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## **The Law and Economics of Immigration Policy**

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## I. INTRODUCTION

In a globalizing world, we see dramatic increases in the international movement of goods, services and capital but next to no growth in the international movement of people. From 1950 to 1999, the average annual growth rate of world real GDP was 3.8%; the average annual growth rate in the trade of goods over the period was 6.2%; from 1980 to 1999 the average annual growth rate in the trade of services was 7.0%; from 1982 to 1999 the average annual growth rate in the stock of FDI was 13%. In contrast, the annual growth rate in the number of immigrants worldwide between 1965 and 2000 was only 1.77%, which does not differ significantly from the rate of growth in world population of approximately 1.72% annually over the same period. In fact, the proportion of the world's population that is made up of migrants has actually decreased since 1965 from 2.4 to 1.97%.<sup>1</sup> While trade and investment are in some cases substitutes for immigration, in other cases they are complements, thus suggesting that at least in part these contrasts are explicable by reference to the much more restrictive nature of most countries' immigration policies. Bob Hamilton and John Whalley<sup>2</sup> have estimated that the elimination of all global restrictions on labour mobility could result in a net *doubling* of worldwide annual GNP. Less sanguine assumptions result in estimated gains that are still highly significant from the perspective of global economic welfare and far exceed the gains from further trade liberalization.<sup>3</sup> In addition, Hamilton and Whalley report that complete immigration policy liberalization would engender a dramatically fairer distribution of world income.<sup>4</sup>

These figures raise important positive and normative puzzles that are of increasing importance in so-called knowledge-based economies in a globalizing world where human capital and agglomeration economies are often the principal source of comparative advantage.

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<sup>1</sup> World Trade Organization, *International Trade Statistics 2000* (Geneva: WTO, 2000)

<sup>2</sup> See Bob Hamilton and John Whalley, "Efficiency and distributional implications of global restrictions on labour mobility: calculations and policy implications" (1984) 14 *Journal of Development Economics* 61.

<sup>3</sup> See Economist magazine, Survey on Immigration, November 2<sup>nd</sup>, 2002, at 3..

<sup>4</sup> *Supra* note 2 at 73-74.

## II. STYLIZED FACTS ABOUT IMMIGRATION POLICIES IN RECEIVING COUNTRIES

While the details of immigration policies in major destination countries such as the U.S., Canada and Australia vary widely, they typically entail three primary classes of immigrants: a family class, an independent class, and a refugee class. Generally speaking, each of the three classes is subject to a quota limiting the number of immigrants who are admissible under the rubric of the relevant class in any given year (however, inland refugee claimants are at least theoretically evaluated against the criteria set out in the 1951 U.N. Convention Relating to the Status of Refugees (the *Geneva Convention*) irrespective of any quota). In the U.S., family sponsorship accounts for a substantially higher percentage of legal immigrants than independent immigrants, relative to Canada and Australia. Canada and Australia apply an elaborate point system for determining the admissibility of independent immigrants, designed with the objective of admitting those with a high probability of effective economic integration. The U.S. applies more loosely defined priority criteria to this category of immigrant. All three countries provide for short-term visas for tourists, students and temporary workers. In the U.S. illegal immigration is a major phenomenon (amounting to perhaps 400,000 immigrants a year, compared to about 800,000 legal immigrants).

Australia's population is 21.5 percent foreign born, Canada's foreign-born population is 16.8 percent and the foreign-born in the U.S. represent 9.8 percent of its population. Canada's annual intake of legal immigrants (approximately 225,000 immigrants) is 0.74 percent of its population. In 2000, the independent class accounted for 58.7 percent (including dependents), the family class accounted for 26.6 percent, and the refugee class accounted for 11.8 percent of the Canadian intake of immigrants. The U.S. legal immigration intake (about 800,000 a year) is about 0.25 percent of its population. Family members account for about 72 percent of the intake, independent immigrants about 12 percent, and refugees about 8 percent. Australia admits about 85,000 immigrants a year – 0.44 percent of its population – about 39 percent family members, 47 per cent independent immigrants, and 12 percent

refugees.

Apart from Australia, Canada and the U.S., the other primary immigrant receiving area is the European Union. The countries of the EU do not (as of yet) have one officially agreed upon and collectively administered immigration policy relating to citizens of third party countries, but they do have a very liberal policy for the internal movement of people. Title IV of the EC Treaty, established in international law by the Treaty of Amsterdam as of May 1, 1999, provides for, *inter alia*, the free movement of all persons – citizens and non-citizens – within the EU, and tighter control of external borders.<sup>5</sup> On May 1, 2004 (five years from the full implementation of the Treaty of Amsterdam) all internal border checks in the EU are scheduled to cease. In addition, all EU states will share a harmonized set of rules governing the granting of external visas. These common rules will include common procedures and conditions concerning visa issuance, common rules regarding third-country nationals who do not require visas, and a common set of standards regarding the physical format of visas. Asylum and immigration policies will be governed in common by the Council of the European Union based on rules that have yet to be finalized.<sup>6</sup>

Labour mobility guarantees for citizens of member countries within the Union have existed since 1961 when the inaugural six countries founded the EU. These labour mobility guarantees have been progressively liberalized, with the free internal movement of people guaranteed by the Treaty of Amsterdam representing the fullest liberalization possible. A significant number of EU nationals are currently making use of the existing guarantees (in 1999 approximately 1.8 percent, or 2.7 million) by working in member states other than their countries of origin.<sup>7</sup> By virtue of Articles 39 and 40 of the EC Treaty, EU citizens currently have, *inter alia*, the right to look for and engage in paid employment in any member state; the right to reside in the member state with his or her family in which the EU

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<sup>5</sup> See SCADPlus, “The Amsterdam Treaty: A Comprehensive Guide” (July 17, 2001) digital document available online at <http://europa.eu.int/scadplus/leg/en/lvb/a11000.htm>.

<sup>6</sup> *Ibid.*

citizen is working and remain in the country of employment even after employment has ceased; and the right to equality of treatment with nationals of any other member state, including access on the same terms to social programs, tax advantages, publicly subsidized education, publicly provided or subsidized housing, civil law standing as a plaintiff or complainant, wage guarantees, and minimum standards of living. In short, “Once employed, EU law provides that every worker and his family enjoy the same social advantages as national workers, whether he is resident in that country or [commutes across the border].”<sup>8</sup> One major caveat associated with equal treatment and eligibility for social assistance surrounds those who are present in another member state in pursuit of work. Job-seekers are not eligible to receive social assistance benefits in the member state to which they have been admitted for residence until they have secured employment. Frontier workers – those who reside in one member state but commute for employment purposes to another member state – are bound by the laws of the country of employment, and as such usually receive social benefits and pay taxes in the member state in which they are employed, not in the country of residence.<sup>9</sup>

### **III. NORMATIVE CRITIQUES OF PREVAILING IMMIGRATION POLICIES**

At current levels approximately only one out of every fifty of the world’s people are living outside their country of origin.<sup>10</sup> The barriers to the international movement of people – for the skilled and unskilled, from developed and developing countries of origin alike – stem primarily from restrictive immigration policies in developed countries. Aggregate average income in the wealthiest twenty countries is more than 37 times greater than the average income in the world’s 20 poorest

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<sup>7</sup> See European Commission, *The Free Movement of Workers in the Context of Enlargement* (March 6, 2001) digital document available online at [http://europa.eu.int/comm/enlargement/docs/pdf/migration\\_enl.pdf](http://europa.eu.int/comm/enlargement/docs/pdf/migration_enl.pdf) at 29.

<sup>8</sup> *Ibid.* at 32.

<sup>9</sup> *Ibid.*

<sup>10</sup> See International Labour Organization, “World migration tops 120 million says ILO: 67 countries are now major receivers of immigrants” (March 2000), digital document available online at <http://www.ilo.org/public/english/bureau/inf/pr/2000.htm>. Other estimates range from 100 million to 140 million. See Sharon Stanton Russell and Michael S. Teitelbaum, *International Migration and International Trade* (Washington, DC: World Bank Discussion Paper

countries.<sup>11</sup> The World Bank estimates that 2.8 billion people (about half of the world's population) live on incomes of less than two dollars a day.<sup>12</sup> With economic disparity so great and the international movement of people so low, the deleterious effects of the restrictive immigration policies of the developed nations are clear.<sup>13</sup> Notwithstanding the fact that hundreds of thousands of people migrate from LDCs to developed countries each year, incumbent governments and residents of the most developed countries have been and continue to be highly successful at perpetuating a state of affairs in which "the huddled masses" are kept at bay. Many highly skilled and well-educated individuals in both developed and developing countries harbour a strongly held desire to emigrate to countries in which they can participate in their field of specialty and make productive contributions that are less likely to be made (for lack of complementary human capital and financial resources) in their countries of origin. As will be demonstrated, the extent to which immigration policies that keep the highly skilled and the relatively unskilled alike from migrating freely are normatively justifiable varies dramatically from the perspectives of economic welfare, communitarianism, and liberalism.

## **A) An Economic Perspective**

### **1) The Welfare Effects of Immigration**

With a set of assumptions that only tenuously approximate reality, neoclassical economic theory suggests that an optimal immigration policy would be not to have one at all.<sup>14</sup> That is, neoclassical economic theory suggests that borders should be open since any constraint on the operation of the international labour market (e.g. closed or only semi-open borders) will generate

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No. 160, 1992); and George J. Borjas, "Introduction" in George J. Borjas, ed. *Issues in the Economics of Immigration* (Chicago: The University of Chicago Press, 2000) 1 at 1.

<sup>11</sup> See The World Bank, *The World Development Report 2000/2001: Attacking Poverty*, "Overview" at 3. Digital document available online at <http://www.worldbank.org/poverty/wdrpoverty/report/overview.pdf>.

<sup>12</sup> *Ibid.*

<sup>13</sup> These effects are clear when one considers the background fact that third world labour employed in the first world is much more productive, valuable and efficient than it is at home. This is largely attributed to the much better legal, financial and political institutions of the developed world, but is probably also due to a much larger pool of managerial talent. See Mancur Olson, "Big Bills Left on the Sidewalk: Why Some Nations are Rich, and Others Poor," (1996) 10(2) *Journal of Economic Perspectives*, 3 at 19-20.

distortions in economic decision-making and impose welfare costs globally in terms of foregone production and, consequently, unrealized utility gains. This suggests that prevailing restrictive immigration policy regimes are deeply misguided. Given the complexity of the issues involved, however, placing much importance on this initial appeal to the conclusions of neoclassical economic theory is premature.

In general, immigration policies are evaluated in two competing ways (although others are conceivable). The first entails the use of a global welfare function that weighs equally the welfare of all persons, wherever they may reside. The second is to use a narrow, nationalistic welfare function in which only the effects on ‘insiders’ – not including those in the country of origin or the immigrants themselves – are considered. Immigration policies are currently debated and designed within nation-states and it is clear (aside from the issue of whether this is desirable) that countries are concerned about the welfare of ‘insiders’ to a greater extent than the welfare of ‘outsiders.’<sup>15</sup> While Howard Chang, among others, has asserted that the distinction between a national welfare function and a global welfare function is pragmatically unimportant because immigration ultimately benefits both insiders and outsiders,<sup>16</sup> it is almost certainly the case that for liberalized immigration policies to be feasible politically, most natives in recipient countries must be made better off (or at least not worse off) by their adoption.

The current debates and available empirical evidence surrounding the economic impacts of immigration are much more sophisticated than they were even a decade ago. However, there are many

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<sup>14</sup> See, for example, Teresa Hayter, *Open Borders: The Case Against Immigration Controls* (London: Pluto Press, 2000).

