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Suzanne McGrath Dale

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The Flying Dutchman Dichotomy: The International Right to Leave v. The Sovereign Right to Exclude¹

I. Introduction

The Flying Dutchman is a mythic figure who is condemned to roam the world, never resting, never bringing his ship to port, until Judgement Day. Cursed by past crimes, he is forbidden to land and sails from sea to sea, seeking a peace which forever eludes him.

The Dutchman created his own destiny. His acts caused his curse. He is ruled by Fate, not man-made law, or custom, or usage. But today, thanks to man's laws and man's ideas of what should be, there are many like the Dutchman who can find no port, no place to land. A dichotomy of law has developed which effectively prevents these newer Dutchmen from finding a harbor.

Traditional international law rules that people must be free to move about the world without undue hinderance, coming and going with reasonable freedom. At the same time, the concept of the sovereign nation includes a right to say who will enter the nation's borders, who will be barred. These two principles are at odds with each other: who is to say that because one may travel freely, any given nation must allow that person to enter? It is conceivable that no nation may allow the traveller to enter. There is no law or right which dictates that every traveller must be guaranteed a welcoming destination or even one which is of the person's own choice.

This dichotomy, the right to leave versus the right to exclude, has created a modern class of Dutchmen, presently typified by the Irish. Citizens of the Republic of Ireland are free to leave as they choose, but where may they go? Sovereign nations which traditionally received outflows of Irish immigrants have exercised their right to exclude. Australia, Canada, New Zealand and the United States no longer have 'open door' policies for immigrants. England accepts the Irish, but they are barred from citizenship. Driven by economic crisis, these newest Dutchmen are caught in the dichotomy: free to leave, no place to go.

1. This Comment gratefully acknowledges the kind assistance of Michael C. LeMay, Professor of Political Science, Frostburg State University; Seton Stapleton, Chief, Immigrant Visa Control Division, U.S. Department of State; and Denis Sheehan, Administrative Officer, Embassy of Ireland.

II. The International Right to Leave

The western world has recognized a need for free flow of peoples that extends back to 1215 and the Magna Carta.² Section 42 provides for the liberty to enter or leave England.

It shall be lawful in the future for anyone to leave our kingdom, and to return, safely and securely, by land or by water, and without violating our trust, but not during war or for some other brief period, nor if the good of the kingdom will be affected³

The only exceptions listed were prisoners, outlaws, natives of a country which was at war with England, and merchants who were provided for in an earlier section.⁴

The principle of freedom of travel continued to be accepted in Western Europe. In 1539, Francisci de Victoria utilized the principle in an attempt to justify the Spanish colonization of South America.⁵ He asserted

it was permissible from the beginning of the world (when everything was in common) for any one to set forth and travel where-soever he would. Now this was not taken away by the division of property, for it was never the intention of peoples to destroy by that division the reciprocity and the common user which prevailed among men⁶

Utilizing this philosophy, he argued that the Spanish had a right to travel into South America and "sojourn there" because the natural law of nations (the "*jus gentium*") dictated that it was only good manners to welcome visitors and treat them courteously.⁷

Nearly two centuries after de Victoria, Emmerich de Vattel, a Swiss diplomat and writer, explored the principle of the right to travel, specifically the right to leave one's own country.⁸ He declared that one might travel on business when his native state was not in

2. MAGNA CARTA (1215), reprinted in W.S. McKECHNIE, MAGNA CARTA, A COMMENTARY ON THE GREAT CHARTER OF KING JOHN (1905) (trans. S. McGrath Dale) [hereinafter MAGNA CARTA].

3. *Id.* art. 42.

4. *Id.* For the provision relating to merchants, see *infra* note 54 and accompanying text.

5. R. PLENDER, INTERNATIONAL MIGRATION LAW 63 (1988).

6. F. DE VICTORIA, DE INDIS ET DE IURE BELLI RELECTIONES (The Classics of International Law No. 1964). Victoria was a sixteenth century theologian and Dominican friar of some renown. A Spaniard by birth, he studied in Paris and later held the prestigious chair of theology at the University of Salamanca. His writings and philosophy strongly influenced both his contemporaries and later legal scholars.

7. *Id.*

8. E. DE VATTEL, THE LAW OF NATIONS OR THE PRINCIPLES OF NATURAL LAW (The Classics of International Law, 1964). Vattel spent his diplomatic career in the service of the Elector of Savoy. His writings expressed the philosophy of his time. Today, THE LAW OF NATIONS continues to be regarded as a valid expression of international law. See *infra*, note 19 and accompanying text.

need of his services.⁹ He also concluded there were circumstances under which a citizen had the absolute right to "renounce his allegiance to his country and abandon it."¹⁰ These circumstances were 1) if one could not find work in his own country, 2) if society or the sovereign failed in its obligations to the people, and 3) if society or the sovereign sought to establish laws a citizen found repugnant.¹¹ Examples of the latter circumstance included establishment of a state religion or a change in government from a democracy to a monarchy.¹²

De Vattel found the right to emigrate derived from a variety of sources. The right might be derived from the laws of nature as according to the standards of civilized society.¹³ It might also be a result of state law or be voluntarily granted by the sovereign.¹⁴ The right might also be the result of a treaty such as those made during the 18th century among some of the German principalities to allow people to emigrate for religious reasons.¹⁵

De Vattel felt so strongly about the right to emigrate that he stated explicitly "[i]f the sovereign undertakes to interfere with those who have the right to emigrate he does them a wrong"¹⁶ Again he cited the example of religious persecution and declared that it was lawful for an emigrant to ask for and receive protection from another state.¹⁷

The concept of international law guaranteeing a right to leave one's own country, a right to travel, was reasserted in the mid-twentieth century in a variety of voices. One of the most prominent sounded in the Universal Declaration of Human Rights in 1948. The United Nations General Assembly proclaimed in article 13 that "[e]veryone has the right to freedom of movement and residence within the borders of each State" and "the right to leave any country, including his own"¹⁸

This modern recognition of an ancient right was upheld by the United States Supreme Court in *Kent v. Dulles*.¹⁹ The Court granted

9. E. DE VATTEL, *supra* note 8, § 221.

10. *Id.* § 223.

11. *Id.*

12. *Id.*

13. *Id.* § 225.

14. *Id.*

15. *Id.*

16. *Id.* § 226.

17. *Id.*

18. Universal Declaration of Human Rights, art. 13, at 71, U.N. Doc. G.A. Res. 217A (III), A/810 (1948) [hereinafter Universal Declaration].

19. *Kent v. Dulles*, 357 U.S. 116 (1958). Rockwell Kent and Dr. Walter Briehl were denied passports on the grounds that they were said to be Communists. At the time, Passport Office regulations permitted denial of passports to persons who were or were suspected of being members of the Communist Party. The Office could also require suspected persons to take an oath as to his or her membership in the Communist Party. Kent and Briehl refused to take the

certiorari to consider whether the Secretary of State had the authority to adopt regulations that would effectually deny passports to suspected Communists who were overseas apparently to further Communist activities, or, in the alternative, whether the Secretary might devise a regulation that would require a passport applicant to provide an affidavit stating that he was not a Communist.²⁰

The Court examined the history of passport usage under United States law and found that "issuance of passports is 'a discretionary act' on the part of the Secretary of State."²¹ However, the Court also found that the right to leave the country was a personal right within the concepts of Fifth Amendment "liberty."²²

In dicta, the Court built on earlier case law and on the Magna Carta²³ and said,

[t]he right to travel is a part of the "liberty" of which the citizen cannot be deprived without the due process of law under the Fifth Amendment . . . Freedom of movement across frontiers in either direction, . . . was a part of our heritage. Travel abroad . . . may be necessary for a livelihood. It may be as close to the heart of the individual as the choice of what he eats, or wears, or reads. Freedom of movement is basic in our scheme of values.²⁴

In ruling that the right to travel was a personal liberty guaranteed by the Constitution, the Court also discussed the values of travel. Among those values, in addition to work, were education and family reunification,²⁵ principles that form the basis of much current immigration law.

At the same time the Supreme Court found the right to travel to be a Constitutionally protected liberty, the principles of movement espoused in the Declaration of Human Rights were confirmed by a variety of modern national constitutions and bills of rights,²⁶ treaties and conventions. One of the foremost regional arrangements is the Treaty of Rome which formalized the establishment of the European Economic Community (EEC) in 1957.²⁷

Article 3 of the treaty provides for the "abolition, as between

oath and brought suit, maintaining that their political affiliations were irrelevant to their right to a passport.

