRCA added § 245A to the INA providing for the legalization of certain aliens who have been continuously present in the United States in

24. "Many have strong family ties here which include U.S. citizens and lawful residents. They have built social networks in this country. They have contributed to the United States in myriad ways, including providing their talents, labor and tax dollars." H.R. REP. No. 682, 99th Cong., 2d Sess. 49, reprinted in 1986 U.S. CODE CONG. & ADMIN. NEWS 5649, 5653.


26. Statement of President Reagan (Nov. 6, 1986), reprinted in N. MONTWEILER, supra note 11, at 539.


Despite the language contained in the House Committee Report, it is somewhat misleading to state that "Congress" as a whole advocated the flexible implementation of the legalization scheme. In fact, there was some variance in the respective positions that both houses of the legislature assumed regarding the scope of amnesty. The Senate was far more restrictive in orientation, and thus sought to effectuate a conservative, less-sweeping plan. Furthermore, although the House officially adopted the liberal approach outlined above, there was nevertheless a significant amount of opposition to the legalization provision within that body, which caused IRCA to pass by a much narrower margin than it would have otherwise.

28. Id. at 73, reprinted in 1986 U.S. CODE CONG. & ADMIN. NEWS 5649, 5677.

29. Id.

unlawful status since before January 1, 1982. Generally speaking, this section applies to two categories of aliens: (1) those who entered the country illegally before January 1, 1982 and have been continuously and unlawfully residing here since; and (2) those who entered as legal nonimmigrants, fell out of legitimate status prior to January 1, 1982, but nevertheless have been continuously and illegally present since that time. An individual falling within either of these broad classifications can qualify for special status as a temporary legal resident of the United States.

To be eligible for adjustment to temporary resident status, an alien must have filed an application with the INS or some qualified designated entity within a one-year period beginning May 5, 1987 and ending May 4, 1988. The application must demonstrate eligibility on two main grounds: (1) a general evidentiary standard; and (2) a requirement that the applicant be admissible as an immigrant. With respect to the evidentiary standard, the applicant must submit documentation establishing proof of identity, continuous unlawful residence, and financial responsibility, as well as photographs, a fingerprint card, and a medical examination report. This evidence is designed to assist the INS in determining whether an applicant has the requisite unlawful immigration status for the purpose of granting amnesty, and whether he or she has met the conditions for continuous residence. The information that the INS receives in the application is deemed confidential, and as such cannot be used as a foundation for subsequent deportation proceedings. Rather, evidence can be utilized only to adjudicate legalization and to prosecute criminal fraud. Eligibility for legalization must be demonstrated by a preponderance of the evidence.

31. INA § 245A(a)(2), 8 U.S.C. § 1255(a) (1988). In addition to the general legalization provision, the Act also creates three other schemes under which certain groups of aliens can qualify for amnesty: (1) a special adjustment of status provision for Cuban-Haitian entrants (INA § 202); (2) a provision conferring temporary resident status on certain seasonal agricultural workers (INA § 302); and (3) an amendment to the registry provision of INA § 249 changing the date for illegal residence from June 30, 1948 to January 1, 1972 (INA § 203).
33. There are some exceptions to this deadline. See 8 C.F.R. § 245a.2 (1989).
34. 8 C.F.R. § 245a.2(d) (1989).
35. For the purposes of IRCA, an applicant for temporary resident status is regarded as having resided continuously in the United States if, at the time of filing the application: (1) no single absence from the United States exceeded 45 days, and the aggregate of all absences did not exceed 180 days between January 1, 1982 and the filing date; (2) the alien was maintaining a residence in the United States; and (3) the alien's departure was not based on a deportation order. 8 C.F.R. § 245a.1(c)(1) (1989).
37. Id.
In addition to the evidentiary requirements, an applicant must be admissible as an immigrant. INA § 212(a) delineates thirty-three conditions of excludability which prohibit an alien from entering the United States. IRCA incorporates this general rule, thereby establishing a threshold level of admissibility which all prospective beneficiaries of legalization must overcome. Nevertheless, the Act alters the impact of these grounds of exclusion in three distinct ways. First, it holds that some grounds simply do not pertain to applicants for legalization. Second, it retains some grounds and precludes the possibility of their being waived. Finally, the Act provides for a special waiver, subject to the discretionary authority of the Attorney General, which permits an applicant who is otherwise excludable to obtain adjustment of status upon proof of certain extenuating circumstances. These special circumstances include humanitarian purposes, assuring family unity, and serving the public interest.

IRCA also contains a medical examination requirement that bears heavily on the question of admissibility. According to this provision, all applicants for regularization of status must submit to an examination by a designated civil surgeon. The examination is conducted in accordance with specific administrative regulations. The purpose of this requirement is both to satisfy quarantine standards and to determine admissibility under INA § 212.

Currently, § 212(a) lists seven medical grounds for the exclusion of aliens. An applicant whose medical report indicates that she falls
within any one of these enumerated conditions is therefore designated inadmissible, barring proof justifying a special waiver. In this respect, then, the medical examination provision plays an important role in the determination of eligibility for legalization.

Upon proof of eligibility, an applicant is accorded status as a temporary resident.\(^4\) The benefits of this designation include entitlement to work authorization, as well as limited permission to travel abroad.\(^5\) Furthermore, after a period of eighteen months as a temporary resident, the applicant can file for adjustment to permanent resident status.\(^6\) An award of permanent status qualifies an alien to apply in due course for United States citizenship.