<sup>15</sup> This is plainly the case given that the modern welfare state provides materially for its own indigent very generously compared to those facing far graver famine and poverty in the third world. Adam Smith long ago recognized the tendency to care more strongly for those closest to us and less strongly for those more removed. See Adam Smith, *The Theory of Moral Sentiments* (Amherst, NY: Prometheus Books, 2000); see especially Part VI, Section II, Chapter I, entitled “Of the Order in which Individuals are recommended by Nature for our care and attention.”

<sup>16</sup> See, for example, Howard F. Chang, “The Economic Analysis of Immigration Law” in Caroline Brettell and James Hollifield, eds., *Migration Theory: Talking Across Disciplines* (New York: Routledge, 2000) 205 at 206; and Howard F. Chang, “Migration as International Trade: The Economic Gains from the Liberalized Movement of Labor” (1998) 3(2) *UCLA Journal of International Law and Foreign Affairs* 371.



issues that are far from satisfactorily resolved because of the sheer complexity of the causes and effects of immigration. First, immigration policies differ functionally among developed countries so that empirical evidence drawn from one country cannot yield conclusive answers to the effects of immigration in another country. Second, as emphasized by George Borjas, the nature of immigrant cohorts to a given country has not been static over time, reflecting shifts in “pull” and “push” factors, as well as changes in immigration policies within countries, making any attempt to draw general conclusions about the desirability of increasing immigration flows even within a given country problematic.<sup>17</sup> Finally, immigrant cohorts to most developed countries have been and continue to be highly heterogeneous – refugees and asylees, family sponsored immigrants, and independent immigrants are often considered together by economists in attempting to evaluate empirically the welfare effects of immigration. It would not be surprising if each subset (and indeed subsets of each subset) of immigrants had separate and differing welfare effects for recipient countries. With these significant cautions in mind, however, the stylized facts and available empirical economic evidence suggest that immigration has been of net benefit to the vast majority of the residents of destination countries, the only possible losers being native workers or prior immigrants with very low skill levels.<sup>18</sup> The data are peculiarly at odds with prevailing public attitudes as revealed by various surveys over the past decade regarding the economic desirability of immigration.<sup>19</sup> The surveys generally show that a majority of residents in developed countries would prefer that current immigration levels be reduced or, at the very least maintained, but certainly not increased. The survey results reflect two

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<sup>17</sup> See George Borjas, *Heaven's Door: Immigration Policy and the American Economy* (Princeton, NJ: Princeton University Press, 1999) at 8.

<sup>18</sup> In a study co-authored with colleagues Richard Freeman and Lawrence Katz, Borjas argues that adverse labour market impacts of immigration on wages are concentrated primarily on high school dropouts. See George Borjas, Richard Freeman and Lawrence Katz, “How Much Do Immigration and Trade Affect Labor Market Outcomes?” (1997) 1 *Brookings Papers on Economic Activity* 1 at 62-63.

<sup>19</sup> See NPG, “Immigration Controls: Why Won’t Congress Listen to the American People” (July 2001) digital document available online at <http://www.npg.org/facts/impolls.htm>.

broad classes of fears: that increased numbers of immigrants will have adverse labour market effects, and will increase the fiscal burden borne by natives.<sup>20</sup>

Recent studies of the effects of immigration on labour markets have generally demonstrated that increased numbers of immigrants have had played little observable role in reducing wages or in increasing unemployment.<sup>21</sup> After conducting a thorough review of the empirical evidence in the literature, a recent report of the National Academy of Sciences<sup>22</sup> concluded that “the weight of the empirical evidence suggests that the impact of immigration on the wages of competing native workers is small.”<sup>23</sup> These findings are puzzling given the accepted labour economics account of the expected effects of greater labour market competition. The conventional analysis suggests that by increasing the supply of labour, *ceteris paribus*, wages will decrease among similarly endowed and situated workers. The *ceteris paribus* proviso is an important one. It requires immigrants to increase the supply of labour in domestic labour markets without contemporaneously increasing the demand for labour. However, an offsetting increase in the demand for labour is in fact quite plausible, since immigrants are consumers of goods and services, and the increased demand for and provision of goods and services inevitably associated with their presence ought to result in a corresponding increase in labour demand by domestic suppliers of goods and services.

George Borjas has recently argued that these studies find very little evidence of adverse labour market effects not because these effects do not exist, but because of the difficulty of isolating the impacts of increased numbers of immigrants in local labour markets.<sup>24</sup> Gaston and Nelson have offered a competing theoretical explanation of the empirical finding that there is little adverse impact

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<sup>20</sup> See Julian Simon, *The Economic Consequences of Immigration*, 2<sup>nd</sup> Edition (Ann Arbor, Michigan: University of Michigan Press, 1999) at 377-384.

<sup>21</sup> See Noel Gaston and Douglas Nelson, “Immigration and Labour-Market Outcomes in the United States: A Political Economy Puzzle” (2000) 16 *Oxford Economic Policy* 104. See also Noel Gaston and Douglas Nelson, *The Wage and Employment Effects of Immigration: Perspectives from Labour and Trade Economics* (Murphy Institute of Political Economy, 2000).

<sup>22</sup> See James Smith and Barry Edmonston, eds., *The New Americans: Economic, Demographic, and Fiscal Effects of Immigration* (Washington, DC: National Academy Press, 1997).

<sup>23</sup> *Ibid.* Quoted by Borjas *et al.*, *supra* note 19 at 63.

on native workers of immigration.<sup>25</sup> They argue that the prediction of labour economics that native workers will experience a decrease in wages and an increase in unemployment is dependent upon the paradigmatic labour economics model which assumes (ostensibly adopted primarily for the sake of convenience) that there is only one final good produced in the economy. With only one final good produced in the economy and production technology held constant, the traditional labour market prediction is that since the supply of labour has increased (with less than a proportional increase in demand for labour), the labour market clearing wage rate must decline. Gaston and Nelson argue that the adoption of a multiple final good model (such as the one favoured by trade theorists) and allowing for trade conditions that permit an approximation of the conditions for factor-price equalization (such as, *inter alia*, fixed commodity prices) could result in no adverse wage or unemployment effect being realized. This is the case because with more than one economy and with each economy producing at least two goods with identical technology (assuming fixed commodity prices), the only way an economy can respond to a unilateral increase in, for example, unskilled labour is to alter its output mix in favour of goods whose production is more intensive in unskilled labour. This theoretical result is uncontroversial in trade theory and is quite robust to changes in assumptions regarding the number of goods, the presence of non-traded and intermediate goods, and even the presence of joint production. Gaston and Nelson soften somewhat this theoretical conclusion by stating that their objective is not to show that “factor-price insensitivity actually obtains, but that, in a world with more than one output, some of the adjustment to an endowment shock will occur via a change in the output mix, reducing the actual, and measured, costs to the competing factor (i.e. domestic unskilled labour).”<sup>26</sup> The authors also cite recent empirical evidence showing that output-mix adjustments in production cause wage

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<sup>24</sup> Borjas *et al supra* note 18.

<sup>25</sup> See Gaston and Nelson in *Oxford Review of Political Economy*, *supra* note 21.

<sup>26</sup> *Ibid.* at 108.

convergence between the northern and the southern states in the U.S., which supports their hypothesis that changes in output mix can accommodate differences in labour market conditions.<sup>27</sup>

The other common economic fear harboured by many members of the public with respect to increased immigration is that immigrants impose a collective cost upon the public sector's finances by burdening the welfare state with disproportionate claims for, *inter alia*, welfare payments, food stamps, subsidized public education, publicly provided or subsidized healthcare, public housing and public pensions.<sup>28</sup>

The most sophisticated study available on the fiscal impact of immigration in the U.S., recently produced by the National Research Council (NRC), suggests that each immigrant and their descendents will on average generate a net fiscal benefit of \$80,000 for natives of the U.S. in net present value terms in 1996 dollars.<sup>29</sup> Highly skilled immigrants and their descendants generate a greater fiscal surplus (\$198,000 each) than do lower skilled immigrants (\$51,000 each), but notably in each case there *is* a surplus.<sup>30</sup> Borjas questions the results of the study based on doubts regarding the realism of some of the study's assumptions concerning U.S. fiscal policy and the inevitable uncertainty associated with trying to predict economic activity over extremely long time horizons. In the case of the NRC study, the time period used was 300 years.<sup>31</sup> Borjas suggests that a fifty-year time horizon would be more appropriate, in which case the average fiscal surplus to each immigrant and his or her descendents would decline to an average of approximately \$11,000 each in 1996 dollars – with a negative return to relatively unskilled and older immigrants.<sup>32</sup> Whether the results of the NRC study or the criticisms and alternative analysis of Borjas offer a better gauge of the fiscal impact of immigrants

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<sup>27</sup> *Ibid.*

<sup>28</sup> A recent study of U.S. data suggests that immigrants benefit disproportionately from the Social Security Program relative to the U.S.-born. However, like the U.S.-born, immigrants pay more into the system than they receive in benefits, thereby benefiting the U.S.-born taken as a whole. See Alan L. Gustman and Thomas L. Steinmeier, "Social Security Benefits of Immigrants and U.S. Born" in George J. Borjas, ed., *Issues in the Economics of Immigration* (Chicago: University of Chicago Press, 2000) at 309-350.

<sup>29</sup> The "NRC study" is Smith and Edmonston, *supra* note 22.

<sup>30</sup> See Smith and Edmonston, *ibid.* at 334.

<sup>31</sup> See Borjas *et al.*, *supra* note 18 at 125.

can best be determined by future empirical work, although the issue is an extremely difficult one to resolve empirically due to the vast array of simplifying assumptions that must be made.<sup>33</sup>

Thus, the available empirical evidence suggests that immigrants have little impact upon labour market outcomes for natives and that immigrants generate a net fiscal surplus.

Julian Simon has estimated that the average immigrant to the United States has a positive aggregate net present value to American residents of between \$37,5000 and \$50,000 (1996 dollars). This estimate includes all influences immigrants have upon the standard of living of natives – including dynamic effects in production and innovation, fiscal effects, and labour market effects..<sup>34</sup> Simon’s estimate may be on the high side, however, because he relies on the existence of considerable scale and dynamic effects associated with increased population in arriving at this estimate that do not seem fully justifiable given the current degree of international economic integration and specialization in production.<sup>35</sup> George Borjas adopts a different approach to measure this “immigration surplus” and in doing so arrives at a radically lower estimate. Borjas suggests that the benefit to natives from immigrants in the U.S. is approximately 0.1 percent of GDP, which represents less than 30 dollars per person per year. However, Borjas claims that this benefit comes at a large redistributive cost – owners of capital gain in total approximately 2 percent of GDP, while suppliers of labour (i.e. native workers)

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<sup>32</sup> *Ibid.*

<sup>33</sup> For example, is the public education system paid for by current taxpayers, or are students assumed to ‘pay-back’ the cost of their education once they enter the labour market? Similarly, is the range of existing public infrastructure (such as bridges and roads) already considered “paid for” or are the costs associated with it amortized over time? If it is amortized, over what time period?

<sup>34</sup> Simon’s actual estimate of the benefits of each immigrant is fifteen and twenty thousand (constant 1975) dollars. See Simon, *supra* note 30 at 206-219, 371. For comparability, however, I have converted this range into 1996 dollars using GDP deflator data available from the U.S. Bureau of Economic Accounts. In the data, 1975 is given an index value of 40.027, whereas 1996 is assigned an index value of 100, generating a factor of approximately 2.5 necessary to compare benefits between the periods. See U.S. Bureau of Economic Accounts, “National Accounts Data: Historical data for chain-type indexes accurate to 3 decimal places (31 files in plain text format), quarterly and annual, 1929:I - 1997:IV” (August 2001) digital document available online at <http://www.bea.doc.gov/bea/dn/chnhist.exe>.

