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# AMERICA'S SCHIZOPHRENIC IMMIGRATION POLICY: RACE, CLASS, AND REASON

CHARLES J. OGLETREE, JR.\*

**Abstract:** The historical purpose of American immigration policy was to provide a haven for those fleeing persecution and those seeking prosperity, as well as to satisfy workforce and frontier-expansion needs. However, a survey of U.S. immigration policy reveals that this historical purpose has been distorted and abandoned, if in fact it ever represented our nation's goal. This essay evaluates and critiques the effect that race and politics have had on immigration policy and enforcement, and on the public opinion that shapes our immigration priorities. This essay specifically questions whether immigration laws are equitably applied, without regard to the race or ethnicity of the immigrant.

*Give me your tired, your poor, your huddled masses yearning to breathe free.*

—Emma Lazarus<sup>1</sup>

## INTRODUCTION

Emma Lazarus' much-quoted poem, "The New Colossus," brings to mind a picture of America generously receiving the world's displaced. The premise of the poem is that the United States has a unique role as a nation open to, and indeed comprised of, immigrants—a role that should be celebrated. The recent public outcry over the return of Cuban-born Elian Gonzalez to Cuba might lead one to believe that, in some respects, the United States in the twenty-first century has realized the aspirations articulated in the nineteenth. Remarkable efforts were made during a seven-month court battle to

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\* Jesse Climenko Professor of Law, Founder and Director of the Harvard University Criminal Justice Institute, sponsor of the Immigration Conference on December 3–5, 1999. I wish to thank Melanca Clark and Angela Litwin for their tremendous assistance in providing research for this article, and Matthew Colangelo and Midwin Charles for their aid during the final stages of this project.

<sup>1</sup> "The New Colossus," 1883. The poem was inscribed on the base of the Statue of Liberty in 1903.

keep Elian in the U.S. and to grant him all the rights and privileges of American citizenship.

However, a comparison of the treatment accorded to Haitian asylum seekers in the same period demonstrates the need to view the Elian Gonzalez case within a larger context:

As the whole country and much of the world focuses on one Cuban boy, Elian Gonzalez, and an international custody battle that has drawn attention from Attorney General Janet Reno and President Clinton, some 3,000 Haitians in the United States face the prospect of leaving their children if they are deported.<sup>2</sup>

Many commentators have noted the disparity between the way American immigration law treats Haitians as compared to Cubans.<sup>3</sup> Illegal immigrants caught entering the United States generally are returned to their countries, but under the 1966 Cuban Readjustment Act, all Cubans who reach U.S. soil are allowed to remain.<sup>4</sup> This policy has a clear racial impact when refugees from Cuba and Haiti are compared—Cuban refugees, most of whom are white, are granted citizenship, while black Haitians are repatriated. In a recent protest of the treatment of Haitian refugees, the Reverend Jesse Jackson noted that this situation “reflects racism in U.S. immigration policy that allows preferential treatment for Cuban refugees but not for those with darker skin colors from Haiti and elsewhere.”<sup>5</sup> As Congressman Charles B. Rangel has remarked, “[n]o one challenges the fact that any other boy who came here illegally from Haiti or the Dominican Republic, for example, would have been sent back to their home immediately. But in the Elian case, there was clearly a double standard, be-

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<sup>2</sup> Rick Bragg, *Haitian Immigrants in U.S. Face a Wrenching Choice*, N.Y. TIMES, Mar. 29, 2000, at A1 (discussing the disparate treatment of Haitians and Cubans under American immigration policy).

<sup>3</sup> See, e.g., Noah Isackson, *Immigration Inequity Cited: Cubans Welcome, Haitians in Limbo*, JACKSON SAYS, CHIC. TRIB., Apr. 26, 2000, at N3; Christine Evans, *Why the World Doesn't Know about Sophonie*, PALM BEACH POST, Apr. 23, 2000, at 1A; *Haitians Hit U.S. Policy as Unfair*, CHIC. TRIB., Jan. 16, 2000, at C9; Deborah Sharp, *Disparate Rules Stoke Haitian Anger*, USA TODAY, Jan. 14, 2000, at 3A. See generally Malissia Lennox, Note, *Refugees, Racism, and Reparations: A Critique of the United States' Haitian Immigration Policy*, 45 STAN. L. REV. 687 (1993).

<sup>4</sup> See *Haitians Hit U.S. Policy as Unfair*, *supra* note 3, at C9.

<sup>5</sup> Isackson, *Immigration Inequity Cited*, *supra* note 3, at N3.

cause even in our distorted dealings with Cuban refugees, the fact is Elian is an illegal alien with no legal right to be here."<sup>6</sup>

This oft-cited disparity in the treatment of Haitian as compared to Cuban refugees is not an isolated situation, but rather is an apt illustration of the factors and considerations that inform American immigration policy as a whole. There is new legislation pending in the Senate, the proposed Latino and Immigrant Fairness Act, that would represent at least a step toward establishing parity for Haitian and Central American immigrants.<sup>7</sup> As the need for this legislation indicates, however, race and politics continue to play a significant role in the immigration and refugee policies of the United States, and in the public opinion that informs those policies.

