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On the immigration disaster

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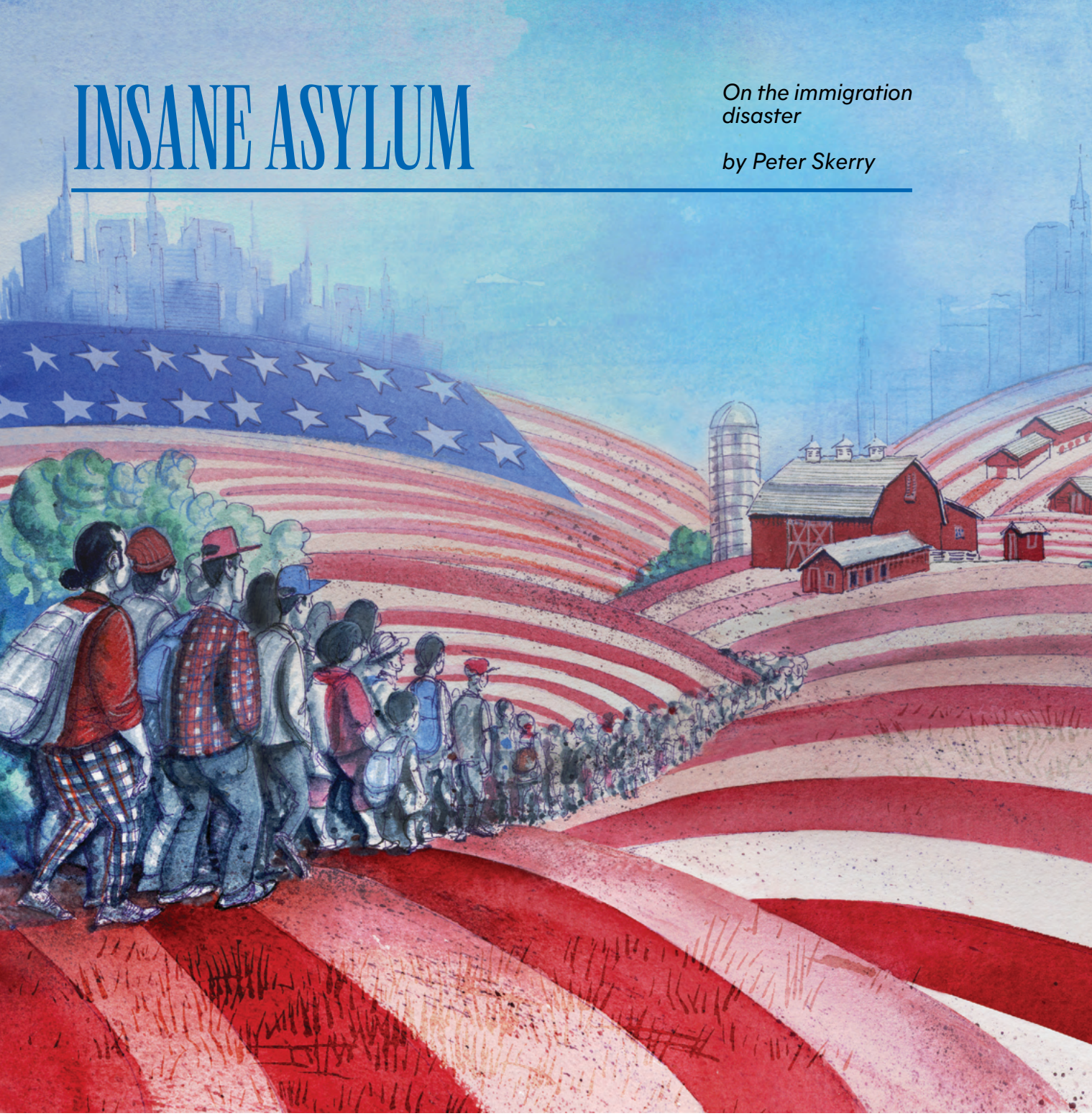
On the immigration disaster

by Peter Skerry



The ongoing crisis at the U.S.–Mexican border has one distinct virtue. It presents Americans with the opportunity to clarify various misconceptions about what is not merely the largest wave of migrants in our history, but also the most disorderly and disruptive. These misconceptions have distorted our rightful understanding of ourselves as the world's preeminent nation of immigrants. And after more than five decades of evasion and outright policy failures, immigration is now at the core of the profound disaffection so many Americans express toward our elites and mainstream institutions. It therefore behooves us to stop and scrutinize the ill-founded assumptions on which various positions and policies—whether "pro-" or "anti-immigration"—have become not just based but entrenched.

