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What Is “Comprehensive Immigration Reform”? Taking the Long View

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My main goal in this Hartman Hotz Lecture is to address one aspect of current debates about immigration law and policy. My focus will be “legalization,” by which I mean a program that confers lawful immigration status on a group of noncitizens who currently lack it. Legalization is worth addressing directly, precisely because it is so contentious and complex.

I will start with just a general sketch of the basic outlines of legalization proposals. One reason to keep this sketch general is that before any legalization proposal becomes law—if that should ever happen—it will undergo countless rounds of negotiation and compromise. The other reason to keep this sketch general is that any discussion of legalization needs to start by identifying the basic issues at stake.

Legalization (or Amnesty): Past and Present. First, some history. When legalization comes under discussion today, the precursor that comes immediately to mind is the general legalization program enacted by Congress as part of the Immigration Reform and Control Act of 1986 (IRCA).¹ This program was limited to aliens who had been residing unlawfully in the United States since January 1, 1982—nearly five years preceding enactment. Excluded were the many unauthorized migrants who entered after that date, as well as those whose presence was legal (for example as a nonimmigrant) until after

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1. Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (codified in scattered sections of 8 U.S.C.). For an overview, see THOMAS ALEXANDER ALEINIKOFF, DAVID A. MARTIN, HIROSHI MOTOMURA & MARYELLEN FULLERTON, IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY 1347-48 (6th ed. 2008).

that date. Those eligible had one year to apply for “temporary resident status,” which lasted for eighteen months, after which they had three years to apply for permanent resident status. Permanent residence required that applicants: (1) maintain continuous residence in the United States; (2) not be convicted of a felony or three or more misdemeanors committed in the United States; and (3) demonstrate a minimal understanding of the English language and a knowledge and understanding of the history and government of the United States (or that they are satisfactorily pursuing a course of study to this end).² This “basic citizenship skills” requirement was waivable for applicants over sixty-five years of age.³

IRCA also legalized “special agricultural workers” (SAWs)—aliens who had resided in the United States and worked at least ninety days in “seasonal agricultural services” between May 1985 and May 1986.⁴ Although legalized SAWs were not required to remain in agricultural labor, the proponents of the program anticipated that many would do so.⁵

Almost 1.7 million noncitizens obtained lawful status under the general legalization program, and another 1.3 million obtained lawful status through the SAW program. Together, the general and SAW programs legalized over sixty percent of the pre-IRCA undocumented population.⁶ But neither program granted lawful status to family members who were ineligible because, for example, they arrived after the cutoff date. These individuals were given other forms of quasi-legal status, however, and many of them were able to acquire lawful immigration status eventually.⁷

According to best estimates, the unauthorized population of the United States today seems to be nearly 12 million,⁸ and the

2. Immigration and Nationality Act § 245A(b), 8 U.S.C. § 1255a(b) (2006); *see also* ALEINIKOFF, MARTIN, MOTOMURA & FULLERTON, *supra* note 1, at 1347-48.

3. Immigration and Nationality Act § 245A(b)(1)(D)(ii), 8 U.S.C. § 1255a(b)(1)(D)(ii).

4. Immigration and Nationality Act § 210, 8 U.S.C. § 1160 (2006).

5. ALEINIKOFF, MARTIN, MOTOMURA & FULLERTON, *supra* note 1, at 1348.

6. *Id.*

7. *Id.*

8. *See* MICHAEL HOEFER ET AL., OFFICE OF IMMIGRATION STATISTICS, U.S. DEP'T OF HOMELAND SEC., ESTIMATES OF THE UNAUTHORIZED IMMIGRATION POPULATION RESIDING IN THE UNITED STATES: JANUARY 2009, at 1 (2010); JEFFREY S. PASSEL &