These issues were the subject of a recent conference on American immigration policy held at the Harvard Law School, jointly sponsored by the Harvard Law School Criminal Justice Institute, the Harvard Law School Immigration and Refugee Clinic, and the Boston College Immigration and Asylum Project.<sup>8</sup> Participants explored a wide range of topics including the human rights implications of U.S. immigration policies, recent developments in immigration jurisprudence, and the intersection of criminal justice and immigration.<sup>9</sup>

A picture emerged of U.S. policies often informed more by issues of race than reason, more by politics than principle. This state of affairs has led the ranking member of the House Subcommittee on Immigration to say:

[I]mmigration law and immigration policy [reflects] the confusions and dishonesty and racial attitudes and class attitudes we have in this country in other domestic areas, and I have found that same kind of irrational class-based, race-

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<sup>6</sup> Charles B. Rangel, News Release, *Cong. Rangel Joins Republicans in Demanding Hearings on Elian Gonzalez* (visited Sept. 6, 2000) <[http://www.house.gov/opps/list/press/ny15\\_rangel/chrsupportsgopcallelianhearings.html](http://www.house.gov/opps/list/press/ny15_rangel/chrsupportsgopcallelianhearings.html)>.

<sup>7</sup> See Latino and Immigrant Fairness Act of 2000, S. 2912, 106th Cong. (2000). The bill would, inter alia, allow undocumented Haitians, Hondurans, Guatemalans and Salvadorans who fled political violence to obtain legal immigrant status, as Cubans and Nicaraguans are currently allowed to do. See *id.* at § 102.

<sup>8</sup> *United States Immigration Policy at the Millennium: With Liberty and Justice For All?* Harvard Law School, Cambridge, Mass. (Dec. 3-5, 1999).

<sup>9</sup> Papers presented at the conference include Daniel Kanstroom, *Deportation, Social Control, and Punishment: Some Thoughts About Why Hard Laws Make Bad Cases*, 113 HARV. L. REV. 1890 (2000) [hereinafter Kanstroom, *Deportation, Social Control, and Punishment*]; Nancy Morawetz, *Understanding the Impact of the 1996 Deportation Laws and the Limited Scope of Proposed Reforms*, 113 HARV. L. REV. 1936 (2000); Gerald L. Neuman, *Jurisdiction and the Rule of Law After the 1996 Immigration Act*, 113 HARV. L. REV. 1963 (2000).

based kind of thinking existing in our immigration policies.<sup>10</sup>

This Essay focuses on the impact of race and ethnicity on American immigration policy.

## I. BRIEF HISTORY OF RACE AND U.S. IMMIGRATION POLICIES

### A. *The Legal Climate*

America's enthusiasm for newcomers has historically been tempered by its skeptical view of outsiders of a different race, ethnicity, economic status, religion, or political affiliation. Concerns about job competition, the burdening of public services and a perceived inability of the U.S. easily to absorb cultural outsiders have accompanied the arrival of immigrants since the eighteenth century.<sup>11</sup>

During the period of American independence, immigrants were considered to be a vital source for labor, population growth, and defense. Indeed, the Declaration of Independence identified British-erected barriers to immigration as a major grievance.<sup>12</sup> Even then, however, many colonists had reservations about what type of immigrants were to be admitted and what effect they would have in the development of the new polity.<sup>13</sup> In particular, many worried that Catholic and German immigrants would destroy the Anglican nature of the colonies and corrupt the political process.<sup>14</sup>

Congress began passing substantive laws restricting immigration in the late nineteenth century. These laws excluded from entry into the U.S. those who were likely to become a public charge, among

<sup>10</sup> Melvin L. Watt, *Present and Future of Immigration Reform*, in 21 *IN DEFENSE OF THE ALIEN* 1, 2 (1999).

<sup>11</sup> See Maxine S. Seller, *Historical Perspectives on American Immigration Policy: Case Studies and Current Implications*, in *U.S. IMMIGRATION POLICY* 137, 138-40 (Richard R. Hofstetter ed., 1984) (discussing the persistence of arguments used to oppose immigration over time).

<sup>12</sup> "He [The King] has endeavoured to prevent the Population of these States; for that Purpose obstructing the Laws for Naturalization of Foreigners; refusing to pass others to encourage their Migrations hither, and raising the Conditions of new Appropriations of Lands." *THE DECLARATION OF INDEPENDENCE* para. 9 (U.S. 1776).

<sup>13</sup> See Seller, *supra* note 11, at 143.