But a funny thing happened on the way to this crisis. The size, relative suddenness, and sustained nature of the mass of humanity arriving at our southern border has rendered dramatically less salient what had long been the dominant frame of the ongoing national debate: the line between legal and illegal immigration. Our decades-long

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national preoccupation with illegal immigration has—at least for now—been eclipsed by the more pressing concern, among elected officials and citizens alike, of addressing the chaos not only along our southern border but also in our major metropolitan areas. Legality has been superseded by reality.

At least since 1994, when the thunderbolt of California's Proposition 187 prohibited the provision of most public services to the undocumented (before being gutted by the federal courts), the national debate over immigration had been fixated on the presumptively bright line between legal and illegal immigration. Yet that line had always been rather blurred, and in recent months it has become almost invisible. Under the Biden administration's disastrous policies, jurisdictions—not just along the border but across the nation—have been overwhelmed with unprecedented numbers of migrants in need of basic services and support. State and local officials struggle to provide food, shelter, and medical care to hundreds of thousands of people, not to mention schooling for the tens of thousands of children accompanying them, all with minimal help from the federal government. We have as a nation come to focus not so much on the legal status of this crush of humanity as on the fiscal, logistical, social, and ethical challenges it poses.

Texas governor Greg Abbott is undoubtedly the most visible and energetic elected Republican official responding to this crisis. Yet even as he asserts his state's right to police its border with Mexico, he proudly claims credit for transporting more than 105,000 recently arrived migrants out of his state to destinations such as Los Angeles, Denver, Philadelphia, Chicago, Washington, and New York. However slick or mean-spirited, such efforts are merely facilitating what would eventually happen anyway—albeit in a presumably more deliberate, orderly, or benevolent manner. After all, there are always a few migrants who arrive at the border prepared to pay for their own transportation to the interior. And many more have relatives in the United States who are prepared to pay their way. Needs for travel assistance have been greatest for those from countries such as Venezuela that lack a history of migration to the United States; such individuals have many fewer established ties to relatives and communal institutions capable of aiding them. Yet even they receive travel and other assistance from religious and charitable organizations, typically established and maintained by other, earlier-arriving groups.

Commenting on developments in Texas, Muzaffar Chishti and Julia Gelatt of the Migration Policy Institute, hardly a restrictionist outfit, conclude that, "from the perspective of overwhelmed border city officials and organizations, the [state-funded] buses provide a useful resource, even if the underlying politics might be at odds." These analysts go on to point out that Republican officials are not unique in this respect: "Border cities have strained to manage the increased arrivals, and the dynamic transcends clear political lines. El Paso, led by a Democratic mayor, began quietly chartering its own buses to New York City in August [2022], and later to Chicago, in response to overcrowded shelters and the arrival of large numbers of migrants without networks in the United States."

Yet aside from the suddenness and scale of today's influx, these are the same challenges that communities across America have long been grappling with—irrespective of the legal status of the migrants. The burdens imposed on our communities and institutions by waves of poorly educated, non-English-speaking migrants have never been easily or fairly accounted for simply by their legal standing.

At the same time, recurrent episodes such as the recent arrest on drug and gun charges of eight Venezuelan migrants squatting in a house in the Bronx are stark reminders that the pervasive association of illegal immigrants with crime is not entirely unfounded. Yet neither is it typically or precisely accurate. As I will elaborate below, undocumented status is not necessarily a crime. Moreover, crime rates among immigrants—undocumented as well as documented—are consistently reported to be lower than among nonimmigrants. Such findings have long been ▶

routinely cited by advocates, allies, and the many sympathizers of immigrants to summarily dismiss legitimate concerns about the social strains and disorder resulting from these historic demographic changes. These of course do not typically rise to the level of "crimes." Yet because this has become *the* dominant frame through which such developments get interpreted and debated, the persistent and legitimate concerns of many Americans about the noncriminal but *not* inconsequential impacts of mass migration are seldom adequately acknowledged or examined. Or are simply dismissed as irrational or racist.

