The Governor's Council for Judicial Appointments

State of Tennessee

Application for Nomination to Judicial Office

Name: Jonathan Haston Wardle

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Home Phone: [redacted] Cellular Phone: [redacted]

INTRODUCTION

The State of Tennessee Executive Order No. 54 (May 19, 2016) hereby charges the Governor's Council for Judicial Appointments with assisting the Governor and the people of Tennessee in finding and appointing the best and most qualified candidates for judicial offices in this State. Please consider the Council's responsibility in answering the questions in this application. For example, when a question asks you to "describe" certain things, please provide a description that contains relevant information about the subject of the question, and, especially, that contains detailed information that demonstrates that you are qualified for the judicial office you seek. In order to properly evaluate your application, the Council needs information about the range of your experience, the depth and breadth of your legal knowledge, and your personal traits such as integrity, fairness, and work habits.

This document is available in Microsoft Word format from the Administrative Office of the Courts (telephone 800.448.7970 or 615.741.2687; website www.tncourts.gov). The Council requests that applicants obtain the Microsoft Word form and respond directly on the form using the boxes provided below each question. (The boxes will expand as you type in the document.) Please read the separate instruction sheet prior to completing this document. Please submit your original, hard copy (unbound), completed application (*with ink signature*) and any attachments to the Administrative Office of the Courts. In addition, submit a digital copy with your electronic or scanned signature. The digital copy may be submitted on a storage device such as a flash drive that is included with your hard-copy application, or the digital copy may be submitted via email to ceesha.lofton@tncourts.gov. See section 2(g) of the application instructions for additional information related to hand-delivery of application packages due to COVID-19 health and safety measures

THIS APPLICATION IS OPEN TO PUBLIC INSPECTION AFTER YOU SUBMIT IT.

PROFESSIONAL BACKGROUND AND WORK EXPERIENCE

1. State your present employment.

Assistant Attorney General, Criminal Appeals Division, Office of Tennessee Attorney General.

2. State the year you were licensed to practice law in Tennessee and give your Tennessee Board of Professional Responsibility number.

2006. BPR # 025741.

3. List all states in which you have been licensed to practice law and include your bar number or identifying number for each state of admission. Indicate the date of licensure and whether the license is currently active. If not active, explain.

Tennessee. BPR # 025741. October 2006. Active.

4. Have you ever been denied admission to, suspended or placed on inactive status by the Bar of any state? If so, explain. (This applies even if the denial was temporary).

No.

5. List your professional or business employment/experience since the completion of your legal education. Also include here a description of any occupation, business, or profession other than the practice of law in which you have ever been engaged (excluding military service, which is covered by a separate question).

Office of Tennessee Attorney General, 2014-present, assistant attorney general.

Wardle Law, PLC, 2011-2014, owner and sole member.

Neal & Harwell, PLC, 2006-2011, associate.

I also worked in information systems and computer programming prior to attending law school. Please see the attached curriculum vitae for more information on my work experience.

6. If you have not been employed continuously since completion of your legal education,

describe what you did during periods of unemployment in excess of six months.

Not applicable.

7. Describe the nature of your present law practice, listing the major areas of law in which you practice and the percentage each constitutes of your total practice.

For the past six years I have handled criminal appeals and appeals of other collateral proceedings on behalf of the State of Tennessee. During this time I have filed 325 briefs and orally argued approximately 70 cases in the Court of Criminal Appeals. I have also responded to Rule 11 applications seeking discretionary review by the Tennessee Supreme Court; and I have successfully filed an application for permission to appeal to the Tennessee Supreme Court. That application was granted and the decision of the Court of Criminal Appeals was summarily reversed. *See Maxwell v. State*, No. W2018-00318-SC-R11-PC (Tenn. Sept. 3, 2019). Litigation before the Court of Criminal Appeals constitutes well over 90% of my practice.

While with the Office of the Tennessee Attorney General, I have also litigated habeas corpus cases in state and federal court, authored two opinions on behalf of the Tennessee Attorney General, and reviewed dozens of extradition applications for legal sufficiency. I have also filed a brief in the Court of Appeals in a case involving the termination of parental rights, and I am currently assigned to a premises liability case pending before the Tennessee Claims Commission.

8. Describe generally your experience (over your entire time as a licensed attorney) in trial courts, appellate courts, administrative bodies, legislative or regulatory bodies, other forums, and/or transactional matters. In making your description, include information about the types of matters in which you have represented clients (e.g., information about whether you have handled criminal matters, civil matters, transactional matters, regulatory matters, etc.) and your own personal involvement and activities in the matters where you have been involved. In responding to this question, please be guided by the fact that in order to properly evaluate your application, the Council needs information about your range of experience, your own personal work and work habits, and your work background, as your legal experience is a very important component of the evaluation required of the Council. Please provide detailed information that will allow the Council to evaluate your qualification for the judicial office for which you have applied. The failure to provide detailed information, especially in this question, will hamper the evaluation of your application.

My answer to Question 7 describes my practice since my employment with the Office of the Tennessee Attorney General.

Prior to joining the Office of the Tennessee Attorney General, I represented clients in a wide variety of matters. While in private practice, I represented clients in juvenile court, general sessions, circuit court, criminal court, probate court, chancery court, the Court of Appeals, and the Tennessee Supreme Court. I also represented clients in federal district court. Most of my cases were in Davidson County, but I handled cases in surrounding counties as well.

As a sole practitioner, most of my practice involved family law, civil rights, landlord-tenant, homeowners' association disputes, personal injury, and criminal defense, with a smattering of wills and probate matters and contract review. I handled every aspect of these cases—drafting pleadings, conducting written discovery and depositions, filing and responding to motions, attending court hearings and bench trials, and preparing appeal briefs and other memoranda.

As an associate at Neal & Harwell, most of my practice involved personal injury and medical malpractice, commercial litigation, and toxic tort; I also dealt with some regulatory matters, criminal defense, workers' compensation, family law, commercial landlord-tenant matters, and class action lawsuits. On some cases, I was mainly involved with legal research, document review, and producing written discovery. But I was much more involved in most of the cases I was assigned to: I drafted pleadings, deposed litigants and experts, argued motions, and attended various court hearings. As a young associate at Neal & Harwell, I also argued a case before the Court of Appeals and before the Tennessee Supreme Court.

My answer to Question 9 describes some of the more significant cases I have been involved in. Please also see the attached curriculum vitae for more information about my work history.

I am admitted to practice in all three federal district courts in Tennessee and in the United States Court of Appeals for the Sixth Circuit.

9. Also separately describe any matters of special note in trial courts, appellate courts, and administrative bodies.

The most-cited case I have litigated is *Cracker Barrel Old Country Store, Inc. v. Epperson*, 284 S.W.3d 303 (Tenn. 2009), which I argued jointly with Bill Ramsey before the Tennessee Supreme Court as part of a S.C.A.L.E.S. project. The primary issue in the case was whether the underlying contract allowed for an award of attorney's fees, but the Tennessee Supreme Court also used the case as an opportunity to clarify the distinction between judicial estoppel and equitable estoppel.

As an associate with Neal & Harwell, I also worked on a joint venture dispute that was litigated simultaneously in federal court and state court. One of the joint venturers merged into a large national company, and the remaining joint venturer filed suit for breach of contract and tortious interference. We represented the

national company that acquired one of the joint venturers. One of the federal court decisions is available in the Federal Supplement at *Freeman Mgmt. Corp. v. Shurgard Storage Ctrs., Inc.*, 461 F.Supp.2d 629 (M.D. Tenn. 2006).

As a solo practitioner, I represented the plaintiffs in a difficult civil rights and education law case that required filing a § 1983 action in federal court and a petition for writ of certiorari in chancery court. The petition for certiorari was denied (as expected) in both chancery court and on appeal. Unfortunately, I had to withdraw from the federal case when I began employment with the Office of the Tennessee Attorney General. The Tennessee Court of Appeals opinion is available at *Link v. Metro. Nashville Bd. of Pub. Educ.*, No. M2013-00422-COA-R3-CV, 2013 WL 6762393 (Tenn. Ct. App. Dec. 19, 2013).

As a solo practitioner, I represented the plaintiff in a homeowners' association dispute. We obtained a temporary injunction preventing the homeowners' association from creating a drainage ditch through my client's property. The parties were particularly acrimonious but, thankfully, the attorneys were not. Eventually the parties resolved the matter, but only after significant effort from the attorneys, experts, and Metro Nashville employees.

As a solo practitioner, I handled some difficult child custody cases. In one case, I represented out-of-state grandparents who wanted custody of their young granddaughter. I was able to secure a favorable outcome for the grandparents and their granddaughter; unfortunately, the mother continued to relapse into her drug addiction. In another child custody case, I undertook the representation of an intellectually challenged mother whose parental rights had already been severely curtailed. After months of work, I was able to help my client stabilize her situation and regain some of the trust she had lost with the court and the guardian ad litem, and my client was again allowed some visitation with her child.

Please see the attached curriculum vitae for other representative cases.

10. If you have served as a mediator, an arbitrator or a judicial officer, describe your experience (including dates and details of the position, the courts or agencies involved, whether elected or appointed, and a description of your duties). Include here detailed description(s) of any noteworthy cases over which you presided or which you heard as a judge, mediator or arbitrator. Please state, as to each case: (1) the date or period of the proceedings; (2) the name of the court or agency; (3) a summary of the substance of each case; and (4) a statement of the significance of the case.

Not applicable.

11. Describe generally any experience you have serving in a fiduciary capacity, such as guardian ad litem, conservator, or trustee other than as a lawyer representing clients.

Not applicable.

12. Describe any other legal experience, not stated above, that you would like to bring to the attention of the Council.

While in law school, I externed with the Honorable Kenneth F. Ripple on the United States Court of Appeals for the Seventh Circuit. This experience helped shape my belief that our legal system depends on good lawyers and judges. I particularly remember the emotional and mental effort Judge Ripple exerted while grappling with a death penalty case. I also took to heart the counsel he gave us after oral arguments, that as lawyers we should always listen to the judge's question and then answer that question.

I also served as a research assistant for Professor Nancy King while she worked on a landmark habeas corpus study, and as a research assistant for Professor Mark Brandon (now Dean of the University of Alabama School of Law) while he worked on his book, States of Union: Family and Change in the American Constitutional Order (2013). Both experiences broadened my horizons: Professor King's project opened my eyes to the complexities of the legal process, and Professor Brandon's research showed me how our legal system developed in the context of long-forgotten historical events.

13. List all prior occasions on which you have submitted an application for judgeship to the Governor's Council for Judicial Appointments or any predecessor or similar commission or body. Include the specific position applied for, the date of the meeting at which the body considered your application, and whether or not the body submitted your name to the Governor as a nominee.

I applied for the trial court vacancy in the 15th Judicial District Circuit Court created by the retirement of Judge John D. Wooten, Jr. The public meeting was held on January 8, 2020. The commission did not submit my name to the Governor as one of the three nominees. Interestingly, Governor Lee did not select any of the submitted nominees to fill the vacancy prior to the August general election.

EDUCATION

14. List each college, law school, and other graduate school that you have attended, including dates of attendance, degree awarded, major, any form of recognition or other aspects of your education you believe are relevant, and your reason for leaving each school if no degree was awarded.

Vanderbilt University Law School, 2003-2006, J.D. Order of the Coif;

Vanderbilt Law Review; Dean's List (every semester); Scholastic Excellence Awards in constitutional law, criminal law, and immigration law & policy. Note published in the Vanderbilt Law Review (58 Vand. L. Rev. 1963 (2005)).

Brigham Young University, 1996-2003, B.A. Communications (print journalism emphasis). National Merit Scholarship; ORCA Grant; reporter and editor for the student newspaper.

PERSONAL INFORMATION

15. State your age and date of birth.

42 [redacted] 1977.

16. How long have you lived continuously in the State of Tennessee?

17 years.

17. How long have you lived continuously in the county where you are now living?

2 years.

18. State the county in which you are registered to vote.

Wilson County.

19. Describe your military service, if applicable, including branch of service, dates of active duty, rank at separation, and decorations, honors, or achievements. Please also state whether you received an honorable discharge and, if not, describe why not.

Not applicable.

20. Have you ever pled guilty or been convicted or placed on diversion for violation of any law, regulation or ordinance other than minor traffic offenses? If so, state the approximate date, charge and disposition of the case.

No.

21. To your knowledge, are you now under federal, state or local investigation for possible violation of a criminal statute or disciplinary rule? If so, give details.

No.

22. Please identify the number of formal complaints you have responded to that were filed against you with any supervisory authority, including but not limited to a court, a board of professional responsibility, or a board of judicial conduct, alleging any breach of ethics or unprofessional conduct by you. Please provide any relevant details on any such complaint if the complaint was not dismissed by the court or board receiving the complaint.

One complaint was filed against me with the Board of Professional Responsibility by a former client (File No. 32187-5-ES). The complaint against me was dismissed; I believe there may have been some action taken against my client's prior attorneys.

I have attached to this application a copy of the disciplinary report I requested last year in support of my application for the vacancy on the 15th Judicial District Circuit Court.

23. Has a tax lien or other collection procedure been instituted against you by federal, state, or local authorities or creditors within the last five (5) years? If so, give details.

I do not believe so. But see my answer to Question 25 below regarding a collection action filed on a business loan.

24. Have you ever filed bankruptcy (including personally or as part of any partnership, LLC, corporation, or other business organization)?

No.

25. Have you ever been a party in any legal proceedings (including divorces, domestic proceedings, and other types of proceedings)? If so, give details including the date, court and docket number and disposition. Provide a brief description of the case. This question does not seek, and you may exclude from your response, any matter where you were involved only as a nominal party, such as if you were the trustee under a deed of trust in a foreclosure proceeding.

Emily Jennifer Wardle v. Jonathan Haston Wardle, Case No. 12D3574, Davidson County Circuit Court. The divorce proceedings were filed in late 2012, the divorce was finalized in 2013, and subsequent parenting plan modifications and related

proceedings continued through 2017.

Reliant Bank v. Jonathan Wardle, Case No. 16GC12705, Davidson County General Sessions Court. This was a collection action on a business loan for my solo practice. The case was filed in 2016 and I agreed to a judgment as soon as the correct amount of the outstanding debt could be ascertained. The debt has been paid in full and the judgment satisfied.

26. List all organizations other than professional associations to which you have belonged within the last five (5) years, including civic, charitable, religious, educational, social and fraternal organizations. Give the titles and dates of any offices that you have held in such organizations.

The Church of Jesus Christ of Latter-day Saints, Mount Juliet 1st Ward, 2018-present. Member, Sunday School President, Organist.

The Church of Jesus Christ of Latter-day Saints, Harpeth Ward, 2003-2018. Member, Finance Clerk, Music Committee Chair, Choir Director, Scout Committee Chair, Primary Teacher, Primary Chorister.

I was also a member of the Exchange Club of Bellevue, TN in 2011 and 2012.

27. Have you ever belonged to any organization, association, club or society that limits its membership to those of any particular race, religion, or gender? Do not include in your answer those organizations specifically formed for a religious purpose, such as churches or synagogues.

    a. If so, list such organizations and describe the basis of the membership limitation.

    b. If it is not your intention to resign from such organization(s) and withdraw from any participation in their activities should you be nominated and selected for the position for which you are applying, state your reasons.

a. Yes. I participated in the Boy Scouts of America, including when membership was limited by gender. I participated as a youth and earned the rank of Eagle. I also participated on a scout committee, including as committee chair, when my oldest son participated in Boy Scouts.

b. I do not currently participate in Boy Scouts on a formal basis.

ACHIEVEMENTS

28. List all bar associations and professional societies of which you have been a member within the last ten years, including dates. Give the titles and dates of any offices that you have held in such groups. List memberships and responsibilities on any committee of

professional associations that you consider significant.

15th Judicial District Bar Association, 2020-present. Member.

Nashville Bar Association, 2006-2011, 2015-present. I actively participate with the following NBA Committees:

- Nashville Bar Journal Committee (2016-present), where I serve on the editorial committee;
- Government Lawyers CLE Committee (2017-present), where I have helped produce the NBA's Government Practice and Professionalism Seminars;
- Historical Committee (2019-present), where I have helped coordinate the submission of articles to the Nashville Bar Journal on topics of historical interest.

Nashville Bar Foundation, 2019-present. Fellow.

J. Reuben Clark Law Society, 2005-present. I am currently on the Board for the Nashville Chapter. I have previously served in the following positions:

- Director, Southeast Area of the Mid-Atlantic Region (2011-2012, 2015-2020);
- Co-Chair, Litigation Section (2009-2011);
- Chair, Nashville Chapter (2007-2009, 2016-2018);
- President, Vanderbilt University Law School Student Chapter (2005-2006).

29. List honors, prizes, awards or other forms of recognition which you have received since your graduation from law school that are directly related to professional accomplishments.

Named a fellow of the Nashville Bar Foundation in 2019.

Nashville Bar Journal Contributor of the Year in 2019.

30. List the citations of any legal articles or books you have published.

Note, *The Strategic Use of Mexico to Restrict South American Access to the Diversity Visa Lottery*, 58 Vand. L. Rev. 1963 (2005).

31. List law school courses, CLE seminars, or other law related courses for which credit is given that you have taught within the last five (5) years.

I was on a panel for the Tennessee Bar Association's Court of Criminal Appeals Bootcamp, in November 2018.

32. List any public office you have held or for which you have been candidate or applicant. Include the date, the position, and whether the position was elective or appointive.

See answer to Question 13 above. Otherwise, none.

33. Have you ever been a registered lobbyist? If yes, please describe your service fully.

No.

34. Attach to this application at least two examples of legal articles, books, briefs, or other legal writings that reflect your personal work. Indicate the degree to which each example reflects your own personal effort.

Attached is a copy of the brief I submitted in *State v. Cynthia P. Nance*, Case No. W2019-01566-CCA-R3-CD. I filed this brief earlier this year, and I orally argued the case in September. I authored the brief alone, with a few edits suggested by a Senior Assistant Attorney General in my division.

Also attached is a copy of the note I published in the Vanderbilt Law Review, cited in response to Question 30. I authored this note alone, with some suggested edits by the Vanderbilt Law Review Board.

ESSAYS/PERSONAL STATEMENTS

35. What are your reasons for seeking this position? ***(150 words or less)***

I care deeply about the rule of law. Even when I do not agree with the substance of any particular law, I care even more passionately about the system that underlies it. I want to belong to the institution that is uniquely dedicated to preserving that rule of law.

I love the intellectual rigor of the appellate courts. And I love to be engaged in a common cause with others whom I admire. I admire the judges who currently serve on the Court and it would be an honor to labor with them in the demanding task of administering and upholding the law.

I enjoy serving others. I have seen how passionately our appellate judges educate lawyers on the improvement of legal skills, and I have seen our judges gently guide struggling attorneys to the resources they need to succeed. I want to share in those efforts.

36. State any achievements or activities in which you have been involved that demonstrate your commitment to equal justice under the law; include here a discussion of your pro bono service throughout your time as a licensed attorney. ***(150 words or less)***

In private practice, I provided services pro bono or for a significantly reduced fee as often as possible. Leaders of my congregation often referred to me individuals of limited means who needed legal assistance. I also helped individuals of limited means who were referred to me by other attorneys, and I handled a couple of matters that were referred to me through the Legal Aid Society.