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debate has emerged anew over the question of whether some form of legalization should be adopted.⁹ Various pieces of proposed legislation would grant lawful status to those who lack it. Their proponents have tried to make the proposals seem less like “amnesty” by adding fines, procedural hurdles, and substantive requirements. For example, the proposal that gained the most traction during the 2007 debate would have established a new “Z visa” for unauthorized migrants residing and employed in the United States as of January 1, 2007. To be eligible, an applicant would pay a \$1000 fine and other processing fees, pass a criminal background check, maintain employment, and provide biometric data. The visa would be valid for four years; it could be renewed, but at renewal an applicant would need to demonstrate “an attempt to gain an understanding of the English language and knowledge of United States civics.”¹⁰ Z visa workers would be put on a “citizenship track,” but they would wait a considerable period of time before being eligible for a permanent resident status and ultimately citizenship. They could not be approved for permanent residence before immigrant visas leading to permanent residence were made available to all other persons with approved immigrant petitions filed before May 1, 2005; furthermore, Z visas holders would need to pay an additional \$4000 fine, be eligible for an immigrant visa, and file their application for permanent residence from outside the United States.¹¹

Beyond the particulars of any legislative proposal, the current state of the debate on legalization comes down to the following. Many proponents of “comprehensive immigration reform” view legalization as the key component of any legislative package that they would support. But many on the other side of the debate view legalization—or amnesty, as they would call it—as the one type of change that is most objectionable.¹²

D'VERA COHN, PEW HISPANIC CTR., A PORTRAIT OF UNAUTHORIZED MIGRANTS IN THE UNITED STATES app. B at 29 tbl.B1 (2009).

9. See, e.g., 153 CONG. REC. S7272-73 (daily ed., June 7, 2007) (statement of Sen. Coburn).

10. S. 1639, 110th Cong. § 601 (2007).

11. See ALEINIKOFF, MARTIN, MOTOMURA & FULLERTON, *supra* note 1, at 460.

12. See Hiroshi Motomura, *Immigration Outside the Law*, 108 COLUM. L. REV. 2037, 2047 (2008).

My comments in this evening's lecture consist of two general parts. First, I will identify several common misconceptions about amnesty—or legalization—and explain how they are misleading or wrong, and how they obscure the fundamental issues that should merit our attention. Then I will move to a more extended discussion of ways to think about the issues implicated in any amnesty or legalization.

Two Common Misconceptions. Now, the misconceptions. One misconception is that legalization is the key component of any comprehensive reworking of our immigration laws. It is not. All that legalization accomplishes is that it corrects the shortcomings of immigration laws in the past. Legalization does nothing to fix immigration laws going forward. This is not to say that legalization is entirely backward looking; it does affect immigration patterns going forward. I will come back to explaining this.

My point for now is that the effects of legalization fade over time. If policymakers overlook or choose to ignore this fact, then the next generation will need to revisit the same issues. This, of course, is a way to evaluate the amnesty program in 1986. It is no accident that the same issues are up for discussion again, about one generation later, with the uncomfortable feeling that we found no durable solutions in 1986.

A second misconception about amnesty—or legalization—is that it is an unusual and infrequent occurrence in U.S. immigration law history. It is not. To be sure, a major component of IRCA was a legalization or amnesty program, but it is only the most visible example from among a vast array of legalization programs that have given lawful immigration status to hundreds of thousands—or even millions—of individuals who have come to the United States outside the law.

This legalization has sometimes occurred on an individual basis. At other times, these legalization programs have benefited large groups of noncitizens. Later in these remarks, I will say more about these programs and their significance. For now, let me just say that the second common misconception about U.S. immigration policy is that legalization is unusual.

Legalization in Context: Heat Versus Light. An interim observation emerges from identifying this combination of

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misconceptions—it is unfortunate that so much attention is being paid to legalization as a political issue, and that this attention is likely to intensify if and when Congress actively debates immigration reform. On the one hand, its benefits are limited, even though its supporters sometimes see legalization as essential. At the same time, notwithstanding the commonplace and almost routine nature of legalization, we like to tell ourselves that it is unusual and almost unprecedented, and this misperception makes it a political third rail. Because of this combination of misconceptions, legalization carries a degree of political liability that is disproportionately intense for the consequences of legalization that are likely to endure.

None of this necessarily suggests that legalization—or amnesty—is good or bad. I have not yet reached that question. So far, I have only argued for a shift in the way that public debate approaches legalization. It is not as radically bad as opponents make it out to be. And it is not as radically helpful as supporters make it out to be.

