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Outsourcing Immigration Compliance

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¹ Reginald F. Lewis Fellow, Harvard Law School, Former Chairman of the Jamaica Trade Board, Former Law Clerk to the Honorable Patricia Wald (ret.), U.S. Court of Appeals for the District of Columbia, Former Law Clerk to the Honorable Keith Ellison, U.S. District Court for the Southern District of Texas, J.D., Yale (1999), M.Phil. Politics, Oxford (1997) (Rhodes Scholar). The genesis of this article was a conversation with a guest worker who drew an analogy between group accountability in the guest worker program that is the subject of this study and micro-lending in programs modeled on the Nobel prize-winning Grameen bank. This work was supported by a grant from the Reginald Lewis Foundation at Harvard Law School. I am grateful to Bruce Ackerman, Randall Kennedy, Reva Siegel and Martha Minow for their ongoing support of my work in this area. Orlando Patterson, David Wilkins, Duncan Kennedy, Lani Guinier, Cristina Rodriguez, Kevin Davis, Kevin Johnson, Steve Legomsky, David Abraham, Martha Mahoney, Kimani Paul-Emile, Ian Ayres, Brad Snyder, Lior Strahilevitz, Devon Carbado, Jim Greiner, Michael Froomkin, Adam Cox, Anne Alstott, Jennifer Gordon, Peter Schuck, Richard Brooks, Ryan Goodman, Gerald Neuman, Peter Henry, Lant Pritchett, Dillon Alleyne, Neville Lewis, Tony Harriott and Nealia Khan of the Harvard Statistical Consulting Service provided helpful comments. I am indebted to the CARICOM Ministries of Labor and faculty at the University of the West Indies for making themselves available for interviews on ongoing research. I am similarly grateful to David Griffith, Heather Gibbs, and the North South Institute (Ottawa, Canada) and the Canadian High Commission. Nicardo Neil, Anneke Hamilton and Densil Reid offered excellent research assistance. The views expressed herein are solely those of the author.

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Abstract

Immigration is a hot button issue about which Americans have sent a clear message. They prefer not to admit more aliens until the government is able to credibly screen for entrants who will abide by the terms of admission and sanction those who do not. While immigration debates now focus almost entirely on undocumented workers, they have overshadowed another critical, yet poorly understood challenge: designing institutions to properly screen for aliens who are visa-compliant and sanction non-compliant aliens. Because failed guest worker programs unquestionably increase the size of the undocumented population, this article addresses the difficulty of institutional design by analyzing the highly controversial guest worker provisions of the Immigration and Nationality Act. This article presents original data from a study of visa-compliance decisions of Jamaicans who work in Canada under a program in which screening is precise, sanctioning is effective and compliance is high. On the basis of this study, this comparative immigration law project contends that the United States should partially outsource screening and sanctioning to source-labor countries.

This article critiques the historical uni-national approach to immigration law. This approach fails to recognize that there are critical asymmetries between the United States and the countries from which aliens originate in their capacity to gather information about potential entrants and to sanction visa-violators. This recognition leads to the following insight: source-labor countries are often better placed to screen because can access accurate information about potential entrants from their communities. Source-labor countries are also often well-placed to deter non-compliance because through collective sanctioning, they can influence communities of origin to persuade their members to abide by visa terms. The criminal law scholarship regularly recognizes the impact of norms on deterring crimes; this ethnographic study suggests that the same may be true with respect to immigration violations. This article contends that aliens are more likely to be compliant so long as the authorities design legal rules that augment compliance norms already present in source-labor communities and incentivize community members to reinforce them.

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INTRODUCTION

*Anywhere you turn, macca jook yu*²

A majority of Americans cite immigration as a leading issue, just behind the economy, national security and health care, with many Americans citing disrespect for the law by undocumented aliens as their primary concern.³ Yet this urgency is not reflected in the law review literature, which has largely failed to address the “disconnect” between goals and outcomes in immigration law.⁴ The goal of immigration law is that aliens should receive pre-entry screening, and be sanctioned if they side-step screening.⁵ The outcome, in sharp contrast, involves the de facto permanent residence of twelve million undocumented persons, the overwhelming majority of whom have never been screened or sanctioned.⁶ Immigration debates now focus almost entirely on undocumented workers obscuring another crucial but under-examined immigration difficulty: questions of institutional design. Given that failures in the design and conduct of guest worker programs clearly increase the size of the undocumented

² Any where you turn you will be stuck by thorns. A Jamaican proverb which is sometimes utilized to capture the sentiment that it is often an exercise in futility to create incentives for persons to play by the rules. F. G. CASSIDY AND R.B. LE PAGE, *DICTIONARY OF JAMAICAN ENGLISH* 253, 284 (2002) (for definitions of the words).

³ Joseph Carroll, *Iraq, Economy, Healthcare, Immigration Top Vote Issues*, GALLUP (2007), <http://www.gallup.com/poll/103132/Iraq-Economy-Healthcare-Immigration-Top-Vote-Issues.aspx>.

⁴ The point has been made by Peter Schuck. See Peter Schuck, *The Disconnect Between Public Attitudes and Policy Outcomes in Immigration* in *DEBATING IMMIGRATION* at 17 (2007) (Carol Swain, ed.). Motomura has argued that this disconnect has received little attention in the law review literature because of the conventional emphasis on the post-entry treatment of aliens. Hiroshi Motomura, *Choosing Immigrants, Making Citizens*, 59 *STAN. L. REV.* 758 (2007) This arises at least partially from the fact that aliens have virtually no legal personhood outside the United States, with limited access to constitutional protections. See, e.g., *Galvan v. Press*, 347 U.S. 522, 530-532 (1954); *Harisiades v. Shaughnessy*, 342 U.S. 580, 592, (1952); *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 542 (1950); *United States ex rel. Turner v. Williams*, 194 U.S. 279, 292 (1904). As such, the law review literature has been disproportionately focused on the treatment of aliens once they arrive in the United States. The primary exception to this scholarly silence on the pre-entry screening is Adam Cox and Eric Posner, *The Second Order Structure of Immigration Law*, 59 *STAN. L. REV.* 809 (2007).