III. AIDS and Its Relationship to HIV\(^5\)

AIDS is a viral disease characterized by a breakdown in the body's immune system.\(^3\) The disease is caused by HIV,\(^4\) which inhibits the ability to resist illness by attacking the very core of the body's defenses.\(^5\) Specifically, the virus targets "T4 helper cells," which help both to distinguish between normal body cells and disease organisms and to determine the appropriate level of response.\(^6\) By identifying, infecting, and killing T4 helper cells, HIV progressively weakens the immune system, render-
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ing its victims susceptible to diseases that do not normally afflict healthy people. 57

Each period in the development of HIV is characterized by different symptoms and illnesses. 58 AIDS marks the final stage in this process, at which point the immune system has virtually collapsed and opportunistic diseases enter the body. 59 To date, AIDS is both incurable and fatal. 60 Few of its victims live longer than three or four years. 61

The HIV virus can be transmitted in the following ways: sexual contact involving the exchange of body fluids; the sharing of contaminated needles by intravenous drug users; transfusions of tainted blood and blood products; and the transplacental passing of the virus from an infected mother to her unborn fetus. 62 Once infection has occurred, the system responds by producing HIV antibodies. 63 Tests to detect the presence of these antibodies are the standard way to discover whether an individual has been exposed to HIV. 64 An individual with a repeatedly reactive antibody test, an “HIV-positive” or “seropositive,” is presumed to be infected with the virus and capable of spreading it to others. 65 HIV-positive blood tests, however, do not indicate that their subjects have AIDS. 66 They merely indicate that the subjects have been exposed to the HIV virus, and that their bodies are grappling with its damaging effects. 67 Not everyone who has been exposed to HIV will develop AIDS. 68 Some people may be carriers, asymptomatic although capable of transmitting the virus. 69 Still others may develop AIDS-related com-

57. Id.
58. See Laurence, supra note 52, at 84-88.
59. Id.
63. See, e.g., Francis & Chin, supra note 52, at 1357.
65. See Public Health Service Plan, supra note 62, at 453.
67. Foreman, supra note 56, at 4; Sicklick & Rubinstein, supra note 66, at 9.
69. See Public Health Service Plan, supra note 62, at 453. See also Feorino, Jaffe, Palmer, Peterman, Francis, Kalyanaraman, Weinstein, Stoneburner, Alexander, Raevsky, Getchell,
plex ("ARC"), which might not necessarily progress to full-blown AIDS. Since it takes a very long time before the symptoms of AIDS are produced, it is not yet clear what proportion of HIV-positive individuals will ultimately die of AIDS. At this juncture, however, there are more people known to have been exposed to the virus than who have been diagnosed with AIDS.

IV. Excludability in Light of AIDS

As the medical exclusion grounds of INA § 212(a) reflect, a significant platform of United States immigration policy has been the refusal to permit entry to aliens afflicted with certain "undesirable" infirmities or disabilities. The emergence of AIDS and its devastating impact on the global health scene have led to the adoption of certain administrative and legislative initiatives which both reinforce and augment this position.

INA § 212(a)(6) provides for the exclusion of aliens afflicted with any "dangerous contagious disease." By 1986, the Public Health Service ("PHS") had identified seven diseases as falling within the ambit of this phrase, including infectious syphilis, gonorrhea, active tuberculosis, and

70. Persons afflicted with ARC manifest some signs of AIDS but do not have a diagnosed secondary opportunistic infection. Gostin, supra note 52, at 4.

71. Foreman, supra note 56, at 4. Recently, however, the Centers for Disease Control has proposed expanding its definition of AIDS to include seropositivity without opportunistic infection. Such definition would cover ARC as well. See Wider AIDS Definition Proposed In Move to Expand U.S. Benefits, N.Y. Times, May 1, 1987, at A18, col. 4.

72. The latency period between viral infection and the appearance of AIDS symptoms ranges from six months to seven years or even longer. Comment, supra note 46, at 128.

73. See Harsburgh, Douglas & LaFrance, supra note 61, at 818; AIDS in the Future: Experts Say Deaths Will Climb Sharply, N.Y. Times, Jan. 14, 1986, at C1 (Science Times), col. 4. For example, one source suggests that only 20% of homosexual men with HIV will develop full-blown AIDS, although another 25% of homosexual men will develop lesser disease states. Osborn, The AIDS Epidemic: Discovery of a New Disease, in AIDS AND THE LAW: A GUIDE FOR THE PUBLIC, supra note 68, at 23-24. See also Curran, Jaffe, Hardy, Morgan, Selik & Dondero, Epidemiology of HIV Infection and AIDS in the United States, 239 SCI. 610, 615 (1988) (citing study finding that 88 months after infection, 36% of subjects had developed AIDS, another group of over 40% had other signs of infection, and only 20% were completely asymptomatic); Eyster, Gall, Ballard, Al-Mondhiry and Goedhart, Natural History of Human Immunodeficiency Virus Infections in Hemophiliacs: Effects of T-Cell Subsets, Platelet Counts, and Age, 107 ANNALS INTERNAL MED. 1, 3 (1987) (using Kaplan-Meier survival curve technique to estimate percentage of adult hemophiliacs who will develop AIDS).

74. Public Health Service Plan, supra note 62, at 453.

75. See supra note 39 and accompanying text.

76. ABA Coordinating Committee on AIDS, AIDS: The Legal Issues 1, 237 (Discussion Draft 1988) [hereinafter AIDS: The Legal Issues].


78. The Public Health Service is the agency charged with defining "dangerous contagious diseases" under INA § 212(a)(6).
leprosy. On April 23, 1986, Dr. Otis Bowen, Secretary of Health and Human Services ("HHS") proposed that the PHS add AIDS to the list of "dangerous contagious diseases." Bowen considered it anomalous to maintain several forms of venereal diseases as bases for exclusion and yet omit a disease like AIDS, which has grave implications. A Notice of Proposed Rulemaking was thus filed to begin the process of formally amending the PHS regulations. HHS solicited commentary on the prospective change from over seventy-five sources, including many groups advocating the rights of alien immigrants. Despite a great deal of negative response, the agency on June 8, 1987 instituted a rule adding AIDS to the INA § 212(a)(6) grounds for inadmissibility. This action was sanctioned by President Reagan, who on May 31, 1987 announced his intention to have all immigrants to the United States screened by ordering HHS to finalize its proposed rule. Indeed, the President took this position despite admonitions against doing so from his own Surgeon General, C. Everett Koop. This modification of the conditions for exclusion had a direct effect on the process of legalization under IRCA. On July 6, 1987, the INS issued instructions requiring that all medical examinations conducted for immigration purposes conform to the newly revised PHS guidelines. At that point, though, routine HIV-antibody testing was not required. The instructions mandated that only those amnesty applicants manifesting clinical symptoms of AIDS were to be referred for confirmatory blood tests.