<sup>14</sup> See *id.* at 142 (citing 3 *WRITINGS OF BENJAMIN FRANKLIN* 72 (A. Smyth ed., 1907) ("[W]hy should Palatine Boors be suffered to swarm into our Settlements and, by herding together, establish their Language and Manners, to the Exclusion of ours? Why should Pennsylvania, founded by the English, become a colony of Aliens, who will shortly be so numerous as to Germanize us instead of our Anglifying them?").

other restrictions.<sup>15</sup> Wealth-based criteria such as literacy and the amount of money in an alien's possession became factors to be considered in determining admissibility.<sup>16</sup> Ironically, Congress passed this legislation during the same period in which Americans began to think of their country as a haven for the poor and oppressed peoples of the world; a sentiment characterized by the words of Emma Lazarus' poem—welcoming the poor and “huddled masses”—inscribed on the base of the Statue of Liberty. Professor Bill Ong Hing, Executive Director of the Immigrant Legal Resource Center, has noted that “[i]n this nation of immigrants, our egalitarian individualism and our xenophobia are strange bedfellows and may cause considerable slippage between the things that we say we are doing and the things that we do.”<sup>17</sup>

### B. *The Changing Political Climate*

Personal wealth was not the only criteria used for exclusion at the end of the nineteenth century. The most pernicious law passed in this period, the Chinese Exclusion Act of 1882, was aimed at Chinese immigrants who had arrived in this country seeking new opportunities during the Gold Rush, and who were widely employed in the construction of railways in the west. White American laborers who felt that the Chinese were competing for their jobs increasingly singled out and vilified these immigrants. The Chinese Exclusion Act effectively barred Chinese immigration, prohibited naturalization for those already in the country, and provided deportation procedures for illegal immigrants.<sup>18</sup>

From 1880 to 1920 the number of immigrants rose dramatically, with the countries of origin increasingly concentrated in Eastern and Southern Europe.<sup>19</sup> These immigrants faced nativist and xenophobic

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<sup>15</sup> See Act of Mar. 3, 1875, ch. 141, 18 Stat. 477 (restricting entrance of destitute persons, criminals, and prostitutes) (repealed 1974); Act of Aug. 3, 1882, ch. 376, 22 Stat. 214, 214 (restricting entrance of those likely to become a public charge) (repealed 1974). See generally Gerald L. Neuman, *The Lost Century of American Immigration Law (1776–1875)*, 93 COLUM. L. REV. 1833 (1993) (examining American immigration policy in the late eighteenth and nineteenth centuries).

<sup>16</sup> See Act of Mar. 3, 1893, ch. 206, 27 Stat. 569 (repealed 1952).

<sup>17</sup> Bill Ong Hing, *Don't Give Me Your Tired, Your Poor: Conflicted Immigrant Stories and Welfare Reform*, 33 HARV. C.R.—C.L. L. REV. 159, 161 (1998).

<sup>18</sup> Chinese Exclusion Act of May 6, 1882, ch. 126, 22 Stat. 58 (repealed 1943).

<sup>19</sup> See U.S. DEP'T OF JUSTICE, 1997 STATISTICAL YEARBOOK OF THE IMMIGRATION AND NATURALIZATION SERVICE 15 chart B, 24–25 tbl. 2 (1999) [hereinafter 1997 INS STATISTICAL YEARBOOK].

sentiment premised on theories of the racial superiority of Nordic Europeans.<sup>20</sup> The rapid rise in immigration rates over the previous generation, combined with the post-World War I political climate, led to the creation of the "national origins" quota system implemented by the Immigration Act of 1924.<sup>21</sup> That legislation set quotas for immigrants from the eastern hemisphere.<sup>22</sup> Each country was assigned a portion of the total number of allowable immigrants, fixed in proportion to the national origin of the total U.S. population, by birth or descent, as reported in the 1920 census. The legislation also specifically barred virtually all immigration from Asia.<sup>23</sup>

The effect and intent of this policy was to ensure that Northern and Western Europeans would constitute a greater proportion of immigrants at the expense of newer immigrant groups such as Jews, Italians, Slavs, and Greeks.<sup>24</sup> Northern and Western Europeans received 82% of the quota, Southern and Eastern Europeans received 14%, and the remainder went to the rest of the world.<sup>25</sup> This origins-based quota system remained in place until its repeal by the Immigration and Nationality Act Amendments of 1965.<sup>26</sup> This Act, combined with subsequent legislation, dismantled the national origins quota system and replaced it with a worldwide quota based on a multi-category visa preference system.<sup>27</sup>

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<sup>20</sup> See JOHN HIGHAM, STRANGERS IN THE LAND 131-57 (1955) (evaluating the contributions of jingoism, isolationism, and pseudoscientific racial theories of the 1920s to the rise of anti-immigrant sentiment). See generally Daniel Kanstroom, *Dangerous Undertones of the New Nativism: Peter Brimelow and the Decline of the West*, in IMMIGRANTS OUT!: THE NEW NATIVISM AND THE ANTI-IMMIGRANT IMPULSE IN THE UNITED STATES 300 (Juan F. Perea ed., 1997) (discussing racist and nationalist theories prevalent at the end of the nineteenth century, and describing the connection between historical and contemporary anti-immigrant sentiment); Kanstroom, *Deportation, Social Control, and Punishment*, *supra* note 8, at 1904-05 ("The view of immigration as an ideal shifted dramatically in this country as the immigrant population changed from primarily Northern and Western Europeans to Southern and Eastern Europeans and Asians.")

<sup>21</sup> See Immigration Act of 1924, ch. 190, 43 Stat. 153.

