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Eric A. Posner

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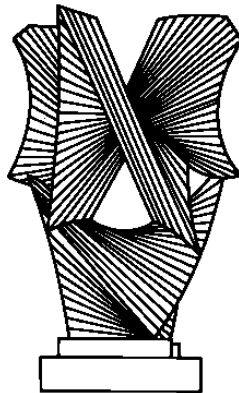
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## THE INSTITUTIONAL STRUCTURE OF IMMIGRATION LAW

*Eric A. Posner*

THE LAW SCHOOL  
THE UNIVERSITY OF CHICAGO

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# The Institutional Structure of Immigration Law

Eric A. Posner<sup>1</sup>

July 26, 2012

*Abstract.* Immigration law scholars should give more attention to the institutional structure of immigration law and, in particular, the way that the government addresses problems of asymmetric information in the course of screening potential migrants and attempting to control their behavior once they arrive. Economic models of optimal contracting provide a useful starting point for analyzing this problem. This approach is applied to several current debates in immigration scholarship, including controversies over “crimmigration” and courts’ refusal to extend labor and employment rights to undocumented aliens.

In a series of papers, Adam Cox and I argue that immigration scholars should give more attention to the institutional structure of immigration law, using models and principles drawn from economic theory.<sup>2</sup> Most existing scholarship takes different approaches. A large doctrinal literature attempts to work out the legal implications of the immigration code and the cases.<sup>3</sup> Another literature, heavily normative, is oriented to advocacy, and is particularly concerned with racism and other forms of discrimination in immigration law, and the ways in which immigration law falls short of what authors see as constitutional requirements, international obligations, or moral principles.<sup>4</sup> A third literature takes a historical perspective on immigration law, but usually focuses like the second literature on the role of racist and other invidious motives in the evolution of immigration law.<sup>5</sup>

As a result of these dominant strands in this literature, the institutional structure of international law and its normative foundations have received less attention than it deserves. By the institutional structure of immigration law, I mean the rules and institutions of immigration

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<sup>2</sup> Adam Cox and Eric Posner, *The Second-Order Structure of Immigration Law*, 59 *Stan L Rev* 809 (2007); Adam Cox and Eric Posner, *The Rights of Migrants: An Optimal Contract Framework*, 84 *NYU L Rev* 1403 (2009); Adam Cox and Eric Posner, *Delegation in Immigration Law*, *U Chi L Rev* (forthcoming 2012), online at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1924382](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1924382) (visited July 23, 2012).

<sup>3</sup> See, for example, Stephen H. Legomsky, *Fear and Loathing in Congress and the Courts: Immigration and Judicial Review*, 78 *Tex L Rev* 1615 (2000).

<sup>4</sup> See, for example, Gerald L. Neuman, *Strangers to the Constitution: Immigrants, Borders, and Fundamental Law* (Princeton 1996).

<sup>5</sup> See, for example, Hiroshi Motomura, *Americans in Waiting: The Lost Story of Immigration and Citizenship in the United States* (Oxford 2007).

law, their behavioral effects, and the connection between these effects and various normative goals that can plausibly be attributed to immigration policy. So there is a descriptive question—what effects does immigration law have on the behavior of migrants and Americans who interact with them, such as employers? And then there is a normative question—do these behavioral effects advance legitimate goals of public policy?

Of course, the goals of immigration law are heavily contested. Some people believe in open borders; for these people, immigration law can serve no legitimate purpose. But there appears to be a rough consensus in this country that open borders are not obligatory, and that immigration law should permit the migration of people who will make significant contributions to U.S. social welfare, in particular (1) those who bring important skills or fill gaps in the labor market, (2) those whose presence would permit family reunification—while in both cases (3) people who intend to migrate permanently should share American values and be capable of being assimilated into society. Let us consider these goals as roughly legitimate, and take them as given. Numerous questions of institutional design remain. How should immigration law be structured so as to advance these goals? For example, should the government ensure that these goals are satisfied for each potential migrant by requiring her to take a test? Or would it be better to let promising migrants enter the country and then make permanent residency conditional on satisfactory behavior over a period of time?

In this essay, I summarize and develop the approach that Cox and I take to answering these questions, and use this approach to shed light on recent debates on the institutional design of immigration law.

## I. The Normative Goals of Immigration Law

As noted above, the normative basis of immigration law is heavily contested, but a rough consensus can be outlined. Below I describe that consensus, relying on the law itself and what seems like the basic public and political attitude about the law—what people support and what they oppose. The aim here is not to defend a particular normative agenda, but to provide a fixed normative baseline, which can be used for understanding the purposes of different provisions of the immigration code.

*The maximand.* The ultimate goal of immigration policy is clearly to maximize some conception of welfare. The major goals of immigration policy, as I discuss below, are related to improving the well-being or wealth of various individuals or firms. Employers seek skilled workers; households seek nannies and gardeners; and Americans seek to be reunited with foreign relatives.

But whose welfare? Should immigration law advance the welfare of Americans only, or also that of foreigners? The latter view, which has some support among philosophers, is known

as cosmopolitanism.<sup>6</sup> In the policy and legal literature, this view is manifested in occasional worries that immigration to the United States will harm people left behind in the migrants' countries, where brain drain occurs.<sup>7</sup> This view ignores the many benefits for foreigners, including remittances and the circulation of knowledge that takes place when migrants return to their home countries, as they often do. But whatever its philosophical merits, the cosmopolitan view has virtually no support in American public policy. Politicians advance the interests of voters, and foreigners do not vote. The normative basis of immigration law thus is maximization of the well-being of Americans.<sup>8</sup>

*Economic well-being.* The next question is how can immigration law be used to maximize the well-being of Americans. A frequent answer to this question is that immigration law should be used to admit highly skilled workers who cannot be found in the United States, or to fill in “gaps” in the labor market.

