

Being Here

There is a widespread tendency to be unsympathetic to complaints that illegal aliens in this country are not being treated as well as other U.S. residents or, indeed, particularly well at all. Illegal aliens by definition violated this nation's laws in order to establish their residence here; thus, it is felt, they need not be extended any special consideration as a result of that residence. For if they do not like conditions in the United States, they are perfectly welcome to go back wherever they came from; they need not do us any favors by prolonging their illegal stay. A similar line of argument is addressed to alien workers who are here legally, under current or proposed guestworker programs. Foreign workers are invited here on our terms—if they do not like the terms, they do not have to accept them. Other desperate unemployed foreigners will be more than willing to come in their stead. On this view, we offer prospective residents a set of terms, which they can take or leave as they choose. There are no minimally acceptable terms that they are guaranteed.

In *Plyler v. Doe* the Supreme Court recently reaffirmed that all U.S. residents, however they came to reside within U.S. geographical limits, are entitled at the very least to the equal protection of our laws. Writing for the majority, Justice William Brennan ruled: "... The protection of the 14th Amendment extends to anyone, citizen or stranger, who is subject to the laws of a state. . . . That a person's initial entry into a state, or into the United States, was unlawful, and that he may for that reason be expelled, cannot negate the simple fact of his presence within the state's territorial perimeter. Given such presence, he is subject to the full range of obligations imposed by the state's civil and criminal laws. And until he leaves the jurisdiction—either voluntarily or involuntarily. . . —he is entitled to the equal protection of the laws that a state may choose to establish." Judith Lichtenberg, Research Associate at the Center for Philosophy and Public Policy, calls this ruling "a benign Catch-22": "those with no right to be here have rights in virtue of being here."

Some minimal standard, then, sets a floor on terms that legal and illegal aliens may be offered. What is this standard? What rights may aliens in our midst claim simply in virtue of the sheer fact that they are *here*?

Equal Protection and Illegal Aliens

Lichtenberg, in "Within the Pale: Aliens, Illegal

Aliens, and Equal Protection," explains that equal protection means that the state may never treat a protected individual as a "moral inferior," as a nonperson. "It means, first, that the state may not treat one person's or group's interests differently from the similar interests of another person or group; it cannot matter more per se that A goes hungry than that B does. . . . Second, not treating a person as a moral inferior means that one may not ignore or utterly dismiss his interests, for that would be to treat him as if he didn't matter, as if he were not a person with feelings, concerns, and projects of his own." If illegal aliens are within the pale of equal protection, their interests, too, must be taken into consideration in establishing government policy: that a policy would affect them adversely *matters* in assessing that policy; it counts as one reason against it.

Equal protection does not mean, however, that the interests of those protected may not be overridden by the weightier interests of others; they must be placed on the scales, but they need not determine the final balance. Lichtenberg notes that legitimate governmental interests and goals may in many cases pull against the claims of individuals and groups, and where state interests are weighty and compelling, other "claims must themselves be substantial to resist the pull." The claims of illegal aliens, furthermore, must be particularly substantial to outweigh the competing claims put forward by the state. Lichtenberg recognizes that unlimited immigration to the United States may well "constitute a threat to essential features of American society." To the extent that aliens do pose such a threat, "to that extent it is legitimate to discriminate against them."

What rights emerge from this complicated balancing process of interest against interest? In which cases, if any, do the claims of illegal aliens carry the day? *Plyler v. Doe* gives one of the clearest examples: in it, the Court protects the rights of illegal alien children to a free public education, striking down tuition requirements imposed on them by the state of Texas. Here the children's interests at stake clearly outweighed any opposing claim of the state. The Court argued that denying these children a basic education would "impose a lifetime hardship" on them, marking them with "the stigma of illiteracy . . . for the rest of their lives." The drain placed on Texas's financial and educational resources, moreover, was negligible. And Lichtenberg doubts that such an obviously shortsighted and imprudent course could possibly be in the state's true interest: "It is harmful to the society itself