In a related vein, Alan Bersin, U.S. attorney for the Southern District of California under President Clinton as well as "border czar" and then commissioner of U.S. Customs and Border Protection under President Obama, reminds us that the increased effectiveness of our border-control measures over the past few decades has resulted in at least a sixfold increase in the price charged by smugglers. Migrant-smuggling has been transformed from the "lone coyote" or "mom-and-pop" operations of the 1990s into "international smuggling networks that have become exceedingly well funded, organized, trained, and equipped." Bersin concludes that migrant-smuggling now represents a "national security threat" that requires "executive action," designating it "a tier one priority for intelligence collection, investigation, prosecution, and disruption." Such highly informed insights not only undermine simplistic notions that undocumented migration is to be understood as a victimless crime but also lend considerable credence to the instinctive, though often poorly articulated, concerns about illegal immigration that so many Americans have been expressing.

The Center for Immigration Studies estimates that as of February 2024 there were 14 million illegal immigrants in the United States, 4 million more than in January 2021 when President Biden took office. Many of these have arrived the old-fashioned way—surreptitiously. And depending on the specific circumstances, such "entry without inspection" might be a felony. But it is more typically treated as a misdemeanor, certainly on the first attempt. Subsequent attempts might result in more-serious charges. Yet, historically, individuals entering without inspection have seldom faced prosecution. They have simply been returned to their country of origin, which disposition has been facilitated—at least until recently—by the fact that in most cases that country has been Mexico.

Nevertheless, "unlawful presence" in the United States is *not* a criminal violation subject to punishment or imprisonment. Such aliens are typically subject only to removal (deportation), an administrative proceeding, not a criminal one. As libertarian lawyer Ilya Shapiro has noted, "Not everything that's illegal—meaning against the law or violating the law—is a crime." Yet once formally removed from this country, aliens who return without permission *are* subject to criminal prosecution and imprisonment.

Then there are the millions of immigrants residing here illegally who originally arrived with proper documentation—perhaps as tourists, students, or temporary workers—and then overstayed their visas. Some of these may have subsequently become eligible for permanent legal residency—for example, because their employer was able to sponsor them or perhaps because they married a citizen—but then found themselves in legal limbo because of bureaucratic delays or bungling.

Finally, in recent years the most dramatically expanding and problematic cohort has been migrants who present themselves to authorities and request asylum. Hundreds of thousands have now been accorded provisional legal status and are awaiting final disposition of their claims to admission. Many, indeed most, will eventually either be denied asylum or simply fail to appear at their formal hearings, which are routinely scheduled years in advance. In either case, it is reasonable to assume that these individuals will continue to reside here, either illegally or perhaps with some form of provisional relief such as a grant of temporary protected status (TPS). This was crafted by Congress in 1990 to afford safe haven to foreign nationals from specifically designated countries who were already residing here and would face dangerous conditions upon their return home. In some situations, TPS has been granted and then extended for more than 20 years. But in most cases, it has eventually been terminated, though its beneficiaries have routinely continued to reside here illegally.

Such contingent, often contradictory responses to illegal immigration have a long history. Consider, for example, the once common process of legalizing agricultural workers who entered the U.S. illegally. Dubbed "drying out wetbacks," this practice has long since been abandoned, and the very terminology deemed unacceptable, even racist. Yet in the years immediately after World War II, immigration officials were caught between the demands of Mexican authorities concerned to legalize those among their nationals working illegally in U.S. agriculture, and American farmers concerned to hold on to those same Mexican workers and thereby avoid the costs associated with hiring legally recruited Mexican guest workers, or *braceros*. The tortuous remedy devised by the Immigration and Naturalization Service (INS) was described critically in 1951 in the *Report of the President's Commission on Migratory Labor*:

> In this improvisation, the Immigration and Naturalization Service would be allowed to "deport" the wetback by having him brought to the border at which point the wetback would be given an identification slip. Momentarily, he would step across the boundary line. Having thus been subjected to the magic of token deportation, the illegal alien was now merely alien and was eligible to step back across the boundary to be legally contracted.

It is worth pointing out that a few years after this practice was implemented, the Eisenhower administration seemingly reversed course with an aggressive deportation effort dubbed "Operation Wetback." By the time that program ended in 1955, under the direction of INS commissioner and retired U.S. Army general Joseph Swing, approximately 1 million presumptively illegal migrant farmworkers had been deported to Mexico.