While Chair of the Nashville Chapter of the J. Reuben Clark Law Society, I helped organize a pro bono program that provided a coordinated response between are attorneys and local church leaders hoping to connect individuals with limited means to available legal resources.

As a government attorney, I am limited in the cases I may take. However, I am still asked to help individuals in need of legal assistance, and I strive to connect them with attorneys and other resources.

37. Describe the judgeship you seek (i.e. geographic area, types of cases, number of judges, etc. and explain how your selection would impact the court. ***(150 words or less)***

This judgeship is on the Tennessee Court of Criminal Appeals, which hears appeals of criminal matters from the trial courts. Although the Court hears cases from across the State, this judgeship must be filled by someone who resides in the Middle Division.

Besides Judge Woodall, whose announced retirement has created this vacancy, there are 11 other judges on the Court. I believe I have argued before each of these judges, and I have a great admiration for the respect with which they treat everyone who appears before them.

My experience before this Court has given me some understanding of the manner in which it conducts its business. My experience handling both cases as a defense attorney and on behalf of the State will help me maintain the fairness and impartiality required of the Court. My broad experience will help me perceive how divergent concepts may fit together within the law.

38. Describe your participation in community services or organizations, and what community involvement you intend to have if you are appointed judge? ***(250 words or less)***

I participate actively with the Nashville Bar Association, and I have started participating with the 15th Judicial District Bar Association to become more involved in the legal community where I live.

I am active with the Nashville Bar Journal and with the NBA Historical Committee. I am particularly pleased that I have been able to use this juxtaposition to foster the publication of articles shining a light on the history of

racial segregation in Nashville's legal community (some of which articles are forthcoming).

I also help produce the NBA's Government Practice and Professionalism Seminars, which present CLE's on topics of interest to government attorneys. I take pride that the CLE's I coordinate (regarding developments in the Tennessee Supreme Court and the United States Supreme Court) are highly rated by attendees.

I have also been active in the J. Reuben Clark Law Society. As discussed in my answer to Question 36, I helped develop a pro bono initiative within the Nashville Chapter. I also developed a fruitful series of lunches connecting local law students with area attorneys. I also helped create the Litigation Section for the global Law Society, and saw its membership grow to several hundred attorneys worldwide.

If appointed judge, one of my areas of emphasis will be law students and new lawyers. I want to instill a sense of camaraderie and civility, and a dedication to their role not just as advocates but as officers of the court and integral components of the judicial system.

39. Describe life experiences, personal involvements, or talents that you have that you feel will be of assistance to the Council in evaluating and understanding your candidacy for this judicial position. ***(250 words or less)***

The attached curriculum vitae, and my answers to Questions 7, 8, and 12, discuss my broad legal experience. I have argued cases from juvenile court to the Tennessee Supreme Court, and I have worked on cases from class actions to paternity actions.

I also have broad experience outside of the law. I have lived in six states and three foreign countries. In college, I majored in print journalism, did Spanish translation, and worked on databases and websites. I was a radio DJ in high school.

All of that adds a richness to the legal experience I will bring to the Court. But there is something much more important that I hope will guide me on the Court.

On a much more personal level, my parents taught me to love others. As a child, we regularly visited my severely mentally disabled second cousin at the developmental center where he was housed. My parents also helped gather resources for a family of limited means whose son was struck by a car and remained comatose for months, and then we helped with his physical therapy until he eventually learned to walk again.

Later, I served desperately poor people as a missionary in Chile. Since moving to Tennessee 17 years ago, I have volunteered at soup kitchens and aided in disaster recovery following tornadoes, floods, and hurricanes. I hope this love for others, instilled by my parents, will continue to guide my interactions while on the bench.

40. Will you uphold the law even if you disagree with the substance of the law (e.g., statute or rule) at issue? Give an example from your experience as a licensed attorney that supports your response to this question. ***(250 words or less)***

Yes. Our judicial system requires judges who will uphold the rule of law even when the outcome may seem unfair in a particular case. While I hope that love will guide the way I treat every person who comes before the Court, it is my dedication to the rule of law that will guide my decisions in any individual case.

In both public and private practice, I have had occasion to advocate for positions that I did not personally agree with. And I have done so as effectively as I could, so long as the position was neither illegal nor unethical.

For example, last year, the Tennessee Supreme Court held the recent amendments to the theft statute changed the punishment only and did not alter an essential element of the crime. *See State v. Menke*, 590 S.W.3d 455 (Tenn. Nov. 27, 2019). While *Menke* was still pending before the Tennessee Supreme Court, I had occasion to argue to the Court of Criminal Appeals that a contrary interpretation was correct, even though I personally believed the outcome eventually reached by the Tennessee Supreme Court was more consistent with existing legal principles. Nonetheless, as *Menke* had not yet heen decided, I made the contrary argument on behalf of my client (the State) as effectively as I could. And we prevailed, though likely because I suggested the Court could decide the case on other grounds. *See State v. Derring*, No. W2017-02290-CCA-R3-CD, 2019 WL 244471 (Tenn. Crim. App. Jan. 16, 2019).

REFERENCES

41. List five (5) persons, and their current positions and contact information, who would recommend you for the judicial position for which you are applying. Please list at least two persons who are not lawyers. Please note that the Council or someone on its behalf may contact these persons regarding your application.

A. Zachary T. Hinkle, Deputy Attorney General, Criminal Appeals Division, Office of Tennessee Attorney General; [redacted] Mr. Hinkle is my deputy in the Criminal Appeals Division.

B. Phyllis Aluko, Chief Public Defender, Law Office of the Shelby County Public Defender; [redacted] I have litigated several criminal appeals opposite Ms. Aluko.

C. Bill Ramsey, Member, Neal & Harwell, PLC; [redacted] I worked with Mr. Ramsey on the *Cracker Barrel* case when I was at Neal & Harwell; now we work together with the Nashville Bar Journal.

D. Adam Dibble, Group Manager, Financial Planning and Analysis, Nyrstar; [redacted] Mr. Dibble is a friend and a counselor in the bishopric of my local congregation of the Church of Jesus Christ of Latter-day Saints.

E. Janet Gieseke; [redacted] Ms. Gieseke is a friend and the president of the women's organization (the Relief Society) of my local congregation of the Church of Jesus Christ of Latter-day Saints.

AFFIRMATION CONCERNING APPLICATION

Read, and if you agree to the provisions, sign the following:

I have read the foregoing questions and have answered them in good faith and as completely as my records and recollections permit. I hereby agree to be considered for nomination to the Governor for the office of Judge of the [Court] of Criminal Appeals of Tennessee, and if appointed by the Governor and confirmed, if applicable, under Article VI, Section 3 of the Tennessee Constitution, agree to serve that office. In the event any changes occur between the time this application is filed and the public hearing, I hereby agree to file an amended application with the Administrative Office of the Courts for distribution to the Council members.

I understand that the information provided in this application shall be open to public inspection upon filing with the Administrative Office of the Courts and that the Council may publicize the names of persons who apply for nomination and the names of those persons the Council nominates to the Governor for the judicial vacancy in question.

Dated: October 6, 2020.

Signature

When completed, return this application to Ceesha Lofton, Administrative Office of the Courts, 511 Union Street, Suite 600, Nashville, TN 37219.

THE GOVERNOR'S COUNCIL FOR JUDICIAL APPOINTMENTS
ADMINISTRATIVE OFFICE OF THE COURTS

511 UNION STREET, SUITE 600
NASHVILLE CITY CENTER
NASHVILLE, TN 37219

TENNESSEE BOARD OF PROFESSIONAL RESPONSIBILITY
TENNESSEE BOARD OF JUDICIAL CONDUCT
AND OTHER LICENSING BOARDS

WAIVER OF CONFIDENTIALITY

I hereby waive the privilege of confidentiality with respect to any information that concerns me, including public discipline, private discipline, deferred discipline agreements, diversions, dismissed complaints and any complaints erased by law, and is known to, recorded with, on file with the Board of Professional Responsibility of the Supreme Court of Tennessee, the Tennessee Board of Judicial Conduct (previously known as the Court of the Judiciary) and any other licensing board, whether within or outside the State of Tennessee, from which I have been issued a license that is currently active, inactive or other status. I hereby authorize a representative of the Governor's Council for Judicial Appointments to request and receive any such information and distribute it to the membership of the Governor's Council for Judicial Appointments and to the Office of the Governor.

Jonathan H. Wardle
Type or Print Name

Signature

6 October 2020
Date

025741
BPR #

Please identify other licensing boards that have issued you a license, including the state issuing the license and the license number.

JONATHAN H. WARDLE

1424 Old Stone Rd., Lebanon, TN 37087
(615) 349-5686 (cell) / (615) 532-7402 (office)
jonathan.wardle@gmail.com / jonathan.wardle@ag.tn.gov

EDUCATION

Vanderbilt University Law School, J.D., 2006

Honors: Order of the Coif
Scholastic Excellence Awards in Constitutional Law, Criminal Law, and Immigration Law & Policy
Dean's List (every semester)
Dean's Scholarship

Activities: Vanderbilt Law Review, Associate Editor
J. Reuben Clark Law Society, Founder & Chapter President
VU Law Partners, Vice President

Brigham Young University, B.A. Communications (print journalism emphasis), 2003

Honors: National Merit Scholarship
ORCA Grant

Activities: NewsNet, City Desk Reporter, Associate Campus Editor, and Copy Editor
SuperFans, VP Men's Intercollegiate Sports

CAREER SUMMARY

As an Assistant Attorney General, I have filed 325 briefs and argued about 70 cases before the Tennessee Court of Criminal Appeals, litigated habeas corpus cases in both federal and state court, and authored two opinions on behalf of the Tennessee Attorney General. In private practice, I litigated a broad spectrum of cases, including commercial litigation, personal injury, family law, criminal defense, landlord-tenant, civil rights, education law, class action, and toxic tort. I have represented clients in federal district court and practically every level of State court, from juvenile court and general sessions to the Tennessee Supreme Court.

PROFESSIONAL EXPERIENCE

OFFICE OF THE TENNESSEE ATTORNEY GENERAL, Nashville, TN **2014-Present**

Assistant Attorney General, Criminal Appeals Division

Appellate practice. File briefs and argue cases before the Tennessee Court of Criminal Appeals, primarily dealing with direct appeals of criminal convictions and related collateral attacks. Handle habeas corpus cases in state and federal court. Review extradition applications for legal sufficiency. Authored two opinions for issuance by the Tennessee Attorney General. Handled an appeal of the termination of paternity rights on behalf of the Department of Children's Services.

Representative Cases:

State v. Smith, No. W2018-01509-CCA-R3-CD, 2020 WL 3572071 (Tenn. Crim. App. June 30, 2020), *perm. app. filed* (Tenn. Aug. 31, 2020)

State v. Clayton, No. W2018-00386-CCA-R3-CD, 2019 WL 3453288 (Tenn. Crim. App. July 31, 2019), *perm. app. denied* (Tenn. Dec. 10, 2019)

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State v. Bonsky, No. W2014-00675-CCA-R3-CD, 2016 WL 1719466 (Tenn. Crim. App. Apr. 27, 2016), *no perm. app. filed*

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Opinion Letters:

Tenn. Att'y Gen. Op. 15-12 (Feb. 5, 2015) (re: expunction of records)

Tenn. Att'y Gen. Op. 14-77 (Aug. 25, 2014) (re: legality of exploding targets)

WARDLE LAW, PLC, Nashville, TN 2011-2014

Owner

Litigation practice. Areas of practice included civil rights and discrimination, education law, family law, personal injury, criminal defense, estate and probate, landlord-tenant, homeowners' association disputes, and other general civil matters.

Representative Cases:

Link v. Metro. Gov't of Nashville & Davidson County, No. 3:12-cv-0472 (M.D. Tenn.)

Messner v. Hickman County, No. 1-11-0059 (M.D. Tenn.)

Link v. Metro. Nashville Bd. of Pub. Educ., No. M2013-00422-COA-R3-CV (Tenn. Ct. App.), opinion available at 2013 WL 6762393

NEAL & HARWELL, PLC, Nashville, TN 2005-2011

Summer Associate (2005); *Associate* (2006-2011)

Litigation practice. Areas of practice included class action lawsuits, commercial litigation, commercial landlord-tenant disputes, toxic tort, personal injury, medical malpractice, wills and estates, criminal defense, franchise termination, intellectual property, and workers' compensation.

Representative Cases:

Freeman Mgmt. Corp. v. Shurgard Storage Ctrs., Inc., No. 3:06-cv-0736 (M.D. Tenn.)

Cracker Barrel Old Country Store, Inc. v. Epperson, 284 S.W.3d 303 (Tenn. 2009)

THE HONORABLE KENNETH F. RIPPLE, U.S. COURT OF APPEALS, SEVENTH CIRCUIT, South Bend, IN Summer 2004

Summer Extern

Apprised federal court of appeals judge of issues pertinent to oral arguments, petitions for rehearing, and current legal trends; edited and cite-checked opinion drafts; drafted order affirming a drug conspiracy conviction (*United States v. Johnson*, 127 Fed. Appx. 894 (7th Cir. 2005)).

OTHER EXPERIENCE

CEDAR FORT, INC., Springville, UT 2002-2003
Intern; Freelance Editor

VIASUBSCRIPTION, Provo, UT 2002-2003
Developer; Web Development Team Lead; Strategic Web Architect

WAL-MART, INFORMATION SYSTEMS DIVISION, Summer Intern, Bentonville, AR 2000, 2001
Intern, Performance Management (Summer 2000); *Intern, Windows Server Engineering* (Sumer 2001)

BRIGHAM YOUNG UNIVERSITY, CITES OFFICE / TESOL, Provo, UT 2001
Spanish Transcription and Translation

MISSIONARY TRAINING CENTER, THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, Provo, UT 1999-2000, 2001
IS Scheduling Specialist

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Proselytizing Missionary, Trainer, District Leader, Mission Historian

PROFESSIONAL ASSOCIATIONS

15TH JUDICIAL DISTRICT BAR ASSOCIATION 2020-Present
Member (2020-Present)

NASHVILLE BAR ASSOCIATION 2006-2011, 2015-Present
Nashville Bar Journal Committee (2016-Present)
Government Lawyers CLE Committee (2017-Present)
Historical Committee (2019)

NASHVILLE BAR FOUNDATION 2019-Present
Fellow (2019-Present)

J. REUBEN CLARK LAW SOCIETY 2005-Present
Board Member, Nashville Chapter (2019-present)
Director, Southeast Area of the Mid-Atlantic Region, (2011-2012, 2015-2020)
Chair, Nashville Chapter (2007-2009, 2016-2018)
Chair/Co-Chair, Litigation Section (2009-2011)
President, Vanderbilt University Law School Student Chapter (2005-2006)

THE EXCHANGE CLUB OF BELLEVUE, TN 2011-2012
President-Elect (2012)

PUBLICATIONS AND RESEARCH

Are You Ready for (Electoral) College?, NASHVILLE B.J., Oct./Nov. 2019, at 37.

Looking Back: The Lingering Impact of the 2010 Nashville Flood, NASHVILLE B.J., Apr./May 2019, at 11.

Legal Tourism . . . In Nashville?, NASHVILLE B.J., Oct./Nov. 2018, at 11.

Note, *The Strategic Use of Mexico to Restrict South American Access to the Diversity Visa Lottery*, 58 VAND. L. REV. 1963 (2005).

Research Assistant, Professor Nancy King, Vanderbilt University Law School, 2006. Reviewed filings in habeas corpus actions for a landmark habeas corpus study. The final report can be found at Nancy J. King, Fred L. Cheesman II, and Brian Ostrom, *Habeas Litigation in U.S. District Courts: Final Report* (August 2007), available at https://www.ncjrs.gov/pdffiles1/nij/grants/219559.pdf.

Research Assistant, Professor Mark Brandon, Vanderbilt University Law School, 2004–2005. Analyzed trends in judicial review of polygamy prosecutions in America over two centuries; catalogued sources dealing with the boarding school education of American Indian children. This research was used in MARK E. BRANDON, STATES OF UNION: FAMILY AND CHANGE IN THE AMERICAN CONSTITUTIONAL ORDER (2013).

"Images of Newspapers in American Genre Painting from 1830 to 1865," American Journalism Historians Association Conference (October 5, 2001). I received a grant for this research, which was guided by Professor Alf Pratte; I presented the paper as a work-in-progress.

OTHER

- Spanish
- Violin, piano, harmonica, organ, voice
- Eagle Scout

REFERENCES

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DISCIPLINARY COUNSEL

November 27, 2019

Mr. Jonathan Haston Wardle
PO Box 20207
Nashville, TN 37202-4015

Re: Jonathan Haston Wardle
BPR #025741

TO WHOM IT MAY CONCERN:

On December 18, 1975, the Tennessee Supreme Court established the Board of Professional Responsibility of the Supreme Court of Tennessee to supervise the conduct of attorneys licensed to practice law in this state.

The records of the Board of Professional Responsibility indicate that the attorney referenced above was licensed in Tennessee to practice law and sworn in on 11/13/2006. The attorney's license is currently Active and is in good standing.

Enclosed for your review is a report generated from our case management system. A blank report indicates that our office has never opened an investigative file on this attorney.

Sincerely,

Mary McKnight
Registration Manager

MLM/lw

Disciplinary History Report

Wardle, Jonathan Haston 025741

Filed	Closed	Complainant	Status	Sub Status
42178-5-ES				
7/7/2015	6/3/2016	Harris, Stacy	Closed	Dismissed by Investigations

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT JACKSON

STATE OF TENNESSE,	)	
	)	
Appellee,	)	
	)	MADISON COUNTY
v.	)	No. W2019-01566-CCA-R3-CD
	)	
CYNTHIA P. NANCE,	)	
	)	
Appellant.	)	

ON APPEAL AS OF RIGHT FROM THE JUDGMENT
OF THE MADISON COUNTY CIRCUIT COURT

BRIEF OF THE STATE OF TENNESSEE

HERBERT H. SLATERY III
Attorney General and Reporter

JONATHAN H. WARDLE
Assistant Attorney General
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CASES

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STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

Did the trial court properly exercise its discretion to impose a sentence of confinement in light of Ms. Nance's lengthy criminal history, which included more than 30 misdemeanor convictions for similar crimes (plus four prior felony convictions)?

STATEMENT OF THE CASE

Defendant Cynthia P. Nance was indicted in three different cases related to the passing of bad or fraudulent checks, theft, and identity theft. She entered a blind plea resolving all three cases. She now appeals, disappointed that the court imposed a sentence of confinement in light of her significant criminal history.

In Case No. 18-596, the Madison County Grand Jury indicted Ms. Nance on one count of passing a worthless check to Robinson Toyota. (I, 5-6.) In Case No. 19-219, the Madison County Grand Jury indicted Ms. Nance on three counts of identity theft, each a separate instance involving the use of Sylvester Brooks's identity. (II, 1-4.) In Case No. 19-220, the Madison County Grand Jury indicted Ms. Nance on one count of criminal simulation and one count of theft, both related to a transaction at Britt Brothers Auto Sales ("Britt Brothers").[1] (III, 3-5.)