<sup>35</sup> See Michael Trebilcock, “The Case for a Liberal Immigration Policy” in in Warren F. Schwartz ed. *Justice in Immigration* (Cambridge: Cambridge University Press, 1995) at 233-234. See also Jagdish Bhagwati, “Behind the Green Card” in Jagdish Bhagwati, ed., *A Stream of Windows: Unsettling Reflections on Trade, Immigration, and Democracy* (Cambridge, MA: MIT Press, 1998) 319 at 320-324.

lose approximately 1.9 percent of GDP. Borjas' position is that the net benefits associated with immigration come at too high a redistributive cost to be attractive.<sup>36</sup>

The Economic Council of Canada ventures an estimate of the benefits to Canadians of an increase in yearly per capita income of approximately 0.3 percent for every one million immigrants admitted to the country.<sup>37</sup> Given that there are approximately about five million immigrants currently living in Canada,<sup>38</sup> the implication of this estimate is that annual per capita GDP is 1.5 percent higher in Canada than it would be if the country had pursued a policy of closed borders for the past several decades. This currently translates into a benefit of approximately 349.50 dollars per Canadian per year.<sup>39</sup> Discounting this annual benefit at 8 percent per annum, the net present value of Canada's immigrant population to Canadian natives amounts to approximately 4,368 dollars each. This estimate of immigrant value is considerably larger than Borjas's estimates, but is significantly lower than the value of the effects as estimated by Simon in the U.S. context. In any case, even the most pessimistic of these estimates – Borjas's – is positive, which at least to some extent serves to dispel the myth that immigrants impose a net economic burden on destination countries. However, it is important to emphasize that these findings only apply to the economic effects of immigration at roughly prevailing levels. Although even a considerable increase in the number of immigrants may continue to be welfare enhancing in net terms, at some threshold rate of immigration – perhaps an order of magnitude higher than now prevailing – it is reasonable to expect that negative congestion externalities and adverse

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<sup>36</sup> See Borjas *et al.*, *supra* note 18 at 90-92.

<sup>37</sup> See Economic Council of Canada, *Economic and Social Impacts of Immigration* (Ottawa: Supply and Services, 1991) at 25.

<sup>38</sup> According to Statistics Canada Census figures, there were 4,971,070 immigrants living in Canada in 1996. See Statistics Canada, "Immigrant population by place of birth and period of immigration, 1996 Census, Canada" digital document available online at <http://www.statcan.ca/english/Pgdb/People/Population/demo25a.htm>.

<sup>39</sup> Canada's per capita GDP in 1999 in U.S. dollars was approximately \$23,300. See *The World Factbook 2000 Online*, digital document available at <http://www.bartleby.com/151/45.html>.

labour market or fiscal effects may cause the current net benefit to become a net domestic welfare loss.<sup>40</sup>

Indeed, Borjas in the U.S.<sup>41</sup> and Reitz<sup>42</sup> in Canada report empirical findings that over the past two decades, the economic performance of recent immigrants in terms of employment and earnings has declined significantly relative both to prior generations of immigrants and the native-born. While the educational qualifications of recent immigrants tend to be higher than prior generations of immigrants they have increased less rapidly than the educational qualifications of the native-born. Moreover, in knowledge-based economies where specialized educational credentials and work experience carry an increasing premium, rigidities or protectionism in domestic educational and professional institutions in evaluating and recognizing foreign credentials and work experience and difficulties faced by domestic employees in the same regard increasingly penalize skilled immigrants. These findings suggest the need to take concerns over fiscally-induced immigration seriously, while at the same time seeking to mitigate inefficient domestic labour market rigidities.

From a global perspective it is sometimes argued that by liberalizing immigration policy developed countries will exacerbate the ‘brain drain,’ robbing developing countries of their most talented and well-trained citizens, leaving those who remain in developing countries worse off. This position relies on two key assumptions. The first is that skilled workers generate positive externalities

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<sup>40</sup> Some commentators believe that the point where the costs of immigration exceed its benefits may be close to being attained; that is, if the point has not been exceeded already. See, for example, Vernon M. Briggs, *Mass Immigration and the National Interest* (Armonk, NY: ME Sharpe, 1992); and Roy H. Beck, *The Case Against Immigration: The Moral, Economic, Social, and Environmental Reasons for Reducing US Immigration to Traditional Levels* (New York, NY: WW Norton, 1996). See also Christopher Jencks, “Who Should Get In?” *New York Review of Books*, November 29, 2001; and Christopher Jencks, “Who Should Get In? Part II” *New York Review of Books*, December 20, 2001. Jencks argues that one of the major problems associated with current levels of immigration is the lack of successful integration of many second generation immigrants – especially Latinos – into US society. For similar Canadian perspectives, see Diane Francis, *Immigration: The Economic Case* (Toronto: Key Porter Books, 2002); Martin Collacott, “Canada’s Immigration Policies: The Need for Major Reform”, (Vancouver: Fraser Institute, Public Policy Sources, September 2002); Daniel Stoffman, *Who Gets In: What’s Wrong with Canada’s Immigration Program, and How to Fix It* (Toronto: Macfarlane Walter & Ross, 2002).

<sup>41</sup> Borjas *supra* note 17.

<sup>42</sup> Jeffrey Reitz, “Immigrant Success in the Knowledge Economy: Institutional Change and the Immigrant Experience in Canada 1970-1975” (2001) 57 *Journal of Social Issues* 579.

in their countries of origin.<sup>43</sup> The second assumption is that the departing skilled workers do not make up the losses to productivity occasioned by their departure in other ways. The conclusion of this line of reasoning (sometimes advanced disingenuously by those opposed to increased immigration for other, less altruistic, reasons) is that we ought to paternalistically restrict immigration for the good of developing countries taken as a whole, although this will inevitably impose opportunity costs on those who would otherwise prefer to migrate in pursuit of better opportunities.

The first assumption, that skilled workers generate at least some positive externalities in their countries of origin, is almost certainly true. It is unlikely that skilled workers can completely capture their full marginal social product in the form of wages from employers. Especially difficult to capture in wages are those aspects of skilled workers' production that do not accrue to their employers, but instead accrue to fellow employees and indirectly to other citizens in the country of origin. For example, a talented and highly skilled CEO who models leadership and effective managerial skills for subordinate managers will in general not be fully remunerated for the future value that he has generated because many of the subordinate managers will eventually leave the firm to join others. Another example would be a highly skilled engineer who designs physical infrastructure in an innovatively efficient manner, in the process directly reducing the total costs of the construction of the project and indirectly reducing transportation costs for the country at large; the engineer will almost certainly not capture her full marginal social product.<sup>44</sup> As is the case with most externalities, however, these positive brain drain externalities defy accurate measurement. To circumvent this problem, some studies have adopted a loss of investment approach which, instead of measuring the positive externalities lost through emigration, seek to measure the direct loss of investments that have been invested in the human capital of those who have emigrated. One such study by Augustine Oyowe

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<sup>43</sup> See, for example, Simon, *supra* note 20 at 296. The examples of employees who might not capture their full marginal product in their wages are adapted from Simon.



places the loss of investment in the human capital of professionals to the African continent at approximately 1.2 billion dollars over the 1985-1990 period.<sup>45</sup>

The second assumption, that departing skilled workers do not benefit their countries of origin in ways sufficient to compensate for lost positive externalities, is less clear. The IMF estimates that worldwide monetary remittances reached 105.2 billion dollars in 1999, 65.3 billion dollars of which is attributed to remittances to developing countries.<sup>46</sup> As Oyowe stresses, “expatriate remittances, particularly from skilled workers who earn higher salaries than the average migrant, constitute an important source of funds for development in their home countries.”<sup>47</sup> Thus, a rejoinder to the second assumption, that the loss of positive externalities to the country of origin is a cost not made up by emigrants, is that the exportation of skilled labour and the receipt of remittances may more than make up for the losses of investment in human capital and the loss of positive externalities. Evidence by Goldfarb *et al.*, suggests that it might actually be advantageous for developing countries to train professionals for export in exchange for expected remittances – for example, in the training of physicians in the Philippines.<sup>48</sup>

Apart from monetary remittances, other possible benefits from exporting skilled labour include the benefits to countries of origin associated with the enhanced human capital obtained abroad by return migrants, who return with even greater skills and know-how and thereby generate higher positive externalities; the facilitation of social and political learning, whereby the evils of corruption and the benefits of democracy and well-functioning markets are witnessed firsthand and relayed to

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<sup>44</sup> Some might object that these externalities are really just examples of consumer surplus brought about by competition in reducing prices of the services provided. The distinction is largely semantic, and in any case, the loss of these types of consumer surplus still represents a loss to the country of origin if the skilled worker emigrates.

<sup>45</sup> See Augustine Oyowe, “Brain Drain Colossal loss of investment for African countries” (1996) 159 *The Courier ACP-EU* at 59-60.

<sup>46</sup> See International Monetary Fund, *Balance of Payments Statistics Yearbook 1998* (Washington, DC: IMF, 1998), quoted by Migration Dialogue, “Migration News – Data – Remittances” (August 2001) digital document available online at <http://migration.ucdavis.edu/Data/remit.on.www/remittances.html>.

<sup>47</sup> *Ibid.*

<sup>48</sup> Robert Goldfarb, Oli Havrylyshyn, and Stephen Magnum, “Can Remittances Compensate for Manpower Outflows: The Case of Philippine Physicians” (1984) 15 *Journal of Development Economics* 1.

those left behind, perhaps influencing attitudes in the country of origin (“social remittances”); and the establishment of trade contacts in developed countries, so that the benefits of freer international trade can be realized more easily through the existence of transnational business networks. That these factors may partly or wholly counter the losses associated with the emigration do not constitute idle speculation. Theoretical work has confirmed that a beneficial brain drain – or brain gain – is indeed possible with relatively realistic assumptions,<sup>49</sup> although some of the intangible benefits associated with a brain gain may be associated with other costs, such as the loss of the voice of dissidents who would prefer to emigrate rather than seek to alleviate oppressive political conditions in their country of origin. Notwithstanding such objections, a recent empirical study confirms the relevancy of the findings of this theoretical literature, concluding that “there is no evidence at all suggesting a decreasing relation between growth in income per capita and migration in developing countries.”<sup>50</sup>

## 2) Critique of Existing Policies

Basic health checks, criminality and national security checks are a standard feature of immigration policies in most developed countries and are likely to be considered valid categories of restraints on immigration by most economists from both a domestic and a global perspective. Terminally-ill and elderly would-be immigrants will often not be employed in the labour market because of the limitations imposed by their illnesses or their age and thus will not contribute tax revenues or more generally to the economic production and prosperity of the nation; however, the terminally ill will often draw disproportionately on the healthcare amenities of the welfare state. In addition, some terminal illnesses are communicable. Consequently, many terminally ill would-be

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<sup>49</sup> See A. Mountford, “Can a Brain Drain Be Good for Growth in the Source Economy?” (1997) 53(2) *Journal of Development Economics* 287.; O. Stark, C. Helmenstein, and A. Prskawetz, “A Brain Gain with a Brain Drain” (1997) 55 *Economics Letters* 227; and J.P. Vidal, “The Effect of Emigration on Human Capital Formation” (1998) 11 *Journal of Population Economics* 4. See also David Dollar and Paul Collier, *Globalization, Growth and Poverty: Building an Inclusive World Economy* (World Bank and Oxford University Press, 2001) at 82.

