William & Mary Bill of Rights Journal

Volume 21 | Issue 2 Article 3

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Repository Citation

Stephen H. Legomsky, *Immigration Policy from Scratch: The Universal and the Unique*, 21 Wm. & Mary Bill Rts. J. 339 (2012), http://scholarship.law.wm.edu/wmborj/vol21/iss2/3

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IMMIGRATION POLICY FROM SCRATCH: THE UNIVERSAL AND THE UNIQUE

Stephen H. Legomsky*

Immigration, as all are surely aware, is the subject of feverish debate in countries throughout the world. From traditionally high-immigration nations like the United States, Australia, Canada, and Singapore to the traditionally homogeneous, low-immigration societies of Japan and South Korea—as well as in States as different as New Zealand, Israel, and the Member States of the European Union—governments are actively rethinking previously sacrosanct tenets of their immigration policies.[1] In

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[1] For the flavor of the contemporary debates in leading countries, see MIGRATION AND GLOBALIZATION (Atsushi Kondo ed., 2008) (comparing Japan, Sweden, France, Germany, the United Kingdom, Australia, New Zealand, Canada, and the United States); JAMES P. LYNCH & RITA J. SIMON, IMMIGRATION THE WORLD OVER (2003) (comparing the United States, Canada, Australia, the United Kingdom, France, Germany, and Japan). The debates in many of the countries mentioned above are well-captured in some of the popular media outlets. For a sampling, see Rick Wallace, *Tokyo Finally Grasps the Migration Nettle*, THE AUSTRALIAN, June 24, 2011, at 25 (explaining Japan's new migration policies); *Australia Needs More Migrants to Boost Economy*, WORKPERMIT.COM (July 10, 2006), http://www.workpermit.com/news/2006_07_10/australia/needs_more_migrants.htm; *Changes to New Zealand Skilled Migrant Category*, WORKPERMIT.COM (Feb. 1, 2008), http://www.workpermit.com/news/2008-02-01/new-zealand-skilled-migration-changes-feb-04.htm (explaining New Zealand's new immigration policies); *Republic of Korea Experiencing a Serious Brain Drain*, WORKPERMIT.COM (June 6, 2007), http://www.workpermit.com/news/2007-06-06/south-korea/brain-drain-immigration-reform.htm [hereinafter *Republic of Korea*] (discussing the need for new immigration policies in South Korea); *Singapore Prime Minister Promotes Immigration as Birth Rate Drops*, WORKPERMIT.COM (Aug. 22, 2006), http://www.workpermit.com/news/2006_08_22/global/singapore_needs_immigrants.htm [hereinafter *Singapore Prime Minister*] (comparing Singapore's problem of falling birth rates with other Western nations and the need

many of those countries, the impetus for immigration reform largely reflects declining birth rates among the native-born, aging populations, and thus a felt need for young workers—especially professional and skilled workers.[2] At the same time, those efforts have hit a wall of social, cultural, economic, and environmental resistance. Meanwhile, the new mobility fostered by modern advances in technology, transportation, and information have only enhanced the appeal of immigration for people adventurous and motivated enough to stake out new lives in distant and unfamiliar lands.[3] All of this has only made the immigration issue more pressing.

In this world on the move, migration and globalization are requiring all of us to think creatively about how to encourage, how to restrain, and how to manage international migration. As some policymakers draft new immigration legislation from scratch and others revisit existing law, it seems time to think *generically* about the overall shape and the critical elements that make up a comprehensive immigration policy.

The premise of this Article is that there exist certain universal issues that immigration policymakers in every receiving country must address, certain decisions that will always have to be made. In saying this, I appreciate that the countries of the world come in vastly different shapes and sizes. They have different histories, cultures, forms of government, social structures, economic realities, age and labor demographics, values, and ultimately even different missions. All of these national attributes, and others, rightly influence a nation's immigration policy.

Several disclaimers, therefore, are required. First, I make no claim of completeness. No doubt there are additional universal issues or decisions. Second, conversely, there will always be additional issues that are *not* universal—issues that are unique to the host country. Third, I stress that I am positing only universal *questions*, not universal *answers*. How a country chooses to resolve these issues will reflect all the relevant characteristics that make the country distinctive.

This Article, then, provides a kind of immigration policy checklist or roadmap. It is offered as a starting point for anyone involved in either the formulation or the wholesale alteration of a country's immigration policy. Reflecting my perception of the key pieces of the immigration puzzle and how they fit together, this Article urges a comprehensive approach. This means simultaneously addressing not only the narrow question of who should be admitted into the country's territory, but also several other subjects that are joined at the hip—citizenship, integration, illegal immigration, and expulsion.

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for increased immigration). Israel is currently contemplating the first comprehensive immigration legislation in its history. SHLOMO AVINERI ET AL., MANAGING GLOBAL MIGRATION: A STRATEGY FOR IMMIGRATION POLICY IN ISRAEL 9, 17 (Ruth Gavison ed., Naftali Greenwood trans., 2010), *available at* http://papers.ssrn.com/SoL3/papers.cfm?abstract_id=1576647.

[2] *See, e.g.*, *Republic of Korea*, *supra* note 1; *Singapore Prime Minister*, *supra* note 1.

[3] *See* John Samuel & Susan George, *Globalization, Migration and Development*, 29 CAN. STUD. POPULATION 31, 34, 36 (2002).

I. THE PRELIMINARIES: DEFINING THE MISSIONS

A visionary immigration policy demands some conscious philosophical choices. Policymakers need to think hard about what they see as the missions—and I use the plural deliberately—of their immigration policy. At the highest level of generality, is the goal solely to maximize the overall welfare of the country's existing and future citizens, as is often assumed? Or, is there a moral obligation to take into account the interests of the prospective immigrants as well? Finally, what if those two sets of interests conflict? On these moral questions there is no consensus.[4]

But even an exclusive focus on the national welfare of the receiving State and its citizens leaves multiple, sometimes conflicting, missions to reconcile. These require prioritization.

Consider, for example, the economic goals. Are the main objectives the growth and vibrancy of the economy, the equitable distribution of economic resources, the labor market, the nation's fiscal health, or the international balance of trade?[5] Moreover, how does one estimate and balance the effects of immigration on consumer prices, industry strength, and worker protection?

Aside from the economy, how much weight should be assigned to the nation's physical security?[6] How much emphasis should there be on population size—does the nation want to expand its population, reduce it, or maintain the status quo, and how

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[4] *See, e.g.*, Joseph H. Carens, *Aliens and Citizens: The Case for Open Borders*, 49 REV. POL. 251, 253 (1987) (arguing for equal weight on the immigration interests of citizens and noncitizens); Stephen Macedo, *The Moral Dilemma of U.S. Immigration Policy: Open Borders Versus Social Justice?*, *in* DEBATING IMMIGRATION 63, 63–64 (Carol M. Swain ed., 2007) (contending that a country's moral obligations to its own poor citizens exceed any owed to poor noncitizens); John A. Scanlan & O.T. Kent, *The Force of Moral Arguments for a Just Immigration Policy in a Hobbesian Universe*, *in* OPEN BORDERS? CLOSED SOCIETIES? 61, 78–82 (Mark Gibney ed., 1988) (arguing that moral issues are not only relevant to immigration policymaking, but consistent with the national interest).

[5] As to the impact of immigration on the U.S. economy, the most rigorous and comprehensive study to date is NAT'L ACAD. OF SCI., THE NEW AMERICANS (James P. Smith & Barry Edmonston eds., 1997). For opposing views on the labor market effects of immigration, compare GEORGE J. BORJAS, HEAVEN'S DOOR: IMMIGRATION POLICY AND THE AMERICAN ECONOMY 10–11 (1999) (fearing that immigration of low-wage workers adversely affects their native counterparts), with Howard F. Chang, *Migration as International Trade: The Economic Gains from the Liberalized Movement of Labor*, 3 UCLA J. INT'L L. & FOREIGN AFF. 371 (1998) (seeing overall positive effects on the labor market).

[6] *Compare, e.g.*, Mark Krikorian, *Keeping Terror Out: Immigration Policy and Asymmetric Warfare*, 75 NAT'L INT. 77 (2004) (attributing the 9/11 attacks to lax U.S. immigration policy), *with* David Cole, *The Priority of Morality: The Emergency Constitution's Blind Spot*, 113 YALE L.J. 1753 (2004) (refuting the link between immigration controls and terrorism, and emphasizing human rights constraints).

much priority does that issue command?[7] To what extent is cultural preservation a critical component of the mission?[8] Is diversity a national goal, and if so, what kind?[9] Is one of the missions of an immigration policy the safeguarding of democratic and constitutional ideals?[10] Is it family reunification? Is it the advancement of human rights and the protection of individuals and groups from persecution, torture, or other harms? Symbolically, what statement should a country's immigration policy make to its own people and to the world, about the nation's basic values and self-identity?

II. CITIZENSHIP

Citizenship (or nationality)[11] policy is inseparable from immigration policy. For one thing, international law recognizes a legal right to enter and remain in one's country of nationality.[12] For another, laws commonly confer special immigration privileges on specified family members of the country's citizens.[13] Ideally, therefore, policy decisions in each of these spheres should reflect policy decisions in the other.

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[7] *See, e.g.*, ELLEN PERCY KRALY, U.S. IMMIGRATION AND THE ENVIRONMENT (1995) (exploring the relationships among immigration, population, and the environment); *see also supra* note 1.

[8] One well-known immigration restrictionist argues strongly that immigration policy must protect the nation's cultural core and that, in the United States, that cultural core is European and not Latino. PETER BRIMELOW, ALIEN NATION 58–73 (1995). For persuasive refutations, see Kevin R. Johnson, *Fear of an "Alien Nation,"* 7 STAN. L. & POL'Y REV. 111, 111–12 (1996); Peter H. Schuck, *Alien Rumination*, 105 YALE L.J. 1963 (1996) (reviewing BRIMELOW, *supra*).

[9] *See* PETER H. SCHUCK, DIVERSITY IN AMERICA 123–31, 324 (2003) (praising diversity and acknowledging government's legitimate role in promoting it, but opposing government efforts to "create or promote any *particular* kind of diversity").

[10] In the context of the European debate over integration as a condition of admission, see *infra* notes 122–25 and accompanying text. Liav Orgad argues that any cultural objectives of an immigration policy should be framed narrowly as a reference to the immigrant's acceptance of the host country's governance and constitutional values. Liav Orgad, *Illiberal Liberalism: Cultural Restrictions on Migration and Access to Citizenship in Europe*, 58 AM. J. COMP. L. 53, 84–86, 88–89, 93, 96–99 (2010).