20. *Id.*

21. *Id.* at 124.

22. *Id.* at 125.

23. *Id.*

24. *Id.* at 125, 126.

25. *Id.* at 126.

26. R. PLENDER, *supra* note 5, at 95-96. Plender lists forty-four nations which, to one degree or another, positively reference the right to emigration in either the national constitution or the equivalent of a bill of rights. Three other nations, France, the Ivory Coast, and Senegal, reaffirm the Declaration in their constitutions. *Id.* at nn. 11-55.

27. Treaty Establishing the European Economic Community (Treaty of Rome), March 25, 1957, 298 U.N.T.S. 11 [hereinafter Treaty of Rome].

Member States, of obstacles to freedom of movement for persons, services and capital; . . ."²⁸ This provision opened the adjoining borders of twelve nations to over 300 million people.²⁹ With the dissolution of the iron curtain and the opening of Eastern Europe, it is not inconceivable that the EEC would extend the freedom of movement principle to its sister States. The concept of including Eastern Europe nations in the EEC has already been discussed by the European Community and consideration is being given to both economic and political unity.³⁰

In 1963, the Fourth Protocol of the European Convention on Human Rights³¹ expanded on the simple proviso that obstacles to the freedom of movement should be removed. Article 2 of the Protocol first provides that those who are lawfully resident in a contracting State should be free to move about within that State and should also be free to choose where they will reside.³² Secondly, the Protocol provides that everyone has the freedom to depart one's own or any other country.³³

The Protocol provides that the rights of freedom of movement and of departure are not to be interfered with except under specific circumstances.³⁴ These are limited to situations where the restrictions are lawful and in the interest of public safety or national security and are intended to maintain public order, protect public health or morals, prevent crime and protect the rights and freedoms of other people.³⁵ Additionally, internal movement may be restricted regionally if such restrictions are lawful and in the public interest.³⁶

The Final Act of the Conference on Security in Europe (Helsinki Accords)³⁷ addresses more discretely the question of liberty to

28. *Id.* art. 3.

29. R. PLENDER, *supra* note 5, at 194. The twelve EEC member nations are Belgium, Denmark, France, GFR, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain and the United Kingdom.

30. *The Economist*, July 7, 1990, (LEXIS, Nexis library, Current file).

31. Fourth Protocol to the European Convention on Human Rights, Sept. 16, 1963, *Europ. T.S. No. 46*, reprinted in 58 AM. J. INT'L L. 334 (1963). Thirteen nations are signatories: Austria, Belgium, Denmark, France, the Federal Republic of Germany, Iceland, Ireland, Italy, Luxembourg, the Netherlands, Norway, Portugal and Sweden. Eight States party to the European Convention, Cyprus, Greece, Liechtenstein, Malta, Spain, Switzerland, Turkey and the United Kingdom, are not signatories.

32. *Id.* art. 2(1).

33. *Id.* art. 2(2).

34. *Id.* art. 2(3).

35. *Id.*

36. *Id.* art. 2(4).

37. Conference on Security and Cooperation in Europe: Final Act, Aug. 1, 1975, 14 I.L.M. 1292. Thirty-five nations are signatories: Austria, Belgium, Bulgaria, Canada, Cyprus, Czechoslovakia, Denmark, Finland, France, the German Democratic Republic, the Federal Republic of Germany, Greece, Holy See, Hungary, Iceland, Ireland, Italy, Liechtenstein, Luxembourg, Malta, Monaco, Netherlands, Norway, Poland, Portugal, Romania, San Marino, Spain, Sweden, Switzerland, Turkey, the United Kingdom, the United States, USSR, and Yugoslavia.

leave a country. The document stresses that the aim of freer movement is to facilitate personal and professional contacts, "an important element in the strengthening of friendly relations and trust among peoples."³⁸ Accordingly, the Act emphasizes freedom of travel on the basis of family ties, especially reunification and marriage, travel for personal and professional reasons, for young people to meet, for sport and for tourism.³⁹ The Act says nothing about restrictions; instead, emphasis is laid on the desirability of easing restrictions wherever they might be encountered.⁴⁰

The Act also considers the question of migrant workers.⁴¹ Although right of a person to emigrate for the purpose of working is tacitly implied, it is not specifically addressed nor ensured. The bulk of this section of the Act is concerned with the economic and social circumstances affecting the worker.⁴²

A far more cogent statement is to be found in the EEC Treaty.⁴³ The Treaty not only provides for freedom of movement within the Community for the purposes of employment,⁴⁴ it also decrees that any discrimination based on nationality is to be abolished.⁴⁵ Certain rights are specifically guaranteed: the right to accept an offer of work; the right to move about and stay in a State while engaged in work and to be governed by the same employment regulations as one of the State's citizens; and the right to remain in the State after having been employed there.⁴⁶ The only limitations permitted are those that would be dictated by reason of public policy, security or health.⁴⁷

An earlier document, the International Labor Organization Convention concerning migration for employment is more inclusive and more far-reaching.⁴⁸ The entire document presumes the right of persons to migrate for employment. Separate articles deal with national policies and regulations on immigration, emigration and mi-

38. *Id.* at 1313.

39. *Id.* at 1313-15.

40. *Id.*

41. *Id.* at 1311.

42. *Id.* at 1311-12.

43. Treaty of Rome, *supra* note 27, art. 48.

44. *Id.* art. 48(1).

45. *Id.* art. 48(2).

46. *Id.* art. 48(3).

47. *Id.*

48. Convention Concerning Migration for Employment (revised), Int'l. Lab. Organization Convention No. 97, July 1, 1949, 120 U.N.T.S. 71. Thirty-eight countries are signatories: Algeria, Bahamas, Barbados, Belgium, Belize, Brazil, Cameroon, Cuba, Cyprus, Dominica, Ecuador, France, the Federal Republic of Germany, Grenada, Guatemala, Guyana, Israel, Italy, Jamaica, Kenya, Malawi, Malaysia (Sabah), Mauritius, the Netherlands, New Zealand, Nigeria, Norway, Portugal, St. Lucia, Spain, Tanzania (Zanzibar), Trinidad, the United Kingdom, Upper Volta, Uruguay, Venezuela, Yugoslavia, and Zambia.

gration for employment;⁴⁹ medical services;⁵⁰ and expulsion of the worker from the host State.⁵¹ The Convention specifically promotes non-discrimination in remuneration, union membership, housing, social security, and taxes.⁵²

Unlike most of the other documents considered, the Convention excludes three classes of worker from its coverage: frontier workers, persons working in the liberal and fine arts who enter a country only for a short time, and seamen.⁵³ On the other hand, the Magna Carta extended the free right of entry to only one category of workers.

All merchants shall be allowed to leave England safely and securely, to enter England, to stop or to travel about England, by land or by water, buying and selling, without unjust taxes, according to ancient and right customs, except in times of war and if they are of the country at war with us⁵⁴

III. The Right to Exclude

For all its generosity regarding the freedom of movement, in the Magna Carta, the right to control movement, specifically that of prisoners, legally outlawed persons, and citizens of nations at war with England, was reserved to the sovereign.⁵⁵ This concept was in full bloom by the eighteenth century, when Vattel held that "natural liberty" decreed a nation has the right to refuse to admit an alien.⁵⁶

Vattel based this right to exclude upon "a care for its own security which [the nation] owes as a duty to itself."⁵⁷ He went so far as to say that a nation has a duty to refuse to admit aliens under specific circumstances: if the national economy cannot support the citizenry; if the proposed immigrants carry contagious disease; or if there is good reason to believe that the immigrants would "corrupt the morals of [the] citizens," or cause religious or other disturbances injurious to public welfare.⁵⁸ For these reasons, he concluded that, while there may be an absolute right to leave one's own country, there is no absolute right to enter another country and take up residence there.⁵⁹

Over a century later, Vattel's philosophy provided the basis for the Anglo-American judiciary's holding that a nation has a sovereign

49. *Id.* art. 1.

50. *Id.* art. 5.

51. *Id.* art. 8.

52. *Id.* art. 6.

53. *Id.* art. 11.

54. MAGNA CARTA, *supra* note 2, art. 41.

55. *Id.* art. 42.

56. E. DE VATTEL, *supra* note 8, § 230 at 92.

57. *Id.*

58. *Id.* § 231, at 92.