<sup>50</sup> See Michel Beine, Frederic Docquier, and Hillel Rapoport, “Brain Drain and Economic Growth: Theory and Evidence” (1999) Presented March 20, 1999 at Université de Versailles St Quentin en Yvelines. Digital document available online at [http://www.cybercable.tm.fr/~jarmah/public\\_html/HRapoport11.htm](http://www.cybercable.tm.fr/~jarmah/public_html/HRapoport11.htm).

immigrants will impose significant costs on the recipient country and can perhaps validly be excluded from admission from a narrow domestic economic perspective, although the precise boundaries of what constitutes an illness that justifies exclusion is problematic.<sup>51</sup> From a global perspective, it is perhaps also valid to deny terminally ill migrants admission, although the conclusion is not as clear. If the disease at issue is communicable, then it may make sense to in effect “quarantine” the would-be migrants in their country of origin by denying them entry so as to prevent exposure to the native population in the destination country and therefore preempt a greater number of people from becoming infected worldwide. In addition, if the terminally ill are drawn to and are admitted to countries that have publicly provided or subsidized healthcare (an adverse selection problem), then the admission of those who are desperately ill and would make use of the healthcare system may threaten the viability and sustainability of the healthcare system as a whole, which would also be welfare reducing globally.<sup>52</sup>

If one accepts the premise that those with criminal records are more likely to commit crimes in the future, then a criminality check prior to admission is likely to be valid economically from both domestic and global economic viewpoints.<sup>53</sup> Those with criminal records are less likely to be

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<sup>51</sup> Health-based exclusions are not self-defining. Consider section 19(1) of the Canadian *Immigration Act*, R.S.C. 1985, c. I-2, which provides (in part) that:

(1) No person shall be granted admission who is a member of any of the following classes:

- (a) persons, who are suffering from any disease, disorder, disability or other health impairment as a result of the nature, severity or probable duration of which, in the opinion of a medical officer concurred in by at least one other medical officer,
- (i) they are or are likely to be a danger to public health or to public safety, or
- (ii) their admission would cause or might reasonably be expected to cause excessive demands on health or social services.

Exactly what constitutes “a danger to public health or to public safety” or what might “reasonably be expected to cause excessive demands on health or social services” is often far from clear.

<sup>52</sup> See Alan O. Sykes, “The Welfare Economics of Immigration Law” in Warren F. Schwartz ed. *Justice in Immigration* (Cambridge: Cambridge University Press, 1995).

<sup>53</sup> Criminality-based exclusions, like health-based exclusions, are not self-defining. Section 19(1) of the Canadian *Immigration Act*, R.S.C. 1985, c. I-2, which (in part) provides that:

(1) No person shall be granted admission who is a member of any of the following classes:

(c.1) persons who there are reasonable grounds to believe:

- (i) have been convicted outside Canada of an offence that, if committed in Canada, would constitute an offence that may be punishable under any Act of Parliament by a maximum term of imprisonment of ten years or more, or
- (ii) have committed outside Canada an act or omission that constitutes an offence under the laws of the place where the act or omission occurred and that, if committed in Canada, would constitute an offence that may be punishable under any Act of Parliament by a maximum term of imprisonment of ten years or more,

successful economically in the recipient country's legal labour market and in aggregate will impose increased costs on society through the costs associated with criminal activities. Thus, those with criminal backgrounds are also validly refused entry from a narrow domestic economic perspective. From a global economic perspective, if one adds the assumption that there are diminishing marginal returns to criminality, then criminals may perhaps also be validly denied entry. This is because, *ceteris paribus*, criminal activity is likely to be initially at a lower level in the more advanced developed economies. This makes criminal activity more remunerative and more tempting to engage in on the margin because of the higher rents available. Not unlike corruption, high levels of criminality and the commensurate lack of security of property rights will tend to compromise incentives, reduce economic activity and result in significant welfare costs in terms of foregone output. In addition, the opportunity costs associated with increasing law enforcement efforts in developed countries are likely to be higher than they are in LDCs because of the higher productivity of the labour that must be diverted to law enforcement.<sup>54</sup>

As the recent terrorist attacks in the U.S. have dramatically underscored, national security checks on would-be immigrants have a similar justification. The now obvious inadequacies in national security screening of would-be immigrants or visitors relate less to substantive immigration law (which in many jurisdictions already contains relevant substantive powers to exclude or deport persons reasonably suspected of terrorist affiliations) and more to ineffective enforcement. Moreover, the challenges entailed in effective national security screening of the millions of tourists and visitors to countries like the U.S. each year should not be confused with the much more modest challenge of screening much smaller numbers of would-be immigrants.

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except persons who have satisfied the Minister that they have rehabilitated themselves and that at least five years have elapsed since the expiration of any sentence imposed for the offence or since the commission of the act or omission, as the case may be.

<sup>54</sup> The U.S. alone spends over 100 billion dollars per year on law enforcement. See Peter H. Schuck and John Williams, "Removing Criminal Aliens: The Promises and Pitfalls of Federalism" (1999) 22 *Harv. J.L. & Pub. Policy* 367 at 382.

Current policies in many countries requiring that employers first ensure that no domestic workers are qualified for the job, or demanding that the employer demonstrate that the employment of the foreign worker at issue would not harm domestic workers should be abandoned. If an employer has extended its recruitment drive to encompass foreign labour markets and is willing to absorb the additional transactions costs associated with sponsorship of a foreign worker, then this commitment should be considered to be *prima facie* evidence that equally qualified workers are not available domestically. In any event, such labour certification conditions constitute blatant protectionism, often preventing employers from hiring the most qualified candidates due to the availability of a marginally qualified domestic candidate. Such restrictions promote mediocrity and are extremely difficult to defend economically.

For economic or independent migrants, immigration policies in developed countries sometimes entail passing point tests (as in Canada and Australia), that depend on, *inter alia*, demonstrating language proficiency, possessing significant training and work experience, working in an occupation experiencing high demand, having relatives who are residents or citizens, and being of a demographically attractive age for the destination country. The available evidence suggests that point system restrictions may be justified from a narrow domestic economic perspective, although the result is not uncontroversial.<sup>55</sup> The use of a point system helps improve the average skill level of immigrants,<sup>56</sup> helps ensure that they are better educated (an education that may have been subsidized by the country of origin), ensures that immigrants are more likely to be able to speak at least one of the major languages of the country (so that they can be more readily and productively integrated into the labour market), and helps ensure that immigrants are young enough that they help improve the

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<sup>55</sup> Arnold De Silva has found that earnings of refugees and economic immigrants differ initially but converge rather quickly in the Canadian labour market. De Silva argues that in Canada the single most important determinant of labour market success is age and that skills based screening may be largely ineffectual. See Arnold De Silva, "Earnings of Immigrant Classes in the Early 1980s in Canada: A Reexamination" (1997) 23(2) *Canadian Public Policy* 179.

demographic profile (dependency ratio) of the country (e.g. to maintain public pay-as-you-go pension schemes) and thereby increase the country's overall fiscal surplus. From a global welfare perspective, the use of a point system is more difficult to assess because the welfare of would-be immigrants and others residing in the country of origin must be considered in conjunction with the welfare of the destination country's nationals. Whether or not the use of a point system is globally welfare enhancing depends upon the differences between skilled and unskilled migrants in the relative level of the positive externalities gained by the destination country, the loss of positive externalities and sunk investment in human capital in the sending country (and the associated second-order effects such as reduced future investment), and the change in individual welfare that migrants and reunified families experience from the move. In general, the positive externalities in the destination country may be larger than they would be in the country of origin for skilled workers because of the increased sharing of information and higher level of economic activity in developed countries – the efficiencies latent in the clusters and networks of the “knowledge-based” economy. The costs sunk into human capital by the country of origin for skilled workers will be higher than for unskilled workers, but may be more than made up for by higher monetary remittances and “social remittances” made by skilled workers. However, to the extent that these investments are not recouped by the country of origin, these sunk costs represent a loss to global welfare because education (and hence investment in human capital) may be underprovided in the future because the country of origin, as the investor, does not realize the full returns on its investment. The private benefits to the migrant from the move will usually be greater for skilled rather than unskilled workers. Although unskilled workers gain higher wages from migrating, skilled workers gain more in absolute terms. The complexity and the countervailing effects involved in this calculus suggests that from a global perspective it is ambiguous as to whether or not point systems are welfare enhancing globally.

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<sup>56</sup> See, for example, Alan Green and David Green, “Canadian Immigration Policy: The Effectiveness of the Point System

For family-sponsored immigrants under prevailing immigration policies in many developed countries it is often sufficient for entry to have an immediate family member who is already a citizen or permanent resident of the destination country as a sponsor. From a narrow domestic economic perspective it may seem *prima facie* that having close relatives in the destination country would likely be irrelevant to subsequent economic performance and that, as a consequence, there should be no importance placed on the presence of relatives in the destination country. However, if the sponsor's welfare is included in the social welfare function, as it generally should be, then the arrival of a close relative has an immediate and significantly positive welfare effect on the destination country. In addition, the presence of immediate family members will likely play an important role in labour market outcomes for most immigrants. Having immediate family in the country will aid labour market participants by providing a nucleus of social capital that can be used to make the social and cultural transition to a new country. In addition, starting a new business may be much easier if one can hire one's immediate family members to work without having to abide strictly by minimum wage laws. This is beneficial because start-ups are often not profitable in the early stages and being able to benefit from (imputed) low wage rates may make the difference between failure and success for many immigrant-initiated businesses. This in turn may increase the monetary remittances and "social remittances" to more relatives left behind in the country of origin. For these reasons, family sponsored immigration may also be desirable from a global economic perspective, although it is difficult to assess definitively the validity and cogency of this conclusion.<sup>57</sup>

From the perspective of economic welfare, many illegal immigrants (not criminals) are almost certainly beneficial for their host economies. Many illegal immigrants work at jobs that natives do not

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and other Instruments" (1995) 28 *Canadian Journal of Economics* 1006; and Paul Miller, "Immigration Policy and Immigrant Quality: The Australian Points System" (1999) 89 *American Economic Review Papers and Proceedings* 192.

<sup>57</sup> The Australian policy of demanding pledge bonds probably increases the desirability of family sponsored immigration, all else the same, and is likely a much more effective means of ensuring independence from social programs than the simple promises to support family members elicited in the context of family sponsored immigrants to Canada. See the discussion of these policies in Section V, *infra*.

want to do at prevailing wage levels – i.e. positions that pay remuneration at rates below natives’ reservation wage. In addition, illegal immigrants are almost certainly net contributors fiscally because they generate considerable tax revenues for host governments through property taxes, sales taxes, and mandatorily withheld income taxes, while remaining ineligible for most social programs. Moreover, they have little incentive to try to receive benefits from most social programs for fear of being discovered and returned to their country of origin. The monetary cost of the social services that illegal immigrants do use, such as emergency medical care or public education, almost certainly does not offset the tax contribution illegal immigrants make. From a global perspective, illegal immigration is also welfare enhancing. The illegal immigrants themselves obviously consider themselves better off, or else they would simply return as legitimate citizens, relieved of the stigma associated with their illegal status, to their countries of origin and would not incur the costs and risks of illegal migration. The brain drain argument is not as strong in the illegal immigration context because many of the illegal immigrants have low skill levels and many who migrate illegally are unemployed in their countries of origin so, if anything, those left behind may have enhanced – not reduced – labour market opportunities.

## **B) A Communitarian Perspective**

Philosophically the primary issue that needs to be addressed in contemplating the appropriate influence of community and culture on immigration policy is the extent to which a nation has a duty to admit (or the prerogative not to admit) outsiders. The ultimate resolution of this issue depends crucially upon the significance placed on liberal ideals and community – the belief in the equal moral worth of individuals versus the belief in the freedom of a collection of persons to govern themselves free from the claims of those outside of the group.<sup>58</sup> Taking liberty seriously is to a considerable

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<sup>58</sup> This discussion draws heavily on earlier work. See Trebilcock, *supra* note 35 at 219-244.



extent irreconcilable with asserting the legitimacy of the exclusion of outsiders.<sup>59</sup> A strict adherence to the dictates of liberalism demands a recognition that the welfare of outsiders is as valuable as the welfare of insiders. As such, liberal values require strong justification for any restrictions on immigration.<sup>60</sup> A privileging of community over liberty, on the other hand, suggests that the interests of insiders are more important than the interests of outsiders, and that therefore the nation-state, in the interests of insiders, can freely dictate any restrictions on immigration that it may consider desirable.

