

RECENT WORKS ON IMMIGRATION POLICYMAKING: A REVIEW ESSAY AND AGENDA FOR THE FUTURE

KITTY CALAVITA

Vernon M. Briggs, Jr. *Immigration Policy and the American Labor Force* (Baltimore: Johns Hopkins University Press, 1984). xv + 294 pp. Bibliography, index. \$29.50.

Elizabeth Hull. *Without Justice for All: The Constitutional Rights of Aliens* (Westport, CT: Greenwood Press, 1985). xi + 244 pp. Bibliography, index. \$35.00.

Gill Loescher and John A. Scanlan. *Calculated Kindness: Refugees and America's Half-Open Door, 1945 to the Present* (New York: Free Press, 1986). xviii + 346 pp. Bibliography, index. \$22.50.

I. INTRODUCTION

The issue of immigration reform has taken a central place on the policy agendas of many Western industrialized countries in the last two decades. Coinciding with this emergence of immigration as a policymaking priority, the quantity of scholarly literature on immigration and immigration law has increased dramatically. The works reviewed here are representative of current research on immigration from a law and society perspective. The purpose of this essay is not only to provide synopses or critical reviews of these works, but to use them as a base from which to address current approaches to the study of immigration law and to suggest possibilities for future work in this area.

I will review the works individually, attempting to draw out the themes that tie them together. Among other things, I will argue that, despite obvious differences in topical focus and political/philosophical stance, these works share an atheoretical approach. Next, I will briefly contrast the descriptive orientation of these works with the few notable attempts over the last decade to frame the issues of immigration and immigration law theoretically. The essay concludes with a discussion of the substantive and theoretical concerns that might inform future research.

LAW & SOCIETY REVIEW, Volume 23, Number 5 (1989)

II. RECENT WORKS ON IMMIGRATION AND REFUGEE POLICYMAKING

Vernon Briggs's *Immigration Policy and the American Labor Force* is one of the most inclusive treatments to date of U.S. immigration policy and its relationship to the labor market. Unabashedly motivated by the desire to improve upon current immigration policy, Briggs sets the following agenda for himself: "The questions that are asked are What has been done? Why has it been done? How has it been done? and What else might be done in the future?" (p. xi).

Briggs's carefully constructed response to the "What has been done?" question is by far the greatest strength of this work. Pointing out that "to truly understand the roots of the illegal immigration issue as it pertains to Mexico, it is necessary to understand the key events that preceded and followed the Mexican War of 1846–1848" (p. 137), Briggs proceeds succinctly yet carefully to insert the Mexican immigration issue in its proper historical context. The descriptive analysis throughout is characterized by similar care, as the author moves from one historical period to another, untangling along the way the complexities of each area of immigration law, from the legal immigration system to commuter workers to refugee policy.

Briggs is less successful in treating his second query, "Why?" He contends that while past U.S. immigration policy "generally accorded with the economic needs of the nation" (p. 13), since 1965 a gap has emerged between the "needs of the labor market and the seeming indifference and counterthrusts of prevailing immigration policy" (p. xii). The specifics of this argument, however, and the recommendations that follow, are ultimately unconvincing. Equally important, the Why question that Briggs initially poses remains unanswered. He never attempts to *explain* the retreat from economic pragmatism that he so laments.

Briggs's failure to convince the reader of his general argument and his reluctance to attempt explanation can both be traced to the absence of a theoretical framework with which to order historical events. Indeed, Briggs shuns theory altogether, insisting that the social science approach has little to contribute to policy discussions. Thus, he begins,

Rather than devote attention to a fruitless review of the various theories . . . or attempt to adopt any particular theoretical approach, this study will focus on immigration policy—not immigration theory—and on the evolution of its influence upon the labor force of the United States. (p. 12)

The implication seems to be that an explanation of immigration policy over time is somehow immediately accessible from the historical events themselves. But, theory is no mere abstraction or, worse yet, *diversion* from the "real world." Quite the opposite,

for without a theoretical guide, it is impossible to make sense of isolated historical events, much less to notice patterns, contradictions, or anomalies among them.

For example, while Briggs posits that in the early period “national economic needs” were the basis for immigration policy, the history that he recounts suggests that significant conflict surrounded the determination of *whose* economic needs were to be paramount. He mentions in passing that the mass immigration of the 1850s was accompanied by a sudden stagnation of wages and worker protests against immigration in the form of the Know-Nothing Party (p. 22); that the Civil War “Act to Encourage Immigration” was the product of a “Republican Party dominated by business interests” who “sought to find a way to increase the supply of workers but not of settlers per se” (p. 24); and that the purportedly restrictive “Alien Contract Labor Law” of 1885—fought for by organized labor who had watched their bargaining power eroded by unlimited immigration—was rendered inoperative by the courts. It is unclear how Briggs determines what constituted “national” economic needs in this climate of conflict.

Furthermore, the historical record that Briggs himself presents suggests that he may have overstated the importance of strictly economic factors. Indeed, as he points out, many of the most important restrictions of this early period (such as the exclusion of the Chinese in 1882 and the literacy test requirement of 1917) were predicated more on ideology than on economic considerations. Presumably because Briggs’s goal is not to probe the historical record in order to *understand* the policymaking process (the realm of theory), he ignores the implications of economic conflicts in the determination of immigration policy. And, presumably because he does not pretend to be engaged in hypothesis testing, he feels less obligated to entertain—or perhaps even notice—competing explanations to which his own data point.

In his treatment of the contemporary period, Briggs’s rejection of theory tends to result in *ad hoc*, sometimes contradictory, approaches. Immigration policies are alternately attributed to public opinion, as when he argues that “the politically popular concept of family reunification” (p. 244) has provided the rationale for post-1965 policies; special interests (“U.S. policy reflects a political genuflection to special interest groups” [p. 245]); and ruling class privilege (“Helping the most privileged members of our society has always been a popular role for government agencies” [p. 165]). In his most cynical moments, Briggs even entertains a never clearly defined conspiracy theory. Noting the inadequacies of the border enforcement effort, he remarks that “some scholars . . . are convinced that the lack of credible deterrence (to illegal immigration) is no accident. They argue that the United States actually wants to have illegal immigrants on hand to keep the labor market for unskilled workers in constant surplus” (p. 156). Briggs implicitly

concurr, calling U.S. immigration law “a policy charade” (p. 158), although he makes no effort to reconcile this with the essentially pluralistic paradigm he seems generally to espouse, nor do we ever learn for whom the “charade” is put on or why. The rejection of a theoretical guide results here not in the *elimination* of theory, but rather in a multitude of conflicting theoretical approaches that surface unannounced and remain unexamined.

