

UNDOCUMENTED ALIENS AND IMMIGRATION REFORM: A LAW AND ECONOMICS ANALYSIS

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ABSTRACT

Immigration reform poses one of the most controversial and difficult issues presently facing American society and the American political system. Although comprehensive reform legislation was introduced in both the Republican-controlled 109th Congress and the Democratic-controlled 110th Congress, the absence of a common ground acceptable to both the conservative and liberal wings of the Republican and Democratic parties has brought these efforts to a standstill. Consequently, numerous states and various municipalities, frustrated by the federal government's inaction, have attempted to resolve the political, social, and economic aspects of this problem by passing housing, employment, and other legislation on their own. This paper investigates the law and economics arguments inherent in this debate. Legal and economic tools of analysis are applied to examine the pros and cons of such issues as temporary worker programs, amnesty for undocumented aliens, and the fencing of the U.S. border. The paper concludes with specific recommendations aimed at strengthening U.S. immigration policy and effecting workable solutions to ameliorate the current stalemate. *JEL classification:* K42

INTRODUCTION

Using data from the March 2004 Current Population Survey, which the U.S. Census Bureau and the Department of Labor jointly compile, the Pew Hispanic Center on March 21, 2005, released a report that estimates the size and characteristics of the segment of immigration known as the undocumented population.¹ This report concludes that:

- the number of undocumented residents living in the U.S. in March 2004 reached an estimated 10.3 million;
- about one-sixth of the undocumented population (some 1.7 million people) are children under the age of 18;
- states that prior to the mid-1990s had relatively small foreign-born populations—for example, Arizona and North Carolina—now are among those showing the largest numbers of undocumented aliens;²
- undocumented Mexicans number 5.9 million (57 percent of the total number); and, assuming the same rate of growth as in recent years, the undocumented population, as of March 2005, has reached nearly 11 million, including more than 6 million Mexicans;

- approximately 80-85 percent of the emigration from Mexico consists of undocumented persons.³

Using estimates derived from census statistics, the report submits that about 8.4 million undocumented persons were living in the U.S. in April 2000.⁴ Hence, the average annual rate of growth from 2000-2004 was an estimated 485,000 per year, leading to the aforementioned 10.3 million total.⁵ In turn, this population of 10.3 million represents approximately 29 percent of the 36 million foreign-born persons living in the U.S.⁶ An August 2007 report of the Office of Immigration Statistics sets out data consistent with the Pew report. This more recent study pegs the number of unauthorized immigrants living in the U.S. as of January 2006 at 11.6 million.⁷ These data indicate that nearly 4.2 million of this population had arrived since 2000.⁸ The report furthermore estimates that 6.6 million of this number emigrated from Mexico, a percentage that mirrors the projections made in the 2005 Pew report.⁹

This inflow of large numbers of undocumented persons raises a wide range of political, legal, and economic issues linked to these undocumented workers; to the employers who hire them and potentially exploit them; to the domestic workers they possibly displace; to the cities that suffer fiscal hardships owing to the presence of these aliens in their communities; and to the politicians whose various constituencies differ widely on whether a problem exists, and if it does exist, on how to formulate a legislative solution. The United States Congress's recent attempts at comprehensive immigration reform demonstrate the magnitude of the discord that surrounds the issue of illegal immigration. For example, the 2006 and 2007 Senate bills offer legislation that would provide a route toward legal status for undocumented aliens currently in the country and who meet certain criteria. The Senate bills also would institutionalize a temporary guest worker program. In contrast, the 2005 House bill ignores both the amnesty and guest worker provisions of the Senate bills and emphasizes an approach largely aimed at securing the borders against illegal crossings. This wide gap regarding how best to conceptualize appropriate immigration policies doomed both the earlier 2005 and 2006 attempts at reform legislation, as well as the more recent efforts of the Senate in 2007. Nonetheless, the immigration reform debate is far from over. The problems addressed by the failed legislation (e.g., the large numbers of undocumented persons, the need for temporary workers, and border control) remain and will, if anything, become more onerous and more difficult to solve with the passage of time.

This paper examines this intersection of law and economics. More specifically, we address the economic consequences of maintaining the status quo as typified by relatively weak border control and minimal employer sanctions versus a much more serious attempt to grapple with the large number of undocumented individuals illegally entering the country each year, as well as the nearly 12 million undocumented persons currently residing in the United States. We discuss both macroeconomic issues, such as society's welfare function and the impact of illegal immigrants on economic growth, in addition to microeconomic issues, such as the impact on employers, native-born workers, and unions, that result from large numbers of undocumented workers entering various labor markets.

The paper is divided into the following sections. We begin with a description of the 1986 Immigration Reform and Control Act and compare the provisions of that act to the more recent bills that have been debated in the United States Senate and

House of Representatives, respectively. Following this discussion, we present economic arguments (e.g., the impact of illegal immigration on economic growth, income distribution, and economic efficiency) for and against enacting new immigration reform legislation or greatly increasing the use of society's resources to control the inflow of illegal aliens—in short, either maintaining the status quo as typified by ineffective border control and weak-to-non-existent employer sanctions or greatly expanding the resources allocated to border security and to identifying those persons already in the country illegally. The paper concludes with a law and economics approach to immigration reform.

IMMIGRATION CONTROL LEGISLATION

The Immigration Reform and Control Act of 1986 (IRCA) represents the first legislation aimed at dealing with the large numbers of persons each year who illegally enter the United States across the vast border between the United States and Mexico. In addition, IRCA sets out a path through which large numbers of persons already illegally residing in the United States could obtain legal status. Although IRCA briefly mentions the need to improve border security, its main thrust is in three areas: 1) a guest worker program for seasonal agricultural workers (presumably to replace the discontinued and discredited Bracero program); 2) a system of sanctions directed at employers who hire undocumented workers; and 3) an amnesty program that would change the status of persons illegally in the country.

IRCA's H-2A Program authorizes the "import" of foreign workers to provide agricultural labor or services that are temporary or seasonal.¹⁰ The admission of temporary H-2A workers requires an employer petition that shows that (a) there are not sufficient workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the labor or services involved in the petition, and (b) the employment of the alien in such labor or services will not adversely affect the wages and working conditions of workers in the United States similarly employed. Although IRCA provides a detailed set of procedures for documenting seasonal shortages, these procedures rely mostly on estimates of supply and demand that only vaguely recognize the role increased wages might play in eliminating any shortage. Indeed, IRCA sets out this disclaimer immediately following the discussion of wages and recruitment efforts: "Nothing in this subsection shall be deemed to require any individual employer to pay any specified level of wages, to provide any specified working conditions, or to provide for any specified recruitment of workers."¹¹ IRCA also mentions that the impact on international competitiveness will also be taken into account when considering the use of increased wages as a means to eliminate supply shortages.

As an incentive for employers to seek the H-2A temporary worker route in contrast to hiring undocumented workers, IRCA institutes a set of employer penalties for hiring unauthorized aliens. Under IRCA,

a person or entity found to be hiring unauthorized aliens must cease and desist from such violations and ... pay a civil penalty in an amount of (i) not less than \$250 and not more than \$2,000 for each unauthorized alien with respect to whom a violation ... occurred, (ii) not less than \$2,000 and not more than \$5,000 for each such

alien in the case of a person or entity previously subject to one order under this subparagraph, or (iii) not less than \$3,000 and not more than \$10,000 for each such alien in the case of a person or entity previously subject to more than one order under this subparagraph....¹²

In 1986, these sanctions presumably were deemed adequate, particularly given the short-term nature of seasonal employment under the H-2A Program and its counterpart, the H-2B Program, which allows employers to hire workers for temporary, nonagricultural jobs (in the construction and hospitality industries, for example). Nonetheless, as we will discuss below, many of the undocumented workers hired in more recent times are employed for year-round instead of seasonal work. Moreover, the resources devoted to imposing sanctions have been so inadequate over the past two decades that the chances of being held accountable for hiring unauthorized workers are virtually nil.

Of the three main features of the 1986 act, the amnesty provision has proved the most controversial, as it is today in the 2006 and 2007 Senate bills. IRCA changes to legal permanent resident status any person who could show long-term residence as evidenced by continuous residence starting prior to 1982. Estimates indicate that about three million individuals became legal permanent residents as a result of IRCA.¹³ Still, amnesty then—and now—represents to many the willingness of the government to benefit lawbreakers at the expense of those following a legal route of entry into the United States.

The 2006 Senate bill (the Comprehensive Immigration Reform Act of 2006), the 2007 Senate bill (the Comprehensive Immigration Reform Act of 2007), and the 2005 House bills (the Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005) include some of the same features as IRCA but reflect issues not present or of little concern in 1986. To illustrate, these more recent pieces of legislation all have numerous provisions related to terrorism. For example, the 2007 Senate bill calls for a risk assessment for all United States ports of entry and all portions of the international land and maritime borders of the United States. This assessment must include a description of the activities being undertaken to prevent the entry of terrorists, other unlawful aliens, instruments of terrorism, narcotics, and other contraband into the U. S.¹⁴ All pieces of recent legislation moreover recognize the increasingly important role organized smugglers play in illegal crossings. For instance, Title II of the House Bill, “Combating Alien Smuggling And Illegal Entry And Presence,” contains sections such as: “Alien Smuggling And Related Offenses” (Sec. 202); “Mandatory Sentencing Ranges For Persons Aiding Or Assisting Certain Reentering Aliens” (Sec. 203); and “Prohibiting Carrying Or Using A Firearm During And In Relation To An Alien Smuggling Crime” (Sec. 206). Similarly, the 2006 Senate bill directs the Secretary of the Department of Homeland Security to

...develop and implement a plan to improve coordination between the Bureau of Immigration and Customs Enforcement and the Bureau of Customs and Border Protection of the Department and any other [f]ederal, [s]tate, local, or tribal authorities, as determined appropriate by the Secretary, to improve coordination efforts to combat human smuggling.¹⁵

Notwithstanding these dissimilarities with IRCA, the more recent legislation in the Senate and House deals with essentially the same issues as the 1986 act, namely, border control, temporary workers, employer sanctions, and amnesty. The Senate and House bills differ markedly, however, in their respective emphases. The House bill largely concentrates on border security and employer sanctions with no discussion of temporary workers or amnesty. Typifying the House bill is a very detailed section outlining border security issues, such as “Achieving Operational Control On The Border” (Sec. 101); “National Strategy For Border Security” (Sec. 102); “Implementation Of Cross-Border Security Agreements” (Sec. 103); and “Deployment Of Radiation Detection Portal Equipment At United States Ports Of Entry” (Sec. 116). In addition, the House bill has an entire section titled “Construction Of Fencing And Security Improvements In Border Area From Pacific Ocean To Gulf Of Mexico” (Sec. 1002). Ultimately, a separate bill containing many of the House’s proposals, “The Secure Fence Act,” was signed into law in 2006.

Although they also address various border issues, the 2006 and 2007 Senate bills place most emphasis on a guest worker program and a proposal that would grant legal status to undocumented persons possessing certain characteristics. The guest worker program outlines the conditions for the admission of nonimmigrant temporary/guest workers for aliens and employers alike. Indeed, both the 2006 and 2007 Senate bills state:

The alien shall establish that the alien is capable of performing the labor or services required for an occupation under [the Act]... [and] shall establish that the alien has received a job offer from an employer who has complied with the requirements of [the Act].¹⁶

The 2006 and 2007 Senate bills moreover require employers to petition for the right to make offers and hire guest workers. An employer guarantees that no domestic worker would take the job being offered to the guest worker, that no domestic worker would be displaced because of the job offer to the guest worker, and that the guest worker will be paid the wages paid to other workers possessing similar skills. In the 2006 and 2007 Senate bills, the period of temporary employment is for three years with the possibility of renewal for another three years. An H-2C nonimmigrant temporary worker¹⁷ who fails to depart at the end of the period of authorized admission may not apply for or receive any immigration relief or benefit under this Act or any other law, except for relief under sections 208 and 241(b) (3) and relief under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.¹⁸

By far the most controversial aspect of either of the Senate bills is section 245B titled “Access to Earned Adjustment.” This section instructs the Secretary of Homeland Security to grant the status of an alien lawfully admitted for permanent residence to any alien who can show continuous physical presence, admissibility under immigration laws, evidence of employment, payment of federal and state income taxes, and the possession of basic citizenship skills. The bill defines each of these conditions in some detail. For example, “continuous physical presence” means “physical presence in the United States on or before the date that is 5 years before April 5, 2006.”¹⁹ Many criticize such provisions as misguided. Such detractors contend that guest worker plans and amnesty programs, by granting permanent

residency to those who have entered the U.S. illegally, reward those who have broken the law while discriminating against long-standing applicants for legal immigration.