⁵ See Executive Summary, U.S. Commission on Immigration Reform, U.S. Policy: Restoring Credibility, 1994 Report to Congress, available at <http://www.utexas.edu/lbj/uscir/exesum94.html>.

⁶ This figure is taken from the work of Douglas Massey, a leading authority on the size of the undocumented population. See Douglas Massey, *Borderline Madness* in Carol Swain, *supra* note 4, at 119. Estimates generally indicate that there are between ten and fourteen undocumented persons in the United States. See also Jeffrey S. Passel, *Unauthorized Migrants: Numbers and Characteristics 3*, Pew Hispanic Center (2005), available at <http://pewhispanic.org/files/reports/46.pdf>; David Martin, *Twilight Statuses: A Closer Examination of the Unauthorized Population*, Migration Policy Institute, June 2005; Background Briefing Prepared for Task Force on Immigration and America’s Future, Pew Hispanic Center, <http://pewhispanic.org/reports/report.php?ReportID=46> (last visited February 5, 2008).

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population, this article addresses the challenges of designing effective institutions through the guest worker provisions of the Immigration and Nationality Act (INA).⁷

The widely publicized political backlash that accompanied President Bush's recent proposal⁸ to expand the guest worker program sent a clear message.⁹ There will be no program expansion until the government is able to credibly screen for temporary workers and sanction those who do not comply with the terms of admission. If the criminal law is any guide for immigration law, the public demand for a tough approach to screening and sanctioning may stem from entrenched psychological, political and psychological factors and is not likely to abate any time soon.¹⁰ While there has been much hand-wringing in the law review literature about the increasingly blunt policies that have resulted from hardening attitudes,¹¹ there has been little discussion about the underlying problem that appears to be fueling the public backlash - what

⁷ 8 U.S.C. § 1101(a) (15) (H) (guest worker provisions). Failed guest worker programs are a primary contributor to the size of the undocumented population in several developed countries. The World Bank has argued in a recent annual report devoted to migration that worldwide labor mobility trends will lead guest worker programs to remain at the center of contentious political debates worldwide. See GLOBAL ECONOMIC PROSPECTS 2006: ECONOMIC IMPLICATIONS OF REMITTANCES AND MIGRATION, available at <http://econ.worldbank.org>; Nowhere is this observation truer than in the United States, the world's largest importer of unskilled persons. See Philip L. Martin, *Economic Integration and Migration: The Case of NAFTA*, [hereinafter Martin: *Economic Integration*], 3 UCLA J. INT'L L. & FOREIGN AFF. 419, 437 (Fall/Winter 1998-99). See also, generally, LANT PRITCHETT, LET THEIR PEOPLE COME: BREAKING THE GRIDLOCK ON INTERNATIONAL LABOR MOBILITY (2006). In the last three decades, the population of migrants in high income countries has doubled, registering an annual growth rate of 3 percent, GLOBAL ECONOMIC PROSPECTS at 6. Migrants now constitute nearly 2.9% of the population worldwide, and 8.3 percent of the population of industrialized countries. *Id.* Over 90% of these migrants are low-skilled persons who would only typically qualify for legal entry into developed countries as guest workers. *Id.*

⁸ For a summary of the reform proposal see Press Release, The White House, Fact Sheet: Fair and Secure Immigration Reform Act (Jan. 7, 2004), available at <http://www.whitehouse.gov/news/releases/2004/01/20040107-1.html>.

⁹ For a summary of the stakes involved for both Democrats and Republicans in the highly contentious debate, see David Nitkin and Matthew Hay Brown, *Bush's Push for Compromise is Greeted with Skepticism, President Encounters Wary Democrats and Some Republican Opposition*, BALT. SUN, February 2, 2007, at 2A; see also Kerry Howley, *Guests in the Machine* (2006), <http://www.reason.com/news/show/123474.html>, describing the controversy engulfing the guest worker program, not only among legislators but also more broadly. ("Give the Senate some credit," James Surowiecki wrote in the June 11 *New Yorker*: "In shaping the current immigration-reform bill, it has come up with one idea that almost everybody hates." *Hates* was an understatement. President George W. Bush had been pushing for some sort of guest worker program since before the 9/11 attacks, and as that idea inched closer to realization in 2007, his critics grew more vitriolic. Right-wingers . . . excoriated Bush for his starry-eyed idealism, and left-wingers . . . came out against the entrance of hundreds of thousands of new immigrants. *The New York Times* complained that no worker should be sent home; *National Review* complained that no worker would go home. *The New Republic* said the plan fell within "the tradition of the African slave ship . . .").

¹⁰ Sara Sun Beale, *What's Law Got to Do with It? The Political, Social, Psychological and Other Non-Legal Factors Influencing the Development of (Federal) Criminal Law*, 1 BUFFALO CRIM. L. REV. 23-66 (1997).

¹¹ Stephen Legomsky's work typifies this approach and provides a helpful summary of other sympathetic views. See Stephen Legomsky, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 WASHINGTON & LEE L. REV. 469 (2007).

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can actually be done to screen for aliens who will abide by the terms of their visas and to sanction those who do not.