More About the First Misconception: Alternatives to Legalization. So far, I have only tried to clear away some conceptual underbrush by addressing and explaining some common misconceptions. I have done so because so much discussion of immigration policy in general, and legalization in particular, starts at the wrong place. But admittedly, I have said nothing that makes a case that we should or should not have an amnesty or legalization program. Now I want to suggest some ways of thinking about whether or not legalization is a good thing and about what shape a legalization program should take—if any is adopted at all.

My starting point, which is admittedly a bit unorthodox, is a thought experiment. It is to imagine what the supporters of legalization might be willing to accept by way of permanent changes to the immigration laws in exchange for abandoning proposals for a one-time legalization program. Right away, the political attractiveness of this approach should be clear. It would not identify any sizeable population of illegal immigrants and give them lawful status on a blanket basis. This might go a long way toward diffusing opposition to legalization—or amnesty. But what does it give to supporters of legalization?

What would legalization supporters be willing to accept in exchange if they would abandon any hope of legalization?

The answer first identifies changes that would simply allow the current population of unauthorized migrants to acquire legal status if they qualify in the current categories for lawful immigration. This may seem eminently sensible, and indeed many readers may be surprised that a noncitizen who is newly qualified in a lawful immigration category—for example through a qualifying job or a qualifying family relationship—might not actually be able to become a permanent resident under current law. To allow this, Congress could reinstate adjustment of status under § 245(i) of the Immigration and Nationality Act (INA). This change would allow those who qualify in an immigration category to become permanent residents even if they are in the United States after an unlawful entry.¹³ Another way to allow full access for those who qualify under lawful admission categories would be to repeal the inadmissibility grounds that currently bar admission to the United States for periods of three or ten years if a noncitizen has been unlawfully present in the United States for 180 days (or one year, respectively).¹⁴

A second type of change to current law would broaden access to discretionary relief from removal. Especially important here are the threshold eligibility requirements for cancellation of removal under § 240A(b) of the INA. This provision can confer lawful permanent resident status on noncitizens who: (1) are in the United States unlawfully if they have been physically present for a certain period of time; (2) are not disqualified (for example, because of certain criminal convictions); and (3) can show a certain degree of hardship.¹⁵ As with § 245(i) and the repeal of the three- and ten-year bars,

13. Immigration and Nationality Act § 245(i), 8 U.S.C. § 1255(i) (2006); *see also* ALEINIKOFF, MARTIN, MOTOMURA & FULLERTON, *supra* note 1, at 660-62.

14. Immigration and Nationality Act § 212(a)(9)(B), 8 U.S.C. § 1182(a)(9)(B) (2006); *see also* ALEINIKOFF, MARTIN, MOTOMURA & FULLERTON, *supra* note 1, at 520-23. For criticism of the three- and ten-year bars, see David A. Martin, *Waiting for Solutions: Extending the Period of Time for Migrants to Apply for Green Cards Doesn't Get at the Real Problem*, LEGAL TIMES, May 29, 2001, at 66.

15. Immigration and Nationality Act § 240A(b), 8 U.S.C. § 1229b(b) (2006); *see also* ALEINIKOFF, MARTIN, MOTOMURA & FULLERTON, *supra* note 1, at 793-801.

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this would change current law, but far more modestly than an amnesty or legalization would.

A third type of change, which also can stand free of any accusations of amnesty or legalization, would rework the scheme for lawful admission of noncitizens to the United States. One option here is to allow a much higher number of noncitizens who lack a college degree to be admitted to the United States as permanent residents, who by definition have a path to citizenship under current law.¹⁶ This group is the labor pool with the starkest disparity between the very strong demand on the part of U.S. employers and potential migrants' very limited lawful access to the United States and its labor market.¹⁷ A related change is to relax or repeal numerical limits that currently cap immigrant admissions in many categories on a country-by-country basis.¹⁸ These limits make the waiting lists for intending immigrants from certain countries—notably Mexico—longer than for those from other countries.¹⁹

A fourth type of change would prompt the U.S. government to address unauthorized immigration in ways that reach well beyond the immigration law scheme itself. Crucial here are international economic development measures to support the economies of sending countries in ways that would give intending migrants a more realistic choice to stay home rather than come to the United States outside the law.²⁰ Here again, Mexico is central because it accounts for about sixty percent of immigration outside the law according to the best available estimates.²¹

16. See Immigration and Nationality Act § 316(a), 8 U.S.C. § 1427(a) (2006); see also ALEINIKOFF, MARTIN, MOTOMURA & FULLERTON, *supra* note 1, at 63-64.