<sup>22</sup> See *id.* The legislation did not set quotas for countries in the western hemisphere. See *id.*

<sup>23</sup> See *id.*

<sup>24</sup> See generally HIGHAM, *supra* note 20, at 300-30 (analyzing the history of this legislation).

<sup>25</sup> See PHILLIP Q. YANG, POST-1965 IMMIGRATION TO THE UNITED STATES: STRUCTURAL DETERMINANTS 15 (1995).

<sup>26</sup> Immigration and Nationality Act Amendments of 1965, Pub. L. No. 89-236, 79 Stat. 911.

<sup>27</sup> See *id.*

## II. THE ROLE OF RACE IN REFUGEE POLICIES

While the dismantling of the quota system removed explicit ethnic discrimination from American immigration policy and heralded an era of liberalization, current immigration policies continue to have discriminatory effects. It is true that the state of immigration affairs has come a long way since 1924; in 1997, countries with non-white populations represented the top five countries of origin of legal immigrants.<sup>28</sup> However, implicit and explicit racial biases still pervade all four major avenues of legal immigration: family-sponsored, employment-based, diversity and refugee.

The family-sponsored and employment-based immigration rules appear to be facially neutral, but per-country ceilings and racial biases in determining eligibility have resulted in fewer immigration visas for people of color. Country caps are a background provision of the family and employment immigration laws. Too many immigrants from any one country cause the country cap to come into play, and those applicants over the cap are placed on a waitlist.<sup>29</sup> The same cap applies to every country regardless of population or the number of people who want to immigrate.<sup>30</sup>

In 1997, the only countries affected by the ceilings were Mexico, India, and the Philippines;<sup>31</sup> since 1965, per-country caps have "had particularly harsh and unintended effects on Mexico and the Philippines."<sup>32</sup> The main effect of the ceilings is to increase the wait between application and admission for immigrants from those countries, sometimes to over ten years. For instance, in 1998 visas were granted under one of the family preference categories to Mexicans who had applied in 1986, and to Filipinos who had applied in 1978.<sup>33</sup> As of January 1997, over one million Mexicans were on visa waiting lists.<sup>34</sup>

The visa eligibility process is characterized by extremely broad administrative discretion, as well as immunity from judicial review,

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<sup>28</sup> See 1997 INS STATISTICAL YEARBOOK, *supra* note 19, at 20 tbl. C. The top five countries in 1997 were, in order: Mexico, the Philippines, China, Vietnam and India. *See id.*

<sup>29</sup> See THOMAS ALEXANDER ALENIKOFF ET AL., IMMIGRATION & CITIZENSHIP PROCESS AND POLICY 295 (4th ed. 1998). These caps do not affect immediate relatives of U.S. citizens. *See id.*

<sup>30</sup> The annual per-country ceiling is established through a complicated "piercing" system. *See id.* at 292-96.

<sup>31</sup> U.S. DEP'T OF STATE, REPORT OF THE VISA OFFICE 1997 5 (1998).

<sup>32</sup> ALENIKOFF, *supra* note 29, at 295.

<sup>33</sup> *See id.* at 296 (citing U.S. DEP'T OF STATE, VISA BULLETIN (Feb. 1998)).

<sup>34</sup> *See id.* at 295.



which makes the process susceptible to racial discrepancies and biases. In a 1991 study of visa denials at U.S. consular offices, James Nafziger found considerable variation among acceptance rates in offices in different countries.<sup>35</sup> The highest acceptance rates were in Japan with 99.7%, while consular offices in Mexico accepted between 55% and 84% of applicants.<sup>36</sup> Nafziger speculated that the wide range of acceptance rates across Mexican offices might be due to "demographic rather than administrative factors":<sup>37</sup>

The more prosperous and "professional" areas, such as Hermosillo and Mexico City, where trade and investment representatives and the intelligentsia tend to be concentrated, have higher rates of visa acceptances. Conversely, a higher rate of applications at the other posts came from poor, rural backgrounds.<sup>38</sup>

Some consular offices have used openly racist criteria in visa decisions. In *Olsen v. Albright*, a consular officer stationed in Brazil sued the State Department because he was fired for refusing to follow the consulate's racial visa eligibility policies.<sup>39</sup> The manual he refused to follow established fraud profiles which were based on factors such as race and national origin.<sup>40</sup> The manual instructed consular officers to scrutinize Korean and Chinese applicants for fraud and declared anyone from certain predominately black cities "suspect unless older, well-traveled, etc."<sup>41</sup> The consular section head had further stated that "Filipinos and Nigerians have high fraud rates, and their applications should be viewed with extreme suspicion, while British and Japanese citizens rarely overstay, and generally require less scrutiny."<sup>42</sup>

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<sup>35</sup> See James A. R. Nafziger, *Review of Visa Denials by Consular Officers*, 66 WASH. L. REV. 1, 69 (1991).

<sup>36</sup> See *id.*

<sup>37</sup> *Id.* at 70.