Traditionally, institutional design scholarship has faced a major constraint -- the influence of the dominant uni-national conceptualization of immigration law. This persists even in the face of a growing recognition that aliens increasingly live transnational lives.¹² The uni-national approach to immigration law reform focuses almost entirely on new federal immigration law in the United States. Little energy is expended thinking about bi-national intervention. This article seeks to change that.

Although a primary goal of immigration law is to collect predictive information about which aliens are likely to be desirable entrants, the United States currently finds itself in the absurd position of screening aliens utilizing poor information with little reference to the countries from which aliens originate, even as these countries often have better information about their nationals. In an effort to mitigate this clear informational disadvantage, this article contends that the United States should execute bilateral arrangements with source labor countries to partially outsource the screening function. This article also recognizes that source-labor countries are also well placed to aid in sanctioning non-compliant aliens, even when they are already on American soil, through their influence on communities from which aliens originate. Thus, the United States also stands to benefit from partially outsourcing the sanctioning function. Can the United States expect other countries to reliably meet their screening and sanctioning commitments? This article says that the answer is yes. In a competitive globalized context in which developing countries prize the access that their nationals have to the American labor market, the repeated game nature of their interactions with the United States increases the likelihood that source-labor countries will actually meet their commitments and will incentivize their nationals to do the same.

This article includes a comparative immigration law study of a Canadian program for guest workers from Jamaica. In contrast to most guest worker programs, in this particular program, screening appears to be precise, sanctioning is effective and compliance is high. In other areas of legal scholarship, ethnographic research has been effectively used to aid interdisciplinary analyses of compliance and deterrence.¹³ The aim of this article is to use “on the

¹² The transnational nature of the alien population is a major theme in the sociological literature, but the law review generally appears not to have incorporated this insight. For a summary of the transnationalism research, see Peggy Levitt, *Salsa and Ketchup, Transnational Migrants Straddle Two Worlds* in THE CONTEXTS READER, AMERICAN SOCIOLOGICAL ASSOCIATION (2007) (Jeff Goodwin and James Jasper eds.). I acknowledge that my utilization of the trans-nationalism concept is unconventional. The sociology literature generally refers to transnational migrants as either citizens and/or permanent residents of two societies. However, the transnational lives of guest workers clearly raise similar issues. Kim Barry has made a similar point in the context of citizenship theory. See also Kim Barry, *A Tribute to the Work of Kim Barry: Home and Away: The Construction of Citizenship in an Emigration Context*, 81 N.Y.U.L. REV. 11 (2006).

¹³ An article which summarizes a broad range of interdisciplinary writing on compliance and deterrence issues is Dan Kahan, *Between Economics and Sociology: The New Path of Deterrence*, 95 MICH. L. REV. 2477 (1997). One such classic ethnographic study, which has been highly influential in criminal law scholarship, is CLIFFORD R. SHAW & HENRY D. MCKAY, *JUVENILE DELINQUENCY AND URBAN AREAS* (1969). For an example of the influence

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ground” research – with a focus on the reasons for visa compliance as told by the guest workers themselves -- to shed light on similar questions of institutional design in the context of immigration law. Through the lens of this research, this article will demonstrate why a continued uni-national approach to immigration law makes little sense.

The article relies on three essential moves, which will be succinctly referred to as the information screening component, the legal compliance component and the collective sanctions component. The information screening component argues that persons who are proximate to visa applicants may be incentivized to share with officials inside information as to which persons are likely to be law-abiding short term guests. The legal compliance component contends that among the subjects of this study, visa compliance is dominant, even when they leave their home countries because their communal norms prioritize visa compliance, and they lose status in their communities if they deviate from these norms. The collective sanctions component contends that astute officials utilized group accountability rules to send signals to community members about the costs associated with breaking immigration laws, which incentivized them to enforce these norms.

Part I sets up the problem by providing a fuller discussion of the difficulties associated with screening and sanctioning and a demonstration of why current academic responses to these challenges are insufficient. Part II offers a new approach that emphasizes outsourced pre-screening and outsourced norms-based sanctioning and then provides the empirical and ethnographic evidence support for such an approach. Part III explains why this proposal works. More specifically, Part III focuses on the central role played by the community screener. She functions as an “intermediary in trust” who stands to lose her primary currency, namely the credibility of her advice, if those who she recommends abscond. Building on McAdams’ esteem-based model and Posner’s signaling model of norms promulgation, Part III also argues that through the stigmatization of visa-violators, there is a persuasive case that governmental policy can amplify visa-compliance norms in the communities from which guest workers originate. Part IV addresses the elephant in the room. Under this proposal, the United States would essentially be retaining a foreign government to act as its agent -- a highly controversial policy in the current political context. Part IV utilizes game theoretic analogies to make the case that governments with high degrees of dependence on the United States will have minimal incentives to breach since the costs of defection are high.

of this work, see Tracey Meares, *Social Organization and Drug Law Enforcement*, 35 AM. CRIM. L. REV. 191 (1998). Another such influential study is ELIJAH ANDERSON, *STREETWISE: RACE, CLASS, AND CHANGE IN AN URBAN COMMUNITY* (1990). For an example of the utilization of this work, see, e.g., Tracey L. Meares & Dan M. Kahan, *Law and (Norms of) Order in the Inner City*, 32 LAW & SOC'Y REV. 805, 809-13 (1998).

