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ENDING THE WELCOME: CHANGES IN THE UNITED STATES' TREATMENT OF UNDOCUMENTED ALIENS (1986 TO 1996)

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I. INTRODUCTION

The United States has historically thought of itself as a melting pot and a refuge for the unfortunate of the world. However, there have been periodic backlashes throughout our history against immigrants, particularly the undocumented, who are seen as taking jobs belonging to United States citizens and requiring economic support in the forms of education, medical care, and welfare benefits. The Illegal Immigration and Immigrant Responsibility Act of 1996 (IIRIRA) is a reflection of the current backlash against undocumented aliens. IIRIRA's backlash is particularly striking when compared with the prior legislative effort to control illegal immigration—the Immigration Reform and Control Act of 1986 (IRCA). In just ten years our treatment of undocumented aliens has become considerably harsher.


The principal aim of both the IRCA and the IIRIRA was to control illegal immigration. The two laws, however, approach this goal in different ways. IRCA's methods consisted of a combination of border enforcement, employer sanctions, and legalization of undocumented aliens with long residence in the United States. Notably, Congress also recognized that factors in an alien's country, sometimes called "push factors," may be the primary reason for his departure. For this reason, IRCA established the Commission for the Study of International Migration and Cooperative Economic Development, charged with examining the conditions which contribute to unauthorized migrations.

Despite IRCA's efforts, it did not achieve its goal of controlling illegal immigration, in part because its provisions had the effect of encouraging and even rewarding unauthorized entry and stay. Congress responded to IRCA's failure with the IIRIRA, which contains much harsher provisions for controlling unlawful entry and stay in the United States. IIRIRA increases border enforcement and, in an effort to control "pull factors," retains employer sanctions, sharply reduces judicial review of decisions in removal proceedings, and curtails many of the potential benefits which could be gained from unlawful entry and stay in the United States. It does not address the root causes of undocumented migration.

This article will first review IRCA's methods for controlling illegal immigration. It will then look at some of the reasons why IRCA did not control, and may even have encouraged, illegal immigration. Next, the article will examine IIRIRA's means for controlling illegal immigration and compare those means with the methods used in IRCA. The article emphasizes that IIRIRA fails to address a crucial component in unauthorized immigration control, that is, the factors which

4. See infra notes 90-95 and accompanying text.
5. See infra notes 17-19 and accompanying text.
6. See infra notes 20-27 and accompanying text.
7. See infra notes 98-111 and accompanying text.
8. See infra notes 17-19 and accompanying text.
9. See infra notes 156-164 and accompanying text.
10. See infra notes 98-111 and accompanying text.
compel aliens to leave their countries even though they do not have authorization to enter or remain in the country in which they resettle. This failure leaves consideration of these factors to scattered, ad hoc measures. The article concludes with the warning that we should not allow IIRIRA's border enforcement and curtailment of "pull factors" to become disconnected from attention to the root causes of undocumented migration. Consideration of these root causes is essential for a humane, balanced immigration policy.

II. THE IMMIGRATION REFORM AND CONTROL ACT OF 1986

IRCA was a great experiment in immigration reform,\textsuperscript{11} effecting a compromise between the aims of stemming illegal migration and preventing onerous results for those aliens who had established themselves in the United States and whose only illegal activity was their entry into the United States.\textsuperscript{12} Estimates of the number of undocumented aliens in the United States prior to IRCA varied.\textsuperscript{13} The Select Commission on Immigration and Refugee Policy estimated that three to six million illegal aliens lived in the United States as of 1981.\textsuperscript{14} According to the 1988 Statistical Yearbook of the Immigration


\textsuperscript{14} See Select Comm’n on Immigr. & Refugee Policy, U.S. Immigration Policy and the National Interest 30 (1981 Staff Report Supp.).
& Naturalization Service (INS) the illegal population was then about 3.5 million.\textsuperscript{15}

IRCA attempted to stop illegal immigration through a three-part system. First, it provided for increased enforcement resources.\textsuperscript{16} Second, it imposed employer sanctions,\textsuperscript{17} under which employers were prohibited from, and could be fined and ultimately imprisoned for, employing aliens who were not lawful permanent residents or did not otherwise possess employment authorization. The purpose was to eliminate the economic "magnet" to work in the United States, considered the single biggest "pull factor."\textsuperscript{18} Employer sanctions also had the effect of installing employers as a sort of deputized enforcement arm of the United States, since employers were required to verify employment authorization of prospective employees and to refrain from hiring persons without employment authorization.\textsuperscript{19}

Third, IRCA established an amnesty scheme, actually three separate legalization programs.\textsuperscript{20} The largest program was


\textsuperscript{17} See generally 8 U.S.C. § 1324a (1994).


\textsuperscript{20} See generally 8 U.S.C. §§ 1255a, 1160. The first of the three programs involved the legalization for persons who had entered the United States before January 1, 1982, and had resided continuously in the United States in unlawful status since that date. \textit{See} 8 U.S.C. § 1255a (1994). The second program involved the adjustment of status to permanent resident for Cubans
comprised of persons who had been in the United States illegally since January 1, 1982.\textsuperscript{21} Between May 5, 1987, and May 4, 1988, about 1.8 million aliens applied for legalization, with an approval rate of ninety-four percent.\textsuperscript{22} Approximately 2.65 million people eventually applied for and obtained legalized status.\textsuperscript{23} The legalization program led to the INS' Family Fairness Program,\textsuperscript{24} initiated in 1988, and the later statutory provisions for Family Unity status.\textsuperscript{25} These provisions allowed children and spouses of persons who were granted legalization to remain in the country with their legalized relative until a visa was available for them.

Legalization was viewed as necessary for two principal reasons: (1) to avoid the maintenance of an underclass\textsuperscript{26} and (2) to free INS enforcement resources for concentration on future

\textsuperscript{22} See IMMIGR. AND NATURALIZATION SERV., IMMIGRATION REFORM & CONTROL ACT: REPORT ON THE LEGALIZED ALIEN POPULATION vii (March 1992).
\textsuperscript{23} See The State 2.5 Million Seek Amnesty, L.A. TIMES, July 11, 1988, at 2.
\textsuperscript{24} See INS Issues Family Unity Guidelines, 64 Interpreter Rels. 1365, 1368 (1987).
\textsuperscript{25} See 8 U.S.C. § 1255a note.

The costs to society of permitting a large group of individuals to live in illegal, second class status are enormous. Society is harmed every time an undocumented alien is afraid to testify as a witness in a legal proceeding (which occurs even when he/she is the victim), to report an illness that may constitute a public health hazard or disclose a violation of U.S. labor law.

\textit{Id.}
illegal entrants. Neither legalization nor a large population of undocumented aliens were intended to recur.

III. IRCA'S APPEARANCE OF REWARDING ILLEGAL ENTRY OR PRESENCE

For a variety of reasons, the provisions implemented by IRCA, as well as existing provisions left unchanged by IRCA, appear to have had the effect of rewarding illegal presence in the United States and maintaining "pull factors," in particular, the chance to gain legal status if one stayed in the United States long enough. First, the major amnesty program, available only for those persons who had been in the United States illegally since January 1, 1982, created an anomalous situation for persons who entered illegally, or who became illegal, by granting them a benefit not available to persons who attempted to comply with the immigration laws. Persons in legal status were eligible for the Seasonal Agricultural Workers program (SAW), but persons in illegal status were not excluded. Moreover, the amnesty programs in themselves may have sent a message that similar programs might be enacted in the future, so as to make remaining in the United States without authorization worthwhile. Indeed, recent legislation provides a new amnesty-like program for Nicaraguans and Cubans, indicating that this message was not an inaccurate one.

27. See Hampe, supra note 26, at 501; see also Smith, supra note 26, at 18. A massive deportation effort would divert important resources of the INS at precisely the time when its enforcement priority should be effective implementation of employer sanctions. See id.

28. See Smith, supra note 26, at 18. By permitting long-term residents who have demonstrated a commitment to this country to work their way into citizenship, we can reach a fair and humane solution to a regrettable situation that we intend never to allow to recur. See id.