A number of scholars have noted the domination of a policy orientation and a neglect of theory in the immigration literature as a whole. Portes (1978: 469), for example, points out that “much of this literature (on illegal immigration) is prescriptive, that is it attempts to persuade readers to support one or another solution to the problem.” He goes on to warn that “By adopting the official perspective, rather than the social science perspective as a point of departure, researchers deliberately surrender important theoretical tools of analysis” (ibid.: 470). One obvious consequence is that the broader understanding of immigration and immigration law is stymied. In addition, however, such atheoretical approaches ultimately fail to realize even the more limited goal of generating viable and realistic policy agendas.

Briggs’s discussion of employer sanctions is exemplary. Citing a number of studies (most notably, North and Houstoun, 1976, and Van Arsdol *et al.*, 1979), Briggs concludes that illegal immigrants flood the labor market and displace legal workers. Primarily on these grounds, he supports sanctions against employers who hire the undocumented. However, because he has left unexamined the relationship between the state and civil society, he has no basis for estimating the extent to which such a law (now passed as part of the Immigration Reform and Control Act of 1986) will, or can, be implemented effectively. Conversely, he is unable to offer concrete strategies to cope with the possibility of employer circumvention or government nonenforcement. This is particularly troublesome, since a host of social scientists as well as policymakers have addressed the many problems associated with employer sanctions enforcement. Briggs himself is aware of the potential problems and in fact admits that “it is debatable . . . how effective such a law would be” (p. 170). In spite of these doubts, he suggests that at least “an employer sanctions law would set the moral tone” (p. 170). Ironically (since the intent in evading theory was to focus on the concrete), such policy agendas in the absence of a coherent model of the state and law are destined to remain a wish list confined to the realm of abstraction.

These limitations (which this volume shares with much of the immigration law literature) should not be overstated, for *Immigration Policy and the American Labor Force* provides us with a wealth of raw data and historical detail. In this respect, Briggs makes a substantial contribution upon which future, more theoretically grounded, studies might build.

Like Briggs's volume, Elizabeth Hull's *Without Justice for All: The Constitutional Rights of Aliens* is an unusually comprehensive yet succinct work, in this case focused on the complex legal issues associated with the treatment of immigrants in the United States. Where Briggs espouses economic pragmatism and enlightened self-interest as the appropriate basis for U.S. immigration policy, Hull takes a different tack, placing ethical considerations and the interests of the "family of man" (p. 154) at the center of analysis.

With such humanitarian concerns as her priority, she examines the rhetoric and reality of immigrants' rights. Focusing sequentially on permanent resident aliens, excludable aliens, undocumented aliens, and refugees, Hull systematically delineates the ways the U.S. legal system discriminates between citizens and "others" (a category that includes not only legal and illegal immigrants but aspiring immigrants and visitors as well).

She points out, for example, that although permanent residents enjoy many of the rights of citizens, there currently exist 700 grounds for deportation, comprising a "Byzantine network of laws beyond the comprehension of anyone other than a highly trained attorney" (p. 32). Furthermore, Hull contends, the way in which these deportations are carried out often violates what we generally consider "inalienable" rights. The author is characteristically compelling:

If the government were to seize individuals suspected of a crime, detain them indefinitely without bail, deny them appointed counsel and the right to compel witnesses in their own behalf, subject them to self-incrimination, prosecute them for an offense perfectly legal when committed, and finally banish them forever from the country, the American public would be outraged: The government would have flaunted half a dozen rights that comprise the bedrock of this country's constitutional system. The government's action would be perfectly legal, however, if the suspects were aliens, facing deportation. (p. 33)

Of course the discriminatory legal treatment of citizens and noncitizens is even more pronounced when the noncitizens are illegal aliens. Prefacing her discussion of the undocumented with a brief historical overview, the author focuses on the extent to which illegal aliens enjoy Fourteenth and Fourth Amendment rights.

Hull's analysis of the Fourteenth Amendment rights of the undocumented includes an investigation of the Supreme Court's reasoning in *Plyer v. Doe*. This case challenged the constitutionality of the Texas School Code, which permitted school districts to refuse to admit undocumented alien children. The court concluded that the Fourteenth Amendment applies to everyone within the boundaries of the United States, whether they be "citi-

zen or stranger" (quoted on p. 90). However, its opinion was "narrow and carefully circumscribed" (p. 90). In particular, the court reserved the possibility (1) that Congress, with its plenary power over immigration, could legislate limits to Fourteenth Amendment coverage as it applies to aliens; and (2) that in the case of overriding state interests, aliens' Fourteenth Amendment rights could be curtailed.

In fact, what is consistently striking from Hull's discussion is the extent to which the courts seem willing to qualify the applicability of basic constitutional rights, according to the weight of countervailing interests. This practice of weighing the costs and benefits of extending rights to immigrants is nowhere more apparent than in the courts' treatment of Fourth Amendment rights regarding unreasonable search and seizure. In contrast to the advances in the criminal justice system of the last decades, courts have been reluctant to confine the Immigration and Naturalization Service (INS) too rigorously to the strictures of the Constitution. In her discussions of warrantless searches involving the stopping and questioning of people who "look foreign" and factory raids on the basis of administrative warrants, Hull traces recent court decisions that outline the parameters of permissible INS activity.

Most important in this discussion is the apparent gap between the Supreme Court's decision that the Fourth Amendment applies to illegal aliens and the liberal interpretation of what constitutes a "reasonable" search by the INS. For example, the Supreme Court determined in *INS v. Delgado* that when the INS enters a factory in order to round up and question workers, this "mere questioning . . . does not constitute a seizure" (quoted on p. 103); therefore, the authorities can execute such searches on the basis of general warrants that do not name specific individuals for specific illegal behavior, or, as Hull puts it, "the broad-based, or general, search warrant that the Fourth Amendment was intended to prohibit" (p. 102). The Justice Department's argument was that if factory searches on the basis of general administrative search warrants were denied them, it "would almost completely destroy the utility of an important and effective tool in apprehending aliens who are illegally present in the country" (quoted on p. 104).