59. *Id.* § 230.

right to exclude and that aliens have no automatic right of entry. The United States Supreme Court, in *Nishimura Ekiu v. U.S.*,⁶⁰ cited Vattel when it ruled

[i]t is an accepted maxim of international law that every sovereign nation has the power, inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe.⁶¹

A year later, in *Fong Yue Ting v. U.S.*,⁶² the Court expanded upon the *Nishimura* opinion. After finding that "[t]he right to exclude or expel all aliens . . . [is] an inherent and inalienable right of every sovereign and independent nation . . .,"⁶³ the Court traced the United States right to Constitutional powers granted Congress. Citing Article I, section 8, the Court found

The constitution has granted to congress the power to regulate commerce with foreign nations, including . . . the bringing of persons into the ports of the United States; to establish a uniform rule of naturalization; . . . and to make all laws necessary and proper for carrying into execution these powers.⁶⁴

As support for their argument, the Court cited Vattel⁶⁵ and *Musgrove v. Chun Teeong Toy*,⁶⁶ a British case. A year before *Nishimura*, the Judicial Committee of the Privy Council examined the case of a Chinese immigrant to the Australian colony of Victoria. The man was denied entry and sued. In ruling against the plaintiff, the justices found that an alien has no legal right to enter British territory.⁶⁷

Over ten years after these three cases, in 1906, the judiciary committee of the privy council reaffirmed their holding in *Musgrove* and cited Vattel as their authority.⁶⁸ In ruling on the question as to whether the Dominion government had the power to expel aliens, the

60. *Nishimura Ekiu v. U.S.*, 142 U.S. 651 (1892). An immigration officer denied a Japanese woman permission to enter the U.S. on the grounds that she was "'a person without means of support, without relatives or friends in the United States.'" *Id.* at 656. On appeal, the Court affirmed the finding of the circuit court that the immigration officer had acted lawfully in barring the entry.

61. *Id.* at 659.

62. *Fong Yue Ting v. U.S.*, 149 U.S. 698 (1893). In three cases, combined for the purpose of appeal, Chinese men were discovered to be without required certificates of residence and were arrested, subject to deportation. Each Chinese sued out a writ of habeas corpus which was dismissed by the circuit court. In a lengthy opinion, accompanied by equally lengthy dissents, the Court upheld the lower court's dismissal of the writs.

63. *Id.* at 711.

64. *Id.* at 712.

65. *Id.* at 707.

66. *Musgrove v. Chun Teeong Toy*, App. Cas. 272 (P.C. 1891) (U.K., Austl.).

67. *Id.* at 282.

68. *Attorney-General for Canada v. Cain*, App. Case. 542, 546-47 (P.C. 1906).

court found a State had the right to admit or expel aliens as it pleased and to attach whatever conditions it chose to the admission and expulsion.⁶⁹

Even today, Vattel's dicta are still "good law" in the United States. In 1984, the United States Court of Appeals for the Eleventh Circuit, in a case involving petitions for asylum made by a number of Haitians, cited Vattel with approval for the proposition that a nation has the right to refuse admission to foreigners.⁷⁰ The court cited both *Fong Yue Ting* and *Nishimura* in support of the "accepted maxim of international law that the power to control the admission of foreigners is an inherent attribute of national sovereignty."⁷¹

The United States' stand on the sovereign right to exclude is just one of four theories on the principle. These theories are: 1) a duty to admit all aliens; 2) a duty to admit all aliens, given certain exclusions; 3) an obligation to admit under given conditions; and 4) no duty to admit.⁷² The first theory, a duty to admit all who wish to enter, has never been generally accepted as a rule of international law.⁷³ The fourth theory, total exclusion, tends to result in strained international relationships.⁷⁴

The two remaining theories are, to some extent, indistinguishable; they differ primarily in intent. The theory that a nation has a duty to admit all aliens except those in certain limited categories was the theory Vattel espoused when he listed those potential immigrants a nation was bound to refuse.⁷⁵ The United States' first immigration restrictions which barred entry of convicted criminals and prostitutes⁷⁶ is an example of this theory. It is a popular theory because it provides legal justification for partial exclusion at will of some of the most undesirable aliens.⁷⁷

The theory that a nation has no duty but merely an obligation to admit, is in wide use today.⁷⁸ Potentially, this theory allows a nation, by imposing a variety of conditions, to establish preferences and delineate categories of immigrants eligible to be admitted which per-

69. *Id.* at 546.

70. *Jean v. Nelson*, 727 F.2d 957, 963-64 (11th Cir. 1984), *aff'd*, 472 U.S. 846 (1985). After arriving in southern Florida, a group of Haitian aliens were detained by the Immigration and Naturalization Service. They brought a class action, asserting the detention policy was discriminatory either on its face or in its application. The Court of Appeals reversed the district court's finding that the policy was not discriminatory in its application.

71. *Id.* at 964.

72. J. G. STARKE, *INTRODUCTION TO INTERNATIONAL LAW*, 335-36 (1984).

73. *Id.* at 336.

74. *Id.* Witness the awkwardness involved in travelling to the U.S.S.R. or China in the past quarter century.

75. E. DE VATTEL, *supra* note 8, § 231.

76. Act of March 3, 1875, ch. 141, § 5, 18 Stat. 477 (current version at 8 U.S.C. § 1182(A)(2), (10) (1990)).

77. J.G. STARKE, *supra* note 72, at 336.

78. *Id.*

mits virtual "designer" immigration. This theory is the obverse of the previous one. Instead of keeping out only undesirable immigrants, it allows in only desirable ones. In this fashion, a nation can arrange to acquire only those immigrants it wants and is not obliged to receive those it would prefer to exclude.⁷⁹ In reality, because most nations recognize an obligation to accept at least a portion of this world's refugees, modern immigration policy tends to be an admixture of the duty to admit most applicants and the mere obligation to accept some applicants.

In spite of all the modern declarations vaunting the right of people to leave their own countries and travel to another and settle there, the stark reality is that immigration for resettlement is no longer possible for most of those who wish to resettle. As of 1987, only five countries, Australia, Canada, Israel, the United States, and New Zealand were accepting immigrants for the primary purpose of permanent residency.⁸⁰ Although the United Kingdom regularly grants resettlement rights, these are generally limited to "patritals" or those with a close patritial connection.⁸¹

Because this Comment has chosen the Irish as an easily traceable emigrant group to examine in terms of modern immigration restrictions, discussion will be limited to the policies of the United Kingdom, Australia, Canada, New Zealand, and the United States. These five nations are traditional receiving states for the Irish seeking resettlement. Their current policies in relation to an established immigrant population demonstrates the dichotomy which exists today when a person wishes to exercise the right to leave one's own country: suddenly, there are not many places to go.

IV. Current Regulations for Permanent Resettlement

Australia's first immigration act, passed in 1901, was intended to exclude non-white immigrants.⁸² This restriction continued until the mid-1950s when the government began to allow resident non-Europeans to apply for naturalization without applying additional restraints.⁸³ In 1973, the government officially eliminated distinctions of race, color or nationality from immigration policy.⁸⁴

79. Salt, *A Comparative Overview of International Trends and Types 1950-80*, 13 INT'L MIGRATION REV. 431, 449-51 (Fall, 1989).

80. *Id.* at 447.

81. Layton-Henry, *British Immigration Policy and Politics*, in THE GATEKEEPERS: COMPARATIVE IMMIGRATION POLICY 70-71 (M.C. LeMay ed. 1989). See *infra* text accompanying note 106 for an explanation of "patritals."

82. Tobin, *Australian Immigration Policy and Politics*, in THE GATEKEEPERS: COMPARATIVE IMMIGRATION POLICY 48 (M.C. LeMay ed. 1989).

83. *Id.* at 50.

84. *Id.* at 50-51.

Australia does not allow entry without a permit⁸⁵ and bases permit awards on a point system. An applicant's score must equal a "priority mark,"⁸⁶ and key factors include job skills, training, age, and English language skills.⁸⁷ Immigration intake fluctuates from year to year as the government attempts to adjust the inflow to the state of the economy.⁸⁸ The planned intake for fiscal year (FY) 1990-1991 has been set at 126,000.⁸⁹ Approximately half that number will be immigrants entering for the purpose of family reunification.⁹⁰ The remaining places will be divided between "economic migration programmes" and refugees.⁹¹

New Zealand imitated Australia for its early immigration history.⁹² Today, the entry policy is even more restrictive than its neighbor's, possibly because of its smaller land mass and limited natural resources. Immigrants for resettlement must be under 46, possess a needed profession or skill, and have a guarantee of employment.⁹³ Special consideration is made for the purpose of family reunification.⁹⁴ However, persons over 46, including retirees, and single parents with dependent children "will not normally be approved."⁹⁵ The Occupational Priority List, a list of occupations "for which there is a clear need for overseas recruitment" is revised every six months.⁹⁶ Many of the occupations are restricted by salary, qualifications, experience, and/or membership in professional organizations.⁹⁷

The United Kingdom (UK) is in an unusual position regarding immigration for settlement. "[T]he historical and imperial links between Britain and its colonies . . . and former colonies . . . meant that Colonial and Commonwealth citizens were British subjects and as such were not subject to any immigration controls."⁹⁸ In fact, un-

85. Migration Act, AUSTL. ACTS P. § 33 (1958).

86. *Id.* § 31(1).