30. See supra note 20 and accompanying text.

31. See Nicaraguan Adjustment & Central American Relief Act, Pub. L. 100-105. 111 Stat. 2160 (1997) [hereinafter NACARA]. Under this program, Nicaraguans and Cubans may adjust their status to that of permanent resident, provided they have been in the United States since December 31, 1995, have not had absences totaling more than 180 days in the aggregate, and are
In addition, IRCA left unchanged an important form of relief for undocumented aliens—suspension of deportation.\(^{32}\) Under this form of relief, aliens who had been in the United States for seven years, regardless of their immigration status during those years, and who could establish good moral character and that their deportation would cause extreme hardship to themselves or to certain United States citizens or lawful permanent resident relatives, could be granted permanent resident status at the discretion of the Attorney General. Persons deportable under criminal grounds for having failed to register, or for having falsified documents; deportable under security deportation grounds, were statutorily eligible for suspension of deportation if they fulfilled a stricter set of requirements. Those persons had to demonstrate physical presence in the United States for a continuous period of at least ten years following the commission of an act or assumption of status constituting the ground of deportation, good moral character for the whole period, and exceptional and extremely unusual hardship to the alien or to his or her United States citizen or permanent resident spouse, parent or child.\(^{33}\)

IRCA also maintained a form of relief somewhat similar to suspension of deportation, known as registry.\(^{34}\) IRCA relaxed the registry requirements by updating the registry date from 1948 to January 1, 1972,\(^{35}\) thus broadening the number of aliens eligible for permanent residence through registry. The Attorney General was authorized to grant, at his discretion, admissible, although the grounds of inadmissibility for public charge, unlawful entry and stay, lack of labor certification, and lack of entry documents do not apply. See NACARA § 202. The relief also covers the spouse and minor children of the applicant, even if those relatives have not resided in the United States since December 31, 1995. See NACARA § 202(d). Sons and daughters of the applicant may adjust status only if they have lived in the U.S. since December 31, 1995. See NACARA § 202(d)(1)(B). Applications must be filed by April 1, 2000. See NACARA § 202(a)(1)(A).

33. See 8 U.S.C. § 1254(a)(2). Even if the statutory requirements were met, the applicant had to convince the Attorney General that favorable exercise of discretion was merited. See id.
34. See 8 U.S.C. § 1259 (registry is the term of art immigration lawyers use to refer to this section).
35. See id.
permanent resident status to persons who had entered and re-
sided in the United States since June 30, 1948, were of good
moral character and were not ineligible for citizenship.\(^{36}\)

United States' asylum provisions, left unchanged by IRCA,
also provided an incentive and to some extent a justification
for unlawful entry and stay. A person who feared persecution
in his country could apply before the INS for asylum at any
point, as long as he was not in exclusion or deportation pro-
ceedings.\(^{37}\) If he was in deportation proceedings he could ap-
ply before the Immigration Judge.\(^{38}\) There was no deadline
for the filing of an asylum application, although an alien
placed in deportation or exclusion proceedings had to raise his
claim for asylum before the Immigration Judge.\(^{39}\) However,
there was no mechanism in place to ensure that expulsion pro-
ceedings commenced after a negative adjudication. Thus, asy-
lum could serve as a means of regularizing status in the United
States, often for an extended period of time.\(^{40}\)

A fourth characteristic of our immigration laws left un-
changed by IRCA, was that no real penalty attached for the
alien who entered the country unlawfully, continued to stay in
the country unlawfully, or overstayd his stay after his visa ex-
pired. Although it was a criminal violation to unlawfully enter
the United States (even though overstaying was not a criminal
offense),\(^{41}\) prosecution of such violations was not a top prior-
ity. An alien deported from the United States as a result of
deporation proceedings was subsequently inadmissible to this
country for only five years (ten years for aggravated felons),\(^{42}\)
while aliens ordered excluded and deported in exclusion pro-
ceedings were inadmissible for only one year.\(^{43}\) However,
aliens could seek dispensation from the reentry bar by request-

\[\text{36. See id.} \]
\[\text{37. See 8 U.S.C. § 1158.} \]
\[\text{38. See 8 C.F.R. § 208.4(c) (1997).} \]
\[\text{39. See id.} \]
\[\text{40. See David A. Martin, Reforming Asylum Adjudication: On Navigat-
ing the Coast of Bohemia, 138 U. Pa. L. Rev. 1247, 1287-89 (1990).} \]
\[\text{41. See 8 U.S.C. § 1325.} \]
\[\text{42. See 8 U.S.C. § 1182(a)(6)(B).} \]
\[\text{43. See 8 U.S.C. § 1182(a)(9)(C)(i).} \]
ing permission from the Attorney General to reapply for admission.\footnote{See 8 U.S.C. § 1182(a)(9)(C)(ii).}

There were means for avoiding even these relatively brief reentry bars. An alien in exclusion proceedings could ask the judge for permission to withdraw his application for entry, in which case he did not have the one-year inadmissibility bar. An alien in deportation proceedings could request relief from deportation in the form of a voluntary departure as long as he could show good moral character and the willingness and funds to depart.\footnote{See 8 U.S.C. § 1254(e) (1994) (repealed by IIRIRA).} A grant of voluntary departure meant that the alien had to leave the country, but he would not be considered deported and would not incur the five-year inadmissibility bar resulting from deportation.

In retrospect, the provisions for judicial review of exclusion and deportation orders prior to the 1996 immigration laws seem generous. Both exclusion and deportation orders were appealable to the Board of Immigration Appeals\footnote{See 8 C.F.R. § 3.38 (1997).} and, if the Board affirmed the Immigration Judge’s decision, they were reviewable in federal court (district court for exclusion; circuit court for deportation).\footnote{See 8 U.S.C. § 1105a (1994) (repealed by IIRIRA).} The filing of a petition for review in the circuit court gave an automatic stay of deportation,\footnote{See id.} except for aggravated felons as defined under the immigration laws, whose deportation was stayed only upon the direction of the court.\footnote{See id.}

A final decision by the Immigration Judge, the Board of Immigration Appeals, or even a federal court, did not necessarily mean the end of an alien’s deportation or exclusion proceeding. If new facts arose in a case, the alien could raise them through a motion to reopen his proceedings.\footnote{See 8 C.F.R. § 3.8 (1997); see also 8 C.F.R. § 3.8 (1997).} The motion could be filed at any time and there was no limit on the number of motions that could be filed by an individual alien.\footnote{See 8 C.F.R. § 3.8 (1997).}
As a result of these characteristics of immigration laws following IRCA, the longer one stayed in the United States, the greater the possibility of accruing equities which might assist in obtaining residence in the United States. The preceding section is not intended to criticize the immigration laws prior to IIRIRA as being overly generous. Indeed, the employer sanctions and enforcement provisions of IRCA were neither intended to be, nor were viewed as, lenient. Rather, the harshness of the IIRIRA provisions have cast the immigration law existing under IRCA in a new light; it is only by comparison with IIRIRA that IRCA seems, in retrospect, benevolent.

IV. IRCA'S FAILURE TO CONTROL ILLEGAL IMMIGRATION

IRCA did not curtail illegal immigration as expected, and there seemed to be only a brief abatement of the flow of undocumented aliens into the United States following IRCA. By 1990, experts calculated that there were again about 3 million illegal aliens in the United States. The House Committee on the Judiciary estimated that there were 4 million illegal aliens in the United States at that time. Thus, the number of undocumented aliens in this country in 1995 was comparable to the pre-IRCA number.

IRCA's failure to control undocumented immigration was based at least in part on the factors mentioned in the preceding section, that is, IRCA's effect of rewarding unauthorized entry and stay. Other contributing factors could include the fact that, even at the time it was passed, a large number of illegal aliens in the country could not meet the requirement of

52. See Espenoza, supra note 19, at 369; see also LeMay, supra note 11, at 112-16; but see INS, News Release, Reduction in Unlawful Alien Entries Noted at 5-Year Anniversary of IRCA (1991).
53. See Passel, supra note 12, at 115.
55. See infra note 14 and accompanying text.
unlawful residence since 1982, although they had strong ties binding them to this country which discouraged them from departing.\textsuperscript{56} There were also criticisms that the INS did not sufficiently advertise the legalization program\textsuperscript{57} and that the standards it applied were too rigorous,\textsuperscript{58} so that some eligible persons might not have applied.\textsuperscript{59} Although significant funds for enforcement were authorized, the President requested less than the appropriated amount.\textsuperscript{60} It is also widely agreed that the effect of employer sanctions was blunted by an extensive market in, and use of, fraudulent employment documents.\textsuperscript{61}

Despite employer sanctions, a market for aliens without employment authorization continued.\textsuperscript{62} Moreover, although Congress recognized in IRCA the effect of factors outside the

\textsuperscript{56} See Merino, supra note 16, at 411 n.15; see also Espenoza supra note 19, at 372. Even with optimistic estimates regarding applications still to be received, the authors predicted that the illegal population, consisting of the 1982-1986 subclass and those eligible for legalization who did not apply, would be almost twice the size of the impaired population. See id. At the time of IRCA, undocumented population who could not meet the requirements was between 1 million and 3.7 million. See id.