The day before trial, Ms. Nance pled guilty to all of these charges. (I, 12-14; II, 12-17; III, 9-12; VI, 1-2; VII, 5-7, 12-13.) Her plea was "open" in the sense that she did not agree to a specific sentence length or manner of service; but she did agree that she was a Range II Offender and she agreed to the amount of restitution to pay Robinson Toyota and Britt Brothers. (I, 12-14; *see also* III, 10; V, 31-32, 35; VI, 2.)

The trial court held a sentencing hearing on August 5, 2019. The court imposed the minimum sentence within Ms. Nance's sentence

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[1] The technical record includes the related general sessions warrant, which contains a notation that the case was continued to give Ms. Nance the chance to pay restitution instead of having the case bound over to the grand jury. (*See* II, 1-2.)

range for all of her crimes (except one): three years for passing the worthless check in Case No. 18-596; four years for each of her identity theft convictions in Case No. 19-219; and four years each for the criminal simulation and theft convictions in Case No. 19-220. (II, 12-17; III, 9-12; V, 31-36; VI, 1-2.) The court aligned all of the sentences concurrently for a total effective sentence of four years. (II, 12-17; III, 9-12; VI, 1-2; *see also* V, 30, 33 (where the prosecutor did not request consecutive sentencing).) However, the court required Ms. Nance to serve her sentences in confinement, concluding that her lengthy criminal history—which included four felony convictions and more than 30 misdemeanor convictions, primarily served on probation—indicated that Ms. Nance would not change her behavior "absent somebody showing her that there's consequences to her actions." (II, 12-17; III, 9-12; V, 33-36; VI, 1-2.)

Judgments were filed on August 9, 2019. (II, 12-17; III, 9-12; VI, 1-2.) Ms. Nance filed a notice of appeal on September 3, 2019.

STATEMENT OF THE FACTS

At the plea hearing, Ms. Nance stipulated to the allegations in the indictments as "at least substantially true" without the prosecutor ever reciting the facts. (VII, 12.) Ms. Nance also affirmed her understanding of her case, the terms of the plea agreement, her exposure at trial, and the rights she was waiving, as well as her desire to enter the plea. (*See* VI, 3-12.)

Because the plea hearing transcript does not contain a recitation of the underlying facts, the facts of each case must he gleaned from the indictments, the general sessions warrants, the victims' testimonies at the sentencing hearing, and the presentence report. The State here presents the facts gleaned from those records as they relate to each case, followed by a description of Ms. Nance's testimony at the sentencing hearing.

Case No. 18-596

The indictment in Case No. 18-596 alleged that, on or about October 7, 2017, Ms. Nance passed a check for $2,431.00 to Robinson Toyota knowing there were insufficient funds in her bank account to pay the check. (I, 6; *see also* I, 3-4.)

At the sentencing hearing, Christopher Ward from Robinson Toyota testified that Ms. Nance bought a used car from Robinson Toyota for $8,999.31. (V, 5, 9.) Ms. Nance wrote a check in the amount of $2,431.00 as a down payment.[2] (V, 5, 8-9.) That check was returned

[2] The rest of the sales price was financed through a loan with a different institution, and Mr. Ward did not know if that entity repossessed the car. (*See* V, 7-8.)

by the bank. (V, 5.) The dealership asked Ms. Nance to pay back the amount of the check, but she never paid any amount of restitution to the dealership. (V, 6.)

Case No. 19-219

The indictment in Case No. 19-219 alleged that Ms. Nance used Sylvester Brooks's personal identifying information to obtain credit, goods, or services on May 1, May 30, and June 4, 2017. (II, 2-4.)

At the sentencing hearing, Sylvester Brooks testified that he had known Ms. Nance for about a year and used to cut her grass. (V, 10.) Around May 1, 2017, he learned someone had opened a credit card in his name with Premier Bank. (V, 10.) That credit card was used to pay a Sprint bill in the amount of $208.53 and some other charge in the amount of $9.75. (V, 11.) Around May 30, Mr. Brooks learned that someone had opened up an AT&T account in his name and charged that account $54.08. (V, 11-12.) Around June 4, Mr. Brooks learned that someone had used his identity to make online purchases at Fingerhut. (V, 12-13.)

Mr. Brooks had not opened any of these accounts or authorized anyone else to do so. (V, 10-12.) The police were able to track the transactions back to Ms. Nance. (V, 11-12.) Ms. Nance never reimbursed Mr. Brooks for any of these purchases or for the trouble she caused by using his identity. (V, 13.)

Case No. 19-220

The indictment in Case No. 19-220 alleged that, on or about December 29, 2008,[3] Ms. Nance used an altered check purporting to be from Pannonia Federal Credit Union and stole property or money from Britt Brothers in an amount over $2,500. (III, 4-5.) The general sessions warrant indicated that the altered check was made out to Ms. Nance in the amount of $4,800; that Ms. Nance negotiated the check at Britt Brothers, claiming the check came from a tax refund; that the check purported to be drawn on an account at Pannonia Federal Credit Union but the routing number was for a different bank; and that the payment system declared the check invalid. (III, 1.)

The prosecutor did not present any witness from Britt Brothers at the sentencing hearing. (*See* V, 14-15.) However, the victim statement contained in the presentence report referred to this as an "I.R.S. check refund scam." (IV, Ex. 1, at 4.)[4] According to the incident report quoted in the presentence report, Ms. Nance "made a down payment of $2000 on a 2002 Jeep Cherokee" with a check that she claimed was "an income tax refund check." (IV, Ex. 1, at 5.) The dealership then gave Ms. Nance a check for $2,685.11, which was "the difference in the down payment and insurance amount and the amount of the [fake] check."

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[3] The warrant issued around the time of the theft but was not served until recently. (*See* V, 14; *see also* III, 1-2 (showing the warrant issued on January 12, 2009, and was served on February 23, 2018).)

[4] The presentence report was made an exhibit to the sentencing hearing. It is also included with the technical record in Case No. 18-596. (*See* I, 17-39.)

(IV, Ex. 1, at 5.) The car was later repossessed but Ms. Nance "refused to pay back [the] cash given to her." (IV, Ex. 2, at 4.)

Sentencing

Ms. Nance did not give a statement for the presentence report. (*See* IV, Ex. 1, at 3.) She did testify at the sentencing hearing, however. (*See* V, 15-29.)

Ms. Nance claimed that she was 55 years old, had several health conditions, and had to take care of her mother who had been injured in a car wreck earlier that year. (V, 18-19, 21.) She also claimed that she only had one kidney and was supposed to have heart surgery. (V, 21.)

Ms. Nance stated, "I do apologize for everything," said she was taking responsibility, and claimed she would pay restitution. (V, 20-21.) However, she denied that she knew she was passing a fake check to Britt Brothers. (V, 22.) She claimed she received the check in the mail after applying for loans online, though she denied that she ever paid any money back on that supposed loan. (V, 22-24.)

Ms. Nance also claimed she thought she had money in her account to cover the check to Robinson Toyota, through a school loan she was supposed to receive for a business course. (V, 25-26.) She claimed the lender kept putting off sending her the money, though she acknowledged she never did pay Robinson Toyota. (V, 26.)

Ms. Nance did acknowledge that she stole Mr. Brooks's identity. (V, 24.) She said she and Mr. Brooks had become friends "some years ago," that he mowed her yard and they loaned each other money. (V, 16-17.) Ms. Nance claimed she stole her friend's identity to pay for gas

and food, and for a cell phone to keep up with her doctors' appointments. (V, 24-25.)

Ms. Nance acknowledged that she had a lengthy criminal history. (V, 17-18.) She admitted that she had four prior felony convictions (three thefts and a forgery),[5] as well as 34 prior misdemeanor convictions. (V, 26-27.) In fact, 30 of those misdemeanor convictions were for passing worthless checks (for offenses committed in 1995, 1996, 2001, 2002, 2012, 2013, 2014, 2015, and 2018, plus 11 times for municipal court convictions that did not state the offense dates). (*See* IV, Ex. 1, at 8-13.) She also had one misdemeanor theft conviction (in 1994), one misdemeanor assault conviction (in 1994), and two traffic offenses (in 2002 and 2003). (*See* IV, Ex. 1, at 9, 12.)

Ms. Nance acknowledged she had been on probation "many times before." (V, 20.) She said she knew how to follow the rules of probation and requested the court put her on probation again. (V, 20-21.) She also said she would pay $250 in restitution each month, in addition to her court costs. (V, 27-28.) She claimed her daughter would help her make the payments.[6] (V, 28.)

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[5] The felonies were all committed in 1995. (*See* IV, Ex. 1, at 11-12.) She pled guilty and received a four-year sentence in June 1996. (*See id.*)

[6] Ms. Nance's daughter testified briefly that she would be willing to help her mother with the payments. (*See* V, 28-29.)

ARGUMENT

The Trial Court Properly Sentenced Ms. Nance.

In this appeal, Ms. Nance argues the trial court should have granted her an alternative sentence. (*See* Br. of Appellant, at 15-22.) She concedes that "she was no longer considered a favorable candidate for probation" in light of her lengthy criminal history. (*Id.* at 22.) Nonetheless, she argues the court should have considered the possibility of a sentence in community corrections. (*See id.* at 15-22.) Indeed, although she broadly requests this Court remand for "consideration of all forms of alternative sentencing," Ms. Nance appears to argue only that the court below erred in not considering her suitability for community corrections. (*See id.* at 15-23.)

A. Ms. Nance never requested community corrections.

The simple answer to Ms. Nance's appeal is that she never asked the trial court to consider a sentence in community corrections. Neither she nor her attorney ever mentioned anything about community corrections at her plea hearing. (*See* VII, 11-14.) And the only document she filed after her plea was a "notice of mitigating factors" that likewise never referred to community corrections. (I, 38-39.)

Much more telling, neither Ms. Nance nor her attorney ever mentioned the possibility of community corrections at the sentencing hearing. (*See* V, 20-21, 31.) In fact, when asked what sentence she wanted the trial court to consider, Ms. Nance only said "[p]robation." (V, 21.) She also discussed only her history with probationary sentences even though she had also already served a sentence on community corrections. (*See* IV, Ex. 1, at 14; V, 20.)

Likewise, her attorney never requested or made any reference to community corrections. (*See* V, 31.) Instead he argued "[s]he is statutorily eligible for probation" and said they were asking the court "to consider that." (V, 31.) Moreover, when the trial court considered whether or not to grant her request for probation, neither Ms. Nance nor her attorney ever attempted to correct the court or explain that she wanted the court to consider any other type of sentence. (*See* V, 33-36.)

It is too late now to claim the trial court really should have considered some other type of sentence. *See* Tenn. R. App. P. 36(a) ("Nothing in this rule shall be construed as requiring relief be granted to a party responsible for an error or who failed to take whatever action was reasonably available to prevent or nullify the harmful effect of an error."); *accord State v. Clayton*, W2018-00386-CCA-R3-CD, 2019 WL 3453288, at *9 (Tenn. Crim. App. July 31, 2019) ("A party may not take one position regarding a ground in the trial court and change its strategy or theory midstream and advocate a different ground or reason in this Court." (internal citation omitted)), *perm. app. denied* (Tenn. Dec. 10, 2019). Accordingly, Ms. Nance's argument should be deemed waived.

B. The trial court did not abuse its discretion by imposing a sentence of confinement.

Waiver notwithstanding, the trial court did not abuse its discretion in requiring a sentence of confinement. The standard of review on appeal of a sentencing decision is whether the trial court abused its discretion, with a presumption of reasonableness attached to the trial court's decision. *State v. Bise*, 380 S.W.3d 682, 706-08 (Tenn.

2012). This same standard applies to the review of a denial of alternative sentencing. *See State v. Sihapanya*, 516 S.W.3d 473, 476 (Tenn. 2014); *State v. Caudle*, 388 S.W.3d 273, 278-279 (Tenn. 2012); *see also State v. Tipton*, No. E2014-02531-CCA-R3-CD, 2015 WL 9015989, at *3 (Tenn. Crim. App. Dec. 15, 2015) ("[W]e review challenges to the denial of a community corrections sentence under the abuse of discretion standard, accompanied by a presumption of reasonableness.") (no perm. app. filed).

"Mere inadequacy in the articulation of the reasons for imposing a particular sentence" does not remove the presumption of reasonableness, and "sentences should be upheld so long as the statutory purposes and principles, along with any applicable enhancement and mitigating factors, have been properly addressed." *Bise*, 380 S.W.3d at 705. Furthermore, "a trial court's misapplication of an enhancement or mitigating factor does not invalidate the sentence imposed unless the trial court wholly departed from" the sentencing statutes. *Id.* at 706. A sentence within the appropriate range will be upheld "[s]o long as there are other reasons consistent with the purposes and principles of sentencing, as provided by statute." *Id.*

By the time Ms. Nance pled guilty in this case, she had already been convicted over 35 times for theft, forgery, and passing bad checks. (*See* IV, Ex. 1, at 8-13; V, 17-18, 26-27.) Most of her prior sentences appear to have been suspended to probation. (*See* IV, Ex. 1, at 8-14.) Yet she had still failed to change her behavior—she continued to steal and defraud people. If anything, her behavior had escalated to even greater amounts of money.

Furthermore, Ms. Nance obviously failed to accept responsibility for her crimes. It is true that she responded in the affirmative when her attorney asked if she were "taking responsibility for what the State has alleged that you've done in these cases." (V, 21.) But she then proceeded to claim ignorance and innocence—it was not her fault she passed a fake check to Britt Brothers, it was not her fault she did not have any money in the bank to cover the check she wrote to Robinson Toyota, and she only stole her friend's identity to pay for necessary items (like a cell phone and Fingerhut purchases). (*See* V, 22-26.)

These considerations alone support the denial of alternative sentencing. *See* Tenn. Code Ann. §§ 40-35-102(3) ("Punishment shall be imposed to prevent crime and promote respect for the law by: . . . (B) Restraining defendants with a lengthy history of criminal conduct . . ."), -102(6) (stating that especially mitigated offenders and Range I Offenders are "favorable" candidates for alternative sentencing), -103(1) ("Sentences involving confinement should be based on the following considerations: (A) Confinement is necessary to protect society by restraining a defendant who has a long history of criminal conduct . . ."), -103(5) ("The potential or lack of potential for the rehabilitation or treatment of the defendant should be considered in determining the sentence alternative or length of a term to be imposed."); *State v. Carter*, 254 S.W.3d 335, 348 (Tenn. 2008) (reversing the grant of probation, in part, because the defendant "possesses a significant criminal history"); *State v. Farmer*, 239 S.W.3d 752, 756 (Tenn. Crim. App. 2007) (affirming the denial of an alternative sentence because of the defendant's "extensive" juvenile history and because his "continued

criminal behavior clearly demonstrates a lack of rehabilitative potential").

Ms. Nance argues the trial court abused its discretion, and its decision cannot be presumed reasonable, because the court failed to even consider the possibility of community corrections. (*See* Br. of Appellant, at 17-18 (citing *State v. Johnson*, 342 S.W.3d 520 (Tenn. Crim. App. 2009)).) Of course, as discussed above, Ms. Nance never asked the court to consider community corrections. *See* Tenn. R. App. P. 36(a).

Furthermore, the case Ms. Nance cites to pre-dates both *Bise* and *Caudle*. Moreover, the effect of the holding in that case was not that every trial court must *sua sponte* consider community corrections for every defendant. Rather, this Court reversed a trial court's refusal to accept a plea agreement for a sentence in community corrections, and the import of the holding was that defendants might still be eligible for community corrections even if they were ineligible for probation. *See Johnson*, 342 S.W.3d at 523-24. Ms. Nance has not cited to any case, and undersigned counsel is unaware of any, that has found error because a trial court failed to *sua sponte* consider the possibility of community corrections.

Ms. Nance argues the trial court should have imposed a sentence in community corrections because she was eligible for community corrections. (*See* Br. of Appellant, at 18-19.) Of course, the fact that she may have been statutorily eligible for community corrections does not mean she was necessarily a good candidate for it. *See Tipton*, 2015 WL 9015989, at *4 ("Simply because an offender meets the minimum

requirements under the Community Corrections Act 'does not mean that he is entitled to be sentenced under the Act as a matter of law or right.'" (quoting *State v. Ball*, 973 S.W.2d 288, 294 (Tenn. Crim. App. 1998))). The fact remains that Ms. Nance had an extremely lengthy criminal history yet continued to engage in the same illegal behavior.

Finally, Ms. Nance argues the trial court abused its discretion by erroneously assessing the proof.[7] (*See* Br. of Appellant, at 19-22.) Specifically, she claims the trial court could not simultaneously conclude both that she had abided by the terms of her past probationary sentences and that she could not reasonably be expected to be rehabilitated. (*See id.* at 20-22.) But the two are not incongruous. Indeed, the fact that Ms. Nance had faced so many prior suspended sentences and yet still continued to engage in the exact same behavior practically compels the trial court's final conclusion:

> She's had 32 misdemeanors and 4 felonies and she hadn't gotten it yet? I don't know that she's going [to] get it absent somebody showing her that there's consequences to her actions. So I don't think she qualifies for probation, just based on her criminal history.

(V, 36.)

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[7] Ms. Nance also argues the court erred in concluding it could not apply the mitigating factor that her conduct did not cause or threaten serious bodily injury. (Br. of Appellant, at 22.) The State acknowledges this mitigating factor refers to bodily injury and not harm in general. *See* Tenn. Code Ann. § 40-35-113(1). However, the "misapplication of an enhancement or mitigating factor does not invalidate the sentence." *Bise*, 380 S.W.3d at 706. Besides, this factor only goes to the length of the sentence, and Ms. Nance does not complain about the length of her sentence, which was essentially the minimum the court could impose.

Ms. Nance claims the evidence that her probation was never revoked proves that "the results were quite successful." (Br. of Appellant, at 20.) The State disagrees. The purpose of punishment under the Sentencing Act is "to prevent crime and promote respect for the law." Tenn. Code Ann. § 40-35-102(3). Clearly all of Ms. Nance's prior sentences had failed to promote within her a respect for the law and deter her from committing more crimes. The trial court did not abuse its discretion when it reached the unfortunate yet inevitable conclusion that Ms. Nance needed to be incarcerated. This appeal has no merit.

