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Racial Disparity: The Unaddressed Issues of the Simpson-Mazzoli Bill

Bill Ong Hing*

I
INTRODUCTION

The Immigration Reform and Control Act of 1982, the Simpson-Mazzoli Bill, was touted by its sponsors as the most sweeping immigration proposal in 30 years. Introduced in March 17, 1982, the bill stirred up great controversy which lasted until its death in the House of Representatives during the lame-duck session of Congress even though the Senate had approved the bill during the summer by a lopsided margin of 80-19.

In spite of the failure of the 97th Congress to enact immigration legislation it appears that new legislation will be introduced again. [Editors note: The bill was reintroduced on February 22, 1983.] The Senate vote indicates that there is great support for some of the provisions in the Simpson-Mazzoli Bill, particularly those dealing with employer sanctions, temporary workers, restriction of certain immigrant relative categories, and implementation of a limited legalization program for undocumented aliens. What is alarming about such support is the racially disparate impact that such laws would have on Hispanic and Asian com-

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2. The sponsors of the bill were Senator Alan K. Simpson (R-Wyoming) and Representative Romano L. Mazzoli (D-Kentucky), Chairman of the Congressional subcommittees on Immigration, Refugees and International Law.

3. Opposition to the bill was spearheaded by Hispanic groups such as the Mexican-American Legal Defense and Educational Fund (MALDEF), and other national groups, including the American Civil Liberties Union. Hernandez, Letter to Editor, Immigration Bill Has Personal Roots, N.Y. Times, Aug. 11, 1982, at A18, col. 4.

4. S.2222, supra note 1.
munities in the United States.  

Before discussing this impact, and the larger policy issues regarding immigration to the United States, it would be wise to reflect upon our past immigration experiences. A look at the Asian experience shows that immigration policies are to a large degree shaped by racial attitudes. Sadly, the shameful history of blatant discrimination has resurfaced with new life and little subtlety against Mexicans.

Following the historical review comes a discussion of the Simpson-Mazzoli Bill. The final section discusses several substantive areas that Simpson-Mazzoli failed to address, but which badly need reform.

II

THE ASIAN EXPERIENCE

A. Pilipinos

Pilipino immigrants were first recruited and imported between 1900-1934 to work on farms in Hawaii and California. More than 100,000 Pilipino workers—able-bodied single, young males—were recruited for the pineapple and sugar cane plantations of Hawaii and the citrus and vegetable farms of California. Foreigners by language and custom, Pilipinos were easily exploited by labor camp owners and faced widespread hostility. Anti-Pilipino riots led to 1934 exclusion laws which provided for an immigration quota of 50 Pilipinos each year.

World War II created a different need for Pilipino manpower; the need for soldiers in the Pacific. Thousands of Pilipinos enlisted to fight for the United States. While the United States made great efforts to naturalize natives of Iceland, England, and other countries as a reward for serving the United States, it made it almost impossible, administratively, for Pilipinos to become naturalized. Subsequent court challenges to this deliberate exclusion have by and large proven fruitless for Pilipino War Veterans. The Supreme Court has held that the government's failure to naturalize these valiant men who were eligible was not "affirmative misconduct", (a finding that was necessary to preclude the government

5. See pt. IV, infra.
7. Id. at 31.
8. Id.
9. Id.
10. Olegario v. United States, 629 F.2d 204 (2d Cir. 1980).
12. Hibi, 414 U.S. 5 (1973) (naturalization denied); Olegario, 629 F.2d 204 (2d Cir. 1980). But see Matter of Naturalization of 68 Pilipino War Veterans, 406 F. Supp. 931 (N.D. Cal. 1975) (naturalization granted to those veterans who could show actual filing of applications or letters of inquiry prior to the cut-off date).
from pleading estoppel).  

Furthermore, under the Philippine Independence Act of 1934 Pilipinos had lost their status as United States nationals. Thus, despite being actively recruited for farm laborers, Pilipinos were now subject to deportation proceedings.  

In recent years Pilipino immigrants and nonimmigrants have been one of the most poorly treated groups of persons at Immigration and Naturalization Service offices (hereinafter INS). The general demeaning attitude of immigration investigators, examiners, and clerical staff towards Pilipinos has been the most troubling aspect of practice for many practitioners in the field of immigration law. Most investigators and examiners lack sensitivity towards persons from the Philippines. As a group, natives of the Philippines are distrusted and interrogated more intensively by immigration inspectors at the airport. In visa cases involving marriages, where one party is from the Philippines, the parties are subjected to exhaustive questioning by examiners far beyond the already humiliating standards of examinations conducted in most marriage cases. Often as a matter of discretion in visa and citizenship cases, further investigation is requested of the United States Consul in Manila—a move that alone creates an additional 6 to 12 months delay. As a general rule the validity of Philippine documents is questioned, and even in many deportation hearings, further independent corroborative evidence is required beyond that required of non-Pilipinos. One Immigration Judge said on the record, “By now, everyone dealing with such matters is well aware that aliens from the Philippines will engage in any fraud to get here and will do anything to stay.”  

A shocking example of exploitation of Pilipino non-immigrants surfaced in 1977, when it was revealed that exchange students from the Philippines were being mistreated by sponsoring American farmers.

The program, sponsored by the National 4-H Club Foundation, and approved by both the State Department and the INS, was billed as an agricultural education program for hundreds of top students from the Philippines. In fact, what the program amounted to for most students was experience as cheap farm laborers. Poor working conditions and substandard housing were the rule. One trainee was forced to live in a converted chicken coop with only a bucket for a toilet and a pan of heated water for his bath. Another took turns sleeping with the pigs two or three times a week to care for farrowing sows. After two years in this training program, one Pilipino received a lump sum paycheck of $135.80.

B. Japanese

Although there is no record of immigration from Japan until 1861, more than a quarter-million Japanese had immigrated by 1930. Japanese in the U.S. today represent the largest Asian American subgroup. From the beginning the Japanese immigrants have struggled against the racist attitudes of the white community. Labeled as unsuited for assimilation, they faced anti-Japanese riots, job discrimination, and discriminatory immigration statutes. During World War II, President Roosevelt ordered the internment of 110,000 West Coast Japanese Americans—most of whom were U.S. citizens. Along with their personal freedom went their property rights, and the Supreme Court rejected the pleas of these citizens with little difficulty. Recent Congressional findings on the injustices faced by the internees resulted in no recommendations for monetary reparations for those affected.

C. Chinese

In 1882, Congress passed immigration laws excluding convicts, lunatics, idiots and Chinese. There is a long infamous history of anti-Chinese laws in the social as well as immigration system of the United States. Chinese were precluded from citizenship. Their wives and daughters could not immigrate, a prohibition which is viewed by some

20. See also Meibert, 4-H Is the Target, Oakland Tribune, Aug. 4, 1977, at 8E, col. 1.
23. See 323 U.S. at 223. The action was upheld as “proper security measures” in light of the “military urgency of the situation.”
as a genocidal act aimed at the Chinese. 27 Only sons of U.S. natives could immigrate, and employment discrimination was the rule. 28

Another aspect of this disparate treatment was the difference in the screening locations for the Chinese. Europeans had their Ellis Island, but the Chinese were kept at the Angel Island known to them simply as "the Island" because it was "no place for angels." 29 For most it was an agonizing one to six months of prison-like isolation and grueling interrogation, not knowing whether they would be admitted or turned back. 30 Between 1910 and 1940, the Island, located in the middle of San Francisco Bay, was used as an immigration station where approximately 50,000 Chinese were confined while the U.S. government decided whether to admit them or not.

Due to an historical lack of birth and marital records in mainland China, Chinese in the United States today seeking to be reunited with family members abroad experience considerable difficulties in petitioning for their relatives. For most non-Chinese, the process is simple. If the relative abroad is one who falls under an immediate relative or preference category, a petition is filed at INS with evidence of that relationship, i.e., birth certificates, marriage certificates, family registries. 31 The processing time varies from district to district, however, an interview is required in only the most unusual cases. 32

In contrast, when a Chinese person files such a petition, a long list of "secondary" evidence of the relationship must be submitted to INS in its support, or else the petition will be returned. Additionally, interviews are as a rule required in Chinese petition cases. This results in an added delay in processing time of from six to eighteen months. If secondary evidence is not available, the Chinese petitioner is usually effectively barred from reunification with the relative abroad.