\textsuperscript{58} See Espenoza, supra note 19, at 358.

\textsuperscript{59} A number of class actions were filed, arguing that individual aliens were precluded from applying or were improperly denied under invalid INS regulations. See generally Robert H. Gibbs, It Ain't Over till its Over: Amnest\textsuperscript{y} Issues Persist Decade after IRCA, 73 Interpreter Rel. 1493 (1996); 9th Circuit Orders Dismissal of Legalization Lawsuit in Light of 1996 Act, 74 Interpreter Rel. 741 (1997). As a result of these cases, as well as delays in appeals of individual cases, there were tens of thousands of amnesty cases still pending at the time IIRIRA was enacted. See 74 Interpreter Rel. 741 (1997). Section 377 of IIRIRA provided that no court shall have jurisdiction over any claim for legalization unless the applicant applied for legalization within the specified time period or attempted to file with the Service but had the application and fee refused by the officer. See id. Based upon this provision, one case, Catholic Social Services v. Reno, 134 F.3d 921 (9th Cir. 1997), was dismissed. See id.

\textsuperscript{60} See David North, Administration Budget Request Shows Large Increase for INS, Cuts for Refugee Programs, 64 Interpreter Rel. 29, 30 (1997).

\textsuperscript{61} See LeMay, supra note 11, at 99.

United States which encouraged undocumented migration to this country, it only addressed these factors by establishing the Commission for the Study of International Migration and Cooperative Economic Development. The Commission was charged with examining the conditions in Mexico and other sending countries which contributed to unauthorized migration to the United States, exploring mutually beneficial reciprocal trade and investment programs to alleviate those conditions, and reporting to Congress on its findings. IRCA itself did not take steps to address the extra-United States factors, or "push factors." Rather, IRCA defined the problem it was designed to deal with as primarily one of economic factors pulling immigrants to the United States, rather than political or economic conditions in the sending country that acted to push citizens out.

As a result of the perceived failure of IRCA, new policies and laws were put into place, culminating in the enactment of IIRIRA.

V. TRANSITION BETWEEN IRCA AND IIRIRA

Between 1986 and 1996, various measures were taken in an attempt to contain undocumented migration. In order to curtail the filing of non-meritorious asylum applications, often viewed as a subterfuge allowing undocumented aliens to gain a

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12, at 117 ("[t]here continues to be a strong demand for the labor of undocumented immigrants").
64. See id.
65. See Lemay, supra note 11, at 114.
66. See LeMay supra note 11, at 158.

Design flaws in the legislative strategy, or invalid assumptions upon which that strategy was based, are also likely to produce unanticipated consequences. Congressional proponents of IRCA, for instance, assumed that pull factors were primary in the immigration flow. To the degree that such an assumption is incorrect, employer sanctions will correspondingly fail to stem the flow of undocumented aliens.
Id.; see also Espenoza, supra note 19, at 371 ("[f]ailure may be inevitable for an approach such as employer sanctions that does not address or correct that pull factor.").
foothold in the United States, asylum procedures were tightened by the INS promulgation of asylum reform regulations. In particular, the “pull factor” of employment authorization, in effect during a sometimes lengthy adjudication process, was limited by the rule that applicants were ineligible for employment authorization until 150 days after the filing of the asylum application. Under the new regulations, INS asylum officers referred applications directly to the Immigration Court together with charging documents commencing deportation or exclusion proceedings, rather than issuing denials. This contrasted with the earlier practice where an alien whose application for asylum was denied would be sent a denial letter and typically given thirty days to depart the United States voluntarily. Only after the thirty-day period would expulsion proceedings be commenced, and the mechanism for forwarding cases from asylum adjudications to deportation did not always seem reliable.

Some aliens were prevented through interdiction from filing full asylum applications. Interdiction procedures were put in place for Haitians arriving by boat and later for Cubans arriving by boat. The United States Coast Guard screened the asylum claims of the intending arrivals and turned back those who did not have well-founded claims.

67. See generally Daniel C. Horne & L. Ari Weitzhandler, Asylum Law After the Illegal Immigration Reform & Immigrant Responsibility Act, 97-4 Immigration Briefings 1 (April 1997) (discussing U.S. and global ambivalence regarding immigration generally and asylum in particular); see also Schuck, supra note 1, at 8-9 (commenting that asylum was used to delay expulsion long enough to gain some other form of relief).

68. See generally 59 Fed. Reg. 62284 (1994). It is estimated that the reforms contained in the 1994 regulations resulted in a reduction in the filing of new asylum claims of fifty percent or greater. See id.

69. See 8 C.F.R. § 208.7(a)(1) (1997).

70. See 8 C.F.R. § 208.4 (1997).

71. An impressive group of scholars have written about the Haitian interdiction program and about the later Cuban interdiction program. Among them are: Harold Hongju Koh, The “Haiti Paradigm” in United States Human Rights Policy, 103 YALE L.J. 2391 (1994); Harold Hongju Koh, Reflections on Refoulement and Haitian Centers Council, 35 HARV. INT’L L.J. 1 (1994); Joan Fitzpatrick & William McKay Bennett, A Lion in the Path? The Influence of International Law on the Immigration Policy of the United States, 70 WASH. L. REV. 589 (1995); Kevin R. Johnson, Judicial Acquies-
Increased attention was paid to deterrence at the border as well. Programs like Operation Gate-Keeper, in San Diego, in which Border Patrol saturated the border to deter clandestine entries, and Operation Hold-the-Line, in El Paso, in which a multi-faceted approach of physical barriers were used to deter clandestine entries, were implemented in an attempt to reduce the number of aliens who entered the country illegally through our southern border with Mexico.\(^7\)

In addition, the Immigration Act of 1990\(^7\) increased the worldwide level of legal immigration and revised the legal family and employment-based immigration quotas, thereby decreasing the backlog in immigrant visas. This reduction may have alleviated unlawful immigration to some extent.\(^4\)

The Immigration Act of 1990 also directed the Attorney General to promulgate regulations limiting the timing and number of motions for reopening and reconsideration of deportation proceedings.\(^7\) Those regulations were issued in 1996, and limited aliens to one motion to reconsider, filed within thirty days of the disputed order, and one motion to

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\(^{72}\) See Clinton Administration Announces Enhanced Border Initiatives, 73 Interpreter Rels. 101, 101 (1996); see also H.R. Rep. No. 104-469, pt.1, at 112-14 (discussing the two programs and commenting that they represented a fundamental change in border strategy); Legomsky, supra note 53, at 10-15; Joel Brinkley, A Rare Success at the Border Brought Scant Official Praise, N.Y. TIMES, September 14, 1994, at A1 (stating that prior to these programs, enforcement efforts had been directed at apprehending persons who attempted to remain in the United States for extended periods of time).


\(^{75}\) See 8 U.S.C. § 1252 note.
reopen, filed within ninety days of the disputed order. Exceptions were provided for motions to reopen filed to apply or reapply for asylum or withholding of deportation based upon changed circumstances; motions to reopen deportation proceedings held in absentia, where the alien demonstrates lack of proper notice or exceptional circumstances excusing his absence, and motions to reopen which are agreed upon by all parties and jointly filed.

Some of the provisions enacted in both IRCA and IIRIRA may have maintained the impression that an unlawful stay in the United States might lead to permanent status. For example, under the Temporary Protected Status (TPS) provisions of the Immigration Act of 1990, the Attorney General is authorized to designate certain nationalities or groups of persons who are within the United States and who cannot return safely to their countries because of natural disaster, armed conflict, or other extraordinary and temporary conditions that prevent them from returning safely. Those individuals are allowed to remain in the United States, with employment authorization, for a designated period of time.