17. See Immigration and Nationality Act § 203(b), 8 U.S.C. § 1153(b) (2006) (setting out the current employment-based immigrant admission categories); see also ALEINIKOFF, MARTIN, MOTOMURA & FULLERTON, *supra* note 1, at 303-04.

18. See Immigration and Nationality Act § 202, 8 U.S.C. § 1152 (2006); see also ALEINIKOFF, MARTIN, MOTOMURA & FULLERTON, *supra* note 1, at 308-10.

19. See U.S. DEP'T OF STATE, 9 VISA BULLETIN NO. 18 (2010), available at http://travel.state.gov/visa/frvi/bulletin/bulletin_1360.html.

20. See generally DOUGLAS S. MASSEY ET AL., BEYOND SMOKE AND MIRRORS: MEXICAN IMMIGRATION IN AN ERA OF ECONOMIC INTEGRATION (2003); Motomura, *Immigration Outside the Law*, *supra* note 12, at 2094-96. For a definition of "outside the law," see *id.* at 2038 n.1 (explaining that the phrase is more literally accurate and neutral than illegal or undocumented immigration).

21. HOEFER ET AL., *supra* note 8, at 4 tbl.3; PASSEL, *supra* note 8, at 21-22.

A fifth type of change in current thinking and current law would also go beyond immigration law per se. The focus here is educational investment in the United States. This is heard far less often as part of the immigration discussion. But the education of Americans is a key part of any sound reworking of immigration policy that tries for meaningful, durable change instead of a quick-fix, one-time legalization. Unlike international economic development, this is not a matter of regulating the flow of migrants to the United States, but of addressing its effects on the United States.²²

Sixth, we have to address the role of enforcement as a necessary part of any legalization program. By putting enforcement last on the list, I do not mean to come close to leaving it out of the policy discussion. At the very least, the enforcement element reflects political reality. History again serves as a useful guide. Back in 1986, IRCA was a fragile and finely balanced compromise that included not only legalization, but also strengthened enforcement in the form of stricter border controls.²³ For the first time, an employer sanctions program introduced federal civil and criminal penalties for employers who knowingly hire or retain unauthorized workers, or who do not fill out and keep paperwork designed to deter and expose unlawful employment. Notwithstanding the significance of enforcement, I address it last because it is important first to consider exactly what law we are enforcing.

My purpose in imagining these changes to current law—but without the sort of blanket, large-scale legalization program modeled after the 1986 program—is partly to suggest that these changes represent a far more durable and politically viable engagement with immigration outside the law than a one-time legalization program. My other purpose in imagining these changes to current law is to suggest an alternative to legalization, not necessarily in opposition to legalization, but identifying what might be better and less objectionable to some.

Objections to Legalization. Having discussed more durable alternatives to legalization, I now want to return to

22. See Motomura, *Immigration Outside the Law*, *supra* note 12, at 2079-82.

23. See Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (codified in scattered sections of 8 U.S.C.); ALEINIKOFF, MARTIN, MOTOMURA & FULLERTON., *supra* note 1, at 1312-22.

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legalization itself, and in particular, to address objections to legalization. One objection that initially seems to make sense is that any legalization will inevitably encourage more immigration outside the law, because the hope that another legalization program will be enacted at some point in the future adds an incentive to come to the United States.

There are different ways to think about this argument. To be sure, any legalization will make another legalization in the future seem more likely than if Congress refuses to enact legalization at all. This does not mean, however, that the prospect of future legalization based on the adoption of a program now will cause an increase in the number of immigrants who come to the United States outside the law. Most unauthorized migrants come because they can find work that pays better than work at home. In fact, it pays so much better that it is worth the considerable risk and sacrifice.