CONCLUSION

For all the foregoing, the judgment of the Madison County Circuit Court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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s/ Jonathan H. Wardle

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NOTES

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The Strategic Use of Mexico to Restrict South American Access to the Diversity Visa Lottery

I. INTRODUCTION

In 1990, Congress enacted the Family Unity and Employment Opportunity Act (the "1990 Act"), which created a visa lottery to enhance the diversity of the immigrant stream and to ensure that areas of the world sending relatively few immigrants to the United States could still have access to the immigrant stream.[1] In order to achieve these goals, Congress created a complex formula by which 55,000 "diversity" visas would be distributed annually among six geographically defined regions based on the total number of

1. *See* 8 U.S.C. § 1153(c) (2005) (setting forth the diversity visa lottery). With the release of the 2004 immigration statistics, we can now review the effects of 10 years of the permanent diversity visa lottery.

immigrant admissions from each region.[2] Under this formula, regions with relatively low admission rates are granted more visas than regions with relatively high admission rates.[3]

As the bulk of immigrants to the United States come from Asia and North America (primarily Mexico), it is not surprising that fewer diversity visas are granted to North American and Asian immigrants than to immigrants from Europe and Africa.[4] What is startling is how few diversity visas are allotted to immigrants from South America, even though every year there are fewer non-diversity[5] immigrants from South America than from Europe.[6] For example, in 2004, South America accounted for approximately 8% of all non-diversity immigrant admissions, significantly less than the 12% that came from Europe.[7] In that same year, almost 38% of all diversity visa

2. 8 U.S.C. § 1153(c)(1).

3. *See id.* The population of each region also plays a role in the calculus. For purposes of this Note, that part of the diversity formula can be largely ignored, but it does explain why the Oceania region qualifies for so few diversity visas.

4. *See infra* app. tbls. 3 & 5.

5. This Note refers to all visas issued under any provision other than the diversity visa lottery as "non-diversity" visas, and any immigrants admitted under any non-diversity visas as non-diversity immigrants.

6. *See* OFFICE OF IMMIGRATION STATISTICS, U.S. DEP'T OF HOMELAND SECURITY, 2004 YEARBOOK OF IMMIGRATION STATISTICS tbl. 8, *available at* http://uscis.gov/graphics/shared/statistics/yearbook/2004/table8.xls [hereinafter 2004 YEARBOOK]; OFFICE OF IMMIGRATION STATISTICS, U.S. DEP'T OF HOMELAND SECURITY, 2003 YEARBOOK OF IMMIGRATION STATISTICS 29-32 tbl.8, *available at* http://uscis.gov/graphics/shared/statistics/yearbook/2003/2003Yearbook.pdf [hereinafter 2003 YEARBOOK]; OFFICE OF IMMIGRATION STATISTICS, U.S. DEP'T OF HOMELAND SECURITY, 2002 YEARBOOK OF IMMIGRATION STATISTICS 30-33 tbl.8, *available at* http://uscis.gov/graphics/shared/statistics/yearbook/2002/Yearbook2002.pdf [hereinafter 2002 YEARBOOK]; IMMIGRATION AND NATURALIZATION SERVICE, U.S. DEP'T OF JUSTICE, 2001 STATISTICAL YEARBOOK 42-45 tbl.8, *available at* http://uscis.gov/graphics/shared/statistics/yearbook/2001/yearbook2001.pdf [hereinafter 2001 YEARBOOK]; IMMIGRATION AND NATURALIZATION SERVICE, U.S. DEP'T OF JUSTICE, 2000 STATISTICAL YEARBOOK 44-47 tbl.8, *available at* http://uscis.gov/graphics/shared/statistics/yearbook/2000/Yearbook2000.pdf [hereinafter 2000 YEARBOOK]; IMMIGRATION AND NATURALIZATION SERVICE, U.S. DEP'T OF JUSTICE, 1999 STATISTICAL YEARBOOK 44-47 tbl.8, *available at* http://uscis.gov/graphics/shared/statistics/yearbook/1999/FY99Yearbook.pdf [hereinafter 1999 YEARBOOK]; IMMIGRATION AND NATURALIZATION SERVICE, U.S. DEP'T OF JUSTICE, 1998 STATISTICAL YEARBOOK 44-47 tbl.8, *available at* http://uscis.gov/graphics/shared/statistics/yearbook/1998/1998yb.pdf [hereinafter 1998 YEARBOOK]; IMMIGRATION AND NATURALIZATION SERVICE, U.S. DEP'T OF JUSTICE, 1997 STATISTICAL YEARBOOK 44-45 tbl.8, *available at* http://uscis.gov/graphics/shared/statistics/yearbook/1997YB.pdf [hereinafter 1997 YEARBOOK]; IMMIGRATION AND NATURALIZATION SERVICE, U.S. DEP'T OF JUSTICE, IMMIGRATION TO THE UNITED STATES IN FISCAL YEAR 1996 tbl.6, *available at* http://uscis.gov/graphics/shared/statistics/archives/fy96/1007.htm [hereinafter IMMIGRATION IN FISCAL YEAR 1996]; IMMIGRATION AND NATURALIZATION SERVICE, U.S. DEP'T OF JUSTICE, IMMIGRATION TO THE UNITED STATES IN FISCAL YEAR 1995 tbl.6, *available at* http://uscis.gov/graphics/shared/statistics/archives/fy95/133.htm [hereinafter IMMIGRATION IN FISCAL YEAR 1995].

7. *See* 2004 YEARBOOK, *supra* note 6, tbl.8.

immigrants came from Europe, but only 3% of all diversity immigrants came from continental South America.[8]

This Note will shed light on the legislative slight of hand responsible for this discrepancy, which has been largely overlooked in the debate surrounding the diversity visa lottery: the strategic definition of the South America region.[9] By defining the South America region to include, for diversity lottery purposes, Mexico, Central America, the Caribbean, and the South American continent, the drafters of the diversity lottery were able to limit a cultural group's access to the lottery while simultaneously ensuring that a maximum number of lottery visas would be available for European and African immigrants.

To put the enactment of the diversity visa lottery in context, Part II will offer a brief overview of the history of U.S. immigration law and policy through the 1990 Act, and Part III will discuss the

8. *See id.* This Note compares admissions in the same year to illustrate the lottery's actual effect on the immigrant stream. When the number of visas to be sent to each region is actually calculated, however, all admissions from the past 5 years (including diversity-based admissions) are tabulated. 8 U.S.C. § 1153(c) (2005).

9. Most of the debate about the lottery has centered on the propriety of promoting diversity by admitting more Europeans, or by discriminating between countries and regions generally. *See, e.g.*, Bill Ong Hing, *No Place for Angels: In Reaction to Kevin Johnson*, 2000 U. ILL. L. REV. 559, 587-89 (2000) (discussing approaches used to reduce immigration from Asia and Latin America and concluding that the diversity visa lottery "is evidence . . . that current immigration law is tainted by race discrimination"); Kevin R. Johnson, *Race, the Immigration Laws, and Domestic Race Relations: A "Magic Mirror" into the Heart of Darkness*, 73 IND. L.J. 1111, 1135 (1998) (noting that Congress, "in an ironic twist of political jargon" established the diversity visa lottery which, "though facially neutral, prefers immigrants from nations populated primarily by white people"); Stephen H. Legomsky, *Immigration, Equality and Diversity*, 31 COLUM. J. TRANSNT'L L. 319, 330, 333-34 (1993) (discussing the rationales for the "so-called 'diversity' program" and the questions it raises about "the role that ethnicity should play in our immigration laws"); Stanley Mailman, *Upcoming Visa Lottery*, N.Y. L.J., Feb. 28, 1994, at 3 (discussing the possible policies behind the diversity visa lottery and stating that the underlying implication – "that natives of one country are . . . less desirable than those of another" – is an "unfortunate addition" to our immigration system); Kunal M. Parker, *Official Imaginations: Globalization, Difference, and State-Sponsored Immigration Discourses*, 76 OR. L. REV. 691, 713-14 (1997) (noting that "the very existence of a category of immigration based purely on difference is at odds with an emphasis on productivity, skills, resources, and self-sufficiency as organizing principles of legal immigration"); Symposium, *Challenges in Immigration Law and Policy: An Agenda for the Twenty-First Century*, 11 N.Y.L. SCH. J. HUM. RTS. 521, 537-39 (1994) (arguing that the diversity visa lottery's attempt to help countries "adversely affected" by the repeal of the national origins quota system is comparable to an attempt to benefit whites that were "adversely affected" by the 1964 Civil Rights Act); Jan C. Ting, *"Other than a Chinaman": How U.S. Immigration Law Resulted From and Still Reflects a Policy of Excluding and Restricting Asian Immigration*, 4 TEMP. POL. & CIV. RTS. L. REV. 301, 308-10 (1995) (arguing that the diversity visa lottery works to exclude Asian immigrants); Walter P. Jacob, Note, *Diversity Visas: Muddled Thinking and Pork Barrel Politics*, 6 GEO. IMMIGR. L.J. 297, 311-13, 329-30, 337-43 (1992) (describing lobbying efforts by an Irish political interest group in favor of the diversity visa lottery, and noting the problems inherent in the use of any "diversity" criteria to effectuate immigration policy).

legislative history of the diversity visa lottery. Part IV will provide a detailed exploration of the effects of the distinctive region definitions in the "so-called" diversity visa lottery[10] and the ostensible reasons for these definitions. Finally, Part V will discuss a number of potential solutions to this disparate treatment (including legislation introduced this year that would eradicate the lottery, albeit for very different reasons), advocating ultimately in favor of a random lottery that does not discriminate with respect to nationality or ethnicity.

II. SETTING THE STAGE

Few issues "cut as deeply into the emotions of Americans as immigration. That is why comprehensive, fundamental reform of immigration policy occurs infrequently."[11] This Section will set the stage for one of those rare attempts to fundamentally reform U.S. immigration policy: the Family Unity and Employment Opportunity Act of 1990, which enacted the diversity visa lottery. To put the 1990 Act in context, this section will present a brief history of U.S. immigration law, followed by an overview of the principles and policies that guide immigration reform and an explanation of how those principles and policies affected the 1990 Act.

A. A Brief History

Congress enacted virtually no immigration restrictions until 1875, thus permitting a large influx of Chinese and European immigrants seeking opportunities associated with the California gold rush and the construction of the transcontinental railroad.[12] But in 1875, Congress began a pattern of restricting immigration along racial lines by making it a felony to contract to supply Chinese laborers.[13] Subsequent acts prohibited the immigration of "all persons of the Chinese race" except for elite classes such as government officials, and required all Chinese nationals to obtain certificates of identity.[14]

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10. Legomsky, *supra* note 9, at 320.

11. Lawrence H. Fuchs, *Immigration Policy and the Rule of Law*, 44 U. PITT. L. REV. 433, 433 (1983).

12. James F. Smith, *A Nation that Welcomes Immigrants? An Historical Examination of United States Immigration Policy*, 1 U.C. DAVIS J. INT'L L. & POL'Y 227, 228-29 (1995).

13. *Id.* at 230; *see also* Ting, *supra* note 9, at 302-03 ("The popular view of Chinese as criminals and prostitutes led to the enactment of the first federal statute restricting immigration in 1875, an act which excluded criminals and prostitutes from immigrating to the United States.").

14. Ting, *supra* note 9, at 303-04; *see also* Smith, *supra* note 12, at 230 (noting that the Chinese Exclusion Act of 1882 "banned the immigration of Chinese laborers for ten years . . . and

Chinese immigrants found without certificates of identity would be deported unless their legal residence could be established by a "credible white witness."[15] By 1917, Congress had restricted immigration from other Asian countries and excluded other "undesirables" from the immigration stream, such as convicts, prostitutes, disabled persons, anarchists, polygamists, alcoholics, illiterates over age 16, and paupers.[16]

In the 1920s, Congress modified its immigration policy by enacting and refining a national origins quota system designed to "preserve the Northern European and British Isles composition of the population" by forcing the ethnic composition of the immigration stream to mirror the ethnic proportions of foreign persons already present in the United States.[17] By 1952, Congress had eliminated all exclusions based on race (perhaps out of deference to its World War II and Korean War allies)[18]; but the national origins quota system remained in effect until the civil rights turmoil of the 1960s.[19]

Congress repealed the national origins quota system in 1965, replacing it with a new focus on family reunification and uniform per-country ceilings, codified in the Immigration Act of 1965 (the "1965 Act").[20] The unpredicted effect of the 1965 Act, however, was the

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prohibited Chinese from becoming United States citizens"). The Supreme Court upheld these acts, declaring that Congress's power to exclude and deport aliens was absolute. *See* Chae Chan Ping v. United States, 130 U.S. 581, 606-10 (1889) (upholding the Chinese Exclusion Act of 1882); Fong Yue Ting v. United States, 149 U.S. 698, 711-14, 728-32 (1893) (upholding the 1892 Act, which imposed the certificate of identity requirement); *see also* Ting, *supra* note 9, at 303-05 (discussing the Supreme Court's holdings, in *Chae Chan Ping* and *Fong Yue Ting*, that Congress has "absolute power" to exclude and order deportations").

15. Ting, *supra* note 9, at 303-04.

16. *See* Smith, *supra* note 12, at 230-31.

17. *Id.* at 232-33 & n.29; *see also* RICHARD D. STEEL, STEEL ON IMMIGRATION LAW §§ 1:1, 4 (1985) (describing the quota system). The Americas remained exempt from the established quotas, Smith, *supra* note 12, at 232, but Congress further restricted Asian immigration during this period by limiting immigration from the "Asiatic barred zone" (essentially China, Japan, and Korea), Legomsky, *supra* note 9, at 327. *See also* Fuchs, *supra* note 11, at 433-34 (discussing the quota system).

18. *See* Smith, *supra* note 12, at 233 (stating that Congress repealed the Chinese exclusion during World War II "because it felt that such legislation represented a continuing insult to its Chinese ally").

19. Ting, *supra* note 9, at 305-06; Smith, *supra* note 12, at 233. In 1952 Congress also passed laws favoring highly skilled workers as immigrants and curbing illegal immigration from Mexico. Smith, *supra* note 12, at 233.

20. Legomsky, *supra* note 9, at 328; *see also* Smith, *supra* note 12, at 233-34 (discussing the repeal of the national origins quota system and the imposition of per-country limits); Kiera LoBreglio, Note, *The Border Security and Immigration Improvement Act: A Modern Solution to a Historic Problem?*, 78 ST. JOHN'S L. REV. 933, 938 (2004) (discussing the 1965 Act's focus on family reunification). While Asian immigration increased dramatically following passage of the Act, immigration from the Americas was limited for the first time (albeit only by a hemisphere quota until 1976, when the country quotas were applied to the Americas), resulting in a severe

creation of a "geographically uneven immigrant stream" and long delays in the visa issuance process.[21] Another unforeseen effect of the 1965 Act was to increase illegal immigration from Mexico, a country which previously had not been subjected to the quotas.[22] In 1986, Congress responded to concerns about illegal immigration with the Immigration Reform and Control Act (the "IRCA"). The IRCA imposed sanctions on employers for hiring undocumented workers, allocated more money for border control, and granted amnesty to illegal immigrants who had been present continuously in the United States since 1982.[23]

Following the enactment of the IRCA, Congress also began a series of temporary programs designed to increase the number of visas available for countries determined to be "underrepresented" or "adversely affected" by the repeal of the national origins quota system

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backlog and long delays to would-be Mexican and Caribbean immigrants. *See id.* at 938 ("As a result [of the 1965 Act] an unforeseen volume of Mexican and Caribbean immigrants . . . caused huge delays in the visa application process; this backlog delayed family reunification, which may have actually spurred illegal immigration." (internal citation and quotation marks omitted)); Smith, *supra* note 12, at 234-35 & n.44 (discussing the problems the limit on Western Hemisphere immigration posed for Mexican immigrants, and the imposition of country ceilings on Western Hemisphere countries in 1976). Moreover, the family reunification policy may have exacerbated these delays by increasing the number of prospective immigrants with qualifying family ties to the United States. Legomsky, *supra* note 9, at 328-29. Although these effects may seem obvious in hindsight, there is some evidence that Congress did not think the effect would be so dramatic. *See, e.g.*, 136 CONG. REC. S7793 (daily ed. Jan. 3, 1989) (statement of Sen. Moynihan).

21. Legomsky, *supra* note 9, at 328-29; *see also infra* note 44. Attempts to remedy these delays have made little progress. As of September 2005, the current waiting period for a prospective immigrant in the Philippines in the first and third preference categories (unmarried and married adult sons and daughters of citizens) is approximately fifteen years. U.S. Dep't of State, *Visa Bulletin* (Sept. 2005), *available at* http://travel.state.gov/visa/frvi/bulletin/bulletin_1360.html. A Philippine immigrant in the fourth preference (brothers and sisters of adult citizens) can expect a twenty-two year wait. *Id.* The wait for similar Mexican immigrants is currently thirteen to twenty-two years. *Id.*

22. Smith, *supra* note 12, at 235; *see also* Frederick G. Whelan, *Principals of U.S. Immigration Policy*, 44 U. PITT. L. REV. 447, 456-57 (1983) (noting that "the whole phenomenon of illegal immigration from south of the United States border is partly an artifact of recent changes in American law" and that the policy of policing the border "has given those coming now an incentive to bring their families and stay, rather than travel back and forth as in the past"). The long visa delays caused by the Act may also have been partially responsible for the increase in illegal immigration. LoBreglio, *supra* note 20, at 938.

23. LoBreglio, *supra* note 20, at 939; *see also* Smith, *supra* note 12, at 236-40 (discussing the provisions of the IRCA). The amnesty program aimed to curb illegal immigration by providing a clean slate on which to implement the new immigration policies , which focus on "the rule of law." *See infra* Part II.B (discussing the rule of law principle, one of three principles that make up current United States immigration policy). The IRCA also created new categories of temporary workers and non-immigrant workers, such as seasonal agricultural workers. Smith, *supra* note 12, at 236-40.

in 1965.[24] With the 1990 Act, Congress further addressed concerns about perceived imbalances in U.S. immigration policy by allocating more visas for some family-based categories, increasing employment-based immigration, and creating the diversity visa lottery.[25] The employment provisions were aimed at "highly-educated or highly-skilled" immigrants, as well as "wealthy foreigners" who would invest at least one million dollars into the creation of a "new commercial enterprise."[26] The diversity visa lottery, which built on the temporary programs designed to benefit "adversely affected" countries, allocated visas to aliens from countries with low U.S. admission rates in an attempt to "restructure the ethnic mix of the immigrant pool."[27]

B. Policies and Principles

The current landscape of U.S. immigration policy is as convoluted as its history. Although family reunification is still the preferred model, at least according to many legislators, it no longer dominates the policy landscape as it did under the 1965 Act. Rather, policymakers now confront multiple "issues on which moral and political philosophy comes face to face with the practical exigencies of legislation."[28]

At least three principles currently guide the formulation of U.S. immigration policy: international cooperation, the rule of law, and the notion of an "open society."[29] The principle of international

24. Legomsky, *supra* note 9, at 328-29 (noting that the 1965 Act's imposition of country limits and the Act's emphasis on family unity resulted in a "geographically uneven immigrant stream," and that in 1986 Congress began enacting "a series of one-shot-only temporary programs" designed to benefit countries "adversely affected" by the 1965 Act's repeal of the national origins quota system). Not surprisingly, the "adversely affected" countries were almost all from Europe: Albania, Algeria, Argentina, Austria, Belgium, Bermuda, Canada, Czechoslovakia, Denmark, Estonia, Finland, France, the Federal Republic of Germany, the German Democratic Republic, Great Britain and Northern Ireland, Guadeloupe, Hungary, Iceland, Indonesia, Ireland, Italy, Japan, Latvia, Liechtenstein, Lithuania, Luxembourg, Monaco, the Netherlands, New Caledonia, Norway, Poland, San Marino, Sweden, Switzerland, and Tunisia. Jacob, *supra* note 9, at 299 n.14.