76. See generally 8 C.F.R. § 3.2(b)(2), (c)(2) (1997).
77. See 8 C.F.R. § 3.2(c)(3) (1997).
79. See 8 U.S.C. § 1254a(1)(A). The Attorney General may grant temporary protected status, which includes employment authorization and protection from deportation, to aliens who are nationals of a foreign state when the Attorney General has designated that the return of the aliens to the state would pose a serious threat to their personal safety, or if, because of earthquake, flood, drought, epidemic, or other environmental disaster, the foreign state is temporarily unable to handle the return of its nationals and the foreign state has officially requested designation, or if the Attorney General finds that there are extraordinary and temporary conditions in the foreign state which prevent its nationals from returning there safely, unless the Attorney General finds that permitting the aliens to temporarily remain would be contrary to the national interest of the United States. See 8 U.S.C. § 1254a(b)(1)(A)-(C).
Among the persons granted TPS were persons who had been living in the United States in undocumented status and who were able to obtain authorized stay and employment authorization through TPS. Although the 1990 Act prohibited subsequent legislation that would allow persons granted TPS to adjust their status to lawful temporary or permanent resident status, absent the affirmative vote of three-fifths of the Senate, events occurring during TPS-authorized stay sometimes provided recipients with a means of obtaining permanent status. For example, the TPS granted to Salvadorans under the Immigration Act of 1990 was extended in the form of "deferred enforced departure" (DED) status, in effect until December 31, 1994. Salvadoran DED coincided with the settlement agreement in American Baptist Churches v. Thornburgh, under which Salvadorans and Guatemalans were allowed to file asylum applications or to have their asylum applications reconsidered by the INS under the asylum regula-

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82. See NACARA § 203(1)(I)(aa) (specifically granted TPS to Salvadorans).
85. 760 F. Supp. 796 (N.D. Cal. 1991) [hereinafter the ABC Case].
tions promulgated in 1990, rather than under the 1994 asylum reform regulations.\textsuperscript{86} During the consideration or reconsideration of their asylum applications, applicants were protected from deportation and granted employment authorization.\textsuperscript{87} The extended periods of stay required to allow applicants to pursue these means of relief have culminated in the special provisions of The Nicaraguan Adjustment and Central American Relief Act of 1997 (NACARA), allowing Salvadorans to apply for suspension and possibly obtain permanent residence, based on their length of stay in the United States.\textsuperscript{88}

The TPS/ABC situation is an example of an apparent ambivalence between our stated goal of cracking down on unlawful migration by eliminating benefits to be gained through undocumented entry and presence, and our willingness to

\textsuperscript{86} See id. at 799-80

\textsuperscript{87} See id. at 804-05; see also 60 Fed. Reg. 35424 (1995).

\textsuperscript{88} See NACARA § 203(1)(I)(aa). Congress has maintained the pre-IIRIRA suspension of deportation for six groups of individuals. For these groups, the accrual of continuous residence is not tolled by the issuance of an order to show cause or notice to appear for removal proceedings, absences of more than 180 days do not automatically break continuous physical presence, and the suspension of deportation provisions existing prior to IIRIRA are maintained. The yearly limit of 4,000 for grants of suspension and cancellation do not apply to these persons. The first group consists of Salvadorans who entered the United States prior to September 19, 1990, and registered for benefits under the settlement agreement in the ABC Case, on or before October 31, 1991, or applied for temporary protected status on or before October 31, 1991. \textit{See} NACARA § 203(1)(I)(aa). The second group consists of Guatemalans who were not apprehended after December 19, 1990 at entry, who entered on or before October 1, 1990, and who registered under the ABC case on or before December 31, 1991. The third group consists of Guatemalans and Salvadoran nationals who filed an application for asylum with the INS on or before April 1, 1990. \textit{See} NACARA § 203(1)(II).

The fourth group consists of spouses and children of the preceding groups. \textit{See} NACARA § 203(1)(III). The fifth group consists of sons and daughters (adult children) of the preceding groups, if the son or daughter is unmarried and, if 21 years or older, entered the U.S. on or before October 1, 1990. \textit{See} NACARA § 203(1)(IV)(aa)-(bb). The sixth group consists of nations of the former Soviet Union (Soviet Union, Russia, any republic of the former Soviet Union, Latvia, Estonia, Lithuania, Poland, Czechoslovakia, Romania, Hungary, Bulgaria, Albania, East Germany, Yugoslavia, or any state of the former Yugoslavia), if the alien entered the U.S. on or before December 31, 1990, and filed an application for asylum on or before December 31, 1991. \textit{See} NACARA § 203(1)(V).
bend the rules for groups of persons who are in need. As a people, we have difficulty balancing our humanitarian impulses with our desire to protect our borders against undocumented migration. It may be a reflection of how we see ourselves and our nation's historic role as a refuge for the unfortunate.

VI. THE ILLEGAL IMMIGRATION REFORM AND IMMIGRATION RESPONSIBILITY ACT AND ITS EFFECT ON ILLEGAL IMMIGRATION

The IIRIRA\textsuperscript{89} resulted in a major enhancement of immigration enforcement. Unlike IRCA, IIRIRA provides no benefits such as amnesty. Instead, it either takes away completely or limits drastically any benefit to be gained by unlawful presence, thereby weakening the "pull factor" of the hope of legal residence. In further contrast to IRCA, IIRIRA does not address the causes of undocumented immigration. A brief review of IIRIRA's provisions to combat unauthorized entry and stay follows.

A. Enforcement

Like IRCA, IIRIRA increases enforcement resources.\textsuperscript{90} It increases the size of the Border Patrol\textsuperscript{91} and interior unauthorized overstay investigators,\textsuperscript{92} allows the Attorney General to authorize state law enforcement officers to perform immigration investigation, apprehension, and detention functions,\textsuperscript{93} and increases the number of federal prosecuting attorneys to enforce immigration-related criminal violations.\textsuperscript{94} IIRIRA also mandates the building of a triple fence in the San Diego

\begin{footnotesize}
89. See supra note 2.
93. See id.
94. See IIRIRA § 204 (not codified).
\end{footnotesize}
Area and requires the INS to develop an automated entry and exit control system to record the departures of all aliens in order to have the capacity to match each person's authorized duration of stay with his departure date. In response to the perceived widespread use of fraudulent documents for employment and other immigration purposes, IIRIRA increases penalties for document fraud.

B. Penalties for Unlawful Presence

The IIRIRA substantially increased the immigration consequences for unlawful presence in the United States. Persons in unlawful status in the United States for more than 180 days and less than one year, and who leave prior to institution of removal proceedings, are then inadmissible for three years. They are inadmissible for ten years if their unauthorized stay exceeds one year. The Attorney General may waive these provisions only if the alien is the spouse, son or daughter of a United States citizen or lawful permanent resident, and if denial of admission would result in extreme hardship to the United States citizen or lawful permanent resident spouse or parent. There are also some exceptions to the reentry bars resulting from unlawful presence: periods of time during which the person is under 18 years of age are not counted, and

95. See IIRIRA § 102, 8 U.S.C. § 1103.
96. See IIRIRA § 110(a), 8 U.S.C. § 1221.
97. See IIRIRA § 211, 18 U.S.C. §§ 1028(b), 1425-1427, and 1541-1544; see also IIRIRA § 212, 8 U.S.C. § 1324c(a) (adding two new document fraud offenses: (1) preparing, filing, or submission, or assisting in the preparation, filing, or submission of any application or document with knowledge or in reckless disregard that it is false, and (2) failing to present to an immigration officer upon arrival in the U.S. a document concerning eligibility to enter to the United States which was presented to a common carrier for the purpose of coming to the U.S.; see also IIRIRA § 217, 18 U.S.C. § 982(a) (requiring forfeiture of any conveyance used and any property derived from or for the use in immigration document fraud or in unauthorized employment of aliens).
98. See 8 U.S.C. § 1182(a)(9)(B)(i)(I) (redesignating paragraph (9) as paragraph (10) and inserting after paragraph (8), a new paragraph (9)).
periods of time while a bona fide application for asylum is pending, unless the alien was employed without authorization.\textsuperscript{102} The unlawful presence inadmissibility grounds do not apply to battered women and children.\textsuperscript{103} Moreover, no period of time before April 1, 1997, is included in a period of unlawful presence.\textsuperscript{104}

The penalties increase for persons who have been ordered to be removed. A person who is removed after proceedings initiated upon arrival is inadmissible for five years.\textsuperscript{105} Aliens ordered removed at a proceeding after entering the country are inadmissible for ten years from the last departure.\textsuperscript{106} The alien may still obtain the Attorney General’s permission to reapply for admission.\textsuperscript{107}

The immigration consequences for unauthorized stay are even more onerous for persons reentering the United States without authorization. Persons who have been ordered removed, or who have been here for one year or more, and who enter or attempt to reenter the United States without authorization, are permanently inadmissible.\textsuperscript{108}

IIRIRA retains the provisions imposing criminal penalties for entry without inspection\textsuperscript{109} and for reentry after being removed.\textsuperscript{110} It adds civil penalties, in the amount of $500 per day, for failure to depart voluntarily from the United States when ordered to do so.\textsuperscript{111}