Though the promise of future lawful status might make a difference to some, far more significant in the decision-making process are the immediate risks and rewards, which do not include the remote possibility of some future legalization. These immediate risks and rewards are central not only because any future legalization is remote, but also because so many unauthorized migrants come to the United States with no expectation of staying permanently. Put differently, if they knew that they could only come to the United States for, say, five years of work that seems well-paid in comparison to their working options at home, they would still come.

But objections that legalization creates an incentive—or at least eliminates a disincentive—for undocumented migration have roots deeper than what can be dismissed by empirical studies. The deeper objection is that legalization *endorses* lawbreaking, even if legalization does not necessarily *cause* lawbreaking. The endorsement itself is objectionable even if it is largely symbolic. Symbols and endorsements matter. Implicated here is the “rule of law,” and the related belief that it is wrong for U.S. immigration policy to back off from enforcing

the laws that the unauthorized population has broken by coming to the United States and staying here.²⁴

The challenge is giving some content to the idea of the “rule of law.” Of course, something about legalization—or literally, granting lawful status to those who do not have it now—sounds antithetical to the rule of law. It is worse yet for amnesty, which implies forgiving past transgressions. This is why the word “legalization” sounds to many like a bad euphemism and why the word “amnesty” seems more honest and accurate yet no less objectionable to many.

There is much to be said about this “rule of law,” but let me try to state my views succinctly. To be sure, there is a powerful impulse to see the rule of law as absolute and to both start and end arguments with the epithet “illegal.” But “immigration law” is not just a set of laws on the books that regulate admission and deportation. It includes a broader array of ways in which we encourage or discourage population flows. From this broader perspective, the Homestead Act and other laws that enabled the settlement of the American West were, in a very real sense, “immigration laws.”²⁵ Immigration law also consists of the ways in which we enforce or do not enforce those laws.²⁶

If the United States had a history of strictly enforcing immigration laws but some noncitizens managed to sneak through and come to comprise an unauthorized population, then it might make sense to think of any after-the-fact official willingness to overlook illegality as an “amnesty” or an act of “forgiveness.” But U.S. national history has shown otherwise for virtually all of the twentieth century. In the context of the U.S. economy’s reliance on immigrant workers, especially on unauthorized workers, it is worth remembering that U.S. policy for much of the twentieth century amounts to open tolerance.²⁷

24. See generally Hiroshi Motomura, *The Rule of Law in Immigration Law*, 15 TULSA J. COMP. & INT’L L. 139 (2008); see also Motomura, *Immigration Outside the Law*, *supra* note 12, at 2089-91.

25. Homestead Act, 12 Stat. 392, 392 (1862); see also Kerry Abrams, *The Hidden Dimension of Nineteenth-Century Immigration Law*, 62 VAND. L. REV. 1353, 1401 (2009).

26. HIROSHI MOTOMURA, AMERICANS IN WAITING: THE LOST STORY OF IMMIGRATION AND CITIZENSHIP IN THE UNITED STATES 177 (2006) [hereinafter MOTOMURA, AMERICANS IN WAITING].

27. *Id.* at 129-30; Motomura, *Immigration Outside the Law*, *supra* note 12, at 2049-53.

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To think of an immigrant group as inside or outside the law is just the beginning of thinking hard about what is fair and just in forming national policy. This is the significance of the second misconception that I noted at the start of my remarks—legalization has not been rare or even unusual in the history of U.S. immigration law.

More About the Second Misconception: Legalization in U.S. Immigration Law History. I should now say more about how this second misconception sheds light on legalization proposals today. One of the great myths of immigration law is that the line between lawful and unlawful immigrants is clear and impermeable. The historical truth is that we have periodically granted lawful status to many newcomers even when they fit into no immigration category and came here outside the law. The legal vehicles have been numerous. They bear technical labels, like suspension of deportation,²⁸ asylum,²⁹ cancellation of removal,³⁰ registry,³¹ the Cuban Adjustment Act,³² the Nicaraguan Adjustment and Central American Relief Act,³³ the Haitian Refugee Immigration Fairness Act,³⁴ the Immigration Reform and Control Act,³⁵ and more.