[11] The laws of some countries distinguish citizenship from nationality. *See, e.g.*, 8 U.S.C. §§ 1401(d), 1408, 1436 (2006) (United States); INTERNATIONAL IMMIGRATION AND NATIONALITY LAW, at MEX-24 (Dennis Campbell ed., 2d ed. 2012) (Mexico). In this summary discussion, I use the two terms interchangeably.

[12] International Covenant on Civil and Political Rights art. 12, *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 171, 173 (prohibiting *arbitrary* denial of right to enter own country); *cf.* Universal Declaration of Human Rights art. 13(2), G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948) ("Everyone has the right . . . to return to his country").

[13] *See, e.g.*, Christine Adam & Alexandre Devillard, *Comparative Study of the Laws in the 27 EU Member States for Legal Immigration*, Eur. Parl. Doc. PE 393.281 (2008), *available at* http://www.libertysecurity.org/IMG/pdf_study_of_laws_for_legal_immigration.pdf (containing individual country reports prepared by the International Organization for Migration at request of European Parliament's Committee on Civil Liberties, Justice and Home Affairs);

Countries have to decide, among other things, which events will generate citizenship at the moment of birth. The traditional divide is between the principles of *jus soli*, which bestows citizenship on individuals born in the country's territory, and *jus sanguinis*, under which a person inherits the citizenship of one or both parents.[14] Practically every country confers citizenship at birth based on some form of *jus sanguinis*, but the precise requirements vary widely from country to country; they go back differing numbers of generations and often depend on whether the citizen parents had resided in the country for a specified number of years before the birth of the citizenship claimant.[15] In contrast, only some countries, mainly in the Americas, offer birthright citizenship based on a pure form of *jus soli*.[16] Most countries today, including the United States, use some combination of the two.[17]

Citizenship later in life—i.e., naturalization—raises hard questions as well. Again, the requirements vary widely. In particular, how long should one have to reside in the country in order to be eligible for naturalization?[18] Should the applicant be required to renounce, or at least take an oath purporting to renounce, other citizenships?[19]

Stephen H. Legomsky, *Rationing Family Values in Europe and America: An Immigration Tug of War Between States and Their Supra-National Associations*, 25 GEO. IMMIGR. L.J. 807 (2012); Lori A. Nessel, *Families at Risk: How Errant Enforcement and Restrictionist Integration Policies Threaten the Immigrant Family in the European Union and the United States*, 36 HOFSTRA L. REV. 1271 (2008).

[14] Ayelet Shachar, *Children of a Lesser State: Sustaining Global Inequality Through Citizenship Laws* 4–5 (Jean Monnet Program, Working Paper No. 2/03, 2002).

[15] There are too many variations to summarize here. For more detailed accounts of the citizenship policies of forty-two leading countries, see the citizenship sections of the individual country chapters in INTERNATIONAL IMMIGRATION AND NATIONALITY LAW, *supra* note 11.

[16] *See, e.g.*, U.S. CONST. amend. XIV, § 1 (United States); 8 U.S.C. § 1401(a) (2006) (United States); INTERNATIONAL IMMIGRATION AND NATIONALITY LAW, *supra* note 11, at ARG-17 to 18 (Argentina); *id.* at MEX-24 (Mexico, but offering only nationality upon birth in the country and deferring citizenship until age 18); *id.* at VEN-28 to 29 (Venezuela). Outside of the Americas, *jus soli* is rare but not unknown. *See, e.g.*, *id.* at AUS-46 to 48 (Australia, until 1986); *id.* at NZ-25 to 26 (New Zealand).

[17] *See* Shachar, *supra* note 14, at 7.

[18] In the United States, for example, the usual requirement is five years of continuous residence after admission for lawful permanent residence, 8 U.S.C. § 1427(a) (2006), with some exceptions, including a relaxation of the requirement to three years for one who is married to and living with a U.S. citizen, 8 U.S.C. § 1430(a) (2006). At the other end of the spectrum, Switzerland imposes a combination of national, cantonal, and municipal requirements for naturalization. INTERNATIONAL IMMIGRATION AND NATIONALITY LAW, *supra* note 11, at SWI-45 to 48.

[19] That distinction is important, because the world's nations vary widely in their willingness to give effect to their citizens' renunciation oaths. For a good compilation, see Charles Roth, *Worldwide Liberalization of Dual Citizenship Rules and Potential Side Effects on U.S. Citizenship*, 83 INTERPRETER RELEASES 2529, 2530 & app. I (2006). The United States, for example, requires a naturalization applicant to take an oath renouncing all foreign allegiances, 8 U.S.C. § 1448(a)(2) (2006), but does not require the person to follow through. Germany,

Subject to any applicable treaties,[20] every sovereign State decides who are, and who are not, its own nationals;[21] thus, no State has the power to decide whether an individual may acquire or retain the citizenship of another State. But nothing prevents a State from conditioning its own citizenship on the person renouncing other States' citizenships. As a result, a country's decision whether to make renunciation a prerequisite to naturalization will reflect its degree of tolerance for dual nationality.[22]

Just as expulsion is the flip side of the admission coin,[23] so too is revocation of citizenship the flip side of the granting of citizenship. Apart from flaws in the original naturalization process, what should be the criteria for taking away someone's citizenship?[24] In particular, should it require the individual's consent, or are there circumstances in which a country's laws should permit the revocation of citizenship against the will of the individual?[25] If the latter, should a demonstrated lack of allegiance be enough, and if so, what should the government be required to prove?[26] This question has special relevance in an age of terrorism. In addition to criminal or other sanctions, should there be citizenship consequences when a person plans, perpetrates, or assists terrorist acts against his or her own country?

Finally, though beyond the scope of the present article, exactly which legal rights and duties should be linked to citizenship? A wide spectrum of political, social, and economic rights, as well as obligations relating to taxation and military service, might be reserved exclusively for citizens, extended to noncitizen residents, or further extended to a wider range of individuals with various legal or physical ties to the country.[27]

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in contrast, conditions naturalization upon actual renunciation of all foreign nationalities. INTERNATIONAL IMMIGRATION AND NATIONALITY LAW, *supra* note 11, at GER-16. For a forceful argument against requiring a renunciation oath, see Gerald L. Neuman, *Justifying U.S. Naturalization Policies*, 35 VA. J. INT'L L. 237, 268–77 (1994).

[20] The most significant modern convention displaying broader acceptance of dual nationality is the European Convention on Nationality, Nov. 6, 1997, E.T.S. No. 166.

[21] Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws arts. 1–2, Apr. 12, 1930, 179 L.N.T.S. 91.

[22] *See, e.g.*, RANDALL HANSEN & PATRICK WEIL, DUAL NATIONALITY, SOCIAL RIGHTS AND FEDERAL CITIZENSHIP IN THE U.S. AND EUROPE (2002); RIGHTS AND DUTIES OF DUAL NATIONALS (David A. Martin & Kay Hailbronner eds., 2003); Linda Bosniak, *Multiple Nationality and the Postnational Transformation of Citizenship*, 42 VA. J. INT'L L. 979 (2002); Peter J. Spiro, *Dual Nationality and the Meaning of Citizenship*, 46 EMORY L.J. 1411 (1997).

[23] *See infra* Part IV.C.

[24] *See, e.g.*, 8 U.S.C. § 1451 (2006).

[25] The U.S. Supreme Court has held that the Constitution does not permit the government to strip a person of U.S. citizenship involuntarily. Vance v. Terrazas, 444 U.S. 252, 270 (1980). Congress has since codified that decision. 8 U.S.C. § 1481 (2006).

[26] For a thoughtful discussion of this question, see T. Alexander Aleinikoff, *Theories of Loss of Citizenship*, 84 MICH. L. REV. 1471 (1986).

[27] *See* Stephen H. Legomsky, *Citizens' Rights and Human Rights*, 43 ISR. L. REV. 67 (2010).

III. THE ADMISSION OF NONCITIZENS

A. Numbers

Numbers matter. How many immigrants should the country admit? Variables include the country's needs and absorptive capacity.[28] Depending on how one feels about the previous issue—that is, *whose* interests count?—the numbers decision might also reflect the demand side of the equation. The country's own absorptive capacity will depend on such demographic variables as the expected mortality rates, fertility rates, and rates of immigration and emigration—as related to the existing population, the foreseeable future immigrant population, and the descendants of both.[29] The question of optimum numbers also depends on the nation's physical geography, including its natural resources and environment, as well as the present and expected future state of the country's infrastructure.[30] The numbers question might further require economic modeling, in addition to forecasting the likely degree of the public's cultural tolerance, and thus the prospects for successful integration.[31]

Perhaps the hardest questions, however, are not "how many?," but "which ones?" In most prosperous countries, the demand for immigrant admissions exceeds the number that the nation is willing to take in.[32] When that is the case, countries have to make the most basic policy decision known to immigration law: who should get priority over whom? The next three subsections discuss the three groups of people who have traditionally received preference in immigrant selection: the families of the country's existing citizens and residents; individuals with valuable occupational skills; and refugees.

B. Family Reunification

The most numerous of the lawfully admitted immigrants in Europe,[33] the United States,[34] and worldwide[35]—have been those who immigrate for the purpose of family

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[28] Stephen H. Legomsky, *Immigration, Equality and Diversity*, 31 COLUM. J. TRANSNAT'L L. 319, 323 (1993).

[29] *Id.*

[30] *Id.*

[31] *Id.*

[32] Shelly Wilcox, *Immigrant Admissions and Global Relations of Harm*, 38 J. SOC. PHIL. 274, 275 (2007).

[33] PIETER BOELES ET AL., EUROPEAN MIGRATION LAW 9 (2009).

[34] Family reunification accounted for approximately two-thirds of all legal immigration to the United States in fiscal year 2010. RANDALL MONGER & JAMES YANKAY, ANNUAL FLOW REPORT: U.S. LEGAL PERMANENT RESIDENTS: 2010, at 1 (2011), *available at* http://www.dhs.gov/xlibrary/assets/statistics/publications/lpr_fr_2010.pdf. This does not even count the spouses and children accompanying or following to join immigrants who are admitted under the non-family programs. *Id.* at 3, tbl.2.

