

IMMIGRATION:

Recasting The Debate



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Immigration Law: Myths and Reality

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Immigration: Recasting the Debate

- **The present refrain:** “We should enforce the laws presently on the books first, and only then consider broader reform.”
- **The reality:** The laws presently on the books are broken. We must reform them as the first step to a sensible, workable immigration policy.



Myth #1:

The way is clear for those who “play by the rules” to come to the United States, just as my ancestors did.



Ellis Island

The law governing admission

The question of who gains lawful admission to the United States is resolved by the interplay of three parts of the law:

- Substantive criteria for admission
- Exclusion grounds
- Numerical limits
 - Overall ceiling for permanent residents
 - Per country limits for permanent residents
 - Numerical limits within many substantive categories

What was the law when your ancestors came?

- The first federal immigration laws imposed race-based exclusion and discriminatory national origin quotas.
 - Chinese Exclusion Act (1882), later extended to all of Asia.
 - Numerical quotas for Europe (1921); smallest allotments to countries of southern and eastern Europe.
- Race-based exclusion operated until 1952; discriminatory national origin quotas until 1965.

What was the law when your ancestors came?

- National origin quotas replaced by uniform per-country limits in 1965.
- Special dispensation for our neighbors—no per-country limits for Western Hemisphere until 1976.
- Migration from Mexico was limited by operation of the public charge exclusion ground, fees, additional administrative requirements.
- The substantive criteria didn't emerge in the last half of the 20th century.

Who can be admitted—current law

- You must meet the substantive criteria.
 - For immigrant categories (permanent residents), the main criteria are family-sponsored or employment-based.
- You must not be inadmissible.
- And you must wait for the visa to become available.
 - For many immigrant categories, that means years.
 - For some temporary worker categories, that effectively means never.

A quick glance at the numbers

Fiscal year 2006:

- 1.2 million immigrants secured legal permanent resident status
 - 40% immediate relatives—spouse, minor children, parents-- of U.S. citizens. This is the one category not subject to any numerical or per-country limits.
- 175.1 million total nonimmigrant admissions, for stays of limited duration.
 - 33.7 million were from countries other than Canada or Mexico

What's broken? The substantive criteria

Problems in the employment-based categories.

- Labor market test (“labor certification”) required for many employment-based immigrant categories is a bureaucratic tangle that doesn’t establish a sensible policy for choosing immigrant workers.
- The temporary visa categories don’t fit the modern global economy.

What's broken? Impact of Numerical Limits

Backlogs for immigrant visas, some examples:

- U.S. citizen petitions for unmarried, adult child-
 - Backlog of pending applications means you wait **six years** for visa to be available.
 - If the beneficiary is from **Mexico**, the wait is **fifteen years**.
- Lawful permanent resident marries, petitions for spouse-
 - Backlog of pending applications means you wait **five years** to be united with your spouse in this country.

What's broken? Impact of Numerical Limits

In some temporary worker categories, demand far exceeds supply:

- H1-B category for professional and skilled workers has cap of 65,000. Twice that many applications were received in the first *two days* they could be filed this year. The category was filled by lottery from applications filed those two days; no more visas are available for fiscal year 2008.

The law governing admission: myth vs. reality

- For those who were not excluded by racial restrictions and national origin quotas, immigration was far more open for much of our history than it is today.
- We can debate the appropriate direction of reform—more visas? fewer visas?—but it's impossible to defend the “laws on the books” as creating a workable system.

Myth #2

It's easy to determine who is "illegal" under the immigration statute.



Identifying “illegal” aliens

- The term “illegal” is not defined in the immigration statute. There are any number of ways that an individual’s presence can be unauthorized, and sometimes routes to gain or to restore lawful status.
- Unauthorized presence is not a crime and removal hearings are civil administrative proceedings.

When someone is apprehended at the border...

In this context, it's usually easy to detect unauthorized status. Withdrawal of application, voluntary departure, or expedited removal procedures yield a quick trip home.



Inside the United States...

It can be difficult to determine whether someone is in authorized status.

- The problem of technical violations.
- The problem of bureaucratic bungling.
- The reality of “twilight status.”
- Some individuals who are not in authorized status have strong equities to remain.

Most aliens apprehended inside the U.S. are entitled to a hearing

What does that mean for any plan of mass deportation?

- Current detention capacity—27,500 beds
- Recent ICE estimate—If we had enough beds, it would cost **\$94 billion** to detain and remove all persons not in authorized status. That figure **does not include court costs**.
- Our immigration courts are in crisis, strained beyond capacity with their current caseload and starved for resources.

Myth #3

Even if we can't effectuate mass deportation of "illegals," all "criminal aliens" should be deported.



What crimes render an alien deportable?

Three key (sometimes overlapping) provisions:

- Crimes involving moral turpitude
- Violation of any law or regulation “relating to a controlled substance”
- Convicted of an “aggravated felony” as defined in the statute.

What counts as an “aggravated felony”

- It used to be a short list.
- But Congress keeps expanding the definition. Examples:
 - When a state criminalizes sex between teens
 - A jilted girlfriend gets into a fight with her rival
 - Shoplifting, petty theft with a suspended sentence
- There is no statute of limitations, and the amendments are retroactive.
 - Long-term lawful residents can now be deported for long-ago offenses that carried no immigration consequences at the time of conviction.

A zero-tolerance stance is costly

- Mandatory detention.
- No consideration of the equities of the case:
 - Long-term lawful permanent residents have families, ties to the community. Some entered as children.
- The law is not only too harsh, it is also exceedingly complex.

Why do we deport permanent resident criminal offenders?

- **To protect the public**—the current statute has strayed too far from that rationale.
- **To punish**—contradicts a century of Supreme Court precedent that deportation is not punishment.
- **They've violated the terms of admission**—fairness dictates we not change those terms in the middle of the game.

Immigration Law: Myths and reality

- **Admission**—We romanticize our history, and fail to understand how current law thwarts even those who “play by the rules.”
- The label “**illegal alien**” masks complexities of immigration status.
- **Criminal Deportation**—Is too politically explosive to be on the table for reform, but it is costly to enforce the law without sensible priorities and without discretion.

Broader lessons for reform

- Don't let rhetoric substitute for serious analysis.
- Identify what is broken and fix it—Don't stick with the laws on the books when they are not working.
- Remember the law has to be implemented out in the real world, by immigration agencies that range from the overtaxed to the completely dysfunctional.

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