\textsuperscript{104} This is the effective date of the portion of the 1996 Act containing the unlawful presence inadmissibility grounds.
\textsuperscript{105} See 8 U.S.C. § 1182(a)(9)(A)(i) (twenty years for second or subsequent removals, permanently for aggravated felons).
\textsuperscript{111} See 8 U.S.C. § 1324d.
C. Repeal of Suspension of Deportation and Replacement with Cancellation of Removal

IIRIRA made significant changes to suspension of deportation, now called cancellation of removal for non-permanent residents. One of these changes is that the accrual of the required period of continuous residence ends at the earlier of either service of a notice to appear for removal proceedings, or commission of a criminal offense which renders the alien inadmissible or deportable.\(^\text{112}\) Moreover, the alien now must show ten years of continuous physical presence in the United States,\(^\text{113}\) thus imposing on all applicants the same lengthy time requirement that was reserved under suspension of deportation for persons falling under certain serious deportation grounds.\(^\text{114}\) He can no longer claim hardship to himself to establish statutory eligibility for this form of relief; only hardship to a United States citizen or permanent resident spouse, parent, or child may be considered.\(^\text{115}\) The level of hardship itself has been increased. All applicants must now show that removal would result in exceptional and extremely unusual hardship,\(^\text{116}\) rather than the extreme hardship required to establish eligibility for suspension of deportation for applicants who were not deportable under criminal, falsification of documents, or security grounds.\(^\text{117}\) Thus, all applicants for cancellation must establish the same high level of hardship reserved under suspension of deportation for persons falling under serious deportation grounds. The Attorney General may not suspend deportation or cancel removal for more than 4,000 persons a year, commencing with applications granted after April 1, 1997.\(^\text{118}\)

IIRIRA relaxed the requirements for cancellation of removal for aliens who are battered spouses or children. A per-

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112. *See* 8 U.S.C. § 1229b(d)(1) (this is an entirely new section added by the IIRIRA).
114. *See supra* note 33 and accompanying text.
116. *See id.*
117. *See supra* note 33 and accompanying text.
son must establish three years residence in the United States, rather than the ten years residence required for regular cancellation of removal, and can base his claim on extreme hardship to himself, rather than the exceptional and extremely unusual hardship to a United States citizen or resident spouse, parent or child, as required for ordinary cancellation of removal.

D. Limitations on Voluntary Departure

Under IIRIRA, voluntary departure has become more difficult to obtain. There are now two forms of voluntary departure: pre-removal proceedings granted by the INS in its discretion, and post-removal proceedings granted by the Immigration Judge in his discretion. Of the two forms, it is considerably easier to establish statutory eligibility for pre-removal proceedings. For pre-removal proceedings, the alien must leave at his own expense, but there is no requirement of proof that he is able to pay for his departure. There is no requirement that he establish good moral character, although he is ineligible for voluntary departure if he has been convicted of an aggravated felony or if he is a convicted terrorist. He may be granted up to 120 days voluntary departure, and he may be required to post a voluntary departure bond.

In contrast, in order to establish statutory eligibility for post removal proceedings voluntary departure, the alien must show

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119. See generally 8 U.S.C. § 1229c(a) for the definition of battered or subject to extreme cruelty.
120. See supra, note 115 and accompanying text. See 8 U.S.C. § 1229b(b)(2)(B) for the definition of battered or subject to extreme cruelty.
121. See 8 U.S.C. § 1229c(b)(1)(B) for the specific provision for good moral character.
122. Compare 8 U.S.C. § 1229c(a) for the definition of battered or subject to extreme cruelty.
123. The alien must demonstrate that the alien has been battered or subject to extreme cruelty in the United States by a spouse or parent who is a U.S. citizen or lawful permanent resident (or is the parent of a child of a U.S. citizen or lawful permanent resident and the child has been battered or subject to extreme cruelty in the United States by such citizen or permanent resident parent). See 8 U.S.C. § 1229b(b)(2).
that he has been physically present in the United States for at least one year prior to service of the notice to appear for removal proceedings. In addition, an alien must establish good moral character for the past five years, must establish by clear and convincing evidence that he has the means to depart the United States and intends to do so, and must place a voluntary departure bond. There is also a civil penalty for failure to depart by the voluntary departure date.

E. Restrictions on Asylum Procedure

IIRIRA has made significant changes in asylum procedures, designed to deter weak or fraudulent claims. Asylum applications must now be filed within one year of entry, although applications filed after the one-year period may be considered if the alien demonstrates changed circumstances which materially affect his eligibility for asylum or extraordinary circumstances relating to the delay in filing the application. Similarly, only one application per applicant may be considered, unless the applicant demonstrates changed circumstances or extraordinary circumstances. No court has jurisdiction to review the Attorney General's determination concerning whether the application was timely filed or whether the alien may be removed to a safe third country. The time periods for consideration of an asylum application are also restricted. Absent exceptional circumstances, the initial interview or hearing must commence no later than forty-five days after the application is filed and administration adjudication, not in-

cluding administrative appeal, must be completed within 180 days after the application is filed.\textsuperscript{138} There is a chilling penalty for filing frivolous claims for asylum—permanent ineligibility for any benefits under the Immigration and Nationality Act.\textsuperscript{139}

\textbf{F. Expedited Removal}

IIRIRA institutes expedited removal procedures which shorten the duration of removal proceedings and thereby shorten the amount of time in which the alien might accrue benefits through his stay. An alien is subject to expedited removal\textsuperscript{140} if he has not been admitted or paroled into the United States and cannot show two years physical presence immediately preceding the determination of inadmissibility, and if he is inadmissible either because of lack of valid entry documents\textsuperscript{141} or because of fraud or willful misrepresentation of a material fact.\textsuperscript{142} If the alien indicates an intention to apply for asylum or a fear of persecution, the alien must be interviewed by an asylum officer who must then determine whether or not the alien has a credible fear of persecution.\textsuperscript{143} An alien determined to have a credible fear of persecution must be detained for further consideration of his asylum application.\textsuperscript{144} An alien determined not to have a credible fear of persecution may request a prompt review of that determination by an Immigration Judge.\textsuperscript{145} If no review is requested, or if the review affirms the decision of the asylum officer, then the alien is removed.

\begin{itemize}
\item[138.] See 8 U.S.C. § 1158(d)(5).
\item[139.] See 8 U.S.C. § 1158(d)(6).
\item[142.] See id.
\end{itemize}
G. Mandatory detention of unlawful entrants without two years residence

IIRIRA makes unlawful entry to the United States less desirable because of mandatory detention.146 Aliens who are inadmissible for lack of entry documents, or because they have procured documentation, or admission by fraud or willful misrepresentation of a material fact must be detained if they have not been physically present in the United States for two years.147 IIRIRA also requires that almost all aliens with criminal convictions be detained pending removal proceedings.148

IIRIRA also requires detention of all aliens who have been ordered removed during the removal period, defined as the ninety days beginning on the date of a final order of removal or the date of the alien's release from detention, if the alien is detained, except under an immigration process.149 The Attorney General is instructed to complete removal within these ninety days.150 INS interim regulations confirm that INS will detain aliens at the beginning of the ninety day removal period.151

H. Limitations on Motions to Reopen

In April, 1996, the Department of Justice issued regulations limiting to one the number of motions to reopen which could be filed, and providing that the motion must be filed not later than ninety days after the final administrative decision, or on


148. See 8 U.S.C. § 1226(c). Prior to AEDPA § 440(c), and the subsequent IIRIRA, only aggravated felons were required by statute to be detained. See 8 U.S.C. § 1252(a)(2)(B) (1994). However, under transition period rules of the IIRIRA, INS may release certain criminal aliens who are lawfully admitted to the U.S., or who are not lawfully admitted but cannot be removed because the designated country of removal will not accept the alien. See INS, State Dept. Begin Implementing New Law, Congress Passes Corrections Bill, 73 Interpreter Rels. 1417, 1418-19 (1996).

149. See generally 8 U.S.C. § 1231.


or before September 30, 1996, whichever was later. The provisions of these regulations were incorporated in IIRIRA. Under both the April, 1996 regulations and IIRIRA, an exception is made for the filing of a motion to reopen based upon an application for asylum or restriction of removal based on changed conditions in the country in which persecution or jeopardy is feared. By regulation, the time and number limits may also be waived by a joint motion to which all parties agree.