The secondary evidence required usually takes the form of photographs, old correspondence, school records, money receipts, affidavits, blood tests, and old Hong Kong documents if Hong Kong was ever a place of residence. The burden to produce this evidence has always fallen on the shoulders of the petitioner who, by the nature of the requirements, is expected to exhibit pack rat characteristics. More often than not, the

27. Id. See also Hune, U.S. Immigration Policy and Asian Americans: Aspects and Consequences, Civil Rights Issues of Asian and Pacific Americans: Myths and Realities, supra note 16 at 285.
32. Id. at §§ 4.19-4.20.
petitioner is advised to correspond with the relative abroad and to re-
quest the relative to obtain documents in China. The request is extreme-
ly unreasonable and unfair given the fact that most of those relatives
remain in small villages and are not particularly mobile or familiar with
formal documents.

Normalization with mainland China has not, for the most part, al-
leviated the problems. The large numbers of recent immigrants from
China are generally persons who have been beneficiaries of approved pe-
titions for ten to fifteen years. Many thousands were permitted out of
China immediately after normalization but are now stranded in Hong
Kong because of the terrible backlogs that have been created for natives
of China. Ironically, after normalization occurred, certain documents
of the local commune authorities which had theretofore been unques-
tionned by U.S. authorities, were suddenly being distrusted, and authen-
tication by U.S. officials in China was required even though their offices
were not fully operative. Similarly, there are reports that the local
commune officials will not provide the documents requested unless ap-
proval has been granted by U.S. immigration officials. However, as men-
tioned above, INS often conditions its approval on the receipt of the
requested Chinese document.

The secondary evidence situation is fraught with inconsistencies.
INS examiners themselves cannot give a definitive list of what will be
required of petitioners. Policies with respect to document requirements
vary from week to week. The disorderly effect is hard on the petitioners
who are left in a constant state of confusion over what will be acceptable
as sufficient secondary evidence of relationship. The only certainty is
that a Chinese petition will take more time to process than most others.

D. Exclusion of Elderly Asian SSI Recipients

A situation which developed in the summer of 1978 serves as an
excellent example of a present INS policy which discriminates solely
against Asians as a matter of discretion.

In August of 1978, immigration inspectors in Honolulu began a
systematic interrogation of returning elderly Asians who were lawful
permanent resident aliens of the United States. The interrogation in
Honolulu has gone far beyond the customary questioning as to purpose
and length of stay abroad. Rather, it focuses on whether or not such
Asians are or have ever been recipients of Supplemental Security Income

35. See generally, Hing, supra note 16 at 299-300.
36. Green Card Asians on SSI Face Exclusion, East/West Newspaper, Feb. 21, 1979, at 3;
Lawyers Guild, supra note 16, § 5.2.
(SSI) public assistance benefits.\textsuperscript{37} SSI is a subsistence program for the elderly and disabled needy made available to citizens and lawful resident aliens alike.\textsuperscript{38} If SSI has ever been received by the returning alien, immigration inspectors take possession of the person's alien card and passport, and instruct the person to report for further inspection and interrogation in the INS district office of residence, e.g., Los Angeles, San Francisco, Seattle, San Diego, Boston.\textsuperscript{39} At the subsequent inspection, these elderly Pilipinos, Chinese, Koreans, and Japanese are informed that they are excludable from the United States under section 212(a)(15) of the Immigration and Nationality Act (hereinafter Act) as "public charges." They are generally given three alternatives: go back to their native country, request an exclusion hearing, or terminate SSI benefits and post a public charge bond of $5,000.\textsuperscript{40}

Note that the INS is dealing here with returning lawful permanent resident aliens and not with first-time immigrants or with undocumented aliens.\textsuperscript{41} The supposed authority for INS to reimpose the public charge grounds for exclusion each and every time a lawful alien reenters the United States stems from a concept termed the "reentry doctrine." However, the reentry doctrine has traditionally been used to exclude returning criminals, subversives and other undesirables, and has not been used under modern immigration laws to exclude returning resident aliens who have sought public assistance.\textsuperscript{42} It is merely an arbitrary policy on the part of INS instituted in the summer of 1978.\textsuperscript{43}

In the more than 500 reported cases, there has been no question that the person had a right to apply for and to receive SSI under Social Security Administration regulations.\textsuperscript{44} There have been no allegations of fraud.\textsuperscript{45} It is equally clear that if these persons had not proceeded abroad, they could not have been deported under section 214(a)(8) of the Act.\textsuperscript{46}

\textsuperscript{37} Green Card Asians, supra note 36; Schwenke, Immigration Lowers the Boom on 81-year-old Isle Widow, Honolulu Advertiser, June 7, 1979 at A-3, col. 1.
\textsuperscript{39} Schwenke, supra note 37.
\textsuperscript{40} INS Guidelines for SSI Takers, Philippine News, June 16-22, 1979, at 1.
\textsuperscript{42} See Gordon & Rosenfield, supra note 26, § § 2.3e, 2.4a, 2.19.
\textsuperscript{43} See Hing, supra note 16, at 293-294.
\textsuperscript{44} Moratorium Sought on Honolulu SSI Cases, Ang Katipunan, Aug. 15-31, 1979 at 9.
\textsuperscript{45} Id.; Schwenke, supra note 37; Glauberman, supra note 41.
\textsuperscript{46} Immigration and Naturalization Act § 241(a)(8) provides in pertinent part:

An alien ... shall ... be deported who ... has within five years after entry become a public charge from causes not affirmatively shown to have arisen after entry.

In order to be deported under this section there must be a demand for repayment and a failure to repay before deportability can be established. Matter of B, 3 I. & N. Dec. 323, 324 (1948). However, SSI rules contain no provisions for such repayment demands. 42 U.S.C. § 1381; 20 C.F.R. 416.
Under SSI rules, recipients are permitted to leave the country for periods up to 30 days without affecting SSI eligibility and, indeed, in many instances the persons have been informed by Social Security representatives prior to departure that there was nothing to worry about. However, these persons have unwittingly walked into the trap of the reentry doctrine—a trap never previously set for lawful permanent residents receiving public assistance.

Although former INS Commissioner Castillo issued guidelines in May of 1979 to deal with these cases on a more humane level, and one such alien has successfully appealed his case to the Board of Immigration Appeals, the guidelines and recent case have been ignored by immigration officials in Honolulu where the root of the problem exists. The harassment of elderly Asians continues there while such questioning has not been directed to other immigrants at other ports, and in spite of some success by such aliens in administrative exclusion hearings.

As previously noted, this procedure marks a sharp change from previous INS policy throughout the country. This simply has never been done before, and even today is not happening in other parts of the country. Because most lawful permanent resident Asian travelers return through Honolulu, the impact of the new policy has fallen squarely on elderly Asians only. The action has caused great alarm in Asian communities throughout the United States, and the action is outrageous when viewed as another extension of the infamous exclusion laws of the past directed at Asians. The racial lines have been sharply defined by the port at which this policy is being effectuated. The exclusion of elderly Asian SSI recipients is a vivid example of selective racial enforcement.

III
A SUMMARY OF THE MEXICAN EXPERIENCE

The analogies with the Mexican experience are clear. Exploitation of workers, prevention of family reunification, and even incarceration similar to Angel Island at various INS Detention Centers exist.

Immigration from Mexico to the United States, even well into the

52. See Hing, supra note 16, at 293-294.
53. See Bone, supra note 50; Schwenke, supra note 37; Glauberman, supra note 41.
Twentieth Century, was largely unrestricted numerically.55 But as soon as economic, social, and political pressures in Mexico forced large migration, the restrictions fell quickly and heavily. In 1953-54 INS authorities, in one of their most infamous examples of human rights and due process violations, conducted “Operation Wetback” which resulted in the deportation of over a million undocumented workers from Mexico and even some United States citizens of Mexican descent.56

Between 1965 and 1976, while the rest of the world enjoyed an expansion of numerical limitations and a definite preference system, Mexico and the Western Hemisphere were suddenly faced with numerical restrictions for the first time.57 Additionally, while the first-come, first-served basis for immigration sounded fair, applicants had to meet strict labor certification requirements.58 Of course, waivers of the labor certification requirement were obtainable for certain applicants, e.g., parents of U.S. Citizen children.59 As one might expect given the new numerical limitations, by 1976 the procedure resulted in a severe backlog of approximately three years and a waiting list with nearly 300,000 names.60

During the 1965-76 experience, two noteworthy things happened. First, Mexicans used about 40,000 of the Western Hemisphere’s allocation of 120,000 visas annually.61 Secondly, during this 11-year period, the State Department wrongfully subtracted approximately 150,000 visas from the Western Hemisphere quota and gave them to Cuban refugees.62