25. Smith, *supra* note 12, at 241.

26. *Id.*; 8 U.S.C. § 1153(b)(5) (2005).

27. Smith, *supra* note 12, at 241.

28. Whelan, *supra* note 22, at 447. As a threshold matter, countries are generally acknowledged to have "an unrestricted, or discretionary, authority over immigration." *Id.* at 447. Thus, it may be "morally permissible for immigration policy to be based exclusively on considerations of interest." *Id.* at 451. In this sense, immigration policy "may more closely resemble foreign policy." *Id.* at 450.

29. *See* Whelan, *supra* note 22, at 453 (describing the three principles that underlie the proposals of the Select Commission on Immigration and Refugee Policy); Fuchs, *supra* note 11, at 438 (discussing how the Select Commission was guided by these three principles when it made its recommendations to the President and Congress).

cooperation allows U.S. immigration policy "to take another nation's interests into account as well as our own," whether to create "a more equal distribution of income and opportunities among the world's people regardless of national boundaries," or to lessen "migratory pressures" by alleviating the conditions that cause them.[30] The rule of law principle asserts that our immigration policy "should be enforced, and therefore [should be] enforceable," which means that policymakers should only act on those policies that the public will be willing to pay to enforce.[31] Finally, the "open society" principle maintains that accepting people from other countries is in the national interest because immigrants "may be expected to contribute in the future, to economic growth and to cultural diversity and enrichment."[32]

Consideration of these principles has resulted in the establishment of the policies that have influenced immigration reform legislation.[33] For example, some of the more prominent policies affecting immigration legislation include diversity, family

30. Whelan, *supra* note 22, at 481-83. To illustrate, IRCA's amnesty provision can be viewed as an attempt to (eventually) reduce migratory pressure on the United States from Mexico by temporarily relieving Mexico of some of its unemployed citizens "until its population control and economic development policies yield better results." *Id.* at 482.

31. *Id.* at 455-56. Whelan points out that this principle raises concerns about the compatibility of non-discrimination with the preservation of a distinctive national character, an admitted national interest. *Id.* at 457-58. Moreover, the "formal equality of treatment for countries obvioualy does not mean equality of opportunity for individuals . . . . Equal treatment for individuals would have called for omitting considerations of nationality altogether and accepting applicants on a first-come first-served (or a lottery) basis within a world-wide pool . . . ." *Id.* at 458-59. Professor Fuchs, who was the Executive Director of the Select Commission on Immigration and Refugee Policy, asserts that "the rule of law emerged as the most powerful and, strangely enough, the most controversial" principle during Select Commission proceedings. Fuchs, *supra* note 11, at 438; *see also id.* at 445 (stating that "economic considerations took second place to those based on jurisprudence").

32. Whelan, *supra* note 22, at 460-61. For example, some degree of openness may be a moral requirement, such as the acceptance of refugees. *Id.* at 461. Insofar as there will be restrictions, the principle of openness also questions how selective we should be io determining who will be admitted; are willing immigrants inherently beneficial to eociety, or should they be screened for certain desirable characteristics? *See id.* (discussing the principles underlying a system of selective immigration as opposed to a truly open or random system).

33. *See* Fuchs, *supra* note 11, at 443 (stating that "policy is not just a matter of how many are admitted, from what countries and by what criteria, but also the process by which they are admitted"). The issue of how many immigrants should be admitted is well beyond the scope of this Note. Some relevant considerations, however, include: What level of population growth is desirable for the United States, and for the world? What will be the impact on the respective population growth rates of admitting more individuals into a comparatively low-fertility society? How does it impact the environment and the national and world economies to admit more individuals into a high-production high-waste society? How will current immigration levels affect future willingnese to admit immigrants? For a helpful discussion of these points, see Whelan, *supra* note 22, at 463-69. The issue of procedure is also beyond the scope of this Note.

reunification, and national economic well-being.[34] The policy of diversity is designed to enhance "cultural diversity, consistent with the national interest."[35] This objective is pursued by enhancing access to the immigration stream from a greater variety of source countries.[36] The general idea of family reunification has not generated significant controversy, but its implementation has.[37] The conflict centers primarily on whether the family-based preferences should reach beyond the nuclear family.[38] The general economic policy underlying immigration is to promote economic growth, or at least to "not cause a decline in the average economic welfare (income) of the population."[39] While immigration has generally enhanced economic growth and may help offset the "aging" of the U.S. population (and the looming Social Security crisis), critics argue that high levels of immigration keep wages at low rates.[40]

A look at history reveals how these policies and principles have already influenced immigration law. For example, economic fears largely drove the decisions in the late nineteenth-century that led to the exclusion of Chinese and other Asian immigrants.[41] And it was the principle of international cooperation, forged by war-time alliances, that ultimately defeated these restrictions. Likewise, principles of the "open society" and diversity led to the repeal of the national origins quota system (which was premised on anti-diversity) and the enactment of the 1965 Act.[42] Ironically, however, the very provisions that repealed the national origins quota system, when coupled with the principle of family reunification, may have actually created a *less* diverse immigrant stream (hence causing the concerns

34. Whelan, *supra* note 22, at 469. The policy decisions underlying decisions to accept, or not to accept, refugees are also beyond the scope of this Note. For an insightful discussion on the relevant considerations, see Fuchs, *supra* note 11, at 435-37, 445-46. *See also* Smith, *supra* note 12, at 236 (discussing U.S. refugee policy).

35. Whelan, *supra* note 22, at 469.

36. *Id.*

37. *Id.* at 471-72. The general policy has been questioned, however, as an instance of "nepotism." *Id.* at 472-73. While this seems like an otherwise unjust discrimination of "independent" immigrants, the alternative is to admit laborers without their families, a morally, socially, and economically dubious proposition. *See id.* at 473.

38. *Id.* at 471-72.

39. *Id.* at 474.

40. *Id.* at 474-76. It has also been pointed out that admitting motivated immigrants may deprive developing nations of needed labor. *Id.* at 476.

41. *See* Ting, *supra* note 9, at 302 (describing the economic conditions that led to the "clamor in the western United States against immigrants from China" that caused Congress to enact restrictive immigration laws).

42. Whelan, *supra* note 22, at 458.

that led to the enactment of the diversity visa lottery).[43] Finally, the IRCA may have been an attempt to establish the rule of law just for the sake of letting law rule, irrespective of the policies behind or the effects of any particular law.[44] This jumbled mess of policies and incoherently applied principles was the impetus for Congress's attempt to reformulate almost every aspect of immigration policy with the 1990 Act.

C. The Immigration Act of 1990

In 1990, after two years of deliberations, Congress enacted the most dramatic changes in immigration law since 1965.[45] In addition to addressing concerns about diversity in the immigration stream, the 1990 Act endeavored to deal with economic concerns such as labor shortages and the desire to recruit highly skilled workers and wealthy investors from foreign countries.[46] It also tried to strengthen the family reunification provisions by addressing certain controversial areas, such as the family preference categories.[47] Additionally, the 1990 Act revisited the entire system of temporary (or non-immigrant) visas.[48] According to the House Report, the purpose of the 1990 Act was to

> [e]ase current U.S. immigration law restrictions that (1) hinder the reunification of nuclear families, (2) impose barriers to immigration on nationals of countries that have served as traditional sources of immigration to the United States, and (3) severely limit

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43. *See id.* at 470 ("If cultural and especially linguistic diversity is the goal that justifies the policy of imposing equal country ceilings, then the policy may be adjudged a partial failure in its recent operation . . . . With respect to the salient and politically sensitive matter of language, at any rate, recent immigration has been less diverse than was immigration before diversity became a conscious objective."). *See also supra* notes 20-23 and accompanying text.

44. Whelan, *supra* note 22, at 454-55; *see also* Fuchs, *supra* note 11, at 439 (noting that the Select Commission decided it was necessary to "close the back door to illegal migration" in order to "maintain the open society – to keep the front door open"). For example, the heavily criticized amnesty provision was advocated as the means of cleaning the slate before ushering in a new era dominated by the rule of law. Whelan, *supra* note 22, at 454. The idea was that supporting a group of "second-class" persons was too costly to our system of government. Fuchs, *supra* note 11, at 440 (quoting SELECT COMMISSION ON IMMIGRATION AND REFUGEE POLICY, 97TH CONG., 1ST SESS., FINAL REPORT AND RECOMMENDATIONS 72 (1981)). But concerns that amnesty would create a perverse incentive to immigrate illegally in hopes of another amnesty provision have largely been vindicated.

45. Mark W. Peters, Note, *Much Ado About Anything? The Effect of the Immigration Act of 1990 and Subsequent Amendments on Nonimmigrant Alien Artists and Entertainers*, 38 WAYNE L. REV. 1661, 1661 (1992).

46. H.R. REP. NO. 101-723, pt. 1, at 41-42, 58-72 (1990).

47. *Id.* at 40-41, 73.

48. *Id.* at 43-45.

the number of highly skilled or otherwise needed foreign-born workers who may become lawful permanent residents of the United States.[49]

III. ENACTMENT OF THE DIVERSITY VISA LOTTERY

Conceding that the 1990 Act was a broad attempt to reshape the entire landscape of U.S. immigration policy, this Note addresses only one of the ways in which the 1990 Act implemented just one of these policies: diversity, through the diversity visa lottery.[50] Furthermore, this Note deals with just one aspect of the lottery – the region definitions. It should be noted, however, that the diversity visa lottery constituted just one part of a substantial and complex immigration reform, which undoubtedly explains the absence of significant opposition to the specific mechanisms behind the diversity lottery.[51] Although this does not legitimize Congress's action, it is inevitable that there will be some give and take between legislators and interest groups when so many interests are at stake.[52] That being said, the diversity provisions did face some controversy on the legislative floors.

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49. *Id.* at 31.

50. Other diversity-based provisions included the temporary lottery (which was specifically designed to give most of the visas to Ireland and Northern Europe), and provisions granting visas to specific countries. *See* Pub. L. No. 101-649, §§ 132-34, 152, 104 Stat. 4978, 5000, 5005 (1990) (providing 40,000 visas in the years 1992, 1993, and 1994 to immigrants from countries that are "not contiguous to the United States and that [were] identified as . . . adversely affected foreign state[s]"; also providing 1000 visas to "displaced Tibetans"; also providing visas for employees of the United States consulate in Hong Kong).

51. *See* Jacob, *supra* note 9, at 331-35 (discussing the need to form broad coalitions across immigrant groups to secure passage of significant legislation).

52. *See* 136 CONG. REC. S17106 (daily ed. Oct. 26, 1990) (statement of Sen. Kennedy) ("This legislation represents a compromise. Each of us would have written this bill differently if we could. The issues surrounding legal immigration stir deep emotions and strong political passions."); Jacob, *supra* note 9, at 331-35; *see also Immigration Act of 1989 (Part 3): Joint Hearings Before the Subcomm. on Immigration, Refugees, and Int'l Law of the Comm. on the Judiciary and the Immigration Task Force of the Comm. on Educ. and Labor*, 101st Cong. 687 (1990) (statement of Daniel A. Stein, Executive Director of the Federation for American Immigration Reform) ("The topic of immigration reform is one that cannot be taken lightly or addressed in just a series of short hearings, followed by a speedy mark-up. Immigration reform comes with open debate over many months . . . . Exchanges are made and compromises are reached that are equitable to both sides."); 136 CONG. REC. S17113 (daily ed. Oct. 26, 1990) (statement of Sen. Simpson) (calling immigration "the greatest political no-win turkey I have ever been in").

A. Background

By 1988, Congress was concerned that so few immigrants wer coming from "traditional sources" of immigration.[53] This concern wa not without some justification. The 1989 President's Comprehensiv Triennial Report on Immigration (the "Triennial Report") showed tha only about 10% of immigrants came from Europe in 1985, 1986, an 1987.[54] Furthermore, the Triennial Report indicated that Asia an North America (including Mexico, Central America, and th Caribbean) accounted for almost 80% of all immigrants in each c those years.[55]

On the demographics of current immigration, the Triennia Report concluded:

> The highest number of immigrant admissions (42.8 percent) were from Asia in 1987 . . . . Following the trend that began with the elimination of the national origins quotas . . . [in] 1965, the highest percentage of immigrants came from Asia during the 1985-1987 period. This pattern has been true every year since 1978 . . . .
>
> Mexico, the Philippines, and Korea were the three leading countries of birth for immigrants admitted to the United States during the 1985-1987 period . . . . With the exception of 1982 when Vietnam led all countries . . ., Mexico was the leading country of immigration to the United States during the 1980s.[56]

Concerns about these demographic disparities prompted both th Senate and the House to consider ways to increase immigration fron European countries in their respective versions of what would becom the 1990 Act.

B. In the Senate

The Senate first approved a version of the 1990 Act in 1988 b a substantial majority, but the House sat on the bill until the 100

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53. *See, e.g.*, H.R. REP. NO. 101-723, pt. 1, at 31; 136 CONG. REC. S2211 (daily ed. Mar. 1 1988) (statement of Sen. Thurmond) (noting that new legislation was needed to "put Weste Europeans on a more equal footing with the rest of the immigrant pool"); 136 CONG. REC. S1711 (daily ed. Oct. 26, 1990) (statement of Sen. Dodd) ("In recent years certain traditional sources c American immigration have been disadvantaged . . . .").

54. THE PRESIDENT'S COMPREHENSIVE TRIENNIAL REPORT ON IMMIGRATION, INTERNATIONA MIGRATION TO THE UNITED STATES tbl.F (1989) [hereinafter TRIENNIAL REPORT]; *see also infr* app. tbl.1. The Triennial report was mandated by the IRCA legislation.

55. TRIENNIAL REPORT, *supra* note 54, tbl.F; *see also infra* app. tbl.1. According to th Triennial Report, South America accounted for about 7% of immigrants annually, Africa fo about 3%, and Oceania for less than 1% annually. *Id.*

56. TRIENNIAL REPORT, *supra* note 54, at 12. The other countries in the Triennial Report' top-ten list were Cuba, India, China (Mainland), Dominican Republic, Vietnam, Jamaica, an Haiti. *Id.* tbl.G.

Congress expired.[57] Senators Simpson and Kennedy reintroduced the legislation in February 1989, promoting it as a response to the 1981 Report of the Select Commission on Immigration and Refugee Policy.[58] Senator Kennedy argued that the bill (S. 358) was intended "to make our immigration system more accurately reflect the national interest, more flexible, and also more open to immigrants from nations which are short-changed by current law."[59] The bill placed a greater emphasis on reunification of close family members (i.e., the nuclear family) and employment-based immigration, and created a new category of independent immigrants.[60]

There was no visa lottery in S. 358. Instead, the bill contained a points-based system directed at the perceived inequities against would-be immigrants from countries that were "adversely affected" by the demise of the national origins quota system. In the words of Senator Simpson, this new system of "independent" immigration addressed the concern that

> [m]any of the older source countries of immigration—that is, Europe and Canada—no longer are able to qualify under today's family-dominated system, and some areas of the world have not in the past and do not now have the family ties necessary to send large numbers of immigrants to the United States—such as Africa.[61]

Of course, some legislators criticized the system for purporting to increase diversity by bringing in more Europeans and Canadians. Furthermore, there is considerable evidence that this provision of the legislation was largely tailored to meet the demands of Irish immigrant special interest groups.[62] Nonetheless, there was substantial agreement in the Senate that northwestern Europeans,

57. 136 CONG. REC. S1228-29 (daily ed. Feb. 7, 1989) (statement of Sen. Kennedy).

58. *Id.* at S1229.

59. *Id.*

60. This is a necessarily short description of all that this bill was designed to accomplish. There are many more aspects to the bill that are beyond the scope of this Note (such as the way it re-structured the family preference system, the way it designed the employment-based system, and the immigrant investor provision). One provision worth mentioning, however, is the NP-5 program, which allocated visas to immigrants from countries "adversely affected" by the 1965 legislation. *See* H.R. REP. NO. 101-723, pt. 1, at 76-77. The definition of an "adversely affected" country is one so defined by the IRCA legislation, "except countries contiguous to the United States." *Id.* at 77; *see also supra* note 24.

61. 136 CONG. REC. S1230 (daily ed. Feb. 7, 1989) (statement of Sen. Simpson). Interestingly, Canada has never qualified for visas under the diversity visa program because it sends too many immigrants (more than 50,000 in any five-year period). *See, e.g.*, Bureau of Consular Affairs, *Registration for the Diversity Immigrant (DV-2006) Visa Program*, 69 Fed. Reg. 65012, 65016-17 (Nov. 9, 2004) (listing countries whose natives qualify for the lottery).

62. For a very insightful discussion on this point, see Jacob, *supra* note 9, at 311-35 (describing in depth the efforts and effectiveness of the behind-the-scenes legwork of special interest groups, particularly pro-Irish groups, in passing the diversity provisions).

such as "Irish, Germans, Italians, [and] Poles" were being "inadvertently discriminated against by the present system."[63]

The points-based approach of S. 358 was designed to admit immigrants based on the number of points they scored under an elaborately designed point allocation system.[64] Points were awarded for a variety of factors, including age (up to 10 points), education (up to 25 points), occupational demand (up to 20 points), occupational training and work experience (up to 20 points), and prearranged employment in the United States (up to 15 points).[65] A provision awarding a relatively high number of points to potential immigrants who spoke English, however, proved too controversial,[66] and the Senate ultimately removed it from the bill. The Senate approved S. 358 on July 13, 1989, by a vote of 81-17.[67]

C. In the House

Following months of committee hearings and mark-ups, the House Committee on the Judiciary recommended passage of the corresponding House bill (H.R. 4300) in September 1990. This bill largely followed the model of the S. 358, and it served the same three purposes: to "strengthen[] our system of family reunification"; to "provide[] to the employers and employees of this country a system of legal immigration for . . . individuals who are needed in our economy"; and to "ensure[] the long-term diversity in our flow of immigrants from around the world."[68] H.R. 4300, however, eliminated the Senate's independent immigration system, replacing it with a

63. 136 CONG. REC. S1843 (daily ed. Feb. 28, 1989) (statement of Sen. D'Amato); *see also* 136 CONG. REC. S8529 (daily ed. July 20, 1989) (statement of Sen. Daschle); 136 CONG. REC. S7896 (daily ed. July 13, 1989) (statement of Sen. Simpson); 136 CONG. REC. S7793 (daily ed. July 12, 1989) (statement of Sen. Moynihan); 136 CONG. REC. H2164 (daily ed. May 24, 1989) (statement of Rep. Fish).

64. S. 358, 101st Cong. (1989).

65. *Id.*

66. *See, e.g.*, 136 CONG. REC. S7865 (daily ed. July 13, 1989) (statement of Sen. Simpson); 136 CONG. REC. S7865 (daily ed. July 13, 1989) (statement of Sen. Simon); 136 CONG. REC. S7751 (daily ed. July 12, 1989) (statement of Sen. Simon); 136 CONG. REC. S7633-34 (July 11, 1989) (statement of Sen. Simpson); 136 CONG. REC. S2211 (daily ed. Mar. 15, 1988) (statement of Sen. Pell).