Hull points out that similar pragmatism has limited the strictures of the Constitution as they apply to INS stops and interrogations. The courts have determined that such stops must be made on the basis of a "reasonable suspicion" that the person interrogated is an illegal alien. However, the Supreme Court in *United States v. Brignoni-Ponce* allowed that "Mexican ancestry" could be a "relevant factor" in determining such suspicion, as could "the character of the area," "attempts to evade officers," and "mode of dress and hair cut" (quoted on pp. 97-98). Hull argues that the consequence of such ambiguous guidelines has been to extend almost limitless discretion to the INS in this area. As she puts it,

“While they cannot in theory question people on the basis of racial or ethnic appearance alone, they in fact do so consistently, and no one familiar with the realities of immigration enforcement would suggest the contrary” (p. 100).

Hull’s analysis of U.S. refugee policies further highlights such distinctions between the law in the books and the law in action, and the wide discretion accorded administrative agencies. Her discussion focuses primarily on the Refugee Act of 1980, whose purported goal was to create a “coherent and comprehensive” (quoted on p. 119) policy which would do away with the regional and ideological limitations of the McCarran-Walter Act. As documented by Hull, it does neither. With the arrival of 125,000 Mariel Cubans and 10,000 Haitian “boat people” in 1980, U.S. refugee policy reverted to its *ad hoc* approach. By devising the classification of “Cuban-Haitian Entrant,” the Carter administration managed to avoid blatant discrimination between the Cubans and the Haitians without having to admit that Duvalier’s U.S.-supported regime generated political “refugees.” Far from a “coherent and comprehensive” policy, this administrative solution underscored the failures of the newly signed Refugee Act. The “special entrants” were treated in an *ad hoc* fashion, while the “machinery established under the Refugee Act lay unused” (p. 125).

Hull describes the Reagan administration’s “interdiction program” instituted in 1981, as the epitome of *ad hoc* and discriminatory procedures designed to systematically deny refugee status to applicants from non-Communist countries, in this case Haiti. Her discussion of the legal fictions devised to assure the success of this strategy is especially revealing. As she points out, the U.S. Coast Guard patrols the Windward Passage between Haiti and Cuba and has declared their authority “to fire upon any craft that fails to halt upon command for inspection”; however, because the perfunctory “hearings” aboard the vessel do not occur within the United States, the INS claims not to be confined to U.S. legal standards. Hull concludes, “The service’s logic is weak; it argues that since interdictions occur on the high seas they are beyond the reach of domestic law, yet at the same time it asserts jurisdiction over vessels intercepted in those waters” (p. 135).

A number of themes recur throughout this work. First, it is clear that ideology plays a central role in the determination of immigration and refugee policies. Second, Hull’s work highlights the sometimes broad discrepancies between legislation, court decisions, and the practices of administrative agencies. Finally, Hull alludes to the contradictions and inconsistencies that surround immigration policymaking and implementation—for example, the difficulty of reconciling America’s “benign self-image” (p. 9) as a haven, with both the nativism that has pervaded U.S. immigration laws and the strident anti-Communism that comprises the backbone of U.S. refugee policies.

Like Briggs's work, *Without Justice for All* is essentially atheoretical, yet it brings to the surface substantive and theoretical issues that provide important building blocks for future work. Judging it on its own merits, this meticulously researched and referenced book is perhaps the best—most informative and readable—book of its kind.

Gil Loescher and John Scanlan's *Calculated Kindness: Refugees and America's Half-Open Door, 1945 to the Present* is more narrowly focused than either Briggs's or Hull's work. Because their attention centers entirely on U.S. refugee policy in the modern period, Loescher and Scanlan can afford to be somewhat more detailed, compiling for us an exhaustive documentation of the process of refugee policymaking. The authors dig extensively into the written record, uncovering archival materials at the National Archives and presidential libraries, some of it undoubtedly for the first time, as well as conducting an impressive quantity of personal interviews. The result is one of the most informative recent works in the law and society literature, and comprises the first detailed account of the forces behind the shaping of refugee policy in the United States.

The authors introduce their analysis with a brief profile of the three main protagonists in the struggle to influence refugee policy: "restrictionists," "humanitarians," and political "pragmatists." Loescher and Scanlan's basic argument is that while restrictionists and humanitarians have been periodically successful in affecting policy, their success has been limited and is almost always contingent on their goals being consistent with—or at least not conflicting with—the foreign policy objectives of political pragmatists.

Chapter I treats U.S. refugee policy in the immediate post-World War II period and includes all of the basic ingredients of the authors' argument. It is perhaps the most compelling chapter of the book, in part because this is a story that has remained largely untold. While we are likely to be familiar with the plight of contemporary Latin American refugees and the double standard regulating their classification, the history of the emergence of this political pragmatics during the early stages of the cold war is far less well-known.

Loescher and Scanlan's discussion of this early period underlines the role of anti-Semitism, the limited impact of humanitarian concern, and the origins of U.S. refugee policy as a cold war weapon. The authors begin in 1945 when American Jewish leaders began an intense lobbying campaign to bring attention to the plight of Jews in the displaced persons camps of Europe and to address the possibility of a rescue mission. Partly motivated by humanitarian concern and partly in response to the successful lobbying of these leaders, President Truman opened consular offices near refugee centers in Europe and admitted 39,000 displaced persons from the unused quotas allotted for regular immigrants.

But the response, according to the authors, proved to be “a stop-gap and limited measure” (p. 6). The visas allotted were drawn from the already existing annual quotas and hence placed strict limits on the numbers from each country to be admitted. Furthermore, the program was conceived as part and parcel of regular immigration law and thus excluded those who were sick, destitute, or otherwise “undesirable.” As a result, only approximately 50 to 60 percent of the allotments were actually used.

The limited scope of this humanitarian effort contrasts sharply with subsequent programs, in particular those that were established with foreign policy objectives in mind. As Loescher and Scanlan tell the story of the expansion of refugee admissions,

A politics of belated rescue [of Jewish survivors of the holocaust] . . . was transformed subtly into a politics which, due primarily to the efforts of strong anti-Communists inside and outside the Truman administration, began equating humanity with the political objectives of the West. (pp. 2–3)

The Displaced Persons Act of 1948, as well as its implementation, was representative of this transformation and the use of refugee policy both for abstract ideological ends and for concrete foreign policy goals.