[35] *See* CHRISTINA BOSWELL & ANDREW GEDDES, MIGRATION AND MOBILITY IN THE EUROPEAN UNION 103 (2011); Orgad, *supra* note 10, at 57–58.

reunification. There are many issues here: which family relationships should qualify? Nuclear family? Extended family?[36] What about immigration based on non-traditional relationships, such as same-sex marriages, polygamous marriages, and non-marital intimate relationships? Europe outpaces the United States on those family issues, though not on some others.[37] Whichever relationships are recognized, should the same preferences that apply to family members of citizens also apply to the family members of its lawfully resident noncitizens?[38] As to the latter, should the requirements be more stringent for family relationships that are formed after the admission of the principal immigrant (described in some countries as "family formation") than for preexisting family members (often described as "family reunification")?[39]

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[36] In the European Union, for example, Member States are required to admit all direct descendants of an EU citizen and of the EU citizen's spouse if those descendants are either under age 21 or dependent, as well as dependent ascendant relatives. Council Directive 2004/38, art. 1–2, 2004 O.J. (L 158) 77 (EC) [hereinafter Free Movement Directive] (declaring the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States). The analogous Directive governing the admission of the family members of resident third country nationals does not require the admission of the extended family. Council Directive 2003/86, pmbl., para. 10, 2003 O.J. (L 251) 12 (EC); *id.* at art. 4.3. United States law authorizes the admission of the parents and siblings of adult U.S. citizens but makes no other provision for extended family. 8 U.S.C. §§ 1151(b)(2)(A)(i), 1153(a)(4) (2006).

[37] In the United States, the family reunification provisions do not extend to unmarried couples. 8 U.S.C. §§ 1151(b), 1153(a), 1153(d) (2006). Similarly, same-sex marriages are not recognized for immigration (or any other federal) purposes. Defense of Marriage Act, Pub. L. No. 104-199, § 3, 110 Stat. 2419 (1996) (codified at 1 U.S.C. § 7 (2006)). In contrast, the immigration laws of at least eight EU Member States admit unmarried partners. Adam & Devillard, *supra* note 13, at 59 & n.109 (listing "Belgium, Denmark, Finland, Lithuania, the Netherlands, Portugal, Sweden, and the UK"). The laws of at least three of those States, Finland, the Netherlands, and the U.K., explicitly admit same-sex partners, whether or not married. *Id.* at 59 & n.110. Subsequent spouses in polygamous marriages are not recognized by either U.S. law or EU law. 8 U.S.C. § 1182(a)(10)(A) (excluding anyone coming to the United States to practice polygamy); Defense of Marriage Act, Pub. L. No. 104-199, § 3, 110 Stat. 2419 (1996) (codified at 1 U.S.C. § 7 (2006)) (defining marriage as a union of "one man and one woman"); Council Directive 2004/38, art. 2(a), 2004 O.J. (L 158) 77 (EC) (applying to spouses of EU citizens); Council Directive 2003/86, art 4.4, 2003 O.J. (L 251) 12 (EC) (applying to spouses of lawfully resident third country nationals).

[38] Under U.S. law, the family members of U.S. citizens are treated far more favorably than the analogous family members of lawfully admitted resident noncitizens. Preference is accorded to the spouses, parents, married and unmarried sons and daughters, and siblings of U.S. citizens. 8 U.S.C. §§ 1151(b)(2)(A)(i), 1153(a)(1), (3), (4) (2006). (8 U.S.C. § 1153 (a)(2) (2006) gives preference to only spouses and unmarried sons and daughters of lawfully admitted resident noncitizens.) In the EU, there are separate directives spelling out the admission requirements for the family members of EU citizens, Council Directive 2004/38, 2004 O.J. (L 158) 77 (EC), and those of lawfully resident third country nationals, Council Directive 2003/86, 2003 O.J. (L 251) 12 (EC).

[39] The Netherlands once attempted to impose more stringent income support requirements in cases of family "formation" (i.e., marriages following sponsor's admission) than in cases

Should there be waiting periods for family unification, either express or de facto, such as those resulting from numerical limits or from qualitative restrictions that take time to satisfy? In the United States, the waiting periods generated by statutory quotas are several years long for some of the family reunification categories.[40] Mandatory waiting periods are less common in the EU, but they are not unknown and are gaining in popularity.[41] For spouses, should there be special rules or procedures to minimize marriage fraud?[42]

Should there be additional eligibility requirements for family members? Pre-admission language requirements or more general pre-admission integration tests are increasingly deployed in Europe, and they are discussed below.[43] Should there be financial support requirements?[44]

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of family "reunification" (preexisting marriages). In *Chakroun v. Minister van Buitenlandse Zaken*, the Court of Justice of the European Union ruled that (except for refugees) the State may not treat those two classes of family members differently. Case C-578/08, Chakroun v. Minister van Buitenlandse Zaken, 2010 E.C.R. I-1839 (Mar. 4, 2010), *available at* http://curia.europa.eu/juris/document/document.jsf?text=&docid=82677&pageIndex=0&doclang=EN&mode=1st&dir=&occ=first&part=1&cid=2001387. United States law allows the admission of spouses and children "accompanying or following to join" specified immigrants, 8 U.S.C. § 1153(d) (2006), but the regulations make clear that this provision applies only to spouses and children acquired before the admission of the principal immigrant, 22 C.F.R. § 42.53(c) (2012).

[40] *See* 9 U.S. DEP'T OF STATE, VISA BULL. No. 34, at 2 (2011) [hereinafter VISA BULL.] (listing waits of generally seven years for unmarried sons and daughters of U.S. citizens, ten years for married sons and daughters of U.S. citizens, eleven years for siblings of adult U.S. citizens, and over three years for the spouses and unmarried minor children of lawful permanent residents—in each case, longer still for immigrants from certain high-volume source countries).

[41] Austria and Estonia have put express numerical limits on total immigration, including family immigration. Adam & Devillard, *supra* note 13, at 39–40. Several EU Member States have adopted various forms of mandatory waiting periods for family immigration. *See id.* at 175 (Cyprus), 198–99 (Denmark), 213 (Estonia), 242 (France), 268 (Greece), 283 (Hungary), 332 (Lithuania), 341 (Luxembourg), 349–50 (Malta), 374 (Poland), 433 (Spain); *Report from the Commission to the European Parliament and the Council on the Application of Directive 2003/86/EC on the Right to Family Reunification*, at para. 4.3.5, COM (2008) 610 final (Oct. 8, 2008) [hereinafter *European Commission Report 2008*] (listing Cyprus, Estonia, Greece, and Lithuania).

[42] Regarding the United States, see Immigration Marriage Fraud Amendments of 1986, 8 U.S.C. § 1186a (2006) (establishing "conditional" permanent resident status for certain spouses and children and imposing additional restrictions). The laws of several EU Member States expressly exclude fraudulent marriages and forced marriages. *See* Adam & Devillard, *supra* note 13, at 134 (Austria), 213 (Estonia), 360 (Netherlands). Some require DNA evidence of the family relationship. Nessel, *supra* note 13, at 1273 & n.10.

[43] *See infra* notes 122–25 and accompanying text.

[44] United States law excludes any noncitizen who is deemed "likely at any time to become a public charge," 8 U.S.C. § 1182(a)(4)(A) (2006), and for this purpose requires legally binding affidavits of support from family members' U.S. sponsors, 8 U.S.C. § 1183(a) (2006). Financial support requirements are also standard in the EU Member States. *European Commission Report 2008*, *supra* note 41, para. 4.3; Adam & Devillard, *supra* note 13, at 60–61.

What about the family members of those who are admitted only on a temporary basis—e.g., students, guest workers, business visitors, and so on? Should those family members be admitted, and if so, on what terms? Should they be allowed to work? Should their right to remain terminate when the family relationship terminates, or when the principal admittee leaves the country?[45]

In order to answer these and other family questions, policymakers have to identify their reasons for having a family reunification program in the first place. Is family reunification mainly a humanitarian project, designed to avoid the hardship of separation? Is it a human rights concept, meant to satisfy international legal obligations?[46] Is it a way to foster the integration of immigrants? Is it a practical alternative to *illegal* immigration?

At the same time, what is the impact of a country's family migration policies on the ethnic composition of the resulting society? Does an emphasis on family migration affect the overall occupational skill levels of immigrants? Does it add social and economic networks? Will it increase or decrease remissions or otherwise affect the international balance of trade?

C. Labor Immigration

A second major component of many countries' immigration policies is labor migration. Again, there are several issues: does the country want or need labor immigrants in the first place, and if so, how can the program be structured so as to balance and protect the legitimate interests of industry, labor, and consumers? In particular, how should the law minimize foreign workers' competition with native workers for job opportunities? What measures will prevent employers from exploiting immigrant workers, using them to depress wages or working conditions of domestic labor, or otherwise violating foreign workers' human rights?

More concretely, should labor immigrants be admitted as temporary guest workers, permanent residents, or both? There is a large divide among the major immigrant-receiving countries on this issue. In Canada, Australia, and the United States, labor

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[45] In the United States, noncitizens who are admitted for temporary periods of time are called "nonimmigrants." 8 U.S.C. § 1101(a)(15) (2006). For the terms of admission of the various categories of nonimmigrants, see 2 CHARLES GORDON ET AL., IMMIGRATION LAW AND PROCEDURE § 12.01 (2011).

[46] The more general international human rights of migrants have been the subject of a vast literature. *See, e.g.*, RICHARD B. LILLICH, THE HUMAN RIGHTS OF ALIENS IN CONTEMPORARY INTERNATIONAL LAW (1984); Joan Fitzpatrick, *The Human Rights of Migrants*, *in* MIGRATION AND INTERNATIONAL LEGAL NORMS 169 (T. Alexander Aleinikoff & Vincent Chetail eds., 2003); David Weissbrodt, *The Protection of Non-Citizens in International Human Rights Law*, *in* INTERNATIONAL MIGRATION LAW 221 (Ryszard Cholewinski et al. eds., 2007). The European Court of Human Rights has been extremely active in applying the European Convention on Human Rights to family reunification. *See* BOELES ET AL., *supra* note 33, at 141–78.

immigrants can theoretically be admitted as permanent residents from the outset.[47] In practice, Australia has recently moved toward temporary labor migration,[48] and, in the United States, the annual numerical ceilings result in substantial waiting periods for most of the permanent resident subcategories.[49] Those waiting periods, combined with the reluctance or inability of employers to hold jobs open for several years, often make it more realistic for labor immigrants to enter the United States initially as temporary workers[50] and adjust their status to permanent residence years later.[51] In contrast, the laws of most European countries expressly admit labor immigrants only for temporary residence and require stays of a specified number of years before granting permanent residence.[52]

If labor immigrants are admitted as temporary guest workers, for how long a period should they be allowed to stay, should those periods be renewable, and what should be the end game? If they can seek permanent residency at some stage, what should that stage be, and what eligibility criteria should be applied? If there is no opportunity for eventual permanent residence, then how does the law ensure that guest workers actually leave the country when their time is up, and is the human impact of removing workers who have formed meaningful bonds within the community morally acceptable? It was several European countries' heavy reliance on guest workers in the 1960s and 1970s[53] that prompted the famous observation by Swiss scholar Max Frisch: "We sought workers, and human beings came."[54]

What criteria should be used in selecting labor immigrants? In the United States, the selection of labor immigrants for permanent residence is based mainly on whether a particular employer has an immediate need for the services of a particular individual that cannot be met by U.S. workers.[55] To document that need, the employer generally must obtain "labor certification," which requires showing that "there are not sufficient workers who are able, willing, qualified . . . and available" to perform the work and that the employment will not "adversely affect the wages and working conditions" of American workers.[56] For temporary workers, U.S. law prescribes analogous conditions,

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[47] *See* Adam & Devillard, *supra* note 13, at 46. Regarding the United States, see 8 U.S.C. § 1153(b) (2006).