67. 136 CONG. REC. S7907 (daily ed. July 13, 1989).

68. 136 CONG. REC. H8631 (daily ed. Oct. 2, 1990) (statement of Rep. Morrison); *see also Immigration Act of 1989 (Part 3): Joint Hearings Before the Subcomm. on Immigration, Refugees, and Int'l Law of the Comm. on the Judiciary and the Immigration Task Force of the Comm. on Educ. and Labor*, 101st Cong. 667 (1990) (app. 1, text of H.R. 4300).

permanent diversity visa lottery similar to the *ad hoc* programs that had surfaced recurrently since 1986.[69]

1. Committee Hearings

From September 1989 through March 1990, the House Judiciary Committee's Subcommittee on Immigration, Refugees, and International Law conducted a series of hearings to consider S. 358 and four alternative immigration reform bills. All four bills had some diversity provision: H.R. 672 and H.R. 2448 had points-based systems similar to the Senate bill, but differed in how the points should be allocated; H.R. 2646 deferred the issue to the executive branch, allowing the President to determine which immigrants to admit consistent with foreign policy goals and the national interest; and H.R. 4165 introduced the diversity visa lottery provisions almost exactly as they now stand.

Interestingly, H.R. 4165, the only bill to include a visa lottery, was not introduced until March 1, 1990. But no representative of any ethnic-based organization testified in or submitted a statement to the hearings after September 27, 1989.[70] Hence, these organizations were not given an opportunity to directly respond to the diversity visa lottery in the subcommittee hearings. These organizations did comment at the subcommittee hearings on the other bills, however. And, although the majority of their testimony addressed the proposed changes to the family preference system, the diversity provisions clearly concerned them, as each organization commented on the diversity provisions of the bills before them.

For example, the National Council of La Raza (the "NCLR") indicated at the subcommittee hearings that it did not oppose creating

69. The House bill also introduced the transitional diversity visa lottery that lasted until 1994. Because the transitional lottery followed substantially different rules than the permanent lottery, I will not discuss it at length in this Note. However, it should be noted that the transitional lottery, and the entire bill, appeared to some representatives as a patchwork of special interest legislation heavily influenced by various immigration advocacy groups, including the same Irish immigration groups that affected the Senate bill. *See* 136 CONG. REC. H12359 (daily ed. Oct. 27, 1990) (statement of Rep. Bryant); 136 CONG. REC. H8677-78 (daily ed. Oct. 2, 1990) (statement of Rep. Smith); Jacob, *supra* note 9, at 325; *see also* 101 CONG. REC. H12367 (daily ed. Oct. 27, 1990) (statement of Rep. Richardson) (listing 17 varied special interest groups that "strongly" supported the legislation).

70. The September 27, 1989, hearing included testimonies from representatives of the American Committee on Italian Migration, the National Council of La Raza, the American Jewish Committee, the Chinese Welfare Council, the Irish Immigration Reform Movement, and the Organization of Chinese Americans; there was also a joint statement by various Asian and Pacific American organizations. *See Immigration Act of 1989 (Part 1): Hearings Before the Subcomm. on Immigration, Refugees, and Int'l Law of the Comm. on the Judiciary*, 101st Cong. (1989).

a new avenue for immigration, but "that it should be done with careful consideration, on a trial basis only" because it represented "an unprecedented step in immigration policy." [71] The NCLR opposed S. 358 because it did not include the family members of independent immigrants selected under its points-based system, which could further aggravate backlogs for family preference visas.[72] The NCLR also opposed H.R. 2448 because it awarded points for English language ability: "[A]ny new channel for immigrants must promote equity and diversity in the best traditions of the U.S. The point categories should not even give the appearance of favoring some parts of the world over others."[73] The NCLR supported the points-based system of H.R. 672 because it did not contain an English language provision, it provided for family members of selected immigrants, and it would begin on a trial basis.[74]

Similarly, the Organization of Chinese Americans, Inc. (the "OCA"), supported H.R. 672 and opposed H.R. 2448 because of the English language provision.[75] The OCA directly addressed the potential for discrimination in the selection of independent immigrants at the subcommittee hearings: "The point system program *should not directly or indirectly favor any regions* of the world. If after enactment, the program is determined to not enhance diversity, then *a random lottery* first-come, first-serve system should be immediately implemented."[76]

The Chinese Welfare Council (the "Council") also advocated a first-come, first-serve system at the subcommittee hearings.[77] The Council criticized the points-based approach of S. 358 for failing to provide for accompanying family members and for assigning points for employment criteria when separate employment-based immigration categories already existed. The Council asserted: "If the purpose of the selected immigrant category is to permit persons to immigrate

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71. *Immigration Act of 1989 (Part 1): Hearings Before the Subcomm. on Immigration, Refugees, and Int'l Law of the Comm. on the Judiciary*, 101st Cong. 216 (1989) (statement of Cecilia Muñoz, Senior Immigration Policy Analyst for the National Council of La Raza). The NCLR is a "national organization dedicated to improving life opportunities for Hispanics in the United States." *Id.* at 205.

72. *Id.* at 216.

73. *Id.*

74. *Id.* The American Jewish Committee also favored the points-based system of H.R. 672, partly because it would begin on a trial basis. *See id.* at 277 (statement of Gary E. Rubin, Director of National Affairs of the American Jewish Committee).

75. *Id.* at 251 (statement of Melinda C. Yee, Executive Director of the Organization of Chinese Americans). The OCA is "a national, non-profit, non-partisan network of concerned Chinese Americans." *Id.* at 241.

76. *Id.* at 251 (emphasis added).

77. *Id.* at 287-88 (statement of Howard Hom, Chinese Welfare Council).

who would not otherwise be able to come under the current law, then the system would operate better on a first-come first-serve basis without any computation of points . . . ."[78]

The Reverand Joseph A. Cogo, representing the American Committee on Italian Migration (the "ACIM"), on the other hand, opposed S. 358 at the subcommittee hearings because it did too *little* to diversify the immigration stream:

> S. 358 unfortunately does dismally little, if anything at all, to resolve the problem of the present imbalance in the usage of visas and to create diversity in our immigration flow.
>
> I suspect that the [points-based system] was conceived with the intent of favoring the traditional flow of European immigration. . . . Honorable as this intention may be, I am afraid this [points-based system] will not solve the Irish problem at all. There are far more Asiatics [sic] – young, skilled, educated and ambitious—than there are Irish in Ireland. And, in point of fact, even if you count together the Irish, the Italians, the Portuguese and the Greeks, they will still be unable to compete, numberwise, with the number of potential immigrant candidates from Asia.[79]

The ACIM concluded that a "regional ceiling or a regional floor are the only practical ways to ensure diversity in our immigration flow."[80]

The Irish Immigration Reform Movement (the "IIRM") also indicated that a points-based system would do too little to help the Irish. Instead, the IIRM proposed that the legislature allocate 30,000 visas annually for 15 years to applicants from specific "disadvantaged" countries in addition to a points-based diversity system designed to assist "underrepresented" countries.[81] The IIRM stated: "[T]here is no question that the [proposed systems] are not fair and balanced *by themselves*. They are not meant to be. However, . . . they create some balance against a system which is currently heavily weighted against many countries in the world."[82]

Not only did the hearings fail to include testimony from ethnic-based organizations about H.R. 4165 and the diversity visa lottery, but the hearings failed to include almost any testimony addressing the diversity visa lottery provision of H.R. 4165 at all. Other non-ethnic

78. *Id.* at 287. A joint statement submitted by various Asian and Pacific American organizations also opposed passage of S. 358's independent immigration provisions, albeit largely because of the provision awarding points for English language proficiency that had already been removed. *See id.* at 613-14 (joint statement of Asian American Legal Defense and Education Fund (New York); Asian Law Alliance (San Jose); Asian Law Caucus (San Francisco/Oakland); Asian Pacific American Legal Center of Southern California; Na Loio No Na Kanaka—Lawyers for the People of Hawaii; and Nihonmachi Legal Outreach (San Francisco)).

79. *Id.* at 259-60 (statement of Rev. Joseph A. Cogo, American Committee on Italian Migration).

80. *Id.* at 262.

81. *Id.* at 222-25 (statement of Donald Martin, Irish Immigration Reform Movement).

82. *Id.* at 224 (emphasis in original).

based groups did testify after the introduction of H.R. 4165 about the merits of increasing the diversity of the immigration stream in general; but most did not testify about the specifics of the diversity provisions.[83]

The little testimony that did address specific provisions took aim at the various points-based systems.[84] For example, the Carnegie Endowment for International Peace testified at the subcommittee hearings that it favored increasing the stream of independent immigrants but argued against tailoring provisions specifically to increase diversity.[85] Similarly, Richard D. Lamm, Director of the

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83. *See, e.g., Immigration Act of 1989 (Part 3): Joint Hearings Before the Subcomm. on Immigration, Refugees, and Int'l Law of the Comm. on the Judiciary and the Immigration Task Force of the Comm. on Educ. and Labor*, 101st Cong. 564 (1990) (statement of Malcolm Lovell, Jr., Former Under Secretary of Labor and Director of the Institute for Labor and Management at George Washington University) ("Diversity is desirable but it should be a by-product rather than a deliberate goal of our immigration policy. Our overriding objective must be to select the most skilled, versatile and adaptable immigrants . . . whatever their country of origin."); *id.* at 669-71 (statement of Eugene McNary, Commissioner of the Immigration and Naturalization Service) (stating that the administration considered it a fundamental principal that "[w]e should continue to adhere to the current practice of admitting all aliens without regard to race, creed, sex or national origin," but that the administration considered "[p]reserving and promoting diversity in sources of immigration" an important policy goal); *id.* at 279-97 (statement of Leon F. Bouvier, Visiting Professor of Sociology, Old Dominion University) (discussing at length the impact of the demographics of the immigrant stream on American society, concluding that fewer immigrants should be admitted and that concern for the individual, as opposed to concern for specific groups, should be the prevailing principle).

There was some testimony relating to the impacts of high levels of Hispanic and Asian immigration at the local level, but the testimony focused on the need to help local governments meet the demands of a growing immigrant population, as opposed to the merits of diversity (or of particular diversity provisions) in the immigration process. *See id.* at 514-16, 541-47 (1990) (statement of Patrick Burns, Center for Public Policy and Contemporary Issues at the University of Denver) (discussing the impacts of high levels of Asian and Hispanic immigration on California schools); *see also id.* at 597-605 (statement of Ellen Rodriguez, Program Administrator for the National Association of Counties) (arguing that changes in immigration policy at the national level can have serious economic consequences at the local level); *id.* at 609-17 (statement of Mark A. Tajima, Legislative Analyst for the Chief Administrative Office of the County of Los Angeles, CA) (same).

84. *See, e.g., id.* at 253-54 (statement of Prof. Barry R. Chiswick, Department of Economics, University of Illinois at Chicago) ("It is essential to preserve the non-racist character of the plan. Points should *not* be awarded on the basis of the applicant's race, religion, ethnicity, or country of origin."); *id.* at 269-72 (statement of Ben J. Wattenberg, Senior Fellow, American Enterprise Institute for Public Policy Research) (advocating a points-based system as well as additional visas made specifically available to immigrants from Europe).

85. *Id.* at 133-34 (statement of Doris Meissner, Senior Associate, Carnegie Endowment for International Peace). Ms. Meissner stated:

> Increasing independent immigration . . . is a sufficient response to the problem of diversity of source countries.
>
> Demand for immigration to the U.S. is simply not evenly distributed by geography, nor has it ever been so in our history. Demand is a function of family flows . . .; from special economic or cultural relationships among countries . . .; and by the legacy of historical connections . . . . Of course, these forces change and potential immigrants

Center for Public Policy and Contemporary Issues at the University of Denver, proposed that immigrants should be selected "on the basis of merit . . . without regard to race, religion or ethnicity."[86] And the American Bar Association submitted to the subcommittee a February 1989 ABA resolution stating, among other things, that "the American Bar Association supports . . . a separate additional quota allotment for independent or unsponsored immigrants based on a *nondiscriminatory* selection system or lottery, or both . . . ."[87] The only hearing testimony that addressed H.R. 4165's diversity visa lottery provision expressed indifference as to how the immigrant stream was diversified.[88]

2. Evolution of H.R. 4300

Five days after the conclusion of the subcommittee hearings, Representative Morrison, chairman of the subcommittee, introduced H.R. 4300.[89] Subcommittee and committee markups began two days later, on March 21, 1990. On September 19, 1990, the Judiciary Committee submitted a favorable report of H.R. 4300 to the House.[90] Interestingly, H.R. 4300 contained no diversity provision of any kind when it was introduced to the subcommittee after the March hearings;[91] but the version of the bill introduced to the House after

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should not be artificially shut out when they do. However, changes in the levels of independent immigration should be adequate to meet this standard. It is not necessary, in addition, to construct ways to build in an outcome of increased source country diversity.

Id.

86. *Id.* at 512 (statement of Richard D. Lamm, Former Governor of the State of Colorado and Director of the Center for Public Policy and Contemporary Issues at the University of Denver). Mr. Lamm criticized the various bills for "set[ting] no priorities and mak[ing] no hard choices" by "saying yes to virtually every interest group with a demand to make on the immigration process." *Id.* at 499-500.

87. *Id.* at 908 app. 21 (emphasis added).

88. *Id.* at 432-33 (statement by Thomas R. Donahue, Secretary-Treasurer, American Federation of Labor and Congress of Industrial Organizations). Mr. Donahue stated:

> We agree that the United States should be accessible to nationals of all countries. The question is how this good is to be obtained. . . .
>
> The Senate chose an elaborate point system . . . . [H.R. 672] adopts a point system but on a time-limited pilot basis. [H.R. 2448] proposes a point system . . . somewhat differently defined. And [H.R. 4165] also would allow for "diversity" immigrants, using a still-different basis for ascertaining the targeted countries. Given this diversity of riches, for once I will be so modest as to say that we agree with the end sought and have no favorite as to the proper means.

Id.

89. *See id.* at 687 app. 1; 136 CONG. REC. H903 (daily ed. Mar. 19, 1990).

90. *See* H.R. REP. NO. 101-728, pt. 1, at 1; 136 CONG. REC. H7889 (daily ed. Sept. 19, 1990).

91. *See Immigration Act of 1989 (Part 3): Joint Hearings Before the Subcomm. on Immigration, Refugees, and Int'l Law of the Comm. on the Judiciary and the Immigration Task*

subcommittee and committee markups contained a diversity visa lottery provision almost identical to the one in H.R. 4165.[92]

The report of the Judiciary Committee contained no explanation as to why the lottery was selected over the other proposals, even though the lottery was in direct conflict with the Senate bill's diversity system. Citing inequities to immigrants from certain countries, "such as Italy, Ireland, Poland, and Argentina," caused by the repeal of the national origins quota system in 1965, the report simply stated:

> The Committee is convinced that . . . changes must be made to further enhance and promote diversity within the present system. . . .
>
> In order to maintain diversity in immigration to our nation, a regional program is created by the bill. This ongoing program, which begins in 19[9]4, provides 55,000 annual visas for natives of regions of the world where immigration through the preference system has been lower than 50,000 over the previous five years.[93]

The only other comments in the report that directly addressed the diversity lottery simply described the lottery's mechanics and asserted that it was designed to be self-adjusting in order to maintain diversity in immigration notwithstanding varying immigrant flows.[94]

The dissenting views published in the Committee's Report, by contrast, specifically attacked the diversity visa lottery:

> H.R. 4300 expands immigration privileges to specific regions and countries under the guise of creating a more diverse immigration flow . . . . Instead of creating an underlying immigration system which is neutral as to race, religion, or national origin, H.R. 4300 grants additional visas to specific countries and regions which, the bill alleges, have been treated unfairly. This is not a rational way to create immigration policy.

Force of the Comm. on Educ. and Labor, 101st Cong. 687-773 app. 1 (1990) (providing the text of H.R. 4300).

92. *Compare* H.R. REP. NO. 101-723, pt. 1, at 5-6 (containing the diversity visa lottery section of H.R. 4300), *with Immigration Act of 1989 (Part 3): Joint Hearings Before the Subcomm. on Immigration, Refugees, and Int'l Law of the Comm. on the Judiciary and the Immigration Task Force of the Comm. on Educ. and Labor*, 101st Cong. 52-57 (1990) (containing the diversity visa lottery section of H.R. 4165).

93. 101 H.R. REP. NO. 101-723, pt. I, at 48. The report actually states that the program was to begin in 1944, but as the Report was published in 1990, this must be a misprint. The Act actually set forth that the permanent diversity visa lottery would begin in 1994. In determining whether any country has sent over 50,000 immigrants in the previous five years, only family-sponsored immigrants, employment-based immigrants and their immediate family, and the immediate relatives of citizens are counted. *Id.* at 78, 86. Currently the lottery only issues 50,000 visas annually as a result of the Nicaraguan Adjustment and Central American Relief Act of 1996, which reserved the use of 5,000 of the 55,000 annual allotment of diversity visas to allow certain undocumented aliens from Central America to adjust their status. *See* Michael M. Hethmon, *Diversity, Mass Immigration, and National Security After 9/11—An Immigration Reform Perspective*, 66 ALB. L. REV. 387, 391 (2003).

94. H.R. REP. NO. 101-723, pt. I, at 78.

> . . . We also object to H.R. 4300's designation of certain countries, regions or continents.[95]

The dissenters asserted that "the appropriate approach is to readjust the underlying system to make it equitable, not to give additional visas to specific countries."[96]

On the House floor, the discussion of H.R. 4300's diversity visa lottery provisions echoed the same themes advanced on the Senate floor in support of S. 358's points-based system. Specifically, supporters cited the need to increase diversity in the immigration stream by allocating visas to underrepresented countries (primarily European).[97] There was some opposition to the diversity provisions in the House,[98] but for the most part they were supported. Conspicuously absent, however, was any discussion of the merits of the House bill's diversity visa lottery as a means of increasing "diversity" over the merits of the Senate bill's points-based system designed to advance the same goal.[99] The House adopted H.R. 4300 on October 3, 1990.

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95. H.R. REP. NO. 101-723, pt I, at 138-40 (dissenting views).

96. *Id.* at 140.