<sup>38</sup> *Id.* Nafziger qualifies this observation by stating: "This, however, is all very impressionistic and speculative. More comprehensive figures from the field merit further analysis." *Id.*

<sup>39</sup> 990 F. Supp. 31, 32-33 (D.D.C. 1997). This case involved nonimmigrant rather than immigrant visas. See *id.* at 33. However, because a high percentage of illegal immigrants are visa overstayers, and many nonimmigrant visitors legally immigrate during their stay, non-immigrant visas affect who is able to immigrate to the United States. See, e.g., Bill Ong Hing, *Immigration Policies: Messages of Exclusion to African Americans*, 37 HOW. L.J. 237, 243 (1994) [hereinafter Hing, *Immigration Policies*].

<sup>40</sup> See *Olsen*, 990 F. Supp. at 33.

<sup>41</sup> *Id.* (quotations omitted).

<sup>42</sup> *Id.* at 34.

The so-called "public charge" ineligibility criterion, allowing visa denials where there is a likelihood that an immigrant will require public assistance, has been particularly subject to racial and ethnic stereotyping. This too is an area in which there is no judicial review. In 1978, a consular discretion study found that 61% of Mexican immigrant visa refusals were for public charge, while the criterion accounted for only 11% of Canadian visa refusals.<sup>43</sup> When interviewed, some consular officers openly admitted to using racial criteria:

A number of consular officers think that certain ethnic groups are more likely to go on welfare than others. One officer believe[d] that Canadians, Haitians, and Portuguese are not as likely to go on welfare as Latin Americans. Another officer stated that Chinese will not go on welfare . . . . Thus, he views Chinese with less suspicion than other groups under the public charge provision.<sup>44</sup>

The susceptibility of the public charge determination to racial stereotyping is particularly troublesome given that it is by far the primary reason for visa rejection. In 1997, public charge represented 76% of initial visa refusals; the next highest ineligibility category, ineffective labor certification, represented less than 12% of rejections.<sup>45</sup> The impact of the public charge category is only likely to increase—since August 1997, family sponsors have been required to show that their income is 25% above the poverty line, instead of the previous requirement of being level with the poverty line, in order to avoid the public charge criterion.<sup>46</sup>

Unlike the family-sponsored and employment-based categories, the diversity visa system as originally established was openly based on ethnic criteria. The original intent of the diversity visa lottery was to benefit certain European groups.<sup>47</sup> When Congress made diversity immigration a separate category under the 1986 Immigration Reform and Control Act, it "sought to ameliorate the steep reduction in European migration that—according to the prevailing view—had

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<sup>43</sup> See Kim R. Anderson & David A. Gifford, *Consular Discretion in the Immigrant Visa Issuing Process*, 16 SAN DIEGO L. REV. 87, 113–14 (1978).

<sup>44</sup> *Id.* at 123 n.250.

<sup>45</sup> See U.S. DEP'T OF STATE, *supra* note 31, at 146–47 tbl. XX. This figure does not include rejections based upon improperly completed applications. See *id.*

<sup>46</sup> Lynn H. Fujiwara, *The Impact of Welfare Reform on Asian Immigrant Communities*, 25 SOC. JUST. 82 (1998).

<sup>47</sup> Cf. ALEINIKOFF, *supra* note 29, at 291.

been an unexpected byproduct of the 1965 amendments.<sup>48</sup> Congress created a list of thirty-six countries whose nationals could participate in the lottery—a list that was disproportionately European.<sup>49</sup> Although the current criteria applied to countries in the diversity category is based on a perceived under-representation in the other immigration categories, Europeans are still the primary beneficiaries. During 1998, European countries had by far the greatest number of diversity immigrants admitted.<sup>50</sup>

According to the State Department, Congress established this category to promote European and African immigration.<sup>51</sup> However, reviews of the benefits of the diversity legislation to would-be African immigrants have been mixed.<sup>52</sup> Because the original 1986 bill only benefited countries whose number of immigrants dropped following the 1965 legislation, no African countries were eligible. It was only under criteria added in 1998 that a substantial number of African countries qualified, and then over three million people applied for only 20,000 slots.<sup>53</sup> The program presents additional barriers for socioeconomically disadvantaged Africans, by requiring a high-school education or qualifying trade skills.<sup>54</sup>

The diversity immigration system can be viewed as the most recent version of the long line of immigration legislation designed to make “the proportions of immigrants who are ethnically similar to the then existing United States population higher than the percentages that either unrestricted immigration or country-neutral immigration criteria would have produced.”<sup>55</sup> Historically, as now, the effects were intended.<sup>56</sup> The ethnic disparities of the program are borne by the countries with the longest waitlists already, since nationals from those countries are, by definition, not eligible. Because diversity immigra-

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<sup>48</sup> *Id.*

<sup>49</sup> *See id.*

<sup>50</sup> *See id.* at 292 (citing U.S. DEP'T OF STATE, DIVERSITY IMMIGRANT VISA LOTTERY (DV-98) RESULTS (Sept. 10, 1997)). In 1998, the United States issued 23,213 diversity visas to citizens of European countries, as compared to 21,179 visas issued to citizens of African countries, 7,280 visas issued to citizens of Asian countries, and 2,476 visas issued to citizens of Caribbean and South and Central American countries. *See id.*

<sup>51</sup> *See* U.S. DEP'T OF STATE, *supra* note 31, at 6.