A more careful understanding of this goal starts with the observation that the admission of a migrant has numerous effects, both positive and negative. First, the migrant, whether highly skilled or not, will expand the labor supply within a particular economic sector. As a result, wages will drop. Employers (including shareholders) will benefit from lower labor costs; so will consumers if, as normally occurs, some of the cost savings result in lower prices. Holding all else equal, American workers in the same sector will experience lower wages (or, if the sector is booming, their wages will not rise as quickly as they otherwise would). Second, the migrant, once in the United States, will consume goods and services, increasing demand, and thus potentially helping American workers who produce goods and services that migrants consume. Third, the migrant will pay taxes and in this way help finance public goods in the United States. But fourth, migrants will contribute to congestion—for example, crowding hospitals and schools. Thus, the empirical effect of migration (both the number of migrants and the types of skills of the migrants) is a complex question, which cannot be answered in the abstract.

*Family reunification.* A longstanding goal of U.S. immigration law has been family reunification. This goal advances social welfare in two ways. First, Americans with close family relations who are abroad are made better off if those relations are admitted into the United States as immigrants. In this way, immigration policy addresses the interests of a subset of the population, those with relations abroad. Second, one might conjecture that by preferring foreigners with close relations in the United States, the government ensures that many migrants will receive assistance when they enter this country, and will be in a better position to adjust to a

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<sup>6</sup> See, for example, Kwame Anthony Appiah, *Cosmopolitanism: Ethics in a World of Strangers* (Norton 2006).

<sup>7</sup> See, for example, Fernando R. Tesón, *Brain Drain*, 45 San Diego L Rev 899 (2008). Compare Yariv Brauner, *Brain Drain Taxation as Development Policy*, 55 St Louis U L J 221, 224, 228 (arguing emigration to developed countries may have positive effects for developing countries).

<sup>8</sup> There is an interesting question at what point the migrant “enters” the U.S. social welfare function, so that public policy appropriately advances his utility function directly. A plausible answer is when the migrant becomes a citizen, but a more complete argument is called for. Welfarism does not answer this question directly.

foreign culture than other immigrants are. The American family relations will likely help the migrant adjust to a new culture by providing advice in the migrant's native language, shelter, financial assistance, and other benefits. It is possible that the emphasis on family reunification in U.S. immigration law accounts for the high level of assimilation of immigrants, which contrasts favorably to the experiences in other countries.

*National glory, culture, diversity, and investment.* Although most of U.S. immigration law is oriented toward importing workers and family members, a number of more marginal provisions advance other goals as well. The laws give preference to talented athletes, artists, and scholars.<sup>9</sup> These people help the United States compete against other countries in the areas of culture and science, and even national glory, as illustrated by the preferences for Olympic athletes. Immigration law also attempts to ensure that migrants hail from a diverse group of countries rather than just a few<sup>10</sup>—possibly reflecting a theory that diversity is valuable, or a fear that an excessive number of migrants from a single country or culture may cause political fragmentation.<sup>11</sup>

*Rights.* Much immigration law scholarship focuses on the rights of migrants, contending that immigration law does not give sufficient respect to their rights. A common complaint is that deportation hearings use summary procedures, or that immigration violations are criminalized. The literature treats these rights as exogenous, and thus the normative desirability of various immigration law provisions stands or falls depending on whether they are consistent with those rights. From the standpoint of social welfare, however, rights must be endogenous: it must be shown how they advance social welfare. And from the standpoint of national social welfare, one must explain why giving rights to aliens advances the interests of Americans. I return to this point in Part II.C., below.

## II. The Institutional Approach

### A. A Useful Analogy and Some Assumptions

Under the approach argued for in this paper, we assume that the state seeks to achieve the goals described above by attracting migrants. Formally, the state seeks to maximize (national) social welfare, but to attract migrants, the state must “pay” the migrants more than their costs from migration. The costs of migration can be high. They include the financial costs of moving to a new location, but also—of considerable importance—the psychic costs of leaving family,

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<sup>9</sup> Allocation of Immigrant Visas, 8 USC § 1153(b) (allocating over fifty percent of visas per year to aliens with “extraordinary ability” or advanced degrees, professors, researchers or physicians).

<sup>10</sup> Allocation of Immigrant Visas, 8 USC § 153(c); Numerical Limitations on Individual Foreign States, 8 USC § 1152(a)(1)(B)(2).

<sup>11</sup> See generally, Samuel Huntington, *Who Are We?: The Challenges to America's National Identity* (Simon & Schuster 2005).

friends, and relations, and moving to a foreign and unfamiliar country, where the language may be different, and cultural, religious, and social norms are likely to be different.

To make migration attractive for migrants, states do not literally pay them, but states must allow migrants to keep enough of their earnings, and allow them to remain long enough, to cover the fixed costs of migration plus the cost of living. As we will see, states must thus offer migrants various rights or guarantees, so that migrants do not believe that, for example, they will be deported as soon as an economic downturn occurs in the host country.