In the heat and passions increasingly aroused by mass migration, we all need to be mindful that the lines we are seeking to reexamine, redefine, and reinforce are never going to be as bright as we might wish.

From the same post-war period, another example of the tortuous, often blurred line between illegal and legal immigrants was the so-called Texas Proviso, a now forgotten provision of the Immigration and Nationality Act of 1952, also known as the McCarran-Walter Act. Loudly denounced for its maintenance of restrictive national-origins quotas as well as its authorization of the exclusion or deportation of communists and other subversives, the act made it a misdemeanor for aliens to enter without inspection or to overstay nonimmigrant visas. It also prohibited the transporting or harboring of illegal aliens.

Yet in response to influential agricultural interests, represented on the critically situated Judiciary Committee by plantation-owner Senator James Eastland of Mississippi, McCarran-Walter engaged in some sleight of hand. Specifically, it deemed the "harboring" of illegal aliens a felony punishable by a $2,000 fine and a prison term of five years. Yet the Texas Proviso stipulated that neither employing nor providing transportation or room and board to workers who happened to be illegal aliens constituted "harboring." Consequently, no penalties were to be imposed even on employers who knowingly hired illegal workers. In other words, migrants *residing* here without a valid visa could be deported, but not those *working* here!

Before gloating at such hypocrisy, we must consider current law. The Texas Proviso remained in force until the Immigration Reform and Control Act of 1986 (IRCA) finally enacted sanctions on employers who hire undocumented immigrants. Nevertheless, the spirit if not the letter of the Proviso endures, though we rarely acknowledge it. IRCA stipulated that penalties be imposed on employers who "knowingly" hire undocumented immigrants. Yet because of objections raised by civil libertarians, advocates concerned about discrimination against Hispanics, and (especially) employers eager to avoid burdensome regulations infringing on their hiring prerogatives, nothing approaching a secure identity card proved acceptable. As a result, IRCA's provisions were reduced to a nullity. To satisfy the law and protect themselves, employers today have only to rely on Social Security cards, rent or utility receipts, and other such documents, all of which are easily falsified. In other words, employer sanctions are virtually useless.

I say "virtually" because sanctions *have* proved highly effective when administered through E-Verify, an online program subsequently developed by the Department of Homeland Security, that allows an employer to enter applicants' tax and Social Security information into a database that promptly verifies their eligibility for employment. E-Verify is mandatory for all new hires in four states, for segments of the workforce in 16 others, and for all federal agencies as well as private contractors who do business with those agencies. Yet when it comes to such private contractors more generally, enforcement is spotty. All told, approximately half of all new hires across the nation currently get screened through E-Verify. To be effective, the proportion needs to be much higher. Until then, the ghost of the Texas Proviso will continue to haunt us.

Members of Congress catering to business interests are hardly the only parties guilty of hypocrisy and duplicity, however. Take the Massachusetts district judge who in 2019 was charged by federal authorities with conspiring with a court officer and a defense attorney to assist an undocumented immigrant in evading detention by an Immigration and Customs Enforcement (ICE) officer. The alien was a Dominican national who had entered the U.S. illegally on three separate occasions, was a fugitive from justice in Pennsylvania, and had most recently been arrested by local Massachusetts police on charges of drug possession. Despite this record, the judge allowed him to exit her courtroom surreptitiously and thence the courthouse by a back door, thereby avoiding the ICE officer awaiting his release via the front lobby.

More than 20 years ago, the eminent legal scholar Peter Schuck, reflecting on immigration law and policy, concluded:

> The situations of actual and putative migrants vary enormously, and any rational and humane immigration policy will want to take many of these factors into account in determining immigrants' legal status. For this reason, immigration policymakers have chosen to make the law ambiguous and open-ended on many crucial points, leaving considerable room for interpretation and specialized judgment by the officials who administer the law in the first instance, and, in the event of appeal by appellate administrative tribunals and federal judges. The law thus grants broad discretion to both low-level and high-level decision makers.

We are currently in an environment where the parameters of such discretion are being not merely reconsidered but fundamentally challenged. And so they should be. But in the heat and passions increasingly aroused by mass migration, we all need to be mindful that the lines we are seeking to reexamine, redefine, and reinforce are never going to be as bright as we might wish. ●