[48] *See* Jock Collins, *Australian Immigration Policy in the Age of Globalization*, *in* MIGRATION AND GLOBALIZATION, *supra* note 1, at 161, 171–73.

[49] VISA BULL., *supra* note 40.

[50] *See* 8 U.S.C. § 1101(a)(15)(H) (2006).

[51] 8 U.S.C. § 1255 (2006).

[52] Adam & Devillard, *supra* note 13, at 46.

[53] Collins, *supra* note 48, at 171.

[54] "Man hat Arbeitskräfte gerufen, und es kommen Menschen." MAX FRISCH, SCHWEIZ ALS HEIMAT? 219 (1990), *reprinted in* STEPHEN H. LEGOMSKY & CRISTINA M. RODRÍGUEZ, IMMIGRATION AND REFUGEE LAW AND POLICY 371 (5th ed. 2009).

[55] *See Employment-Based Immigrant Visas*, U.S. DEP'T OF STATE, http://travel.state.gov/visa/immigrants/types/types_1323.html (last visited Dec. 6, 2012).

[56] 8 U.S.C. § 1182(a)(5)(A) (2006). There are exceptions. For example, noncitizens with "extraordinary ability" in specified fields, "outstanding" professors and researchers, and

so as to diminish competition with the U.S. domestic labor force.[57] Two prominent U.S. scholars have criticized the current structure, objecting not only to the slow and cumbersome bureaucracy it has required, but also to the very premise of selecting permanent residents on the basis of employers' transitory needs.[58]

Some other countries use points systems designed to predict the immigrant's likely long-term contributions to the host society generally and to the economy in particular.[59] Points might be awarded for such factors as youth, education, knowledge of the host country's language, and work experience. Canada and Australia have gone that route,[60] while Germany and the United States recently considered, but ultimately rejected, proposed points systems.[61] Also, should the focus be on professional or other skilled workers—as is contemplated, for example, by the "blue card" program in the European Union[62]—or is there a need for unskilled workers as well? Should there be annual numerical ceilings on the admission of workers?[63]

D. Refugees

Refugees comprise a third major category of admissions. Here there are two broad kinds of programs to distinguish. In an offshore program, a country agrees in advance

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certain multinational executives and managers are exempted from these requirements. *See id.* § 1153(b)(1)(A)–(C) (defining the first employment-based preference category); *id.* § 1182(a)(5)(A) (applying the labor certification requirement only to other employment-based preference categories). In addition, the requirement may be waived for certain subcategories of employment-based immigrants "in the national interest." *Id.* § 1153(b)(2)(B).

[57] *See id.* §§ 1101(a)(15)(H), 1101(a)(15)(O), 1101(a)(15)(P) (laying out categories of eligible temporary workers); *id.* § 1182(n) (requiring "labor condition applications" from employers for admission of certain professional workers).

[58] DEMETRIOS PAPADEMETRIOU & STEPHEN YALE-LOEHR, BALANCING INTERESTS 37–94 (1996) (arguing that temporary needs are best served by temporary workers and that permanent residence for labor immigrants should be based on a points system aimed at predicting long-term contributions).

[59] *See, e.g.*, RUTH ELLEN WASEM, CONG. RESEARCH SERV., RL32235, U.S. IMMIGRATION POLICY ON PERMANENT ADMISSIONS 17 (2009).

[60] *See* Mary Liston & Joseph Carens, *Immigration and Integration in Canada*, *in* MIGRATION AND GLOBALIZATION, *supra* note 1, at 207, 210 (describing Canadian points system); *Visas, Immigration and Refugees: Professionals and Other Skilled Migrants*, AUSTRALIAN DEP'T IMMIGR. & CITIZENSHIP, http://www.immi.gov.au/skilled/general-skilled-migration/points-test.htm (last visited Dec. 6, 2012) (describing the Australian points system for skilled labor immigrants).

[61] *See* S. 1639, 110th Cong. § 502 (2007) (introduced June 18, 2007) (proposing points system as element of comprehensive U.S. immigration reform package); Wolfgang Bosswick, *Immigration Policy in Germany*, *in* MIGRATION AND GLOBALIZATION, *supra* note 1, at 107, 128 (explaining the political compromise that ultimately doomed the German points system).

[62] Council Directive 2009/50, 2009 O.J. (L 155) 17–18 (EC) (concerning conditions of entry and residence of third-country nationals for the purposes of highly qualified employment).

[63] United States law numerically caps certain subcategories of temporary workers. *See* 8 U.S.C. § 1184(g) (2006).

to accept a certain number of overseas refugees and, perhaps, to transport them into its territory for permanent resettlement.[64] Since 1980, the United States has operated a large overseas refugee resettlement program,[65] but only a handful of other countries have followed the U.S. lead.[66] In contrast, an onshore program is one in which a person arrives at the frontier or in the interior—on his or her own—and applies for protection.[67] These are commonly called asylum programs.[68] A country formulating an immigration policy might consider both offshore and onshore refugee programs.

A preliminary decision is whether to ratify the 1951 U.N. Refugee Convention, as amended by the 1967 U.N. Refugee Protocol, if the country has not already done so.[69] As of April 1, 2011, 147 States were parties to either the original Convention or the Protocol or both.[70] As discussed below,[71] the Convention defines the term "refugee" and lays out certain refugee rights that the States Parties are obliged to respect.[72]

The major substantive question is whom the country wishes to protect, and from what. There are, first of all, people who qualify as refugees under the Refugee Convention, as having a "well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion."[73] This Convention definition reaches millions of individuals, but it is still narrow and technical. The Convention Against Torture, as its name implies, protects individuals from torture and related harms.[74] But what about those who are fleeing from other dangers, such as the crossfire of a civil or international war, or environmental disaster, or other national or regional emergencies? They might not be able to demonstrate persecution or torture,

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[64] *See, e.g.*, *Fact Sheet 60—Australia's Refugee and Humanitarian Program*, AUSTRALIAN DEP'T IMMIGR. & CITIZENSHIP, http://www.immi.gov.au/media/fact-sheets/60refugee.htm (last visited Dec. 6, 2012) [hereinafter *Fact Sheet 60*].

[65] *See* Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 109 (1980) (repealed 1994).

[66] GUY S. GOODWIN-GILL & JANE MCADAM, THE REFUGEE IN INTERNATIONAL LAW 500 & n.213 (3d ed. 2007).

[67] *See, e.g.*, *Seeking Protection in Australia*, AUSTRALIAN DEP'T IMMIGR. & CITIZENSHIP, http://www.immi.gov.au/visas/humanitarian/_pdf/seeking-protection-in-australia.pdf (last visited Dec. 6, 2012); *Fact Sheet 60*, *supra* note 64.

[68] *See, e.g.*, 8 U.S.C. § 1158 (2006).

[69] Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137 [hereinafter Refugee Convention], *amended by* Protocol Relating to the Status of Refugees, Jan. 31, 1967, 606 U.N.T.S. 267 [hereinafter Refugee Protocol].

[70] U.N. HIGH COMM'R FOR REFUGEES, STATES PARTIES TO THE 1951 CONVENTION RELATING TO THE STATUS OF REFUGEES AND THE 1967 PROTOCOL 1, *available at* http://www.unhcr.org/protect/PROTECTION/3b73b0d63.pdf (last visited Dec. 6, 2012).

[71] *See infra* note 81 and accompanying text.

[72] Refugee Convention, *supra* note 69, art. 1, § A, *amended by* Refugee Protocol, *supra* note 69, art. 1.2.

[73] *Id.*

[74] Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment art. 3.1, Dec. 10, 1984, 1465 U.N.T.S. 113 (defining torture and prohibiting return "to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture").

but their lives or welfare might nonetheless be in peril. Those situations frequently present themselves in the context of mass influxes rather than individual arrivals, and thus create special challenges for the receiving States.[75] Should the nation offer a safe haven to any of those classes of individuals?[76] If so, should protection be limited to those who have already arrived and wish only to remain, or should the program extend to individuals who are overseas and seek admission?[77] And for any of these dangers, should the law confine its protection to the person who has physically left his or her country of origin, or should the program also cover individuals internally displaced within their home countries?[78]

Should even those individuals who clearly need protection be denied it for reasons of national security or public safety, or because they forfeited their moral claims for protection by personally persecuting others?[79] When should the State deny protection

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[75] *See, e.g.*, Michael Clemens, *Crossing Borders to Escape Natural Calamities Is No Easy Option*, GUARDIAN (Aug. 23, 2012, 7:56 PM), http://www.guardian.co.uk/global-development/poverty-matters/2012/aug/23/crossing-borders-escape-natural-calamities.

[76] In the United States, the Secretary of Homeland Security has the authority to grant "temporary protected status," 8 U.S.C. § 1254a (2006), to the nationals of countries experiencing armed conflict, environmental disaster, or other "extraordinary and temporary conditions" that prevent safe return, *id.* § 1254a(b)(1), provided that certain other conditions are met, including continuous physical presence in the United States since a date specified by the Secretary of Homeland Security, *id.* § 1254a(c)(1)(A)(i)–(ii). Analogous schemes sprouted up in Europe after the Yugoslav crisis of the early 1990s. *See* GOODWIN-GILL & MCADAM, *supra* note 66, at 340 & n.393. The relevant EU instrument is Council Directive 2001/55, 2001 O.J. (L 212) 12 (EC), concerning "minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof." African nations have gone further, granting full "refugee" status to those fleeing armed conflict. Jean-François Durieux & Agnès Hurwitz, *How Many Is Too Many? African and European Legal Responses to Mass Influxes and Refugees*, 47 GER. Y.B. INT'L L. 105, 115–25 (2004).

[77] In the United States, the statute makes clear that the program is limited to individuals already present, and then only if they have been present since a date specified by the Secretary of Homeland Security. 8 U.S.C. § 1254a(c)(1)(A)(i)–(ii) (2006); *id.* § 1254a(c)(5) (2006). International practice varies. *See, e.g.*, GOODWIN-GILL & MCADAM, *supra* note 66, at 341.