Historically, countries have often sought to limit immigration to those who are culturally similar to natives or, what amounts to much the same thing, privilege those who are culturally or ethnically similar to insiders for admission. The national origins quota system, the core of U.S. immigration policy from 1924 to 1965, privileged Europeans for admission to the country based on the fact that individuals of European origin made up the bulk of the U.S. population at the time of the 1920 census. The current German *Aussiedler* policy, which grants immediate citizenship (subject to certain quota restrictions) to any ethnic German who can prove German descent, pass a German language test, and demonstrate familiarity with German culture, is another example of ethnically driven immigration policies. Australia and Canada also have historical legacies replete with racially discriminatory approaches to immigration policy.<sup>61</sup>

Australia, Canada and the U.S. do not currently have immigration policies that explicitly account for the racial or ethnic background of those who seek to immigrate. However, it is important to recognize that racially and ethnically blind immigration policies accompanied by the provision for

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<sup>59</sup> For a discussion, see Peter Schuck, "Immigration Law and the Problem of Community" in Nathan Glazer, ed., *Clamor at the Gates* (San Francisco: Institute for Contemporary Studies, 1985) at 285-307. See also Peter Schuck, *Citizens, Immigrants and In-Betweens: Essays on Immigration and Citizenship* (Boulder, Colorado: Westview Press, 1998).

<sup>60</sup> See, for example, Howard F. Chang, "Immigration Policy, Liberal Principles, and the Republican Tradition" (1997) 85(7) *Georgetown L.J.* 2105.

<sup>61</sup> Pursuant to Australia's 'White Australia' immigration policy, it was very difficult for non-Europeans to be admitted to Australia prior to the mid-1970s. See, for example, Nancy Viviani, ed., *The Abolition of the White Australia Policy: The Immigration Reform Group Revisited*, (June 1992) Centre for the Study of Australia-Asia Relations, Working Paper No. 65, Faculty of Asian and International Studies, Griffith University, Queensland. For an historical account of racial and ethnic discrimination in the Canadian immigration policy context, see Ninette Kelley and Michael Trebilcock, *The Making of the Mosaic: A History of Canadian Immigration Policy* (Toronto: University of Toronto Press, 1998).

family reunification immigration in Australia, Canada and the U.S. has to some extent the effect of muting changes in the status quo in terms of the racial and ethnic composition of each of the countries.<sup>62</sup> This is partly why the political campaign of the early 1960s (supported by John F. Kennedy, among others) in the U.S. against the national origin quota system was successful, despite the fact that considerable political forces were mobilized against the reform.<sup>63</sup> Those who wanted to retain the national origins quota system were mollified by the fact that because the main way for gaining admission under the new regime would be the family sponsorship route, the ethnic composition of America would not change dramatically<sup>64</sup> (although subsequent experience has largely confounded this assumption). Which of these approaches to immigration policy is most appropriate? Can countries legitimately systematically exclude immigrants of certain nationalities, races, or ethnic backgrounds?

Journalist Peter Brimelow has argued that “there is a sense in which current immigration policy is Adolf Hitler’s posthumous revenge on America... The U.S. political elite emerged from the war passionately concerned to cleanse itself from all taints of racism or xenophobia.”<sup>65</sup> Brimelow claims that there is nothing wrong with not wanting to admit immigrants, but that those who suggest it this are unfairly accused of being xenophobic or racist. Brimelow asserts that:

A nation, of course, is an interlacing of ethnicity and culture. Individuals of any ethnicity or race might be able to acculturate to a national community. And the American national community has been unusually assimilative. But nevertheless, the massive ethnic and racial transformation that public policy is now inflicting on America is totally new – and in terms of how Americans have traditionally viewed themselves, quite revolutionary. Pointing out this reality may be embarrassing to starry-eyed immigration enthusiasts who know no history. But it cannot reasonably be shouted down as “racist.” Or “un-American.”<sup>66</sup>

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<sup>62</sup> This occurs to the greatest extent in the U.S. because a large majority of the immigrants – 72 percent – are admitted based on family ties. See United States Immigration and Naturalization Service, *1998 Statistical Yearbook of the Immigration and Naturalization Service* (Washington, DC: U.S. Government Printing Office, 2000) at 17.

<sup>63</sup> See Christian Joppke, *Immigration and the Nation-State: The United States, Germany and Great Britain* (Oxford: Oxford University Press, 1999) at 26.

<sup>64</sup> *Ibid.*

<sup>65</sup> See, Peter Brimelow, *Alien Nation: Common Sense About America’s Immigration Disaster* (New York: Random House, Inc., 1995) at xv.

<sup>66</sup> *Ibid.* at 10.

Brimelow's position can be most positively be regarded as favouring the exclusionary American national origins quota system of U.S. immigration policy of 1924 to 1965. Brimelow does not suggest that American liberal democratic values are being threatened by increased immigration. The claim is that increased numbers of immigrants who are ethnic and racial minorities are threatening America's traditional view of itself. Given America's troubled past with race relations, this should perhaps be regarded as a positive development.<sup>67</sup>

Political philosopher Michael Walzer is a prominent proponent of the position that in nearly all instances it is legitimate for nation-states, as sovereign entities freely dictating their relationships with other peoples and other nation-states, to choose to exclude outsiders.<sup>68</sup> Walzer suggests that nations are like clubs. As such, argues Walzer, nations should be able to define their own membership criteria. Walzer's fundamental claim is that:

The distribution of membership is not pervasively subject to the constraints of justice. Across a considerable range of the decisions that are made, states are simply free to take in strangers (or not) – much as they are free, leaving aside the claims of the needy, to share their wealth with foreign friends, to honor the achievements of foreign artists, scholars, and scientists, to choose their trading partners, and to enter into collective security arrangements with foreign states. But the right to choose an admissions policy is more basic than any of these, for it is not merely a matter of acting in the world, exercising sovereignty, and pursuing national interests. At stake here is the shape of the community that acts in the world, exercises sovereignty, and so on. Admission and exclusion are at the core of communal independence. They suggest the deepest meaning of self-determination. Without them, there could not be *communities of character*, historically stable, ongoing associations of men and women with some special commitment to one another and some special sense of their common life.<sup>69</sup>

This position elevates nation-state sovereignty to a level where almost any constraints a nation wishes to impose on immigrants in protection of its culture and its status as a cohesive community are legitimate – even those that are invidiously discriminatory on racial, ethnic, religious, or ideological grounds. There are at least two contestable aspects of Walzer's position. The first is that the continuing development and evolution of international human rights norms increasingly suggests that

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<sup>67</sup> For an expanded discussion and analysis of Brimelow's attack on those in favour of increased immigration, see Chapter 14 of Schuck, *Citizens, Immigrants and In-Betweens*, *supra* note 59.

<sup>68</sup> See Michael Walzer, *Spheres of Justice* (New York: Basic Books, 1983).

nation state sovereignty is not as strong as Walzer seeks to suggest. The second surrounds Walzer's implicit assumption that 'communities of character' cannot be defined by common commitment to liberal democratic institutions and the corresponding values of tolerance and inclusion. Liberals in developed countries are likely to argue strenuously that liberal values can and in many countries *do* serve as a basis for 'communities of character.'

In the *Disuniting of America*, Arthur Schlesinger Jr. argues a position that straddles the communitarian/liberal divide. Schlesinger believes that children of ethnic minorities should not be entitled to public education catering to their ethnic or national origin in terms of the language of instruction, the historical perspective emphasized, or the aspects of world geography concentrated upon. Instead, argues Schlesinger, the American public education system should be committed to furthering American culture and the importance of liberal democratic institutions. According to Schlesinger,

The militants of ethnicity now contend that a main objective of public education should be the protection, strengthening, celebration, and perpetuation of ethnic origins and identities. Separatism, however, nourishes prejudices, magnifies differences and stirs antagonisms... Watching ethnic conflict tear one nation after another apart, one cannot look with complacency at proposals to divide the United States into distinct and immutable ethnic and racial communities, each taught to cherish its own apartness from the rest. One wonders: Will the center hold? or will the melting pot give way to the Tower of Babel?<sup>70</sup>

The liberal aspect of Schlesinger's *prima facie* communitarian position is that he apparently assumes that a relatively liberal immigration policy is demanded philosophically (giving rise to his factional concerns), but that within the bounds of a liberal immigration policy it is legitimate to seek to limit the degree to which the cultural values of immigrants are allowed to permeate the political culture of the U.S. through the accommodation of different ethnic beliefs, different "histories," and languages in the education system.

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<sup>69</sup> *Ibid.* at 61-62.

<sup>70</sup> See Arthur M. Schlesinger, Jr., *The Disuniting of America* (New York: W.W. Norton & Company, 1992) at 17-18.

### C) Liberal Perspectives

Joseph Carens has outlined the consequences of favouring liberty over community from three different liberal perspectives: libertarianism, social contractarianism, and utilitarianism.<sup>71</sup> Libertarianism, as formulated by Nozick,<sup>72</sup> demands no more from government than the protection of property rights and the facilitation of exchange provided by the enforcement of contracts. From a libertarian perspective then, immigration policies that go any further than pre-empting immigration that might impose any involuntary costs or burdens on residents is unacceptable because it will entail constraints on personal liberty. From a social contractarianism viewpoint, the appropriate immigration policy is the one that would be agreed to behind a Rawlsian “veil of ignorance” such that the drafters of immigration policy would not know the particularities of their own personal situation (morally arbitrary features such as country of residence, gender, education, ethnicity, etc), beyond knowing that they represent some human personality in the world.<sup>73</sup> The purpose of the veil is to ensure that the drafters of the ideal immigration policy would not be bargaining with known endowments and would therefore seek to ensure that the policy drafted would be fair to all concerned, especially the least advantaged. The social contractarian perspective then also militates in favour of the relatively free international movement of people, with a similar caveat to libertarianism. Free immigration should occur only so far as the maintenance of public order and respect for rights is not threatened by immigrant flows. From a utilitarianism perspective, Carens argues that the utility of both citizens and immigrants ought to be considered,<sup>74</sup> with the result that immigration should be allowed to the point where the marginal net benefits accruing to immigrants (if there were no net benefits they would presumably not move) equal the marginal net costs to citizens of the immigration through, for instance, congestion effects.

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<sup>71</sup> See Joseph Carens, “Aliens and Citizens: The Case for Open Borders” (1987) 47 *Review of Politics* 251.

<sup>72</sup> See Robert Nozick, *Anarchy, State and Utopia* (Oxford: Basil Blackwell, 1974).

<sup>73</sup> See John Rawls, *A Theory of Justice* (Cambridge, MA: Harvard University Press, 1971).

<sup>74</sup> See Carens, *supra* note 71 at 256.