Finally, both the Senate and House bills toughen the employer sanctions concerning hiring undocumented workers. The House bill increases the penalties for hiring undocumented workers from IRCA's penalties of not less than \$250 and not more than \$2,000 for a first offense to not less than \$5,000 and not more than \$7,500. Similarly, the penalties for second offenses are increased from not less than \$2000 and not more than \$5000 to not less than \$15,000 for each offense. Specifically, Section 274A (4) of the Senate bill states:

An individual who falsely represents that the individual is eligible for employment in the United States ... shall, for each such violation, be subject to a fine of not more than \$5,000, a term of imprisonment not to exceed 3 years, or both.²⁰

The 2007 Senate bill furthermore mandates a 2,200 annual increase in personnel devoted to workforce enforcement and fraud detection in each of the next five years and requires

the Secretary [to] ensure that not less than 25 percent of all the hours expended by personnel of the Bureau of Immigration and Customs Enforcement of the Department to enforce the immigration and customs laws shall be used to enforce compliance with this section.²¹

The remainder of the paper discusses the social welfare dimensions of immigration reform as reflected in these legislative initiatives.

A SOCIAL WELFARE FUNCTION APPROACH

Whether the United States simply maintains the status quo or ultimately enacts broad immigration reform legislation has a direct impact on the welfare of society as whole and individual members of that society. The broad range of economic, legal, political, and social consequences that will result from the approach chosen include, for example, large inflows of undocumented, low-skilled workers; guest worker and amnesty proposals; programs aimed at erecting actual and virtual fences along the border with Mexico; ineffectual sanctions of employers who hire undocumented workers; litigation by native workers damaged by illegal hiring practices; and piecemeal local /state immigration-reform initiatives aimed at correcting the inactivity at the federal level. All these possible outcomes have repercussions for the standard of living of that society, the distribution of income among various members of that society, the economic efficiency at which that society operates, and the quality of life enjoyed by that society. In what follows, we evaluate various aspects of illegal immigration and immigration reform by considering their economic welfare implications (i.e., their impact on society's standard of living, the distribution of income, and the like). Some of the consequences of illegal immigration or immigration reform (e.g., the impact of illegal immigrants on economic growth) are straightforward and either beneficial or harmful to society's welfare. Others (such as granting amnesty to undocumented individuals), however, are more complex, manifesting both benefits and costs, and therefore requiring subjective judgments as to their respective merits or demerits.

ILLEGAL IMMIGRATION AND ECONOMIC GROWTH

“Arguably the most important statistic for anyone seeking to understand the immigration issue is this: in 1960, half of all American men dropped out of high school to look for unskilled work, whereas less than ten percent do so now.”²² Jacoby (2006) notes further that “[t]he resulting shortfall of unskilled labor—estimated to run to hundreds of thousands of workers a year—is showing up in sector after sector. So unless the share of older Americans willing to bus tables and flip hamburgers increases—and in truth, this cohort of the population is decreasing without immigrants—the restaurant sector will not experience robust growth in the next decade.”²³ Just how big is the real growth dividend? Toting it up with exactitude remains problematic owing to the difficulty of measuring the extent and effects of immigrant complementarity. Still,

[a] back-of-the-envelope calculation suggests that eight million laborers working 2,000 hours a year at \$9 an hour—an average wage based on employers’ reports—would generate \$144 billion worth of economic activity. Add the National Academy of Sciences’ conservative estimate of the native-born income these immigrants make possible because they are different—an additional \$10 billion—and the total contribution comes to \$154 billion, or more than the gross state product of Kentucky and 1.2 percent of what is now a \$13 trillion U.S. economy. A similar estimate of all immigrants’ contributions—legal and illegal—comes to \$700 billion, or 5.4 percent of GDP.²⁴

And none of these figures takes the full measure of the way these newcomers complement American workers.²⁵

The near-retirement of baby boomers has caused a spike in the median age of U.S. workers. According to Department of Labor projections, this median age will increase from 36.6 to 40.6 years in the 20-year period of 1990-2010.²⁶ Correlating with this upturn is a concomitant decrease in the number of native-born men who have failed to earn a high school diploma. In 1960, 53.6 percent of such men were within this cohort; but by 1998, that number had plummeted to 9 percent.²⁷ During that same period, the number of those who had earned college degrees almost tripled, spiraling up from 11.4 percent to 29.8 percent.²⁸ While educational attainment levels were on the rise, the number of low-skilled jobs skyrocketed, increasing by more than 700,000 per year.²⁹

This dichotomy has contributed to the present quandary regarding immigration reform. The shortfall of U.S. workers who can fill this void has led to U.S. firms’ increasing reliance on immigrant labor to staff these jobs.³⁰ Although some economists submit that high wages would lure U.S. workers to accept such low-end jobs, these experts concede that some companies would rather move their operations overseas than pay these high wages.³¹ Economic growth historically has been the most significant linchpin for linking public opinion and U.S. immigration policy. A robust economy allows the citizenry and policymakers alike to downplay concerns about high levels of immigration, whether legal or illegal. On the other hand, a sluggish economy breeds unease and oftentimes anti-immigrant backlashes—as reflected in the restrictive immigration legislation enacted in 1996.³² The current tension surrounding immigration reform derives from the fact that, in recent years,

immigrant inflows—approximately one-third to one-half of which is comprised of undocumented persons—have fueled about one-half of the total labor force growth realized in the U.S., with certain areas and sectors showing even higher percentages.³³

In a broader resource-allocation context, the redistribution of the world's labor force brings about two primary effects: the convergence of real wage rates and an increase in the world's output. As to the first effect, the movement of labor from Mexico to the United States lowers the labor-to-land ratio in Mexico and increases that ratio in the U.S., thereby causing real wages to rise in Mexico and to fall in the U.S. An increase in the world's output derives from the fact that the U.S.'s gain outstrips Mexico's loss. The migration of workers from Mexico to the U.S., where the workers enjoy a higher marginal product of labor owing to the U.S.'s lower initial labor-to-land ratio, means that the U.S.'s gain exceeds Mexico's loss. Lest one downplay the magnitude of these overall gains, Howard F. Chang emphasizes that "studies suggest that the gains to the world economy from removing immigration barriers [would] be enormous."³⁴

Obhof (2002) asks the question: if the transaction of illegal immigration is an economically efficient offense, then who are its victims? He excludes the migrants from this calculation by pointing out that the voluntariness of their conduct presupposes that their flouting of immigration laws benefits them here in the U.S., given the receipt of wages that are nearly nine times larger than those they would receive in Mexico. In Obhof's view,

[i]f the data show that the benefits to the country as a whole are quite large, while the presumed harm is ambiguous or nonexistent, no economic rationale exists for enforcement, especially when it is costly. If the presence of illegal immigrants yields a benefit, then enforcing restrictive immigration barriers not only hurts the economy, but also consumes scarce resources that could be more productively deployed somewhere else. At the very least, one would expect the net effects of illegal immigration to be studied more extensively before the polity allocates enormous resources to stopping it.³⁵

Clearly, from a perspective that concentrates solely on economic growth and the standard of living—emigration—legal or illegal—eliminates resource misallocations resulting from artificial barriers that restrict resource mobility.

AMNESTY AND ECONOMIC GROWTH

Many who emphasize the positive role of immigrants in U.S. society and in the economy also see granting amnesty to those currently in the country illegally as advantageous. If society's goal is to maximize output and politicians' interests coincide with those of their constituents who support them financially, then amnesty can be shown under some circumstances to represent an optimal social policy. Chau (2003) uses a mathematical model to show that if illegal immigration is necessary to maximize output, then amnesty makes political sense, given employer sanctions that impede employers from realizing their planned production. As employer sanctions become more probable or more burdensome, employers increasingly will be willing to fund and support politicians who will push for amnesty legislation. Chau concludes

that “[a]mnesty can thus be viewed as a key component of immigration reform proposals involving employer sanctions, precisely by correcting for the production distortions induced by the onset of employer inspections.”³⁶ Similarly, those who favor forgiveness of illegal immigrants contend that regularizing their legal status will bring such workers “out of the shadows” and enable them to move more freely across the country, perhaps to areas with low unemployment rates or to those regions that show a pent-up demand for low-end jobs.³⁷

Legal status [may] also lead to skill-upgrading and economic advancement among some formerly undocumented workers. An analysis of undocumented immigrants who legalized their status as part of the IRCA amnesty shows they experienced significant wage growth in the first four years following legalization, with about 44 percent of the increase in men’s wages stemming from changes in measured characteristics such as educational attainment, English proficiency, and experience.³⁸

While granting amnesty has other efficiency aspects that we will discuss below, amnesty unarguably does contribute to economic growth, labor productivity, and resource mobility.

ILLEGAL IMMIGRATION AND CONSUMER PRICES

The availability of immigrant labor willing to fill the demand for low-end jobs not only benefits certain employers but consumers as well. Consumers in a receiving country (like the U.S.) enjoy the lower prices born of the cost-cutting resulting from the employment of undocumented workers. These savings do not accrue merely from the operations of smaller entrepreneurs: even the consumers of “big box” businesses such as Wal-Mart derive advantages from the lowering of retail prices that comes from reductions in cost.³⁹ Thus, as Ehrenberg and Smith (1994) point out, immigration of labor “benefits [the] consumers using the output of this labor.”⁴⁰ In particular, low-income consumers derive advantages from the lower-priced output of the immigrant labor supply, as these laborers often produce food products and other basic necessities. Still, these gains are not confined to poorer consumers. The lower-cost goods and services produced by immigrant-intensive industries benefit the native population as a whole to the tune of an estimated one to ten billion dollars annually. Though a modest sum when compared to the size of the U.S. economy, it nevertheless represents a significant increment in absolute terms.⁴¹ Anti-immigration proponents fail to take into account that more stringent immigration policies may offset these gains and thus “reduce the total wealth of natives as a group.”⁴²

ILLEGAL IMMIGRATION AND INCOME DISTRIBUTION

The proponents of immigration see immigrants as willing to work harder and longer hours in positions that many Americans would not deign to accept. From this perspective, one can argue that immigrants actually enhance the economic standing of the native born. Without the immigrant-fueled labor supply for low-skilled construction jobs, the wages of builders, architects, electricians, and plumbers

would stagnate. Similarly, immigrant staffing in the hospitality industry (restaurants, hotels, and catering services) increases the amount of time native-born workers can devote to more productive work or leisurely pursuits. “And over time, the higher return for higher-level work creates incentives for more Americans to become plumbers, electricians, and architects, thus making the entire economy more productive.”⁴³

Those in the anti-immigration camp often counter with the assertion that employers should pay American workers more and thereby obviate the need for foreign-born labor. However, this position fails to take into account the complementarity of wage levels.

Even in sectors such as construction and hospitality, in which the work must be done in the United States, it hardly makes sense to lure an American to a less productive job than he or she is capable of by paying more for less-skilled work. Meanwhile, because they complement rather than compete with most native-born workers (and this in turn attracts additional capital), immigrants raise rather than lower most Americans’ wages.⁴⁴

The nativist position—in focusing almost exclusively on the notion that immigrants take jobs from Americans—also ignores the fact that immigrants frequently create jobs (witness the recent boom in lawn care services and nail-manicure businesses) that reflect this new complementary workforce’s attracting capital and deploying it to raise productivity in innovative ways.⁴⁵ Moreover, staving off immigration would not necessarily result in an uptick in the wages offered for low-skilled jobs. “On the contrary, in many instances the jobs would simply disappear[,] as the capital that created and sustained them dried up or the companies mechanized their production.”⁴⁶

In spite of theoretical predictions to the contrary, research indicates that illegal immigration depresses wages but only to a minimal degree. Indeed, an examination of the impact of immigration on the labor market suggests that the natives of the host country enjoy overall gains from immigration labor. True, some native workers—those who compete with immigrants—will suffer declining wages. However, this downturn constitutes merely a transfer of wealth among natives, because the gain realized by those who employ immigrants at lower wages offsets the loss incurred by native workers directly competing with immigrants.⁴⁷ Consequently, little evidence exists for the proposition that immigration—legal or illegal—has significantly lowered the wages of domestic workers. Theoretically speaking, immigrants could concentrate into one industry (say, agriculture, restaurants, apparel and textiles, or any other industry that employs large numbers of semiskilled laborers) in a given locale and thereby depress that industry’s wages.