On June 2, however, before the PHS had issued its final rule, the Senate approved an amendment to the Supplemental Appropriations Act of 1987, adding HIV to the list of "dangerous contagious diseases." This

79. See supra note 39 and accompanying text.
81. Id. at 15, 355.
82. Comment, supra note 46, at 121.
83. Opponents of the proposed rule feared that the INS could discriminate against certain high risk groups through inappropriate referrals for medical exams. Id. Additionally, opponents feared that the proposals "did not reflect the current state of medical knowledge regarding AIDS, thereby serving to perpetuate misinformation about the disease." Id. Some commentators posited that similar action on the part of other countries might gridlock international travel. Id.
86. It is important to note that all these developments transpired around the same time that the application period for IRCA legalization began.
87. 64 INTERPRETER RELEASES 873-74 (1987).
amendment was sponsored by Senator Jesse Helms, who cited the growing number of AIDS cases worldwide as a reason to fear that immigration would catalyze the spread of the disease in the United States.\textsuperscript{90} The Government, Helms contended, has an obligation to “protect its citizenship from foreigners emigrating to this country who carry AIDS,”\textsuperscript{91} and an HIV exclusion would go far toward providing the necessary protection.\textsuperscript{92}

Despite Helms’ rhetoric, the proposed amendment did not receive immediate, unqualified acceptance. In fact, many Senators entertained it with a significant amount of apprehension. Senator Danforth, for example, stressed the need to better educate Congress on AIDS and the major philosophical, political, and economic issues surrounding the disease before engaging in any decisive legislative action.\textsuperscript{93} He expressed regret that these questions were not properly analyzed in committee before being put to vote on the Senate floor,\textsuperscript{94} and opined that most Senators felt the proposed amendment had been “thrust upon them.”\textsuperscript{95} Yet regardless of the doubts expressed, debates foregone, and ignorance admitted, the Senate voted unanimously to designate HIV as a “dangerous contagious disease” under INA § 212(a)(6). The House accepted the proposed amendment shortly thereafter,\textsuperscript{96} and on July 7, 1987, it was enacted into law.\textsuperscript{97}

Pursuant to this enactment, HHS published a final rule substituting HIV for AIDS on August 28, 1987. These guidelines mandated HIV antibody testing for all applicants for permanent residence and refugee admission over the age of fifteen.\textsuperscript{98} Initially, there was some ambiguity as to whether Congress intended the new HIV exclusion to apply to aliens seeking legalization under IRCA. Alien advocacy groups hoped for a very limited interpretation of the regulation that would effectively

\textsuperscript{90} 133 CONG. REc. S7410-11 (daily ed. June 2, 1987) (“[It is only elementary that as the epidemic continues to grow and spread abroad, immigrants coming to this country in greater numbers will be bringing the AIDS virus to the United States”).

\textsuperscript{91} \textit{Id.} at 7410.

\textsuperscript{92} \textit{Id.} at 7410-11.

\textsuperscript{93} \textit{Id.} at 7412-13.

\textsuperscript{94} “[T]he first three votes that we have had on the AIDS issue have been in the form of amendments to appropriations bills. ... This is not an issue that has enjoyed the analysis of committees before coming to the Senate. It has not enjoyed forceful debate ....” \textit{Id.} at 7412.

\textsuperscript{95} \textit{Id.} Senator Danforth articulated the prevalent sense of concern when he cautioned that Congress was “going to go off half-cocked” in dealing with the issue. \textit{Id.} at 7413.


\textsuperscript{97} \textit{Id.}

\textsuperscript{98} Under these rules, applicants under the age of 15 will be tested if there is reason to believe they are infected. 52 Fed. Reg. 32,541 (1987) (to be codified at 42 C.F.R. § 34.2(b)).
exempt amnesty applicants from its strict standards.99 During the amendment vote, however, Senator Helms explicitly stated his intention to apply the rule to IRCA,100 and shortly after enactment it became evident that the INS would comply with Helms' plan.101 Consequently, aliens seeking adjustment of status under IRCA are subject to compulsory HIV antibody testing as part of their medical examination requirement.102

V. The HIV Exclusion Rationale as Applied to IRCA

A. The Impact of the Exclusion Rule on IRCA Legalization Applicants

The HIV exclusion could apply to any of the approximately 3 million aliens who have sought amnesty under IRCA.103 Those who applied for legalization between December 1, 1987 and the May 4, 1988 cutoff date had to submit to testing for the virus.104 Those who filed applications earlier, and thus were not subject to the HIV exam at the outset, must nevertheless undergo testing at the permanent residency stage.105 It is difficult to determine the actual number of applicants who may be infected with HIV. Conservative estimates place the total at approximately 1,200.106 Two factors, however, indicate that this number may be mark-

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100. In his words, [I]ndividuals who are illegally in the United States and who are applying for amnesty under the recently passed "Immigration Reform and Control Act of 1986" will be tested as well. Under current law, they are required to undergo a medical exam and testing for dangerous contagious diseases at the alien's expense. My amendment would simply add to the existing list one more dangerous contagious disease. 133 CONG. REC. S7411 (daily ed. June 2, 1987) (statement of Sen. Helms).
101. AIDS: The Legal Issues, supra note 76, at 239.
102. Id. Since legalization applicants under IRCA are subject to the same medical exclusions as applicants for permanent resident visas, members of this latter group are also required to undergo HIV antibody testing as part of their compulsory medical examinations. 42 C.F.R. § 34.4 (1988).
106. It is estimated that for every million Anglo-Americans, there will be about 150 cases of HIV infection. Letter from J. Craig Fong, Managing Attorney and Public Relations Coordinator, Asian Pacific American Legal Center of Southern California, Los Angeles, California to author (March 29, 1989) [hereinafter Fong letter]. With respect to Hispanics, the number is approximately 400 per million. Id. The rate of infection among Asians is thought to be about 25 per million. Id. Given these estimates, and the percentage of the total volume of amnesty
edly under-inclusive. First, the adoption of the HIV exclusion provision may have prompted many aliens who suspected that they were infected not to file for amnesty, or to drop out of sight before the application process was complete. Second, a significant number of aliens who knew they were high risk for HIV may have filed their applications before the exclusionary provision went into effect. This possibility suggests that the number of identifiable HIV-positives will increase substantially after the second medical examination at the permanent residency stage. In sum, then, it appears that the HIV exclusion will have a profound effect on a significant number of applicants.