<sup>52</sup> *See* Hing, *Immigration Policies*, *supra* note 39, at 260.

<sup>53</sup> *See id.*

<sup>54</sup> *See id.* at 261.

<sup>55</sup> Stephen H. Legomsky, *Immigration, Equality and Diversity*, 31 COLUM. J. TRANSNAT'L L. 319, 330 (1993).

<sup>56</sup> *See id.* at 326-30 (demonstrating the racial basis for promoting European immigration).

tion is the only category not tied to any specific criteria, these exclusions make it nearly impossible for unskilled Mexicans and Filipinos, who don't have family members in the U.S., to immigrate legally.

### III. REFUGEES

Understandably, no country is capable of absorbing all of the world's refugees.<sup>57</sup> While choices must be made about the appropriate criteria to use for admission, American refugee policy—as with the family-sponsored, employment-based, and diversity visa systems—is informed by political considerations and racial bias.

Congress first enacted comprehensive refugee legislation in 1980.<sup>58</sup> Prior to the Refugee Act of 1980 (the "Refugee Act"), the majority of refugees had been admitted into the United States under ad hoc legislation created to deal with particular world crises as they arose. Decisions were invariably influenced by American foreign policy objectives and concerns. Those aliens who were fleeing from Communist governments and other countries unfriendly to the U.S. were disproportionately granted asylum or refugee status.<sup>59</sup> For example, under the 1965 Immigration and Nationality Act Amendments, one of the three enumerated mechanisms for providing refugee treatment for aliens was expressly limited to those fleeing persecution from "Communist-dominated" and Middle Eastern countries.<sup>60</sup>

In 1980, the United States overhauled its refugee policies and attempted to bring them into conformity with the United Nations Protocol Relating to the Status of Refugees (the "Protocol"). The United States had been a signatory to the Protocol since 1968 but had been resistant to making major changes in domestic immigration law in order to come into compliance with the Protocol. Among the changes included in the Refugee Act was the institution of a "credible fear" standard, requiring that asylum seekers show a "well-founded

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<sup>57</sup> Refugees are defined as aliens who are outside of the U.S. and who cannot return to their country of nationality because of a well-founded fear of persecution. See Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (codified at 8 U.S.C. § 1101(a)(42) (1994 & Supp. IV 1998)). Asylees are those aliens who are already inside American borders. See 8 U.S.C. § 1158(a) (1994).

<sup>58</sup> See Refugee Act of 1980, *supra* note 57.

<sup>59</sup> See J. Michael Cavosie, Note, *Defending the Golden Door: The Persistence of Ad Hoc and Ideological Decision Making in U.S. Refugee Law*, 67 IND. L.J. 411, 412 (1992).

<sup>60</sup> Immigration and Nationality Act Amendments, *supra* note 26.

fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion."<sup>61</sup>

The new legislation eliminated language specifying any ideological or geographical preference for admitting refugees. The Refugee Act did, however, provide for the President to make an annual determination, subject to consultation with Congress, of the number of refugees to be admitted and the percentage to be allotted to each country.<sup>62</sup> This discretion allows ideological and geographical biases to continue to impact the refugee system.

Furthermore, legislation passed subsequent to the Refugee Act has served to reintroduce an ideological and geographical preference system for refugees. The Foreign Operations, Export Financing, and Related Programs Appropriations Act of 1990 relaxed the refugee standard for selected aliens.<sup>63</sup> The legislation substituted the "well-founded fear" standard of persecution with a less stringent "credible basis for concern" standard for Soviet Jews, Evangelical Christians, Ukrainian Catholic or Orthodox Church members, and selected Vietnamese, Laotians, and Cambodians.<sup>64</sup>

An examination of the refugee admissions authorized by American presidents between 1980 and 1997 reveals that "[i]n every year from [the Refugee Act's] adoption until the collapse of Communism, Presidents allocated almost the entire refugee quota to those who were fleeing communist countries (or other United States adversaries, such as Iran)."<sup>65</sup> The numbers also show that the decline of Communism among the world's governments has been accompanied by a reduction in the overall refugee quota.<sup>66</sup>

A number of legal actions have challenged the government's discriminatory behavior in refugee status determinations. In *Orantes-Hernandez v. Thornburgh*, a class of Salvadoran citizens won an injunction prohibiting the INS from encouraging the abandonment of claims for asylum.<sup>67</sup> Similarly, in *American Baptist Churches v. Thornburgh*, a class of Salvadorans and Guatemalans brought suit against the INS alleging discrimination in the adjudication of asylum and depor-

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<sup>61</sup> Refugee Act of 1980, *supra* note 57.

<sup>62</sup> *See id.*

<sup>63</sup> Pub. L. No. 101-167, 103 Stat. 1195 (1989).

<sup>64</sup> *See Cavosie, supra* note 59, at 431-32.