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I. THE CENTRAL PROBLEM OF IMMIGRATION LAW REFORM: SCREENING FOR SHORT TERM TYPE AND SANCTIONING DEFECTORS

A. A tale of impossibility:

*"There is nothing more permanent than temporary workers."*¹⁴

At the center of the recent highly divisive deliberations over comprehensive immigration reform was a program to reform the guest worker provisions of the INA,¹⁵ by significantly increasing the number of guest workers and allowing them to work in a wide range of sectors.¹⁶ President Bush was the primary advocate of the reform proposal, emphasizing that his support was contingent on the *temporary* tenure of guests.¹⁷ The proposal did not receive broad Congressional support where it spawned a plethora of counter-proposals.¹⁸ Indeed, given the controversy surrounding the immigration issue, the critique of the guest worker proposal represented a rare instance of convergence among both Democrats and Republicans.¹⁹ Critics seemed unconvinced that "guests" would actually remain "guests." A vocal population of constituents jammed Congressional phone lines to express their opposition to the program

¹⁴ For a widely cited quasi-academic discussion of the challenges of sanctioning, see Phillip Martin and Michael Teitelbaum, *The Mirage of Mexican Guest Workers*, 80 FOREIGN AFFAIRS, 117, 131, November/December 2000; see also Martin, *Economic Integration*, *supra* note 6.

¹⁵ 8 U.S.C. § 1101(a) (15) (H).

¹⁶ For the key provisions of the guest worker reform proposal, see Press Release, The White House, *supra* note 8.

¹⁷ *Id.*; see also Press Release, The White House, President Signs Homeland Security Appropriation Act for 2006, (October 18, 2005), available at <http://www.whitehouse.gov/news/releases/2005/10/20051018-2.html> (Statement of President Bush: "You see, we got people sneaking into our country to work. They want to provide for their families. Family values do not stop at the Rio Grande River. People are coming to put food on the table. But because there is no legal way for them to do so, through a temporary worker program, they're putting pressure on our border. It makes sense to have a rational plan that says, you can come and work on a temporary basis if an employer can't find an American to do the job. It makes sense for the employer, it makes sense for the worker, and it makes sense for those good people trying to enforce our border.").

¹⁸ Consider the several manifestations of McCain/Kennedy comprehensive immigration reform bills of which this article only mentions a few including, e.g., The Comprehensive Immigration Reform Act of 2007, S. 1348 110th Cong. (2007) (known as the "Kennedy/McCain 2007 bill"); The Comprehensive Immigration Reform Act of 2006, S. 2611, 109th Cong. (2006) (known as the "Kennedy/McCain 2006 Bill"); The Secure America and Orderly Immigration Act, S. 1033, 109th Cong., (2005), LEXSEE 109 S. 1033 (another manifestation of "Kennedy/McCain"); see also The Comprehensive Enforcement and Immigration Reform Act of 2005, S. 1438, 109th Cong., LEXSEE 109 S. 1438 (commonly known as Cornyn-Kyl); The Save America Comprehensive Immigration Act of 2005, H.R. 2092, 109th Cong., LEXSEE 109 H.R. 2092 [hereinafter Jackson-Lee] (Sponsored by Sen. Jackson-Lee).

¹⁹ For both Republican and Democratic critiques of President Bush's guest worker proposal, see Jackson-Lee, *supra* note 18; Press Release, Governor Mitt Romney on Immigration Reform, (2007), available at http://www.mittromney.com/News/Press-Releases/Immigration_Reform_Statement.

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expansion.²⁰ The issue featured prominently in the Presidential campaign with one candidate, Mitt Romney, ominously warning that a new guest worker program threatened to simply replicate the “impossible” situation that the United States had faced before, namely creating a population of “permanent” temporary workers.²¹

The evidence is on the side of the critics. One such “impossible” situation was America’s primary historical experience with guest workers programs, a bilateral labor treaty known as the Mexican *Bracero* program.²² In this program, screening was poor, visa overstay rates were high and sanctioning was minimal.²³ During the program’s two decade tenure, there was a significant spike in the apprehension of undocumented persons who had been admitted as guest workers and had not complied with their visa terms.²⁴ More than four decades since the demise of the *Bracero* program, immigration reform debates demonstrate that concerns surrounding screening and sanctioning still persist.

Why is screening guest workers so difficult? The government is generally better at screening than popular discourse would suggest. After all, over one million aliens enter the United States daily, the overwhelming majority of who are temporary visitors who have been successfully screened.²⁵ However, in the guest worker context, screening poses peculiar challenges. Applicants are generally the poorest citizens of poor countries.²⁶ They generally lack the traditional documentary mechanisms of credibly establishing that they are likely to be short-

²⁰ Numbers USA was a powerful opposition group which organized the Congressional phone calling program. See 10 Principles for Immigration Reform, <http://www.numbersusa.com/interests/principlesforimmigrationreform.html>. (last visited November 6, 2007).

²¹ Michelle Oddis, *Immigration Reform: Makes Romney, Breaks McCain*, (2007), <http://www.humanevents.com/article.php?id=20872>.

²² The now infamous *Bracero* (“farmhand”) program was inaugurated under a bilateral agreement with Mexico during the World War II to meet critical agricultural labor shortages, and ultimately involved widespread visa overstays and deportations. See KITTY CALAVITA, *INSIDE THE STATE: THE BRACERO PROGRAM, IMMIGRATION AND THE I.N.S.* (1992); BARBARA A. DRISCOLL, *THE TRACKS NORTH: THE RAILROAD BRACERO PROGRAM OF WORLD WAR II* 53 (1999); ERNESTO GALARZA, *MERCHANTS OF LABOR* (1964); There are a few discussions of the *Bracero* program in the law review literature, which include Maria Elena Bickerton, *Prospects of a Bilateral Immigration Agreement with Mexico: Lessons from the Bracero Program*, 79 TEX. L. REV. 895, 909 (2001); Camille J. Bosworth, *Guest Worker Policy: A Critical Analysis of President Bush’s Proposed Reform*, 56 HASTINGS L.J. 1095, 1100 (2005); Merav Lichtenstein, Note: *An Examination of Guest Worker Immigration Reform Policies in The United States*, 5 CARDOZO PUB. L. POL’Y & ETHICS J. 689 (2007).