I. Limitations on Judicial Review

IIRIRA severely limits judicial review of removal decisions. The statute provides that no court shall have jurisdiction to review final orders of removal for aliens who are removable because they have committed a criminal offense, including convictions for aggravated felonies, controlled substance violations, or firearms offenses. In addition, two crimes of moral turpitude, where both crimes are committed within five years of entry and where both convictions were crimes for which a sentence of one year or longer might be imposed. Neither do the courts have jurisdiction to review any judgment concerning the granting of relief under Sections 212(h), 212(i), 240A, 240B, or 245 nor on any decisions

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152. See 8 C.F.R. § 3.2(c)(2) (1997).
156. See generally 8 U.S.C. § 1252. The IIRIRA judicial review provisions maintain in large part curtailment of judicial review enacted in Section 440(a) of AEDPA; see infra note 164 and accompanying text. The AEDPA provision has also been challenged, and, in general, upheld. See, e.g., Chow v. INS. 113 F. 3d 659 (7th Cir. 1997).
158. See 8 U.S.C. § 1252(a)(2)(B)(i). Waivers of certain criminal inadmissibility grounds are available for immigrants who are the spouse, parent, son, or daughter of a U.S. citizen or permanent resident, and who meet the statutory requirements and demonstrate that a favorable exercise of discretion is merited. See 8 U.S.C. § 1182(h).
159. See 8 U.S.C. § 1252(a)(1)(B)(i). Waiver of fraud and misrepresentation grounds of inadmissibility are available for immigrants who are the spouse, son, or daughter of a U.S. citizen or permanent resident and who
based on discretionary relief other than asylum.¹⁶³ This is one of the most troubling parts of IIRIRA. Advocates argue that the provision impermissibly interferes with the judicial function and the separation of powers, and the provision has, therefore, resulted in a number of challenges.¹⁶⁴ Like expedited removal, the curtailment of judicial review shortens the length of time an undocumented alien spends in the United States and, consequently, limits the accrual of stay which might result in immigration benefits.

meet the statutory requirements and demonstrate that a favorable exercise of discretion is merited. See 8 U.S.C. § 1182(i)(1).

¹⁶⁰. See 8 U.S.C. § 1252(a)(1)(B)(i). Cancellation of removal, and either retention of permanent residence or adjustment of status to permanent residence are available for certain aliens who meet the statutory requirements and who demonstrate that they merit the favorable exercise of discretion. See 8 U.S.C. § 1230A.


¹⁶². See 8 U.S.C. § 1252(a)(1)(B)(i). This section provides for adjustment of status to permanent residents for aliens who meet the statutory requirements and demonstrate that a favorable exercise of discretion is merited. See 8 U.S.C. § 1245.

¹⁶³. See id.

¹⁶⁴. The scope of this article does not allow a detailed treatment of the arguments against the judicial review provisions of AEDPA and IIRIRA. However, a good deal has already been written on the matter. See Lucas Guttentag, The 1996 Immigration Act, Federal Court Jurisdiction - Statutory Restrictions and Constitutional Rights, 74 Interpreter Rel. 245, 255-59 (1997) (emphasizing that IIRIRA did not preclude habeas corpus review). Gutenberg argues that there may still be a possibility of judicial review on the issue of whether an alien is inadmissible or deportable because of criminal convictions. See id. at 249. Gutenberg discusses issues of statutory eligibility for discretionary relief. See id. He also contends that Article III and the Due Process Clause provide an independent basis for judicial review in removal proceedings. See id. at 259-60; see also M. Isabel Medina, Judicial Review: A Nice Thing? Article III, Separation of Powers and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, 29 Conn. L. Rev. 1525 (1997); Lenni Benson, Back to the Future: Congress Attacks the Right to Judicial Review of Immigration Proceedings, 29 Conn. L. Rev. 1411 (1997) (discussing habeas corpus as a still-valid method for obtaining judicial review).
J. Restrictions on Public Benefits

IIRIRA contains its own provisions restricting welfare for aliens, making aliens who are excludable, deportable, or non-immigrant, ineligible for any means-tested public benefits.\(^{165}\) In addition, IIRIRA makes excludable, deportable, and non-immigrant aliens (except for lawful non-immigrants authorized to work in United States) ineligible for grants, contracts, professional licenses, driver’s licenses, and commercial licenses.\(^{166}\) Coupled with the 1996 Welfare Reform Act,\(^{167}\) IIRIRA’s curtailment of alien eligibility for public benefits takes away what was considered another major “pull factor” for undocumented immigration and makes existence as an undocumented alien in the United States considerably more difficult.

\(^{165}\) See IIRIRA § 501, 8 U.S.C. § 1641 (making an exception for emergency medical conditions, short-term non-cash emergency disaster relief, certain food programs, and battered aliens); see also IIRIRA § 503, 42 U.S.C. § 402 note (An alien is ineligible for Social Security benefits for any month during which the alien is not lawfully present in the United States); 8 U.S.C. § 1623 (making aliens not lawfully present ineligible for post-secondary education benefits on the basis of residence within a state unless U.S. citizens and nationals eligible for such benefits are eligible without regard to state residence).

\(^{166}\) See IIRIRA § 502, 8 U.S.C. § 1621 note.

\(^{167}\) See Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. 104-193, 110 Stat. 2105 (codified in scattered sections of 7, 8, 21, 25, & 42 U.S.C.) [hereinafter PRWORA]. Under PRWORA, undocumented aliens are ineligible for all federal public benefits, a term defined broadly to include any contracts, loans, professional or commercial license, retirement benefits, health or disability benefits, food assistance, housing, post-secondary education, or any other “similar” benefits provided by the federal government. See 8 U.S.C. § 1611(a)-(c). Limited exceptions include emergency medical care, short-term, non-cash, in-kind emergency disaster relief, and certain treatment for communicable diseases. See 8 U.S.C. § 1611(b). Undocumented aliens are further ineligible for state or local public benefits (defined by, and subject to exceptions similar to, the provisions governing federal benefits), unless the state passes post-PRWORA legislation to the contrary. See 8 U.S.C. § 1621. PRWORA also made lawful permanent residents ineligible for most forms of federal public benefits, but those provisions were relaxed for eligible aliens in the U.S. at the time PRWORA was enacted. See Balanced Budget Act of 1997, Pub. L. 105-33, 111 Stat. 638-43 (1997) (codified as amended in scattered sections of 8 and 42 U.S.C.).
VII. THE ELIMINATION OF "PULL FACTORS"
UNDER IRCA AND IIRIRA

As can be seen from the preceding sections, IRCA targeted one large "pull factor"—employment in the United States. IIRIRA goes much further in removing other possible "pull factors"—it removes or limits benefits that may accrue from illegal presence, it penalizes unlawful presence by imposing severe penalties for future immigration, and it maintains the employer sanctions initiated in IRCA. In addition, IIRIRA streamlines the deportation process considerably through expedited removal, increased detention, limitation of motions to reopen, and limitation of judicial review, thereby limiting the amount of time a removable alien may remain in the United States.

IIRIRA's provisions have met with success in terms of alien removals. In May, 1997, the INS announced the highest quarterly removal number in history. Total removals for the first nine months of the 1997 fiscal year were 75,743. INS credited this success to increased detention space and increased funding for vehicles, detention, deportation officers, and INS special agents.

IIRIRA leaves for another day the consideration of another reputed "pull factor"—birthright citizenship. A number of proposals have been made in Congress to eliminate citizenship based solely on birth in the United States.


169. See generally, INS Announces Record Pace of Removals, 74 Interpreter Rels. 1371 (1997).

170. See INS News Release, supra note 168. The news release quotes INS General Counsel David Martin as saying, "If we can detain them, we can remove them." Id.

171. Under the Fourteenth Amendment to the United States Constitution, all persons born in the United States and subject to its jurisdiction are citizens. See, e.g., Christopher Eisgruber, Birthright Citizenship and the Constitution, 72 N.Y.U. L. Rev. 54, 69 (1997) (commenting that birthright citizenship in itself may be an immigration "pull factor").

172. See id. at 54 nn.5-8 (citing several newspaper articles mentioning different proposals on birthright citizenship).
IIRIRA also left in place registry, prolonging one means of obtaining residence through extended stay, regardless of whether the stay is unauthorized.