The importance of this point can be seen when one considers that migrants must normally make *country-specific investments*. A country-specific investment is an expenditure of resources, typically by the migrant, which pays off for the migrant only as long as the migrant remains in the country in question. A classic example of a country-specific investment is learning the language of a country where that country's language is not spoken elsewhere (as is the case for Japan, but not the United States). The migrant to Japan who learns Japanese is unlikely to be able to earn payoffs if he leaves Japan, except possibly as an interpreter or translator. Another type of country specific-investment is learning the norms and customs of a country. Migrants also make country-specific investments by establishing relationships with citizens.

The economic analogy is the firm-specific investment, which is used in labor economics to describe workers who earn skills that pay off only in the firm in which they are employed. Once workers make firm-specific investments, they are subject to hold-up by the employer—the employer can underpay the worker because the worker cannot obtain equal payoffs at other firms. As a result, workers will not make firm-specific investments unless they receive contractual or other assurances that they will remain with the firm or be compensated if they are fired. Similarly, migrants will not make country-specific investments if they believe that they can be easily deported.<sup>12</sup>

The state can be seen as akin to an employer, and immigration law then can be understood in two ways: (1) as a *screening device* for distinguishing desirable migrants and undesirable migrants, just as employers use screening devices for distinguishing desirable job applicants and undesirable job applicants; and (2) as a *method for controlling the behavior* of migrants after they are admitted, just as employers use contracts to control workers. This useful analogy clarifies the way that immigration law is, or can be, structured so to advance its normative goals. The analogy also draws attention to the crucial assumption of the approach: that

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<sup>12</sup> It should not be assumed that it is always in the national interest to encourage country-specific investment. Nations can benefit from short-term or cyclical foreign labor, which supplements the work force during labor shortages without depriving citizens of jobs during economic slowdowns. For a contrary view, see Cristina Rodriguez, *Guest Workers and Integration: Toward a Theory of What Immigrants and Americans Owe One Another*, 2007 U Chi Legal F 219 (2007), who criticizes guest worker programs because they block long-term incorporation of foreign workers into the citizenry.

the problem for the state is that migrants have private information both about their characteristics and their behavior. The state needs to elicit that information in order to advance its goals.

In sum, the state receives payoffs from admitting migrants, and especially migrants who will work and pay taxes. Migrants receive payoffs from migrating to states where their employment prospects are superior to those in their home countries. However, migrants will not migrate in the first place, or make country-specific investments, if they believe that they will be too easily deported, or subject to abuse. Thus, countries must grant certain rights to migrants in order to attract them.

## B. Methods of Screening

In models used by economists to analyze the hiring process, the analyst assumes that the employer has limited information about the “type” of a job applicant. “Good types” are workers whose preferences and abilities are suitable for the employer. “Bad types” are other workers. It is tempting to assume that employers can determine the type of a worker simply by reading his c.v. And sometimes they can. But usually employers care about more than the formal educational achievements of job applicants; they also care about their enthusiasm, diligence, creativity, ability to work with others, and other characteristics, of which degrees may not be good predictors. Even prior work experience may give employers little information about the abilities of a worker.

Employers address these problems in several ways. They invest in verifying information that job applicants provide, and searching for additional information about the applicant. They give job applicants tests and subject them to exams. They interview them. They hire them on a temporary basis, and then give them a permanent position if they demonstrate that they are suitable for the firm. All of these methods generate information about the job applicants “type,” enabling the employer to avoid hiring people who lack the appropriate talents.

Immigration authorities face the same problem that employers do. An applicant for entry—temporary or permanent—possesses private information about his or her “type.” In the context of immigration, the “good type” of immigrant is the immigrant with two major characteristics: (1) skills that are valuable for domestic employers, and (2) assimilability. Ideally, the immigrant will possess both characteristics, but it would be a mistake to assume that only high-skilled migrants are considered desirable under U.S. policy. U.S. employers also seek unskilled workers who will take jobs that Americans refuse to take; given the surfeit of unskilled workers around the world, the goal then is to choose immigrants who are most assimilable.

The government’s strategy is to condition admission on proof that a potential migrant belongs to the right type. Of course, a potential immigrant of the wrong type has no incentive to reveal his type, and indeed will engage in “cheap talk”—insisting that he belongs to the good



type when he in fact does not. The government therefore obviously cannot take the potential migrant's word for it. Instead, the government can (for example) condition a visa on proof that an employer will hire the migrant and indeed on satisfactory performance for a period of time. Where the question is not the migrant's skills but his assimilability, the government could condition the visa on proof that the migrant speaks English, has lived in the United States, or has other characteristics or experiences that predict assimilability. In addition, the government could admit the migrant conditional on eventual assimilation—which can be measured in various ways, such as avoiding imprisonment, or making friends and establishing relationships.

There are two basic approaches to screening. Under the *ex ante* approach, the government examines information about characteristics of the potential migrant that exist at the time of entry: education, language skills, past experience in the United States, criminal record, and so forth. Under the *ex post* approach, the government permits the migrant to enter on a temporary or conditional basis, and then extends the period of the visa if the migrant shows that he can prosper in the United States—by obtaining a job, making relationships, joining community organizations, learning English, and engaging in other actions that demonstrate assimilability. Each approach has characteristic advantages. Under the *ex ante* approach, the government avoids taking the risk that a temporarily admitted migrant disappears into the vast underground economy, and can also assure the migrant who possesses the right qualifications that she will not be ordered to leave in the future, thus encouraging the migrant to make country-specific investments. But the *ex ante* approach will rarely work well for the vast quantity of unskilled migrants, who cannot realistically distinguish themselves as assimilable or not on the basis of *ex ante* information. For them, the *ex post* approach is most suitable, as it allows them to prove their assimilability by prospering while living in the United States.