In the first place, this act—the first legislation in the United States to be aimed specifically at refugees—was lobbied for intensively in Congress on the grounds that opening American doors to those who were reluctant to return to Eastern Europe would provide the United States with a symbolic victory in the escalating cold war. Quoting from the House debate, the authors expose the “persistent theme” of this debate, “that we do ourselves and our democracy a great deal of good by show[ing] to all the world that we are in truth champions of freedom and that we shall aid all those who rally to our cause” (quoted on p. 19). Expanding the act in 1949, congressional leaders proclaimed, “It will be an ideological weapon in our ideological war against the forces of darkness, the forces of Communist tyranny” (quoted on p. 24).

The use of refugees as “weapons” in the cold war was not confined to the realm of symbolism. Rather, Loescher and Scanlan document the ways in which refugee policies were shaped over time in order to provide for the “furtherance of the national intelligence mission” (quoted on p. 24). The strategy was apparently initiated in 1949. That year, the act establishing the Central Intelligence Agency provided for 100 visas annually for special entrants who could contribute to the intelligence community; the same year, an amendment to the Displaced Persons Act set aside slots for “outstanding anti-Communist leaders” who might “represent an important element in our foreign policy” (quoted on p. 24).

Though the authors’ primary argument revolves around the subordination of humanitarianism to foreign policy concerns in the

shaping of refugee policy, a number of implications concerning the nature of lawmaking and the state more generally emerge in the process of developing this argument. For example, the central role of contradictions in the policymaking process, although not developed explicitly by the authors, is alluded to. In particular, in this early postwar period, a conflict between abstract ideological concerns and political pragmatism emerged and was played out in the debate over the Internal Security Act of 1950 and, later, the Refugee Relief Act of 1953.

The Internal Security Act, passed in 1950 over President Truman's veto, excluded from the United States all "subversives," focusing specifically on anyone who had ever been a member of the Communist Party. The president's veto message highlighted the problems with this approach, emphasizing that this exclusion on ideological grounds contradicted concrete foreign policy concerns. The authors quote the president's message to Congress:

It must be obvious to anyone that it is in our national interest to persuade people to renounce Communism, and to encourage their defection from Communist forces. Many of these people are extremely valuable to our intelligence operations. Yet under this bill the government would lose the limited authority it now has to offer asylum in our country as the great incentive to such defection. (quoted on p. 25)

As Truman had predicted, in the months following passage of this law, refugee admissions from Communist countries were virtually brought to a standstill.

In response to this contradiction between ideological and foreign policy concerns, six months after the passage of the Internal Security Act, it was amended to allow the admission of "involuntary" members of the Communist Party. In 1952, under pressure from the State Department, the CIA, certain voluntary associations, and the press (which the authors argue was permeated by intelligence community interests), Congress made even voluntary and previously active members of the Communist Party eligible for admission. This resolution to the conflict made it possible once again to use certain highly placed refugees as professional defectors, that is, to recruit them through "selective inducement" and to use them for information-gathering activities. It also of course paved the way for the continued use of Eastern European refugees as de facto propagandists. As the U.S. ambassador to Czechoslovakia pointed out in 1951 when arguing for a liberalization of the Internal Security Act, "Nothing contributes more substantially to Western and U.S. objectives than successful escapes, particularly spectacular ones like Freedom Train" (quoted on p. 37).

The authors' implicit argument here is that cold war anti-Communism generated a contradiction. On one hand, it enhanced restrictionism with regard to anyone who might conceivably bear

the vestiges of sympathy for Communism; on the other hand, the political pragmatics of the cold war made “escapes” from the Soviet orbit extremely useful, both ideologically and practically. The resolution of this conflict ultimately subordinated the purely ideological to the pragmatic, a pattern that, according to the authors, has characterized much of U.S. refugee policy ever since.

A second theme that repeatedly surfaces but remains largely undeveloped has to do with the importance of executive and administrative discretion, and the related issues of formal versus de facto law. Executive discretion in refugee policymaking is most evident in the extensive use of “parole.” Loescher and Scanlan describe in detail the first en masse use of parole when, in 1956, President Eisenhower unilaterally “paroled” 32,000 Hungarians into the United States. They argue that in so doing he “stretch[ed] American immigration law almost beyond recognition” (p. 50). Admitting thousands of aliens who were neither eligible under the prevailing quotas nor the targets of emergency legislation of any kind, the president bypassed Congress by capitalizing on a “small loophole” (p. 50) in immigration law. Referring to an obscure provision in the law which permitted the attorney general to “parole” aliens into the United States temporarily (and which had apparently been intended for individuals experiencing medical or other emergencies), President Eisenhower definitively altered U.S. refugee policy. In 1960 administrative discretion was added to executive privilege as a pivotal ingredient in the shaping of de facto policy. As hundreds of thousands of Cubans arrived in the United States illegally or overstayed their visas, the Immigration and Naturalization Service granted them “extended voluntary departure”—a classification that, together with parole, has effectively removed refugee policymaking from the legislative branch.

The authors make three main points regarding such discretion. First, executive and administrative discretion has served to maximize the political use of refugees. Historically, while Congress has been more likely to be restrictionist or swayed by humanitarian concerns, the executive branch (in particular the State Department, the CIA, and the president) has been the primary source of political pragmatism. Furthermore, the authors argue that for more than twenty years, the “pattern” of refugee policymaking has been that “most decisions to admit refugees were initiated in the Department of State to meet specific foreign policy concerns approved by the President and then were submitted to key Congressional leaders for rubber-stamp approval” (p. 68). The consequence of this discretionary chain of command has been to enhance the influence of political pragmatists.

Second, Loescher and Scanlan point out that this transformation of refugee policymaking into an “executive-dominated” (p. 50) process, violates the traditional division of labor on immigration and refugee matters. Since 1875 when Congress passed the first

federal immigration law, “it had been universally understood that Congress—and not the President—possessed the constitutional authority to set conditions for entry” (p. 56).