[78] The international definition of "refugee" does not include the internally displaced. Refugee Convention, *supra* note 69, art. 1, § A(2) (requiring that the person be "outside the country of his nationality" or, if stateless, "outside the country of his . . . habitual residence"). However, the United Nations has taken steps to protect internally displaced persons. *See* GOODWIN-GILL & MCADAM, *supra* note 66, at 481–88 (summarizing the international measures); Francis Mading Deng, *The Global Challenge of Internal Displacement*, 5 WASH. U. J.L. & POL'Y 141 (2001) (describing the U.N. role from the point of view of the former Special Representative to U.N. Secretary-General on Internally Displaced Persons); Walter Kälin, *Introduction to The Guiding Principles on Internal Displacement*, 10 INT'L J. REFUGEE L. 557 (1998) (summarizing general framework for internally displaced persons). In contrast, the U.S. refugee definition expressly includes the internally displaced. 8 U.S.C. § 1101(a)(42)(B) (2006).

[79] The Refugee Convention excludes individuals who have engaged in specified serious misconduct from all the protections afforded by the Convention, Refugee Convention, *supra*

on the ground that the particular applicant should be someone else's problem, or because he or she has already found a safe harbor, or *should* have found a safe harbor, somewhere else?[80]

When protection is granted, what form should it take? Should it be limited to what international lawyers call "non-refoulement," meaning not returning the person to the particular country in which he or she fears harm?[81] When should the law permit return to a safe third country?[82] When should protection take the broader form of affirmatively allowing the person to remain in the territory of the destination country?[83] When that permission is granted, for how long should the person be allowed to remain—only until the danger subsides, or permanently? Is there a point at which the right thing to do is to give up on the possibility of repatriation and grant a right of permanent residence so that the refugee can begin to rebuild his or her life? If so, what is that point?[84] What civil, political, economic, social, and cultural rights should refugees have?[85] What should be the rules for admission of the person's family members?[86]

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note 69, art. 1.F, and further denies those who have committed certain other bad acts the specific right not to be returned to the country of persecution, *id.* art. 33, § 2.

[80] *See generally* Stephen H. Legomsky, *Secondary Refugee Movements and the Return of Asylum Seekers to Third Countries: The Meaning of Effective Protection*, 15 INT'L J. REFUGEE L. 567 (2003) (providing a revised version of the consultant's report to the U.N. High Comm'r for Refugees on the permissibility of returning refugees to third countries through which they have passed en route).

[81] Non-refoulement is the most basic protection required by the Refugee Convention, *supra* note 69, art. 33. The analogous provision of U.S. law is 8 U.S.C. § 1231(b)(3) (2006) (restriction on removal).

[82] *See, e.g.*, Legomsky, *supra* note 80.

[83] This is the remedy commonly known as "asylum." *See, e.g.*, 8 U.S.C. § 1158 (2006) (using the term "asylum" in that way).

[84] On this question, national practices differ widely. Some jurisdictions, including Hong Kong, accept refugees on the understanding that they must leave once the opportunity to resettle safely elsewhere presents itself. GOODWIN-GILL & MCADAM, *supra* note 66, at 551–53. In the United States, refugees may generally be granted permanent residence status one year after admission under either the overseas refugee program or asylum. 8 U.S.C. § 1159 (2006).

[85] The Refugee Convention requires States to recognize a variety of rights, including non-discrimination, religious freedom, access to court, work permits, education, welfare, labor laws, and free movement within the country. Refugee Convention, *supra* note 69, arts. 3, 4, 16, 17, 22–24, 26–28. For an exhaustive study of refugee rights, see JAMES C. HATHAWAY, THE RIGHTS OF REFUGEES UNDER INTERNATIONAL LAW (2005).

[86] Several European instruments require "respect for . . . family life" or similarly require countries to admit the family members of third-country nationals generally (not just refugees). *See, e.g.*, Convention for the Protection of Human Rights and Fundamental Freedoms art. 8, Sept. 3, 1970, 213 U.N.T.S. 222, *amended by* Protocol No. 3, E.T.S. 45, Sept. 21, 1970, *and* Protocol No. 5, E.T.S. 55, Dec. 20, 1971; Charter of Fundamental Rights of the European Union art. 7, Mar. 30, 2010, 2010 O.J. (C 83) 389 ("respect for . . . family life"); *id.* art. 9 ("right to marry and . . . to found a family"); *id.* art. 24 § 3 (child's "right to maintain on a regular basis

Because asylum claims can take a long time to decide,[87] another issue is what sorts of reception conditions should be in place while the person's asylum claim is pending. For example, should the person be allowed to work? Should the country provide public assistance when it is needed for basic living expenses?[88] Under what circumstances should asylum seekers be detained?[89]

Finally, what kinds of procedures do these refugee status determinations require, both overseas and at home? On the one hand, the vital individual interests at stake demand procedures that realistically permit careful, accurate, and consistent decision-making. On the other hand, there are the realities of finite resources, manipulation of the system, and the importance of avoiding long delays. In particular, should the inquiries be adversarial or inquisitorial?[90] What appellate or review mechanisms should be available?[91] Should legal aid be offered to indigent asylum applicants, during either

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a personal relationship and direct contact with both his or her parents"); *id.* art. 33 § 1 (family's "legal, economic and social protection"); Free Movement Directive, *supra* note 36, pmbl. para. 2. These instruments, and the interpretations of their respective treaty bodies, are well-discussed in BOELES ET AL., *supra* note 33, at 72–74, 161–205. United States law expressly provides for the admission of the spouses and children of both those admitted under the offshore refugee program and those granted asylum. 8 U.S.C. §§ 1157(c)(2), 1158(b)(3) (2006).

[87] *See, e.g.*, *The US Immigration Court System: Workload and Due Process Challenges*, CTR. MIGRATION STUD. (Feb. 21, 2012), http://cmsny.org/2012/02/21/osuna-on-us-immigration-court-system/.

[88] The EU rules appear in Council Directive 2003/9, 2003 O.J. (L 31) 18 (EC), establishing minimum standards for receiving asylum seekers. In the United States, work authorization is expressly prohibited during the first 180 days in which an asylum application is pending, 8 U.S.C. § 1158(d)(2) (2006), and there is no provision for welfare eligibility before asylum has been granted, Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-93, §§ 401(a), 431(b), 110 Stat. 2105.

[89] Calling the detention of asylum seekers "inherently undesirable," the office of the U.N. High Commissioner for Refugees urges a "presumption against detention" and calls for limiting detention to certain specified necessities. U.N. High Comm'r for Refugees, *UNHCR's Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum-Seekers* 1, 3–4 (1999), *available at* http://www.unhcr.org/refworld/pdfid/3c2b3f844.pdf. The United States, nonetheless, routinely detains asylum seekers in a broad range of situations. Stephen H. Legomsky, *The Detention of Aliens: Theories, Rules, and Discretion*, 30 U. MIAMI INTER-AM. L. REV. 531, 543–49 (1999) (distinguishing categorical determinations from individualized adjudication); Michele R. Pistone, *Justice Delayed Is Justice Denied: A Proposal for Ending the Unnecessary Detention of Asylum Seekers*, 12 HARV. HUM. RTS. J. 197, 247–62 (1999) (analogizing to pre-trial detention in criminal cases).

[90] For a thoughtful study, see David A. Martin, *Reforming Asylum Adjudication: On Navigating the Coast of Bohemia*, 138 U. PA. L. REV. 1247, 1368–69 (1990) (proposing an inquisitorial, interview-based system).

[91] The EU rules require every Member State to assure a "right to an effective remedy before a court or tribunal" against a decision on an asylum application. Council Directive 2005/85, art. 39, 2005 O.J. (L 326) 31 (EC) [hereinafter Procedures Directive] (outlining minimum standards on procedures in Member States for granting and withdrawing refugee status). In the

the initial phase or any subsequent phases?[92] Are special accelerated procedures warranted for particular categories of cases?[93]

E. Geography

Family reunification, labor immigration, and refugees might be the three main pillars of a typical immigration policy, but policymakers have additional admission priorities to resolve. One of them is especially sensitive: what role, if any, should cultural and geographic variables like race, ethnicity, religion, and country or region of origin play in the selection of immigrants?

The most conspicuous way to regulate the geographic origins of a country's immigrant population is to build explicit preferences for particular countries' nationals into the law. These provisions are common features of modern immigration laws, as nations form regional associations based on historical or contemporary ties. The European Union is the clearest and most powerful example, but other associations of nations with reciprocal immigration preferences include the South American trade pact known as MERCOSUR[94] and the Trans-Tasman Travel Arrangement between Australia and New Zealand.[95] NAFTA[96] contains provisions that ease the rules for the movement of certain business travelers among Canada, the United States, and Mexico; the same is true for the seventeen countries currently participating in the Business Travel Card

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United States, the asylum procedures vary depending on whether the initial application is filed before or during removal proceedings, but in either case, there is ultimately a right of appeal to an administrative tribunal and a further right of judicial review, subject to numerous exceptions. DEBORAH E. ANKER, LAW OF ASYLUM IN THE UNITED STATES §§ 1.8–1.10 (2011); LEGOMSKY & RODRÍGUEZ, *supra* note 54, at 1029–85.

[92] Subject to several limitations, the EU rules mandate the provision of free legal assistance upon the request of an asylum applicant. Procedures Directive, *supra* note 91, art. 15. U.S. law, in contrast, contains no analogous provision.

[93] *See, e.g.*, ANKER, *supra* note 91, § 1:7 (describing U.S. expedited removal procedure); Maryellen Fullerton, *Inadmissible in Iberia: The Fate of Asylum Seekers in Spain and Portugal*, 17 INT'L J. REFUGEE L. 659 (2005) (critiquing Spanish and Portuguese accelerated asylum procedures); David A. Martin, *Two Cheers for Expedited Removal in the New Immigration Laws*, 40 VA. J. INT'L L. 673, 703–04 (2000) (defending same); Michele R. Pistone & John J. Hoeffner, *Rules Are Made to Be Broken: How the Process of Expedited Removal Fails Asylum Seekers*, 20 GEO. IMMIGR. L.J. 167, 210–11 (2006) (criticizing fairness and accuracy of U.S. expedited removal process).

[94] *See Brazil: New Immigration Program for Citizens of MERCOSUR Countries*, GLOBAL IMMIGR. NEWS (Nov. 15, 2009), http://totallyexpat.com/global-immigration-news/brazil-new-immigration-program-for-citizens-of-mercosur-countries/.