B. The Compelling Public Health Justifications for the Exclusion Rule

The purpose of listing HIV infection as an excludable health condition is to prevent the importation of HIV into and the further spread of AIDS within the United States. That these are laudable objectives cannot be denied. AIDS is one of the most serious threats to public health that exists today. As of March, 1988, over 88,000 cases had been reported in this country, and it is estimated that at least one million more people have been exposed to HIV. Furthermore, the number of AIDS applications that these ethnic groups comprise, it is suspected that there are at least 1000 to 1200 cases of HIV exposure among the 3 million legalization applications filed. It is a safe bet that underreporting is far more widespread in the undocumented population than in the population at large. C. Kamasaki, National Council of La Raza, Memorandum to National Coordinating Agencies and Interested Persons Regarding AIDS Testing and Legalization 3 (June 22, 1987) [hereinafter Kamasaki Memo]; Note, The Impact of AIDS on Immigration Law: Unresolved Issues, 14 BROOKLYN J. INT’L L. 223, 242 n.128 (1988).

Telephone interview with Pat Dunn, Pro Bono Legalization Coordinator for the Bar Association of San Francisco and Chairperson for the HIV Task Force of the San Francisco Coalition for Immigrant and Refugee Rights and Services (Jan. 10, 1989).


Letter to Farer, supra note 113.
cases is expected to rise geometrically in the coming years. Hence, there are compelling grounds for adopting measures to control the spread of the epidemic.

The exclusion rule can be viewed as one such measure. United States immigration policy has long been employed as a mechanism for combatting the proliferation of disease, and in this context the practice of excluding aliens who are afflicted with certain contagious diseases has been widely accepted. The HIV exclusion is consistent with this tradition. The methods utilized by the rule comport with previously accepted procedures to detect and exclude aliens with serious illnesses. Moreover, "[t]he spread of HIV by certain high risk sexual practices is not unlike the transmission of syphilis and other diseases" currently listed under INA § 212(b)(6). Thus, both the gravity of the AIDS problem and the pattern of historical practice justify the expansion of the medical exclusion category to include HIV.

C. The Conflict Between the Exclusion Rule and IRCA's Legalization Rationale: Will Waivers Solve the Problem?

While the public health concerns embodied in the HIV exclusion are indisputable, the rule threatens to produce an effect which may detract substantially from its desirability. The exclusion will reduce the number of aliens eligible for amnesty under IRCA, a result which appears inconsistent with the humanitarian objectives of legalization: (1) granting formal recognition to "those aliens . . . who have contributed for years toward our economic and social well being," and (2) awarding this recognition in a "liberal and generous fashion."

Yet despite this apparent conflict, and the potentially restrictive impact of the HIV exclusion, Congress claims to have remained faithful to the humanitarian goals of IRCA, providing for the equitable treatment of

116. Other options available to combat AIDS include public education, voluntary or mandatory testing programs, and quarantine. See Note, Preserving the Public Health: A Proposal to Quarantine Recalcitrant AIDS Carriers, 68 B.U.L. REV. 441, 470-78 (1988).
118. See Comment, supra note 46, at 129-33.
119. Medical Examination of Aliens, 52 Fed. Reg. 32,541 (1987) (to be codified at 42 C.F.R. § 34.2(b)).
120. See Comment, supra note 46, at 133.
all HIV applicants through the availability of a waiver.\textsuperscript{123} Under INA § 245A(d)(2)(B)(i), a condition of inadmissibility may be waived at the discretion of the Attorney General on the basis of "humanitarian purposes, to assure family unity, or when it is otherwise in the public interest."\textsuperscript{124} Congress\textsuperscript{125} has indicated its intent that such waivers be liberally granted,\textsuperscript{126} and although the HIV exclusion went into effect after IRCA was enacted, it appears that the legislature, or at least one committee, sought to maintain this liberal position with respect to the new rule.\textsuperscript{127}

Amnesty applicants thus technically enjoy the possibility of a waiver of the HIV exclusion. In reality, however, it appears highly unlikely that many will benefit from this measure.\textsuperscript{128} In addition to the three conditions for waiver enumerated under IRCA itself,\textsuperscript{129} the INS has established a second set of procedures for adjudicating the appeals of HIV excludables:

\[\text{[T]}\text{he discretionary authority of the Attorney General will not be used unless the applicant can establish that (1) the danger to the public health of the United States created by the alien's admission is minimal, (2) the possibility of the spread of the infection created by the alien's admission to the United States is minimal, and (3) there will be no cost incurred by any level of government agency of the United States without prior consent of that agency.}\]

In order to qualify for a waiver, therefore, an applicant must first satisfy at least one of the statutory requirements set forth in IRCA, and then overcome a second layer of review contained in the INS guidelines.\textsuperscript{130}

\textsuperscript{123} See supra notes 42-43 and accompanying text.
\textsuperscript{125} Note the qualification of the use of the word "Congress," discussed supra note 27.
\textsuperscript{126} As the House Judiciary Committee stated:

The Committee expects the Attorney General to examine the legalization applications in which there is a waivable ground of exclusion carefully, but sympathetically. The Committee's intent is that legalization should be implemented in a liberal and generous fashion, as has been the historical pattern with other forms of administrative relief granted by the Congress. In most cases, denials of legalization ... should only occur ... within the specified non-waivable grounds of exclusion.

\textsuperscript{127} The House Judiciary Committee observed that "[t]he Attorney General should consider issuing waivers of that ground of inadmissibility or exclusion in cases of infection with the AIDS virus for persons who arrived in the United States and established residence by January 1, 1982." H.R. REP. No. 28, 100th Cong., 1st Sess. 37-38 (1987).
\textsuperscript{128} See Starr, supra note 104, at 102-04.
\textsuperscript{129} See supra note 43 and accompanying text.
\textsuperscript{130} Cable from James A. Puleo, INS Assistant Commissioner for Examinations, to INS Regional Offices (March 2, 1988), reprinted in 65 INTERPRETER RELEASES 239 (1988) [hereinafter Cable].
\textsuperscript{131} Telephone interview with Joe D. Cuddihy, Senior Immigration Examiner, INS (Jan. 11, 1989) [hereinafter Cuddihy interview].
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This process has been described as effectively nullifying the opportunity for obtaining waivers in any significant number.\textsuperscript{132} It will be extremely difficult, for example, for an individual to demonstrate that he will neither endanger the public health nor foster the spread of the disease absent detailed discussion and surveillance of his activities.\textsuperscript{133} In addition, since the estimated cost of medical treatment for individuals whose HIV infection develops into AIDS is approximately $50,000 per year, it is unlikely that the majority of amnesty applicants will have sufficient health insurance or funds to render reliance on a government agency unnecessary.\textsuperscript{134} Therefore, waivers will actually be available only in a few isolated and highly aberrant instances.\textsuperscript{135} Some argue that the combination of the IRCA conditions, the INS guidelines, and the discretionary nature of review simply makes it too difficult for anyone to qualify.\textsuperscript{136} This assertion appears to be valid, given that the INS has granted, at most, five waivers\textsuperscript{137} out of an estimated thirty-five to fifty applications.\textsuperscript{138} Regardless of the availability of the waiver provision, then, there is a significant amount of evidence to suggest that the HIV exclusion will frustrate the liberal objectives of IRCA legalization.