<sup>65</sup> STEPHEN H. LEGOMSKY, IMMIGRATION AND REFUGEE LAW AND POLICY 763 (2d. ed. 1997) (citing 55 Fed. Reg. 41,979-80 (Oct. 17, 1991)).

<sup>66</sup> *See id.* at 764.

<sup>67</sup> *See* 919 F.2d 549, 554-55, 567-68 (9th Cir. 1990).

tation claims, and succeeded in forcing a favorable settlement agreement.<sup>68</sup>

Although refugees have enjoyed some success in challenging discriminatory practices, refugee policy has been adversely affected by other recent judicial developments. In *Sale v. Haitian Centers Council*, the Supreme Court held that Haitian asylum-seekers could be summarily returned to Haiti because they were intercepted on the high seas, and consequently were not subject to existing protections against forcible repatriation without screening for a well-founded fear of persecution.<sup>69</sup> Such a technical interpretation of American obligations to refugees is troubling in that it enables the INS to make calculated determinations to deny refugee status irrespective of the merits of a given claim. One commentator notes that "*Sale* communicates an attitude of calculated cynicism toward international obligation, which in the long run may prove its most destructive legacy."<sup>70</sup>

#### IV. RACIAL POLITICS AND IMMIGRATION PRACTICES

In addition to the disparate racial impact of legal immigration categories, the enforcement of immigration laws and the treatment of illegal aliens is also skewed along racial lines. An analysis of INS enforcement activity and resource allocation shows a disproportionate focus on illegal immigrants from Latin American countries.

Illegal immigrants make up less than 2% of the national population, with the vast majority concentrated in just a few states.<sup>71</sup> While the stereotypical image of an illegal immigrant is of a Latino crossing the U.S. border at night, more than 40% of illegal immigrants are actually people who entered the country legally but overstayed their visas.<sup>72</sup> Mexico does consistently supply more illegal immigrants than

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<sup>68</sup> See 760 F. Supp. 796, 797-800 (N.D. Cal. 1991); see also *Haitian Refugee Center v. Smith*, 676 F. 2d 1023 (5th Cir. 1982) (finding that expedited administrative procedures used by immigration officials in asylum adjudication of Haitians were discriminatory and violated Haitians' due process rights). See generally Kevin R. Johnson, *Judicial Acquiescence to the Executive Branch's Pursuit of Foreign Policy and Domestic Agendas in Immigration Matters: The Case of the Haitian Asylum-Seekers*, 7 GEO. IMMIGR. L. J. 1 (1993).

<sup>69</sup> 509 U.S. 155, 158-59 (1993).

<sup>70</sup> Joan Fitzpatrick, *The International Dimension of U.S. Refugee Law*, 15 BERKELEY J. INT'L L. 1, 10 (1997).

<sup>71</sup> U.S. Dep't of Justice, Immigration and Naturalization Service, *Illegal Alien Resident Population*, (last modified Aug. 11, 1999) <<http://www.ins.usdoj.gov/graphics/aboutins/statistics/illegalalien/index.htm>>. The seven states with the largest populations of illegal aliens—California, Texas, New York, Florida, Illinois, New Jersey, and Arizona—make up 83% of the total number of illegal immigrants. See *id.*

<sup>72</sup> See *id.*

any other country, but recent figures show Canada and Poland to be the fourth and fifth most common source countries, respectively.<sup>73</sup> These figures challenge the notion that illegal immigrants are all of a certain ethnic group or that they all enter the country in the same way.

In spite of this varied picture of the sources and methods of illegal immigration, a vastly disproportionate amount of enforcement activity is directed at Latin Americans generally, and Mexicans in particular. While not all of the top five source countries for illegal immigrants are in Latin America, the top five countries of citizenship for deported illegal aliens are all Latin American countries.<sup>74</sup> Enforcing American immigration policy usually means patrolling the U.S.-Mexico border, and Latin Americans bear the brunt of this tactic. The United States spends 85% of its anti-illegal immigration resources on border control,<sup>75</sup> and southwest border enforcement accounted for 89% of what the INS terms "deportable aliens located" in 1997.<sup>76</sup>

Only four in ten illegal immigrants, however, enters the United States through the Mexican border.<sup>77</sup> Though estimates of the percentage of illegal immigrants from Mexico range from 39% to 54%,<sup>78</sup> over 90% of illegal immigrants apprehended are Mexican.<sup>79</sup> The decision to place higher priority on border interdiction than on locating and deporting visa overstayers further magnifies the disparate treatment of Mexican and Central American illegal immigrants. Visa overstayers make up just 16% of Mexican and 26% of Central American illegal immigrants, but they constitute 91% of the illegal population

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<sup>73</sup> See U.S. DEP'T OF JUSTICE, 1994 STATISTICAL YEARBOOK OF THE IMMIGRATION AND NATURALIZATION SERVICE 197 tbl. N (1996); but see 1997 INS STATISTICAL YEARBOOK, *supra* note 19, at 200 (showing Mexico, El Salvador, Guatemala, Canada and Haiti as the top five source countries for illegal immigrants, with Poland ranking tenth).