²³ For a general discussion of the program’s failings, see Douglas S. Massey and Zai Liang, *The Long-Term Consequences of a Temporary Worker Program - The US Bracero Experience*, 8 POP. RSCH. & POL. REV. 199, 199 (1989).

²⁴ *Id.* See also Martin and Teitelbaum, *supra* note 14.

²⁵ Most of these persons are non-immigrants, the overwhelming majority of whom enter under the B1-B2 category, which is referred to in shorthand as the “visitor visa for business or pleasure.” IRA KURZBAN, *IMMIGRATION LAW SOURCEBOOK* at 390 (2002).

²⁶ The World Bank annual report details the relevant characteristics of this population that pose difficulties in screening. See *GLOBAL ECONOMIC PROSPECTS*, *supra* note 6.

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term guests.²⁷ For example, they are less likely than high-skilled or high-income applicants, to be able to provide tangible evidence of traits that are predictive of short-term tenure including source-country ties (such as assets or professional ties in their home country). Moreover, these individual-level constraints are augmented by nationwide resource and governance constraints in poor countries, which undermine their efforts to provide credible evidence of their inclination to play by the rules (such as police reports).²⁸

Why is sanctioning such a challenge? Again in the guest worker context, sanctioning raises peculiar challenges.²⁹ This difficulty arises from the tenuous nature of their ties to the state, and the broader society, which in turn arises from the parallel universe that they inhabit at the margins of society.³⁰ Moreover, even if aliens arrived legally in the first place, as temporary visa recipients, their formal legal tenure in the United States is necessarily brief. This reality only augments the tenuous nature of their ties.³¹ Guest workers rarely interact formally with state institutions, even when they enter legally and formal interaction with state institutions is even less likely if they later overstay their visas and become undocumented.³² The fragility of these ongoing ties complicates the deterrence issue because it is arguably more difficult to deploy formal sanctions against such persons.

B. Heading in the Wrong Direction: Current Academic Approaches to the Problem

(1) Screening

²⁷ *Id.*

²⁸ *Id.*

²⁹ There are differing views about the difficulty of deploying sanctions against undocumented workers. For a summary of the differing views; see Tamar Jacoby, *Immigrant Nation*, FOREIGN AFFAIRS, Nov. - Dec. 2006; see also Massey and Liang, *supra* note 23.

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

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Although there has been renewed academic interest in guest worker programs,³³ the scholarship displays a disproportionate focus on “first order issues,”³⁴ that is, on what the ultimate goals of guest worker programs should be in light of the underlying moral commitments of a liberal constitutional democracy.³⁵ The scholarship has an expansionist flavor with a focus on the admission of more aliens, for longer periods and with a broader cadre of rights, and thus displays a clear detachment from restrictionist political realities. This is not atypical. The underlying current of most immigration law scholarship is expansionist.³⁶ Like the broader immigration law review literature, scholarship on guest workers leaves crucial questions of institutional design unexamined.

A prominent exception to this scholarly trend is Cox and Posner who emphasize second order institutional design questions, namely, how to best screen for those aliens who satisfy

³³ For broader skeptical discussions in the law review literature of guest worker programs, as they are currently constituted with brief references to the difficulties surrounding compliance, see Jennifer Gordon, *Transnational Labor Citizenship*, 80 S. CAL. L. REV. 503 (2007); Cristina M. Rodriguez, *Guest Workers and Integration: Toward a Theory of What Immigrants and Americans Owe One Another*, 2007 U. CHI. LEGAL F. 219. Michael Walzer offers a broader philosophical discussion of how guest worker programs fail to conform to the liberal egalitarian principles that govern full membership in a just state and simultaneously undermine the fabric of political community, see MICHAEL WALZER, *SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY*, 56-61(1983); see also JOSEPH CARENS, *CULTURE, CITIZENSHIP AND COMMUNITY: A CONTEXTUAL EXPLORATION OF JUSTICE AS EVENHANDEDNESS* (2000); CANADIAN POLITICAL PHILOSOPHY AT THE TURN OF THE CENTURY: EXEMPLARY ESSAYS (R. Beiner and W. Norman eds. 2000); JUSTICE IN IMMIGRATION, 136, 140 (Warren F. Schwartz ed., 1995); REINVENTING CITIZENSHIP: DUAL CITIZENSHIP, SOCIAL RIGHTS AND FEDERAL CITIZENSHIP IN EUROPE AND THE US (R. Hanson and P. Weil eds. 2000); James Woodward, *Liberalism and Migration, in Free Movement: Ethical Issues in THE TRANSNATIONAL MIGRATION OF PEOPLE AND OF MONEY*, 59, 82 (Brian Barry & Robert E. Goodin eds. 1992). Guest worker programs have also been criticized on the grounds that they depress wages with a disproportionate impact on the most disadvantaged, including urban residents and particularly African-Americans. See GEORGE BORJAS, *THE IMPACT OF IMMIGRANTS ON THE U.S. ECONOMY* (1990) (noting the influence of low-skilled aliens on wages in U.S. urban centers).

³⁴ See Motomura, *supra* note 4. The term “first order” is Cox and Posner’s, *supra* note 4.