97. *See, e.g., id.* at 48; 136 CONG. REC. E3110 (daily ed. Oct. 3, 1990) (statement of Rep. Scheuer); 136 CONG. REC. E3098 (daily ed. Oct. 3, 1990) (statement of Rep. Anderson); 136 CONG. REC. H8718 (daily ed. Oct. 3, 1990) (statement of Rep. Schumer); 136 CONG. REC. H8718 (daily ed. Oct. 3, 1990) (statement of Rep. Weiss); 136 CONG. REC. H8667 (daily ed. Oct. 2, 1990) (statement of Rep. Ortiz); 136 CONG. REC. H8650-51 (daily ed. Oct. 2, 1990) (statement of Rep. Markey); 136 CONG. REC. H8649 (daily ed. Oct. 2, 1990) (statement of Rep. Engel); 136 CONG. REC. H8644 (daily ed. Oct. 2, 1990) (statement of Rep. Oakar); 136 CONG. REC. H8638 (daily ed. Oct. 2, 1990) (statement of Rep. Morrison); 136 CONG. REC. H8634 (daily ed. Oct. 2, 1990) (statement of Rep. Fish); 136 CONG. REC. H8632 (daily ed. Oct. 2, 1990) (statement of Rep. McGrath); *see also* 136 CONG. REC. E3148-49 (daily ed. Oct. 5, 1990) (statement of Rep. Gilman) (commending the Ancient Order of Hibernians, an Irish group, on their efforts to bring about the 1990 immigration reforms); 136 CONG. REC. E3118-19 (daily ed. Oct. 3, 1990) (statement of Rep. Donnelly) (arguing that the diversity visa lottery and other provisions did not do enough to benefit potential Irish immigrants).

98. *See* 136 CONG. REC. H8641 (daily ed. Oct 2, 1990) (statement of Rep. Bryan) (explaining that he will offer an amendment that strikes the diversity portions of the bill and leaves only the family unity provisions); 136 CONG. REC. H8677-78 (daily ed. Oct. 2, 1990) (statement by Rep. Smith) (arguing that H.R. 4300 actually works against fairness and equality by undoing the work of the 1965 immigration bill).

99. Rep. Donnelly's comments published in the extension of remarks did discuss the merits of specific aspects of the diversity visa lottery. However, he did not contrast this lottery with the Senate's points-based system. His concerns were that the lottery did not start soon enough and that it discriminated against countries with low populations, particularly Ireland, by only allowing one application per person. *See* 136 CONG. REC. E3118-19 (daily ed. Oct. 3, 1990) (statement of Rep. Donnelly).

D. From Bill to Law

The Joint Conference Committee adopted the House version of the bill on October 26, 1990. The committee modified the diversity visa lottery only by requiring that immigrants admitted under the lottery have the equivalent of a high school degree. On consideration of the Joint Conference report, the Senate did not directly comment on the replacement of S. 358's points-based system with the diversity lottery, and any comments made about the diversity provisions at all were generalized.[100] This may have been because the drafters of the Senate bill acquiesced to the changes in order to pass other reforms that had been years in the making.[101] As stated by Senator Kennedy: "This bill, like all major legislation, represents many years of work, and many efforts at compromise. . . . This legislation represents a compromise."[102] In the end, this compromise won out as both legislative bodies approved the Joint Conference report, on October 27, 1990.[103] President George Bush, Sr., signed the 1990 Act, and the diversity visa lottery, into law on November 29.[104]

IV. THE REGION DEFINITIONS—WHY IS MEXICO IN SOUTH AMERICA?

The diversity visa lottery was designed to preserve the diversity of the immigrant stream by "divid[ing] the world into high and low admission regions," and allocating visas to each region "in the inverse proportion [of] the percentage of immigrants sent to the United States."[105] Therefore, the critical factor in determining how to allocate diversity visas is the definition of each region; these definitions dictate the type of diversity sought (e.g., cultural, racial

100. *See, e.g.*, 136 CONG. REC. S17109 (daily ed. Oct. 26, 1990) (statement of Sen. Simpson); 136 CONG. REC. S17110 (daily ed. Oct. 26, 1990) (statement of Sen. Dodd).

101. Jacob, *supra* note 9, at 332 ("[F]rom the very beginning, our goal was to promote diversity. We were willing to jettison the point system to keep diversity alive.") (quoting Michael Myers, who served as counsel to the Senate Judiciary Committee's Subcommittee on Immigration and Refugee Affairs, on why the Senate sponsors were willing to adopt the House provisions).

102. 136 CONG. REC. S17106 (daily ed. Oct. 26, 1990) (statement of Sen. Kennedy).

103. 136 CONG. REC. H12368-69 (daily ed. Oct. 27, 1990); 136 CONG. REC. S17568-69 (daily ed. Oct. 27, 1990).

104. Statement of President George Bush Sr. upon Signing S. 358, 1990 U.S.C.C.A.N. 6801-2. Notably, President Bush made no reference to the diversity provisions of the 1990 Act in his signing statement. *See id.* at 6801-1 to 1-2. The President, however, did praise other provisions of the act: "[This bill] accomplishes what the Administration sought from the outset of the immigration reform process: a complementary blending of our tradition of family reunification with increased immigration for skilled individuals to meet our economic needs." *Id.* at 6801-1.

105. H.R. REP. NO. 101-723, pt. I, at 78. Then the visas are "apportioned according to the population of [each] region." *Id.*

geographic, etc.) by laying the framework on which the mathematical formulations apply. Ultimately, the region definitions are responsible for how the blind mathematical equations allocate diversity visas to different countries.

In large part, the regions appear to be drafted along neutral geographic lines: "[T]he areas described in each of the following clauses shall be considered to be a separate region: (i) Africa. (ii) Asia. (iii) Europe. (iv) North America (other than Mexico). (v) Oceania. (vi) South America, Mexico, Central America, and the Caribbean."[106] With two notable exceptions, these regions roughly approximate the continental divisions. They also roughly resemble, with the same two notable exceptions, the regions used for groupings in official immigration statistical reports, including the President's Comprehensive Triennial Report on Immigration that was sent to Congress in 1989: Europe, Asia, Africa, Oceania, North America (including Central America and the Caribbean), and South America (the continent).[107]

The two notable exceptions are the subject of this Note: "North America *(other than Mexico)*" and "South America, *Mexico, Central America, and the Caribbean.*"[108] As a cultural grouping, this division may make sense. In fact, there is support for the proposition that Congress actually intended to make this cultural grouping. For example, in the hearings and Senate and House floor debates, the terms "Hispanic," "Latin American," and "Central American" were used almost interchangeably, particularly when talking about the disproportionate number of immigrants coming from Mexico and Central America.[109]

Without discussing the cultural similarities and differences of the various Latin American countries, "South America, Mexico, Central America, and the Caribbean" is arguably a plausible cultural grouping. The more significant question, however, is: Why did Congress choose to make this cultural grouping when it avoided other

106. 8 U.S.C. § 1153(c)(1)(F) (2005).

107. *See, e.g.*, TRIENNIAL REPORT, *supra* note 54, tbl.F; 2004 YEARBOOK, *supra* note 6, tbl.8; IMMIGRATION IN FISCAL YEAR 1995, *supra* note 6, tbl.6. The 2004 Yearbook explicitly includes Central America and the Caribbean in North America, as does the Immigration to the United States in Fiscal Year 1995 report. The numbers suggest that the Triennial Report did also.

108. 8 U.S.C. § 1153(c)(1)(F) (2005) (emphasis added).

109. *See, e.g.*, 136 CONG. REC. S7335 (daily ed. July 12, 1989) (statement of Sen. Cranston) (noting that sibling relationships are important "in those countries–mostly Hispanic and Asian–where [the sibling-based] visas are most used"); 136 Cong. Rec. E3110 (daily ed. Oct. 3, 1990) (statement of Rep. Scheuer) ("Over the past quarter century the vast majority of immigrants have hailed from Latin America or from Asia.").

possible similar groupings?[110] The congressional record, itself, is devoid of any explanation.[111]

One explanation may be that Congress sought to avoid a politically charged (and counter-productive) attempt to promote diversity by discriminating between cultures. It is not hard to imagine the political repercussions to a Senator who introduced a provision designed to select immigrants based on their religion or primary language, for the ostensible purpose of increasing "diversity."[112] Focusing on objective geographic divisions is a much more politically neutral way to promote diversity.[113]

If Congress was only interested in geographic diversity, however, why the cultural grouping of Latin America? Concerns about excessive Hispanic immigration cannot be the only reason since immigration from South America had been anything but excessive.[114] It is possible that the diversity lottery was a direct response to the concerns of the ACIM that the Senate's points-based system did too little to further the cause of European, and particularly Irish, migration.[115] An intent to increase European immigration can be deduced from the statutory provisions defining the diversity lottery regions, which provide a distinctly heneficial treatment for Irish immigrants: "Only for purposes of administering the [diversity visa

110. For example, Egypt, Sudan, and Saudi Arabia are classified in two separate continental regions instead of in a cultural grouping. But such a grouping is just as plausible as the legislative commingling of Brazil, Jamaica, and Guatemala.

111. *See supra* Part III. Likewise, even ten years after the lottery took effect, commentators have failed to explain the anomalous definition. Even Stephen Legomsky, who correctly details the mechanics of the program and notes the lottery's disproportionately favorable treatment of Europe and Africa, has not provided an explanation for the abnormal regional definition that actually explains why so many visas are granted to Europe and Africa. *See* STEPHEN H. LEGOMSKY, IMMIGRATION AND REFUGEE LAW AND POLICY 236-37 (3d ed. 2002) (discussing the mechanics of the diversity visa lottery).

112. Indeed, a simple allocation of additional points for English language ability proved controversial enough to require its removal from the Senate's original points-based system. *See supra* note 66 and accompanying text.

113. For some interesting discussions on the meanings of diversity, equality, xenophobia, globalization, and the implications of Congresa's failure to define "diversity" in the 1990 Act, see Hethmon, *supra* note 93, at 392-405 (discussing transnational diversity theory and its impact on national immigration systems); Legomsky, *supra* note 9, at 321-25, 330-34 (considering various universal ideas that arise from discussions of immigration policy and geographic priorities in immigration policy); Parker, *supra* note 9, at 691-99, 727-30 (analyzing the impact of globalization on immigration questions).

114. According to the Triennial Report, only 7% of all immigrants were coming from South America. *See supra* notes 54-56 and accompanying text.

115. *See* Immigration Act of 1989 (Part 1): Hearings Before the Subcomm. on Immigration, Refugees, and Int'l Law of the Comm. on the Judiciary, 101st Cong. 259-60 (1989) (statement of Rev. Joseph A. Cogo, American Committee on Italian Migration); *see also id.* at 222-25 (statement of Donald Martin, Irish Immigration Reform Movement) (declaring that a point system would not help the problems of Irish immigration to the United States).

lottery], Northern Ireland shall be treated as a separate foreign state . . . ."[116] Granting Ireland double status for lottery purposes by taking Northern Ireland out of the United Kingdom (which is limited in its allotment of diversity visas because it already sends so many immigrants to the United States) lends substantial support to allegations that the creation of the lottery was little more than special interest group appeasement.[117]

The disparate Latin American cultural grouping may have thus been an additional attempt to benefit prospective European immigrants by limiting South American access to the diversity lottery. If the South America region only included continental South America, the number of diversity visas allocated to immigrants from continental South America would be comparable to the number allocated to immigrants from Europe and Africa because the number of total immigrants coming from each of these continents is approximately the same.[118] But the number of diversity visas allocated to potential South American immigrants can be significantly curtailed if Mexico, Central America, and the Caribbean are combined with continental South America, since so many immigrants already come from Mexico, Central America, and the Caribbean. The visas deprived would-be South American immigrants by this unconventional geographic grouping can then be made available to the other "low admission regions"—most notably Europe and Africa.[119]

This tactic is particularly effective because of its effect on the North America region. After removing Mexico, Central America, and the Caribbean, only Canada and Greenland remain in the North America region.[120] Furthermore, Canada routinely sends more than 50,000 immigrants to the United States in any given five year period,

116. 8 U.S.C. § 1153(c)(1)(F) (2005).

117. *See, e.g.*, H.R. REP. NO. 101-723, pt. 1, at 138-39 (dissenting views) ("Instead of fashioning a policy for the national interest of all Americans, H.R. 4300 responds to every special interest group that has made a demand on the United States immigration system."); Jacob, *supra* note 9, at 311-21, 323-25.

118. *See infra* notes 124-128 and accompanying text.

119. A "low admission region" is a region that does not account for more than one-sixth of the total number of immigrants over a five-year period. 8 U.S.C. § 1153(c)(1)(B)(i) (2005).

120. For immigration statistics purposes, Mexico, Central America, and the Caribbean are typically included with North America. *See supra* note 107. For diversity lottery purposes, the Bahamas has been included in the North America region, even though it is considered a part of the Caribbean for immigration statistics purposes. *Compare, e.g.*, Bureau of Consular Affairs, *Registration for the Diversity Immigrant (DV-2006) Visa Program*, 69 FR 65012, 65017 (Nov. 9, 2004) (including the Bahamas in North America for the diversity visa lottery), *with* 2004 YEARBOOK, *supra* note 6 (including the Bahamas in the Caribbean).

so it would not be allocated any diversity visas.[121] Thus, by grouping Mexico, Central America, and the Caribbean with continental South America, the North America region could be turned into another Oceania for purposes of the diversity visa calculus, never substantially affecting the number of diversity visas available for European and African immigrants.[122] In sum, through the strategic definition of the South America region, the drafters of the lottery could simultaneously preclude a particular cultural grouping from meaningful access to the diversity visa lottery *and* ensure maximum access for European and African immigrants.

The numbers bear this argument out. Every year since the inception of the diversity visa lottery, there have been slightly fewer non-diversity visa immigrants from continental South America than from Europe, and slightly more non-diversity immigrants from continental South America than from Africa.[123] Immigrants from continental South America typically account for about 7% of all non-diversity visas; European and African immigrants account for about 14% and 4%, respectively, of all non-diversity visas.[124] But while immigrants from Africa and Europe together routinely account for almost 80% of all diversity immigrants (about 44% and 35%, respectively), less than 3% of all diversity immigrants come from South America, even less than its already low percentage of non-diversity admissions.[125] In fact, of the four continents that each account for less than one-sixth of total immigration, South America is the only one that receives a smaller percentage of diversity visas than non-diversity visas.[126] As predicted, North American immigrants (including Central America and the Caribbean) usually account for

121. *See* Victor C. Romero, *On Elián and Aliens: A Political Solution to the Plenary Power Problem*, 4 N.Y.U. J. LEGIS. & PUB. POL'Y 343, 369 (2001).

122. Because of its low population, Oceania is granted only a few diversity visas, despite its low number of annual admissions. *See infra* app. tbls. 2-5; *see also supra* note 3.

123. For the discussion that follows, Tables 2-5 in the Appendix may be helpful.

124. *See* sources cited *supra* note 6.

125. *See* sources cited *supra* note 6.

126. The other three "low admission" continents combined send four times as many diversity immigrants as non-diversity immigrants. European immigrants typically receive about 14% of all non-diversity visas and 44% of all diversity visas; African immigrants receive about 4% of all non-diversity visas and almost 35% of all diversity visas; and immigrants from Oceania receive about 0.5% of all non-diversity visas and about 1.4% of all diversity visas. Combined they account for about 18% of all non-diversity immigrants and 80% of all diversity immigrants. *See infra* app. fig.1.

roughly the same number of diversity visas as immigrants from Oceania—about 1% to 2%.[127]

Of course, the numbers change with the regional definitions.[128] Under the legislative definition, the South America region accounts for about 45% of all non-diversity visa admissions and less than 5% of all diversity-based admissions; and the new North America (absent Mexico, Central America, and the Caribbean) accounts for only 2% of all non-diversity admissions, and less than one-half of one percent of all diversity admissions.[129] In short, as predicted, the unorthodox definition of the America regions dramatically increases the number of non-diversity admissions counted against South America, thus precluding any meaningful access to the diversity lottery for immigrants from both American continents and ensuring that more diversity visas are available for European and African immigrants.

The effect of the regional definitions could not have come as a surprise to the drafters of the diversity lottery—the percentage of immigrants coming from each region has not changed substantially since Congress was presented with the Triennial Report. The Triennial Report showed that about 7% of all immigrants were coming from South America, 11% from Europe, and 3% from Africa.[130] Today, about 7% of all non-diversity immigrants come from South America, 14% from Europe, and 4% from Africa.[131] The percentages of non-diversity immigrants from each region have not changed significantly over the past 15 years, and the diversity lottery calculus has not changed since its inception. Thus, one is led to conclude that the

127. *See* sources cited *supra* note 6. Asian immigrants typically account for about 16% of all diversity admissions, even though almost 35% of all non-diversity immigrants also come from Asia. *See* sources cited *supra* note 6.

128. Besides the disparate definition of the America regions, the diversity-visa-defined regions differ from the definitions in immigration statistics in other ways. In determining which countries and regions are high or low admission, immigrants from an overseas territory are counted with their mother countries (and their mother countries' regions). 8 U.S.C. § 1153(e)(1)(F) (2005). Additionally, a few countries are routinely considered part of one region for immigration statistics purposes, and part of another for diversity visa issuance purposes, most notably Turkey (Europe for the diversity visa lottery; Asia for immigration statistics) and the Bahamas (Caribbean for immigration statistics, but North America (not including the Caribbean) for the lottery). *Compare, e.g.*, Bureau of Consular Affairs, *Registration for the Diversity Immigrant (DV-2006) Visa Program*, 69 Fed. Reg 65,012, 65,016-17 (Nov. 9, 2004) (listing countries by region for the diversity visa lottery), *with* 2004 YEARBOOK, *supra* note 6, at tbl.8 (listing countries by region for immigration statistics). The statistics in this Note take account of these discrepancies as much as possible. *See infra* note 152.

129. *See* sources cited *supra* note 6.

130. *See* TRIENNIAL REPORT, *supra* note 54, tbl.F. The percentages in the text are averages of the percentages for each year (1985-1987). *See infra* app. tbl.1.

131. *See* sources cited *supra* note 6.

deviant definition of the South America region works an intentional discrepancy.

V. POTENTIAL SOLUTIONS

Inasmuch as the current "diversity" system reflects a preference for specific countries and regions to the detriment of other deserving countries and regions, it needs reform. As evidenced by the history of the diversity lottery itself, there are many ways to promote diversity in the immigration stream. This Section will address three different methods: elimination, reclassification, and randomization.

A. Elimination

It could be argued that the diversity lottery should be eliminated, since it is designed to benefit European immigrants at the expense of would-be South American immigrants. In fact, three bills introduced in the House this year would do exactly that, and another would suspend the diversity lottery indefinitely.[132] One of these bills reintroduced legislation passed by the House in the last Congress that would eliminate the lottery out of terrorism concerns.[133] The House Judiciary Committee report regarding that bill characterized the diversity visa lottery as "a threat to U.S. security" because it did not limit the countries from which applicants could come and because it

132. H.R. 1912, 109th Cong. (2005) (proposing to suspend the allocation of diversity visas and other "nonessential" visas indefinitely to provide "temporary" workload relief to the immigration services departments); H.R. 1587, 109th Cong. (2005) (proposing to eliminate the diversity visa lottery and increase the cap on a particular temporary worker visa (H-2B)); H.R. 1219, 109th Cong. (2005) (limiting its proposal to an elimination of the diversity visa lottery); H.R. 688, 109th Cong. (2005) (proposing to eliminate the diversity visa lottery as part of a larger plan to protect against terrorism and immigration fraud). None of these bills have proceeded out of committee. Additionally, a Senate bill introduced this year would enable immigrants selected by the lottery to remain eligible for processing beyond the year in which they first applied for the program. S. 1119, 109th Cong. (2005). Also, Rep. Jackson-Lee introduced two bills that would double the allotment of diversity visas as part of a pro-immigrant reform plan, H.R. 2092, 109th Cong. (2005) and H.R. 257, 109th Cong. (2005), but neither of these has made it out of committee either.