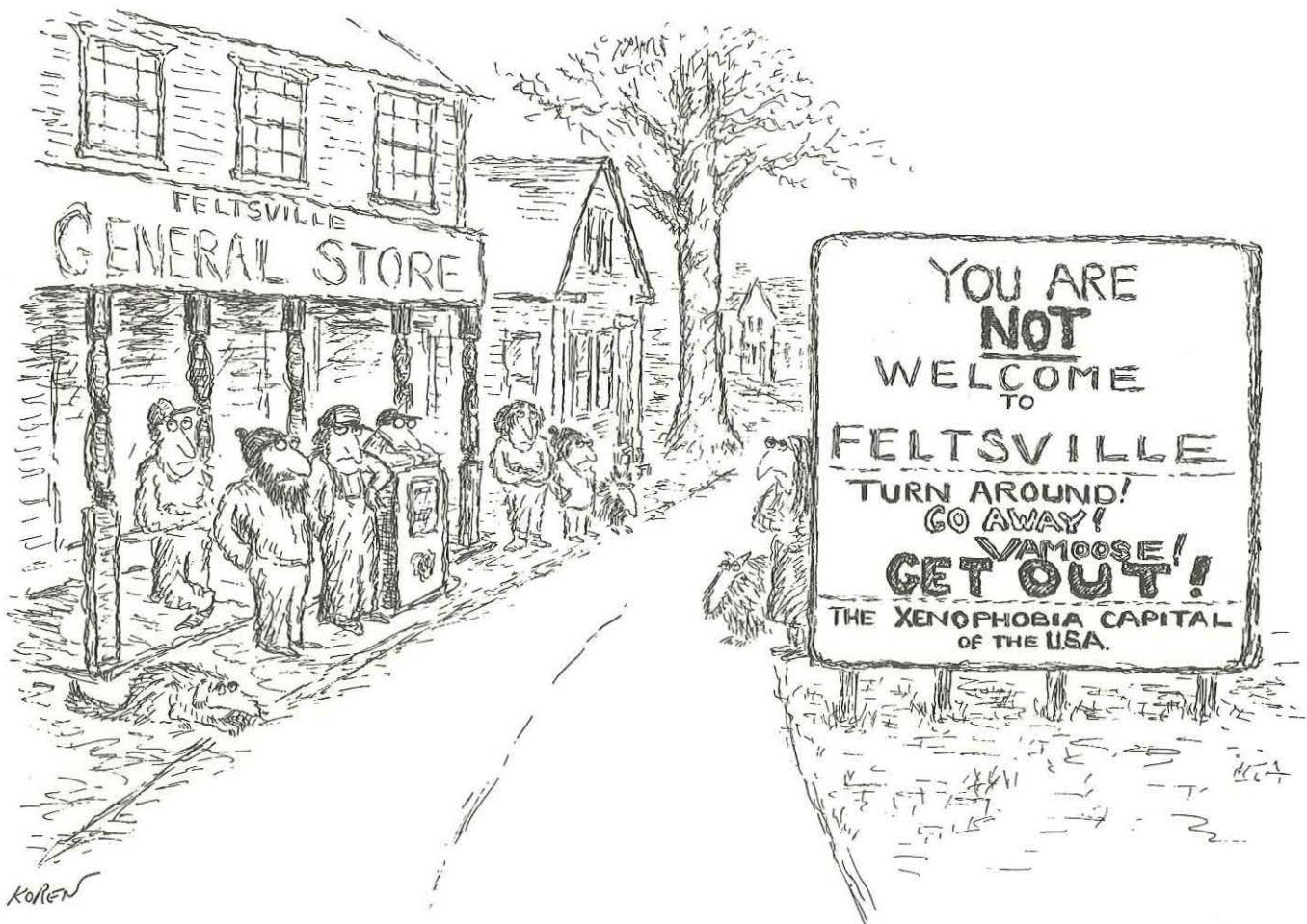
to permit the creation or perpetuation of a 'permanent underclass' of people who make no contribution to and have no stake in the common life." Finally, even if the state has a legitimate interest in expressing its disapproval of unlawful activity, the children of illegal aliens have not chosen to break any law, and so the sins of their parents should not be set in the scales against them.

Some critics of the Court's decision in *Plyler v. Doe* have charged that a broad array of other federal services, such as food stamps and Medicaid, will now also have to be made available to those who enter this country in defiance of its laws. But each case must be weighed separately. It may be that other benefits represent less vital interests than education, or that providing them to illegal aliens would cost vastly more than the state is able to pay. Various benefits offered to illegal aliens might spur unlawful migration and sanction

widespread lawlessness. And adults who break the law cannot claim that their illegal act should not be held against them. These are all considerations that might provide decisive reasons against treating illegal aliens on a par with legal residents. But equal protection means that there will always be reasons on the other side as well. And sometimes, as in *Plyler v. Doe*, these will be the reasons that determine what we, as a nation, should do.