Finally, the authors argue that in spite of the clear usurpation of their “constitutional authority” and despite periodic congressional resistance in specific cases, the virtually unlimited use of executive discretion could not have lasted for so long without the implicit consent of Congress. The motives for such a delegation of authority remain unclear here. Loescher and Scanlan imply that in large part Congress did not object because they generally agreed with executive decisions. Specifically, “Presidential initiatives to afford special immigration opportunities to the victims of Communist regimes remained ideologically appealing” (p. 69). This explanation is somewhat unconvincing, particularly in light of Congress’s later (unsuccessful) attempts to reassert its authority in this area. It may be that there were more fundamental, structurally driven reasons for congressional impotence, a possibility which the authors never address and a subject to which we will return later.

When *Calculated Kindness* turns to an examination of more recent refugee flows, the argument becomes more complex. For one thing, the authors argue that while the double standard has largely been retained (vividly portrayed here in the discussion of the differential treatment accorded Cubans and Haitians in the 1970s), restrictionist concerns have made it more difficult even for those from some Communist-block countries to receive the classification of “refugee.” Furthermore, the authors contend that refugee policy is no longer simply an “artifact of the cold war” but occasionally displays “broader humanitarian roots” (p. 69). They point out, for example, that U.S. refugee policies vis-à-vis the Indochinese in the 1970s were not based solely on political calculation but were the product of intensive lobbying by highly placed individuals who had been in Vietnam and had developed emotional attachments as well as a sense of guilt.

Adding to the complexity of the contemporary period, beginning in the mid-1960s, tensions between the legislative and executive branches became more apparent. Indicative of these tensions, the two main immigration laws of this period—the Immigration and Nationality Act of 1965 and the Refugee Act of 1980—included attempts to recoup congressional authority in refugee matters. The 1965 law pursued two strategies in this regard. First, it tried (unsuccessfully) to bring refugee policy into the purview of regular immigration law, by including in the new preference system, a “seventh preference” reserved specifically for refugees. In addition, while the statute did not explicitly *prohibit* the use of parole, House and Senate reports attempted to put limits on its use by stating that:

it is the express intent of the [Judiciary] Committee that the parole provisions of the Immigration and Nationality Act [of 1952] . . . be administered in accordance with the original intention of the drafters of that legislation. The parole provisions were designed to authorize the Attorney General to act only in emergency, individual, and isolated situations . . . and not for the immigration of classes or groups outside the limit of the law. (quoted on pp. 73–74)

By the late 1970s, when the influx of Indochinese refugees and Soviet Jews had reached unprecedented proportions, the failures of the 1965 strategy had become all too apparent. Recognizing that the unlimited use of parole and a continued ad hoc approach to refugees was untenable in the long run, the Carter administration initiated and supported new congressional legislation. In restricting parole and providing for a greater congressional role in setting limits, the Refugee Act of 1980 represented an effort to routinize and regulate refugee admissions. (It was, furthermore, ostensibly Congress's intent to eliminate the ideological and geographical biases of the seventh preference and replace it with the United Nations' definition of "refugee.") Yet, as the authors show, "the effects . . . have been more cosmetic than real" (p. 215). Not only has the double standard been retained in practice, but the use of parole (immediately evident in the 1980 admission of hundreds of thousands of "Cuban-Haitian entrants") has gone uninterrupted. The authors conclude that the major consequence of this latest attempt by Congress to reclaim refugee policymaking authority has been that it has "engendered a widespread belief . . . that Congress lacked effective means of regulating administrative discretion" (p. 187).

The 1980s have witnessed increasing intragovernmental conflicts, specifically between the political pragmatics of the State Department and the greater restrictionism of the INS and Congress. Once again, the authors argue, political pragmatism has generally won out: "The intensification of the cold war during the Reagan years has . . . had the familiar effect of uniting strident anti-Communists and the private voluntary agencies in the common cause of preserving substantial (but, of course, ideologically selective) refugee admissions," and this despite "the increasingly restrictionist sentiment in Congress" (p. 207).

Calculated Kindness is unusual in the contemporary immigration law literature in that it is not policy oriented. Unlike the other books reviewed here, its concern is with exposing the causal bases for U.S. policies rather than with evaluating them or prescribing reforms. In this respect, it has perhaps the most immediate potential for contributing to theoretical debates within the area of law and society. Yet the work remains curiously descriptive. Meticulously documenting the immediate causes of specific refugee policies over time, the authors avoid drawing any conclusions

from, or offering explanations for, the empirical patterns that so clearly emerge.

Some of these patterns and the questions that they raise echo those implicit in Hull's work. For example, the tensions between the ideological and the pragmatic goals of immigration policymaking (and the dominance of the pragmatic) to which Hull refers reverberate here. Loescher and Scanlan recognize ideology as a not insignificant factor in refugee policymaking (for example, when it takes the form of anti-Communism), and in this they have made an important contribution to a literature that has tended to over-emphasize the economic and to discount or overlook "superstructural" elements.¹ At the same time, however, it is clear from their analysis that, in a contest between the ideological and the pragmatic (as, for example, when the cold war ideologues behind the Internal Security Act of 1950 clashed with intelligence community pragmatists), it is the latter which dominates.

A second theme that permeates both Hull's and Loescher and Scanlan's works has to do with the gap between the law in the books and the law in action (paralleled by the discrepancy between the rhetoric and the reality of immigration and refugee policy). What is clear in both of these analyses is that the executive branch exercises wide discretion in the shaping of actual—as distinct from formal—policy, and that this delegation of authority is at least implicitly sanctioned by both Congress and the courts. Furthermore, this division of labor, along with the gap between formal and de facto policy that it generates, has had the consequence of reinforcing the primacy of pragmatics.

Like both Briggs's and Hull's works, *Calculated Kindness* provides no theoretical tools with which to make sense of these patterns, or even to order the complex networks of cause and effect that the authors uncover. Occasionally, Loescher and Scanlan seem to espouse a pluralist model of refugee policymaking, as for example when they attribute the U.S. acceptance of hundreds of thousands of Indochinese refugees to the combined efforts of well-organized citizen groups and a few powerful, sympathetic, and guilt-ridden men within the State Department. At other times, they appear to reject outright the pluralist tradition, stressing for

¹ Although referring to the literature addressing the motives of immigrants themselves rather than policymakers, Bach and Schraml (1982: 327) warn of the dangers of such analytical exclusivity:

We need to reconsider the rigidly economic content of our categories. . . . The volume and diversity of global migration . . . has been expanding rapidly as the result of large-scale refugee movements. Our current versions of the "political" economy of migration have essentially abdicated any analytical responsibility for these massive population shifts.