### C. Controlling Behavior and the Rights of Migrants

States also seek to control the behavior of migrants after they enter the country. To understand the problem, imagine that the screening works perfectly, and so only good types are admitted. Nonetheless, problems may arise. Even good types may act in ways that do not advance the state's interest, and if they do so, the state may be justified in removing them.

The optimal contract framework is helpful here. Imagine that a migrant enters the United States. The migrant is admitted only because immigration authorities determine that she fills a gap in the labor market. However, the migrant quits her job soon after admission, qualifies for public welfare, and commits crimes. This is a problem of moral hazard. To the extent that the government cannot monitor the migrant and punish or remove her for failing to perform the actions for which she was admitted, the migrant may have an incentive to “shirk,” and engage in other actions that may be more profitable for her.

To counter moral hazard, the government can take a number of actions. It can monitor the migrant by, for example, requiring her to make reports about her activities to immigration authorities, which would need to verify her reports. It can keep track of any criminal activity of which she is convicted. In addition, it must sanction migrants who violate the “contract.” Removal may be an adequate remedy, but it may not be sufficient. If the cost to the migrant of removal is not high enough to deter moral hazard, then criminal sanctions may be warranted.

A more difficult problem arises when a migrant who has not acted badly may nonetheless lose her value to the state. This could happen if, for example, an economic downturn takes place, so that the migrant’s labor value diminishes. It could also happen in times of insecurity; migrants from certain countries which become military enemies may be regarded with suspicion. In these cases, the government may have an incentive to remove the migrant.

However, the government’s hand is constrained. As noted above, the government benefits if migrants make country-specific investments. But migrants will be reluctant to make country-specific investments if they believe that they may be removed for any reason or no reason. Thus, it is important for the state to commit in advance that it will remove migrants only under specified conditions, including bad behavior by the migrant, but also—if it is desirable—economic downturn and war. Migrants will reduce their country-specific investments relative to an absolute guarantee, but the level will be optimal given the government’s uncertainty about the future.

In this framework, migrants have rights but the rights are endogenous: governments grant rights to migrants in pursuit of the national interest rather than being constrained by exogenous moral or constitutional obligations. Governments should grant rights to the extent that doing so is necessary to attract migrants and encourage them to make country-specific investments, but there is no reason to believe that the rights of migrants will be the same as the rights of American citizens. Instead, rights should increase as the migrants’ value for the country increases, especially where it is desirable to encourage country-specific investment—which is likely to be the case for skilled workers and not, or less so, for unskilled workers. It will also make sense to expand the rights of migrants as their residence in the host country lengthens. Due process rights should be adequate to minimize false positives (where migrants are mistakenly deported) and false negatives (where migrants are mistakenly permitted to stay) to the extent that resources are not better used for other purposes. If migrants are risk averse, as is likely, then due process rights should be substantial, so as to minimize the risk of false positives.

In recent year, controversies have erupted over the criminalization of immigration violations that earlier had been merely civil violations. For example, it is now a crime to reenter the United States after having been removed at an earlier time. Many commentators argue that this trend is unfair or self-defeating. The problem is that removing (or repeatedly removing)

immigration law violators may not create sufficient deterrence where the border remains relatively porous. Thus, harsher sanctions may be justified as a method of discouraging excessive levels of illegal migration. I will return to this topic in Part III.B.

#### D. Delegation

An important feature of U.S. immigration law is delegation of authority to private individuals or non-federal institutions. One could imagine, for example, a screening system that does not rely on delegation. Applicants for entry submit evidence of their qualifications to government officials, who evaluate it, and then grant or deny a visa. However, our system does not work that way.

In the case of employment-related migration, the government delegates in large part to employers. Employers must sponsor applicants for entry in most cases; in doing so, they signal their support for the applicant to the government, and provide evidence that the applicant meets the various criteria for admission. The logical explanation for this approach is that employers have both better information about the skills of potential migrants, and have better incentives to distinguish the good types and the bad types, because the good types will contribute more to their profits.

The problem with delegation is that the agent's interest will not be perfectly aligned with that of the principal. Employers want to make profits, not advance national welfare, and so they will, for example, invest inadequately in screening where they expect migrants to quit shortly after admission. The law partially addresses this problem by making the migrant's continued presence in the country (roughly) conditional on continued employment with the sponsoring employer. But the law does not address other problems; for example, employers may have little interest in ensuring that workers are likely to assimilate as long as they contribute to the bottom line. One can imagine rules that would improve employers' incentives, for example, by making them financial responsible when sponsored migrants commit crimes or stop work.

The other main area of immigration law is family reunification. One can again start by imagining a system that did not involve delegation. Any applicant for permission to migrate would submit to the immigration authorities a list of the names of relatives who live in the United States. If the relationships are close or numerous enough, the application would be improved. But that is not our system. The U.S. system requires that existing family members sponsor the migrant, which requires, among other things, that the family members promise to help the migrant adapt to her new surroundings.