Guestworker Rights

If even illegal aliens are within the pale of equal protection, how are we bound to treat legal aliens, particularly workers we have expressly invited to come among us as participants in the American labor force? Some 30,000 foreign workers currently take part in the



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"H-2" temporary worker program, filling primarily low-level seasonal jobs; and temporary foreign worker or guestworker programs are frequently proposed as components of an overall package of immigration legislation. Part of the attractiveness of these programs to many employers is that foreign workers are willing to live and work on terms that would be unacceptable to most American citizens. But the terms that we are required to offer them would seem to be considerably better than the worst possible terms we can get them to take.

Equal protection means that American policymaking must proceed on the assumption that, while they are on American soil, these workers matter just as

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citizen workers do. This has not been the case through much of the history of foreign worker programs in this country. Manuel García y Griego, writing in *The Border That Joins*, edited by Peter G. Brown and Henry Shue, gives a portrait of the importation of Mexican workers to the United States that indicates how thoroughly and systematically the interests of these workers were disregarded. Through the period of the official *bracero* program (1942-1964), and the years preceding and following, the United States consistently manipulated Mexican workers for its own interests—actively recruiting Mexican labor during times of boom, and rounding up and deporting Mexican labor during times of bust—usually with little or no regard to the effects of such recruitment and deportation on the workers themselves.

The Mexican *bracero* workers faced additional abuse and exploitation, furthermore, in substandard working and living conditions, which frequently violated even the less than generous terms set by the contract program. What protests were raised against this pattern of abuse, according to García, centered on the adverse effects it might be having on American labor market conditions. The interests of the Mexican workers were perceived as simply less important.

Equal protection does not exhaust the moral limits on how we may treat invited foreign workers, however. In testimony before the Subcommittee on Immigration, Refugees, and International Law of the House Committee on the Judiciary, Henry Shue, Director of the Center for Philosophy and Public Policy, proposed three fundamental principles that should govern the design of any proposed guestworker program:

- 1) Respect for the integrity of the family dictates that people not be required by law to live in sep-

aration from their families for any greater period of time than absolutely necessary.

- 2) The principle of no taxation without representation dictates that people not be required by law to pay for the conduct of policies in which they have no voice (and from which they receive few benefits).
- 3) Respect for individual liberty dictates that people not be required by law to move in and out of countries regardless of their own choices except for the strongest possible reasons.

These principles are violated by any temporary worker program which does not provide for prompt reunification of workers with their families, which levies taxes upon workers without providing any minimal system of effective self-government, or which shuttles workers back and forth from country to country without allowing them the option to apply for permanent residence in the country of employment.

Shue grants that foreign workers need not be granted all the rights and privileges of full American citizenship. There are good reasons, for example, why foreigners should not be allowed to vote on certain matters of national policy, such as foreign policy toward their own country; nor is it unreasonable to believe that foreign workers need an initial period of acquaintance with their new society before they are in a position to make sound judgments about broad social issues. But Shue points to the success of Swedish experiments with allowing migrant workers to vote in local elections, and concludes that temporary residents should be allowed to help "decide the issues that most directly affect their lives."

Shue's three principles, then, set somewhat stringent conditions under which the United States is able to invite foreign workers into its labor force. If the conditions seem too exigent, we must seek other ways in which to meet our labor needs or reexamine the extent to which we truly need imported labor. For once people are invited onto our territory, they are able to make claims upon us, claims for a decent minimum of hospitality, and for a decent minimum of justice.

The positions discussed in this article are drawn from: "Within the Pale: Aliens, Illegal Aliens, and Equal Protection," by Judith Lichtenberg, forthcoming in the *University of Pittsburgh Law Review*, Vol. 44, No. 2 (Spring, 1983), Symposium Issue on Immigration and the Constitution; "The Importation of Mexican Contract Laborers to the United States, 1942-1964: Antecedents, Operation, and Legacy," by Manuel García y Griego, in *The Border That Joins: Mexican Migrants and U.S. Responsibility*, Maryland Studies in Public Philosophy, edited by Peter G. Brown and Henry Shue (Totowa, N.J.: Rowman and Littlefield, 1983); and Henry Shue's testimony before the Subcommittee on Immigration, Refugees, and International Law of the House Committee on the Judiciary, October 14, 1981. To order *The Border That Joins*, see page 15.

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