87. DEP'T IMIGR., LOC. GOV'T & ETHNIC AFF., PERMANENT ENTRY VISAS § 3 (1st ed. 1989) (Aust.). The December, 1989 Priority Occupation List includes electronics and industrial engineers, therapists, mechanics and machinists, cooks, and waiters (skilled).

88. Tobin, *Australian Immigration Policy and Politics*, in *THE GATEKEEPERS: COMPARATIVE IMMIGRATION POLICY*, *supra* note 82, at 55.

89. Facts on File World News Digest, July 20, 1990, at 541, col. 2 (LEXIS, Nexis library, Current file).

90. The Daily Telegraph, Jan. 31, 1990, at 35 (LEXIS, Nexis library, Current file).

91. *Id.*

92. R. PLENDER, *supra* note 5, at 87 n.63.

93. Immigration Act of 1987, 1987 N.Z. Stat. 74 (as summarized in NEW ZEALAND IMMIG. SERVICES. ABOUT NEW ZEALAND: IMMIGRATION (March, 1988)).

94. *Id.*

95. *Id.*

96. NEW ZEALAND IMMIG. SERVICES. OCCUPATIONAL PRIORITY LIST, (Sept., 1989).

97. *Id.* The Sept., 1989 list included accountant, boatbuilder, economist-financial analyst, electrical engineering technician, medical doctors (interns and residents admitted only on a temporary basis) nurses, physiotherapist, speech/language therapist, and woodworking machinist. Lawyers are not listed.

98. Layton-Henry, *British Immigration Policy and Politics*, in *THE GATEKEEPERS: COMPARATIVE IMMIGRATION POLICY*, *supra* note 81, at 64.

til 1962 when the Commonwealth Immigrants Act was introduced,⁹⁹ the UK did not restrict immigration.¹⁰⁰ The assumption was that people would migrate from the UK throughout the Commonwealth, not immigrate in from the Commonwealth.¹⁰¹ After World War II, however, the flow did reverse itself, and many Commonwealth citizens migrated to the UK.¹⁰²

Beginning in 1962, various immigration controls were introduced, the first a system of employment vouchers intended to limit the inflow.¹⁰³ The Immigration Act of 1971 established the basic provisions in control today.¹⁰⁴ The Act established a "right of abode" for UK and colonial citizens and for some Commonwealth citizens connected by birth or marriage to one who has the right of abode.¹⁰⁵ Those with the "right of abode" are referred to as "patrials."¹⁰⁶ Dependants, *i.e.*, spouses, minor children and some elderly relatives, of people with a right of abode may enter the UK for settlement.¹⁰⁷ Special arrangements are made for certain British passport holders from overseas and for refugees.¹⁰⁸

The Irish hold a unique position in the British immigration program. Neither patrials nor citizens nor, by virtue of the Irish Nationality Act of 1949,¹⁰⁹ aliens, they have a free right of movement in and about the UK.¹¹⁰ They have full citizenship rights and are eligible to vote.¹¹¹ However, the Home Secretary may refuse them entry if he believes such exclusion is in the public interest.¹¹² The Irish are also subject to deportation if convicted of a criminal offense.¹¹³

Much of Canadian immigration policy mirrored that of the U.S. As the latter began to restrict immigration, Canada found itself the favored alternate host.¹¹⁴ As a result, the government enacted immigration statutes that were frequently similar to earlier statutes

99. *Id.* at 69.

100. *Id.* at 61.

101. *Id.*

102. *Id.* at 60.

103. *Id.* at 69.

104. Immigration Act of 1971, pt. 1 (U.K.).

105. *Id.* at pt. 1, § 2(1).

106. Layton-Henry, *British Immigration Policy and Politics*, in *THE GATEKEEPERS: COMPARATIVE IMMIGRATION POLICY*, *supra* note 81, at 71.

107. CENT. OFF. OF INFORMATION, *IMMIG. INTO BRITAIN*, 9-10 (Jan., 1990) [hereinafter *IMMIG. INTO BRITAIN*].

108. *Id.* at 10.

109. Irish Nationality Act, 1949, 14 Geo. 6, § 2 (Eng.).

110. Layton-Henry, *British Immigration Policy and Politics*, in *THE GATEKEEPERS: COMPARATIVE IMMIGRATION POLICY*, *supra* note 81, at 60.

111. *Id.*

112. *IMMIG. INTO BRITAIN*, *supra* note 107, at 3.

113. Immigration Act of 1971, pt. 1, § 3(6) (U.K.).

114. R. PLENDER, *supra* note 5, at 69.

passed in the U.S.¹¹⁵ A good example is the Chinese Immigration Act, 1885, passed three years after the U.S. passed the Chinese Exclusionary Act in 1882.¹¹⁶ Canada maintained a series of racially-exclusive regulations into the 1930s.¹¹⁷

After World War II, Canada's restrictive policies gradually loosened until, in the mid 1960s, the policy became one of non-discrimination.¹¹⁸ Today, immigration to Canada is carefully controlled. Parliament sets immigration levels annually, basing their decision on demographic needs of the provinces and on the labor market.¹¹⁹ Levels for calendar year 1988 totaled 125,000-135,000 and were divided into three major classes: the family class, spouses and/or dependant children of persons already resident; workers and business immigrants, their spouses and other dependants; and refugees.¹²⁰

Independent immigrants, that is, non-family or business class, must meet "selection standards established by the regulations for the purpose of determining whether or not the immigrant will be able to become successfully established in Canada."¹²¹ The "selection standards" are a point system which includes such criteria as education, specific vocational preparation, experience, occupation, arranged employment, age, fluency in French and English, and personal suitability.¹²²

Certain classes are regarded as inadmissible. These include persons with health conditions which might cause "excessive demands on health or social services."¹²³ Other inadmissibles include criminals and those who might commit a criminal offense and persons believed to be spies or subversives or who will engage in acts of violence.¹²⁴

By comparison, basic United States immigration policy is very generous. There is a larger annual intake, no point system, no age limit, and a broader interpretation of "family" for the purpose of reunification. The current intake is 270,000, not including refugees and special visa categories.¹²⁵ The Immigration and Nationality Act

115. *Id.*

116. *Id.* at 70.

117. *Id.* at 71.

118. *Id.* at 81.

119. Immigration Act, 5 R.S.C., ch. I-2, § 7 (Can. 1985).

120. EMPLOYMENT AND IMMIGRATION CANADA, ANNUAL REPORT TO PARLIAMENT ON FUTURE IMMIGRATION LEVELS, 2 (1987).

121. 5 R.S.C., ch. I-2, § 6.

122. EMPLOYMENT AND IMMIGRATION CANADA, THE REVISED SELECTION CRITERIA FOR INDEPENDENT IMMIGRANTS, at 5 (1985). Canada, like New Zealand, is looking for younger immigrants. Ten points are granted an immigrant who is between 21 and 44 years of age. Those older or younger receive only five points. *Id.*

123. 5 R.S.C., ch. I-2, § 19.

124. *Id.*

125. 8 U.S.C. § 1151 (1970 & Supp. 1990).

of 1965¹²⁶ drastically revised the Immigration and Nationality Act of 1952¹²⁷ by eliminating the country quota system and substituting a series of preference categories. Visas are allotted on a percentage basis according to category, and no one country may receive an allotment in excess of 20,000 per year.¹²⁸

Four preference categories facilitate family reunification, and two are employment related. Theoretically, there is a seventh category. Any visas remaining after the annual distribution are to be made available to applicants, not including refugees, who do not fit in one of the above categories.¹²⁹

UNITED STATES PREFERENCE PRIORITIES¹³⁰

<u>Preference</u>	<u>Percentage</u>	<u>World-wide Maximum</u>
1) Unmarried sons & daughters of U.S. citizens	20%	54,000
2) Spouses, unmarried sons & daughters of legally resident aliens	26%	70,200
3) Professionals, scientists, artists whose services are sought by a U.S. employer	10%	27,000
4) Married children of U.S. citizens	10%	27,000
5) Siblings of U.S. citizens (citizen must be over 21)	24%	64,800
6) Workers, skilled or unskilled, where there is a shortage of employable and willing people already in the U.S.	10%	27,000

V. The Irish As Flying Dutchmen

It is against this background that the current exodus of Irish

126. Immigration and Nationality Act of 1965, Pub. L. 89-236, 79 Stat. 911 (codified as amended in scattered sections of 8 U.S.C. (1970 & Supp. 1990)).