At any rate, in 1977 Congress imposed the preference system on Mexico and the Western Hemisphere along with a 20,000 visa per country numerical limitation.63 Thus Mexico’s annual visa usage rate was virtually cut in half overnight, and thousands were left stranded on the old system’s waiting list.64 The 11-year misallocation of visas to Cuba eventually led to the permanent injunction and a “recapturing” of the wrongfully issued visas in Silva v. Levi.65 However Mexicans again received the

56. See Lawyers Guild, supra note 16, § 2.4; Gordon & Rosenfield, supra note 26, § 6.9; The Tarnished Golden Door, supra note 54 at 11.
57. See Gordon & Rosenfield, supra note 26, § 1.4c.
58. Id.
59. Id.
60. Memorandum for the Associate Attorney General, Re: Allocation of Visas under Silva v. Levi, Deputy Assistant Attorney General, Office of Legal Counsel, Department of Justice, 3 (May 15, 1978).
61. See The Tarnished Golden Door, supra note 54, at 12; Silva v. Bell, 605 F.2d 978, 980-982 (7th Cir. 1979).
62. Gordon & Rosenfield, supra note 26, § 7.9e.
64. Silva v. Bell, 605 F.2d at 980-982.
short end of the stick when the State Department's formula for reallocation, which failed to provide sufficient visas for thousands of Mexicans on the Silva waiting list, was upheld. 66 As a result, in February 1982, INS authorities began to round up those Silva letter recipients that had not been accorded immigrant visa numbers in order to advise them of the termination of the Silva injunction against their deportation and the end of their work authorization that flowed from their Silva letter class status. The recipients were further informed that unless provisions of the existing immigration law qualified them to remain in the United States, they would have thirty days for voluntary departure. 67 Because of the public outrage, the INS as of August 20, 1982, ceased to enforce departure in cases involving former Silva letter recipients subject to deportation or exclusion proceedings. 68 However on February 1, 1983, the Enforcement Branch of the INS ordered the resumption of processing Silva letter recipients. 69

To make matters worse, in the first year of the preference system and 20,000 limitation on countries of the Western Hemisphere, Mexico lost 14,000 visas due to what can generously be labelled a congressional oversight. 70 The enactment date of the new law was January 1, 1977. However since the government's fiscal year runs from October 1 to September 30, the amendments did not become effective until after one full quarter of fiscal year 1977 had expired. 71 During that first quarter, 14,203 visas were issued to Mexicans pursuant to the immigration system which prevailed in the Western Hemisphere before the new law became effective. The State Department nevertheless charged those visas against the newly-imposed national quota of 20,000, leaving only 5797 visas available for Mexican immigrants between January 1 and September 30, 1977. 72 In De Avilia v. Civiletti, 73 the Seventh Circuit Court of Appeals sustained the State Department's approach even though it was "obvious that Congress . . . through inadvertence failed to inform the State Department how to administer during a fraction of the fiscal year a statute designed to apply on a full fiscal year basis." 74

66. 605 F.2d 978.
67. Memorandum from E. B. Duarte, Jr., Director, Outreach Program, Central Office Immigration and Naturalization Service, To Outreach Centers, Subject: Silva Case Update (Questions/Answers) (February 19, 1982).
69. Memorandum from E. B. Duarte, Jr., Director, Outreach Program, Central Office Immigration and Naturalization Service, To Outreach Centers, Subject: Silva Update (February 3, 1983).
71. Id. at 472.
72. Id.
73. Id. at 471.
74. Id. at 476.
The result on Mexican immigration since the 1977 imposition of the preference system and 20,000 visa limitation is not surprising. Mexico and Asian countries share the largest backlogs in family reunification categories. For example, the category for spouses and unmarried children of lawful permanent residents (Second Preference) is backlogged more than nine years. Brothers and sisters of United States citizens (Fifth Preference), a category which was attacked by Simpson-Mazzoli, must wait at least five years if they are from Mexico. Married sons and daughters of United States citizens (Fourth Preference) from Mexico must wait more than four years.

A year ago, Mexicans were the victims of highly publicized INS raids reminiscent of “Operation Wetback” and of raids directed at Chinese and Japanese in the past. In what the INS labeled “Operation Jobs” during the week of April 26, 1982, 5000 people of primarily Hispanic appearance were arrested in nine metropolitan areas across the country. Critics of the raids charged that the operation was directed at Mexicans, whipped up anti-alien hysteria and caused much fear in the Latino community, but did not provide jobs for native-born citizens. Curiously, the “Operation Jobs” was timed during the same week that the Simpson-Mazzoli Bill was being marked up in the Senate subcommittee on Immigration. The raids also coincided with Congress’ consideration of additional funds for the INS.

“Operation Jobs” merely highlighted what has been going on for many years. A review of litigation initiated long before the April 26 operation indicates that the INS has long focused its sweeps on persons of Hispanic descent. In fiscal year 1977, for example, of the deportable aliens arrested, more than 90 per cent were Mexican. Operations and facts such as these clearly illustrate the anti-Mexican enforcement sentiment of the INS.

76. Id.
77. Id.
78. Id.
81. See Castro, supra note 79.
82. Id.
83. See, e.g., ILGWU v. Sureck, 681 F.2d 624 (9th Cir. 1982); Illinois Council v. Pilliod, 531 F.Supp. 1011 (N.D. Ill. 1982).
IV
RACIALLY DISPARATE PROVISIONS OF SIMPSON-MAZZOLI

A. Employer Sanctions and Worker Identity Cards

The Simpson-Mazzoli Bill contained a series of employer sanctions provisions which would impose penalties on anyone who would hire, recruit or refer for employment an alien who is not a lawful permanent resident or who has not been given employment authorization. For the first offense there would be a $1000 civil fine, and a $2000 civil fine for the second offense. Where there has been a "pattern or practice" of violations there would be a criminal penalty of up to $1000, six months imprisonment, or both, for each violation. The Bill would have also directed the President to, within three years, develop and implement a secure system to verify employment eligibility. The possibility of using a form of national worker identity card in such a system was specifically mentioned in the Bill.

Placing employers in the position of determining who is eligible to work will increase discriminatory hiring practices against Hispanic, Asian, Black and other minority Americans and lawful permanent residents in general. Under the verification and record keeping requirements of Simpson-Mazzoli, employers would protect themselves from liability by employing only "safe hires," those who appear to be citizens in terms of color, language or customs. Some employers would refuse to even consider applications from foreign-looking persons. Employers would not be liable under the sanctions provision if they simply turned away foreign-looking applicants without verifying their right to work.

Any system of universal identification, whether by a national worker identification card or computer bank, intrudes deeply into the American system of freedom and individual liberties. Such a system would further broaden the government’s police power to stop, question

85. S. 2222, supra note 1, § 101. When H.R. 5872 and S. 2222 were initially introduced; they were identical. 59 Inter. Rel. 175 (1982).
86. S. 2222, supra note 1, §101.
87. Id.
89. Id.
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and search. Unlike most European countries, the United States does not have a national police force or any other device which permits our national government to keep close tabs on each citizen or foreigner and his movements. Americans should be proud of that heritage, but the employer sanctions/verification system proposal constitutes a major step toward the creation of a totalitarian system. Furthermore, the Attorney General has estimated that an identification card system could cost $2 billion. And the INS has estimated that enforcing employer sanctions will require $120 million per year.

While employer sanctions and employee identification could be utilized to assist in the control of the undocumented, the cost to this nation’s democratic traditions, the cost of discrimination against its minorities, and the intrusion into the business sector is too high. If sanctions are to be imposed at all, they should be imposed only on employers of large numbers of undocumented aliens. There is no reason to develop new laws for those employers because present laws dealing with fair labor standards, working conditions and minimum wage are sufficient if vigorously enforced.

B. Elimination of Fifth Preference

The Simpson-Mazzoli Bill proposed that the Fifth Preference category, the current category allowing for reunification of brothers and sisters of U.S. citizens, be abolished. If enacted, this provision would strike a severe blow to the immigration policy of family reunification.

That the elimination of Fifth Preference would have its strongest impact on Asians and Mexicans is apparent by an examination of the State Department Visa Bulletin. The countries listed with major backlogs in Fifth Preference are Mexico and the Asian countries. The Visa Bulletin reveals that for brothers and sisters from mainland China, those who initially applied to immigrate almost five years ago are just today being processed. For Taiwan and Korea the wait has been four years. The only natives of the Philippines who are being processed today under Fifth Preference are those who have waited almost 12 years.