One consequence of focusing on *refugee* policy, as Loescher and Scanlan do, may be that it forces us to reconsider the economic orientation of much of the immigration literature, opening up the analysis to ideological and political inputs.

example that the success of both “humanitarians” and “restrictionists”—irrespective of their numbers, organization, or resources—is dependent upon the congruence of their interests with those of political pragmatists.

In the end, the contribution of these works is twofold. First, they make a substantial empirical contribution, despite the significant methodological hurdles to doing research in this field. The secrecy of the INS has been well documented in “The Secret Law of the Immigration and Naturalization Service” (*Iowa Law Review*, 1970). Compounding the data-collection difficulties that result from this secrecy is the inadequacy of much of the official data relating to immigration (see, for example, *Whom Have We Welcomed?* by Tomasi and Keely, 1975, and *Immigration Statistics: A Story of Neglect*, edited by Levine *et al.*, 1985). Finally, the policymaking processes that these authors set out to document are frequently the product of informal interactions and negotiations that typically leave no paper trail, and hence require innovative and aggressive information-gathering techniques for which there are few methodological formulas. In spite of these barriers, the authors have succeeded in compiling a rich empirical base for future, more theoretically driven, studies.

Furthermore, the data uncovered by these studies raise a series of important theoretical questions that might guide future work. First, what is the relationship, to which Briggs addresses himself, between economic interests and immigration policymaking? Aside from the empirical question of whether this relationship has changed over time as Briggs argues it has, what are the implications of any such relationship—and historically specific changes in it—for an understanding of the connections between the economic and the political, the state and civil society? Second, if the wide gap between the law in the books and the law in action is virtually a fixture in this area of policymaking, upon what institutional or structural bases is it predicated? Related to this, why and how do differing institutions within the state successfully claim the power to shape *de facto* law? For example, it is apparent from Hull’s work that the Immigration and Naturalization Service exercises wide discretion to affect immigration policy as it relates to illegal aliens, foreign workers, and green-card holders. Yet, as Loescher and Scanlan demonstrate, this agency is clearly a minor actor, and its voice is often overridden in the shaping of refugee policy. Fourth, to the extent that differing institutions within the state conflict over specific policy issues, what factors shape their respective positions? Equally important, what explains the patterns of dominance among these institutions?

The studies reviewed here clearly raise more theoretical questions than they answer. Yet, their contribution resides precisely in the nature of the questions they trigger. A brief overview of past theoretical work in the area of immigration policy will serve both

to highlight the importance of the issues raised here and to provide at least a starting point from which to approach them in future work.

III. IMMIGRATION, THE ECONOMY, AND THEORIES OF THE STATE

While the bulk of the immigration law literature is policy oriented and atheoretical, a few theorists have focused on the function of immigration in capitalist economies and the role of the capitalist state in producing and shaping the immigrant flow. Portes (1977), Bach (1978), Sassen-Koob (1981), and Castles (1985), for example, have argued that immigration from peripheral countries to core countries maintains and enhances rates of profit by increasing capital's flexibility and labor's vulnerability. *Illegal* immigrant workers—stripped of all political rights and saddled with a criminal status—represent a particularly vulnerable and hence profitable source of labor. As Portes puts it,

The more immigrants acquire a legitimate foothold in the host society, the less advantageous their presence is and the more they come to resemble the native proletariat. Conversely, the more they can be kept at the political fringes of the society, the more useful they are in fulfilling significant functions for the economy. (1977: 34)

These theorists argue that the state in capitalist society plays an active role in reproducing the immigrant labor supply to suit the specific needs of capital. Not only have state policies provided for a plentiful supply of legal immigrant workers (as in the case of the *braceros* in the United States and guest workers in Western Europe), but they have ensured a steady stream of illegal workers as well. According to Sassen-Koob (181: 70), the very existence of nation-states and border enforcement, at the root of "illegal" migration, "facilitates the extraction of surplus labor by assigning criminal status to a segment of the working class—the illegal immigrants." Similarly, Bach (1978: 537) states, "The (American) state ensures submissiveness by dealing with undocumented immigrants as criminals."

Once national boundaries and laws regulating the flow of legal migration have established the context for the illegal flow, the enforcement arm of the state is critical. According to Sassen-Koob (1981), it is in border enforcement that the contradictory role of the state is most apparent. For it is in the threat of enforcement that illegal migrants are rendered vulnerable, and at the same time domestic labor is presumed to be protected. Yet strict enforcement, of course, would restrict the very phenomenon—illegal migration—which is so beneficial. For this reason, "selective enforcement" is a critical ingredient of state policy and represents the embodiment of the contradiction. As Sassen-Koob (1981: 70)

puts it, “*Selective* enforcement of policies can circumvent general border policies and protect the interests of capital sectors relying on immigrant labor.”

According to these theorists, a high degree of administrative discretion is required both to increase immigrant labor’s vulnerability and to enhance the flexibility of the state’s options. Castles, for example, argues that the administrative discretion built into guest worker programs in Germany in the late 1950s was designed to maximize state control over the migrants and to minimize time lags in responding to economic change. The vagueness of the statutes “gave the authorities great latitude in granting or refusing residence permits, and kept migrant workers in a state of dependency and insecurity” (1985: 522).

Bach points out that in the United States, the exercise of administrative discretion often has the consequence that “the duly enacted laws of the nation are openly violated not only by the immigrants but by the administrators of the law.” He contends that the resulting “repressive relationship (of the American state) to the Mexican immigration” (1978: 537) operates to maximize the migrants’ “political weakness” and hence their profitability to capital.