127. Immigration and Nationality Act of 1952, Pub. L. 414, 66 Stat. 163 (codified as amended at 8 U.S.C. §§ 1101-1503 (1970 & Supp. 1990)).

128. 8 U.S.C. § 1152 (1970 & Supp. 1990).

129. *Id.*

130. 8 U.S.C. § 1153 (1970 & Supp. 1990).

immigrants must be viewed. Throughout the 1970s, Irish unemployment rates were under 10%.¹³¹ Between 1980 and 1985, the rate rose to over 16%.¹³² In 1988, the figure dropped to slightly over 15%.¹³³ Net outward migration increased from 8,000 in 1980 to 46,000 in 1989.¹³⁴ During the 1980s, the total net outward migration was in excess of 180,000.¹³⁵

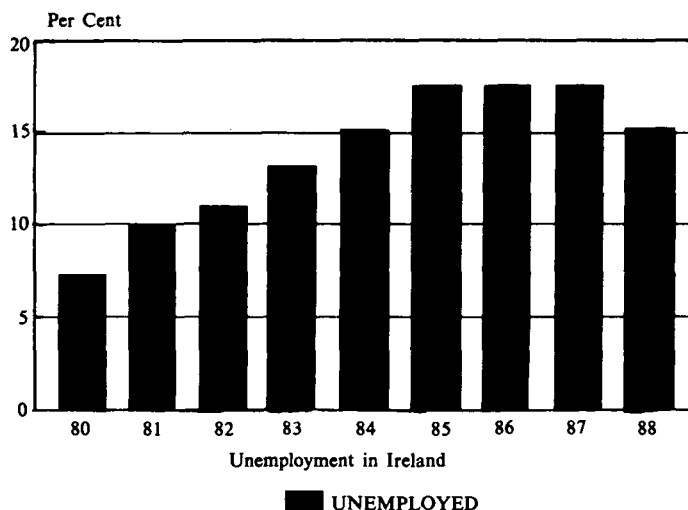
The bulk of the emigrants, 70%, went to the United Kingdom. Twenty-five percent came to the United States. The remaining 5% went to EEC¹³⁶ countries, Australia, New Zealand, and Canada.¹³⁷ Except for the EEC, the destinations are all traditional ones. The difference, however, is the difficulty in being received by those traditional hosts. The doors are no longer standing open, and previous preferential leanings may no longer exist.

There are, currently, between 40,000 and 125,000 illegal Irish

131. Interview with Denis Sheehan, Administrative Officer, Irish Embassy (Oct. 8, 1990) [hereinafter Sheehan].

132. *Id.*

133. *Id.*



134. *Id.*

135. *Id.*

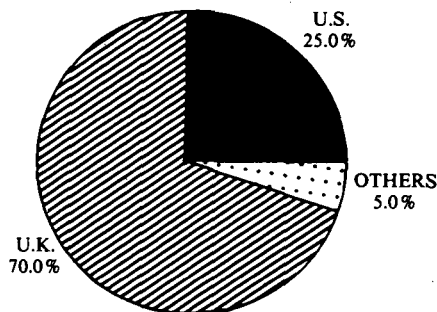
136. Ireland is a member of the European Community, and citizens may, and often do, migrate to member nations without restrictions. In 1977, a small but significant ethnic minority resided in Belgium, for instance. S. CASTLES, *HERE FOR GOOD*, 90 (1984). However, according to the Irish Embassy, European migration is not popular because the Irish school system does not stress bi-lingualism, and acquiring a working facility in a foreign language creates obstacles to easy integration. Emigration to Australia, Canada and New Zealand is limited because of their comparatively restrictive immigration policies.

137. PROJECT IRISH OUTREACH, CATHOLIC CHARITIES, ARCHDIOCESE OF NEW YORK, *IMMIGRATING USA: A GUIDE FOR IRISH IMMIGRANTS*, 13 (2nd printing 1990) [hereinafter *IMMIGRATING USA*].

immigrants in the United States.¹³⁸ Not all Irish migrating to the U.S. are illegals: in FY 1990, 4,829 Irish were granted resident visa numbers.¹³⁹ However, these figures are inflated by the inclusion of 4,005 lottery visas.¹⁴⁰ Less than 1,000 Irish entered under the six preferences categories of the Immigration and Nationality Act of 1966,¹⁴¹ immigrants who had finally reached the top of the list in the long waiting lines attached to each category.

Entering the U.S. by the standard procedure is a slow process for the Irish. Waiting periods vary from six years (siblings of citizens) to no wait at all (sons and daughters of U.S. citizens).¹⁴² The waiting periods for the two work preferences range from about a year for third preference (professionals, scientists, artists) to three to four years for sixth preference (certified labor shortage).¹⁴³ Yet there was once no such wait, and the Irish were able to enter for settlement almost at will.

The Irish formed a major part of the United States' immigration pool from the earliest days of the nation. By 1790, the national population was about 3 million. The Irish population was about two percent of that number.¹⁴⁴ In the 1830s, political and religious perse-



IRISH EMMIGRANT DESTINATIONS

138. Sheehan, *supra* note 131.

139. Interviews with Seton Stapleton, Chief, Immigrant Visa Control Division, U.S. State Department (Sept. 9 and Oct. 8, 1990) [hereinafter Stapleton].

140. *Id.* The Immigration Reform and Control Act of 1986 (IRCA), Pub. L. 99-603, 100 Stat. 3359 (1986) made provision for 5,000 visas to be distributed by lottery in each of FY 1987 and 1988. This provision, labelled "Donnelly visas" after Congressman Brian Donnelly who sponsored the legislation, was included largely to benefit the Irish, most of whom were unable to benefit by the Jan. 1, 1982 cut-off date for amnesty. The program (NP-5) was continued and expanded in the Legal Immigration Amendments Act of 1988, Pub. L. 100-658, 102 Stat. 3808. Fifteen thousand visas were added for each of FY 1989 and 1990. At the same time, a second visa program (OP-1), named after its sponsor, Congressman Howard L. Berman, was added to provide a total of 10,000 visas during FY 1990 and 1991 to "natives of underrepresented countries." *Id.* § 3(a). An underrepresented country is defined as one which used less than 5,000 preference immigrant visa numbers during FY 1988. *Id.* § 3(e).

141. Sheehan, *supra* note 131.

142. IMMIGRATING USA, *supra* note 137, at 17-18.

143. *Id.* at 18-19.

144. M. C. LEMAY, FROM OPEN DOOR TO DUTCH DOOR, 24-25 (1987).

cutions by the British drastically raised the emigration levels.¹⁴⁵ The potato famine in the late 1840s forced more emigration. Over a million Irish landed in the U.S. between 1847 and 1854, almost a quarter million in 1851 alone.¹⁴⁶

The flood continued into the twentieth century, unhindered by any legislative bar or control which particularly affected the Irish people. In 1875, Congress passed an act which barred the entry of convicts and prostitutes.¹⁴⁷ In 1882, the Chinese Exclusionary Act also barred "any convict, lunatic, idiot, or any person unable to take care of himself or herself without becoming a public charge."¹⁴⁸ The first immigration legislation which directly affected the Irish was the Immigration Act of 1921.¹⁴⁹

The 1921 Act established the first quota system, limiting immigration from any one nation to three percent of "the number of foreign-born persons of such nationality resident in the United States as determined by the . . . census of 1910."¹⁵⁰ The Republic of Ireland was still considered part of the United Kingdom at the time the Act was written, and the Irish quota was included in the 77,342 allotted Great Britain.¹⁵¹

The next quota-establishing act, the Immigration Act of 1924, calculated quotas based on two percent of the population figures resulting from the 1890 census.¹⁵² This provided the Irish, now an independent country, with a quota of 28,567.¹⁵³ In 1928, Congress enacted legislation which established the quotas that remained in effect, with little change, for the next thirty-five years.¹⁵⁴ Quotas were derived on the basis of the 1920 census,¹⁵⁵ and the Irish received an allotment of 17,853. In 1952, this figure was minutely adjusted, to 17,756, by a presidential proclamation which established new national quotas.¹⁵⁶

Enactment of the Immigration and Nationality Act of 1965¹⁵⁷ resulted in a drastic limitation of available visas. Although any one

145. *Id.* at 25.