³⁵ These articles include Linda Bosniak, *Exclusion and Membership: The Dual Identity of the Undocumented Worker Under United States Law*, WIS. L. REV. 955 (1988); Karla Campbell, *Guest Worker Programs and the Convergence of US Immigration and Development Policies: A Two-Factor Economic Model*, 21 GEO. IMMIGR. L.J. 663 (2007); Howard Chang, *Immigration and the Workplace: Immigration Restrictions as Employment Discrimination*, 78 CHI.-KENT. L. REV. 291 (2003); Bradley Condon and J. Brad McBride, *Do You Know the Way to San Jose? Resolving the Problem of Illegal Mexican Migration to the United States*, 17 GEO. IMMIGR. L.J. 251 (2003); Andrew Elmore, *Egalitarianism and Exclusion: US Guest Worker Programs And A Non-Subordination Approach to the Labor-Based Admission Of Non Professional Foreign Nationals*, 21 GEO. IMMIGR. L.J. 521 (2007); Ruben J. Garcia, *Ghost Workers in an Interconnected World: Going Beyond the Dichotomies of Domestic Immigration and Labor Laws*, 36 U. MICH. J.L. REFORM 737 (2003); Phillip Martin, *Guest Workers: New Solution or New Problem?* U. CHI. LEGAL F. 289 (2007); Lori A. Nessel, *Undocumented Immigrants in the Workplace: The Fallacy of Labor Protection and the Need for Reform*, 36 HARV. C.R.-C.L. L. REV. 345 (2001); Belinda Reyes, *The Impact of U.S. Immigration Policy on Mexican Unauthorized Immigration*, U. CHI. LEGAL F. 131(2007); Michael J. Wishnie, *Emerging Issues for Undocumented Workers*, 6 U. PA. J. LAB. & EMP. L. 497 (2004).

³⁶ Peter Schuck has made this point. See Schuck in Swain, *supra* note 4.

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stipulated first order goals regarding number, type and tenure.³⁷ They characterize immigration screening primarily as an informational problem,³⁸ in that a state must meet the challenge of obtaining enough information to ascertain whether a potential entrant matches its type preferences. The principal design choice for any state is between ex ante screening in which an alien is screened on the basis of pre-entry information and denied entry if she does not fit the state's first-order goals and an ex post system, in which an alien is screened on the basis of post-entry information and deported if she does not meet first-order policy goals.³⁹ While most developed economies at least purport to rely on ex-ante screening to match aliens to the low-skilled service sub-sectors of their labor markets, Cox and Posner note in the American context, this goal is illusory. Rather, the low-skilled sector of the US labor market is currently serviced by a shadow system of illegal immigration.⁴⁰ They conceptualize the illegal immigration system "as a de facto ex post screening system operating under the guise of an ex ante system."⁴¹

They support this claim by shifting their focus from the formal legal framework to the actual enforcement decisions.⁴² The formal legal framework provides that persons are deportable simply on the basis of illegal entry. However, as a practical matter, rather than pursuing all undocumented entrants (as they are required to do in theory on the basis of the ex ante rule), officials have historically only pursued those who commit other (i.e. non-immigration) crimes. Thus, in reality, the system as it relates to low-skilled workers is an ex-post system in which entrants, who later provide evidence of undesirability, are screened only after their entry and deported. In their words "contact with the criminal justice system becomes a proxy for type."⁴³

Cox and Posner argue that the emphasis on ex-post screening is not coincidental. Rather they argue that this system is in fact a reflection of a clear institutional preference for an ex post system to an ex ante system in the context of low-skilled aliens. A primary rationale for this preference is that for the low-skilled sub-sector of the labor market, ex-post indicators typically provide more accurate information than ex-ante indicators. Specifically, juxtaposing the selection of low-skilled workers with high-skilled aliens in Canada and other developed economies (where aliens earn visa points which are indexed to their qualifications), they argue that for low-skilled workers, ex-ante indicators are typically unreliable predictors of desirability.

³⁷ See Cox and Posner, *supra* note 4.

³⁸ Cox and Posner's primary focus is on mechanisms of screening immigrants (that is persons who are admitted for long-term residence and possibly citizenship). However, they point out that their analytical framework is also applicable to the challenges of admitting temporary guests. See Michael Trebilcock, *Immigration Policy* in PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW (1998); Michael Trebilcock, *The Law and Economics of Immigration Policy*, AM. LAW & ECON. REV. 271-317 (2003) [hereinafter Trebilcock, Law and Economics of Immigration] .

³⁹ See Cox and Posner, *supra* note 4.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

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However, this institutional bias for ex-poste screening does not comport with the expressed preferences of actors in both the legislative and executive branches. For several decades, a coalition of shifting political alliances has sought to ensure that the admission of large numbers of low-skilled persons has been premised on temporary tenure.⁴⁴ In a post 9/11 world, the modern manifestation of this sentiment is not only an insistence on temporary tenure, but a simultaneous insistence that they are screened prior to arrival.⁴⁵ Although Cox and Posner do not contend that reliable ex-ante screening for short-term type is futile, an assumption regarding the inherent difficulty of ex-ante screening underlies their work, and imposes significant constraints on available policy modifications to temporary worker programs. Another difficulty with the Cox and Posner framework is its American-centric focus in a globalized world, namely its failure to take account of those actors outside the United States that can help in ex-ante information gathering.

(2) Difficulties in Sanctioning and Deterrence

Why do some persons comply with immigration laws? Unlike the criminal law, where there is a plethora of writing on compliance and deterrence,⁴⁶ the legal scholarship is largely silent on these points in the context of immigration law.⁴⁷ While Cox and Posner briefly discuss the importance of finding appropriately calibrated ex post sanctions (which deter entry from undesirable types but not from desirable types), they do not discuss what such sanctions might look like.⁴⁸ Moreover although scholars have bemoaned the historical ineffectiveness of the state, and the increasingly proposals to sanction,⁴⁹ they have not addressed the peculiar challenges that accompany sanctioning in the temporary worker context.⁵⁰

⁴⁴ ARISTIDE ZOLBERG, *A NATION BY DESIGN*, 436 (2006).