91. See The Tarnished Golden Door, supra note 54, at 66.
95. S.2222, supra note 1, § 202.
96. Visa Bulletin, supra note 75.
97. Id.
98. Id.
99. Id.
100. Id.
present backlog for natives of Hong Kong, a dependent area of Great Britain, is only slightly better, approximately 10 years. Mexico like mainland China is backlogged five years in the Fifth Preference category.

However instead of proposing additional visas to clear the backlogs in the countries mentioned for this significant category, a procedure which has been utilized in the past for countries such as Italy, the Simpson-Mazzoli Bill proposed the elimination of Fifth Preference. One understandably wonders why such a proposal has been made, especially since the Federal Select Commission on Immigration and Refugee Policy which had studied immigration issues from 1978-1980 recommended preserving Fifth Preference, expanding other family reunification categories, and providing additional numbers to clear the backlogs.

Furthermore the proposal to eliminate Fifth Preference went against the grain of past immigration policy. From the very inception of our immigration system, Congress has recognized the importance to the historical doctrine of family reunification of permitting immigration privileges to brothers and sisters of U.S. citizens, and has often expressed this view during enactment of immigration laws.

In Section 2(d) of the first Quota Act of May 19, 1921, it was stipulated that “preference shall be given as far as possible to wives, parents, brothers, sisters, children under eighteen years” of United States citizens and applicants for citizenship. This preferential selection of siblings was continued in the basic Nationality Act of 1952. Brothers and sisters of United States citizens were placed in the same category of importance as sons and daughters of citizens, which were classified as Fourth Preference immigrants.

In enacting the Immigration Reform Act of 1965, Congress, in classifying brothers and sisters as Fifth Preference, assigned to this category a considerable percentage of visas—24 percent.

In the Act of October 20, 1976, Congress, in various sections of the Immigration and Nationality Act, rejected an earlier draft of the bill which provided that married siblings be eliminated from Fifth Preference visas.

101. Id.
102. Id.
104. Ch. 8, § 8(d), 42 Stat. 5, 6 (1921).
105. 66 Stat. 163.
This consistent recognition by Congress of the importance of brothers and sisters in the family structure during a 60-year span should not be lightly cast aside. After a decade and a half of experience since the Immigration Reform Act of 1965, experts on immigration policy do not differ in any appreciable degree as to the basic importance of brothers and sisters, whether married or not, to the nuclear family unit.\textsuperscript{108}

Senator Simpson in support of the proposal stated publicly that one justification was that the brother and sister relationship is not an important one to American families.\textsuperscript{109} This statement ignores the fact that American families are comprised of groups from many cultures and backgrounds; that the sibling relationship is upheld by American and religious values; and thus to discourage such relationships is to attack the American family structure. Finally, the sibling relationship grows stronger as the years go by and especially when parents have passed on.

Another justification for elimination of Fifth Preference put forth by Senator Simpson is that the mood of the country is towards only admitting immigrants who will be productive.\textsuperscript{110} Justifying the elimination of Fifth Preference immigrants on lack of productivity grounds implies that Fifth Preference immigrants are lazy and unproductive. Senator Simpson is forgetting the historical and continuing hard work ethic of immigrants to the United States. His statements also illustrate an ignorance of present immigration laws, which strictly require new immigrants to either have job offers or to demonstrate that either they or their relatives are wealthy enough to support the new immigrant.\textsuperscript{111} Furthermore, even a cursory examination of new Fifth Preference immigrants would reveal that the vast majority begin to work immediately and that most public assistance is not readily available to them.\textsuperscript{112}

\section*{C. Legalization/Amnesty}

The Simpson-Mazzoli Bill contained legalization/amnesty provisions which would have granted permanent resident status to undocumented persons who entered the United States before January 1, 1977 and "temporary status" to those who entered after 1977 but before January 1, 1980.\textsuperscript{113} Those in the "temporary" category who lived here an additional

\begin{itemize}
\item \textsuperscript{108} See Report of Select Commission, supra note 88, at 119-120, 308.
\item \textsuperscript{109} See Simpson, Foreword, 20 San Diego L. Rev. 1,9 (1982).
\item \textsuperscript{110} Id.
\item \textsuperscript{112} Under section 1614(a)(1)(B) of the Social Security Act the income of an alien's sponsor is deemed to the alien for three years, making it virtually impossible for the alien to receive supplemental security income for that period.
\item \textsuperscript{113} S.2222, supra note 1, § 301.
\end{itemize}
three years and who could demonstrate a basic proficiency in English could then qualify for permanent residency.\textsuperscript{114} Those eligible for permanent residence would not be entitled to any federal benefits for three years; and temporary residents would not receive any federal benefits for six years.\textsuperscript{115} Persons who entered the country after January 1, 1980, would not be eligible for legalization; they would instead be subject to deportation.\textsuperscript{116}

Legalization is an essential component of any comprehensive immigration reform legislation. However, the ultimate goal of such a program should be to bring a large underclass of persons presently residing in the U.S. into the mainstream of our society and under the protection of our laws.\textsuperscript{117} To accomplish this goal, its design must be simple, humane and broad-reaching in order to be workable. The eligibility criteria must be clear-cut and the cut-off date should not exclude large segments of the undocumented population. The offer to adjust status must be presented in a way which will not discourage people from coming forward for fear of being found ineligible and subject to deportation. Furthermore, the program must assure that family units are not subjected to prolonged separations.\textsuperscript{118}

Measured against these criteria, the Simpson-Mazzoli legalization proposal raised some serious concerns and, moreover, left many questions unanswered.

The legalization/amnesty provision was unclear as to what kind of evidence would be acceptable to prove entry into the U.S. before the specified cut-off dates. Since undocumented persons live an “underground” existence, the maintenance of records—especially records under their true names—is virtually unknown or impractical at best. It is common knowledge that many work under false names and false social security numbers. Thus, while they may possess tax records as one form of proof of physical presence in this country, it will be difficult to show that they are the same persons mentioned in the tax records.

Coupled with the problem of proof of entry was the requirement of proof of “continuous residence” in this country since the date of entry. The term “continuous residence” was not defined in the legislation. Instead, it was left to the discretion of the Attorney General.\textsuperscript{119} Consequently, a person could have been required to prove in detail physical presence for every week or every month of a given year, and if a person left the country for a short visit, he or she might forfeit eligibility for

\textsuperscript{114} \textit{Id.}
\textsuperscript{115} \textit{Id.}
\textsuperscript{116} \textit{See} Reza, \textit{Immigration: Restriction or Reform}, 2 Cal. Law. 32, 35 (Dec. 1982).
\textsuperscript{117} \textit{See} Statement of Ochi, Report of Select Commission, \textit{supra} note 88, at 385-386.
\textsuperscript{118} \textit{Id.}
\textsuperscript{119} S.2222, \textit{supra} note 1, § 301.
RACIAL DISPARITY

Additionally, there was no mention of whether family members had to independently qualify for legalization or whether the family would be considered as a unit. It was unclear what would happen if the head of a household could prove that he or she was here prior to the prescribed cut-off date, but the spouse and children could not do so. It also appears that persons granted temporary or permanent resident status could not petition to bring spouses or children currently living abroad into the country. This exclusion of family members would have undermined the participation of many eligible aliens from the program. Adjustment of status for the entire family unit would have been more humane, and would have reduced the flow of unauthorized entries into the United States in the future.

The ineligibility of legalization participants for government benefit programs also raised serious issues. This summary exclusion from public assistance was unnecessary and would have likely resulted in extreme hardship for such residents in instances of unforeseen emergencies. This specific eligibility criteria established by the laws and regulations governing the particular assistance programs should be sufficient. These people have contributed to the tax base which finances these programs and should therefore be entitled to benefits if they have met the established eligibility requirements. Other problems existed in the bill's provision that States or political subdivisions could render such people ineligible for assistance funded by that State or subdivision. Again, these residents have paid taxes in those states and have otherwise paid their way. Even so, some local governments have attempted to cut off health care services to the immigrant community. These actions, when challenged in court, have resulted in injunctive orders preventing the


121. In 1976, a legalization program in Australia reportedly attracted less than 20 percent of the country's undocumented. Report of Select Commission, supra note 88, at 399.