[95] *Visas, Immigration and Refugees: New Zealand Citizens Entering Australia*, AUSTRALIAN DEP'T IMMIGR. & CITIZENSHIP, http://www.immi.gov.au/allforms/travel-documents/new-zealand.htm (last visited Dec. 6, 2012).

[96] North American Free Trade Agreement, ch. 16, Dec. 17, 1992, 32 I.L.M. 289 (1993), *available at* http://www.sice.oas.org/trade/nafta/naftatce.asp.

arrangement of the Asian-Pacific Economic Cooperation (APEC).[97] United States law exempts both tourists and business visitors from the usual visa requirements if they are nationals of certain countries with low rates of visa denials and visa abuse.[98] Many Muslim countries have been generous in offering temporary protection to Muslim refugees.[99] Israel has a special Law of Return designed to provide a safe haven for Jews.[100] Germany, Turkey, and Japan have (or previously had) programs specifically for ethnic Germans,[101] ethnic Turks,[102] and ethnic Japanese,[103] respectively.

It is possible to achieve similar effects indirectly. A country's immigration criteria might be country-neutral on their face but more (or less) realistically attainable by nationals of particular countries or regions. Thus, Australia's infamous, and now defunct, White Australia policy required fluency in European languages that Chinese laborers and South Pacific Islanders were unlikely to speak.[104] Alternatively, a country might award points for fluency in its own language.[105] Or, as some EU Member States have recently done, it might adopt a so-called integration-abroad requirement that bars the foreign spouses of its citizens or residents unless they can speak the country's language.[106]

The United States historically had various laws that explicitly excluded most East Asian immigrants,[107] and from 1921 to 1965 the United States operated under a national origins quota system.[108] This regime prescribed different annual limits for

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[97] Atsushi Kondo, *New Challenges for Managing Immigration in Japan and Comparison with Western Countries*, *in* MIGRATION AND GLOBALIZATION, *supra* note 1, at 15, 25 & n.2.

[98] 8 U.S.C. § 1187 (2006).

[99] *See* Legomsky, *supra* note 80, at 590 (describing Muslim refugee flows to Pakistan, Iran, the former Soviet Central Asian Republics, Indonesia, Saudi Arabia, Kuwait, Syria, Lebanon, Jordan, Egypt, and Iraq).

[100] *Law of Return 5710-1950*, JEWISH VIRTUAL LIBR., http://www.jewishvirtuallibrary.org/jsource/Immigration/Text_of_Law_of_Return.html (last visited Dec. 6, 2012).

[101] Bosswick, *supra* note 61, at 128.

[102] Zeynep Kadirbeyoglu, *Changing Conceptions of Citizenship in Turkey*, paras. 14.2.2, 14.5, *available at* CITMODES, UNIV. EDIN. SCH. OF L., http://www.law.ed.ac.uk/citmodes/files/turkey.pdf (last visited Dec. 6, 2012) ("exceptional acquisition" of Turkish nationality for individuals of Turkish descent).

[103] Kondo, *supra* note 97, at 25–26.

[104] Accounts can be found in *Fact Sheet 8—Abolition of the 'White Australia' Policy*, AUSTRALIAN DEP'T IMMIGR. & CITIZENSHIP (Oct. 2012), http://www.immi.gov.au/media/fact-sheets/08abolition.htm; *White Australia Has a Black History*, NAT'L LIBR. AUSTL. STAFF PAPERS (1995), http://www.nla.gov.au/openpublish/index.php/nlasp/article/view/960/1235 (written and presented at the Indigenous Research Ethics Conference, 27–29 Sept. 1995).

[105] *See supra* note 60 and accompanying text.

[106] *See infra* note 123 and accompanying text.

[107] Classic historical accounts are JOHN HIGHAM, STRANGERS IN THE LAND (2d ed. 2002); MILTON R. KONVITZ, THE ALIEN AND THE ASIATIC IN AMERICAN LAW (1946); RONALD TAKAKI, STRANGERS FROM A DIFFERENT SHORE (1989).

[108] The Acts, from earliest to the most recent, include: Act of May 19, 1921, ch. 8, § 2(a), 42 Stat. 5 (introducing numerical quotas for first time); Immigration Act of 1924, ch. 190,

different immigrant source countries, and it did so for the admitted purpose of minimizing the admission of southern and eastern Europeans, mainly Jews and Catholics.[109] History has not looked kindly upon those laws. In 1965, Congress replaced these national origins quotas with a single, uniform limit on the number of immigrants who may be admitted in a single year from a single country.[110] That change eliminated the explicit discrimination against natives of particular countries, but even a uniform per-country limit still subjects two otherwise similarly situated individuals to different waiting periods depending on whether their countries of origin send many or few immigrants to the United States. Thus any per-country limit, even if uniform, affects the ethnicity of the resulting population. The United States' "visa lottery" operates in a like manner.[111] After a series of ad hoc programs to admit immigrants from countries and regions that have sent relatively few immigrants to the United States in recent years,[112] Congress in 1990 enacted permanent legislation for the admission of so-called "diversity immigrants."[113]

Finally, even a facially geography-neutral law that places a high priority on family reunification significantly affects the country's ethnic makeup. Because recent immigrants will naturally be those most likely to have close family members overseas, prioritizing family reunification reinforces preexisting immigration patterns, thus influencing the resulting population mix.[114]

As the foregoing discussion illustrates, a country that wants to inject ethnic, racial, religious, or linguistic selectivity into its admissions policy has ways of doing so. The question for every nation is whether this is a good idea. Is cultural homogeneity, or alternatively is the replication of a country's historical or contemporary ethnic mix, a valid national goal? Conversely, is diversity a valid national goal, and if so, what kinds?[115]

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§ 11(a)–(b), 43 Stat. 153, 159 (modifying the quota formula and making the national origins system permanent); Act of Oct. 3, 1965, Pub. L. No. 89-236, 79 Stat. 911, 911–12 (repealing the national origins quota system).

[109] GORDON ET AL., *supra* note 45, § 2.02[2]; HIGHAM, *supra* note 107, at 265–72.

[110] Act of Oct. 3, 1965, Pub. L. No. 89-236, § 2, 79 Stat. 911, 911–12.

[111] *See About Green Card Lottery*, U.S.A. GREEN CARD LOTTERY, http://www.usagreencardlottery.org/about-green-card-lottery.jsp (last visited Dec. 6, 2012).

[112] *See* Immigration Amendments of 1988, Pub. L. No. 100-658, § 3, 102 Stat. 3908, 3908–09; Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, § 314, 100 Stat. 3359, 3439.

[113] Immigration Act of 1990, Pub. L. No. 101-649, § 132, 104 Stat. 4978, 5000 (codified as amended at 8 U.S.C. § 1153(c) (2006)).

[114] *See* STEPHEN C. LOVELESS ET AL., IMMIGRATION AND ITS IMPACT ON AMERICAN CITIES 19–45 (1996); Joseph A. Rodriguez, *Assessing and Predicting the Impact of Immigration on Communities*, H-URBAN (1997) (reviewing LOVELESS, *supra*), http://www.h-net.org/reviews/showrev.php?id=858.

[115] *See* SCHUCK, *supra* note 9, at 123–31.

F. Temporary Visitors

Aside from selecting permanent residents, immigration policymakers have to decide whom to admit for temporary periods. The usual categories include tourists, students, business visitors, temporary workers, and a variety of others, which could include journalists, diplomats, airline crews, and the like.[116] Decisions include not only which categories to admit, but also what specific eligibility requirements to impose, whether to prescribe numerical limits, how long each class of temporary visitors should be allowed to stay, what restrictions to place on their activities, including the conditions for allowing employment, and what sorts of visa regimes and other procedures to put in place.[117]

G. Exclusion Grounds

Apart from requiring certain positive credentials for each category of either permanent residents or temporary visitors, countries have to decide what factors will be disqualifying. Typical exclusion grounds relate to criminality, national security, inability to support oneself financially, public health, abuse of the immigration system itself, or simply the lack of essential documents.[118] Few will quibble with these general concepts, but the devil is in the details, and those details can generate some difficult issues. Precisely which crimes, or categories of crimes, will be grounds for exclusion? Will admissibility depend on the number of crimes committed, their classification as felonies or misdemeanors, the potential or actual sentences, the individual's age, or the timing of the offenses? How serious must be the threat to national security before that ground becomes applicable, and how can the law be articulated so as not to chill civil liberties? What income levels will be required? Which diseases, if any, will disqualify someone? What types of fraud should the system be designed to detect? Will these various exclusion grounds apply with equal force to individuals seeking permanent residence and those seeking only temporary stay or residence? Under what circumstances will administrative officials be authorized to grant discretionary waivers of the various exclusions?

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[116] Probably the most elaborate set of temporary visitor categories is that of the United States. The U.S. statute lays out twenty-two categories of "nonimmigrants" and breaks down most of them into subcategories, each with different conditions of stay. 8 U.S.C. § 1101(a)(15) (2006). The State Department regulations dissect those subcategories into even finer subcategories. 22 C.F.R. § 41.12 (2012).

[117] *See, e.g.*, RUTH ELLEN WASEM, CONG. RESEARCH SERV., RL 31381, U.S. IMMIGRATION POLICY ON TEMPORARY ADMISSIONS 1 (2011) (noting the "policy tensions" surrounding these decisions in the United States).

[118] In the United States, all these exclusion grounds are enumerated in 8 U.S.C. § 1182(a) (2006). The exclusion grounds adopted by each of the EU Member States are described throughout Adam & Devillard, *supra* note 13. Nationals of EU Member States and their family members, however, may be denied admission to other EU Member States only on narrow grounds. *See* Free Movement Directive, *supra* note 36, art. 27, § 1 (allowing exclusion only "on grounds of public policy, public security or public health").

H. Admission Procedures

Once admission criteria are adopted, what procedures should be created to implement them?[119] Who should be required to obtain visas, and precisely what documentation should those individuals have to present? What will be the role of immigration inspectors at ports of entry, both for individuals who have visas and for any who are exempted from that requirement? Will informal interviews, formal hearings, or both be available for people who are initially turned away at ports of entry? Will there be any formal appellate or review process by a specialized administrative tribunal, court of general jurisdiction, or both?

IV. OTHER DECISIONS

A. Integration

In my view, a successful immigration policy necessarily includes a comprehensive plan for integrating immigrants into the host society—economically, culturally, politically, linguistically, and in all other essential respects. Policymakers have to decide not only how to implement a plan for integration, but also what integration means. The latter inquiry requires decisions about multiculturalism. How much space should integration mechanisms leave for immigrants to retain their own cultural practices when those practices differ from fundamental traditions or values of the host society? In Europe, the debate over wearing Islamic veils in schools or other public places exemplifies this tension,[120] but the debate goes well beyond veil laws, to a broad range of cultural practices.