⁴⁵ *Id.*

⁴⁶ For an article which contains a good summary of the deterrence literature in the criminal law context, *see* Kahan, *supra* note 13.

⁴⁷ There have been occasional allusions in the literature to this issue. For example, Peter Schuck wrote over a decade ago reflecting on the centrality of deterrence question, “[t]he essential idea of a prevention strategy is quite simple and compelling. To the extent that aliens who are likely to be illegal at entry or to lose their legal status after entry can be deterred from attempting to come to the United States, or detected and prevented from entering the United States once they arrive, the necessity for detention – indeed, for any further enforcement activity – will be minimized.” *See* Peter A. Schuck, *INS Detention and Removal: A “White Paper”*, 11 *GEO. IMMIGR. L.J.* (1997), at 678.

⁴⁸ Cox and Posner, *supra* note 4.

⁴⁹ For a discussion of the increasing popularity of punitive measures in the name of deterrence *see* Daniel Kanstroom, *Deportation Nation: Outsiders in American History* (2007); David Cole, *Enemy Aliens*, 54 *STAN. L. REV.* 853 (2002); Stephen Legomsky, *supra* note 11.

⁵⁰ This has been recognized by a range of scholars from other diverse academic disciplines, who advocate differing policy prescriptions that fall along the political spectrum, *see, e.g.*, DOUGLAS S. MASSEY, JORGE DURAND, AND NOLAN J. MALONE, *BEYOND SMOKE AND MIRRORS: MEXICAN IMMIGRATION IN AN ERA OF ECONOMIC INTEGRATION*

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Low-skilled aliens are often not visible to the broader population, and as such, are often “out of sight.”⁵¹ The difficulty of sanctioning is exacerbated by the disinclination of many Americans to cooperate with the authorities, given their deep ambivalence about sanctioning persons who may lack formal permission to work, but who are otherwise law-abiding and making critical contributions to the economy.⁵² Clearly, the transitory nature of this population is relevant in institutional design. As was the case in screening, the challenges become more imposing if they are viewed through American-centric lens.

In the current political context, there is likely to be profound skepticism about drawing on the help of actors outside the United States to help perform a function such as sanctioning that is seen as central to the federal government’s immigration power. Outsourcing proposals are now referred to pejoratively as the “*Halliburton* approach,” and are likely to be viewed particularly skeptically in the immigration context.⁵³ However, the United States regularly incentivizes third-party entities *within* its borders not only to screen for aliens who violate immigration laws, but also to aid in the process of sanctioning by reporting them. This is precisely the function of employer-sanction statutes that penalizes employers who fail to screen aliens for work permits and report non-compliant persons.⁵⁴ Moreover, even outside the United States, there is a long history of the utilization of third-party entities to aid in screening and reporting.⁵⁵ For example, carrier sanction statutes penalize carriers who fail to screen aliens before they board vessels to the United States, or fail to report those who utilize fraudulent documentation.⁵⁶

Unlike the criminal law review literature,⁵⁷ which recognizes the implications for institutional design of ethnographic research (both in populations that sanction and populations that are being sanctioned), the immigration law literature has not typically utilized such research. Arising partly from such research, there has emerged in the criminal law literature, a more full-bodied account of deterrence arising from a broadened understanding of “what the law is.”⁵⁸ In

(2002): Jacoby, *supra* note 29; Martin: *Economic Integration*, *supra* note 6; Martin & Teitelbaum, *supra* note 14; D.G. Papademetriou, P.L. Martin & M.J. Miller, *U.S. immigration policy: the guestworker option revisited*, INT. MIGR. 1983;21(1):39-5.

⁵¹ *Id.*

⁵² *Id.*

⁵³ The CNN commentator, Lou Dobbs is perhaps the best known proponent of such views. For commentary on Lou Dobbs approach which is comedic but nevertheless elucidates the skepticism towards such proposals, see Andy Borowitz, *Illegal Immigrants to Write Immigration Bill*, ST. PETERSBURG TIMES June 17, 2007 at 5P.

⁵⁴ See The Immigration and Nationality Act, 8 U.S.C. §1324(a) (2000) for the codification of employer sanctions and Bosniak, *supra* note 35, for a discussion of the history of employer sanctions.

⁵⁵ ZOLBERG, *supra* note 44.

⁵⁶ For a general discussion of carrier sanctions, see Erika Feller, *Carrier Sanctions and International Law*, 1 INT'L J. REFUGEE L. 48, 66 (1989).

⁵⁷ See, e.g., Meares, *supra* note 13.

⁵⁸ It is not my intention to engage the longstanding debate arising out the law and society movement about what law “is” but simply to make the point that it has long been recognized in the criminal law context, that social norms have

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contrast, debates about sanctioning and deterrence in the context of immigration have as their point of departure a very formalistic understanding of law, one that privileges formal legal regimes and does not account for the effect of norms on law abidance. A robust literature has developed on norms-based sanctioning and deterrence in the criminal law.⁵⁹ The immigration law review literature has no such equivalent.