Current immigration policies in developed countries do not seem to fit neatly into either the liberal ideology or the communitarian ideology. For example, the widespread adoption (albeit debatable observance) of the 1951 U.N. Convention Relating to the Status of Refugees (the *Geneva Convention*) with respect to the admission of refugees undermines one of the core tenets of the communitarian position – community self-definition – by constraining a significant portion of national sovereignty through international supra-national commitments. Another delegation of state sovereignty with respect to immigration policy can be observed in the EU, where the Treaty of Amsterdam has committed the 13 continental members to the eventual free internal movement of people with no internal border checks. However, one might suggest in response that the EU is becoming the relevant sovereign in Europe and so this apparent delegation of sovereignty is no more than the formation of a larger community. Indeed, the contemplated restrictions on migration with respect to Eastern European countries that are awaiting membership suggest that this interpretation may be more accurate. With these possible exceptions, however, the communitarian position is well reflected in the current state of immigration policies among developed nations. Family-sponsored immigration policies reflect a concern that new immigrants should be like old immigrants. Independent admissions based on employer sponsorship, the investment of a considerable amount of financial capital, age, language ability, and possession of work experience implicate both communitarian and liberal ideals. The screening process implicates communitarian ideals because such policies define criteria that attempt to maximize the benefit to insiders of immigration. Liberal ideals are implicated to the extent that the screening process does not take into account cultural or ethnic factors, but instead accepts all applicants who exhibit the qualities believed to be important indicators of the ability to succeed in the domestic labour market.

The very necessity of the existence of the *Geneva Convention* for the protection of the persecuted suggests that the liberal prescription of relatively open borders is (or at least was) not

adhered to automatically by the liberal democratic states of the developed world. In addition, with respect to family-sponsored immigration it is not clear how, from a liberal perspective, family-sponsored applicants for admission can make a stronger moral claim for admission than those without family ties (although this may be contested with respect to close relatives such as spouses and minor children).. Similarly, from a liberal perspective it should be irrelevant what age one is, how much work experience one has, or how proficient one is in the language of the country that one seeks admission to so long as (if one adopts a libertarian perspective) one can credibly pledge not to be a burden on current residents. The idea that each person is of equal moral worth is apt to be blind to family relationships and economic considerations. Therefore communitarianism and not liberalism currently more accurately describes the predominant approach to immigration policy in almost all developed countries, although liberal ideals have not been without influence.

#### **IV. RETHINKING IMMIGRATION POLICIES**

One of the key ingredients of immigration policy in most developed countries is a quota system that restricts the number of immigrants that will be accepted each year in each admission class. These quotas are justified on the basis that completely open borders would be problematic because of negative externalities (e.g. congestion effects) and the political and fiscal stresses that would be placed on the redistributive programs of the welfare state due to fiscally induced migration.<sup>75</sup> Despite the problems perceived to be associated with illegal immigration (which are at least in part due to quotas), quota systems are a practical (albeit arbitrary) way of limiting the number of immigrants arriving each year. One of the primary shortcomings of the quota method is that it unduly hampers the flow of immigrants who can demonstrate that they will not be a burden on the amenities of the welfare state.

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<sup>75</sup> Alan Sykes has argued, however, that open borders may be the first-best solution if such a policy were coupled with changes to social programs making them inaccessible to non-citizens. Sykes acknowledges however, that the political process may not accommodate these restrictions with ease, and that these modifications may not be legally feasible. See Sykes, *supra* note 51 at 176.

Many would-be immigrants, despite the fact that they are able to demonstrate that they will not be a burden through various means, such as the possession of adequate personal resources or through pre-arranged employment (independent immigrants), through the sponsorship of legally resident or citizen relatives (family immigrants), or through the sponsorship of a private party or organization (refugees selected overseas), are not able to immigrate due to quota restrictions.

Another problem associated with the quota system is that quotas must be set in advance, which places the very difficult (perhaps impossible) task of predicting the needs of the labour market (at least in the case of the independent class quota) in the hands of a centralized bureaucracy. The administration of immigration policies in developed countries is, for the most part, unduly restrictive and bureaucratic. Immigration policies are bureaucratic because immigration laws are managed by centralized bureaucratic agencies that are often given full and independent responsibility for ascertaining and predicting *ex ante* the needs of the labour market for the next year (in Australia and Canada this responsibility includes assessing the demand for various classes of workers), ensuring that the nation's commitments under the *Geneva Convention* have been respected, and determining the total number of immigrants that should be admitted each year.<sup>76</sup> Centrally planning for the future needs of the domestic labour market is an assignment that to be done correctly and accurately requires an almost unlimited amount of information including, *inter alia*, accurate forecasts of the global macroeconomic environment, an assessment of the economic health and prospects of each of the country's major industries, an accurate determination of how well domestic firms are faring internationally, and a sensitivity to changes in demand due to shifting consumer preferences and relative prices of goods and services. The cost of generating an accurate forecast is likely to be prohibitive, and at best such a

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<sup>76</sup> This has recently changed in Canada. On December 15, 2001, the new *Immigration and Refugee Protection Regulations* – to take effect as of June 28, 2002 – were introduced. Among the changes are a new points system that scores prospective immigrants on six criteria, including age, education, experience, language ability, arranged employment and adaptability, eschewing previously scored categories such as occupation which granted points to immigrants seeking to work in areas perceived to have the greatest labour demand. For the full text of the proposed regulations, see *Immigration and Refugee Protection Regulations*, Canada Gazette, 2001.I.4477.



forecast can only be couched in probabilistic terms. As a result of the stochastic nature of economic outcomes, an ideal immigration policy would take into account the ever changing dynamic state of the economy and the national labour market in determining the appropriate number of immigrants to admit on a yearly, monthly, or even weekly basis. Moreover, given the administrative delays associated with processing immigration applications in virtually all developed countries, the lags between quota setting and actual admissions is likely to prove highly problematic. General immigration quotas are inequitable to the extent that they restrict the entry of persons who pose no threat of being a burden fiscally and are insufficiently sensitive to labour market conditions because of the difficulties associated with central planning (i.e. the near impossibility of obtaining and processing sufficient information) and administrative delays.

*A priori* there is nothing particularly malign about having a bureaucratic body responsible for overseeing immigration policy. Indeed, absent completely open borders, such a body is necessary to oversee whatever restrictions are imposed on the entry of foreigners into the country. Rather, the problematic aspect of bureaucratic bodies charged with implementing immigration policy is that it is often their responsibility to determine how many immigrants ought to be admitted to the country (in the U.S. this responsibility lies with Congress), and for judging on a case by case basis whether or not particular applicants satisfy arbitrary or subjective criteria for admission.

The prescriptions proposed here are centrally motivated by the idea that there is a compelling case for devolving and decentralizing power over immigration decision making to private parties to a much greater extent than currently prevails, although health, criminality and national security checks should be retained for the reasons outlined earlier. This reorientation would allow the international movement of people to be much freer and would promote a more efficient mix of international movements in goods, services, capital and labour. I now spell out in some detail how such a decentralized approach to immigration policy might operate.

## A) Independent Applicants

As a starting premise, those who wish to immigrate who have already secured employment or who have financial resources sufficient to maintain independence from the amenities of the welfare state (except publicly-subsidized education and healthcare) should be able to emigrate freely provided that they, either individually or through their employer, have taken out specified minimum coverage private insurance to cover any drawings that they may make against non-contributory social programs within a certain period of time after entry. This private insurance requirement (akin to mandatory automobile accident insurance) is central to my proposals in seeking to screen out fiscally-induced immigration by internalizing a significant portion of the social costs of immigration to would-be immigrants or their sponsors. To the extent that the prescribed minimum coverage proves to be inadequate to reimburse drawings on these social programs, immigrants and their sponsors would be jointly and severally liable for reimbursement of the deficiency. Labour certification requirements and domestic search requirements are protectionist and inefficient because they impose additional costs on hiring foreigners (making domestic workers arbitrarily more attractive) and are therefore of little (if any) value in a decentralized system. Under a decentralized approach, the labour market would regulate the inflow of persons congruently with demand. Employers would sponsor immigrant workers as frequently as is deemed to be cost justified.

The social programs that immigrants would be denied legitimate access to immediately after entry would include, *inter alia*, welfare payments, food stamps, public housing subsidies, and public non-contributory pensions. Publicly-subsidized education and healthcare would not be among the excluded benefits and would thus be available to all immigrants. Public education would not be included in the enumerated items because public education is one of the primary mechanisms through which liberal democratic states impart liberal values such as tolerance to succeeding generations – a function that is important in establishing and perpetuating the security of a nation’s liberal democratic

institutions. Publicly-subsidized healthcare would not be among the excluded items because, given that the immigrant has presumably already passed a medical examination prior to landing, there is likely to be no significant adverse selection problem or abuse of the system in this regard. Given that education and healthcare are primary goods, it would take a considerable threat of fiscal abuse to preempt their use by newly landed immigrants. Further, given the fact that all immigrants are taxed on their income at the same rates and in precisely the same way as are natives, there appears to be little justification for denying them the enjoyment of publicly provided education and publicly-subsidized healthcare. Similarly, objections that increased immigration will result in increased negative congestion effects and thus generate demand for more infrastructure such as highways, schools, and hospitals are met by the fact that immigrants pay taxes just as do natives.

The responsibilities entitling one to sponsor an immigrant might include taking out specified minimum insurance coverage against any social benefits (excluding publicly subsidized education and healthcare) that the immigrant might draw on during the minimum residence period required for full social program eligibility. The selection of a minimum residence period is to some extent arbitrary. However, arguably it should not be longer than the period of residence required to qualify for citizenship: in Canada three years, in the U.S. five years. Longer periods would create normatively problematic first and second-class citizens. The social program insurance device would entail a mandatory obligation on the part of the sponsor to pay the premiums required to insure the worker against any drawings he or she may make against the amenities of the welfare state. The sponsored worker would be free to draw on social programs (other than publicly-subsidized education or healthcare, which would be provided as a matter of course), but the state would be entitled to be indemnified for these drawings by the insurance company underwriting the social program insurance policy held by the sponsor. One of the main advantages of this insurance scheme is that in a competitive private insurance market insurance premiums would adjust to reflect the expected

drawings of immigrants given their observable characteristics such as educational background, occupation, type of sponsor (e.g. employer, family, or humanitarian), age, work experience, etc. If it turns out that the fears of fiscally induced immigration are exaggerated and immigrants do not draw public benefits at a significant rate, insurance will be inexpensive and readily affordable for most sponsors. If fears of fiscally induced immigration are well-founded, then insurance premiums will be significantly higher, thereby increasing the costs of sponsorship and creating stronger incentives for sponsors to be more selective in screening potential immigrants. Thus, if fears of fiscally induced migration are credible then, all else the same, the number of immigrants sponsored and admitted will decrease due to the increased costs associated with insurance and sponsorship.

Once a sponsored employee has arrived in the country, employers would be obligated to continue paying premiums on the insurance contract for the full minimum residence period, regardless of whether or not the employee remains employed by the employer (unless a new employer agrees to assume this responsibility). If the employer subsequently becomes insolvent, winds-up, or otherwise cannot be compelled legally to honour their obligation to pay premiums for the period, then the sponsored immigrant would become responsible for taking over the insurance premium payments or else could potentially held to be in default of the conditions for permanent residence and be subject to deportation from the country.

A related concern in the context of employer sponsored immigrants might be that fly-by-night or sham employers might sponsor dozens of immigrants, commit to paying their premiums for three years, then promptly declare bankruptcy and/or wind-up their operations. To the extent that this is a concern, however, insurance companies have the incentive to sell insurance only to reputable, well-established businesses, or perhaps demand premium payments up-front from companies that present relatively poor or unknown default risks. Moreover, immigrants not covered by current social-program insurance policies will be subject to deportation.

Independent immigrants who are admitted based on having financial assets sufficient to maintain independence from the amenities of the welfare state (for example, under investor immigrant programs) and are thus not sponsored by employers would remain responsible for obtaining social program insurance coverage of the required minimum amount for the requisite period, although one would expect the premia to be minimal.