122. See Reza, supra note 116.

123. Id.

124. S.2222, supra note 1, §§ 301, 302.

125. A report by the Human Resources Agency of San Diego, for example, estimated that tax contributions of undocumented workers in that county were approximately $49 million per year. In contrast, the report cites findings that only $2 million per year are expended toward providing social services to this group, including mandatory education costs. County of San Diego, California, Human Resources Agency, A Study of the Socioeconomic Impact of Illegal Aliens on the County of San Diego, at 53-58, 173 (Jan. 1977).

126. See County Health Alliance et. al. v. Board of Supervisors, Los Angeles Superior Court, No. 0360546 (May 28, 1981); Sequoia Community Health Foundation v. Board of Supervisors, Fresno Superior Court, No. 269458-6 (Aug. 28, 1981).
local governments from implementing such policies.\textsuperscript{127} Federal legislation that allows state and local governmental entities to exclude immigrants from health care services might give impetus to renewed efforts to eliminate such vital services to that segment of the population.

Regarding the adjustment of status from temporary resident to that of lawful permanent resident, the bill delineated criteria for proof of eligibility.\textsuperscript{128} The most serious racially oriented criterion involved the requirement of knowledge of the English language as a condition of permanent residency.\textsuperscript{129} This requirement is inconsistent with the current law and creates a double standard that tends to exclude aliens from non-English speaking countries. Under existing law, persons applying for lawful permanent resident status do not have to demonstrate knowledge of English; only those applying for citizenship are required to do so. Yet the Simpson-Mazzoli Bill proposed to treat this class of immigrants with a harsher hand by imposing this additional obstacle.

Another problem with respect to eligibility involved waivers of inadmissibility. One of the eligibility requirements under the bill was that the alien establish admissibility under section 212(a) of the Act.\textsuperscript{130} Under the proposed system, the representative from the voluntary agency would not only process the case, but also make an eligibility recommendation.\textsuperscript{131} The recommendation anticipated in most cases would be that the alien is eligible and should be granted relief. A problem would arise, however, where the alien would not be eligible without a waiver of inadmissibility. Since voluntary agency representatives would not have the authority to grant such waivers, the representative would have a serious dilemma. Since statutory eligibility in such a case would not have been completely established, should the application be forwarded to INS? The problem, of course, is that if the waiver is not granted by the INS, the applicant has been exposed to INS and is subject to deportation proceedings.

A final criticism of the proposed legislation relates to the cut-off dates for eligibility for permanent residence and temporary residence. The cut-off dates play a crucial role in the success or failure of the entire program. To achieve full participation in the program, it should not exclude large segments of the undocumented who cannot meet the cut-off date. If there is fear or uncertainty of deportation and/or separation from family members, the undocumented will be reluctant to come forward. In establishing the 1980 cut-off date, the bill would have diminished the effectiveness of the program. Based on the estimates of the Select
Commission and of many scholars in this field, it is safe to say that hundreds of thousands of undocumented persons would not have fallen within the grace period. 132 Those entering the country after 1980, and those who were here before but do not come forward because they are uncertain of their eligibility or fear that their documentation may not be acceptable, would continue to reside in the U.S. and be even more susceptible to exploitation. This would have been particularly true in light of the proposed employer sanctions provision that exempt employers from liability for undocumented workers hired before the date of enactment. 133 Many of the undocumented who fall within this gap are the same people now working for these employers. This results in a huge underclass of persons who could continue in their jobs because of the exemption granted to employers, but who have no expectation of ever legalizing their status. Should they try to ask for higher wages or improved working conditions, the unscrupulous employer could hold the threat of exposure to the INS over their heads to force them to comply with his terms of employment. To prevent this kind of exploitation, the slate should be wiped clean. The legalization of all undocumented persons residing in the U.S. on the date of enactment of such a provision should be allowed.

D. Expansion of the H-2 Temporary Worker Program

The Simpson-Mazzoli Bill permits the admission of workers “to perform agricultural labor or services . . . of a temporary or seasonal nature.” 134 Furthermore, procedures for employers would have been streamlined. For example, they do not have to apply more than 50 days in advance of need, yet the Department of Labor would have had to make a decision on the application no later that 20 days before need was to begin. 135

While the Simpson-Mazzoli Bill did not call for the establishment of a major guestworker program as had been advocated by some, 136 the fact is that the bill would have begun to institutionalize the procedures for exactly that. The change in statutory language and streamlining of procedures represented the preliminary framework for the reestablishment of the Bracero Program. In the agricultural industry, it would have been likely that large numbers of Mexicans would have been brought in under the streamlined H-2 program. However, H-2 workers would not be eligible, even when unforeseen circumstances arose, for welfare bene-

133. S.2222, supra note 1, § 101(a)(1).
134. Id. at § 211(a).
135. Id. at § 211(b).
fits, food stamps, medicaid or unemployment compensation. Furthermore there were no assurances in the Simpson-Mazzoli Bill that spouses and children of the new H-2 workers would receive any immigration benefits. In sum, these workers, the majority likely to be Mexican, would again be placed in the highly vulnerable and exploitable situation which those in the Bracero Program encountered.

The point is that if workers are truly needed, the process should be kept simple, and lawful permanent residence status should be granted to such persons. Only then will such workers be at least minimally removed from an exploitable second class residency position, and the protections of health and safety, labor standards, and health assistance afforded them if the need arose.

E. Elimination of Judicial Review in Significant Areas

Under present law, administrative deportation orders, exclusion orders, political asylum denials, and denials of motions to reopen are reviewable in the federal courts of appeal or federal district courts. The Simpson-Mazzoli Bill would have eliminated judicial review of all final orders of exclusion, denials of political asylum applications and other administrative decisions such as denials of requests for stays of deportation. Furthermore, the Bill would have eliminated the right to exclusion hearings for aliens appearing at the borders who have no "reasonable basis" for entry and who have not applied for asylum.

These proposals are another aspect of Simpson-Mazzoli which would have tremendous impact on Hispanics and Asians. The curtailment of review rights in political asylum cases would severely affect Hispanics and Asians. For Pilipinos facing persecution back home at the hands of the Marcos regime, or El Salvadoreans facing the horrors of right-wing paramilitary oppression, it is the federal courts who provide the last chance of objective, non-politically influenced review of their claims. Of course one cannot overlook the fact that thousands of Haitians were seeking asylum when the Simpson-Mazzoli Bill was drafted, and some have charged the drafters with blatant anti-Black motives.

The provision which would have eliminated exclusion hearings for

137. S.2222, supra note 1, § 211.
138. Id.
140. S.2222, supra note 1, § 123(b).
141. Id., § 121.
142. See e.g., Reyes v. INS, 673 F.2d 1087 (9th Cir. 1982) (likelihood of persecution in the Philippines established); Almirol v. INS, 550 F. Supp. 253 (N.D.Cal. 1982) (reversed INS denial of application for waiver by alien who established objective evidence of well-founded fear of persecution in Philippines), But see Martinez-Romero v. INS, 692 F.2d 595 (9th Cir. 1982) (reported anarchy in El Salvador alone was not sufficient basis for asylum).
those appearing at the borders without "any reasonable basis" to enter is troublesome for other reasons as well.\textsuperscript{143} Present exclusion hearing procedures are not burdensome nor administratively time consuming. Many aliens reaching our shores have such low levels of sophistication and education that the presence of unsympathetic border inspectors could have very well resulted in the turning away of aliens who in fact had valid claims to asylum or entry. Yet the proposal left the determination of such important matters to the unreviewable and unfettered discretion of the border inspectors. Again, the fear is that in light of past practices by the INS, any abuse would fall most heavily on Hispanics and Asians.

\section*{V \textbf{SUBSTANTIVE CHANGES THAT SHOULD BE MADE}}

Congressional focus on the Simpson-Mazzoli Bill during 1982 precluded consideration of other substantive immigration issues that cry out for change. Below is a discussion of several proposals which, if enacted by Congress, would represent a step in the direction towards a more fair and humane law.

\textit{A. Revision of Suspension of Deportation Requirements}

Under section 244(a)(1) of the Immigration and Nationality Act (the Act)\textsuperscript{144} aliens who have been physically present in the United States continuously for seven years and who have been of good moral character during that period are eligible for relief from deportation ("suspension") if a showing is made that their deportation would result in "extreme hardship" to themselves or certain other relatives lawfully in the United States. While the extreme hardship requirement is difficult for most suspension applicants,\textsuperscript{145} it has been particularly difficult for applicants from Mexico to meet:

In this case, there is nothing to distinguish the hardship of these petitioners from that of the thousands of other Mexican nationals who annually enter the United States illegally and who then accumulate seven years of good time in this country. The resulting changes in their standard of living and the resulting widening disparity between their standard of living here and that which remains the lot of their fellow countrymen who continue the struggle for existence in Mexico do not, per se, create extreme hardships. It is the disparity between the standards of living in the two adjoining coun-

\textsuperscript{143} See The Tarnished Golden Door, supra note 54.