VI. Arguments Against the Exclusion of HIV-Positive Legalization Applicants

IRCA legalization was intended in large part to accord legitimate status to a "shadow population" deemed worthy of legal protection by vir-

\textsuperscript{132} See, e.g., Starr, supra note 104, at 102-04.
\textsuperscript{133} Loue, Representing HIV-Positive Clients, 11 IMMIGR. J. 10, 11 (1988).
\textsuperscript{134} Id. See also Futureshock, NEWSWEEK, Nov. 24, 1986, at 30 (examining enormous growth of AIDS in general population).
\textsuperscript{135} Indeed, of the few cases where the INS has granted waivers, all of the applicants had private health insurance, a luxury uncommon among those eligible for amnesty. Telephone interview with Pat Dunn, supra note 109.
\textsuperscript{136} See, e.g., Loue, supra note 133, at 11.
\textsuperscript{137} INS guidelines require all HIV waiver requests to be transferred from the regional offices to the Deputy Commissioner in Washington, D.C. for final certification. See Cable, supra note 130. As of the time this Comment was written, the Deputy Commissioner's office claimed not to have received any applications for review. Cuddihy interview, supra note 131. See also Report of the Presidential Commission on the Human Immunodeficiency Virus Epidemic, June 24, 1988, at 156 (presents current United States policy and recommendations regarding testing of refugees for HIV virus and treatment of those testing positive). Thus, those waivers that have reportedly been granted must have been adjudicated by the regional offices acting beyond the purview of their prescribed authority. Cuddihy interview, supra note 131.
\textsuperscript{138} It is unclear how many waiver applications have actually been filed. The statistics cited in the text have been developed from conversations with representatives of public assistance groups that are working on waiver cases. The estimates may be conservative, however, since they do not take into account the possibility that a number of aliens have filed waiver requests through private counsel.
tue of their social and economic contributions. To effectuate this policy, Congress expressed its desire that the amnesty program be implemented flexibly, in order to encourage maximum participation. In light of this rationale, the following sections demonstrate that it is both incongruous and unfair to deny adjustment of status to HIV-positive aliens.

A. Humanitarian Concerns

The amnesty provision is grounded in the notion that “the legalization program is to be implemented in a liberal and generous fashion.” The adoption of the HIV exclusion, however, will undermine these equitable designs with respect to infected applicants. One argument supporting this conclusion — that the INS has in effect denied access to the waiver mechanism — has already been introduced. But there is still other evidence to sustain this view. For example, given the long incubation period of the virus, and the six-year minimum residence requirement for amnesty eligibility, it is very likely that most HIV-positive applicants contracted the infection in the United States. This probability suggests that the Government’s commitment to these individuals should be strengthened beyond its already professed intent to acknowledge their social and economic contributions. The fact that aliens who are demonstrably worthy recipients of temporary legal residence have been exposed to a potentially fatal disease on American soil adds moral content to, and further solidifies, their relationship to this country. Yet by instituting the HIV exclusion, the Government has chosen to absolve itself of all responsibility, moral or otherwise, that it purported to assume through legalization. A condition which should logically reinforce the case for granting amnesty has in effect become the pretext for denying it.

A related example of the HIV exclusion’s destructive effect on the equitable underpinnings of legalization involves the consequences of deportation. The confidentiality provisions of IRCA prohibit the INS from initiating deportation proceedings against an amnesty applicant based on the information he or she has divulged during the course of the pro-

139. See supra note 23 and accompanying text.
140. See supra note 27.
141. See supra note 28 and accompanying text.
142. H.R. REP. No. 682, 99th Cong., 2d Sess. 72, reprinted in 1986 U.S. CODE CONG. & ADMIN. NEWS 5676. See also Mazzoli, supra note 6, at 49 (“Congress intended that the INS be generous and humane in its interpretation of the legalization requirements in order to ensure the highest level of participation in the program.”).
143. See supra notes 123-38 and accompanying text.
144. “[T]he overwhelming majority of immigrants with AIDS contracted the disease in the United States.” Kamasaki memo, supra note 108, at 3. See also Starr, supra note 104, at 101.
Nevertheless, a rejected applicant, like an individual who declines to pursue legalization in the first place, remains undocumented and therefore deportable. The HIV exclusion will thus force a number of aliens to return to their countries of origin, where they may be subjected to substandard medical care and various forms of discrimination. Furthermore, some countries may go so far as to refuse to readmit their own infected citizens. Hence, the potential consequences of expulsion reinforce the notion that the HIV exclusion is an affront to the humanita-

145. See supra note 36 and accompanying text.


147. Most legalization applicants come from developing nations, primarily from Mexico (approximately 70%) and El Salvador (8%). Starr, supra note 104, at 102 n.94. These nations may have only a fraction of the resources that the United States has available to cope with AIDS. Id. at 106-08. This was the conclusion of the Panos Institute, an international information and policy studies organization that developed its estimates by comparing the number of reported AIDS cases in a given country to its national per capita income. R. Sabatier, Blaming Others 14-15 (1988). The disparity between the United States and these countries may be even greater than the Institute suspects. Given that most underdeveloped countries do not have adequate systems of diagnosis and surveillance in operation, the number of unreported cases is likely to be very high, thus diminishing the amount of money per victim that a country can allocate to combat AIDS. The exclusion rule will therefore banish a substantial number of HIV-positive applicants to homelands that are ill-equipped to provide the kind of counseling, treatment, and experimental programs that they would have access to were they permitted to remain in this country. Starr, supra note 104, at 106-08.