A clear advantage of such a system is that U.S. residents will sponsor relatives only (or mainly) when they are confident that the relatives will succeed as immigrants. Sponsors will seek to import family members who are industrious and responsible rather than those with

propensities toward criminal behavior. In addition, out of bonds of family loyalty, sponsors are likely to provide assistance to the migrant, helping her to adjust to a new workplace and a new environment. The system helps ensure that migrants will be welcomed and assimilated into existing U.S. communities.

On the cost side, family reunification obviously limits migration to people who already have family members in the United States who are willing to sponsor them. Many qualified migrants are not so lucky. And sponsors will, as in the case of employers, follow their own interests rather than those of the country, sponsoring migrants in some cases who may have criminal proclivities or no desire to work for a living.

Another group of delegates in the U.S. system are the states. Congress has delegated a range of powers to state governments that are related to immigration. Unlike the case of employers and families, however, Congress has not given states the power to choose among potential migrants, at least not explicitly. But Congress has given states a great deal of enforcement power. Although the limits of these powers are subject to controversy and litigation, it is clear that states can, for example, report suspected criminals who offer no proof of U.S. citizenship to the immigration authorities, who can then take action against them. Many states (and municipalities) aggressively use these powers, while others do not, reflecting different public attitudes toward migration. In areas where migrants are welcomed, states and cities do not check for proof of U.S. citizenship even when offering privileges like drivers licenses.

In recent years, the federal government has attempted both to exploit and constrain the police powers of states in more creative ways. A number of programs require states to check suspects for immigration status by sending identification data to federal immigration authorities, and then to turn over the suspects to federal authorities if they are not legally present. In this way, the U.S. government attempts to take advantage of states' vast police powers while preventing states from adopting policies toward immigration contrary to federal law.

### III. Five Applications

#### A. The Points System

We can summarize some of the insights discussed so far by offering a brief set of criticism of points systems. Under a points system, the government awards points to an applicant based on the number and kind of desirable characteristics that she has. An applicant will receive points for, among other things, advanced degrees that show educational attainment; fluency in the national language; prior experience living in the host country; relationships with citizens; and related factors that show the applicant's suitability as a temporary worker or immigrant. Points systems exist in Canada and other countries. Many immigration reformers praise points

systems<sup>13</sup> because they seem like a logical way to ensure that immigration serves the national interest; these systems are contrasted to America's apparently chaotic approach that relies on the uncoordinated efforts of employers and family members.

Yet the points system is not as appealing as it first seems. First, the points system assumes away the problem of asymmetric information in the screening process. It is simply assumed that the government can reliably determine people's qualifications. But the government is not in a good position to determine whether, say, a degree in electrical engineering from university X in Cambodia is as good as a degree in electrical engineering from university Y in Peru. Only employers can reliably determine whether job applicants will serve their needs. And the points system overlooks the benefits from ex post evaluation—where people are admitted on the basis of very general criteria and then permitted to remain if they obtain jobs, avoid crime, and become assimilated. Recall also that labor market needs do not always track educational attainments; the economy may need, say, nurses rather than doctors. Indeed, in this respect the points system assumes that the government can determine which sectors of the labor market are in need of replenishment, when in fact employers are more likely to possess this information.

Second, and related, the points system is particularly inappropriate for a country like the United States, where there is significant demand for unskilled foreign labor. Points systems that value educational credentials undervalue unskilled labor; a points system could be adjusted so that educational attainments are not given points, but then there would be no way to give preference to highly educated people where their labor is demanded.

Third, the points system ignores the problem of controlling migrants once they are here. To be fair, proponents of points systems are not usually focused on this problem. But by the same token they ignore a vast area of immigration law. Even people who score well on the points system might decide, once they obtain admission, not to pursue productive activities and instead become a public charge or turn to a life of crime. To counter these incentives, the government must monitor and sanction migrants, even those who are admitted legally.

Finally, the points system ignores the advantages of delegation. As noted above, the government is not in a strong position to evaluate applicants for entry, and may even be at a disadvantage with respect to enforcement compared to states and municipalities. Delegation exploits the informational advantages of private individuals and other governmental entities. By contrast, the points system assumes a top-down approach administered by the national government, and thus contains all the disadvantages of that type of approach.

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<sup>13</sup> See, for example, Stephen Yale-Loehr and Christoph Hoashi-Erhardt, *A Comparative Look at Immigration and Human Capital Assessment*, 16 Geo Immigr L J 99 (2001) (comparing the U.S. immigration selection policy to point based systems and concluding the U.S. should adopt the latter).

## B. “Crimmigration”

It is common to think of illegal immigration as a public policy failure that results from the government’s reluctance to expend adequate resources to enforce the law. But this thinking is question-begging: why doesn’t the government expend greater resources to enforce the law. Cox and I argued that one can better conceive of an “illegal immigration system” in which the government consciously encourages or allows migrants to enter the country illegally while retaining the authority to remove them for any reason, with minimal due process.<sup>14</sup> Thus, while the lawful system is characterized by high ex ante barriers to entry, plus (relatively) strong protections from removal, the illegal system is characterized by (relatively) low ex ante barriers to entry (for example, overstaying a tourist visa) and weak protections from removal.<sup>15</sup>

The case for the illegal immigration system is that immigration policy seeks to meet a large demand for unskilled labor, but it is very difficult to screen people who lack credentials. For unskilled labor, the biggest concern is that the migrant will be unable to assimilate, but ability to assimilate is not something that can be observed at the border. Instead, the government allows entry, but retains the authority to remove the migrant for any reason—crime, joblessness, even economic downturn—while also periodically granting a path to citizens via amnesty bills to migrants who satisfy certain criteria—obtain employment, learn English, and so forth. The courts have implicitly endorsed this approach by refusing to grant robust due process protections to illegal migrants subject to removal procedures.