\textsuperscript{144} Immigration and Nationality Act § 244(a)(1), 8 U.S.C. § 1254(a)(1)(1976).

tries which provides the magnet for the illegal immigration which flows steadily northward. If this court were to grant relief in this case we would be holding that the hardship involved in returning to a former, lower material standard of living automatically requires a remand in every deportation case that fits the residential and character requirements of [section 244].  

This type of judicial bias against Mexicans is even worse at the administrative hearing level. Mexicans in suspension hearings face an extra burden when compared with applicants from other countries. With today's severe economic crisis and rate of unemployment, the deportation of a longtime resident of the United States back to Mexico imposes a tremendous hardship on that Mexican and his or her family. Such an economic hardship affects every aspect of a person's life, and is usually considered in suspension cases of persons from other countries.

In light of the built-in prejudices that the "extreme hardship" requirement has fostered against Mexicans, the statute should be amended to require only a showing of plain hardship along with the physical presence and moral character requirements. Only then will the true "ameliorating" policy which underlies the suspension provision be fairly applied for Mexicans who qualify.

B. Adjustment of Status for Mexicans Under the Preference System

Under section 245 of the Act, persons may adjust their status to that of a lawful permanent resident without leaving the United States

146. De Reynoso v. INS, 627 F.2d 958, 959 (9th Cir. 1980).
147. See e.g., Matter of Reyes, I.D. No. 2907 (BIA 1982) (motion to reopen denied to Mexican applicant).
148. See e.g., Bueno-Carrillo v. Landon, 682 F.2d 143 (7th Cir. 1982), where in discussing the Mexican applicant's claim, stated:

We do not believe that Congress intended the immigration courts to suspend the deportation of all those who will be unable to maintain the standard of living at home which they have managed to achieve in this country. If the critical emphasis were on the economic situation in the alien's homeland, a grant of relief would obviously be mandated in the case of aliens from many developing countries. It is only when other factors such as advanced age, illness, family ties, etc., combine with economic detriment that deportation becomes an extreme hardship.

Id. at 146.

149. See e.g., Prapavat v. INS, 662 F.2d 561, 562 (9th Cir. 1981) (Court held that the Board should have considered the fact that aliens would suffer economic hardship from having to return to Thailand).
150. The Select Commission recommended eliminating the "extreme" requirement. Report of Select Commission, supra note 88, at 278.
so long as they fall under a preference category and a visa is immediately available. However the ability to adjust one’s status without having to leave the United States does not apply to most Mexicans under the preference system because of the section 245 requirement that the person must have initially entered with inspection. This results in more costs and longer processing times for Mexicans.

Other applicants, usually overstayed students and visitors from other countries, are not precluded from adjustment even though they have overstayed or violated nonimmigrant status. They can obtain temporary approval in one day. But the process for even the most straightforward Mexican case would take minimally six months to a year because the Mexican who has entered without inspection but is married to a United States citizen must correspond with a United States Consulate in Mexico, complete application forms and await a visa interview abroad. The entry with inspection requirement of section 245 effectively discriminates against Mexicans because they comprise the vast majority of aliens who have entered without inspection. Even Canadians represent a small number because of the relaxed entry policies for Canadians along the United States’ northern border.

This discriminatory provision of section 245 should be removed. Adjustment of status without having to leave the United States should be afforded to all persons who have entered the United States as long as all other visa and section 245 requirements are met.

C. Expansion of Numerical Limitations and Clearing Backlog

The Simpson-Mazzoli Bill contained a provision which would have increased the annual quotas for Mexico and Canada from 20,000 to 40,000 immigrant visas per country. If in any fiscal year the number of visas issued to immigrants of either Canada or Mexico fell below 40,000, then in the next fiscal year the shortfall would have been added to the other country’s allotment. Mexico would have stood to gain back some of what it had lost in 1977 because Canada ordinarily does not

152. Id. This section applies to those aliens who were “inspected and admitted or paroled into the United States.” See also Lawyers Guild, supra note 16, at 4-61.
154. See Gordon & Rosenfeld, supra note 26, § 7.7b.
156. For example, in 1977 about 70 percent of the aliens entering without inspection who were required to depart were Mexican. See 1977 Annual Report, supra note 84, at 96.
157. Id. While 10,896 of those entrants without inspection who were required to depart in 1977 were Mexican, only 426 were Canadian.
158. S.2222, supra note 1, § 201.
159. Id.
come close to reaching its present 20,000 limitation.\textsuperscript{160}

These proposals are based on sound principles. The increase would alleviate serious backlogs which are causing severe and unnecessary hardships to prospective immigrants.\textsuperscript{161} [Presently, spouses and children of United States lawful permanent residents from Mexico must wait up to nine years because of the inadequate numbers of visas available.\textsuperscript{162} The understandable desire to join their families contributes to the problem of illegal immigration. Thus, this proposal would strengthen our country's traditional immigration objective of family unity.\textsuperscript{163}]

In all fairness, however, the proposal for increased numbers fails to consider the serious backlogs that have developed in certain Asian countries and the extremely long waiting period faced by not only spouses and children of lawful permanent residents from the countries involved, but also by certain children, brothers and sisters of United States citizens. The long waiting lists are the result of a biased immigration policy against Asians. Between 1910 and 1950, a combined total of approximately 193,000 Japanese and Chinese were permitted to immigrate.\textsuperscript{164} In contrast, over 760,000 Mexicans lawfully immigrated during the same period.\textsuperscript{165} The effects of disparate treatment lasted well into the 1960's. For fiscal years 1967 and 1968, the total number of immigrants from China, Taiwan, Hong Kong, Japan, Korea and the Philippines was 84,452. The total from Mexico alone was 85,934. Under the preference system, from 1970 to 1976, the total for the same Asian and Pacific countries was 580,855. Mexico, which was not subject to a preference system during that period, was granted 436,408 immigrant visas.\textsuperscript{166}

It is with this background in mind that when expansion of numerical limitations for Mexico and Canada are being considered, the situation for China, Korea, and the Philippines should be reviewed as well. There are similar policy reasons for expanding the numerical limitations for the Asian countries and furthermore, better relationships with Asian countries is a priority of United States foreign policy. Thus, such action would signal the goodwill and understanding of the United States at a time when our country's role in the world political situation is being so closely scrutinized.

Furthermore, Congress should clear the backlogs for Mexico and Asian countries. Taking action to clear up backlogs in an immediate remedial fashion is not new or unusual for Congress. Prior to 1965, there

\textsuperscript{160} See 1977 Annual Report, \textit{supra}, note 84, at 68.

\textsuperscript{161} See notes 95-101, \textit{supra}, and accompanying text.

\textsuperscript{162} See Visa Bulletin, \textit{supra} note 75.


\textsuperscript{165} \textit{Id.}

\textsuperscript{166} \textit{Id.}
were numerous occasions when Congress passed legislation to expedite visas for preference aliens from countries, such as Italy, where quotas were in arrears.\textsuperscript{167} The Select Commission had proposed that an additional 100,000 visas for five years be provided to help clear the backlogs.\textsuperscript{168}

There are a variety of alternatives which could be implemented to remedy the backlog situation for Mexico and Asian countries. Of course an expansion of the numerical limitations of the countries involved would have the most immediate and direct positive effect. Classifying second preference relatives (spouses and unmarried sons and daughters of lawful permanent residents) in the immediate relative classification, section 201(b),\textsuperscript{169} which is not subject to numerical limitations would ease the present backlogs tremendously.\textsuperscript{170} Also a provision which placed a limit (i.e., two years) on how long a beneficiary would have to wait for an immigrant visa would constitute a significant step towards truly recognizing the interest of family reunification.

Another permanent change in the visa allocation system which would be fairer is the elimination of the per country numerical limitation in favor of one world-wide numerical limitation on the preference categories. At least in that manner, all persons from countries with pressures of migration would be on an equal footing with persons from other parts of the world.\textsuperscript{171}

\textbf{D. Elimination of English Literacy Requirement for Naturalization}

The English literacy requirement for naturalization continues to serve as an effective deterrent to citizenship for most elderly Asian and Mexican immigrants.\textsuperscript{172} Without the benefits of naturalization, these persons are prohibited from entering the mainstream of American life. For example, all federal civil service jobs and certain state police positions and local teaching posts are limited to citizens.\textsuperscript{173} Of course, the right to vote is only extended to citizens.