In addition, these individuals, once expelled, may be dealt with harshly. In many countries, a pervasive sense of ignorance and hysteria regarding AIDS has translated into hostile, often abusive policies. Id. at 106-07; R. Sabatier, supra, at 118. For example, in Cuba, seropositive individuals are quarantined. Id. In West Germany, the state of Bavaria has authorized its police to detain for examination anyone suspected of carrying the AIDS virus. The AIDS Cops Are Coming, Time, March 9, 1987, at 55. Less harsh forms of persecution include diminished job opportunities, social ostracism, and withholding government and health benefits. Starr, supra note 104, at 106 n.123.

In identifying the hostile and discriminatory positions toward AIDS and HIV victims that other countries have assumed, I do not mean to imply that these individuals will escape similar treatment in this country. On the contrary, AIDS sufferers have been the objects of prejudice and abuse in the United States since the disease was first diagnosed. Widespread educational campaigns and advances in clinical knowledge, however, are working to raise the level of collective consciousness in this country respecting the disease. This trend suggests that the incidence of discrimination is decreasing. Comparatively speaking, then, HIV positives in the United States are much less likely to encounter the kind of overt abuse, or indeed even the less obvious forms of discrimination, that are standard practice in other countries.

148. Several countries have implemented programs to screen some categories of foreigners for HIV as a condition for obtaining entry. See infra note 194 and accompanying text. Therefore, it might not be unreasonable to assume that some of these countries would apply such exclusionary policies to their own citizens, particularly those who have resided abroad for a period long enough to suggest that they did not contract the HIV infection at home.

Senator Simpson flagged this as a potential problem, noting the additional complications it presents:

[D]o you exclude them and deport them to a country that will not take them? Then what are we talking about? Leaving them here illegally in a status with a communicable disease? That is a possibility. Or, are you talking about detention or areas where they will be kept quarantined? That is really where we are headed here.

arian concerns of IRCA. The inequity associated with excluding an amnesty applicant who contracted a potentially deadly disease while in the United States should be obvious. The prospect that this exclusion might relegate some applicants to inadequate medical care and persecution, moreover, approaches unconscionability.

B. **Testing for HIV Infection Will Undermine the Successful Implementation of the Legalization Program**

The HIV exclusion will undermine the ability to maximize the regularization of eligible applicants by driving large numbers of potential applicants underground. Generally speaking, the target population for amnesty consists of less educated, often minimally literate people, many of whom have fled political oppression in their home countries, or who have been exploited by employers and other authority figures.\(^1\) All have lived in fear of detection and deportation by the INS.\(^2\) In short, this population characteristically suspects any governmental initiatives, institutions, or associations.

Congress attempted to allay this suspicion and thus encourage maximum participation in the amnesty program by incorporating the confidentiality provision, designed to protect all information contained in the application.\(^3\) The introduction of the HIV testing requirement, however, is likely to exacerbate the fears of a great many eligible aliens, and deter them from applying.\(^4\) This will particularly be the case with certain foreign nationals such as Haitians and central Africans, who are perceived as being at high risk for HIV exposure.\(^5\) Moreover, those who are in fact infected with HIV will not receive the benefits of education and counseling, and will therefore be more likely to transmit the virus.\(^6\) In this light, then, the HIV exclusion could conceivably increase the proliferation of AIDS and HIV in this country.\(^7\)


151. See supra note 36 and accompanying text.


153. 52 Fed. Reg. 32,540 (1987) (to be codified at 42 C.F.R. § 34.2(b)).


C. Additional Arguments

1. Negligible Public Health Benefits

The addition of HIV as an excludable "dangerous contagious disease," and the application of HIV-testing requirements to the legalization provision of IRCA, will do little to slow the progress of the disease in this country. This conclusion is supported by three contentions. First, it is doubtful that the testing of amnesty applicants will have any significant impact on the volume of HIV exposures in the United States. As of the date of this writing, the Centers for Disease Control ("CDC") estimated that between 1 and 1.5 million Americans have been exposed to HIV.\(^\text{156}\) The target population eligible for legalization under IRCA, on the other hand, is approximately 3.9 million.\(^\text{157}\) Thus, only a minute fraction\(^\text{158}\) of the total number of HIV exposures in the United States are likely to come from prospective amnesty applicants.\(^\text{159}\)

Second, there is no empirical evidence to suggest that legalization applicants have a higher prevalence of HIV exposure than the general population.\(^\text{160}\) At worst, their rates of infection are likely to be similar to those of legal residents.\(^\text{161}\) Indeed, in many of their native countries, the exposure rates are reportedly far lower than in the United States.\(^\text{162}\) The HIV-testing requirement thus targets a population not known to be at a higher risk than other groups residing in this country.

Finally, the compelling public health goals of the HIV exclusion are undermined in light of the fact that the testing requirements are not applicable to all foreigners seeking entry into the United States.\(^\text{163}\) Generally speaking, all aliens applying for nonimmigrant visas are exempt from HIV examination, as are aliens below the age of fifteen.\(^\text{164}\) HIV carriers


\(^{157}\) Id.

\(^{158}\) 0.58%.

\(^{159}\) Letter to Farer, supra note 113, at 7.

\(^{160}\) Id.

\(^{161}\) Id.; see also supra notes 106-10 and accompanying text.

\(^{162}\) The documented rates of infection in certain Asian and Hispanic nations, for example, are far below that of the United States. Fong letter, supra note 106. This observation does not apply to applicants from Haiti and certain African nations, however, where the rates of exposure are significantly higher.


\(^{164}\) Id. The nonimmigrant visa exemptions are ironic given the intent underlying IRCA legalization. Few aliens eligible for nonimmigrant status have contributed to the welfare of the nation to the extent that amnesty applicants have. Yet despite their more tenuous relationship to the United States, these individuals are subject to requirements for legal admission that are substantially less stringent.