There are indications that IIRIRA may go too far, and subsequent legislation has provided relief for some of its harsher consequences. For example, the Nicaraguan Adjustment and Central American Relief Act grants permanent residence to Nicaraguans and Cubans who have been in the United States for a specified period of time and allows certain categories of aliens to apply for suspension of deportation as it existed prior to IIRIRA. President Clinton, concerned that Haitians were not also granted this relief, has granted Deferred Enforced Departure (DED) to Haitians who were paroled into the United States or who applied for asylum before December 31, 1995. Under DED, the Haitians will be allowed to stay and work lawfully in the United States for one year, which may be extended. While adjustment of status under Section 245(i) for aliens not in lawful status has been allowed to sunset, it will linger on under new legislation which allows persons to adjust their status under Section 245(i) as long as the underlying visa petition or labor certification is filed by January 14, 1998.

173. See 8 U.S.C. § 1259; see also, supra notes 34 and 35 and accompanying text.
174. See NACARA §§ 202, 203; see also, supra notes 32 and 82 and accompanying text.
175. At the time he signed NACARA, President Clinton stated that he was troubled by the differences in relief offered to similarly situated persons. See Congress Passes Law Providing Special Relief to Immigrants of Specified Nations. 11 IMMIGRANTS' RIGHTS UPDATE (November 26, 1997) at 1, 2; see also Congress Makes Additional Changes in Central American Bill; Haitian Relief Urged, 74 Interpreter Rels. 1788, 1789 (1997).
177. See id.
178. Aliens in the United States who are eligible for permanent resident visas may obtain their visas through a process known as "adjustment of status," which occurs within the United States rather than through consular proceedings abroad. The code sets specific requirements for adjustment of status. See 8 U.S.C. § 1255(a). Among these requirements is that the applicant must be in lawful immigration status at the time the application is filed. See 8 U.S.C. § 1255(c). The applicant must have been inspected and admit-
With IIRIRA, the United States has significantly deterred unlawful entry and burdened unlawful presence in this country. Through expedited removal, detention, and increased border control, it is more difficult to enter the United States. Through the negative consequences of unlawful status on eligibility to immigrate in the future, we have increased the incentive to return home prior to accruing extended unlawful status. Through curtailing the forms of discretionary relief available to persons who remain in the United States in unlawful status, we have lessened the incentive to remain here unlawfully.

Additionally, through denial of driver's licenses and other permits to aliens in undocumented status and the delay imposed on employment authorization for asylum seekers, we have made life as an unauthorized alien in this country very difficult. Nonetheless, as set forth in the next section of this article, we still have a sizable population of undocumented aliens, and we find it very difficult to enforce harsh immigration measures against persons who we see as being in need. Perhaps a way to reconsider this ambivalence is by increased attention to the root causes of undocumented migration. If we are going to close our doors, then shouldn't we do so with a helping hand?

See 8 U.S.C. § 1255(a). The INA was amended to allow persons who had not been inspected, as well as persons who had failed to maintain lawful immigration status, to adjust their status to immigrant upon paying a fee of five times the usual adjustment fee. See Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act of 1995, Pub. L. 103-317, 108 Stat. 1760, 1765-66 (1994). The provision was not a permanent one, however, and was due to sunset on September 30, 1997. Congress provided that beneficiaries of a visa petition or labor certification filed by January 14, 1998, and who are otherwise eligible, may continue to take advantage of the relaxed eligibility requirements of Section 245(I). See Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act of 1998, Pub. L. 105-119, 111 Stat. 2440, 2458-59.
VIII. CONSIDERING THE OTHER SIDE OF THE IMMIGRATION COIN—THE ROOT CAUSES OF UNDOCUMENTED MIGRATION

Despite the United States’ efforts to control illegal migration, statistics show that we continue to have a very large population of undocumented aliens. Researchers estimate that even after IRCA, the population of undocumented aliens increases by between 300,000 and 400,000 every year. The INS itself estimates that there are 5 million illegal immigrants living in the United States and that 275,000 will come in illegally or overstay their visas each year.

The continued presence of undocumented entrants, despite the difficulty of their lives in the United States, indicates that the factors pushing people out of their country may be significantly more important than the “pull” by the receiving country. If the pressures to leave a country are severe enough, people will continue to emigrate, despite the lack of permission to enter another country. If this analysis is correct, then attention to the “push factors” is essential.

The identification of the causes of undocumented migration is a complicated matter; the factors vary, depending on the period of time in question, the historical context, the sending country, the region within the sending country, and the individual and his situation. Factors causing persons to leave...
their countries can include repression, persecution, unemployment, over-population, economic disparity, family separation, civil unrest, war, personal preference, and the formation of a family or social network, among others. On occasion, foreign governments request that their citizens not be immediately returned.

With IRCA, Congress recognized that measures in addition to enforcement and reduction of "pull factors" were necessary to control undocumented migration. IRCA established the

(1990) [hereinafter Unauthorized Migration] (discussing the problematic questions in considering the causes of international migration); Astri Suhrke, Global Refugee Movements and Strategies of Response, in U.S. Immigration and Refugee Policy 168 (Mary M. Kritz ed., 1983); Unauthorized Migration to the United States: Perception and Evidence, 13 Pop. & Dev. Rev. 671-90 (1987) (contending that IRCA could not accomplish its goals of reduction of undocumented aliens in the United States because the economic and political pressures of other countries which continue to bring immigrants to United States remain unchanged).

183. Repression can include departure enforced by the alien's country. See Zolberg, supra note 1, at 133 (noting that the Vietnamese exodus was welcomed by Vietnamese officials as an opportunity for ethnic cleansing); see also, Zolberg, supra note 1, at 142 (reporting that Castro released common criminals, imprisoned homosexuals, mental patients, and terminally ill for the Mariel boatlift).


185. See Zolberg, supra note 1, at 152 (noting Salvadoran President Duarte's plea in April 1987, that Salvadorans not be deported, because this would exacerbate unemployment and deprive many families of much-needed remittances from the United States); see also 58 Fed. Reg. 32157 (1993). "Because immediate repatriation of more than 83,000 persons would have a serious negative impact on the evolving situation in El Salvador, President Clinton has directed that DED be extended for an additional eighteen months . . . ." Id.
Commission for the Study of International Migration and Cooperative Economic Development, charged with examining the conditions in sending countries which contribute to unauthorized migration and with examining trade and investment programs to alleviate those conditions.\textsuperscript{186} The Commission envisioned an unprecedented goal: the promotion of mutually beneficial economic development so as to over time obviate the need for enforcement of immigration laws.\textsuperscript{187}

In its 1990 final report, the Commission noted that there is a direct or indirect migration consequence to most important foreign policy decisions whether political or economic.\textsuperscript{188} In particular, United States trade and international aid policies contribute to the pressures causing undocumented migration.\textsuperscript{189} Although our foreign trade, assistance, and relations

\begin{itemize}
    \item \textsuperscript{186} The Commission was established by Section 601 of IRCA, with the following mandate:
        \begin{quote}
            The Commission, in consultation with the governments of Mexico and other sending countries in the Western Hemisphere, shall examine the conditions in Mexico and such other sending countries which contribute to unauthorized migration to the United States and mutually beneficial, reciprocal trade and investment programs to alleviate such conditions.
        \end{quote}
        \textit{See supra} note 63; \textit{see also} Unauthorized Migration, \textit{supra} note 182, at 23. The Commission was the successor to an Inter-Agency Domestic Council Committee appointed by President Gerald Ford in 1975 to examine unauthorized migration. \textit{See id.; see also} Select Comm'n, \textit{supra} note 26, at 35-45. While recommending the further study of migration issues, the Commission did not specifically recommend addressing the root causes, but instead focused on enforcement of the immigration laws, on employer sanctions, and on legalization of undocumented persons already in the United States. \textit{See id.; see also} Unauthorized Migration, \textit{supra} note 182, at 23. The Commission's recommendations formed the basis for the Immigration Reform and Control Act of 1986.
    \item \textsuperscript{187} See Unauthorized Migration, \textit{supra} note 182, at 3.
    \item \textsuperscript{188} See \textit{id.} at 2.
    \item \textsuperscript{189} See Zolberg, \textit{supra} note 183, at 148, 153 (describing effect on Central America of U.S. protective sugar importation policy); \textit{see also} Josh DeWind & Michael K. Baldwin, \textit{International Aid and Migration: A Policy Dialogue on Haiti}, in Unauthorized Migration, Research Addendum Vol. 1, \textit{supra} note 18, at 158 (contending that export-led development strategy which fails to take into account the political situation in recipient Haiti causes repression of workers and labor organizations, increasing pressure to emigrate); \textit{see also} Sergio Diaz-Briquets, \textit{Relationships Between U.S. Foreign Policies and U.S. Immigration Policies}, in \textit{Threatened Peoples}, \textit{supra} note 1, at
\end{itemize}
policies sometimes have the effect of reducing migration pressures, that effect is frequently an inadvertent result or, if it is a consideration factor, exists jointly with other concerns, particularly national security and trade objectives.\textsuperscript{190}

The Commission strongly recommended that the issue of migration receive as much attention as other concerns in the foreign policy process.\textsuperscript{191} To accomplish this, the Commission recommended the establishment of an Agency for Migration Affairs, an independent agency charged with providing overall leadership and direction for United States immigration policy and required by statute to coordinate closely with other government agencies whose decisions affect migration.\textsuperscript{192} In addition, "the Commission recommended that relevant federal agencies should be required to prepare and disseminate immigration impact statements, similar to environmental impact statements, to accompany major decisions regarding development assistance and trade with migrant-sending countries."\textsuperscript{193} The Commission found that, although there are other important factors, the search for economic opportunity is the primary motivation for most unauthorized migration to the United States.