This does not, however, change the fact that over the great expanse of the American economy, including all industries and labor markets, the average effect of increased immigration on both wages and employment levels will remain negligible.⁴⁸

David Card’s investigation of the impact of the so-called Mariel Boatlift on Miami, Florida, wage and employment rates reinforces these conclusions. This Cuban exodus infused 45,000 new, poorly educated workers into the Miami area, increased

the size of its labor force by 7 percent, and raised Miami's unskilled labor force by more than 16 percent.⁴⁹

One would expect the wages and employment levels of Miami's unskilled workers to fall as a result, but this did not occur. The wages and employment levels of unskilled black workers in Miami actually rose relative to those of unskilled blacks in four comparison cities (Atlanta, Los Angeles, Houston, and Tampa). Even among Hispanics, the unemployment rate fell faster than in comparison cities from 1982 to 1985.⁵⁰

Other investigations add credence to these findings as well. For example, increased border enforcement in California and Texas, which measures presumably would decrease the number of undocumented immigrants who reach the U.S. or affect the places at which these illegal entrants cross the border, has had no effect on wages in those states, including the wages of the least educated.⁵¹ Furthermore, studies that do not differentiate between legal and illegal immigrants typically have found little evidence to support the proposition that wages fall when a large influx of immigrants occurs.⁵²

Still, one segment of U.S. workers—native-born, high school dropouts—does compete with immigrant labor.

But not even the most pessimistic economists think that the resulting downward pressure on wages affects more than ten percent of the U.S. labor force or that the drop in those American workers' earnings has been more than five percent over the last 20 years. Moreover, these unskilled native workers benefit in other ways from immigrant complementarity, because they pay less for goods such as food and housing.⁵³

However, adjustments to U.S. labor markets can occur not just from wages but from unemployment—in this case, from undocumented immigrants' displacing native workers and legal immigrants. "Few economists have studied this possibility, but existing research indicates that employment rates among natives (and previous immigrants) decline by about one to two percent for each 10 percent increase in the immigrant inflow into low-skilled occupation groups (Card, 2001)."⁵⁴

In addition to statistical evidence demonstrating the possible negative impacts from illegal immigration on employment rates, anecdotal evidence such as the following is often used by those who maintain that illegal immigrants are displacing domestic workers:

A growing number of multi-million dollar construction projects, in both the public and private sectors, are designed from the outset to use huge amounts of illegal labor. Law breaking is assumed in the architectural plans and cost estimates, with the result that contractors who do not use illegal labor are unable to bid for these projects successfully.

A dry wall contractor in Montrose, Colorado, used to pay his legal workers twelve to fifteen dollars an hour plus overtime, but now he is unable to provide those jobs because he cannot outbid the contractors who pay illegal workers only eighty dollars cash for a ten-hour day. He is going out of business because he refuses to use

illegal workers, and he knows many other small contractors in the same boat.

In 2003, a traffic control crew of about ten people working on a new bridge on a state highway in rural Colorado was informed by the foreman one Friday afternoon, that effective Monday, their hourly rate would be reduced to what they 'pay the Mexicans.' 'If you don't like it, tough. You can quit.' They all quit. The following Monday two vans arrived from Denver with illegal workers as replacements.

A February 2003 *Denver Post* investigative report showed that the use of labor brokers to employ illegal labor in the construction industry is widespread across the mountain states and the Midwest. Despite this spotlight put on the problem, in the two years since that report, there has not been a single arrest or prosecution of a labor broker or a general contractor in the construction industry in the state of Colorado.

The loss of jobs to illegal labor is expanding rapidly into the service sector, and it is not limited to landscape gardening, restaurants, and hotels. It is also running rampant in the janitorial services industry. Millions of such service industry jobs are being lost by legal workers across the nation. It is simply a lie to say these are all 'jobs Americans won't do.' They are jobs being taken away from Americans by companies that will use cheaper illegal labor to boost their profits. The lower labor costs are seldom passed along to the consumer.⁵⁵

In general, the distributional effects of illegal immigration are strongly positive with only a small percentage of the work force negatively impacted. Indeed, all significant economic changes, such as immigration, technology, international trade, and the like, always will have winners and losers. A new technology, for instance, that vastly improves the ability of firms to handle data may displace many clerical workers employed in data-entry occupations. Over time, those displaced workers will retrain and find jobs in other occupations. A Pareto efficient economic change transpires when the gains from the change exceed the losses incurred. Theoretically, if that is the case, then winners could compensate losers; and society will still come out ahead. Immigration appears to be one of these Pareto efficient changes.

GUEST WORKER PROGRAMS AND INCOME DISTRIBUTION

Those who regard immigrants as an economic threat to domestic workers also resist both the existing and the proposed guest worker programs. These opponents cite evidence that, according to Harvard economist George Borjas, the value of lost wages owing to competition from cheaper immigrant labor (legal and illegal) amounts to about \$133 billion per year nationwide.⁵⁶ Low-skilled African-Americans and Hispanics who are legally in the U.S. (the individuals typically found on the lowest prong of the job ladder) constitute the groups most injured by this wage suppression. Opponents of guest worker programs therefore argue that "[i]t is

hypocritical for any politician or any political party to claim to be offering empowerment opportunities in education and small business while simultaneously supporting open borders.”⁵⁷ To illustrate, a 2002 Pew Hispanic Center report estimated the number of undocumented farm workers at 1.0 to 1.4 million.⁵⁸ According to the 2002 Current Population Survey, an average of 793,000 people per week reported hired farm work as their primary employment.⁵⁹ Among the poorest laborers in the U.S., in 2002, they earned on average \$300 per week, or 57 percent of the pay earned by all salary and wage earners.⁶⁰ The unemployment rate in the hired farmer labor force was also much higher than that experienced by the rest of the work force. Between 1994 and 2002, the unemployment rate for farm workers remained stable (12.4 to 10.6 percent), while the unemployment rate for other salary and wage earners declined (from 6.1 percent to 4.0 percent).⁶¹ These depressed wages have led some to claim that the labor shortages that are touted as a central policy basis for the H-2A program and the Bush proposed guest worker program are ephemeral. Economists nonetheless submit that an actual labor shortage would cause wages to rise so as to attract the required contingent of workers.⁶²

Situations exist, however, where increased wages may not eliminate shortages. For instance, if the least desirable occupations become dominated by undocumented workers and domestic workers shun these occupations, shortages may occur in spite of increasing wages. Those who oppose guest worker programs maintain that growers’ increasing reliance on undocumented workers has brought about this wage depression and has driven domestic workers out of the agricultural sector. Indeed, such a situation may lead domestic workers to remain unemployed rather than to seek employment in an immigrant-dominated labor market. The temporary worker program in Germany illustrates this proposition. One criticism of Germany’s temporary worker program focuses on the program’s rigidity. Gastarbeiter work permits in general are heavily regulated, with linkages to specific companies, jobs, or regions and prohibitions on foreigners emigrating to areas the government considers overpopulated being commonplace.⁶³ Among other outcomes, this permit regime has led to a two-tiered labor force, with foreigners segregated into the least desirable, lowest-paying jobs and indigenous workers slotted into the more prestigious, higher-paying, white-collar ranks. Moreover, the geographical limitations of some permits—and the resultant disproportionate number of foreigners—have caused some Germans to view these workers as invaders who are taking over certain towns.⁶⁴

Needless to say, these economic and regional divisions have contributed greatly to the country’s social stratification and have created a dependency on foreign labor in many German industries. As foreigners begin to dominate positions at the lowest tier of the work force, Germans increasingly have refused to apply for these jobs, even in times of economic downturn. Therefore, a native labor shortage [has] existed in certain industries even when German unemployment has been high.⁶⁵

Moreover, in criticizing the Senate bill’s temporary worker program, those arrayed against such programs maintain that the Bracero program demonstrated that wages tended to stagnate or fall in areas where braceros worked. In fact, a Department of Agriculture report concerning farm wages from 1953-1959 noted that farm wages

had increased, except in those areas characterized by concentrations of braceros. “This phenomenon left domestic workers with no choice but to accept positions at the prevailing rate or have braceros hired in their place.”⁶⁶ Opponents of the current guest worker proposals contend that, like the Bracero program, employers similarly will be able to manipulate the labor market by determining when a labor shortage exists. Bracero growers, “[b]y offering a position at a given wage and then finding a shortage at that rate—because it was unacceptable to domestic workers[s]—[were] then free to hire braceros.”⁶⁷ The resultant ability to determine artificially when a labor shortage existed led to depressed wages and few employment opportunities for domestic workers. Citing this historical backdrop, critics of the recently proposed guest worker provisions submit that, “by artificially increasing the supply of low-skilled workers, [the current program] would short-circuit any market incentives for employers to increase the wages and benefits, or improve working conditions, for entry-level blue-collar workers.”⁶⁸

ILLEGAL IMMIGRATION AND GOVERNMENT EXPENDITURES

The distributional repercussions of illegal immigration spill over into the public sector as well. Those who desire more stringent immigration laws point to the negative impact illegal immigrants have on all levels of government. To illustrate, a recent study by the Center for Immigration Studies (CIS), a Washington, D.C., non-partisan research institute, found huge hidden costs arising from the seemingly growing addiction to “cheap labor.” Households headed by illegal aliens imposed more than \$26.3 billion in costs on the federal government in 2002 and paid only \$16 billion in taxes—creating a net fiscal deficit at the federal level of almost \$10.4 billion, or about \$2,700 per illegal household. Among the largest annual costs of illegal aliens identified by the CIS study are

Medicaid: \$2.5 billion[;]

Medical care and treatment for the uninsured: \$2.2 billion[;]

The federal prison and court systems: \$1.6 billion[;]

Food assistance programs such as food stamps, WIC, and free school lunches: \$1.9 billion.⁶⁹

Borjas (1994) similarly finds that such new immigrants may have an adverse fiscal impact because recent immigrants participate in welfare programs more heavily than past immigrants did.⁷⁰

As noted earlier, unauthorized immigration also imposes fiscal burdens on state and local governments. A National Research Council (NCR)-sponsored study on the impact of immigration is instructive. While this study did not consider illegal immigration exclusively, it found that the net fiscal impact of immigrants in California in 1994-1995 amounted to approximately \$1,178 per native household.⁷¹ This uptick derived from (a) the increased costs of public education represented by the need to school the children born to immigrants and (b) the net loss represented by the lower tax revenues received from immigrant households, which are more likely to be poorer than their native-born counterparts but which receive more in terms of transfer payments such as welfare.⁷² Although the NCR-sponsored study arguably overstates the fiscal impact of undocumented immigrants, “it makes two important points: one, negative impacts tend to increase as skill levels decline; and two,

immigrants from Latin America pose a larger fiscal burden than other groups, in part because of higher fertility rates.”⁷³ In challenging the notion that undocumented immigrants pose substantial fiscal burdens, other commentators point out that the cost per native household represented by illegal immigration runs to no more than a couple of hundred dollars annually—a sum that immigrants’ federal tax payments on average offset. “According to estimates, two-thirds of illegal immigrants have income tax withheld from their paychecks, and the Social Security Administration collects some \$7 billion a year that goes unclaimed, most of it thought to have accrued from contributions by unauthorized workers.”⁷⁴

AMNESTY, GUEST WORKER PROGRAMS, AND ECONOMIC EFFICIENCY

As argued above, granting amnesty to undocumented workers and expanding the use of guest worker programs generally provide positive economic benefits. However, unless such programs are carefully designed, undesirable, inefficient outcomes may result. Critics of amnesty view it as rewarding those who have violated the immigration laws, as well as perhaps violating other laws that prohibit the purchase of fraudulent documents. For such detractors, governmental initiatives that in effect reward such behavior weaken the efficacy of the criminal-justice system. Consequently, even the most ardent supporters of amnesty acknowledge that it is only one piece of the larger puzzle that comprises comprehensive immigration reform. They in addition concede that, as shown by IRCA, one amnesty begets expectations of future amnesties. Moreover, the

hopes of gaining legal status conditional on living or working in the U.S. for a certain period of time [will] likely encourage more undocumented immigration. In addition, an amnesty is likely to lead to larger undocumented flows as families reunify in the U.S. with the members who have qualified for legal status. If the U.S. goal is to discourage undocumented immigration, then policymakers need to consider other policies as well, including a guest worker program and tougher workplace enforcement.⁷⁵

As discussed above, this is exactly what the most recent, failed Senate bill purports to do.