If we look beyond the technicalities, two common themes emerge. One is that the United States has given lawful status to noncitizens who are here because of events beyond their control. For example, America's proud tradition as a refuge for those

28. See ALEINIKOFF, MARTIN, MOTOMURA & FULLERTON, *supra* note 1, at 793. Suspension of deportation is one precursor of the discretionary relief now known as cancellation of removal. *Id.*

29. See Immigration and Nationality Act § 208, 8 U.S.C. § 1158 (2006); see also ALEINIKOFF, MARTIN, MOTOMURA & FULLERTON, *supra* note 1, at 828-946.

30. See Immigration and Nationality Act § 240A(b), 8 U.S.C. § 1229b(b) (2006); see also ALEINIKOFF, MARTIN, MOTOMURA & FULLERTON., *supra* note 1, at 793-801.

31. See Immigration and Nationality Act § 249, 8 U.S.C. § 1259 (2006); see also ALEINIKOFF, MARTIN, MOTOMURA & FULLERTON, *supra* note 1, at 816-18.

32. Cuban Adjustment Act, Pub. L. No. 89-732, 80 Stat. 1161 (1966) (codified in scattered sections of 8 U.S.C.).

33. Nicaraguan Adjustment and Central American Relief Act, Pub. L. No. 105-100, §§ 201-204, 111 Stat. 2193 (1997) (codified as amended in scattered sections of 8 U.S.C.). See generally SUSAN BIBLER COUTIN, *NATIONS OF EMIGRANTS: SHIFTING BOUNDARIES OF CITIZENSHIP IN EL SALVADOR AND THE UNITED STATES* (2007).

34. Haitian Refugee Immigration Fairness Act of 1998, Pub. L. No. 105-277, §§ 901-904, 112 Stat. 2681-538 to -542 (1998) (codified as amended in scattered sections of 8 U.S.C.).

35. Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (1986) (codified in scattered sections of 8 U.S.C.).

fleeing persecution is so deeply rooted that we often forget the way many of them arrived—without papers.

Some of the other programs I mentioned were outgrowths of refugee and asylum protection. These programs include the Cuban Adjustment Act for immigrants from Cuba. Another example is the Nicaraguan Adjustment and Central American Relief Act (NACARA), which granted lawful immigration status to large numbers of previously unauthorized migrants from Nicaragua, El Salvador, and Guatemala. A related example is the Haitian Refugee Immigration Fairness Act (HRIFA), the origins of which lie in NACARA, and in particular in the concern that asylum seekers from Haiti were not being treated as favorably as those fleeing Latin American countries such as Cuba or Nicaragua. Similarly, much current debate about the way immigration law treats many unaccompanied children and victims of domestic violence,³⁶ trafficking,³⁷ and other criminal activity³⁸ amounts to a debate about whether to protect these migrants, even if they lack lawful presence, by deciding to treat them—and indeed, to imagine them—outside the category of “illegal aliens.”

A second common theme in this history of occasional legalization is that we have legalized noncitizens based on their integration into American society and their contributions to our national future. This happens, for example, when immigration courts grant lawful status on a case-by-case basis to individuals through some form of discretionary relief. These determinations rely on a number of factors that vary from case to case, but a key set of considerations looks at integration into American society as measured in various ways, including family ties to U.S. citizens and permanent residents, as well as work history.³⁹

36. See Immigration and Nationality Act § 101(a)(51), 8 U.S.C. § 1101(a)(51) (2006) (defining petitioners under the Violence Against Women Act (VAWA)).

37. See Immigration and Nationality Act § 101(a)(15)(T), 8 U.S.C. § 1101(a)(15)(T) (defining noncitizens who qualify for T visas for trafficking survivors).

38. See Immigration and Nationalization Act § 101(a)(15)(U), 8 U.S.C. § 1101(a)(15)(U) (defining noncitizens who qualify for U visas for crime victims).

39. See Immigration and Nationalization Act § 240A(b)(1)(D), 8 U.S.C. § 1229b(b)(1)(D) (2006). General integration into U.S. society, including work history, was a more significant factor in discretionary relief before the law was amended in 1996. See, e.g., *In re O-J-O-*, 21 I. & N. Dec. 381, 382-83 (B.I.A. 1996).

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Similar considerations drove the legalization program included in IRCA in 1986.