The INS has indicated that it will subject nonimmigrants to testing if they appear to be ill. Federal Government Seeks to Bar Entry of Aliens Who Have AIDS, N.Y. Times, Apr. 24, 1986, at A1, col. 1. Similarly, the PHS noted in its Notice of Proposed Rulemaking that "if there is reason to suspect that an [amnesty] applicant under age fifteen could be infected," he may be
who apply for admission under these categories can therefore enter the
country and engage in practices that will spread the
virus.165 Thus, although some HIV-positives may be excluded under IRCA, many
others (indeed, perhaps more) will be admitted through other avenues of
legal entry.166 Because it is based on irrational distinctions and imposed
in an inconsistent manner, the HIV exclusion will do little to arrest the
AIDS epidemic in this country.167

2. Reliability and Accuracy in HIV Testing

Another problem associated with the exclusion rule is that it depends
too heavily on the accuracy and reliability of HIV examination tech-
niques and protocol, none of which can be guaranteed at present.168 The
most common methods of testing for the presence of HIV antibodies are
the enzyme-linked immunosorbent assay (ELISA),169 and the more ex-
pensive, more accurate Western blot.170 According to the PHS, a legali-
ization applicant is considered seropositive only after two ELISAs and a
confirmatory Western blot indicating that he is infected with HIV.171
This procedure has been found to be extremely sensitive and detective

required to take a blood test. 52 Fed. Reg. 32,540, 32,543 (1987) (to be codified at 42 C.F.R.
§ 34.2). Nevertheless, given that an individual can be an HIV carrier for years before mani-
festing any symptoms of the virus, it is unlikely that such qualifying policies will have any
impact on the number of infected people who enter the country under these classifications.

165. This conclusion is bolstered by the fact that some nonimmigrants can remain in the
United States for extended periods of time. For example, an L-1 intracompany transferee visa
recipient may be admitted for three years, with additional extensions of two or three years
available. A. FRAGOMEN, A. DEL RAY & C. BELL, 1988 IMMIGRATION PROCEDURES HAND-
BOOK 263 (1988). Students may be allowed to stay in the United States for up to eight years.
Id. at 60. Investors can remain almost indefinitely. Id. at 177-78. An HIV carrier who falls
under one of these headings, therefore, can pose as significant a threat of spreading the virus as
can a legalization applicant. Furthermore, since these individuals will go undetected, and as
such will not be subjected to any kind of compulsory counseling, their destructive potential
may be markedly greater.

167. Id.
169. The ELISA test involves placing HIV proteins on plastic beads and adding a blood
sample. If the blood contains HIV antibodies, they will combine with the proteins and the
beads will change color. Testing of Blood for AIDS Virus, N.Y. Times, July 13, 1988, at B2,
col. 6. This test was designed for screening large programs such as donations to blood banks
and hospitals. Barry, Cleary & Fineberg, Screening for HIV Infection: Risks, Benefits, & the
170. Kamasaki memo, supra note 108, at 2; Loue, supra note 133, at 10. A Western blot is
performed by passing an electric current through a gel containing HIV proteins, which arrange
themselves at different heights on the gel. The proteins are blotted from the gel onto a special
paper and combined with a blood sample. If the paper changes color, HIV antibodies are
present in the blood. Testing of Blood for AIDS Virus, supra note 169. The Western blot
procedure is very expensive, and is not designed for large-scale screening programs. Barry,
Cleary & Fineberg, supra note 169, at 262.
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when applied to populations with high rates of exposure.\textsuperscript{172} When applied to populations with low rates of exposure, however, such as the group applying for amnesty under IRCA, it can yield large numbers of "false positives"\textsuperscript{173} and "false negatives,"\textsuperscript{174} and thus is of questionable validity.\textsuperscript{175}

The predictive value of the HIV test (i.e., the percentage of true positives among all positives, and the percentage of true negatives among all negatives) depends on the prevalence of the virus among the target population.\textsuperscript{176} In other words, the greater the proliferation of HIV exposure among a given class of examination subjects, the greater the likelihood that a positive antibody test result is in fact a "true positive."\textsuperscript{177} Section 212(a)(6) as applied to IRCA requires the testing of a large population that is generally at low risk of infection.\textsuperscript{178} Consequently, a number of false positives and false negatives can be expected among the pool of legalization applicants.\textsuperscript{179} According to the CDC, which helped draft the alien testing regulations, the three-tiered testing procedure mandated by the PHS will reduce the threat of such inaccuracies to a negligible level.\textsuperscript{180} Other experts are much less confident about this assumption.\textsuperscript{181} One study estimates that in low-risk populations the use of the three-test protocol will produce, for every twenty-eight true positives, eleven false positives and two false negatives, or an error rate of approximately twenty-eight percent.\textsuperscript{182}

The threat of obtaining a significant number of false positives and false negatives has serious implications that can be brought to bear on all of the arguments against the HIV exclusion outlined in this Comment. For instance, a high rate of false positives will undercut the humanitarian goals of legalization by unfairly denying adjustment of status to some individuals due to a health condition that they do not possess.\textsuperscript{183} It will also diminish the success of the legalization program by creating incen-

\textsuperscript{172} Id.

\textsuperscript{173} A "false positive" reaction occurs when an individual who has never been exposed to the AIDS virus nevertheless tests positive for the presence of HIV antibodies. AIDS: The Legal Issues, supra note 76, at 82.

\textsuperscript{174} A "false negative" occurs when an individual is infected with HIV, but his initial test indicates otherwise. AIDS AND THE LAW: A GUIDE FOR THE PUBLIC, supra note 68, at 132.

\textsuperscript{175} Barry, Cleary & Fineberg, supra note 169, at 263.


\textsuperscript{177} Barry, Cleary & Fineberg, supra note 169, at 263.

\textsuperscript{178} Id.

\textsuperscript{179} See Gostin, supra note 52, at 4.

\textsuperscript{180} Letter to Farer, supra note 113, at 11.


\textsuperscript{182} Barry, Cleary, & Fineberg, supra note 169, at 263.

\textsuperscript{183} Letter to Farer, supra note 113, at 7.
tives for these individuals to abandon the application process and seek refuge in the anonymity of undocumented status.\textsuperscript{184} At the other end of the spectrum, a high rate of false negatives will dilute the public health benefits associated with the HIV exclusion by allowing infected applicants to enter or remain in the United States based on erroneous test results.\textsuperscript{185} Thus, the technical limitations of testing methods may exacerbate other problems that the HIV exclusion creates. This prospect in turn supports the notion that the exclusion rule is antithetical to the intent underlying amnesty.