Guest worker programs also encourage potentially inefficient behavior. History indicates that a large percentage of those admitted to the U.S. as guest workers will stay on as permanent residents.

Some of them may apply for permanent status by legal means, but many may choose to stay illegally. Consequently, any realistic and workable guest worker plan must fix this gaping hole in our immigration system by making enforcement a priority. Without an effective mixture of incentives and sanctions for inducing people to return home, and locating and deporting those who do not return home, a new guest worker program for millions of new workers will fail to fix the problem of illegal entry and visa overstays.⁷⁶

Straightforward economic solutions to this “overstay” problem exist, however. Epstein, Hillman, and Weiss (1999) have mathematically analyzed the

provision of the proper incentives to ensure the repatriation of guest workers at the end of their employment. Employers in this model are required to pay a bond, for example \$5,000 per worker, that is forfeited if the worker does not return home after the period of employment. Workers who desire to stay longer than the period of work have an incentive to take jobs with employers who do not pay the bond and who instead poach workers from legal employers. This mathematical model leads to several conclusions: 1) The illegal population is smaller if the permit for legal employment is granted for a longer period (the assurance of longer-term employment and the learning that takes place in the authorized sector provide incentives not to switch to illegal employers); 2) an increase in the amount of the bond causes the number of workers who leave the country to rise (employers have more to lose and consequently increase wages in the later periods in order to maintain employees who might be tempted to seek illegal employment elsewhere); 3) the greater the human capital accumulation in legal employment, the greater the propensity to return home after the specified period; and 4) deferred payments to legal workers decrease the wages paid in the legal market and increase the proportion of workers who leave the country. The Epstein et al. approach offers one of the few suggestions that places the burden of ensuring repatriation on employers. Although Epstein et al. worry about the possibility that a black market might emerge between workers who do not want to return home at the end of their temporary employment period and employers who want to avoid paying the bond, a simple solution to thwart such perverse behavior might entail the levying of a fine—consisting of a multiple of the bond paid by those who abide by the law—on anyone who illegally hires temporary workers.⁷⁷ In addition, the most recent Senate bill encourages workers to return at the end of their temporary employment by making them ineligible for any aid from either federal or state sources. Other proposals, such as the plan put forth by President Bush, which in many aspects closely parallels the Senate bill, provide incentives to return to the country of origin through such mechanisms as home-country savings accounts comprised of credits applied to the worker's home country's retirement plan and the establishment of a U.S.-based and managed tax-preferred savings account that would be disbursed upon the worker's return to his or her native land.⁷⁸

ILLEGAL IMMIGRATION AND PERVERSE, INEFFICIENT, PRIVATE-SECTOR INCENTIVES

The unintended consequences of a cheap labor supply are magnified by the concentration of undocumented workers in certain industries.

For example, within the agriculture and construction sectors alone, undocumented workers outnumber citizen workers three-to-one. Construction workers in drywall and ceiling tile installers ... are four times as likely to be undocumented workers as citizen workers. Each of these industries, however, is low-paying, meaning that workers in those occupations earn on average no more than \$12,000 a year. Furthermore, the average income for an undocumented worker is typically about 40 percent lower than for a documented worker and about 50 percent lower than for a citizen worker.⁷⁹

Employers in these industries obviously benefit from inflows of cheap unskilled labor through higher profits and lower product prices. As Diaz-Pedrosa (2004) observes, “Illegal employment also allows some industries to stay afloat in an increasingly competitive global market because it lowers production costs for the employer. For example, some argue that the unavailability of illegal immigrants who perform agricultural work at a low wage would cause a decrease in agricultural production.”⁸⁰

Various negative side effects result, however, from having access to undocumented workers. First, a cheap source of labor leaves employers with few incentives to look for more efficient and innovative ways of doing business. More important,

[t]he negative effects of this behavior ripple throughout the entire economy because more productive industries are unable to replace less competitive ones that rely upon artificially depressed wages.⁸¹

Second, this emphasis on lower wages and retaining the cost-cutting strategies that maintain such wage structures can literally mean life or death for undocumented workers.

Human Rights Watch (HRW) has concluded that immigration status is directly related to health and safety on the job. Citing an Associated Press report, HRW notes that Mexican workers in the United States, the majority of whom are undocumented, are 80 percent more likely to die in the workplace than citizen workers. The same Associated Press investigative report, which focused on U.S. Bureau of Labor Statistics from 1996 through 2002, found that ‘Mexicans now represent about 1 in 24 workers in the United States, but about 1 in 14 workplace deaths.’⁸²

Among the reasons the report found for this startling statistic was that

Mexicans are hired to work cheap, the fewer questions the better. They may be thrown into jobs without training or safety equipment. Their objections may be silent if they speak no English. Those here illegally, fearful of attracting attention, can be reluctant to complain. And their work culture and Third World safety expectations don’t discourage extra risk-taking.⁸³

The resultant cost to taxpayers in unpaid hospital bills has not gone unnoticed by those U.S. citizens⁸⁴ who have lobbied local and state governments to pass anti-immigrant legislation (a development discussed later in this paper).

Still and all, employers often find ample economic rationales for breaking the law. A system aimed at controlling illegal immigration through internal measures typically holds employers civilly or criminally liable if they hire undocumented immigrants. Yet some scholars submit that this form of internal control may be ineffectual in curbing “the demand for illegal employment when wage differentials are sufficiently high to compensate for the risk involved in recruiting illegal workers, and when geographical proximity and the existence of networks give employers easy access to immigrant labor.”⁸⁵ Employers who need such workers face a Hobbesian choice: they can pretend the proffered work-authorization documents are valid and hire the applicants, or they can curtail their operations’ productive capacities because of a shortage of applicants. “Facing such a predicament, employers often knowingly

accept false documents and employ undocumented workers, despite the possibility of facing sanctions.”⁸⁶

For some companies, such a benefit-risk analysis ultimately becomes part of their corporate cultures. As *U.S. v. Tyson Foods, Inc.*, 258 F. Supp. 2d 809 (E.D. Tenn. 2003), indicates, on several occasions, undercover investigators caught Tyson managers hiring undocumented workers. Nonetheless, a jury acquitted Tyson on all 34 indictments alleging Tyson’s criminal responsibility for the illegal acts of these employees. Tyson used as its defense the argument that its corporate policy did not allow the hiring of undocumented workers, that its managers attended workshops where they were informed of this corporate policy, and that managers who violated this policy were acting on their own in violation of explicit company policy. Commentators on the outcome of this case suggest that courts must dispose of such cases in a manner that reflects the courts’ awareness of the corporate edicts that often foment the hiring of illegal workers: executive- and board of directors-mandated production goals and budgetary constraints that leave hiring managers with few lawful options for achieving these corporate objectives.

As alleged by the government in the *Tyson* case, the courts must reverse that pressure. Instead of allowing the company brass to pressure hiring managers to meet corporate projections through whatever means necessary, courts have the power to induce executives to change the dynamics from the top down—and must use their power. Only when the corporate liability standard is revised to guarantee stiff sanctions against companies that violate immigration laws will executives have the incentives necessary to implement genuine policies against illegal hiring, actively monitor adherence, and make budget and pricing changes internally if necessary.⁸⁷

ILLEGAL IMMIGRATION AND PERVERSE, INEFFICIENT POLITICAL INCENTIVES

Political responses to illegal immigration can create potentially inefficient outcomes as well. Particularly within the destination country, the politics that surround the issue of illegal immigration may create undesirable policy outcomes. To illustrate, employers who benefit from cheap illegal-immigrant labor may lobby for lax enforcement of the immigration laws. Simultaneously, unions and large segments of the general populace presumably will advocate tougher immigration approaches.

The result is a political compromise that leads to the presence of a black market. Consequently, politicians are forced to speak out of both sides of their mouths. They appease the citizenry’s fears of an immigrant invasion through external manifestations of immigration regulation such as border control. But, they also protect the needs of employers through means that do not jeopardize the image of a strong hand against illegal immigration, namely[,] the lax enforcement of immigration laws in the labor market.⁸⁸

The resultant Janus-like solution leads politicians to take stands that officially condemn illegal immigration while at the same time these selfsame officials

unofficially acquiesce in the employment of illegal immigrants because these workers fulfill the need for a cheap labor force within the destination county. “[Simply put,] illegal immigration continues to exist because its perceived benefits outweigh the costs of completely regulating it.”⁸⁹ A celebrated 1998 INS raid on onion fields in Georgia represents an apt case in point. When Georgia officials publicly castigated the INS for injuring the farmers in question, the INS agreed to forgo enforcement of the immigration laws as to such farmers for the entire onion-growing season.⁹⁰ “The unstated subtext is that most members of Congress are not concerned about the absence of workplace enforcement; indeed[,] many of their constituents and campaign contributors would become very upset if the INS ever became serious about worksite inspections.”⁹¹ This double standard especially manifests itself in border-security issues. Politicians of course seek to placate those constituencies who want rigorous border-control enforcement. But these very politicians realize that a draconian border-security approach would antagonize those manufacturing and agribusiness supporters who rely on unfettered access to cheap labor.

The reluctance of the federal government to impose workplace sanctions prohibiting the hiring of undocumented workers leads to three undesirable, inefficient outcomes: 1) increasing reliance on erecting a wall to secure the borders; 2) legislative enactments by state and local governments to fill the current void created by the federal government; and 3) resort to the judicial system by workers alleging damages from the hiring of undocumented workers.

1) The Inefficiency of Primarily Hinging Immigration Control on Securing the Borders

Rather than emphasizing the enforcement of the existing sanctions aimed at precluding the hiring of undocumented workers, some recent immigration-reform measures have focused on “fencing” the U.S.–Mexico border. Besides being costly and inefficient, this border-security approach in addition promotes other ill-advised side effects. As described above, the House bill provides legislation aimed at walling off, either physically or virtually, large sections of the nation’s southwestern border. With the House bill stalled in conference, the House and Senate also passed legislation—later signed into law by the President—that specifically mandates the erection of this wall. The “Secure Fence Act” thus calls for a 176-mile fence from the Gulf of Mexico in Brownsville, Texas, past Laredo, Texas, and a 51-mile barrier from south of Eagle Pass, Texas, to north of Del Rio, Texas. The 88 miles from Columbus, New Mexico, to El Paso, Texas, will also be fenced, along with the 361 miles from Calexico, California, to Douglas, Arizona. By authorizing \$33.7 billion of spending that will begin to take effect in 2009, this act will dramatically increase the resources allocated to border security. Although much of the funding will be devoted to border fencing and the hiring of additional border patrol agents, funds are also designated for increased numbers of beds at detention centers, more sophisticated remote sensing equipment, and vehicle barriers. Estimates of the cost of construction of the 700 miles of fencing range from \$2 to \$9 billion, expenditures that in turn will necessitate future congressional appropriations. The sheer financial magnitude of this undertaking has led many to view the act as nothing more than a symbolic gesture. Frank Sharry, the executive director of the National Immigration Forum, opines, “I’m going to go out

on a limb and say we'll never see a 700-mile wall along the southern border ... [This legislation] is about incumbent protection, not border protection."⁹²

Even in preliminary discussions, the notion of building a wall along the Mexican border fostered spirited debates. Proponents argued that only a wall would stop the influx of undocumented immigrants. Opponents countered that ever since the Great Wall of China, border walls have provided little more than a false sense of security.⁹³ Earlier attempts at improving border security, for instance, the 1986 passage of IRCA and the enactment of the 1996 Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) forced Mexican illegal border-crossers to rely increasingly on costly "coyotes" and to enter the United States through more dangerous, remote, rural areas. As the physical and financial tolls increased, undocumented immigrants opted to remain in the United States for longer periods of time. "Accordingly, the median stay of undocumented immigrants from Mexico grew from 2.6 years to 6.6 years from 1986 to 1998; and the number of undocumented immigrants doubled from four million to eight million after 1986, with the undocumented population growing at about 250,000 a year."⁹⁴