To round out this examination of legalization in U.S. immigration law history, we should ask why we see this pattern of ad hoc legalization. One reason is that immigration policy choices are very difficult to anticipate in advance. If we look closely at any of these examples of the permeability of the legal-illegal line in immigration law, it becomes clear that each instance reflects circumstances that were compelling in ways that were hard to anticipate. This uncertainty involves not only the laws that are enacted, but also how those laws are enforced. Enforcement choices are highly discretionary, and decision-makers often shift priorities.

A second reason is that letting immigrants come outside the law, and then periodically legalizing those with strong work histories, may be more accurate and efficient than trying to identify in advance who the best economic contributors will be. Sometimes we cannot make a good case for letting in a certain group of immigrants because the contributions that they will make to America are too speculative, but we are willing to recognize their contributions once they become clear.⁴⁰

A third reason for this pattern of ad hoc legalization is that today, even more than a generation ago, a significant reduction in immigration outside the law would require many more resources than what the government currently devotes to immigration law enforcement.⁴¹ Resources can be devoted to a mix of the interior and the border. Interior enforcement can focus on the workplace, on noncitizens who are deportable due to crimes, or on those who abscond after removal orders. Likewise, border enforcement could target airports, the border with Mexico or Canada, or pre-inspection stations outside the United States. Assuming enforcement of immigration laws, government officials may impose civil immigration penalties or, in certain instances, criminal sanctions. After these systemic choices are made, individual officers target some individuals

40. See Adam B. Cox & Eric A. Posner, *The Second-Order Structure of Immigration Law*, 59 STAN. L. REV. 809, 844-49 (2007) (arguing that the current enforcement system screens ex post and explaining why this may be preferable to screening ex ante).

41. See Motomura, *Immigration Outside the Law*, *supra* note 12, at 2054; MOTOMURA, *AMERICANS IN WAITING*, *supra* note 26, at 176-80.

and leave others alone. Given the factual and political complexity of these choices, screening after entry through individual or periodic group legalizations is more flexible, and especially more responsive to the needs of the U.S. economy, than anything that requires legislation or agency implementation.

A fourth reason for ad hoc legalization is more troubling but requires mention. In many periods of U.S. history, immigration law enforcement—and how enforcement has been tempered through various forms of legalization—has reflected discrimination by race and ethnicity.⁴² Prominent here is the pronounced inclination to think of certain workers—especially Mexican workers throughout much of the twentieth century—as a flexible labor force that could be kept at the margins of our society, even if active recruitment by U.S. employers and tolerance of unlawful status by the U.S. government was in large measure responsible for the growth of the unauthorized population in spurts throughout the twentieth century and continuing to the present day.⁴³ Moreover, much of the individualized discretionary relief that was available to white immigrants in the mid-twentieth century—on the theory that their illegal status was merely “technical”—was unavailable to immigrants from Mexico and other Latin American countries.⁴⁴ Having tolerated immigration outside the law but also having granted legalization to favored groups, it is politically and morally awkward, and perhaps untenable, to deny legalization to other groups today.

Shaping Legalization by Starting With Historical Practice. Now I will pull together the main strands from my four sets of comments on: (1) misconceptions about legalization; (2) alternatives to legalization; (3) objections to legalization; and (4) a historical look at legalization.

The first key step is to think not about legalization but about the kind of immigration law system we want to have. We need to think more broadly than policymakers often do and take

42. See MOTOMURA, *AMERICANS IN WAITING*, *supra* note 26, 48-49, 70-71, 128-30, 178-79.

43. Motomura, *Immigration Outside the Law*, *supra* note 12, at 2049-51.

44. See ALENIKOFF, MARTIN, MOTOMURA & FULLERTON, *supra* note 1, at 656; MAE M. NGAI, *ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA* 56-90 (2004).

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the long view of immigration reform. This means, among other things, that legalization is a matter of retrospectively selecting the immigrants whom we might have been wise to select in the first place, not about penalizing those who came or stayed outside the law.

To put this general concept into action, we need to think about the alternatives to legalization that I discussed earlier in these remarks. This would mean bringing the lawful admissions system into closer alignment with the needs of the U.S. economy as it strives to remain competitive worldwide. We should also rework the lawful admissions system to allow those who qualify in an immigrant admission category to acquire lawful permanent resident status. We should allow the mechanisms that have historically been part of U.S. immigration law, and which recognize contributions to society by granting lawful status to deserving individuals on a case-by-case basis, even if they lack lawful status today.