3. \textit{Foreign Policy Considerations}

The final argument against the HIV exclusion occurs in the foreign policy context. The need for global cooperation in the fight against AIDS has been stressed by the World Health Organization ("WHO"),\textsuperscript{186} the agency that has undertaken the task of coordinating the global campaign against the disease. In addition, education has been identified by WHO and other expert interests as the most efficacious method of arresting the epidemic.\textsuperscript{187} WHO regards the dissemination of information on the transmission of HIV as key to arresting the further spread of the virus.\textsuperscript{188} Accordingly, the agency maintains that information regarding sexual practices which minimize the spread of HIV must be clearly and effectively communicated to the general population, and especially to members of high-risk groups.\textsuperscript{189}

WHO’s approach has been espoused in lieu of compulsory testing, which has been denigrated as a waste of resources better allocated for education, research, and surveillance.\textsuperscript{190} The agency has cautioned that screening efforts may be prompted by a misunderstanding of the “casual

\textsuperscript{184} \textit{See supra} note 108 and accompanying text.
\textsuperscript{185} Starr, \textit{supra} note 104, at 92-96.
\textsuperscript{188} \textit{Note, supra} note 186, at 1052 n.55.
\textsuperscript{189} \textit{Id.}
\textsuperscript{190} \textit{See Consultation on International Travel Restrictions and Human Immunodeficiency Virus (HIV)}, 62 WHO WEEKLY EPIDEMIOLOGICAL REC. 77 (1987). This position has been echoed by members of the scientific and academic communities. \textit{See, e.g., Chen, The AIDS Pandemic: An Internationalist Approach to Disease Control}, 116 DAEDALUS 181, 190 (1987); Cleary, \textit{supra} note 187, at 270-71; Lange & Dax, \textit{HIV Infection and International Travel}, 36 AM. FAM. PHYSICIAN 197 (1987); Veitch, \textit{supra} note 85, at 8.
transmission” of HIV, or by the need to evince active concern over the control and prevention of AIDS. Indeed, Dr. Jonathan Mann, the Director of WHO’s Special Programme on AIDS, sharply criticized the use of restrictive measures such as mandatory testing, stating that the AIDS hysteria threatened free travel between countries as well as international exchange and communication.

WHO’s efforts to combat the spread of AIDS, and particularly its emphasis on education, have received widespread endorsement in the international community. Yet, notwithstanding this support, the magnitude of the AIDS epidemic has led many nations to reject the agency’s position and institute compulsory testing programs for aliens. By adopting a position that favors HIV testing rather than education, therefore, the United States joins these states in repudiating WHO’s attempts to develop a cohesive, multinational solution to the AIDS problem. Given the United States sphere of influence as a world power, moreover, its impact on these global initiatives may be especially acute. Other countries may be prompted by its example to enact similar policies requiring HIV screening of immigrants and nonimmigrants. Hence, the HIV exclusion will perpetuate, if not augment, a recent trend among an increasing number of nations to abandon any collaborative efforts to


The European Communities Council also applauded WHO’s position in its Conclusions concerning AIDS. Conclusions of the Council and of the Representatives of the Governments of the Member States, Meeting with the Council of 15 May 1987 concerning AIDS, 30 O.J. EUR. COMM. (No. C 178) 1 (1987). Among other issues, the EC Council focused on “the ineffectiveness, in terms of prevention, of any policy of systematic and compulsory screening.” Id. In addition, the London Declaration on AIDS Prevention called for the implementation of WHO’s global AIDS strategy, noting that the “single most important component of national AIDS programmes is information and education.” World Summit of Ministers of Health Issues, London Declaration on AIDS Prevention, reprinted in WHO Press Release, WHO/LUN 4, at 1 (Jan. 28, 1988).

A number of countries have enacted laws conditioning entry on HIV status, including Bangladesh, Belgium, Bulgaria, China, Costa Rica, Cuba, Czechoslovakia, India, Iraq, Kuwait, the Philippines, Qatar, Saudi Arabia, South Africa, the Soviet Union, Syria, Thailand, and the United Arab Emirates. AIDS: The Legal Issues, supra note 76, at 247; R. Sabatier, supra note 147, at 118-20.

195. See Note, supra note 186, at 1052.
196. AIDS: The Legal Issues, supra note 76, at 247.
combat AIDS. In this respect, the rule may have “inhumane” implications that extend far beyond the scope of IRCA’s legalization rationale.

VII. Conclusion

As he signed IRCA into law, President Reagan proudly forecast that the landmark legislation would “go far to improve the lives of a class of individuals who now must hide in the shadows.” In so doing, he articulated the importance of the humanitarian concerns that are encapsulated in the amnesty provision. Indeed, these concerns have been widely recognized by Congress and the Executive Branch as an indispensable element of a revised immigration policy, and their pursuit touted as one of the primary objectives underlying the Act. Unfortunately, the adoption of the HIV exclusion and its subsequent application to IRCA will have a detrimental impact on the humanitarian focus of legalization. Perhaps this impact can be tolerated, given the compelling public health interests requiring decisive measures to arrest the spread of HIV. Yet upon closer examination, it appears that the exclusion rule is not an appropriate solution. The rule will prove ineffective in combating the proliferation of the disease, and may in fact produce effects which sustain or even enhance the growth of the epidemic.

Congressman Mazzoli, who played an instrumental role in the enactment of IRCA, recognized that the Act would encounter some difficulties. “[S]nags, glitches, and snafus,” he stated, “[were] inevitable given the landmark nature of this legislation.” Mazzoli went on to discount the gravity of these potential problems, however: “[IRCA] is not perfect. Its implementation will not be perfect either. But a commitment by all to work toward the fair, humane, and effective implementation of the statute will erase most of these imperfections.”

Obviously, Mazzoli did not anticipate the irreconcilable contradictions that would arise with the incorporation of the HIV exclusion into the legalization scheme. Indeed, given the social and political exigencies which prompted the rapid adoption of the exclusion rule, it appears that everyone involved grossly underestimated the impact of this particular “snafu.” In this light, Congress should reopen the inquiry regarding the HIV exclusion, and reevaluate the rule in view of the evidence and argu-

197. See Note, supra note 186, at 1052-1055, 1057.
198. N. MONTWEILER, supra note 11, at 539.
199. See supra note 27 and accompanying text.
200. See supra note 23.
201. Mazzoli, supra note 6, at 51.
202. Id. at 52.
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ments against it. An examination of this sort can yield only one conclusion: regardless of whether the exclusion rule has merit as applied to new immigrants, principles of equity and expediency warrant an exemption for IRCA legalization applicants.