Data also exist on the eight-year experiment (from 1993-2001) aimed at gaining control of the border by tripling the border patrol budget and reallocating resources to crossing areas typically used by illegal entrants. Corneilius (2001) reports evidence suggesting that the probability of apprehension has increased significantly since 1993 if illegal entry is attempted at one of the most heavily fortified areas. However, by the late 1990s, would-be undocumented immigrants had learned to avoid the most patrolled sites; and the get-away rate accordingly remained at its historical 70-80 percent level.⁹⁵ Corneilius (2001) notes further that the rate of apprehension in California and Texas, the sites of increased patrols, has dropped; but the percentage of apprehensions occurring in Arizona has soared.⁹⁶

Despite these mixed results, one fact remains clear: These alternative crossing areas have led to increased deaths. Overall, the increase in the number of deaths associated with border crossings between 1996-2000 rose by 474 percent; but for Texas and Arizona the increase for the same period was 1,186 and 1,181 percent, respectively. The causes of deaths also have changed. Most deaths in the 1996-2000 period were related to environmental causes (hypothermia, dehydration, or heat strokes) as opposed to the homicides, automobile accidents, and drownings that characterized earlier attempts to cross the border without authorization. Finally, there appears to be no evidence of an overall deterrent effect. A GAO study found that even though enforcement officials have "realized [the] goal of shifting illegal alien traffic away from urban areas ... [,] rather than being deterred from attempting illegal entry, many aliens have instead risked injury and death by trying to cross mountains, deserts, and rivers."⁹⁷ Moreover, labor market evidence in terms of available illegal workers, wage rates, etc. does not indicate any overall deterrence of undocumented workers.⁹⁸

2) The Inefficiency of Piecemeal Local Initiatives to Enforce the Immigration Laws

The inability and/or unwillingness of the federal government to secure the borders and to enforce workplace sanctions has motivated private individuals and local governments to fill this gap. As an illustration, at a red light in California in late

September 2004, retired CPA Jim Gilchrist received the inspiration that culminated in the modern-day Minuteman Project. Teaming with Tucson, Arizona, newspaper publisher Chris Simcox, the two launched a force of citizen volunteers⁹⁹ who, instead of fighting the British, would aim its sights on illegal immigration along the Mexican border.¹⁰⁰ The organization made international headlines “when 849 volunteers fanned out along a 23-mile section of Arizona’s border with Mexico in April 2005.”¹⁰¹ Dedicated to serving as the eyes and ears of what they perceive as the overworked and overextended border patrol, volunteers must pay a \$50 application fee and pass a background check. Volunteers can carry weapons for self-defense in the states (such as Texas) that authorize the carrying of such firearms, but the Minutemen can neither touch nor arrest border crossers.¹⁰²

Even more far-reaching than the Minuteman Project is the plethora of state and local enactments concerning immigrants and immigration. Indeed, “[a]s of November 16, 2007, no fewer than 1562 pieces of [such] legislation ... had been introduced among the 50 state legislatures. Of these bills, 244 became law in 46 states. [Eleven] bills [were] vetoed by ...[g]overnors. Two measures are pending [gubernatorial] review.”¹⁰³ In fact, “[s]tate legislators ... introduced almost three times more bills in 2007 than in 2006 (570). The number of enactments from 2006 (84) has nearly tripled to 244 in 2007... [T]here could be additional legislation related to immigrants later as the year [2007] draws to a close.”¹⁰⁴ Although these measures cover virtually “every policy arena relevant [to] state legislatures...[,] [m]any states have focused on employment, health, identification and driver’s and other licenses, law enforcement, public benefits, and human trafficking.”¹⁰⁵ Employment-related legislation centers primarily on eligibility verification at both the employer and employee levels. Other enactments link eligibility verification to the receipt of unemployment benefits and workers’ compensation.¹⁰⁶ While some states require employers to use the federal Basic Pilot Program (a federal electronic employee-identification/verification scheme) to determine the legal status of employees, one state’s governor vetoed parts of a statute that would have established a work group to examine “the need for and feasibility of verifying [the] citizenship or immigration status of persons for whom background checks are required.”¹⁰⁷ These mixed results characterize proposals dealing with public benefits as well. Some states mandate proof of lawful residence in the U.S. as a prerequisite for receiving public benefits, while others have inaugurated programs designed to facilitate and promote the integration of immigrants into society.¹⁰⁸ Simply put, “[i]n the continued absence of a comprehensive federal reform of the United States’[s] challenged immigration laws, [the] states have displayed an unprecedented level of activity—and have developed a variety of their own approaches and different solutions.”¹⁰⁹

Mirroring these state-level initiatives, municipalities ranging from Hudson, New Hampshire, to Escondido, California, have similarly used their authority to pass a broad spectrum of ordinances aimed at stanching the problems associated with the growing population of undocumented immigrants. Such communities typically cite the job displacement of native-born Americans by these immigrants, the financial drain on the communities that results from this influx of illegal immigrants, and the lowered quality of life (rises in crime, nuisance, reckless behavior, and unsanitary conditions) attributable to this burgeoning population.¹¹⁰ As noted earlier, research

bears out the fears that undocumented workers are supplanting native-born Americans—at least in certain categories of jobs.

Empirical studies conducted in the early 1990s estimated the total cost of job displacement due to undocumented immigrants would reach approximately \$171.5 billion between 1993 and 2002. A recent study has also shown that new undocumented immigrants have substantially increased their ability to find work while the documented immigrants and native-born American citizens have seen a decrease in their ability to find employment between 2000 and mid-2003.¹¹¹

Low-skilled American workers in particular feel the brunt of such job losses. The estimated 100,000 day laborers who fan out over at least 400 separate hiring sites in the U.S. may account for an estimated 40-50 percent of the wages lost as these “workers for hire supply the increasing demand for cheap labor in various communities.”¹¹²

Recent studies also give credence to local complaints about the mounting costs associated with jurisdictions’ absorbing these newcomers. To illustrate, [o]ne study estimated that \$5.4 billion was spent in public assistance to undocumented immigrants in 1990. That same study stated that \$11.9 billion was spent in public assistance and displacement costs for an undocumented population of 4.8 million in 1992. More recent studies support these findings with an estimated \$24 billion spent on social services for undocumented immigration. With an undocumented immigration population that already is estimated to be nearly double the amount [sic] cited in 1992, it is not surprising that state[s] and local communities are beginning to look to their local law enforcement agencies to address these issues....¹¹³

Beginning in July 2006, Hazleton, Pennsylvania, enacted some of the strictest ordinances of any of the various measures used by municipalities to fight illegal immigration. The city council in this municipality of approximately 31,000 residents passed a series of measures aimed at combating what officials viewed as the problems created by illegal aliens. Among other things, the ordinances prohibited the employment and harboring of undocumented aliens within the city and required apartment dwellers to obtain an occupancy permit, a precondition of which is proof of U.S. citizenship or lawful status. Under the ordinances, landlords faced fines of \$1,000 per day for each illegal immigrant living on their properties and \$100 per day for each day the owner allowed such tenancies after having been given notice of a violation of the ordinance.¹¹⁴ The plaintiffs who subsequently challenged the legality of the ordinances included lawful permanent residents of the U.S.; several Jane and John Doe plaintiffs who proceeded anonymously owing to their illegal alien status; the Hazleton Hispanic Business Association comprised of 27 Hispanic business and property owners, including landlords in the city; and several Latino-rights organizations. The plaintiffs sued on a variety of constitutional theories, namely, federal preemption, procedural due process, equal protection, and privacy. The plaintiffs also asserted federal statutory causes of action based on the Fair Housing Act and U.S.C. Section 1981, the latter of which provides that all persons shall have

the same right to make and enforce contracts and have the full and equal benefit of all laws to the same extent enjoyed by white citizens. Finally, the plaintiffs alleged violations of Pennsylvania state law, including the theory that, in enacting the ordinances, the City had exceeded its legitimate police powers.

To merit federal court jurisdiction, the plaintiffs initially had to show that they had standing. Particularly in dispute was whether the anonymous, illegal-alien plaintiffs could proceed with the case. Citing the 14th Amendment's due process and equal protection clauses, both of which refer to "persons," the court emphasized that Supreme Court precedents have consistently interpreted this term "to apply to all people present in the United States, whether they were born here, [e]migrated here through legal means, or violated federal law to enter the country."¹¹⁵ Holding that even these anonymous plaintiffs have standing, the court underscored its conclusion by stating, "We cannot say clearly enough that person who enter this country without legal authorization are not stripped immediately of all their rights because of this single illegal act."¹¹⁶

After engaging in an exhaustive analysis, the Court found that federal law—specifically IRCA—preempted the employment provisions of the ordinances and that, in conflicting with IRCA, these provisions contravened the Supremacy Clause of the U.S. Constitution. Likewise, the ordinances' prohibitions on housing illegal aliens and the permit provisions conflicted with federal immigration laws and thus were preempted as well. The court in addition struck down both the employment and the landlord-tenant provisions as violative of due process but found no violations of equal protection or privacy. While the court rejected the Fair Housing Act federal statutory cause of action, it agreed with the plaintiffs that, in prohibiting undocumented aliens from entering into leases, the tenant-registration and housing provisions violated U.S.C. Section 1981. With regard to the state-law claims, the court held: (1) that the City had the right to license businesses as long as the regulatory scheme did not violate state law and (2) that the ordinances were lawful under the state landlord-tenant act. Still, the court concluded that the City had exceeded its police powers in enacting ordinances that violated the plaintiffs' constitutional rights under the U.S. Constitution. Significantly, the court ended its opinion by asserting that

[w]hatever frustrations officials of the City of Hazleton may feel about the current state of federal immigration enforcement, the nature of the political system in the United States prohibits the City from enacting ordinances that disrupt a carefully drawn federal statutory scheme. Even if federal law did not conflict with Hazleton's measures, the city could not enact an ordinance that violates rights the Constitution guarantees to every person in the United States, whether legal resident or not. The genius of our Constitution is that it provides rights even to those who evoke the least sympathy from the general public. In that way, all in this nation can be confident of equal justice under its laws. Hazleton, in its zeal to control the presence of a group deemed undesirable, violated the rights of such people, as well as others within the community. Since the United States Constitution protects even the disfavored, the ordinances cannot be enforced.¹¹⁷

The complicated opinion set out in the *Hazleton* case sends a cautionary note to municipalities bent on stemming illegal immigration through the political process. As *Hazleton* demonstrates, such local regulatory regimes will inevitably spawn costly legal challenges. This emerging patchwork of conflicting local ordinances and state laws may lead to a balkanization of jurisdictions divided into those perceived as pro-immigration or anti-immigration, thus leading to the creation of “pull” factors that will attract certain illegal aliens but push others even further into the shadows. Indeed, to some extent this has already happened. For example, “[t]hirty-two cities and counties in 16 states—including San Francisco, Austin, Texas, Houston and Seattle—have adopted ‘sanctuary policies’ protective of undocumented immigrants....”¹¹⁸ Such sanctuary policies often involve granting undocumented persons access to schools and other publicly provided benefits, issuing drivers’ licenses or other governmental identification to such undocumented persons, and prohibiting law-enforcement personnel from investigating the residency of any individuals. These policies are often based on humanitarian concerns or, as in the case of drivers’ licenses, on improving public safety. Sanctuary policies have fueled a storm of criticism from conservatives who largely see these initiatives by local politicians as ploys for currying favor with minority groups by providing identification that will make it possible for undocumented persons to participate, albeit illegally, in local, state, and federal elections. Such concerns have prompted several states to consider following the approach taken by Colorado in enacting legislation that “... denies some funding to communities that prevent police and other municipal employees from cooperating with immigration authorities.”¹¹⁹ At least three other states—Michigan, New York, and New Jersey—are considering following the example of Colorado, which adopted an anti-sanctuary law last year. Members of Congress have proposed similar legislation at the federal level.¹²⁰

Besides using employment and housing laws as the City of Hazleton did, state and local officials have begun to expand state criminal-law—typically statutes dealing with nuisance, trespass, and loitering—to abate the presence of illegal aliens in their communities.¹²¹ Arrests made on the basis of these particular grounds are especially prone to a discriminatory application of the law—yet another undesirable policy outcome. This fact, plus the new federal/state/local partnership recently sanctioned by the Department of Homeland Security, has heightened the apprehensions voiced by civil libertarians. Spurred by Arizona Governor Janet Napolitano’s August 15, 2005, declaration of a state of emergency along the state’s border with Mexico, Homeland Security has delegated authority to state and local agencies to act as deputies in the enforcement of the immigration laws. However, this approach has been criticized as an unlawful incursion into the federal-immigration regulatory area because, for example, when states “target undocumented immigrants by creating new expansive trespass laws or by only discriminatorily enforcing a nuisance statute, they are granting themselves new powers that are entirely separate from those enumerated in the ... sanctions and penalties for immigration violations set forth in the [federal immigration statutes] ... and are therefore preempted by [f]ederal authority”¹²² Moreover, such local enactments, if they continue to proliferate, could result in our country’s having thousands of “borders,” an outcome that would clearly conflict with the constitutional mandate for uniformity in the immigration laws.¹²³

No one disputes the fact that state and local governments have authority to engage in the legitimate exercise of police powers aimed at promoting the general welfare, including the maintenance of their communities' quality of life. But the unilateral creation of new immigration-related laws by local governmental units and the targeting of undocumented aliens have resulted in a backlash against such individuals that is at odds with our nation's historical bent toward inclusiveness. More important, these regimes, while costly, are largely ineffectual in dealing with the complex issues associated with illegal immigration. Therefore, "it would be more appropriate for these state and local entities to adhere to ... federal[ly] structured authority in order to protect against unlawful discrimination and [thereby] preserve a single unified immigration policy across the entire nation."¹²⁴ In this regard, Gabriel Escobar, the associate director of the Pew Hispanic Center in Washington and the co-author of a national survey of Hispanics that found that most believe the national immigration-policy debate has increased discrimination, observes that "[w]hat people are realizing, and what Hazleton and other communities like Hazleton are a sign of, is that even though this is entirely a federal responsibility, the effects of immigration are felt most acutely on the local level."¹²⁵ The deep-seated dissatisfaction with the current federal-immigration policy that has led to this pastiche of local and state legislation serves to underscore the compelling need for Congress to live up to this responsibility by passing comprehensive immigration-reform legislation.