We also need to understand that immigration, including immigration outside the law, reflects patterns of economic development in sending countries whose economies are closely related to our own. We also need to understand that any adverse effects of immigration on some groups of U.S. citizens reflect shortcomings of our educational system more than such effects suggest that immigration is the problem.

In addition, when we view legalization as retrospectively choosing immigrants, we should keep in mind what it means to acquire lawful immigration status—i.e., permanent residence—in the United States. Above all, this requires a path to citizenship, even if a long one, rather than deciding that any noncitizens who acquire lawful status must be relegated to permanent second-class status.⁴⁵

Now I come to this question—what is the role of legalization when we think about such changes to the current immigration system? As I have said, the changes that we make to the system itself will matter more in the long run than the contours of any legalization program. But a legalization program can help the implementation of these changes in several ways.

45. I discuss the reasons for this in MOTOMURA, *AMERICANS IN WAITING*, *supra* note 26, at 151-67.

Administrative efficiency is important in this context. If we believe that certain groups of individuals are quite likely to qualify for a certain type of immigration status in spite of individual variations, we should find it more efficient to grant the status categorically, rather than examining the facts of each case. For example, we adjudicate many asylum claims individually, but we have been willing to grant related forms of protection from persecution or disaster on a group-by-group basis. This is a way to think about children who were brought to this country at a young age by their parents, who have completed high school, and who will be contributing to America by attending college or serving in the military. We might decide in all fairness to look at each case individually, but it makes more sense to think about them as a group with individual variations being relatively inconsequential.

A related point is more substantive in that group legalization smoothes out random variations in the circumstances of individuals. If large population flows have been tolerated or even encouraged over generations, it makes sense to think in terms of these groups rather than to focus on individuals. Consider, for example, the role of gender in any group legalization program as compared with a case-by-case legalization of the sort that would be established by broadening eligibility for cancellation of removal. The latter might benefit traditional breadwinners while limiting access to lawful immigration status for caregivers in the home. Treating the beneficiaries of legalization on the basis of membership in a group—or put differently, in an immigrant community—reduces disparities by gender.

So conceived as the group-by-group implementation of desirable permanent changes to immigration law, any legalization program—or combination of programs—that may be adopted may be narrower than a broad, blanket legalization program. This is especially likely to be true as the politics of immigration reform get tougher. But the perfect (legalization program) should not be the enemy of the good. If a broader package of more durable changes to immigration law can be enacted, it would be more acceptable to limit legalization to those who would benefit from applying those permanent changes retrospectively. A sizeable and important group would

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benefit, for example, from repealing the three- and ten-year bars, reinstating § 245(i), opening up discretionary relief, broadening admissions for less skilled workers, *and* making all of these changes retrospectively. If this sort of durable package of changes becomes law, the shortcomings of any such legalization program will matter less over time.

Taking the Long View. I will end by recalling a question that was put to me several years ago at a forum on immigration policy. The question was simple but wise and went something like, “Everyone talks about comprehensive immigration reform. But what does comprehensive immigration reform really accomplish? What does it get us?”

I have spent a lot of time thinking about this question, and I have come to this response—any sort of reworking of our immigration laws can only buy time to make the changes that really matter in the long run. I think it is clear that I support some kind of legalization program. But I think it is important to put any such program—and any arguments for or against it—in a context that helps us understand what is at stake.

If we have some kind of legalization, immigration outside the law will drop initially, if only because we will relabel persons from unlawful to lawful. Some of these new lawful residents will be able to sponsor their close relatives, and in this sense, legalization can be forward-looking. But unless we also make the changes to immigration law that I have described, foster international economic development, and better serve the population in the United States that is most vulnerable to economic displacement by newcomers, immigration outside the law will increase over time. The consequence will be forcing our children to revisit these issues, perhaps in a form even more pressing than we face them today. In short, my comments amount to a plea that we think about legalization—and more generally about “comprehensive immigration reform”—in the way the next generation would want us to.