146. *Id.*

147. Act of March 3, 1875, ch. 141, § 5, 18 Stat. 477 (current version at 8 U.S.C. § 1182(A)(2), (10) (1990)).

148. Chinese Exclusionary Act, ch. 126, § 2, 22 Stat. 58 (1882) (repealed December 17, 1943).

149. Immigration Act of 1921, ch. 8, 42 Stat. 5 (1921) (repealed June 27, 1952).

150. *Id.*, § 2(a).

151. M.C. LEMAY, *supra* note 144, at 91.

152. Immigration Act of 1924, ch. 190, § 211(a) (1924) (repealed June 27, 1952).

153. M.C. LEMAY, *supra* note 153, at 91.

154. S. J. Res. 5, 45 Stat. 1009, § 6 (1928).

155. *Id.*

156. Proclamation 2980, 17 Fed. Reg. 6019 (1952), *reprinted in* 66 Stat. C36 (1952).

157. Immigration and Nationality Act of 1965, Pub. L. 89-236, 79 Stat. 911 (codified as amended in scattered sections of 8 U.S.C. (1970 & Supp. 1990)).

country could be issued up to 20,000 visas,¹⁵⁸ the total number was subject to a cap (270,000 in 1989),¹⁵⁹ and visas were issued in the order in which requests were received.¹⁶⁰ Instead of nearly 18,000 visas being available almost for the asking, the Irish of the 1980s were obliged to wait their turn, along with the rest of the world's emigrant population.¹⁶¹

158. 8 U.S.C. § 1152 (a) (1970).

159. 8 U.S.C. § 1151(a) (1970).

160. 8 U.S.C. § 1153(c) (1970).

161. A large communications problem exists as to who has a "right" to immigrate to the United States. Under the Immigration and Nationality Act of 1952, with its attendant quotas, foreign nationals knew, or could easily discover, what their chances were of obtaining a visa. They knew where they were in the line. The only number they had to worry about was the allotment for their country. However, the Immigration and Nationality Act of 1965 introduced a cap on total immigration per year and replaced the old quotas with a percentage system. Therein lies the problem. People apparently do not recognize the cap and have not made the mental switch from "quota" to "percentage limitations" and "order of priority specified," the language of the 1965 Act. Immigration and Nationality Act of 1965 § 201(d).

Comparison: Immigration and Nationality Acts
1952-1989

	1952	1965	1990
Annual Maximum (World Wide)	none 202,749 entered	170,000	270,000
National Miximum	17,756 (Ireland)	20,000	20,000
Preference 1	50% desirable immigrants + spouses, minor children	20% unmarried sons & daughters of citizens	20%
Preference 2	30% parents of citizens	20% spouses, unmarried sons and daughters of citizens	26%
Preference 3	20% spouses, minor children of resident aliens	10% professionals, scientists, artists	10%
Preference 4	Extras, other eligibles; maximum 25%: siblings, sons & daughters of citizens	10% married sons and daughters of citizens	10%
Preference 5		24% siblings of citizens	24%
Preference 6		10% certified labor shortages	10%
Preference 7		6% persecuted aliens from specified countries, areas	

The Act makes two very specific numeric limitations. The first is the *total* number of immigrants to be admitted during any one fiscal year. Currently, that number is 270,000. Stapleton, *supra* note 139. The second limitation is the number of visas, 20,000, to be made available to any single nation for any single fiscal year. Immigration and Nationality Act of 1965 § 203(a). Obviously, if the total number of visas available for all the applicants from all around the world is only 270,000, not every nation can expect to be allotted the potential national maximum of 20,000. If every nation could expect to receive a total allotment, then

VI. Legislative Rescues

In the ten years prior to passage of the Immigration and Nationality Act of 1965, FY 1956-1965, 71,023 Irish immigrated to the United States, approximately 7,102 annually.¹⁶² In the twenty years following, FY 1966-1985, a total of 31,820 were admitted, that is, 1,591 annually.¹⁶³ The restrictions of the 1965 limitations were felt when the Irish economy began to fail in the early 1980s.¹⁶⁴ Unable to find refuge in a country which had been one of Ireland's traditional hosts in times of economic trouble, thousands of young Irish

only 13.5 countries would be served.

In addition, to make it absolutely clear that the quota system is no longer in use, the Act says

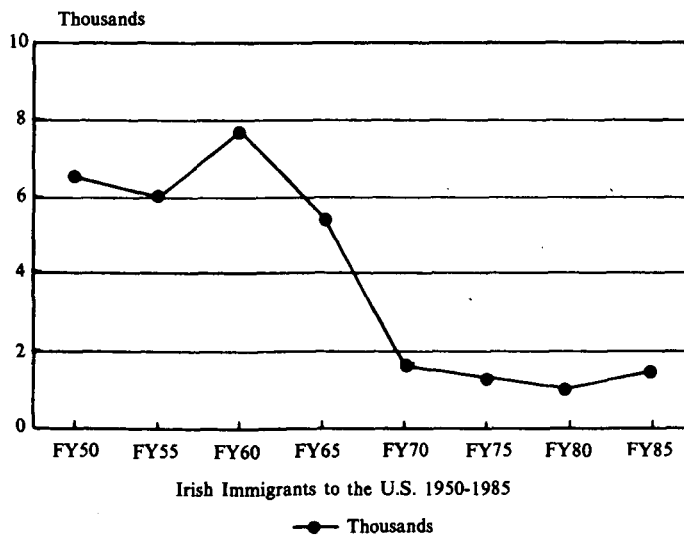
[t]he immigration pool and the quotas of quota areas shall terminate June 30, 1968. Thereafter immigrants . . . who are subject to the numerical limitations . . . shall be admitted in accordance with the *percentage limitations and in the order of priority specified* in section 203.

Id. § 201(e), emphasis added.

In spite of this clarity, there is still a firm belief that "quotas" exist. For many Irish, and those sympathetic to their current difficulties, the "numerical limitations" language of the 1965 Act translates into a "quota" of 20,000. In an opinion appearing *The New York Times* in 1986 and entitled "Relax the Irish Quota", President Reagan was quoted as stating "the Irish quota is 20,000 annually." *The New York Times*, March 21, 1986, *reprinted in* 132 Cong. Rec. S3213 (1986). Newspapers perpetuate the misuse: "The 1965 act raised quotas from countries that had been previously disadvantaged . . ." *The New York Times*, Nov. 27, 1988, A1 at 52, col. 3. "The Irish were disadvantaged by a 1965 rewrite of immigration quotas . . ." *The Washington Post*, March 12, 1989, at A1, col. 3. "[T]he 1965 Immigration and Nationality Act . . . raised quotas . . ." *The Christian Science Monitor*, March 23, 1989, at 24, col. 2. Under these circumstances, it is no wonder people are still confused.

^{162.} Stapleton, *supra* note 139.

^{163.} *Id.*



^{164.} *The Christian Science Monitor*, March 23, 1989, at 24, col. 2.

simply entered illegally.¹⁶⁵

A variety of legislative measures sprang up in response to the newest wave of Irish immigration. The earliest, the Immigration Reform and Control Act of 1986 (IRCA)¹⁶⁶ was a mixed blessing to the new illegals. On the negative side, the amnesty provisions¹⁶⁷ did not apply to the Irish as the majority of them did not arrive until after the amnesty cut-off date of Jan. 1, 1982. Net outward migration from Ireland remained below 10,000 annually until 1983 when the unemployment rate approached fourteen percent.¹⁶⁸ Then outmigration rose to 14,000.¹⁶⁹ Amnesty was a pointless provision, and in fact, only 600 Irish actually qualified.¹⁷⁰

However, Congressman Brian J. Donnelly attached a saving section to the Act, a provision for additional visas.¹⁷¹ Section 314 provided for distribution of 5,000 visas in each of FY 1987 and 1988.¹⁷² The visas were to be made available to those nations which were "adversely affected by the enactment of Public Law 89-236."¹⁷³

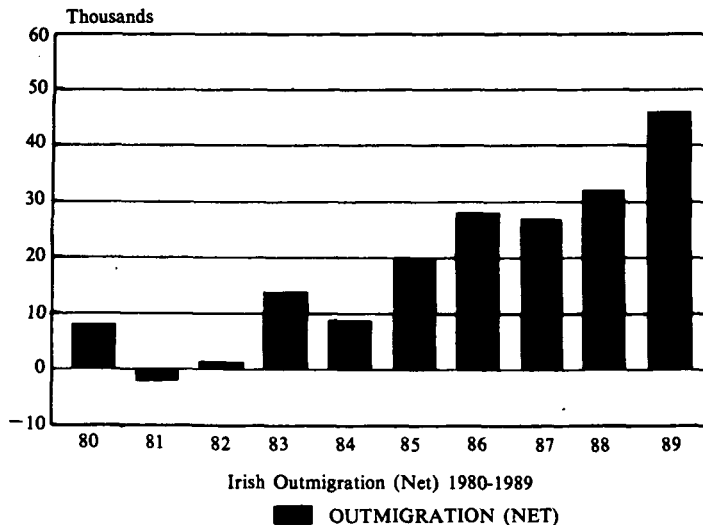
165. *Id.*

166. Immigration Reform and Control Act of 1986, Pub. L. 99-603, 100 Stat. 3359 (as codified in scattered sections of 8 U.S.C.).