3) Internalizing the Cost of ineffective Employer Sanctions through Statutory and Judicial Enforcement

IRCA, as well as the bills that have come out of the Senate and House, contain strong language aimed at protecting domestic workers from the hiring of immigrants, legal or illegal. Diaz-Pedrosa (2004) foremost blames politicians for the inefficient regulation of illegal immigration throughout the U.S. labor market. He argues that elected representatives attempt to juggle the interests of employers who desire a ready and cheap work force with the segments of the general populace who view the "invasion" of newcomers (whether legal or illegal) into the country as disconcerting. Politicians' attempts to please both sides translates

into an immigration system that de jure prohibits the presence and employment of illegal immigrants but de facto reaps the benefits of their contributions to the underground economy and encourages more immigrants to cross the border illegally.¹²⁶

Politicians' policy-making initiatives, however difficult to formulate, therefore must distinguish between pressure groups (for instance, employers who benefit from illegal immigrant labor) and enforcement strategies. Policies that do

otherwise would be based on political naiveté and wishful thinking, or, alternatively, a cold and calculated political hiding-of-the-ball. Stated in more colloquial terms, it would be like asking the wolves to take care of the sheep. [Such policies do] not work. And, if [they do], [they only perpetuate] the status quo of a system that wants to regulate immigration—just not very well.¹²⁷

The splash of media attention surrounding the INS raids on several Wal-Mart stores in 2003 and other well-publicized raids by Immigration and Custom Enforcement (ICE) agents in 2006 and 2007 belie the priority given to enforcement in

recent years. The number of workplace arrests by the Immigration and Naturalization Services (INS), for example, fell dramatically from 17,552 in fiscal year 1997 to 451 in fiscal year 2002.¹²⁸ Employers can avoid the civil and criminal penalties that the law exacts for hiring undocumented workers if such employers have made a good-faith effort to verify applicants' legal status. Consequently, the number of firms incurring fines for immigration and naturalization infractions and the total amount of fines and seizures of property collected (in fiscal year 2002, about \$2 million) remain low.¹²⁹ In fiscal year 2005, 251 arrests occurred; and the amount collected as a result of ICE investigations was \$649,146.¹³⁰ Fiscal year 2006 statistics show 716 arrests culminating in \$1,782,447 in fines and seizures of property.¹³¹ These ten years of data support the proposition that a streamlined procedure for verifying documentation and stiffer penalties for violations—dimensions included in the Senate bills—represent important bulwarks of an effective immigration policy.¹³²

The *Tyson* case mentioned earlier highlights how difficult it is to hold employers liable for illegal hiring even in the face of strong evidence of wrongdoing. As a consequence of this litigation, a sum of only \$5200 was collected from the individuals who pleaded guilty and who now no longer work for the company.¹³³ *Tyson* itself incurred no significant penalties at all. Because sanctions are not deterrents to undesirable behavior unless they are enforced, two approaches have been suggested to offset the ineffectiveness of the current enforcement regime. The first entails changing the standard of liability so as to weaken the affirmative defenses now available to employers. The narrowly drawn jury instructions in the *Tyson* case provided that “[a] corporation may not be found liable for acts [that] it genuinely tries to prevent.”¹³⁴ This catch-all affirmative defense is premised on the idea that its agents' acts are not within the “course and scope” of the agents' employment (the standard the law uses for imposing vicarious liability on the defendant corporation) if the firm “in good faith” had forbidden its agents to perform such acts. However, the defendant company cannot avail itself of this defense if the corporate policies or work-related instructions are shams designed to convey a false impression of compliance with the law. In these circumstances, the agents' acts would fall within the course and scope of their employment; and the company would be liable for the agents' conduct.¹³⁵ Hence, the arguably unduly permissive standard that enabled *Tyson* to escape liability has engendered calls for a more stringent standard whereby the performance of *any* illegal act by the agent will result in liability.

Under this standard, liability attaches regardless of any underlying expectations or company policies that may be in place as a façade. If an employee is involved in hiring an undocumented worker, the hiring activity is deemed to be performed as part of his [or her] duties for the company. Under a strict liability standard, it is irrelevant whether the company expected the agent to hire a legal or illegal worker, nor is it relevant whether an employee handbook forbids the hiring of illegal workers—a prohibited activity has occurred and the corporation will be held liable for it. This result is important because ... a relaxed standard allows corporations to easily evade liability for immigration violations and thus no deterrent effect is realized.¹³⁶

This approach has the added advantage of encouraging self-monitoring by corporations in order to ensure internal compliance. Corporations' resultant ability to identify and sanction their agents more efficiently than the government can will strengthen the investigatory and prosecutorial functions of the agencies charged with enforcing the immigration laws and will save resources as well. Simply put, the "real threat of strict criminal liability, accompanied by penalties in excess of the costs avoided by hiring illegal workers, will induce corporations to abide by the federal laws and to issue unambiguous directives to their workers to ensure compliance."¹³⁷

The Racketeer Influenced and Corrupt Organizations Act (RICO) offers an alternative approach for holding companies liable for contravening the immigration laws. Enacted in 1970 to deal with the "enterprise criminality"¹³⁸ that typified organized crime, RICO applies to a broad spectrum of criminal and civil activities, a result Congress intended at the inception of the act. The RICO statute allows "any person injured in his or her business or property by reason of a violation of section 1962 of this chapter ... [to] sue ... in any appropriate United States district court" for civil damages.¹³⁹ To show a violation of section 1962(c), a plaintiff must show four elements of proof: (1) conduct; (2) of an enterprise (3) through a pattern (4) of racketeering activity.¹⁴⁰ Fulfilling the third prong requires proof of the defendant's commission of a predicate offense that RICO defines as racketeering activity¹⁴¹ and at least two acts of such activity in order to establish the commission of a "pattern" of racketeering activity. In 1996, Congress added to RICO certain immigration predicates, including transporting or harboring undocumented persons; aiding such persons to illegally enter the United States; or fraudulently using visas, permits, and other immigration documents. By including these predicate offenses, Congress manifested its desire to provide private citizens with a means of redressing injuries stemming from the widespread disregard of the immigration laws.¹⁴²

As part of pleading a predicate offense, the plaintiff must state that the defendant had knowledge that the individuals it had hired or encouraged were illegal aliens.¹⁴³ In civil RICO cases, a plaintiff must satisfy section 1964(c), which entails proof of (1) an injury to one's business or property and (2) that such injury "was by reason of" the substantive RICO violations.¹⁴⁴ Besides the showing of a predicate offense, a plaintiff must prove injury—typically depressed wages or lost contracts—and must demonstrate causation, arguably the most difficult aspect to prove. Beyond these statutory requirements, a RICO plaintiff must show constitutional standing, since he or she is invoking federal jurisdiction. Standing mandates the plaintiff's alleging "the invasion of a legal interest that is fairly traceable to the defendant's conduct and [one] likely to be restored by a favorable decision from the court."¹⁴⁵ In short, RICO prohibits individuals from conducting or conspiring to conduct, in interstate commerce, an enterprise involving racketeering activities. By allowing private attorneys-general to supplement the enforcement efforts of the Justice Department and the ICE, RICO enables such litigants to obtain relief that otherwise would be unavailable, given the government's limited resources.

In the context of immigration, then, RICO private attorneys-general can sue employers who have "engaged in systematic schemes to hire foreign-born workers illegally" for "lost property."¹⁴⁶ The lost property oftentimes represents the wages forgone by legal U.S. workers who either were displaced by the offending employers so as to make room for the influx of cheaper undocumented labor or injured by the

depressed wage-scales resulting from increases in this illegal labor supply.¹⁴⁷ The first case to use the immigration predicates under RICO, *Commercial Cleaning Services v. Colin Services Systems*, 271 F.3d 374 (2d Cir. 2001), came to trial in 2000. Since that time, a host of cases has been decided at the federal district court and federal court of appeals levels. As a consequence, a split has developed in the circuit courts of appeal. The Second (*Commercial Cleaning Services*), Sixth (*Trollinger v. Tyson Foods, Inc.* 370 F.3d 602 [2004]), Ninth (*Mendoza v. Zirkle Fruit Co.*, 301 F.3d 1163 [2002]), and Eleventh Circuits (*Williams v. Mohawk Industries*, 465 F.3d 1277 [2006]) have handed down decisions that, in the opinion of one commentator, follow the law as written by Congress in allowing legal workers to sue for wages lost when employers engage in certain systematic hirings of undocumented workers to the detriment of those in the legal work force. In short, the Second, Sixth, Ninth, and Eleventh Circuits have approved RICO as the basis for private causes of actions to enforce the immigration laws. However, the Seventh Circuit, in *Baker v. IBP, Inc.*, 357 F.3d 685 (7th Cir. 2004), rejected the IBP former employees' argument that the defendant company had engaged "in a policy of knowingly employing undocumented illegal immigrants for unskilled positions in an effort to reduce labor costs by driving down employee wages."¹⁴⁸ Specifically the *Baker* court held that, IBP, Inc.'s use of third-party organizations to help it find illegal workers for its plants did not constitute participation in an "enterprise" through a pattern of racketeering activity. The enterprise requirement mandates proof of two distinct entities: (1) the RICO person and (2) the enterprise.¹⁴⁹ IBP argued that its relationship with the recruiting firms constituted nothing more than "ordinary business activity." The Seventh Circuit accepted this argument and refused to find that IBP and the employment-placement companies comprised an association-in-fact enterprise. Rather, the court viewed IBP's relationship with the companies as an agency relationship that would defeat the RICO statute's requirement of distinctiveness. In 2007, the Supreme Court denied review of *Williams v. Mohawk Industries, Inc.*, thus failing to resolve the split in the federal circuits as to the proper resolution of this important issue.