In recent years, immigration scholars have drawn attention to so-called crimmigration, which for present purposes I will define as the increasing use of criminal law and criminal law enforcement against illegal migrants.<sup>16</sup> Starting in the 1980s, Congress has criminalized a number of acts that traditionally were civil immigration violations and has enhanced penalties for criminal immigration violations; and the executive branch has significantly increased resources devoted to criminal immigration enforcement.<sup>17</sup> Immigration law scholars have deplored this trend on several grounds, namely, that in practice migrants are given summary procedures which inadequately protect their rights, and that their incentives to assimilate will be weakened if they are faced with arbitrary procedures or the criminalization of the very acts that lead to

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<sup>14</sup> Cox and Posner, *Second-Order Structure*, supra at 813–14 (2007).

<sup>15</sup> Both Bush and Obama have pursued a policy of cracking down on illegal immigrants who commit crimes, while generally leaving alone those who do not. See Julia Preston, *Immigration Officials Arrest More Than 3,100*, NY Times (NY Times Apr 2 2012), online at [http://www.nytimes.com/2012/04/03/us/immigration-officials-arrest-more-than-3100.html?\\_r=1&scp=1&sq=immigration%20sweep&st=cse](http://www.nytimes.com/2012/04/03/us/immigration-officials-arrest-more-than-3100.html?_r=1&scp=1&sq=immigration%20sweep&st=cse) (visited July 23 2012); Julia Preston and John H. Cushman, Jr., *Obama To Permit Young Migrants To Remain In U.S.*, New York Times, June 16, 2012, at A1.

<sup>16</sup> See Jennifer M. Chacón, *Managing Migration Through Crime*, 109 Colum L Rev Sidebar 135 (2009); David Alan Sklanksy, *Crime, Immigration, and Ad Hoc Instrumentalism*, 15 New Crim L Rev 157 (2012); Ingrid V. Eagly, *Prosecuting Immigration*, 104 Nw U L Rev 1281 (2010).

<sup>17</sup> Chacón, 109 Colum L Rev Sidebar at 137–38 (cited in note 10).

assimilation (including the criminalization of various forms of “harboring” where Americans lend aid to illegal migrants).<sup>18</sup>

However, there are several good reasons for this trend. First, as noted, prosecution for criminal violations may contribute to screening of low-skill migrants who otherwise do not possess visible differentiating characteristics that the state could use to distinguish the good migrants from the bad. Immigration policy seeks people who will assimilate; all things equal, participation in criminal activity signals a personality type that is unlikely to assimilate. To be sure, one might object that the current system is excessively crude.<sup>19</sup> It makes the judgment of a migrant’s potential for assimilation turn on a single criminal act rather than on consideration of all relevant factors, such as the length of time that migrant has resided in the country, whether he has learned the language, whether he is normally employed, and so forth. A more flexible system may be called for.

Second, criminalization of immigration violations will generally enhance deterrence by subjecting violators to more serious punishments. At the same time, the involvement of criminal process helps prevent wrongful conviction.

Third, deportation may be a cheap and effective way of deterring people from committing serious crimes that are not immigration-related. Deportation is cheaper than a long period of imprisonment; thus, holding constant the magnitude of the sanction, the government can reduce its costs by giving a convicted criminal a short prison term and then deporting him rather than by giving him a long prison term (assuming reentry can be prevented).

Some commentators object to deportation on the grounds that it is akin to “exile” of U.S. citizens, which is unconstitutional, at least when migrants have sufficient contact with the United States as to entitle them to “membership” in this country.<sup>20</sup> However, the constitutional prohibition on exile does not apply to non-citizens, and there is no particular reason to extend it to non-citizens. There may well be cases where deportation would impose an unacceptable hardship on the migrant—for example, where the migrant has resided in the United States since she was a child and does not speak the language or have any contacts with the country in which she was born. Thus, one might support limitations on deportation where deportation would be inhumane. But it would be wrong to conclude that deportation is inhumane in the more routine case where the migrant has substantial contacts with her home country.<sup>21</sup> By contrast, exile of a

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<sup>18</sup> See Eisha Jain, *Immigration Enforcement and Harboring Doctrine*, 24 *Geo Immigr L J* 146, 152–54 (2010).

<sup>19</sup> See generally, Juliet P. Stumpf, *Doing Time: Crimmigration Law and the Perils of Haste*, 58 *UCLA L Rev* 1705 (2011) (arguing that focusing on the single criminal moment is superficial because an individual is a collection of many moments and experiences).

<sup>20</sup> McLeod, at 22-34. []

<sup>21</sup> In one of the few proposals by an immigration scholar to use the threat of removal to address crime problems, Eleanor Brown creatively argues that people in a terrorist’s network who fail to inform on him would be deprived of

U.S. citizen will normally cause great hardship because (in the absence of special circumstances like dual citizenship) that person will have no right to citizenship in a foreign country, and so could end up stateless.