Those admitted to the country on student visas to study would benefit from this liberalized immigration policy regime, as would host countries.<sup>77</sup> Students from abroad admitted to study at the post-secondary level have in most cases established that they have the motivation and talent required to succeed in an academic environment. This same motivation and talent is often translatable into considerable value in the labour market. If these students are able to secure employment and sponsorship upon graduation, there is little reason to preclude them from doing so. In fact, there appear to be several reasons to encourage them to stay. Most college and university graduates on student visas are fluent in at least one of the country's major languages, are well educated, talented, and motivated, and therefore *prima facie* well equipped to contribute productively immediately to the domestic economy. In addition, they are likely to be relatively young so that their presence can help improve the dependency ratio, and are likely to have already internalized to a considerable extent the values and social mores of the country.

To the extent that young students who stay after completing post-secondary education abroad contribute to a brain drain for the country of origin which is costly – a debatable proposition as noted above – there may be scope for countries of origin to try to reduce the magnitude of these ‘brain drain’

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<sup>77</sup> Jagdish Bhagwati has long advocated a liberal approach to encouraging foreign students to stay-on in the United States after they have completed their formal education. See, for example, Jagdish Bhagwati, “The False Alarm of Too Many Scientists” in Jagdish Bhagwati, ed., *A Stream of Windows: Unsettling Reflections on Trade, Immigration, and Democracy* (Cambridge, MA: MIT Press, 1998) 363. At 368, Bhagwati remarks that the “intelligent and highly motivated foreign students who come to this country for scientific education and then ‘stay on’ in large numbers assimilate readily, becoming indistinguishable from native-born Americans. The scientific eminence of the United States thus reflects a virtuous circle: the best and brightest from around the world are attracted to our universities, and they in turn help make our universities world class.”

costs. One option may be for countries of origin to demand that students leaving the country to study abroad (or their families) repay the publicly-subsidized portion of their primary and secondary education if they ultimately elect to remain abroad after completing their studies (or to post a bond to this effect). Given the fact that the existence of a brain drain is empirically contestable, however, and the further fact that it is unclear who actually pays for publicly-subsidized primary and secondary education of emigrating students such policies may be unwarranted.

## **B) Family Preference Immigration**

An arrangement very similar to that envisaged for independent immigrants could be instituted for family preference immigrants. Under the decentralized family preference system, any individual that is sponsored by a relative (such as a spouse, parent, or age of majority child) would be eligible immediately for immigration, provided that the would-be immigrant has met health, criminality and national security checks and his or her sponsor has secured social program insurance of a specified minimum amount on the immigrant's behalf. This would be a highly desirable development because of the extremely long waits currently imposed on family sponsored immigrants in many developed countries. For instance, in January 1997 in the U.S. the family preference queue for siblings of U.S. citizens consisted of 1.5 million applicants, representing a wait of at least ten years (and in some cases as long as twenty years).<sup>78</sup> As with independent immigrants, family sponsored immigrants admitted through the decentralized process would be eligible to receive publicly-subsidized education and healthcare benefits (with the possible exception of those who are sixty-five years or older upon landing, or those who cannot meet the health check, who could be required to obtain independent private health insurance), but any welfare payments, food stamps, public housing subsidies, or public pension payments received within a specified period of time after entry would be subject to reimbursement by the sponsor's insurer. The degree of proximity of the family required to make use

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<sup>78</sup> See Chang, *supra* note 16 at 220.

of the family category of admission relationships (i.e. degree of consanguinity necessary for sponsorship), which is a long-standing matter of contention in immigration policy debates in many countries, is of second-order importance under these proposals given their cost-internalizing nature.

### **C) Refugees and Asylum Seekers**

The issue of refugee admissions is less amenable to a decentralized approach to immigration policy. There are two main types of refugees – those who arrive in the host country seeking admission (inland refugee claimants), and displaced persons who are selected overseas for admission to the host country (overseas refugee claimants). Those who arrive uninvited in the desired destination country claiming that they are refugees must be considered for admission in accordance with the host country’s obligations under the *Geneva Convention* (unless, for instance, the country has enacted restrictions – as have Germany, the U.S., and Canada – providing that the country will not consider the cases of asylum seekers arriving via a “safe third country” or from “safe countries of origin”). Because signatory countries have an obligation under international law to consider the cases of inland refugee claimants on their merits by virtue of the *Geneva Convention*, the decentralized approach is not readily applicable. For refugees selected overseas, however, the decentralized approach will generally be relevant.

Developed countries often establish targets for the number of refugees selected overseas for admission to the host country. A complete abandonment of the quota approach in favour of decentralized overseas admissions may result in a deluge of overseas refugee claimants (although this is probably unlikely). The current quotas are arbitrary, but are to some extent understandable because refugees selected overseas often lack valuable labour market skills such as fluency in the language of the country of landing and/or specialized human capital, and because they may take slightly longer to integrate into the country’s labour market (although, as noted above, the empirical evidence does not

support fears of long-run non-integration).<sup>79</sup> Thus, an abandonment of the quota system for overseas refugees should not be ruled out altogether. Despite these concerns, however, many residents of developed countries take great pride in extending aid to refugees and asylum seekers and are likely to gain psychic utility from the knowledge that they are helping those in desperate need. In addition, to the extent that a decentralized system requires social program insurance similar to that advocated for the independent and family classes, there is little to fear fiscally from a higher influx of refugees selected overseas.

Canada's approach to the admission of refugees is currently partly decentralized. Private organizations in Canada interested in sponsoring overseas refugee claimants must negotiate a *Sponsorship Agreement* with the Minister of Immigration, which details the criteria for determining whether or not a person is a refugee, and establishes the sponsor's obligation to provide housing and food for the refugee for up to two years after the arrival of the refugee in Canada. Such a regime could be replaced with a mandatory social program insurance system similar to that advocated for the independent and family preference immigration contexts. To the extent that private parties derive positive marginal utility from sponsoring refugees and asylum seekers (and provided that they commit credibly to apply the *Geneva Convention* criteria to the selection of overseas refugee claimants and must maintain social program insurance for those they sponsor), refugee sponsors should be free to facilitate admittance to those with deserving claims from overseas without limitation (subject again to health, criminality and national security checks). Where refugees cannot satisfy the health test, they should be admissible if their sponsors have obtained adequate permanent, private health insurance.

#### **D) Illegal Immigrants and Guest Workers**

For several reasons illegal immigration should be discouraged despite its net positive welfare effects; this discouragement, however, should not be through increased border controls, but through

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<sup>79</sup> See De Silva, *supra* note 55.



accommodation. The psychic costs borne by illegal immigrants associated with the stigma attached to their status, as well as the continual fear of discovery are considerable (but presumably outweighed by the expected benefits of staying). In addition, patrols are largely ineffective at keeping out those who desperately desire admission, and the costs associated with patrolling borders are significant. Finally, the existence of an underclass of 'others' who are unable to participate politically in the community by voting or running for office and are unable to participate in social programs is undesirable for humanitarian reasons.

One way to relieve the pressure exerted by illegal immigrants to immigrate is to liberalize immigration policy. By eliminating quotas for immigrant admissions, and by allowing those sponsored by employers (and supported with social program insurance) to gain entry so long as they pass health, criminality and national security checks, some of the pressure exerted by illegal immigrants for admission will be relieved. Although obtaining employer sponsorship, securing social program insurance, and passing health, criminality and national security checks imposes transactions costs that would not necessarily accompany illegal immigration, being considered a 'legitimate' or 'legal' immigrant is likely to be of considerable psychic value. In addition, once legally admitted to the country, under these proposals an immigrant would immediately begin fulfilling the period of residency required to participate fully in social programs and also to naturalize as a citizen (thereby ultimately gaining the rights associated with political participation such as voting and being eligible to stand for election).

If demanding employer sponsorship and social program insurance of unskilled immigrants proves to impose too great a burden in terms of transactions costs on employers or would-be immigrants to stem the tide of illegal immigration, another way to eliminate the pressure for illegal immigration would be to liberally distribute temporary worker visas to any employer-sponsored immigrant. Due to the problems associated with trying to expel temporary workers, exemplified by the

permanent guest worker phenomenon of Western Europe, this liberal temporary worker system could be accompanied by an automatic graduation to permanent legal immigrant status after a specified period of continuous employment in the host country. That is, if one held a temporary worker visa for *e.g.* three to five years and worked continuously (or nearly continuously, if not with the same employer for the entire period), then one would be automatically extended legal permanent resident status. During the period of residence as a temporary worker, the only social services available would be publicly-subsidized education and healthcare services. Upon the automatic grant of permanent resident status, the temporary worker would qualify for full participation in all social programs and would begin the period of residency necessary to naturalize as a citizen and secure the rights associated with full political participation. Thus, there would be very little incentive for would-be workers to immigrate illegally because they would forgo the medium to long-term benefits associated with the relatively straightforward process to work legally. The host country would also benefit from the implementation of this system. Immigrants who would have possibly entered the country illegally otherwise would be registered as temporary workers and thus would be easily identifiable by the host country. The introduction of the temporary worker class of admission by creating a registry of temporary workers would help social program administrators curtail the consumption by such workers of social services to which they are not entitled (such as welfare, non-contributory pension benefits, food stamps, etc.), would (at least to some extent) reduce foregone tax revenues by reducing the incentives to pay workers ‘under the table,’ and would also allow the resources previously allocated to patrolling borders for illegal immigrants to be allocated to more productive uses.

## **V. THE MANDATORY INSURANCE PROPOSAL IN CONTEXT**

The proposal to require sponsors of immigrants to maintain social program insurance of a specified amount is not markedly different in motivation from certain aspects of current immigration

policies. Several current immigration policy initiatives, such as the requirements of the Canadian investor admission class, the mandatory Canadian ten-year support undertaking for family class immigrants, and the Australian Assurance of Support and its associated pledge bonds, are implicitly designed to combat fiscally induced migration in a manner similar but inferior to the mandatory social program insurance proposal. The mandatory insurance proposal is also consistent in several respects with but, again, superior to proposals to auction off visas (Julian Simon) or to sell entry visas at a fixed lump sum price (Gary Becker) that have been promoted as ways to combat fears of fiscally induced migration and to attenuate the economic inefficiencies associated with quotas.

In Canada, to qualify for admission as an investor an applicant has to demonstrate that they have operated, controlled, or managed a business; have acquired at least \$800,000 in net worth; and that they are willing to make a substantial investment in Canada upon being issued a visa. This last condition entails the investment of \$400,000 for a five year period in a program managed by Citizenship and Immigration Canada (CIC). This \$400,000 investment is not refundable after a visa is issued and is repaid without interest at the conclusion of the term. According to the CIC, the funds are remitted directly to the CIC and are not invested by the applicant but instead are delivered to and are secured by the “provinces and territories that use the funds to create jobs and develop their economies.”<sup>80</sup> Pragmatically, an individual admitted to Canada as an investor has essentially purchased their visa for a sum equal to the net present value of the foregone investment returns that \$400,000 would earn over a five year period. If \$400,000 is invested for five years and earns a compounded annual after tax rate of return of 6 percent per year, then at the conclusion of the five year period the investment is worth approximately \$535,290. If inflation is running at a rate of 3.0 percent per year, then the Canadian investor admission class can be understood as requiring the equivalent of a payment of approximately \$116,702 for admission. A payment of this order of magnitude constitutes a

very high barrier to entry and serves to deter all but the wealthiest of would-be immigrants. That such payments are routinely extracted from immigrant investors suggests that Canada's quota system is deterring a considerable number of immigrants who would enhance the nation's welfare, but who cannot afford the steep price of entry nor gain admission in any of the other subclasses.