In *Trollinger, Baker, and Mohawk*, the RICO plaintiffs were legal employees who had been injured by the use of undocumented workers in a way that resulted in the plaintiffs either losing their jobs or having their wages lowered. The *Commercial Cleaning Services* plaintiffs were not employees of the defendant company but rather employees of a competitor company whose RICO claim was based on their wages being undercut by illegally hired, undocumented workers. The act has also been used by undocumented workers to enforce existing labor laws that protect them from exploitation, as seen in *Zavala v. Wal-Mart Stores, Inc.*, 393 F. Supp.2d 295 (D. N. J. 2005), although *Zavala* was dismissed on its RICO enterprise and conspiracy claims. Suits would be unsuccessful, as well, in the other category of cases in which employers are using the increased labor supply to survive, such as in the agriculture industry, where the market for the resulting goods would not support higher wages. In these cases, it would not be possible to show lost wages due to the influx of undocumented workers (and thus, the plaintiffs would lack the ability to demonstrate the injury required by RICO).¹⁵⁰

If the holding in the *Baker* case is ultimately accepted by the Supreme Court when it definitively resolves the present split in the circuit courts of appeal, the case's interpretation of enterprise liability may threaten the salutary policy implications of

holding employers liable for their use of undocumented immigrant labor. Nevertheless, given the increasing use of RICO as a remedial tool in the immigration area, employers attracted to the notion of hiring undocumented immigrants as a cheap labor supply must take into account the possibility of RICO-based litigation being filed against them as they calculate the benefits and drawbacks of exploiting undocumented workers.¹⁵¹

CONCLUSIONS – ARGUMENTS FOR IMMIGRATION REFORM

Without question, immigrants add a great deal to the United States, both in terms of the strength their diversity brings and their clear contributions to economic growth and prosperity. It is also the case that the large number of those already illegally in the country and the significant inflows of illegal immigrants who enter each year pose potential national-security concerns—since they cannot be tracked—and also lead to economic costs and perverse incentives. The ambivalence policymakers have shown toward enforcing the immigration laws and imposing sanctions poses a major obstacle to any meaningful reform. The very fact that citizens and municipalities have taken it on their own to find solutions (witness the Minuteman Project and the local housing and employment ordinances that prohibit the hiring of undocumented persons) illustrates the woeful state of affairs spawned by current immigration policies. Furthermore, attempts at better securing the borders, in the aggregate, have been unsuccessful, leading to increasingly more dangerous and more sophisticated ways of avoiding capture. The dramatic growth in the number of coyotes, the increased specialization of these coyote businesses, and the greater rates of border-crossing deaths at more dangerous, less-patrolled border areas represent some of the inauspicious outcomes of these efforts.

From a law and economics perspective, the ideas discussed in this paper lead to several straightforward conclusions:

- Illegal immigrants primarily emigrate to the U.S. in order to increase their standard of living.
- Businesses hire illegal workers because it is profitable to do so.
- Illegal immigrants have contributed to economic growth and have brought about few negative income-distribution effects.
- Guest workers are economically desirable, but mechanisms must be in place to ensure that those workers depart at the termination of their work period.
- Society may gain from changing the status of illegal immigrants.
- Piecemeal attempts at immigration-reform at the state and local levels lead to undesirable and inefficient outcomes.
- Internalizing the costs of ineffective employer sanctions through statutory and judicial enforcement is a slow, inefficient process.
- Fencing the borders offers one of the least efficient ways of controlling illegal immigration.

A sizable part of the illegal-immigration problem results from the inability and/or unwillingness of the federal government to levy sanctions on businesses that

hire illegal workers. Consequently, firms do not face the actual or expected costs of their illegal actions. If jobs are plentiful for illegal immigrants, push-pull factors, which research indicates are the primary force behind migratory movements between countries, will encourage poor workers in countries such as Mexico to devise ways to cross the border illegally. Conversely, the very same push-pull factors will greatly reduce illegal crossings if the pull of higher-paying jobs does not exist for those without proper documentation.

The solution is uncomplicated in principle but, as history has shown, more complex in practice. The simplest solution would be for the federal government to fund the increased staffing of the Department of Homeland Security (DHS) needed to enforce the sanctions, as mandated in the Senate and House bills, and to hold the DHS accountable for the use of these policing resources. Some form of vicarious liability that would make firms responsible for the acts of their employees, such as that suggested in the previous discussion of the *Tyson* case, would obviously close a large loophole as well. Other proposals aimed at making it more difficult for illegal workers to use forged documents, stolen identities, non-existent Social Security numbers, and like strategies would also help. Perhaps the Internal Revenue Service (IRS) model of randomly selecting businesses for surprise employee document audits might provide a cost-effective way of encouraging businesses to internalize the costs of their illegal activities. Once profit-oriented firms realize the government is serious about imposing sanctions, it is very likely that a great deal of illegal hiring will end—and with it the jobs that attract illegal entrants.

If lawmakers remain ambivalent about enforcing sanctions because of the political backlash from businesses that rely on a steady flow of cheap, low-skilled, illegal workers, then the only alternatives are private initiatives such as RICO or the state and local legislative measures that make it illegal to hire and house undocumented individuals. As described above, RICO, although not a panacea for all types of wrongs, allows individuals who have suffered damages from illegal hiring to seek redress. Moreover, the statute, having been successfully applied in a number of private- and public-sector situations, has a positive track record. It may be too early to know definitively whether the local ordinances against hiring or housing undocumented individuals will stand up to the legal challenges these initiatives face, but such grass-root efforts to impose sanctions on the illegal activities of businesses will probably escalate if the current lax enforcement of sanctions by the federal government persists.

The undisputable fact that businesses are the primary beneficiaries of guest workers suggests that businesses who successfully petition the government for the right to employ such temporary workers should be made responsible for seeing that these workers return to their home country at the end of the employment period. A bond posted at the time the workers are hired and redeemed when proof is given that the workers have returned home, such as that suggested by Epstein et al., would place the obligation of ensuring that workers go back to their home countries at the termination of employment where it logically should be—on those who benefit from such workers and those who are responsible for the workers' being in the U. S. in the first place. Severe enough fines on those who are tempted to poach these workers from others who legally hire them would very likely deter this possibility. Of course, lawmakers may be reluctant to impose such a duty on businesses desirous of

employing temporary workers. Nonetheless, it appears that, historically speaking, lawmakers have been willing to draft legislation that imposes sanctions on those who hire illegal workers and to include various requirements businesses must satisfy when petitioning for guest workers. In this sense, a return-home guaranty bond would simply constitute another condition of hiring temporary workers.

The amnesty issue, or as the Senate bills term it, a change in legal status, appears the most difficult to solve. There is no question that those currently in the U.S. without proper documentation and who would, under these proposals, be eligible for a change in status to lawful permanent resident have broken the law. Society therefore has a choice. On the one hand, those already illegally in the country can be relegated to a subculture where they remain in low-skilled jobs, probably assimilate very little, and raise children who themselves have very low skills and fail to assimilate. The more recent research on the strength of the correlation between the skill levels of one generation and that of the next implies that households with low skill levels will tend to have children who themselves as adults will possess concomitantly low skill levels. The alternative approach is to provide an avenue for those who are already in the country illegally to become part of the social structure that allows and encourages persons to upgrade their skills and their educational attainments. As discussed previously, those who legalized their status as part of IRCA had significant increases in their earnings that were attributable to educational attainment, English proficiency, and experience—and these changes occurred in a very short time span. More important, as such households become increasingly mainstream, their offspring also benefit from the social capital and infrastructure improvements provided by their households. Needless to say, such a granting of amnesty must be coupled with other efforts, including those that would dry up the market for illegal workers and provide incentives for temporary workers to return to their home countries. If not, any such proviso will simply encourage others to enter the country illegally in the hope that some future extension of amnesty will legalize them. This was the major fault of IRCA: it legalized the status of those already illegally in the country but did very little to stop the influx of future illegal entrants.

Fencing off the border offers the least desirable of all of the options open to curb the flow of illegal immigrants and, if used at all, should be a last-resort policy employed only if all other initiatives fail. First of all, it is far more expensive than any of the other options open to the government. Estimates of the cost of fencing the borders run from about \$2 billion to \$9 billion, not counting the cost of the patrol staff and the technology that would necessarily complement a border wall. Second, the short experience DHS already has had with border fencing in California indicates that such a measure will encourage potential illegal entrants to find more sophisticated, and very likely more dangerous, ways of entering the country. And third, the building of a fence sends an extremely undesirable symbolic message to our Mexican neighbors and to the rest of the world.

In June 2007, the Senate rejected comprehensive immigration-control legislation that included many of the proposals mentioned above. Nonetheless, the underlying dilemmas posed by the large numbers of undocumented persons, the economic need for a guest worker program, the lax-to-non-existent enforcement of laws prohibiting the hiring of undocumented workers, and the continued emigration of illegal aliens into the United States remain unabated. The failure of Congress to

overhaul the immigration laws has led to piecemeal attempts by the Bush Administration, Congress, and local and state governments to effect immigration reform, initiatives that will very likely create more problems than they solve. For example, the Bush Administration has decided to crack down on employers who hire undocumented workers by requiring employers to resolve mismatched Social Security information within 90 days. Although recognizing the economic turmoil this might cause for the businesses involved, the Administration has essentially ignored the real possibility that this tightened enforcement will permanently force large numbers of undocumented workers into the underground economy or perhaps into criminal activity and thus increase the burdens on all levels of government to support the U.S.-born children of such workers. This crackdown on employers has been coupled with renewed promises to secure the nation's borders through actual and virtual fences. As noted previously, such efforts are extremely costly, likely to fail, and make an ill-advised statement not only to our Mexican neighbors but to the rest of the world. The federal government's ineffectiveness in responding to the problem of illegal immigration has forced municipal and state governments to enact their own legislation barring undocumented persons from rental housing, employment, and various publicly funded programs. Many of these laws are very likely unconstitutional, and some have already been successfully challenged in the courts. Moreover, as a response to these anti-immigrant laws, still other local governments have created "sanctuary" cities by advocating a no-questions-asked policy as to immigration status. Such a patchwork of local and federal solutions is doomed to fail. A national problem cannot be solved willy-nilly at the local level. The only saving grace of such misguided measures is the pressure they have placed on politicians to make immigration reform a key issue in the upcoming presidential campaign. One hopes that both the new president and Congress will have the political fortitude and the circumspection required to enact national legislation that grapples meaningfully with all the human, legal, and economic issues associated with this pressing national imbroglio. A bipartisan effort that rejects the inflammatory rhetoric that has infused the recent debate and that focuses instead on crafting a balanced, judicious, farsighted approach holds the most promise for achieving the successful formulation of the comprehensive immigration reform that the nation urgently needs.

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ENDNOTES

- ¹ Passel (2005), p. 1.
- ² Passel (2005), p. 1.
- ³ Passel (2005), p. 1.
- ⁴ Passel (2005), p. 2.
- ⁵ Passel (2005), p. 1.
- ⁶ Passel (2005), p. 1. According to the report, the 57 percent share (5.9 million) of this undocumented population held by Mexicans has remained constant over the past decade despite rapid upticks in the overall undocumented population in the U.S. Approximately 24 percent of these undocumented persons come from other Latin American countries; nine percent are from Asia; six percent are from Europe and Canada; and four percent are from the rest of the world. Indeed, the number of newly arrived unauthorized immigrants—estimated over the past decade as averaging 700-800 million annually—equals the rate of arrival for legal immigrants.
- ⁷ Hofer, Rytina, and Campbell (2007), p. 1.
- ⁸ Hofer, Rytina, and Campbell (2007), p. 1.
- ⁹ Hofer, Rytina, and Campbell (2007), p. 1.
- ¹⁰ Knowles, 2007.
- ¹¹ The Immigration Reform and Control Act of 1986 (IRCA), Section 210A (D).
- ¹² IRCA, Section 101 (4) (A).
- ¹³ Orrenius and Zavodny, 2004, p. 27.
- ¹⁴ See Comprehensive Immigration Reform Act of 2007, Section 112, "National Strategy For Border Security."
- ¹⁵ See Comprehensive Immigration Reform Act of 2006, Section 115, "Combating Human Smuggling."
- ¹⁶ See Section 218A, part (a) (1) and (a)(2).
- ¹⁷ The Comprehensive Immigration Reform Acts of 2006 and 2007 create a nonagricultural, temporary worker classification—H-2C. Although the 2006 and 2007 Senate bills are quite similar in their approaches to guest/temporary workers, the 2007 bill introduced some very controversial changes that generated criticism from the technology sector. Although the technology sector favored the increase from 20,000

to 115,000 in visas for people with advanced degrees from U. S. schools, technology firms objected to two new provisions in the 2007 Senate bill. First, the current legislation sets out a much higher standard for hiring temporary H1-B visa workers for firms with a workforce in which over 15 percent of its employees hold H-1B visas. The proposed 2007 Senate bill applies to all H1-B employers, regardless of their percentage of H1-B visa holders. The most recent proposal also requires all H-1B employers to attest that no U.S. worker was displaced from a job six months prior to or after the hiring of an H-1B worker. That rule creates substantial hurdles for “legitimate” employers in terms of the flexibility of their work forces and global competitiveness. Second, the 2007 bill places a premium on individuals with degrees or skills in the high-demand areas of science, technology, engineering, and medicine. However, “tech” employers say the point system delineated in the proposed amendments to the bill takes control away from businesses because employers would no longer be able to sponsor green-card applications for the specific individuals the firms want to hire.