133. *Compare* H.R. 688, 109th Cong. (2005), *with* H.R. 775, 108th Cong. (2003). Other bills introduced in the last Congress would have eliminated the diversity visa lottery until illegal immigration had slowed to less than 10,000 individuals annually, H.R. 946, 108th Cong. (2003), and suspended issuance of diversity visas to relieve the immigration workload, like this year's HR. 1912, H.R. 2235, 108th Cong. (2003). Rep. Jackson-Lee also introduced two bills last year that would have doubled the annual diversity visa allotment. *See* H.R. 4885, 108th Cong. (2004); H.R. 3918, 108th Cong. (2004).

did not require immigrants to have family or business ties to the United States.[134]

Elimination of the diversity visa lottery, however, would not necessarily make this country any safer from terrorism. Immigrants seeking admission under a diversity visa must still pass the same security screening as all other immigrants.[135] In any event, would-be terrorists have bypassed, and will likely continue to bypass, the immigration system's security measures by simply crossing the border illegally.[136] Thus, the diversity lottery is not likely a significant threat to national security.

Moreover, ensuring that individuals from *every* country (even those without family or business ties to the United States) have access to the immigration process is a worthwhile goal.[137] Even the dissenters to the House Judiciary Committee's report on H.R. 4300 concede that "a number of regions and countries are underrepresented under the current system."[138]

B. Reclassification

Another potential solution is to leave the system as it is, but to rename the South America region "Latin America." Obviously this does nothing to remedy current inequities; but there is a certain appeal to calling a spade a spade. Furthermore, if our society can stamp South America, Mexico, Central America, and the Caribbean with the cultural homogeny label, this would at least be an honest approach.

Another possibility is to maintain a system of regions, but to reincorporate Mexico, Central America, and the Carihbean into the North America region. A variant of this proposal would group Mexico and the Caribbean with the North America region and group Central America with the South America region. Alternatively, a seventh region could be created for Central America (and/or Mexico and/or the Caribbean).

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134. H.R. REP. NO. 108-747, at 4 (2004). Of course, this logic would also prevent *any* system of independent immigration.

135. *See* 8 U.S.C. § 1182(a) (2005).

136. *See* Ruchir Patel, *Immigration Legislation Pursuant to Threats to US National Security*, 92 DENV. J. INT'L L. & POL'Y 83, 95 (2003) (noting that foreign terrorists who have entered the United States by crossing the border illegally have done so "without any consequence by the INS").

137. *See* Legomsky, *supra* note 9, at 334 (arguing that we should view immigrants as individuals, not as representatives of their native countries).

138. H.R. REP. NO. 101-723, pt. 1, at 138 (dissenting views).

Each of these solutions would have the desirable effect of allocating diversity visas to South American immigrants along more equitable lines than the current system does without further reducing the small number already allocated to North American immigrants. Of course, this solution does not address the double status enjoyed by Ireland.[139] More significantly, this solution does not address the underlying problem—a system designed to differentiate between *any* defined groupings will inevitably have discriminatory effects, which is antithetical to a system of *independent* immigration.

C. Randomization

The best approach is to eliminate the region system from the diversity lottery entirely. As Professor Stephen Legomsky has stated, "Countries don't immigrate. People do."[140] A Mexican individual without family or business ties in the United States has exactly the same immigration prospects as an Irish individual without family or business ties in the United States.[141] The only way to truly level the playing field for all would-be "independent" immigrants is to abandon the region system entirely. This approach may not compensate those countries that had previously benefited from racial and ethnic discrimination under the national origins quota system; but perpetuating the effects of such a discriminatory system should not be an objective of U.S. immigration policy. Only by creating a truly equal playing field, without respect to borders, can the United States send the clear message that its immigration policy truly values individuals (and diversity) without regard to race or national origin.[142]

Of course, there are several ways to administer a diversity system that disregards country (or region) of origin. The Senate already presented one such approach—a points-based system that selects immigrants based on their possession of characteristics considered favorable to the national interest, such as education level. The difficulty with this approach, however, is its inherent potential to mask discrimination. For example, the Senate excised an English language quotient to alleviate concerns about discrimination, only to have the same English language criterion find its way into one of the

139. *See supra* notes 116 and 117 and accompanying text.

140. Legomsky, *supra* note 9, at 334.

141. *Cf. id.* (arguing that an immigration policy in which "a European who has no individual equities and who applies for a visa today should be admitted ahead of a Mexican who has been waiting ten years to rejoin his or her family" is antithetical to a principle of racial equality).

142. *See id.* at 334-35.

House bills considered in subcommittee hearings.[143] Furthermore, the Senate approved a provision allocating points based on a potential immigrant's age. But if age preference is acceptable national policy, might not gender or skin color also be acceptable considerations? As illustrated by the current diversity lottery, cultural discrimination may already be an accepted national policy. Put simply, there is too much potential for discrimination in *any* system of independent immigration that allows legislators to determine which characteristics are desirable and which are not, especially since the Supreme Court has made clear that Congress has unfettered dominion over the immigration selection process.[144]

The only acceptable approach to independent immigration is one that does not discriminate at any level. At this point, the suggestion (and foresight) of the Organization of Chinese Americans is worth reconsideration: "If after enactment, the program is determined to not enhance diversity, then *a random lottery first-come, first-serve system* should be immediately implemented."[145] The February 1989 American Bar Association resolution made a similar recommendation: "a separate additional quota allotment for independent or unsponsored immigrants based on a *nondiscriminatory* selection system or lottery, or both . . . ."[146] The best system for admitting independent immigrants and increasing true diversity (cultural, geographic, economic, and racial) is a random lottery where the only qualification is a desire to live in "The Land of the Free."

A random world-wide lottery would allocate visas to those geographic areas with the greatest demand. As stated by Professor Frederick Whelan, "formal equality of treatment for countries obviously does not mean equality of opportunity for individuals, since a person's chance of being issued a visa, or the length of time he must wait for one, varies greatly depending on the demand in his country."[147] Although Whelan's statement was a criticism of the

143. *See supra* notes 66 and 73 and accompanying text.

144. *See supra* note 14.

145. *Immigration Act of 1989 (Part 1): Hearings Before the Subcomm. on Immigration, Refugees, and Int'l Law of the Comm. on the Judiciary*, *supra* note 70, at 251 (statement of Melinda C. Yee, Executive Director of the Organization of Chinese Americans) (emphasis added).

146. *Immigration Act of 1989 (Part 3): Joint Hearings Before the Subcomm. on Immigration, Refugees, and Int'l Law of the Comm. on the Judiciary and the Immigration Task Force of the Comm. on Educ. and Labor*, *supra* note 52, at 908, app. 21 (1990) (emphasis added). Along these lines, Frederick Whelan's comments on the effect of the per-country ceilings is also prescient: "Equal treatment for individuals would have called for omitting considerations of nationality altogether and accepting applicants on a first-come first-served (or a lottery) basis within a world-wide pool . . . ." Whelan, *supra* note 22, at 459.

147. Whelan, *supra* note 22, at 458-59.

uniform country ceilings, it is equally applicable to the current lottery system, whose highly formalized treatment of countries and regions clearly "does not mean equality of opportunity for individuals."[148]

Furthermore, it is at least theoretically possible that a random lottery would do a better job of distributing visas to currently underserved regions than the current lottery. If Africa, Europe, and South America, for example, all have a similar number of individuals desiring to immigrate to the United States, a random lottery will ensure that, on average, each of these regions will receive an equal allotment of lottery visas. But if it turns out that more individuals want to immigrate to the United States from one particular region, a random lottery will not artificially inflate or deflate the actual demand for visas from each region.[149] In addition, a random lottery eliminates any discrepancies in the region definitions—for example, by assigning Middle Eastern countries to three different regions.[150] Most importantly, however, a random lottery focuses on the individual. By considering each applicant without regard to race, ethnicity, nationality, religion, age, primary language, or any other artificial criterion,[151] only a random world-wide lottery can provide a truly equitable system of independent immigration.

VI. CONCLUSION

The history of U.S. immigration policy is riddled with prejudicial and discriminatory practices. One could even make the argument that Congress has become more adept at masking its discriminatory intentions. History may yet label the strategic definition of the South America region in the diversity visa lottery a particularly subtle instance of discriminatory immigration policy. By lumping Mexico, Central America, and the Caribbean with the South American continent, the drafters of the 1990 Act simultaneously limited a cultural group's access to the diversity visa lottery and ensured that a maximum number of diversity visas would be available for European and African immigrants.

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148. *Id.*

149. There are no statistics on how many individuals actually want to immigrate to the United States from every country and region, so which areas have the greatest "demand" cannot be determined with any degree of certainty.

150. *See, e.g.*, Bureau of Consular Affairs, *Registration for the Diversity Immigrant (DV-2006) Visa Program*, 69 Fed. Reg. 65012, 65016-17 (Nov. 9, 2004).

151. General admissibility requirements, such as an absence of affiliation with active terrorist groups, would still have to be met by each independent immigrant, of course. *See supra* note 135 and accompanying text.

Nevertheless, a system of independent immigration can add value to our immigration policy, especially since immigrants in many nations may otherwise be effectively denied access to the immigrant stream. The only way to effectively administer a system of independent immigration, however, is to eliminate the regions altogether and issue a truly random world-wide lottery without respect to legislatively devised, artificial criteria.

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APPENDIX[152]

Table 1. Percentage of Immigrants Admitted by Region of Birth, 1985 – 1987.[153]

Region	1985	1986	1987
Africa	3.0	2.9	2.9
Asia	46.4	44.6	42.8
Europe	11.1	10.4	10.2
North America	31.9	34.5	36.0
Oceania	0.7	0.6	0.7
South America	6.9	7.0	7.4

Table 2. Percentage of Non-Diversity Immigrants Admitted by Region of Birth (South America as a continent), 1995 – 2004.[154]

Region	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004
Africa	4.3	3.7	4.2	4.2	3.5	3.6	3.8	4.3	4.9	5.1
Asia	38.8	34.8	34.4	34.9	32.1	32.4	33.7	32.9	35.9	36.0
Europe	15.5	14.3	13.1	11.7	11.9	13.5	15.4	15.5	12.4	12.2
N.America	34.2	39.6	40.9	41.4	45.1	43.1	39.9	39.7	38.0	38.2
Oceania	0.6	0.5	0.5	0.6	0.5	0.5	0.5	0.5	0.6	0.6
S.America	6.6	7.0	6.9	7.3	6.8	6.9	6.6	7.2	8.2	7.9

152. This Note compares admissions to illustrate the actual effect on the immigrant stream, even though that is not how the actual number of diversity visas allocated to a given region is determined. *See supra* note 8. Because not every recipient of a diversity visa is actually admissible, and because many recipients choose not to utilize the visa in the calendar year in which it is granted, the numbers fluctuate from year to year and always fail to equal the number actually granted. The numbers in Tables 2 and 3 of this appendix represent the regions as defined in the Statistical Yearbooks; the numbers in Tables 4 and 5 represent the regions as defined in administering the diversity visa lottery. For an explanation of how these regions differ (besides including Mexico, Central America, and the Caribbean in the South America region), see *supra* note 128.

153. TRIENNIAL REPORT, *supra* note 54, tbl.F. The Triennial Report did not list which countries it counted in each region, but the numbers indicate that it divided the regions largely as did the Immigration Service in compiling its later statistical reports (which all included Mexico, Central America, and the Caribbean with North America). *See supra* note 107 and accompanying text.

154. *See* sources cited *supra* note 6.

Table 3. Percentage of Diversity Immigrants Admitted by Region of Birth (South America as a continent), 1995 – 2004.[155]

Region	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004
Africa	29.1	35.4	32.9	33.9	32.7	31.1	37.0	38.1	35.7	40.7
Asia	13.6	16.4	16.7	17.1	15.2	14.2	14.2	16.8	17.6	16.2
Europe	50.3	42.3	44.1	42.8	45.6	48.3	42.8	39.4	41.4	37.6
N.America	2.6	2.0	2.8	2.9	3.1	2.4	1.7	1.4	0.9	0.9
Oceania	1.3	1.4	1.4	1.2	1.4	1.6	1.6	1.2	1.2	1.4
S.America	3.2	2.5	2.1	2.1	2.0	2.4	2.7	3.1	3.3	3.2

Table 4. Percentage of Non-Diversity Immigrants Admitted by Region of Birth (South America as defined in 8 U.S.C. § 1153(c) (including Mexico, Central America, and the Caribbean)), 1995 – 2004.[156]

Region	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004
Africa	4.3	3.7	4.2	4.2	3.5	3.6	3.8	4.3	4.9	5.1
Asia	38.8	34.8	34.2	34.6	31.9	32.1	33.4	32.6	35.6	35.7
Europe	15.5	14.3	13.3	12.1	12.2	13.8	15.8	15.8	12.8	12.6
N.America	1.9	3.8	1.5	1.8	1.5	2.1	2.2	2.0	1.8	1.8
Oceania	0.6	0.5	0.5	0.6	0.5	0.5	0.5	0.5	0.6	0.6
S.America	38.9	42.8	46.3	46.9	50.3	47.8	44.3	44.8	44.3	44.2

Table 5. Percentage of Diversity Immigrants Admitted by Region of Birth (South America as defined in 8 U.S.C. § 1153(c) (including Mexico, Central America, and the Caribbean)), 1995 – 2004.[157]

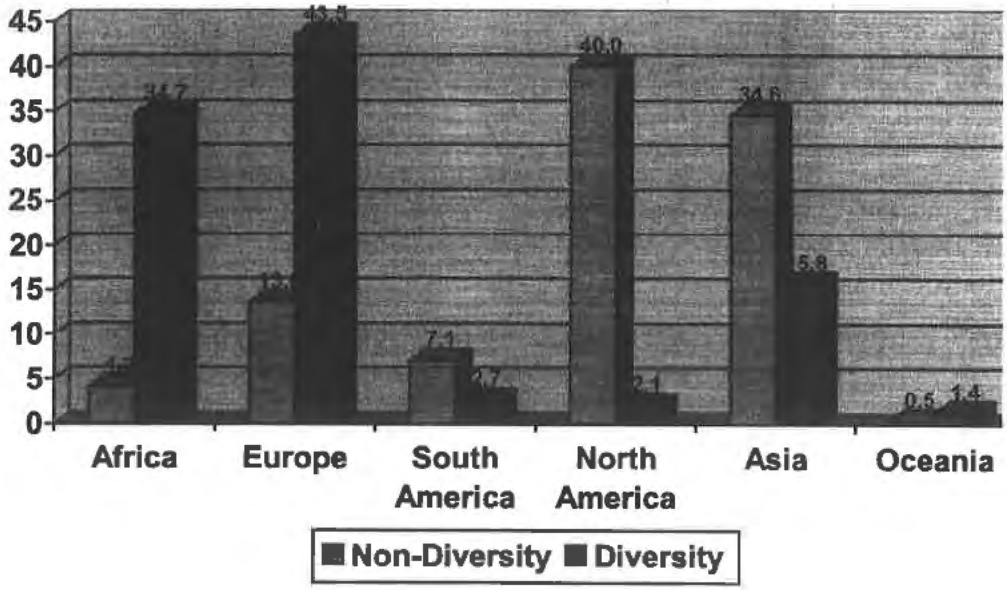
Region	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004
Africa	29.1	35.4	32.9	33.9	32.7	31.1	37.0	38.1	35.7	40.7
Asia	13.6	16.4	13.9	14.4	13.0	12.7	12.7	15.2	15.5	14.0
Europe	50.3	42.3	46.9	45.5	47.8	49.8	44.3	41.0	43.5	39.7
N.America	0.6	0.3	0.3	0.3	0.2	0.3	0.2	0.2	0.2	0.1
Oceania	1.3	1.4	1.4	1.2	1.4	1.6	1.6	1.2	1.2	1.4
S.America	5.1	4.3	4.6	4.7	4.9	4.5	4.2	4.2	4.0	4.0

155. *See* sources cited *supra* note 6.

156. *See* sources cited *supra* note 6. For a description of how the diversity regions are implemented, see *supra* notes 128 and 152. Because of changes in political boundaries since the start of the lottery, and changes in the way immigration statistics have been maintained, there is some uncertainty inherent in calculating these statistics.

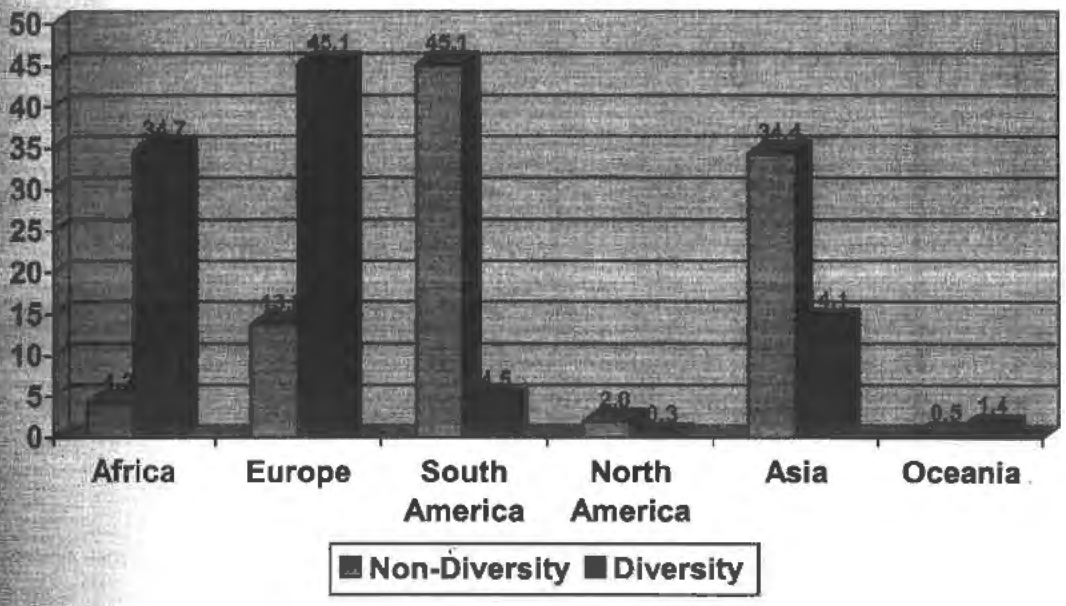
157. *See* sources cited *supra* note 6.

Figure 1. Average Percent of Non-Diversity and Diversity Immigrants Admitted by Region of Birth (South America as a continent), 1995-2004.[158]



158. *See* sources cited *supra* note 6. The average percent was derived by averaging the percentages from each year (1995-2004).

Figure 2. Average Percent of Non-Diversity and Diversity Immigrants Admitted by Region of Birth (South America as defined in 8 U.S.C. § 1153(c) (including Mexico, Central America, and the Caribbean)), 1995 – 2004.[159]



159. *See* sources cited *supra* note 6. The average percent was derived by averaging the percentages from each year (1995-2004).