Congress' preservation of the English literacy requirement for naturalization is irrational. There is no constitutional requirement to condition citizenship on English literacy, nor is there any historical evidence

\begin{itemize}
  \item 167. \textit{See generally,} Gordon & Rosenfield, \textit{supra} note 26, § 1.4.
  \item 168. \textit{See} Report of Select Commission, \textit{supra} note 103, and accompanying text.
  \item 169. 8 U.S.C. § 1151(b).
  \item 170. The Select Commission had made similar proposals. \textit{See} Report of Select Commission, \textit{supra} note 103.
  \item 171. The United States Civil Rights Commission recognized that the per country limitation perpetuates the racial discrimination produced by the national origins system. \textit{See} The Tarnished Golden Door, \textit{supra} note 54, at 8-11.
  \item 173. \textit{See Mow Sung v. Campbell,} 626 F.2d 739 (9th Cir. 1980).
\end{itemize}
that the framers of the Constitution intended our society to be uniform in language or tradition.\textsuperscript{174} To the contrary, history reveals that the thrust of independence for the colonies was diversity and sovereignty, and a guarantee of rights for all people.

Although there is a waiver of the English literacy requirement for naturalization for petitioners over age 50, there is an additional requirement that such a petitioner must have been a lawful permanent resident in the United States for over 20 years.\textsuperscript{175} The requirement is still applicable therefore to the elderly who have not resided in the United States for 20 years, and to persons such as elderly Chinese who have lived here for 40 or more years but went through confession programs in the 1960's and only then established lawful permanent residence.\textsuperscript{176} The English literacy requirement ignores the fact that most of these persons can survive totally in their communities without English and through the excellent non-English media available, remain abreast of current events and government hearings—presumably one of the reasons behind the English literacy requirement.

Furthermore, the English literacy requirement for naturalization is completely inconsistent with the position of Congress on the right to vote. In the 1975 amendments of the Voting Rights Act, Congress indicated its opposition to English literacy requirements by mandating the use of bilingual ballots in certain jurisdictions.\textsuperscript{177} The amendments were a recognition of the fact that non-English-speakers are as well-informed as the English-speaking electorate.\textsuperscript{178} The next logical step for Congress to take has not arrived, namely, the elimination of the English literacy requirement for naturalization so that these people can meet the citizenship requirement in order to register to vote.

However, given the English literacy requirement, INS itself could do a great deal to alleviate the trauma to most people involved in the naturalization process. Greater sensitivity and patience exhibited to the elderly petitioners by naturalization examiners would be a good start. Additionally, history and government questions which are customarily administered in English could be given in the petitioner's native language. This procedure would be consistent with the statutory layout of the English literacy and History/Government requirements which fall under two separate subsections of section 312 of the Act.\textsuperscript{179}

\textsuperscript{175} Section 312(1) of the Act, 8 U.S.C. §1423(1).
\textsuperscript{176} 37 Interp. Rel. 6 (1960); Gordon & Rosenfield, \textit{supra} note 26, §2.30f(5).
\textsuperscript{178} \textit{See President Ford Signs Voting Act Extension}, East/West Newspaper, Aug. 13, 1975, at 1.
\textsuperscript{179} See section 312(2) of the Act, 8 U.S.C. §1423(2).
The grounds for exclusion under the Act are numerous and represent years of ad hoc Congressional action directed at closing the doors to those deemed unfit to enter the United States. Thus, while an alien might meet preliminary immigration qualifications as an immediate relative or preference alien, the alien will still be denied admission if one of the 34 grounds of exclusion is not satisfied unless a discretionary waiver, available under certain circumstances, is granted by the INS.

Criminals, subversives, polygamists, illiterates, drug addicts, the insane, the unhealthy, and public charges are listed in the exclusion section. Many of these grounds for exclusion can be traced back to times in our history when strong feelings of racism and political paranoia pervaded the nation and the minds of its legislators. The concern of this discussion is not, however, directed as an attack on the grounds for exclusion themselves, but rather at a doctrine of immigration law which relies on the exclusionary grounds to deport or deny readmission to unsuspecting lawful permanent resident aliens who have temporarily proceeded abroad.

The “reentry doctrine”, as it has come to be known, provides that an alien, even an alien who is a lawful permanent resident of the United States (i.e., in possession of an alien registration receipt card), is subject to the grounds for exclusion each and every time a new entry is made into the United States. Although such a principle is not explicitly stated in the Act, that statutory construction has resulted from a reading of section 101(a)(13) which defines “entry” as “any coming of an alien into the United States”, together with section 212(a) which provides that aliens “shall be excluded from admission” if the grounds for exclusion are not satisfied. The interpretation that every attempted “entry” is equivalent to an application for “admission” (which results in the reentry doctrine) has been upheld by the Supreme Court.

Thus, a lawful permanent resident who commits an act or who falls into an excludable class after initially immigrating, not serious enough to be deported for, may in fact be excluded from readmission if he/she leaves the country temporarily because that act or class falls within one of the grounds for exclusion. This occurs quite often because the

180. See section 212(a), 8 U.S.C. § 1182(a).
181. See e.g., §§ 212(c), (g), and (i) of the Act; 8 U.S.C. § § 182(c), (g), (h) and (i).
182. Section 212(a) of the Act; 8 U.S.C. § 1182(a).
183. See Gordon & Rosenfield, supra note 26, §§ 2.3e, 2.19, 4.6c(2).
186. See Gordon & Rosenfield, supra note 26, § 2.3e.
188. Id.
grounds for deportation under section 241(a) of the Act\textsuperscript{189} are not as encompassing as, and are more difficult to meet than, the grounds for exclusion.\textsuperscript{190}

Examples of the operation of the reentry doctrine are plentiful. A lawful permanent resident who is convicted of petty theft is not deportable.\textsuperscript{191} However, if that individual leaves the country for a vacation and attempts to return, section 212(a)(9) of the Act would operate to exclude the resident alien.\textsuperscript{192} Similarly, a permanent resident who, after initial immigration, becomes bankrupt and needs public assistance would not be deportable.\textsuperscript{193} But if this resident alien leaves the country to visit an ill relative, the individual would be excludable upon return under section 212(a)(15).\textsuperscript{194}

Even if the facts rendering the returning alien excludable are not made known to the inspecting immigration border officer and the resident alien is readmitted, once the facts are made known to immigration officials, deportation proceedings can be instituted against the person under section 214(a)(1) of the Act\textsuperscript{195} as one who “at the time of entry was within one or more of the classes of aliens excludable by the law.” Since the reentry of such an individual is, by definition, an “entry”, the cited ground for deportation would apply to a returning lawful resident.\textsuperscript{196}

The principles of the reentry doctrine also come into play under section 241(a)(4) of the Act.\textsuperscript{197} Under that section, an alien who is convicted of one crime involving moral turpitude “committed within five years after entry” (emphasis added) may be deported. Thus, a lawful permanent resident of the United States for ten years who proceeds abroad, returns, then is convicted of a crime involving moral turpitude four years after the reentry is deportable under the cited section.\textsuperscript{198} This is in spite of the fact that the alien may have been a lawful permanent resident for 14 years.\textsuperscript{199}

\textsuperscript{189} 8 U.S.C. §1251(a).
\textsuperscript{190} Compare §212(a) of the Act, 8 U.S.C. §1182(a), with §241(a) of the Act, 8 U.S.C. §1251(a).
\textsuperscript{191} This is true assuming the conviction did not result in a sentence of a year or more in prison. Section 241(a)(4) of the Act, 8 U.S.C. §1251(a)(4).
\textsuperscript{192} 8 U.S.C. §1182(a)(9).
\textsuperscript{193} To be deportable under §241(a)(8), 8 U.S.C. §1251(a)(8), the alien must have become a public charge within five years of entry for a cause that existed prior to entry, and there must have been a failure to repay the benefits after demand. Matter of B, 3 I\&N Dec. 323 (1948).
\textsuperscript{194} 8 U.S.C. §1182(a)(15). See e.g., United States ex rel. Minuto v. Reimer, 83 F.2d 166 (2d Cir. 1936) (returning 70 year old woman excluded where her senility might affect ability to earn a living).
\textsuperscript{195} 8 U.S.C. §1251(a)(1).
\textsuperscript{196} See Gordon & Rosenfield, supra note 26, §4.6c(2).
\textsuperscript{197} 8 U.S.C. §1251(a)(4).
\textsuperscript{198} E.g., Muñoz-Casarez v. INS, 511 F.2d 947 (9th Cir. 1975).
\textsuperscript{199} Id. at 948.
The harshness of the reentry doctrine was recognized by the Supreme Court in *Rosenberg v. Fleuti.* There the Court carved an exception to the strict definition of entry and held that in order for the reentry doctrine to apply, the lawful permanent resident must have intended "to depart in a manner which can be regarded as meaningfully interruptive of the alien's permanent residence." However, for the most part, the INS and the Board of Immigration Appeals has limited the *Rosenberg v. Fleuti* case to its facts, viz., an absence of "about a couple hours" duration.