There are other problems with deportation as a criminal sanction. It will be ineffective if the violator can simply reenter the country. And it may result in the export of criminals to countries with weaker criminal justice systems where they may continue to wreak havoc. Thus, in certain conditions a country may properly refrain from deporting criminals as a form of international cooperation or development aid.

### C. Labor and Employment Law

As Keith Cunningham-Parmeter notes, it was traditionally assumed that illegal workers and lawful workers had the same rights in the workplace—including the rights to form unions and to be free of discrimination (except to the extent that employers may fire a worker or refuse to hire him on the basis of illegal status).<sup>22</sup> But in *Hoffman Plastic Compounds, Inc. v. NLRB*, the Supreme Court held that illegal workers could not recover damages for certain labor law violations that were available to lawful workers, and since then other cases have suggested ways in which the rights of illegal and lawful workers diverge under both labor law and employment law.<sup>23</sup>

Cunningham-Parmeter fears that this trend will isolate illegal workers, to the detriment of themselves and to the legal community. Yet there are strong reasons for denying rights to illegal migrants that are granted to citizens and lawful permanent residents. Some context is useful here. Illegal migrants have no right to work at all—just as many lawful foreign residents may enter the country on a visa but lack the right to work. Thus, it is not obvious that it is unfair that if they work illegally, they lack some of the rights that lawful workers possess.

Existing law reflects a judgment that rights can be used to lure desirable workers to this country, and to reward them in stages as they prove themselves fit subjects for citizenship. Thus, people who enter lawfully after proving their credentials receive more rights than people who enter illegally; and people who have obtained a green card receive more rights than people who merely have visas. If this scheme serves legitimate public policy objectives,<sup>24</sup> then Cunningham-

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their visas or access to visas. See Eleanor Brown, *A Visa to “Snitch”: An Addendum to Cox and Posner*, 87 Notre Dame L Rev 973, 1003 (2012) (“An Addendum”).

<sup>22</sup> Keith Cunningham-Parmeter, *Redefining the Rights of Undocumented Workers*, 58 Am U L Rev 1361, 1367–68 (2009).

<sup>23</sup> Id at 1366–71. *Hoffman Plastic Compounds, Inc. v National Labor Relations Board*, 535 US 137, 149–152 (2002) (holding that undocumented alien who was fired in violation of the National Labor Relations Act was not eligible for back pay.).

<sup>24</sup> As argued in Cox and Posner, *The Rights of Migrants: An Optimal Contract Framework*, 84 NYU L Rev 1403 (2009).



Parmeter's proposal that illegal workers be given the same rights as legal workers would undermine those objectives.

In a related article, Stephen Lee argues that employers may use immigration laws to ensure the removal of workers who draw attention to workplace violations.<sup>25</sup> Under the law, employers are not supposed to hire illegal migrants; if they do so anyway, they may be subject to sanctions. But in practice, the government relies on employers to screen out illegal workers, and so when employers report illegal workers to the government, the government gratefully detains them rather than questioning the employer's motives.

Lee, like Cunningham-Parmeter, emphasizes ugly aspects of a system that limits the rights of migrants for policy reasons. He further emphasizes that delegation of screening power to employers allows them to subject foreign workers to harsh working conditions, which may also deprive U.S. workers of employment because employers must give U.S. workers better working conditions. The problem is the result of agency costs: employers do not share the government's interests in excluding foreign workers, and still less the government's interest in workplace safety. Delegation to employers thus inevitably leads to perverse outcomes unless the government modifies employers' incentives.

But it is not clear that the solution is to give illegally present foreign workers the same rights as U.S. workers. Conferring employment and labor rights on illegal workers would have the following effects, some of them offsetting. First, the U.S. labor market would become more attractive to foreign workers to the extent that they value these rights, and thus their incentive to migrate illegally would increase, exacerbating the problem of illegal immigration. Second, however, employers would find foreign workers less attractive because the cost of employing them would rise. The second effect would probably predominate over the first, because if foreign workers valued the rights more than the wage offset, then employers would probably give those rights to them voluntarily. Third, conferring those rights on foreign workers may benefit U.S. workers—for example, by encouraging whistleblowing or facilitating unionization—but this would be another reason why employers would more reluctant to hire foreign workers if required to give them U.S. rights. Thus, the overall effect of granting labor and employment rights to foreign illegal workers would likely be to reduce the demand for their labor, which would harm them as well as U.S. consumers who benefit from their work. Such an approach would be in tension with the traditional illegal immigration system, which provides work and potentially a path to citizenship to unskilled foreign workers with no attachment to this country.

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<sup>25</sup> Stephen Lee, *Private Immigration Screening in the Workplace*, 61 *Stan L Rev* 1103, 1103 (2009).

#### D. Screening of Low-Skilled Workers

Cox and I argued that what we call the “illegal immigration system” in the United States may be due in part to the difficulty of screening low-skilled workers plus constitutional constraints on removal of legal immigrants.<sup>26</sup> Suppose that a country demands low-skilled labor. The world presents an ample supply of such workers, but they will look largely identical to the country’s government. Selection cannot be based on educational credentials because most low-skilled workers have none beyond perhaps primary education; in addition, educational credentials may have little relevance to the work. What the government seeks are people who work hard, who obey the law, and—where the demand is for temporary workers rather than permanent migrants—who will return to their country when their labor is no longer needed. All of these characteristics are unobservable, and formal proxies—for example, the absence of a criminal record, an employment history, and so forth—may be unreliable.