¹⁸ See Comprehensive Immigration Reform Acts of 2006 and 2007, Section 218A, part (h).

¹⁹ See Comprehensive Immigration Reform Acts of 2006 and 2007, Section 245B B(I). While the 2006 Senate bill mandates that illegal immigrants leave the country and then return to seek an adjustment to permanent residence status, the 2007 Senate bill makes the return optional, since it creates a Z visa category whereby undocumented persons could obtain a Z Visa, which is renewable indefinitely.

²⁰ See Comprehensive Immigration Reform Act of 2007, Section 274A.

²¹ See Comprehensive Immigration Reform Act of 2007, Section 274A. In contrast to the 2006 Act, the 2007 Act increases the minimal enforcement personnel from 2,000 to 2,200, as well as the minimum percentage of enforcement personnel assigned to enforcement from 20 to 25 percent, respectively.

²² Jacoby, 2006, p. 58.

²³ Jacoby, 2006, p. 58.

²⁴ Jacoby, 2006, p. 58.

²⁵ Jacoby, 2006, p. 58.

²⁶ Jacoby, 2004.

²⁷ Jacoby, 2004.

²⁸ Jacoby, 2004.

²⁹ Jacoby, 2004.

³⁰ Jacoby, 2004.

³¹ Jacoby, 2004.

³² Jacoby, 2004.

³³ Orrenius and Zavodny, 2004; Mosisa, 2002.

³⁴ Chang, 2000, p. 205.

³⁵ Obhof, 2002, pp. 176-177.

³⁶ Chau, 2003, p.196.

³⁷ Rivera-Batiz, 1999 as cited in Orrenius and Zavodny, 2004, p. 27.

³⁸ Rivera-Batiz, 1999 as cited in Orrenius and Zavodny, 2004, p. 27.

- ³⁹ Diaz-Pedrosa, 2004.
- ⁴⁰ Ehrenberg and Smith, 1994, pp. 352-358.
- ⁴¹ Obhof, 2002.
- ⁴² Chang, 2000, p. 212.
- ⁴³ Jacoby, 2006, p. 57.
- ⁴⁴ Jacoby, 2006, p. 57.
- ⁴⁵ Jacoby, 2006.
- ⁴⁶ Jacoby, 2006, p.58.
- ⁴⁷ Obhof, 2002.
- ⁴⁸ Obhof, 2002, p. 173.
- ⁴⁹ Obhof, 2002.
- ⁵⁰ Obhof, 2002, p. 173.
- ⁵¹ Hanson et al., 2002.
- ⁵² For a survey of other studies, see Borjas, 1999.
- ⁵³ Jacoby, 2006, p. 57.
- ⁵⁴ Orrenius and Zavodny, 2004, p. 26.
- ⁵⁵ Tancredo, 2005, pp. 72-73
- ⁵⁶ Cited in Tancredo, 2005, p. 73.
- ⁵⁷ Tancredo, 2005, p. 74.
- ⁵⁸ Martin, 2002, p. 4.
- ⁵⁹ This information can be found at <http://www.ers.usda.gov/Briefing/FarmLabor/Employment> (last visited April 5, 2005)
- ⁶⁰ This information can be found at <http://www.ers.usda.gov/Briefing/FarmLabor/Employment> (last visited April 5, 2005)
- ⁶¹ This information can be found at <http://www.ers.usda.gov/Briefing/FarmLabor/Employment> (last visited April 5, 2005)
- ⁶² Kosegi, 2001, p. 298. Adding credence to this view is the aforementioned 1997 GAO study that pointed to the absence of any such shortage of agricultural workers. Shortages resulting from labor displacement may skew these statistics, as may worker hesitancy to leave manufacturing or construction jobs for agricultural jobs, particularly if the workers have previously worked in an agricultural setting.
- ⁶³ Jacoby, 2004.
- ⁶⁴ Jacoby, 2004.
- ⁶⁵ Jacoby, 2004, p. 1656.
- ⁶⁶ Morgan, 2004, p. 137.
- ⁶⁷ Morgan, 2004, p. 138
- ⁶⁸ Morgan, 2004, pp. 137-138.
- ⁶⁹ Tancredo, 2005, p. 74.
- ⁷⁰ Borjas, 2004.
- ⁷¹ Orrenius and Zavodny, 2004, p.27
- ⁷² While undocumented immigrants remain ineligible for most welfare programs, any children born in the U.S. are citizens and thus eligible for welfare and other types of public assistance. Their parents' lack of legal status has no bearing on the children's potential eligibility for such programs.

- ⁷³ Orrenius and Zavodny, 2004, p.27.
- ⁷⁴ Jacoby, 2006, p. 54
- ⁷⁵ Orrenius and Zavodny, 2004, p. 3.1
- ⁷⁶ Tancredo, 2005, p. 70.
- ⁷⁷ Epstein et al., 1999.
- ⁷⁸ Knowles, 2007; Orrenius and Zavodny, 2004.
- ⁷⁹ Williams, 2006, pp. 761-762.
- ⁸⁰ Diaz-Pedrosa, 2004, p. 442.
- ⁸¹ Diaz-Pedrosa, 2004, p. 444.
- ⁸² Williams, 2006, p. 761.
- ⁸³ Williams, 2006, pp. 761-762.
- ⁸⁴ Williams, 2006, p. 762.
- ⁸⁵ Diaz-Pedrosa, 2004, p. 448.
- ⁸⁶ Morgan, 2004, pp. 136-137.
- ⁸⁷ Tanger, 2006, p. 89.
- ⁸⁸ Diaz-Pedrosa, 2004, p. 434.
- ⁸⁹ Diaz-Pedrosa, 2004, pp. 442-443.
- ⁹⁰ Diaz-Pedrosa, 2004. Since 9/11, enforcement derives from the Department of Homeland Security's Bureau of Immigration and Customs Enforcement (ICE), not the INS.
- ⁹¹ Cornielius, 2001, p. 678.
- ⁹² Gaouette, 2006, p. 1.
- ⁹³ Guerra, 2006.
- ⁹⁴ Jacoby, 2004, p. 1610.
- ⁹⁵ Corneilius, 2001, p. 663.
- ⁹⁶ Corneilius, 2001, p. 667.
- ⁹⁷ Cited in Corneilius, 2001, p 676.
- ⁹⁸ Corneilius, 2001, p. 676.
- ⁹⁹ Volunteers span the social and income spectrum, ranging from cab drivers to doctors and lawyers, with a strong concentration of retired law enforcement officials and military veterans.
- ¹⁰⁰ Montgomery, 2005
- ¹⁰¹ Montgomery, 2005, Domestic News Section
- ¹⁰² Critics of the project, including President George Bush. decry the presence of what they view as armed "vigilantes" who will impede—rather than strengthen—border security. See Susan McMillan, Roger O. Crockett, and Christopher Palmeri, p. 30.
- ¹⁰³ National Conference of State Legislatures, *Immigration Policy Project*, November 29, 2007, p. 1, accessed at www.ncsl.org, last visited February 4, 2008.
- ¹⁰⁴ National Conference of State Legislatures, *Immigration Policy Project*, November 29, 2007, p. 1, accessed at www.ncsl.org, last visited February 4, 2007.
- ¹⁰⁵ National Conference of State Legislatures, *Immigration Policy Project*, August, 6, 2007, p. 1, accessed at www.ncsl.org, last visited August, 23, 2007.
- ¹⁰⁶ National Conference of State Legislatures, *Immigration Policy Project*, August, 6, 2007, p. 1, accessed at www.ncsl.org, last visited August, 23, 2007.

- ¹⁰⁷ National Conference of State Legislatures, *Immigration Policy Project*, August, 6, 2007, p. 3-4, accessed at www.ncsl.org, last visited August, 23, 2007.
- ¹⁰⁸ National Conference of State Legislatures, *Immigration Policy Project*, August, 6, 2007, p. 4, accessed at www.ncsl.org, last visited August, 23, 2007.
- ¹⁰⁹ National Conference of State Legislatures, *Immigration Policy Project*, August, 6, 2007, p. 1, accessed at www.ncsl.org, last visited August, 23, 2007.
- ¹¹⁰ Almonte, 2007, pp. 658-659.
- ¹¹¹ Almonte, 2007, p. 659.
- ¹¹² Almonte, 2007, p. 659.
- ¹¹³ Almonte, 2007, pp. 660-661.
- ¹¹⁴ *Lozano v. City of Hazleton*, 496 F. Supp. 2d., 477, 530 (M.D. Pa. 2007).
- ¹¹⁵ *Lozano v. City of Hazleton*, 496 F. Supp. 2d., 477, 499 (M.D. Pa. 2007).
- ¹¹⁶ *Lozano v. City of Hazleton*, 496 F. Supp. 2d., 477, 498 (M.D. Pa. 2007). The court ultimately found that only two plaintiffs, a couple who owned a business and both of whom were naturalized citizens, lacked standing.
- ¹¹⁷ *Lozano v. City of Hazleton*, 496 F. Supp. 2d., 477, 555 (M.D. Pa. 2007).
- ¹¹⁸ Montgomery, 2007
- ¹¹⁹ Bazar, 2007, p. 3A.
- ¹²⁰ Bazar, 2007.
- ¹²¹ Canyon County, Idaho, sued several local employers under the RICO Act, arguing that the firms' use of illegal workers to reduce labor costs constituted racketeering activity that harmed the county owing to the county's being forced to provide medical and criminal justice services to such undocumented aliens. (*Canyon County v. Syngenta Seeds, Inc.*, 2006 WL 3023453 (C.A. 9)). Even though this case was dismissed, given the unsettled law concerning the application of the RICO Act to illegal immigration (a topic discussed earlier in this paper), other local communities may seek to solve their immigration-related problems in this manner.
- ¹²² Almonte, 2007, p. 681.
- ¹²³ Almonte, 2007.
- ¹²⁴ Almonte, 2007, p. 687.
- ¹²⁵ Scolfor, 2006, Domestic News.
- ¹²⁶ Diaz-Pedrosa, 2004, p. 481.
- ¹²⁷ Diaz-Pedrosa, 2004, p. 481.
- ¹²⁸ Office of Immigration Statistics, 2003.
- ¹²⁹ Orrenius and Zavodny, 2004.
- ¹³⁰ *Yearbook of Immigration Statistics*, 2005, Table 37.
- ¹³¹ *Yearbook of Immigration Statistics*, 2006, Table 37.
- ¹³² Orrenius and Zavodny, 2004.
- ¹³³ Tanger, 2006.
- ¹³⁴ Tanger, 2006, p. 87.
- ¹³⁵ Tanger, 2006.
- ¹³⁶ Tanger, 2006, p. 88.
- ¹³⁷ Tanger, 2006, p. 88.
- ¹³⁸ Yu, 2006.

¹³⁹ 18 U.S.C. 1964 (c) (1995).

¹⁴⁰ *Williams v. Mohawk Industries*, 465 F. 3d 1277 (11th Cir. 2006), p. 1282.

¹⁴¹ Diaz-Pedrosa, 2004.

¹⁴² Diaz-Pedrosa, 2004.

¹⁴³ Diaz-Pedrosa, 2004.

¹⁴⁴ Diaz-Pedrosa, p. 478.

¹⁴⁵ Diaz-Pedrosa, p. 478.

¹⁴⁶ Yu, 2006 p. 911.

¹⁴⁷ Yu, 2006, p. 911.

¹⁴⁸ Yu, 2006, p. 937.

¹⁴⁹ Yu, 2006.

¹⁵⁰ Clearly, RICO does not represent a panacea for curing all the ills associated with illegal immigration. For example, relying on the act for redress would be largely ineffectual in industries (such as agriculture) that show little or no competition between illegal immigrants and native workers. In these cases, it would not be possible to meet RICO's requirement of a showing of injury (lost wages) stemming from the influx of undocumented workers. The same would be true of situations in which employers seek an increased labor supply in order to survive (again, typically in agricultural operations); in such circumstances, the market for the resultant goods would not support the payment of higher wage rates. Still, the fact that RICO makes successful litigants eligible for treble damages increases the act's attractiveness as a legal theory.

¹⁵¹ Yu, 2006.