The reentry doctrine should, therefore, be legislatively eliminated from the Immigration and Nationality Act in order to effectively eliminate the "harsh consequences" of the doctrine as criticized by the Supreme Court. The doctrine operates to exclude or deport lawful permanent residents who unsuspectingly leave the United States and walk into the trap of the reentry doctrine. No warning is given to such resident aliens who could not be deported if they had not departed from the United States temporarily. To this day, it remains an anomaly in our immigration laws.

The reentry doctrine can easily be legislated out. The definition of "entry" under section 101(a)(13) of the Act could be changed to specifically exclude the return of lawful permanent residents from temporary absences abroad. Section 212(a) of the Act could also be amended to include the following underlined changes:

Except as otherwise provided in this Act, the following classes of aliens (other than aliens who have been lawfully admitted for permanent residence and who are returning from temporary visit abroad) shall be ineligible to receive visas and shall be excluded from admission to the United States...

Only with such revisions can the true spirit of the Supreme Court's sentiment in *Rosenberg v. Fleuti* be carried out, and the harshness of the reentry doctrine be eliminated.

**F. Fourth Amendment Exclusionary Rule in Deportation Proceedings**

The Board of Immigration Appeals has specifically held that the Fourth Amendment Exclusionary Rule does not apply in deportation proceedings. In *Matter of Sandoval* the Board held that the "societal..."
costs” imposed by the application of the exclusionary rule in deportation cases would be too great. 208 Therefore under present law, an order of deportation will be sustained even though the alien has been illegally arrested and evidence of deportation is tainted. This is true in spite of the fact that a criminal prosecution of the same alien for illegal entry would likely be thrown out of federal District Court. 209 As the law stands now, only where there has been some serious due process violation or a violation of a regulation designed to protect the alien will evidence be barred. 210

The inapplicability of the Exclusionary Rule is not acceptable in light of the ongoing raids and Gestapo-like tactics of INS agents and Border Patrol. 211 The present rule breeds further abusive practices by INS investigators and agents whose excessive behavior usually goes unpunished. 212 Illegal INS tactics are as repulsive as analogous police activities whose fruits have been traditionally excluded. The stakes at deportation hearings are as high if not higher than most criminal cases, and the policies underlying the Exclusionary Rule are as relevant.

While recent cases have held certain INS raid tactics unconstitutional, 213 the relief enjoining such raids does not provide a remedy to the alien who is in the midst of an administrative deportation hearing.

G. Statute of Limitations for Deportation

The present grounds for deportation do not provide any statute of limitations. 214 As long as the person is not a citizen, the person is deportable if he/she falls within one of the nineteen deportable classes, 215 even though he/she has been a lawful permanent resident of the United States for twenty-five years. Thus, persons who have lived in the United States since childhood are subject to deportation proceedings if they are convicted of possession of marijuana. 216 Most of the grounds for de-

208. Id. at 80-84.
209. See e.g., U.S. v. Heredia-Castillo, 616 F. 2d 1147 (9th Cir. 1980) (illegally obtained evidence suppressed in case involving alleged use of forged immigration document).
210. See Matter of Toro, 17 I+N Dec. 340 (1980) (only where officer's actions are so aggravated as to violate fundamental fairness will evidence be suppressed); Matter of Garcia-Flores, 17 I+N Dec. 325 (1980) (evidence obtained after failure to advise alien as to right to counsel in accordance with regulation should be suppressed).
211. See notes 79-83, supra, and accompanying text.
212. See generally, The Tarnished Golden Door, supra note 54, at 117-129 (complaint investigation procedures of INS are inefficient and inadequate).
213. E.g., ILGWU v. Surek, 681 F.2d 624 (9th Cir. 1982) (Fourth amendment prohibits detenctive questioning of workforce unless INS investigators can articulate facts and reasonable inferences therefrom that warrant reasonable suspicion that each questioned person is an alien illegally in the U.S.).
portation treat both long-term and new permanent residents, as well as nonimmigrants here on temporary visas, in the same manner. Deportation, however, is a much more severe penalty for long-term residents of the United States and their families than for recently arrived permanent residents or aliens here temporarily as nonimmigrants.

The failure to provide a statute of limitations in deportation laws, at least for longtime permanent residents, is inconsistent with most criminal laws of American jurisdictions except for the most heinous crimes. Thus, a humanitarian statute of limitations of ten years, for example, should be enacted for some, if not all, of the deportation provisions. Most people would agree that in a ten year period sufficient equities, family and emotional ties, would have developed to justify a bar to deportation.

**H. Meaningful Right to Counsel in Deportation Proceedings**

Section (242(b)(2) of the Act provides that an alien has a right to counsel in deportation hearings, but not at government expense. The law thus operates in a manner which effectively bars the right to counsel to indigents who are not fortunate enough to locate a volunteer attorney. Although the regulations currently require INS authorities to advise aliens if free legal services are available, recent amendments to the Legal Services Corporation Act prohibit legal service offices from representing aliens. Only one court has seriously hinted that indigent aliens should have the right to appoint counsel, but then only on a limited case by case determination.

The assessment of deportability and the possibility of relief or defenses are complicated issues. One judge has stated:

> We have had the occasion to note the striking resemblance between some of the laws we are called upon to interpret and King Minos' labyrinth in ancient Crete. The Tax Laws and the [INA] are examples we have cited of Congress' ingenuity in passing statutes certain to accelerate the aging process of judges.

Yet the present system presumes that indigent aliens unfamiliar with our laws can get through the complexities alone. These assumptions are impossible to accept in light of the consequences at deportation hearings. Many so-called "deportable" aliens have the right to remain in the United States that can only be determined after serious research and

218. 8 C.F.R. §287.3 (1982).
220. Aguilera-Enriquez v. INS, 516 F.2d 565 (6th Cir. 1975) (right to appointed counsel only where fundamental fairness would not otherwise be provided).
221. Lok v. INS, 548 F.2d 37, 38 (2d Cir. 1977).
analysis by counsel. The right to counsel should therefore be provided at government expense, particularly for lawful permanent residents.\textsuperscript{222}

VI
CLOSING OBSERVATIONS

Immigration is not a phenomenon of the past. We have experienced a 100 percent increase in the number of immigrants since 1965 (about 400,000 per year as compared with about 190,000 from 1924 through 1965).\textsuperscript{223} The countries from which immigrants come are not the same as in the past. There is a basic ethnic shift in our immigration—away from Europe in favor of Latin America and Asia.\textsuperscript{224} This trend towards immigration to the United States will continue as long as economic and/or political instability continue to exist in the countries of high visa demand. The force of family reunification in the countries discussed is also a significant factor which indicates that continuous immigration can be expected. Americans of European ancestry completed their reunification process generations ago when immigration laws favored them, and now those pressures are not significant for them. While the current trends of Mexican and Asian immigration may continue to be impalatable to some,\textsuperscript{225} they are here to stay. Some day there will be a realization that the Statue of Liberty which welcomes new immigrants is facing the wrong direction.

Only through organizational efforts, community education, working together and lobbying efforts can the policymakers be challenged to, once and for all, implement a fair and humane immigration policy for persons of any language, race or color.

\textsuperscript{222} The Select Commission recommended providing counsel at government expense to lawful permanent residents. \textit{See} Report of Select Commission, \textit{supra} note 88, at 274.

\textsuperscript{223} \textit{See} 1976 Annual Report, \textit{supra} note 55, at 86-89.

\textsuperscript{224} \textit{Id}.

\textsuperscript{225} In the Select Commission's Final Report, Senator Simpson took the time to discuss the "ethnic patterns" of immigration, the "influx" of Indochinese refugees, Mexico as the "largest single source" of "illegal immigration", "fertility rates", and problems of "assimilation." \textit{See} Report of Select Commission, \textit{supra} note 88, at 410-413.