What specific elements should a comprehensive integration plan contain? In particular, what provision should be made for reuniting immigrants with their overseas family members?[121] How should the government encourage language instruction and facilitate access to it? Do the efforts by several European governments to bar access of family members until they have learned the country's language[122] facilitate or impede integration? To justify pre-entry language requirements for family members, governments have generally touted the benefits of easing the family members' social, cultural, and economic integration into the host society.[123] Opponents have emphasized the practical obstacles to pre-entry language acquisition, the resultant

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[119] Asylum and other refugee status determinations require special procedures. *See supra* notes 90–93 and accompanying text.

[120] *See generally* JOHN R. BOWEN, WHY THE FRENCH DON'T LIKE HEADSCARVES (2007).

[121] *See supra* Part III.B.

[122] *See* Kees Groenendijk, *Pre-Departure Integration Strategies in the European Union: Integration or Immigration Policy?*, 13 EUR. J. MIGRATION & L. 1, 3–4 (2011).

[123] *See id. at* 14 (describing Germany's rationale); Bernard Ryan, *Integration Rules in Immigration and Nationality Law: The Case of the United Kingdom*, CTR. FOR MIGRATION L. 3, 8 (2010), http://www.kent.ac.uk/law/research/documents/ryan-UK-final-1.pdf.

delays in family reunification, and the deleterious effects on the integration of the immigrant sponsors.[124] Should the government offer, or support efforts by the private sector to offer, job training? To what extent should immigrants be eligible for public assistance? Is eventual naturalization expected? Are there other things the host country can do, and which are in its interest to do, that would help immigrants and their families understand and adapt to critical cultural and democratic norms? Should a specialized government agency for immigrant integration be created?[125] If integration is to succeed, it should be a two-way street. Policymakers need to decide not only how to encourage immigrants to adapt to their new country, but also what kind of public education campaign about immigration and integration would benefit the host society.[126]

B. Illegal Immigration

Legal immigration aside, policymakers today need to estimate the extent and impact of illegal immigration and decide what policy responses are appropriate. Elsewhere I have attempted a more detailed examination of this large subject[127] and thus will confine the present discussion to a brief outline of the issues and the solutions commonly adopted or proposed.

The starting point is to assess the magnitude of the problem. This entails not only empirical investigation of the size, demographics, and tangible effects of illegal immigration (both positive and negative), but also subjective value judgments concerning the seriousness of those effects. A sense of proportion is critical. Has the phenomenon caused, or is it about to cause, the kind of crisis that demands draconian measures? Or, are the practical effects modest enough that less muscular responses are sufficient?

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[124] BOSWELL & GEDDES, *supra* note 35, at 109; Groenendijk, *supra* note 122, at 25–27 (urging the importance of family reunification despite capacity concerns).

[125] Portugal, known throughout Europe for its successful integration of immigrants, has created a government agency to create and administer its integration programs. Lucinda Fonseca et al., Migration Policy Grp., *Portugal*, *in* CURRENT IMMIGRATION DEBATES IN EUROPE 1, 25–28 (Jan Niessen et al., eds., 2005), http://www.migpolgroup.com/public/docs/141.EMD_Portugal_2005.pdf. These address issues of education, criminality, naturalization, health, housing, and free Portuguese language courses. *Id.*

[126] For thoughts on the two-way nature of the integration project in the U.S. context, see Juan F. Perea, *"Am I an American or Not?" Reflections on Citizenship, Americanization, and Race*, *in* IMMIGRATION AND CITIZENSHIP IN THE TWENTY-FIRST CENTURY 49, 65 (Noah M.J. Pickus ed., 1998) (arguing that American immigration policies should be reframed as a "reciprocal and mutual process of accommodation, rather than a one-way process of assimilation by immigrants"); Cristina M. Rodríguez, *Guest Workers and Integration: Toward a Theory of What Immigrants and Americans Owe One Another*, 2007 U. CHI. LEGAL F. 219, 247–57.

[127] *See* Stephen H. Legomsky, *Portraits of the Undocumented Immigrant*, 44 GA. L. REV. 65 (2009) [hereinafter Legomsky, *Portraits*] (relating fictional debate between scholars with polar opposite views on illegal immigration); Stephen H. Legomsky, *The Removal of Irregular Migrants in Europe and America*, *in* RESEARCH HANDBOOK ON MIGRATION AND INTERNATIONAL LAW (Vincent Chetail ed., forthcoming 2012) [hereinafter Legomsky, *Removal*].

The typical policy options either actually implemented or proposed can be thought of as falling into four categories. The most common set of approaches can be grouped under the heading of enforcement. These include border apprehensions, through such means as increased border patrol personnel,[128] physical barriers,[129] and more sophisticated border technology;[130] interior enforcement, such as prohibitions on hiring unauthorized workers,[131] workplace raids,[132] employer audits,[133] counterfeit-resistant immigration and identification documents,[134] national identity cards of the type that predominate in Europe,[135] and an electronic database of authorized workers.[136] A second set of strategies includes limited amnesties (which by definition would forgive the violations and withhold punishment) and legalizations (which would impose fines or other penalties as a condition of eligibility).[137] A third set of strategies, advocated by anti-immigrant organizations, has been dubbed "self-deport[ation]."[138] Recognizing

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[128] *See, e.g.*, Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 101, 110 Stat. 3009-546; Douglas S. Massey, *Beyond the Border Buildup: Towards a New Approach to Mexico-U.S. Migration*, IMMIGR. DAILY, http://www.ilw.com/articles/2006,0109-massey.shtm (last visited Dec. 6, 2012) (showing that enhanced border enforcement since 1986 has coincided with reduced apprehension rates and increased immigration).

[129] Act of Aug. 13, 2010, Pub. L. No. 111-230, 124 Stat. 2485; *see* Massey, *supra* note 128.

[130] Act of Aug. 13, 2010, 124 Stat. 2485.

[131] 8 U.S.C. § 1324a (2006).

[132] On April 30, 2009, U.S. Immigration and Customs Enforcement's Homeland Security Investigations (HSI) division established a revised worksite enforcement method. It focused on criminal prosecutions against employers that, among other activities, used unauthorized workers in their business model. In the 2011 fiscal year, HSI authorized more than 700 criminal arrests based on related investigations. *Fact Sheet: Worksite Enforcement*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT (May 23, 2012), http://www.ice.gov/news/library/factsheets/worksite.htm.

[133] Julia Preston, *Illegal Workers Swept from Jobs in 'Silent Raids,'* N.Y. TIMES, July 10, 2010, at A1.

[134] Illegal Immigration Reform and Immigrant Responsibility Act of 1996, § 104, 110 Stat. at 555–56.

[135] Within the European Union, residents of Member States are authorized to cross the border of a Member State upon presenting a valid passport or residence permit issued by a Member State. *Commission Recommendation Establishing a Common 'Practical Handbook for Border Guards (Schengen Handbook)' to Be Used by Member States' Competent Authorities when Carrying Out the Border Control of Persons* § I.3, COM (2006) 5186 final (Nov. 6, 2006).

[136] For example, E-Verify is a government-maintained electronic database designed to store the names and social security numbers of all individuals—U.S. citizens and noncitizens alike—who are authorized to work in the United States. *E-Verify*, U.S. CITIZENSHIP AND IMMIGR. SERVICES, http://www.dhs.gov/e-verify (last visited Dec. 6, 2012). The origins of E-Verify are in the Basic Pilot Program mandated by IIRIRA. *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996, §§ 401–404, 110 Stat. at 655–65.

[137] *See* S. 1639, 100th Cong. § 601(a), (e)(5) (2007) (providing for a $1500 penalty for applying for immigration status).

[138] *See* Legomsky, *Portraits*, *supra* note 127, at 103 & n.102 (describing the policy, "attrition through enforcement," advanced by the Center for Immigration Studies (CIS)).

the near impossibility of locating, apprehending, and removing an entire population by physical force, they aim to make the lives of undocumented immigrants so unsustainable that they will return home on their own.[139] A final set of strategies might attempt to deter illegal immigration by offering positive alternatives, such as helping to stimulate the economies of major source countries,[140] encouraging improvement of human rights conditions in major source countries, enforcing domestic labor laws so as to diminish employer incentives to exploit—and therefore to hire—unauthorized labor, and expanding the opportunities for legal immigration under family reunification and labor migration programs.[141]

C. Expulsion

The flip side of the admission coin, and one of the policy responses to illegal immigration, is deportation. What should the grounds for deportation be?[142] What circumstances justify exceptions to those grounds, or at least the possibility of discretionary waivers?[143] And importantly, what procedures should deportation require? For example, should there be formal hearings, appeals, or a right of judicial review?[144]

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[139] *See generally* Kris W. Kobach, *Attrition Through Enforcement: A Rational Approach to Illegal Immigration*, 15 TULSA J. COMP. & INT'L L. 153 (2008) (advocating attrition through enforcement).

[140] In recent years, the combination of a worsening U.S. labor market and a growth in job opportunities in Mexico has drastically reduced the volume of illegal immigration into the United States. Damien Cave, *Better Lives for Mexicans Cut Allure of Going North*, N.Y. TIMES, July 6, 2011, at A1.

[141] *See generally* Legomsky, *Portraits*, *supra* note 127; Legomsky, *Removal*, *supra* note 127.

[142] In the United States, the grounds for removing noncitizens from the interior appear in 8 U.S.C. § 1231(a) (2006), and fall into roughly the same categories as the analogous exclusion grounds in 8 U.S.C. § 1182(a) (2006). In the EU, each Member State has its own removal grounds, but for irregular migrants the EU has adopted some common ground rules. *See* Council Directive 2008/115, 2008 O.J. (L 348) 98 (EU) [hereinafter Return Directive] (establishing common standards and procedures in Member States for returning illegally staying third-country nationals).

[143] The U.S. statute contains numerous waiver provisions that generally authorize discretionary relief from specified removal grounds in specified circumstances, such as long-term presence, family separation, or other unusual hardship. *See, e.g.*, 8 U.S.C. § 1158 (2006) (asylum); *id.* § 1182(h) (waiver of certain criminal grounds); *id.* § 1182(i) (waiver of fraud grounds); *id.* § 1229b (cancellation of removal); *id.* § 1255 (adjustment of status). In the EU, the Return Directive simply authorizes relief "for compassionate, humanitarian or other reasons." Return Directive, *supra* note 142, art. 6, § 4.