The Commission recommended the alleviation of this type of emigration pressure through (a) trade with and investment in sending countries, including amendment of import restrictions for migrant-sending countries;\textsuperscript{194} (b) foreign development aid to migrant-sending countries, including the financing of voluntary family planning efforts and the provision of pro-

\textsuperscript{181} (describing effect of U.S. domestic price support programs on exports from Mexico and Caribbean countries).

\textsuperscript{190} See Unauthorized Migration, \textit{supra} note 182, at 2 ("the effect on migration of other official actions has never figured seriously in the formulation of U.S. foreign policy. Emphasis is usually on immediate goals—resolution of the crisis of the moment—rather than on the long term, the permanent movement of people into the United States"); Stephen Lande & Nellis Crigler, \textit{Trade Policy as a Means to Reduce Immigration}, in 1 Unauthorized Migration, Research Addendum Vol. I, \textit{supra} note 18, at 534-35, 558.

\textsuperscript{191} See Unauthorized Migration, \textit{supra} note 182, at 26-27.

\textsuperscript{192} See \textit{id.} at 27-32.

\textsuperscript{193} See \textit{id.} at 30.

\textsuperscript{194} See \textit{id.} at 49-71.
gram assistance funds for increased vocational education in sending countries, and (c) cooperation and consultation with sending countries in an attempt to reduce undocumented migration.

One of the Commission's principal recommendations concerning trade was that the United States expedite the development of a United States-Mexico free-trade area and encourage its incorporation with Canada into a North American free trade area. This recommendation has come to pass; the North American Free Trade Agreement (NAFTA) is now in effect, thus including within a joint economic development process the country which has been the principal source of United States immigration, both documented and undocumented. NAFTA and its anticipated result of economic development in Mexico was seen as the best solution in the long run to the problem of undocumented migration from Mexico, although there was a general consensus that economic

195. See id. at 81-94.
196. See id. at 95-106.
197. See id. at 58. The Commission also recommended a number of other specific trade and development measures: inter alia, the indefinite extension of the Caribbean Basic Initiative (CBI), a unilateral U.S. tariff preference scheme intended to provide incentives for economic growth and political stability in Central America and the Caribbean, and the transformation of the CBI into a contractual arrangement similar to the Loan Agreement between the European Community and 66 African-Caribbean-Pacific countries. See id. at 59-62, 65. The Commission also recommended the extension of Section 936 of the Internal Revenue Code, allowing U.S. corporations which derive significant income from Puerto Rican or Caribbean Basic Initiative countries to obtain exemption from U.S. taxes on such income. See id.
199. See Hearing Before the Subcomm. on Int'l Law, Immigration, and Refugees of the Comm. on the Judiciary, House of Representatives, 103d Congress, 1st Session, 43-52, 45-8 (November 3, 1993) [hereinafter Hearings Before the Subcomm. on Int'l Law] (statement of Donna Hrinak, Deputy Assistant Secretary for Mexico and the Caribbean, Department of State); see also Sharon Stanton Russell, Migration Patterns of U.S. Foreign Policy Interest, in THREATENED PEOPLES, supra note 1, at 69; Victoria Lehrfield, Patterns of Migration: The Revolving Door from Western Mexico to California and Back Again, 8 LA RAZA L.J. 208, 221 (1995).
200. See Hearings Before the Subcomm. on Int'l. Law, supra note 199, at 29 (statement of Doris Meissner, Commissioner of the Immigration and Naturalization Service); see also REPORT OF THE ADMINISTRATION ON THE
development would stimulate migration in the short and medium-term because of displacement of rural populations.\textsuperscript{201} It is ironic, however, that along with the emphasis placed upon NAFTA’s anticipated reduction in undocumented migration, the issues of trade and migration were consciously separated.\textsuperscript{202}

A different set of “push factors” exist in the case of refugee flows. A large number of scholars have noted the effect of United States foreign policy in our refugee and asylum decisions.\textsuperscript{203} The Commission noted the special problems involved with refugee flows, and described the United States’ primary role as one of providing leadership and financial support for the United Nations High Commission for Refugees, the International Organization for Migration, and other international organizations concerned with humanitarian problems, development and migration.\textsuperscript{204} It also commented that receiving

\textbf{North American Free Trade Agreement and Actions Taken in Fulfillment of the May 1, 1991 Commitments 111 (September 18, 1992) (stating NAFTA will raise standards of living in Mexico and retard migration of low-skilled low-wage workers from Mexico to the United States); Congress Debates NAFTA as House Panel Considers Immigration Implications, 70 Interpreter Rel. 1465, 1472 (1993) (Clinton Administration officials testified before Congress that NAFTA represented the best hope for reducing illegal immigration from Mexico); Elizabeth F. Kraus, The Systemic Effects of Economic Trade Zones on Labor Migration: The North American Free Trade Agreement and the Lessons of the European Community, 7 Geo. Immigr. L. J. 323, 324, 347 (1993) (arguing that the estimated growing Mexican population will destabilize the situation and create increased pressure for Mexican workers to emigrate. Contrary to approach followed by the European Community, NAFTA agreement focuses solely upon the reduction of trade barriers without contemporaneous harmonization of social policy).}

\textsuperscript{201.} See Hearings Before the Subcomm. on Int’l. Law, \textit{supra} note 199, at 31 (statement of Doris Meissner, Commissioner of the Immigration and Naturalization Service).

\textsuperscript{202.} See Kevin R. Johnson, Free Trade and Closed Borders, NAFTA and Mexican Immigration to the United States, 27 U.C. Davis L. Rev. 937, 957 (describing exclusion of immigration from NAFTA and reasons for this exclusion).


\textsuperscript{204.} See Unauthorized Migration, \textit{supra} note 182, at 16.
countries must continue to examine their legal frameworks for addressing new patterns of migratory movements that involve persons not easily categorized as refugees or regular immigrants. A later commission, the Commission on Immigration Reform, made additional recommendations regarding mass migration emergencies, including the establishment of a regional temporary protection system.

The Commission for the Study of International Migration and Cooperative Economic Development remains the sole commission established by Congress to examine the root causes of undocumented migration. The work of the Commission has been taken up by the Commission on Legal Immigration Reform, established in the Immigration Act of 1990. Although the Commission on Legal Immigration Reform was not charged with examining the root causes of migration or with studying the means of alleviating those root causes, the Commission specifically included a recommendation that the United States give priority in its foreign policy and international economic policy to long-term reduction in the causes of unauthorized migration to the United States. In particular, the Commission on Immigration Reform supported the recommendations of the Commission for the Study of International Migration and Cooperative Economic Development related to trade with and investment in immigrant-sending countries.

IX. CONCLUSION

Immigration can be approached in two ways: at the border or through economic development and increased employment

205. See id. at 21.
208. See id. The Commission on Legal Immigration Reform was instructed to consider another concern expressed by the Commission for the Study of International Migration, that is, the impact of immigration on the foreign policy and national security interests of the United States. See id.
210. See id. at 175-76.
in source countries. The United States has emphasized the first approach;\textsuperscript{211} we must follow the lead of the Commission for the Study of International Migration and Cooperative Economic Development and the United States Commission on Immigration Reform, as well as the achievement of NAFTA, in order to increase our efforts on the second approach. The emphasis in the IIRIRA on enforcement and curtailment of "pull factors" should not be seen as a complete approach to undocumented migration. Rather, enforcement and curtailment are one side, and attention to root causes of undocumented migration the other side of the same coin—an effective and humane policy for the control of undocumented migration.

\textsuperscript{211} See Lande & Crigler, supra note 182, at 535.