The role of contradictions is prominent in this literature. According to Bach, there is

an irreconcilable contradiction which defines the limits of state policies toward labor and, thus, immigration. On the one hand . . . the state . . . acts in ways to promote accumulation for the capitalist class as a whole. On the other hand, the imposition of a political force upon the relations of the world economy subjects the structure of economic relations to political struggles and, thus, to potential impediments to accumulation. The state must respond to these political struggles to maintain the legitimacy of its claim to universal political representation. . . . (Bach, 1978: 543–44)

He goes on to say that the state’s response to this contradiction is to attempt to “stabilize labor conditions” through alternating “repression” and “amelioration.”

Bustamante recasts this contradiction between the economic and the political by focusing on the ideological component of the political process. He argues that historically U.S. immigration policies have been the product of “contradictions between the objective dimension of economic relations and the subjective dimension of political relations” (1983: 330). Specifically, because “the state plays a critical role in the control over the survival of the system as a whole” (*ibid.*), it must reconcile the economic reality of the need for immigrant labor with the political reality of restrictionist ideology. It is in this way that Bustamante explains the apparently self-contradictory immigration reform proposals put forward in

the early 1980s (and ultimately passed in the form of the Immigration Reform and Control Act of 1986). These proposals simultaneously purport to “seal the border” with employer sanctions and stepped-up border enforcement, and to open the border through liberal foreign worker programs. As Bustamante explains it, employer sanctions (which, he argues, will be an ineffective deterrent) is the state’s response to restrictionist ideology, while the admission of hundreds of thousands of temporary guest workers represents a concession to economic reality.

Drawing from structural theorists of the state (particularly Offe, 1974, and Poulantzas, 1975), these immigration theorists generally agree that the role of the state in producing and shaping immigration under advanced capitalism is predicated on a structural relationship between the state and capital.² As Portes (1977: 33, 34) puts it, U.S. immigration policies that have historically benefited capital are not the consequence of a “political stranglehold exercised by a particular group” (for example, employers of immigrant labor), but are determined instead by “the latent structure of economic relationships and related political concerns.” My own work on immigration lawmaking suggests that

the objective relation between capitalism and the state is based on the fact that the capitalist state’s function is, and must be, that of actively perpetuating the political economy, so that ultimately the state’s interests and the long-term interests of capital are similar. (Calavita, 1984: 12)

These works, and the structural tradition of which they are a part, provide critical insights into the nature of the structural parameters within which immigration policy debates take place in capitalist societies. Often, however, they commit the teleological fallacy of deducing purpose or cause directly from outcome. Related to this, the “state” itself is sometimes reified, rendered monolithic, and even takes on human qualities as the prime actor in analyses that are curiously lacking in deliberate human action. These issues are undoubtedly intertwined. Probably because the structural level of analysis discourages examination of the activities of the individual political actors who actually fashion and implement law, the precise causal links between structures and outcomes are left vague. The implication is often that law follows directly from the needs of structure. Conversely, the advantageous consequences of certain legal outcomes—or their “functions”—are implicitly assigned causal status. Furthermore, in part because concrete human actors are missing from these analyses, the “state”

² See Cashmore’s excellent analysis of Canadian immigration law for an exception to this structural approach. Making an essentially instrumentalist argument, Cashmore claims that “those groups controlling Canada’s economic resources also determine the content and form of immigration law” (1978: 427).

itself—decked in human attributes—performs the role of protagonist.

Bach and Schraml have cautioned us against the structural determinism permeating much of the “historical-structural” view of migration. They argue that “the historical-structural literature now suffers from excessive repetitions of the functions of labor migration in the development of world capitalism. . . . In a sense, we have developed good political economy but insufficient migration theory” (1982: 324). Focusing on theories of the causes of immigration, rather than immigration *law per se*, Bach and Schraml warn that

our portrayal of migrants as social actors has not progressed far beyond the “iron filings” of push-pull theories (borrowing from Abu-Lughod’s [1975: 201] metaphor). No longer metal pieces, migrants are now treated more like empty grocery carts, wheeled back and forth between origin and destination under the heavy intentions of world capital. (1982: 324)

Clearly, we need to bring human actors back into our analyses. Bach and Schraml (1982: 324) rightly urge us, in our explanations of migration, “to uncover the actual mechanisms through which people move geographically.” Similarly, in our studies of immigration and refugee policymaking, we need to examine the precise processes by which concrete political actors, individually and as participants in the institutions of the state, shape and interpret policy, and in so doing provide the link between structure and outcome.

IV. BRIDGING THE GAP BETWEEN THEORY AND DATA: AN AGENDA FOR FUTURE WORK

The descriptive studies with which this essay began tend to confirm a number of points made in the theoretical literature. Together, they underscore the importance of many of the economic, ideological, and political variables to which the theoretical literature points. They highlight historically specific contradictions among these factors and substantiate the dominance of economic and political pragmatism over ideology and rhetoric in the resolution of these contradictions. Finally, the strong and recurring patterns which they expose suggest that there are underlying structural or institutional forces at work which set the parameters of the policy debate and influence its outcome.

At the same time, this empirical work draws attention to the limitations of our theories and provides potential avenues for escape from the current impasse. First, these studies leave little doubt as to the inadequacies of theories that render the state a monolithic actor. As Loescher and Scanlan—and to a lesser extent Hull—demonstrate empirically, the various institutions of the state do not always act in a cohesive fashion, nor do they inevitably

share the same interests. To the contrary, Loescher and Scanlan depict the conflicts within and between the state's institutions as among the most significant ingredients in the refugee policymaking process. If our structural theories of the state and immigration are to advance, it behooves us not to ignore such empirical data (rationalizing, for example, that it is irrelevant to "macro-level" analyses). Rather, we need to ponder seriously the ways in which these data can contribute to less simplistic conceptualizations of the state and the policymaking process.

One possibility is that at specific historical junctures and on given issues, the state itself is fragmented, and the precise way in which it is fragmented is indicative of the nature of the contradiction that permeates the issue. In such a case, the various institutions of the state—in their respective positions on the issue at hand—may represent the embodiment of the conflicting sides of an underlying contradiction. A dialectical analysis of the data that Loescher and Scanlan present might suggest, for example, that a contradiction has existed historically (not unlike the one that Bustamante finds in immigration policymaking) between restrictionist ideology, on one hand, and the political and foreign policy realities that necessitate extensive refugee admissions, on the other. Splits and disagreements within the state apparatus then—predictable and patterned as they have been, according to Loescher and Scanlan's data—represent the concrete and visible embodiment of this contradiction, which ultimately is played out in terms of conflicts among the state's actors. (Such an interpretation might also give us a handle with which to approach the pattern of State Department dominance that Loescher and Scanlan leave unexplained.)