We argue that to address this problem U.S. policy has been to look the other way and permit workers to enter the country illegally, while retaining the authority to remove them if they are caught committing crimes or seeking public welfare, or even if the demand for labor declines. Because the workers are present in the country illegally rather than on visas, constitutional protections are minimal, and so deportation can be accomplished cheaply, using summary procedures. Meanwhile, workers who stay in the country for a long time, prosper, assimilate, and avoid criminal activity may eventually be given a path to citizenship through discretionary legislation.

In an interesting paper, Eleanor Brown describes a program in Canada which overcomes the problems with ex ante screening of unskilled or low-skill agricultural workers.<sup>27</sup> Canada and Jamaica have entered an arrangement under which Canada “outsources” to Jamaica the task of screening Jamaicans who apply for visas to work temporarily in Canada. Canada provides Jamaica with some minimal criteria for entry—emphasizing health, strength, farming experience, and lack of criminal record. Crucially, because Jamaica benefits from permitting its citizens to work in Canada (in part through remittances), the Jamaican government has strong incentives to screen out people who do not meet Canada’s criteria and who plan to overstay the visa and work illegally. Jamaica, in turn, has selected people on the basis of (1) strong ties to the country (such as participation in a family farm); (2) reports from informal community records that indicate that the applicant has avoided criminal activity (formal police reports are unreliable); and (3) residence in rural communities, which tend to be more tight-knit than urban communities.<sup>28</sup> Jamaica also educates workers accepted into the program about the penalties for violating the

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<sup>26</sup> Cox and Posner, *The Second-Order Structure of Immigration Law*, 59 *Stan L Rev* at 843–47, 851–52 (cited in note 14).

<sup>27</sup> Eleanor Marie Lawrence Brown, *Outsourcing Immigration Compliance*, 77 *Fordham L Rev* 2475 (2009).

<sup>28</sup> *Id.* at 2499–2500.

rules and the consequences for communities that rely on it.<sup>29</sup> Jamaican officials are even permitted to enter Canadian territory to monitor and provide aid to workers.

As Brown explains, in this system Canada overcomes both screening and control problems by delegating some of the administration of the program to Jamaica. Jamaica has better information about the “types” of applicants than Canada does, and Jamaica has means of disciplining violators that Canada lacks—which includes appealing to their sense of honor and patriotism, and their concerns for the well-being of compatriots who would be harmed if the program were shut down.<sup>30</sup> The delegation of authority to an agent always raises concerns about the incentives of the agent, but here Canada is in a good position to evaluate Jamaica’s efforts—simply by counting up the number of workers who go AWOL from the program and receiving reports from employers about the quality of work. Canada can credibly threaten to shut down the program if Jamaica fails to screen properly, and in turn Jamaica has apparently put a great deal of creativity into developing effective screening procedures.

#### E. Bonding

Another issue Cox and I addressed was the problem of ensuring that migrants or foreign workers comply with the conditions of entry. Temporary foreign workers, for example, must promise that they will work, comply with the law, and exit the country when their visas expire. A major problem with low-skilled workers is that they may enter the country lawfully but then overstay their visa and then remain in the country and work illegally. Some countries require foreign workers to post a bond when they enter the country; they forfeit this bond if they violate the terms of entry. Eleanor Brown has advocated a similar system for the United States.<sup>31</sup>

The approach has some obvious merits. Under current law, workers have little to lose by overstaying their visa. They are unlikely to be caught and deported; even if they are, the penalties are usually light. Part of the problem is the cost of tracking down illegal workers and then processing them through the immigration system. By contrast, a bonding mechanism works virtually automatically. For example, the mechanism could be set up so that the worker recovers the bond when she returns to her home country and provides proof to the American embassy that she no longer resides in the United States. The embassy could check to see if the migrant has a U.S. criminal record; if not, it will return the bond to her.

The major problem with this approach is that most unskilled workers will not have enough money to post a bond. Thus a bond requirement could significantly reduce the supply of

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<sup>29</sup> Id at 2501.

<sup>30</sup> In this paper and another paper, Brown creatively explores the way that the sending country can exploit local social networks, which gives them advantages in obtaining information about and controlling the behavior of migrants. See id; Brown, *An Addendum*, cited in note 21.

<sup>31</sup> Eleanor Marie Lawrence Brown, *Visa as Property, Visa as Collateral*, 64 Vand L Rev 1047 (2011).

unskilled labor to the United States, and also do little to relieve the pressure of illegal immigration. Brown suggests that workers may be able to borrow money for the bond from local banks. The bond would be returned from the U.S. government to the bank when the migrant's visa expires and the migrant has returned to her home country.<sup>32</sup> The problem with this proposal is that banks will not usually lend money to poor people, especially in countries where it is difficult to bring lawsuits to enforce debts. Banks would demand collateral and in most cases the worker will not be able to supply it. Maybe in some cases, workers will be able to use the family farm or other property of family members or relatives as collateral, but again only a limited group of people would have this capacity. Thus, while the bonding proposal makes sense from a theoretical perspective, its practical value is probably limited.

Readers with comments should address them to:

Professor Eric A. Posner  
University of Chicago Law School  
1111 East 60th Street  
Chicago, IL 60637  
eric\_posner@law.uchicago.edu

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<sup>32</sup> Id at 1052, 1072.

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