<sup>74</sup> See U.S. Dep't of Justice, Immigration and Naturalization Service, *Country of Origin* (last modified Mar. 7, 2000) <<http://www.ins.usdoj.gov/graphics/aboutins/statistics/299.htm>>. Mexico, El Salvador, Guatemala, Canada and Haiti were the top five source countries of illegal immigrant population, while illegal immigrants from Mexico, El Salvador, Honduras, Guatemala and the Dominican Republic were the top five groups apprehended by immigration officials. See *id.*

<sup>75</sup> See Nic Paget-Clarke, *The Militarization of the U.S.-Mexico Border: Interview with Maria Jiménez*, IN MOTION MAGAZINE, Feb. 2, 1998, available at <<http://www.inmotionmagazine.com/mjl.html>>.

<sup>76</sup> 1997 INS STATISTICAL YEARBOOK, *supra* note 19, at 173.

<sup>77</sup> See MICHAEL FIX & JEFFREY S. PASSEL, IMMIGRATION AND IMMIGRANTS: SETTING THE RECORD STRAIGHT 25 (1994).

<sup>78</sup> See *id.* (estimating that 39% of illegal immigrants are from Mexico); 1997 INS STATISTICAL YEARBOOK at 200 (estimating that 54% of illegal immigrants are from Mexico).

<sup>79</sup> See Paget-Clarke, *supra* note 75.

from the rest of the world.<sup>80</sup> This prioritization has only become more pronounced in recent years; since 1994, there has been a 122% increase in Border Patrol agents, and two thousand immigration inspectors have been added.<sup>81</sup>

There is further evidence that border enforcement is applied selectively. In a comparison of America's two border states, INS statistics for 1996 suggest that the Border Patrol apprehends about 91% of Mexican illegal immigrants but only 28% of illegal Canadian immigrants.<sup>82</sup> These figures demonstrate that even within a policy context that prioritizes border enforcement, that enforcement is applied selectively, with greater resources and effort being expended to patrol the Mexican border.

Once inside the country, Latinos are systematically and disproportionately targeted for deportation. For instance, the INS began its plan to increase immigration enforcement in the country's interior with Operation Vanguard, targeting the Nebraska meat-packing industry; up to 90% of workers in the meat-packing industry are Latino.<sup>83</sup> While the INS claimed that Operation Vanguard was motivated not by race but by the historically high rates of illegal immigrant employment in the meat-packing industry, the actions and attitudes of INS agents in many other cases betray the existence of an institutional bias.<sup>84</sup> One stark example occurred when the INS pulled over the mayor of Pomona, California, Eddie Cortez, and questioned him about his immigration status. As Cortez described the event: "(The agent) said, 'Identify yourself, or else I will put you in the van with the rest of them.' Twice, I ignored their request for identification. I wanted a reason. If I did not break a law, why were they stopping

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<sup>80</sup> See U.S. Dep't of Justice, Immigration and Naturalization Service, *Illegal Alien Resident Population* (last modified Aug. 11, 1999) <<http://www.ins.usdoj.gov/graphics/about-ins/statistics/illegalalien/index.htm>>.

<sup>81</sup> See Thaddaus Herrick, *Reno Urges Putting Brake on Border Patrol Buildup*, HOUS. CHRON., Mar. 10, 1999, at A1.

<sup>82</sup> See U.S. Dep't of Justice, *Country of Origin*, *supra* note 74. The percentages are calculated using INS figures for the number of aliens apprehended in 1996 and estimates for the number of illegal immigrants who manage to enter and remain in the country annually. Note that even though the *rate* of apprehension is much higher for Mexicans, in absolute numbers there are far more Mexicans than Canadians entering each year. A 91% apprehension rate for illegal Mexican immigrants misses an estimated 154,000 illegal aliens, while the 28% apprehension rate for Canadians only results in an estimated 8,000 entering the country illegally. *See id.*

<sup>83</sup> See David LaGesse, *Social Security Officials Halt INS Program in Meatpacking Industry*, DALLAS MORNING NEWS, Aug. 13, 1999, at 5A.

<sup>84</sup> *See id.*



me?<sup>85</sup> These incidents demonstrate the role that racial politics play in immigration practices, and especially in anti-illegal immigration control.

#### CONCLUSION

The treatment of refugees from unpopular countries such as Mexico and Haiti, when compared to the treatment of Elian Gonzalez and immigrants from favored countries, confirms that our immigration policies are based on race rather than reason, and begs the question whether fairness is the operating principle of American immigration policies. While the state of immigration policies in the United States has come a long way since the implementation of the national origins quota system in 1924, it is evident that racial biases still pervade the major avenues of legal immigration. As a nation founded by and comprised of immigrants, America must maintain its openness to immigrants and its commitment to the equitable application of immigration law. The nineteenth century American aspiration to be a haven for the tired, the poor, and the huddled masses must become a realization, not just for those seeking refuge from favorable countries, but for all.

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<sup>85</sup> Lee Romney, *Over The Line? Citing Questioning of Mayor, Activists Say Border Patrol Targets All Latinos*, L.A. TIMES, Sept. 2, 1993, at J1.