167. *Id.* § 201.

168. Sheehan, *supra* note 131.

169. *Id.*



170. The Christian Science Monitor, March 23, 1989, at 24, col. 2.

171. Immigration Reform and Control Act of 1986 § 314.

172. *Id.* § 314(a).

173. *Id.* § 314(b)(1). An "adversely affected country" is defined as one "whose average annual rate of immigration to the United States during the period from July 1, 1966, to September 30, 1985, was less than its average annual rate of immigration to the United States during the period from July 1, 1953, to June 30, 1965." 22 C.F.R. § 43.2 (1987). Thirty-six countries were determined to be "adversely affected." Stapleton, *supra* note 139.

Visas were to be distributed in the chronological order in which applications were received.¹⁷⁴

Given such an opportunity, the Irish were more than equal to the challenge. Applications were sent to a Washington, D.C. post office box on January 21, 1987.¹⁷⁵ Of the 1.5 million applications received, 200,000 of the earliest came from potential Irish immigrants.¹⁷⁶ Individuals submitted as many as fifty applications.¹⁷⁷ Other enterprising souls invited in their friends to a visa party. Guests spent the first part of the evening filling out hundreds of applications in the host's name.¹⁷⁸ Not surprisingly, the Irish came out ahead in the sweepstakes, garnering 3,920, or 39.2%, of the total number of available visas.¹⁷⁹

Two years later, in November, 1988, two more supplementary visa programs were established.¹⁸⁰ The first, again sponsored by Congressman Donnelly, extended the 1986 program two more years, through FY 1989 and 1990 and added 15,000 visas.¹⁸¹ Visa recipients were to be chosen from the applicant pool, already saturated with Irish applications, established in 1987.¹⁸² If the Irish benefitted from their proverbial luck in the first round of the lottery, they were wildly successful in the second round. They were allotted 12,409 more visas, bringing their four-year total to 16,329 and their total share to 40.8%.¹⁸³

The second lottery authorized by the 1988 Act was not as beneficial to the Irish. Sponsored by Congressman Berman, this lottery was intended enhance diversity by supplementing visas for "under-

174. Immigration Reform and Control Act § 314(b)(2).

175. The New York Times, November 27, 1989, § 1, at 52, col. 3.

176. *Id.*

177. The Washington Post, March 12, 1989, § 1, at 1, col. 3.

178. The New York Times, March 17, 1989, at B1, col. 4.

179. Stapleton, *supra* note 139. Canada had the second highest number, 1,796. Great Britain and Northern Ireland combined ran a poor third with a mere 1,120. Some eligible countries were awarded few to no visas, but most of these were smaller nations with limited emigration in general (Albania-0, Estonia-1, Gibraltar-1, Iceland-3, Latvia-1, Liechtenstein-0, Luxembourg-0, Monaco-0, New Caledonia-0, San Marino-0). *Id.*

180. Immigration Amendments of 1988, P.L. 100-658, 102 Stat. 3908 (as codified in 8 U.S.C. §§ 1101, 1153 (Supp. 1990)).

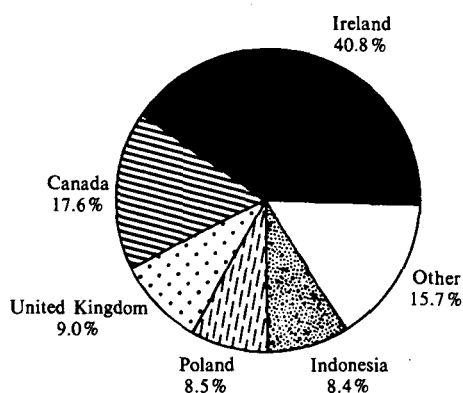
181. *Id.* § 2(a).

182. *Id.* § 2(b).

183. Stapleton, *supra* note 139. Canada stayed in second place with a final total of 7,055 and a share of 17.63%. Great Britain and Northern Ireland retained third place with 3,604 and a share of 9.01%. Poland and Indonesia were closely tied for fourth place with shares of 8.46% and 8.44% respectively. *Id.*

represented" countries.¹⁸⁴ An underrepresented country is defined as one in where fewer than 5,000 preference immigrants received visas during FY 1988.¹⁸⁵ To make the allotment of visas as equitable as possible, they were to be issued strictly in random order.¹⁸⁶ A further proviso dictated that only one application per alien was permitted, and if more than one was submitted, each would be voided.¹⁸⁷

Under these limitations, visa parties were not in order. The Irish received only 125 visas for FY 1990, a number which placed them eighteenth on the list of recipient countries.¹⁸⁸ The first six recipient countries were Bangladesh, 2,218; Pakistan, 909; Egypt, 469; Peru, 458; Trinidad & Tobago, 428; and Poland, 349.¹⁸⁹



Donnelly Visas by Country (FY87—FY90)

184. Immigration Amendments of 1988 § 3.

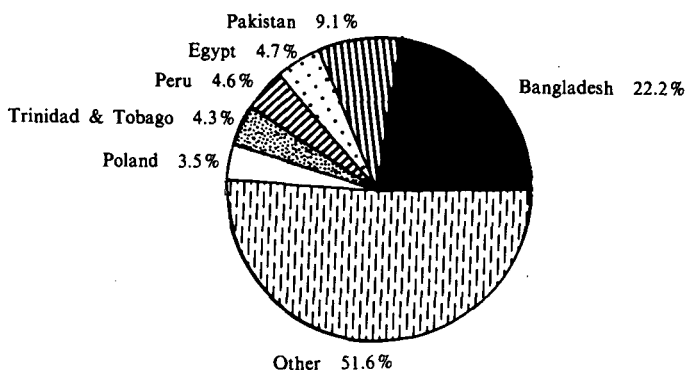
185. *Id.* § 314(e). Visa numbers issued under § 314 of the 1986 Act were not to be included in calculating the number of visas each country used. *Id.* One hundred, sixty-two nations qualified as "underrepresented." Thirteen countries did not. *Id.*

186. Immigration Amendments of 1988 § 3(b).

187. *Id.*

188. Stapleton, *supra* note 139.

189. *Id.*



Berman Visas by Country (FY 1990)

The passage of the Immigration Act of 1990¹⁹⁰ on October 27, 1990 provides windfall blessings for Irish immigrants, legal and illegal. The Act raises total annual immigration to 700,000 for FY 1992-1994.¹⁹¹ Beginning in FY 1995, the annual ceiling will drop to 675,000.¹⁹² The Irish can expect to benefit from this major restructuring of United States immigration policy in three specific ways.

Highlights: Immigration Act of 1990

	FY 1992-1994	FY 1995 and after
World-Wide level (estimated)	700,000	675,000
Per Country level (estimated)	7% of any subsection	same
Immediate relatives of citizens	estimated ceiling 239,000	estimated ceiling 254,000
Family Sponsored category		
* unmarried sons & daughters of citizens	23,400	same
* sons, daughters & spouses of resident aliens	114,200	same
* married sons & daughters of citizens	23,400	same
* siblings of citizens	65,000	same
<u>Total</u>	<u>226,000</u>	<u>226,000</u> (floor)

190. H.R. CONF. REPT. NO. 955, 101st Cong., 2d Sess., 136 CONG. REC. H12,358-H12,368 (1990). The Act was signed Nov. 29, 1990.