[144] In the United States, the general removal process includes a quasi-formal, adversarial, evidentiary hearing before an executive branch official known as an "immigration judge." *See* 8 U.S.C. § 1229a (2006). Either the noncitizen or the government may appeal to an administrative tribunal called the Board of Immigration Appeals. 8 C.F.R. § 1003.1(b)(3) (2012). The noncitizen also has a right to petition for review in the relevant U.S. Court of Appeals, although the availability of judicial review is now subject to broad exceptions. 8 U.S.C. § 1252(a) (2006). The individual EU Member States generally have their own removal procedures, but

Under what circumstances will individuals be detained during all or part of the removal process?[145] Should there be a right to counsel for some or all cases, and if so, should the government ever be required to supply counsel to indigent individuals in deportation proceedings—for example, those in which the individual is a permanent resident or seeks asylum?[146] Are there circumstances in which accelerated or other exceptional deportation procedures are warranted?[147] What adaptations will be made in cases where national security concerns are present?[148] When will otherwise deportable individuals be allowed to depart voluntarily in lieu of removal?[149]

D. Who Decides?

Superimposed on all the issues discussed to this point—and anterior to resolving them—is the "who decides?" question. This question has several dimensions. If the country is part of one or more larger associations such as the European Union or the Council of Europe, what is the optimal allocation of power between the supranational association and the individual Member States?[150]

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the Return Directive guarantees a right of appeal or review. Return Directive, *supra* note 142, art. 15.

[145] U.S. law makes liberal use of pre-removal detention. *See, e.g.*, Legomsky, *supra* note 89, at 533–35. EU law, in contrast, allows detention only for the purpose of carrying out the removal of an individual who impedes return or is at risk of absconding. Return Directive, *supra* note 142, art. 15. Even then, there must be no less coercive means, there must be a "reasonable prospect of removal," and specified procedural safeguards must be provided. *Id.*

[146] In the United States, a noncitizen in removal proceedings has a statutory right to counsel, but not at the government's expense. 8 U.S.C. §§ 1229a(b)(4)(A), 1362 (2006). In the EU, access to legal assistance is required in asylum cases. Return Directive, *supra* note 142, art. 13.

[147] The United States has established several special accelerated removal procedures; the most important is expedited removal, which ordinarily takes place at ports of entry but, in certain limited circumstances, may also be utilized in the interior. *See* 8 U.S.C. § 1225(b) (2006). Many of the EU Member States have also adopted accelerated removal procedures, particularly for irregular migrants apprehended in the border areas. *Evaluation of EU Readmission Agreements*, at 12, COM (2011) 76 final (Feb. 23, 2011).

[148] U.S. law makes a number of adjustments in national security cases, most of them adopted in specific response to the attacks of September 11, 2001. *See* LEGOMSKY & RODRÍGUEZ, *supra* note 54, ch. 10 (summarizing special procedures designed specifically for immigration cases that potentially present national security issues). In sharp contrast, the EU's Return Directive offers few exceptions relating to national security. *See, e.g.*, Return Directive, *supra* note 142, art. 7, § 4 (authorizing Member States to avoid granting voluntary departure when a person poses a national security risk); *id.* art. 12.1 (excusing Member States from giving reasons for return decisions to safeguard national security).

[149] EU law strongly encourages voluntary departures in lieu of forcible returns. Return Directive, *supra* note 142, pmbl. para. 10, art. 7. U.S. law grants a circumscribed discretion to allow voluntary departure in specified circumstances, which vary depending on the stage of the proceeding. 8 U.S.C. § 1229c (2006).

[150] *See generally* BOELES ET AL., *supra* note 33 (examining the ways in which the European States have assigned the various immigration-related responsibilities).

Whichever decisions the country chooses to reserve for itself, how will the powers be allocated internally? That inquiry, in turn, has multiple components. If the country is a federation, how should immigration policy discretion and implementation be apportioned as between the national government and its political subdivisions? The U.S. Supreme Court has long held that the federal government has the exclusive power to regulate immigration,[151] but drawing a clear line between regulating immigration and regulating the daily lives of immigrants has proved challenging, and today the state-federal division of immigration policy in the United States is the subject of vigorous debate.[152] In some other federations, immigration policymaking is shared by the national government and its political subdivisions.[153]

Whether a State is federal or unitary, every democracy will have to make some key separation of powers decisions. How should immigration policy discretion be allocated between the legislative and executive branches—in presidential systems of government, in Westminster-type parliamentary systems, and in other types of parliamentary democracies?[154] In practical terms, this entails determining which decisions should be embodied in statutes and which ones should be left to administrative regulations or other governmental pronouncements.

Finally, within the executive branch, how should the agencies that perform the various functions be organized? Should immigration be assigned to the department in charge of justice or home affairs, to the department that regulates labor, to the State Department or Foreign Affairs Ministry, or to the department responsible for national security? Moreover, should all the immigration functions reside in the same

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[151] Chae Chan Ping v. United States (*The Chinese Exclusion Case*), 130 U.S. 581 (1889); Chy Lung v. Freeman, 92 U.S. 275 (1876).

[152] For commentary favoring a broad state role in regulating immigration, see Cristina M. Rodríguez, *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. 567 (2008); Peter H. Schuck, *Taking Immigration Federalism Seriously*, 2007 U. CHI. LEGAL F. 57; Peter J. Spiro, *The States and Immigration in an Era of Demi-Sovereignties*, 35 VA. J. INT'L L. 121 (1994). For commentary urging more limited state involvement, see Gerald L. Neuman, *Aliens as Outlaws: Government Services, Proposition 187, and the Structure of Equal Protection Doctrine*, 42 UCLA L. REV. 1425 (1995); Michael A. Olivas, *Immigration-Related State and Local Ordinances: Preemption, Prejudice, and the Proper Role for Enforcement*, 2007 U. CHI. LEGAL F. 27 (arguing that state, county, and local ordinances regulating general immigration are unconstitutional on federal preemption grounds in the context of immigration and nationality); Michael J. Wishnie, *Laboratories of Bigotry? Devolution of the Immigration Power, Equal Protection, and Federalism*, 76 N.Y.U. L. REV. 493 (2001) (arguing for heightened judicial scrutiny of state action in the immigration context).

[153] *See, e.g.*, Liston & Carens, *supra* note 60, at 207, 213–14; Bosswick, *supra* note 61, at 107, 131–32.

[154] Generally, parliaments have delegated far more policy discretion to their respective governments than has the U.S. Congress, which has filled the governing statute with minutely detailed rules. STEPHEN H. LEGOMSKY, IMMIGRATION AND THE JUDICIARY: LAW AND POLITICS IN BRITAIN AND AMERICA 259–61 (1987).

department or unit, or is it better to disperse the officials in charge of service, enforcement, and adjudication?[155]

E. Country-Specific Twists

Supplementing the universal issues are the country-specific variety. The latter issues might be unique, or they might be shared by some other nations. Thus, every Member State of the European Union faces issues that arise out of the principles of freedom of movement, Schengen's abolition of internal borders, and the common delegations of power to central EU authorities.[156] Former colonial powers might feel special obligations, and thus offer preferential immigration privileges to the current nationals of their former colonies.[157]

Many nations are unique or at least distinctive in still other ways. Countries such as the United States, Australia, and New Zealand might stand out as attractive because their economies are dramatically better than those of most—or all—of their regional neighbors.[158] Some countries stand out because of geography. Their locations make them convenient destinations for immigrants and asylum seekers. Examples include countries situated on the periphery of the European Union.[159] Still other countries might be desirable destinations because they are democracies surrounded by autocratic States

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[155] In the United States, the various immigration functions were reorganized in the wake of the September 11, 2001, terrorist attacks. Today, the functions that could be roughly classified as service, border enforcement, and interior enforcement are lodged in three different government agencies, though all are within the Department of Homeland Security: U.S. Citizenship and Immigration Services (USCIS), Customs and Border Protection (CBP), and Immigration and Customs Enforcement (ICE). 72 Fed. Reg. 20,131, 20,131 (Apr. 23, 2007). Formal adjudication takes place within a separate agency, the Executive Office for Immigration Review, situated in the Department of Justice. 8 C.F.R. § 1003.0 (2012).

[156] *See generally* BOELES ET AL., *supra* note 33 (discussing evolving trends in European migration after the formation of the EU).

[157] *See, e.g.*, Adam & Devillard, *supra* note 13, at 384, 390 (describing the Portuguese government's preferential treatment for nationals of Cape Verde and Brazil).

[158] *See generally World Factbook: Country Comparison: GDP—Per Capita (PPP)*, CENT. INTELLIGENCE AGENCY, https://www.cia.gov/library/publications/the-world-factbook/rankorder/2004rank.html (last visited Dec. 6, 2012) (listing gross domestic product per capita on a purchasing power basis of each nation).

[159] *See, e.g.*, Reinhard Marx & Katharina Lumpp, *The German Constitutional Court's Decision of 14 May 1996 on the Concept of 'Safe Third Countries'—A Basis for Burden-Sharing in Europe?*, 8 INT'L J. REFUGEE L. 419, 434–38 (1996) (describing disproportionate reception of asylum seekers by countries of southern and eastern Europe). Today, the southern European countries voice particular concerns over the arrivals of North Africans fleeing the tumultuous conditions arising out of the Arab Spring. *See, e.g.*, Sabina Castelfranco, *Italian Island Crowded by North African Refugees*, VOICE OF AM. (Mar. 4, 2011), http://www.voanews.com/english/news/africa/Italian-Island-Crowded-by-North-African-Refugees-117464783.html (describing arrivals on Italy's Lampedusa Island).

that deprive their populations of basic human rights. A State such as Israel shares some of these characteristics and has the additional distinction of having been founded specifically as a safe haven for Jews, a mission that immensely complicates its immigration policy decisions.[160]

CONCLUSION

After this whirlwind tour of the major issues that immigration policymakers the world over have to address, the question remains: what does it all add up to? On the one hand, universal issues abound. In resolving them, policymakers everywhere can learn valuable lessons from both the successes and the failures of other countries' experiences. On the other hand, whether issues are universal or host country–specific, their resolutions necessarily reflect the country's own distinctive characteristics—its history, missions, culture, values, national ethos, economy, and security. Subject to human rights and other international legal constraints, these are the kinds of decisions that only the nation's own people, acting through their elected leaders, have the moral standing to make.

As they train one eye on the prodigious long-term practical consequences of the immigration policy that they construct, policymakers should train the other eye on the symbolic effects. An immigration law makes an announcement: it says "these are the people we will welcome as our fellow residents and neighbors; those are the people we will not." In making that statement, an immigration law acts as a mirror. It reflects the qualities that we value or reject in others. For the same reason, immigration policies supply a litmus test. They offer the world a glimpse into our souls, an insight into what we truly believe.

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[160] Avineri et al., *supra* note 1, at 10.