Second, Hull's and Loescher and Scanlan's works both underline the importance of purely political—as distinct from economic—considerations in the shaping of policies directed at immigrants, and in so doing should caution us against the excesses of economism. Indeed, political pragmatism is an ongoing theme throughout both of these works, their data suggesting that it is often responsible for the recurring discrepancies between the law in the books and the law in action. Furthermore, these works indicate that ideological factors, while usually taking second place to political pragmatism in the formulation of *de facto* policy, can on occasion exert their own independent influence, as in the case of the role of anti-Communism during cold war refugee policymaking.

At the most general level, the contribution of these empirical studies may be that they will force us in future work to take seriously the complexity of the policymaking process—a complexity that is all too apparent from the richness of the empirical data provided here. If it is a truism that empirical data provide a litmus test for our theories, it is also the case that it is only through the confrontation of anomalous data, and their incorporation into our

analyses, that the explanatory value of our theories can be advanced.

I am aware of the potential difficulties of integrating the kind of empirical data provided in these works with the more macro-level structural analyses of immigration lawmaking referred to previously. However, if we are to avoid structural determinism and the reification of the state as the only deliberate actor in our analyses, it will be necessary to bring *people* back in. This approach will involve more than a simple adding on of disparate levels of analysis. Ideally, macro- and micro-level variables will not be treated as entirely distinct categories. Rather, we must investigate the ways macro-structural pressures are reproduced at the micro level, penetrating and shaping the decisions of the political actors who ultimately formulate, interpret, and implement immigration policies.

V. CONCLUSION

Ernest Cashmore, in his historical analysis of Canadian immigration laws, summarizes the goals of our collective enterprise. "It seems," he says simply and to the point, "that a mature sociology of law might plausibly turn its attention to specific case studies, in an effort to provide the kind of evidence [that] may point to some model(s) having more explanatory power than others" (1978: 410).

The area of immigration lawmaking holds out a great deal of potential for students of law and society who take Cashmore's challenge seriously. Large-scale immigration (such as that which has characterized the United States experience) has direct implications for the economy, foreign relations, and the labor movement, as well as such superstructural elements as cultural reproduction and state legitimation. As a result, the examination of the production and reproduction of the immigrant flow has the potential to clarify some of the most significant relationships and forces within and between the state and civil society. The books reviewed here not only provide an extensive empirical base upon which this endeavor can build, but they may also act as a catalyst for the reformulation and embellishment of our theories in this area.

KITTY CALAVITA is Assistant Professor in the Program in Social Ecology at the University of California, Irvine. Her publications include *U.S. Immigration Law and the Control of Labor, 1820-1924* (London: Academic Press, 1984). She currently has a National Science Foundation grant to do a study of policymaking in the Immigration and Naturalization Service.

REFERENCES

- ABU-LUGHOD, Janet (1975) "Comments: The End of the Age of Innocence," in B. DuToit and H. Safa (eds.), *Migration and Urbanization*. The Hague: Mouton.
- BACH, Robert L. (1978) "Mexican Immigration and the American State," 12 *International Migration Review* 536.
- BACH, Robert L., and Lisa A. SCHRAML (1982) "Migration, Crisis and Theoretical Conflict," 16 *International Migration Review* 320.
- BRIGGS, Vernon M., Jr. (1984) *Immigration Policy and the American Labor Force*. Baltimore: Johns Hopkins University Press.
- BUSTAMANTE, Jorge A. (1983) "The Mexicans Are Coming: From Ideology to Labor Relations," 17 *International Migration Review* 323.
- CALAVITA, Kitty (1984) *U.S. Immigration Law and the Control of Labor, 1820-1924*. London: Academic Press.
- CASHMORE, Ernest (1978) "The Social Organization of Canadian Immigration Law," 3 *Canadian Journal of Sociology* 409.
- CASTLES, Stephen (1985) "The Guests Who Stayed—The Debate on 'Foreigners Policy' in the German Federal Republic," 19 *International Migration Review* 517.
- HULL, Elizabeth (1985) *Without Justice for All: The Constitutional Rights of Aliens*. Westport, CT: Greenwood Press.
- IOWA LAW REVIEW (1970) "Note: The Secret Law of the Immigration and Naturalization Service," 56 *Iowa Law Review* 140.
- LEVINE, Daniel B., Kenneth HILL, and Robert WARREN (eds.) (1985) *Immigration Statistics: A Story of Neglect*. Washington, DC: National Academy Press.
- LOESCHER, Gil, and John A. SCANLAN (1986) *Calculated Kindness: Refugees and America's Half-Open Door*. New York: Free Press.
- NORTH, David S., and Marion F. HOUSTOUN (1976) *The Characteristics and Role of Illegal Aliens in the U.S. Labor Market: An Exploratory Study*. Washington, DC: Linton and Company.
- OFFE, Claus (1974) "Structural Problems of the Capitalist State," in Klaus von Beyme (ed.), *German Political Studies*. Beverly Hills, CA: Sage Publications.
- PORTES, Alejandro (1978) "Toward a Structural Analysis of Illegal (Undocumented) Immigration," 12 *International Migration Review* 469.
- (1977) "Labor Functions of Illegal Aliens," 14 *Society* 31 (September/October).
- POULANTZAS, Nicos (1975) *Classes in Contemporary Capitalism*. London: New Left Books.
- SASSEN-KOOB, Saskia (1981) "Towards a Conceptualization of Immigrant Labor," 29 *Social Problems* 65.
- TOMASI, S. M., and Charles B. KEELY (1975) *Whom Have We Welcomed? The Adequacy and Quality of United States Immigration Data for Policy Analysis and Evaluation*. New York: Center for Migration Studies.
- VAN ARSDOL, Maurice, Joan W. MOORE, David M. HEER, and Susan PAULVIR HAYNIE (1979) "Non-Apprehended and Apprehended Undocumented Residents in the Los Angeles Labor Market: An Exploratory Study." A Report Prepared for the Employment and Training Administration, U.S. Department of Labor. Los Angeles: Population Research Laboratory, University of Southern California.