191. H.R. CONF. REPT. NO. 955, 101st Cong. 2d Sess. 119 (1990) [hereinafter CONF. REPT.]. Current immigration is approximately 500,000 annually. BNA Washington Insider, October 26, 1990, (LEXIS, Genfed library, BNAWI file).

192. *Id.* Once again terminology is changing. Unable to learn to substitute "preferences" for "quotas", see *supra* note 161, commentators and comments can anticipate continued confusion with the introduction of "levels," "floors" and "ceilings" to the vocabulary of immigration law.

Transition, Family category	55,000	eliminated
Employment based categories		
* priority workers; "extraordinary ability"	40,000	same
* advanced professionals; "exceptional ability"	40,000	same
* qualified workers —skilled —unskilled (ceiling: 10,000)	40,000	same
* investors	10,000	same
* special immigrants	10,000	same
<u>Total</u>	<u>140,000</u>	<u>140,000</u>
Diversity (for FY 1992-94, 40% of the annual total is mandated to go to the Irish)	40,000 (Irish: 16,000)	55,000
<u>Annual Total</u>	<u>700,000</u>	<u>675,000</u>

First, the Irish are guaranteed 16,000 visas a year from FY1992 through FY1994.¹⁹³ Second, immigration preferences have been rearranged and the numbers increased.¹⁹⁴ And third, a category labelled "diversity immigrants" makes 55,000 visas available annually beginning FY 1995.¹⁹⁵

The Act provides 40,000 visas for each of FY 1992-1994 for immigrants from countries identified as "adversely affected" by section 314 of IRCA.¹⁹⁶ Visa candidates must have a firm offer of at least one year's employment in the United States.¹⁹⁷ A special provision quietly delimits the Irish immigrant's pot of gold. Forty percent of the visas available each year (16,000) are specifically reserved for "natives of the foreign state the natives of which received the greatest number of visas issued under section 314 of the Immigration Reform and Control Act" or to their spouses or children.¹⁹⁸ Forty-eight thousand visas will not completely relieve the entry problem, but they should go a long way toward easing it.

After the three year introductory period, 55,000 diversity visas will be distributed annually according to a formula to be derived by

193. Immigration Act of 1990, Pub. L.No. 101-649, § 132(c), 104 Stat. 4978, 5000.

194. *Id.* § 111, at 4986. Compare the figures in the in-text chart preceeding note 193 *supra* with those at note 130 *supra*.

195. *Id.* § 101(a), at 4982.

196. *Id.* § 132, at 5000.

197. *Id.*

198. *Id.* See *supra* graph accompanying note 183.

the Attorney General's office.¹⁹⁹ These visas are intended to benefit natives of the foreign states which produced fewer than 50,000 immigrants in the preceding five year period.²⁰⁰ Conditions are attached to these visas. Only 7% (3,850) per year may be allotted to any one country.²⁰¹ There is also an education/work experience requirement. Eligible applicants must have either a high school education or its equivalent.²⁰² Alternatively, the applicant must have at least two years' experience in an occupation which requires a minimum of two years' education or training.²⁰³ The Irish should qualify for some of these visas unless a dramatic rise in immigration moves Ireland out of the "adversely affected" category.²⁰⁴

Rearrangement of admission preferences will also benefit the Irish. Preferences are now broken down into two broad categories and priorities and numbers reassessed. Per country levels for each subdivision equal seven percent of the world-wide total.²⁰⁵ It should be noted that this percentage is a maximum, not a guarantee. The first category is immediate relatives of citizens which includes spouses, minor children and parents.²⁰⁶ An estimated 239,000 visas for FY 1992-1994 and 245,000 for FY 1995 and the years following are allotted to this category.²⁰⁷

The second category of preferences, family-sponsored immigrants, is subdivided into four classes and has an estimated annual, world-wide level of 465,000 for FY 1992-1994.²⁰⁸ Thereafter, the level rises to 480,000 annually.²⁰⁹ The four classes roughly correspond to the family preferences established in 1965. In order, these preference classes are the unmarried sons and daughters of citizens (same as 1990 Code), spouses and unmarried sons and daughters of resident aliens (same as 1990 Code), married sons and daughters of citizens (previously fourth preference), and siblings of citizens (previously fifth preference).²¹⁰

The third group of preferences, employment-based immigrants,

199. *Id.* § 131, at 4997-98.

200. CONF. REPT., *supra* note 191, at 122.

201. Act of 1990, *supra* note 193, § 131, at 4999.

202. *Id.*

203. *Id.*

204. Sheehan, *supra* note 138. Ireland emphasizes education strongly. Most young people have the equivalent of a high school education, and many have advanced schooling, particularly in trades and technical occupations such as nursing.

205. Act of 1990, *supra* note 193, § 102, at 4982.

206. CONF. REPT., *supra* note 191, at 119.

207. *Id.* Visas for the immediate relatives of U.S. citizens are unlimited, a circumstance which inflates annual immigration figures. 8 U.S.C. § 1151(a) (1970 & Supp. 1990). The new figures are derived by subtracting specifically allotted visas from the estimated total per annum.

208. Immigration Act of 1990 § 101(a) at 4982.

209. *Id.*

210. *Id.* § 111(2), at 4986.

is limited to a world-wide maximum of 140,000.²¹¹ There are five subdivisions: priority workers; professionals with advanced degrees or of exceptional ability; skilled workers and others; special immigrants; and entrepreneurs.²¹² The majority of the available visas are reserved for highly educated or highly skilled immigrants.²¹³ Fewer than 50,000 visas will be available for the less skilled, less educated worker.²¹⁴

These latter two categories, family-sponsored and employment-based will not particularly benefit the Irish. Instead, the increased numbers in each category merely represent a greater opportunity to qualify under standards which may be more stringent than the current ones. The Irish may actually find themselves more limited in the employment-based category as most current immigrants are between ages eighteen and thirty-five,²¹⁵ and they may not be able to qualify as priority workers or professionals. It remains to be seen how effective this new legislation will actually be in shortening the lines of those waiting to immigrate legally.

VII. Conclusion

The timely arrival of the Immigration Act of 1990 has apparently provided Irish immigrants with an answer to the Flying Dutchman Dichotomy. But for how long? Who will be the next group of immigrants to suffer? What host countries will be able or willing to restructure their policies to accommodate the next group of Dutchman?

The United States' legislative answers to the problems of Irish and other immigrants in the latter part of the twentieth century are stop-gaps. They do not provide an answer to the basic problem: one may have right to leave one's own country, but when international law permits any nation to limit access to its borders as it chooses, there may be no place for the traveller to go.

There may not be an answer. Unless one is prepared to suggest that all countries must open their borders to whoever chooses to enter, and this Comment does not, there does not seem to be any solution. However, there may be a temporary answer to a temporary problem. The Irish are currently emigrating because their home economy is forcing them to leave their country to find employment. Perhaps the answer to the Dichotomy, at least in areas of unemployment, is to encourage international migration on a temporary basis

211. *Id.* § 101(a), at 4982.

212. *Id.* § 121, at 4987-89.

213. *Id.*

214. *Id.* at 4989.

215. IMMIGRATING USA, *supra* note 137, at 12.

for the purpose of finding work.

The concept of the right to migrate for employment has already been discussed.²¹⁶ While it is beyond the scope of this Comment to address this right in any detail, it does suggest that migration for employment might not be just a human right in today's world. It might be a human necessity.

The Irish economy is just one "hot spot" of economic trouble, but there will be others. As one economy recovers, another begins to fail. Currently, even as the Irish economy shows signs of strengthening, the disastrous economies in newly open Eastern European countries are causing thousands to migrate into the European Community.²¹⁷ The Soviet Union is due to enact a law granting its citizens freedom of travel.²¹⁸ No one knows how many people will decide to migrate, but Western Europe is not prepared to absorb all the new immigrants who arrive daily looking for jobs, sanctuary, a new home.²¹⁹

The international community as a whole must address the question of migration, especially migration for employment. Stop-gap measures cannot continue to serve as solutions to a recurring problem. It is time for the international community to take seriously the philosophy set forth in the International Declaration of Human Rights.

Everyone has the right to work, to free choice of employment, to just and favorable conditions of work and to protection against unemployment.²²⁰

Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized.²²¹

Suzanne McGrath Dale

216. See *supra* notes 41-54 and accompanying text.

217. The New York Times, November 1, 1990, at A13, col. 1.

218. *Id.*

219. *Id.*

220. Universal Declaration, *supra* note 18, art. 23.

221. *Id.* art. 28.