Applicants sponsored by a permanent resident or citizen of Canada who is a spouse, fiancé, fiancée, parent, grandparent, or a child over the age of 19, are *prima facie* eligible for admission to Canada in the family class. However, the sponsoring relative must meet certain income requirements, and sponsors must also undertake to provide for the settlement needs of their applicants, including lodging and maintenance for 10 years after the applicant immigrant arrives in Canada.<sup>81</sup> These undertakings are motivated by precisely the same considerations as is the mandatory insurance scheme – to discourage fiscally induced migration. As a matter of practice, however, these undertakings are rarely (if ever) used to recover social assistance payments made to family sponsored immigrants, in large part due to the fact that social assistance payments fall under provincial jurisdiction whereas the undertakings are made to the federal government in the course of the sponsorship process.<sup>82</sup> While well-intentioned, the central problem with these undertakings is that they are difficult to enforce for two reasons. The first reason is the federal/provincial mismatch in responsibility for making social assistance payments and in enforcing the undertakings. The second reason is that if sponsors fall on financially difficult times they may not be able to afford to support those they have sponsored. It is difficult (even abstracting from the jurisdictional mismatch issue) to enforce these sponsorship

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<sup>80</sup> See Citizenship and Immigration Canada, *Planning Now for Canada's Future* (Ottawa: Minister of Public Works and Government Services Canada, 2001), Appendix B at 29.

<sup>81</sup> *Ibid.* at 21.

<sup>82</sup> According to the Ontario government, in the year 2000 there were approximately 17,000 defaulted sponsors in Ontario alone and immigrants whose sponsors defaulted collected approximately 125 million dollars of social assistance. See Ontario Ministry of Community and Social Services, "Baird Condemns Federal Liberals for Promoting World Wide Welfare" (April 5, 2000) digital document available online at <http://www.gov.on.ca/CSS/page/news/news2000/apr500.html>.

undertakings since sponsors have no insurance coverage for providing for those they have sponsored and are not required to set aside funds *ex ante*.

The Australian system is superior to the Canadian undertaking system in that family sponsors are required to post a bond and formally enter into an Assurance of Support, which consists of a “legal commitment by the assurer to repay the Commonwealth of Australia any benefits paid to those covered by the assurance in the first two years after their migration from overseas or grant of permanent residence in Australia.”<sup>83</sup> The Assurance of Support is supported by pledge bonds in the amount of AU\$3,500 for the primary applicant and AU\$1,500 for each additional adult who is sponsored for admission. The value of the bond less any drawings made by the sponsored immigrant is returned to the assurer at the conclusion of the two-year support period, which helps prevent the default problems that are apparently common in the Canadian experience. The Assurance of Support and the accompanying pledge bonds do need not to come from either the applicant or the sponsor – a third party assurer is acceptable. The disadvantage of the Australian system is that the value of the bond is fixed without reference to any of the circumstances of the sponsor or the incoming immigrant. Low risk and high risk immigrants must pledge bonds of the same amount. Moreover, although the quantum of funds demanded is not extraordinary, AU\$3500 is a considerable amount of money and many sponsors and immigrants are apt to be unable to afford to finance pledge funds, even if they carry a relatively low risk of default. The mandatory insurance scheme improves upon the pledge bond in three ways. First, insurance premiums can be paid periodically, which reduces the liquidity problem faced by sponsors and immigrants seeking to save the AU\$3500 demanded for a pledge bond. Second, insurance premiums adjust for the perceived risk that a would-be immigrant poses; pledge bonds are the same value for all would-be immigrants. Finally, insurance coverage for drawings on social assistance can exceed that possible under a pledge bond regime at relatively little additional cost,

which gives the state added confidence that newly landed immigrants will not constitute a fiscal burden.

The advantages of the decentralized, mandatory social insurance approach to immigration policy can be demonstrated more clearly still by comparing it with two approaches that have found favour with economists Julian Simon and Gary Becker – the sale, either through auction or through some preset price, of entry visas.<sup>84</sup> In Simon’s proposal, periodic auctions of a certain number of visas would be used to sell admission. Under Becker’s proposal, by contrast, anyone willing to pay a certain fee up-front for an entry visa (he suggests 50,000 dollars) would be entitled to enter the country (in his example, the U.S.) immediately. These two proposals each improve upon the three class quota system status quo in at least two respects. First, those who have the greatest willingness (and ability) to pay for entry will be able to enter immediately without having to suffer through the often inordinately long waiting periods occasioned by the restrictive nature of the quota system. Only those whose welfare would be markedly improved by gaining immediate entry would choose to pay Becker’s fixed fee. Similarly, only those with the highest willingness to pay would purchase a visa in Simon’s visa auction. In other words, those with high opportunity costs associated with waiting for entry would no longer have to do so, which would be welfare improving. Second, the admission of such immigrants would not likely constitute a net fiscal burden for the receiving country because the immigrants *ex ante* have made a large fiscal contribution to the country’s government either through the payment of Becker’s fixed fee or Simon’s auction price. Moreover, those who are willing and able to pay a considerable sum of money in order to emigrate are likely to be able to support themselves, either through existing means or through newly acquired means (i.e. through employment in the receiving

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<sup>83</sup> For the full details see Australian Department of Immigration and Multicultural Affairs, “DIMA Fact Sheet 27: Family Stream Immigration – An Overview” (December 13, 2000) digital document available online at <http://www.immi.gov.au/facts/27family.htm>.

<sup>84</sup> See Gary Becker and Guity Nashat Becker, *The Economics of Life* (McGraw Hill, 1997) at 58-59; Simon, *supra* note 20 at 357-363; and Julian Simon, “The Price of Citizenship – Auctioning Immigration Visas Helps Foreigners and Americans Alike” (1987) 39 *Policy Review* 71.

country) upon arrival. Each of these proposals suffer from one primary disadvantage. Individuals who do not possess and cannot find a way to borrow the sum required to pay for entry would be hard pressed to find the means to do so, given the fact that it is difficult in general to borrow against one's human capital. Thus, even skilled and talented immigrants from the poorest countries might find it difficult to gain entry. Becker postulates that third parties might be willing to lend would-be immigrants the funds necessary to immigrate immediately. For example, employers might be willing to make loans to those whom they wish to hire, friends and relatives may pool resources in order to make a loan, and even commercial lenders might make loans for entry permits to those would-be immigrants who are deemed to be good risks. For the poorest immigrants, Becker suggests that the government might be able to lend them money to help pay for the cost of an entry visa in a program not unlike loan programs for post-secondary students. To prevent abuse of the system, the country could refuse to grant citizenship to anyone who has not fully repaid their loan.

The decentralized, mandatory social insurance program addresses the same concerns and shares the same advantages of the proposals of Simon and Becker, but does so more efficiently and more equitably. First, since the traditional quota system would be abandoned, entry would be much easier for most would-be immigrants. With the decentralized, mandatory social insurance program there would be no long queues and the associated time costs that might cause would-be immigrants to pay a large up-front fee as in Becker's proposal. It is even clearer that the mandatory social insurance program is an improvement upon Simon's scheme, since Simon would retain quotas for the proportion of visas that are sold. Moreover, assuming that a competitive insurance market would develop if the insurance proposal were adopted, each would-be immigrant would pay a price closely correlated with their expected draw on the amenities of the welfare state – not some predetermined, arbitrary price for entry set by a political process as in Becker's scheme. Simon's proposal has the advantage of using the market to set the price of a visa via an auction, but this price is artificial and depends in large part

upon the number of visas that are periodically auctioned off (again, politically determined). In addition, the insurance program would mitigate (at least to some extent) the liquidity constraints faced by would-be immigrants under the Simon and Becker proposals. Because insurance premium payments would be made periodically, and would in most instances likely be of a considerably lower order of magnitude than the costs associated with Simon's auction price or Becker's proposed fee, even the poorest immigrants would likely find the system to be accessible, though, of course, not perfectly so (perfect accessibility would require immediate, costless entry and thus completely open borders, which would be problematic for reasons outlined earlier). The main advantage of the Simon and Becker approaches, of course, is the relative ease with which immigrants would be able to purchase entry. With the insurance proposal the advantages for the labour market associated with rapid admission of workers from abroad are not lost, the issue of fiscally induced migration is controlled and, because labour mobility would be considerably higher than it would be under these competing approaches (due to much lower costs associated with entry), a greater increase in global economic welfare might well result.

## **VI. CONCLUSION**

The international movement of people lags behind international movements of goods, services, and capital mostly because immigration policies in most developed countries are relatively restrictive. This state of affairs is undesirable because the potential benefits to global economic welfare in terms of increasing world economic output from freer international movement of people are large. In addition, liberalized immigration policies have the potential to decrease global income inequalities. One of the main barriers to opening up the borders of developed countries to unrestricted immigration flows, however, is fiscally induced migration. Impoverished immigrants may be drawn to developed countries by the amenities of the welfare state which, at the limit, may threaten the viability of the social programs that comprise the welfare state.



In order to realize most of the economic benefits associated with liberalized immigration flows without impairing the viability of the welfare state, this paper has argued for abandoning numerical quotas on family sponsored and independent immigrants and relying instead on the mechanisms of sponsorship and minimum mandatory social program insurance. The sponsorship/mandatory social program insurance system would protect the integrity of the welfare state by preventing its abuse by newcomers. At the same time, decentralization of immigration decision making would generate improvements in the efficiency of labour markets in developed countries by decreasing the uncertainties associated with recruiting abroad, by decreasing the waiting period associated with the bureaucratic requirements of immigration agencies, and by allowing the needs of the labour market to indirectly determine the number of immigrants admitted each year. The delegation of immigration decision-making power to those benefiting from the decisions, coupled with a policy requiring them to internalize the costs of any social program abuses through insurance premiums, would generate a much better alignment of incentives than bureaucratic administration of admission requirements (beyond health, criminality, and national security checks).

The timing of immigration policy reforms may prove to be a key determinant of how much benefit individual countries will be able to realize from liberalization. Many industries already face increasingly fierce global competition for the recruitment of those possessing highly specialized human capital. Given the empirical fact that once specialized clusters of complementary industries form in a particular locale they tend to be self-perpetuating (agglomeration economies),<sup>85</sup> an important first-mover advantage may be seized by those countries demonstrating a willingness to dispense with formal immigration quotas and allowing international labour markets to operate more freely. Such initiatives should be complemented by more effective public and private resettlement assistance

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<sup>85</sup> See Michael Porter, "Clusters and Competition: New Agendas for Companies, Governments and Institutions", in Michael Porter (ed) *On Competition* (Boston, MA: Howard Business School Publishing, 1998).

programs and credential equivalency determination mechanisms.<sup>86</sup> These clustering benefits are likely to be most concentrated in the recruitment of those with highly specialized human capital, but may be realized to an indeterminate extent with the recruitment of relatively unskilled workers as well. As natives and highly skilled immigrants are drawn increasingly into employment demanding highly specialized human capital in the so-called “new” or “knowledge-based” economy, new complementary opportunities for unskilled workers arise. Dual career households demand nannies, housekeepers, gardeners, and cooks. To the extent that these positions cannot readily be filled by unskilled native workers, growth in highly skilled occupations may be hampered for lack of affordable ancillary services. Thus, the general liberalization of immigration policy in developed countries will facilitate the reaping of the greatest range of benefits possible. Not only will countries adopting such policies capture a potentially very important first-mover advantage, but they will be able to reinforce this advantage by admitting unskilled workers that are able to meet the requirements proposed above to provide the support services demanded by many highly skilled workers, their families, and their employers.

In short, I believe that in an increasingly globalized world economy, developed countries would find it prudent to integrate immigration policy fully and centrally into their external economic policies (along with external movement of goods, services, and capital) and to remove it from the largely protectionist, inefficient bureaucratic backwater in which it has languished in most developed countries for much of their history. While the recent terrorist attacks in the U.S. may create pressures to render existing immigration policies more restrictive rather than more liberal than they currently are – and indeed national security screening obviously needs to be rendered more stringent and effective – we should not allow these events to blind us to the substantial long-term domestic and global welfare gains likely to be realized from more liberal immigration policies.

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<sup>86</sup> See Jeffrey Reitz, *Warmth of the Welcome* (Westview Press, 1998).