II. A NEW APPROACH: PARTIALLY OUTSOURCED PRE- SCREENING AND PARTIALLY OUTSOURCED NORMS-BASED SANCTIONING

A. First order assumptions

The discussion that follows is based on several admittedly contested and controversial assumptions surrounding “first order” issues. In his historical examination of immigration policy, Zolberg demonstrates that immigration policy has always been characterized by an ongoing political consensus (supported by shifting alliances in different historical periods) that economic growth is inextricably tied to an ongoing flow of newcomers.⁶⁰ Even in those historical periods where new entrants were “not welcome,”⁶¹ an ongoing coalition of business interests ensured that they were nevertheless “wanted” as temporary entrants.⁶²

The practical manifestation of this “pragmatic restrictionism” is that a consensus has developed among the legislative and executive branches that an ongoing inflow of low-skilled

a significant impact on whether persons debate criminal law. For a summary of work about what constitutes “law” from a law and society perspective, see Brian Tamanaha, *A Non-Essentialist Version of Legal Pluralism*, JOURNAL OF LAW & SOC., Volume 27, Number 2, 296 (2000). For a widely cited example of norms enthusiasm in the criminal context, see Dan M. Kahan, *Social Influence, Social Meaning, and Deterrence*, [hereinafter, Kahan: *Social Influence*], 83 VA. L REV. 349 (1997).

⁵⁹ Building on Bentham’s classic conception of deterrence, the recognition of the impact of norms on deterrence (normative deterrence) is a recognized concept in the criminal law; it appears not to have been applied to immigration law. Examples of such work include Katharine Baker, *Sex Rape and Shame*, 79 B.U. L. REV. 663 (1999) and Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591 (1996). For a critique of proposals arising from a norms-based approach to deterrence, see Bernard Harcourt, *Reflecting on the Subject: A Critique of the Social Influence Conception of Deterrence, The Broken Windows Theory and Order-Maintenance Policing New York Style*, 97 MICH. L. REV. 291 (1998). For other discussions which recognize the importance of norms in discussions of deterrence, see Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 NW. U. L. REV. 453, 471-88 (1997) (contending that the classical utilitarian conception of deterrence fails to appreciate the importance of norms in governing the willingness of citizens to obey the law); see also Alvin K. Klevorick, *On the Economic Theory of Crime, in Criminal Justice*, NOMOS XXVII 289, 292-94, 301-04 (J. Roland Pennock & John W. Chapman eds. 1985) (maintaining that the economic theory of deterrence fails to account for the role of societal norms).

⁶⁰ See generally, ZOLBERG, *supra* note 44 at 432-459.

⁶¹ *Id.* at 436.

⁶² *Id.*

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entrants to fill service jobs is necessary.⁶³ However, given the historical and ongoing ambivalence about admitting low-skilled aliens on a long-term basis, any politically practicable course of action is likely to be premised on short term tenure. Any policy proposal is also likely to be accompanied by more stringent mechanisms of ensuring that persons who enter temporarily are in fact held to these terms.⁶⁴ Notably, the proposals that attracted the most support in the last Congress were all predicated on the temporary tenure of low-skilled aliens, combined with mechanisms of tracking compliance.⁶⁵

This political consensus has clear implications for the first order issue of “type.” In the same way that INA displays clear preferences for certain “types” among the highly-skilled (e.g. computer scientists) with accompanying mechanisms of validating type (e.g. professional qualifications),⁶⁶ immigration policy will increasingly focus on meeting an articulated political consensus for short-term “types” among the low-skilled, with accompanying mechanisms of validating type. This first order goal dictates certain second order design priorities. There will be a renewed institutional focus on finding reliable predictors of likelihood of temporary tenure and screening applicants according to these predictive criteria,⁶⁷ as well as a renewed focus on devising mechanisms of effectively sanctioning those who are ultimately not short-term “types.”⁶⁸ The discussion that follows is essentially a refinement of these “second-order” institutional design questions.

B. The partial-outsourcing normative deterrence proposal

This section’s partial-outsourcing normative deterrence proposal contains both a theoretical claim and an empirical claim. The theoretical claim is that partially outsourcing both screening and sanctioning to properly incentivized source-labor countries, may enhance both screening and sanctioning, particularly if they are able to draw on norms in source-labor communities to improve sanctioning and deterrence. The empirical claim, discussed in the next section is that a particular legal approach, namely a bilateral labor arrangement, which utilizes

⁶³ See Jacoby, *supra* note 29 (“In fact, the nation is far less divided on immigration . . . than the current debate suggests.”).

⁶⁴ *Id.* (“some legislators . . . insist that any new slots be strictly temporary: workers would be admitted, perhaps without family, for a period of two or three or six years and would then go home.”)

⁶⁵ See, e.g. Kennedy/McCain 2007 bill, Kennedy/McCain 2006 Bill, Cornyn-Kyl Jackson-Lee, *supra* note 18.

⁶⁶ For a general discussion of the clear preference for certain types of talent, see Ayelet Shachar, *The Race for Talent: Highly Skilled Migrants and Competitive Immigration Regimes*, 81 N.Y.U.L. REV. 148 (2006). For example, in many developed economies there is a clear preference for migrants with particular technical skills (e.g. computer scientists) who can contribute to the high growth technical sectors of the economy.

⁶⁷ See, e.g., Cox and Posner, *supra* note 4, at 824 (“a second order design question is how to sort applicants for immigration, so that only the desired types are admitted, where the desired type is just the type of person who satisfies the criteria derived from a state’s first-order immigration goals”).

⁶⁸ See Jacoby, *supra* note 29 (“virtually every major media outlet has surveyed public attitudes on the issue and the results have been remarkably consistent . . . an overwhelming majority would like to see Congress address the problem with . . . tougher enforcement”).

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outsourcing and group accountability to augment communal incentives to select and sanction, has helped to foster both improved screening and deterrence.

More specifically, the proposal consists of five principal prongs. Given that a primary goal of immigration law is to collect information about the desirability of potential entrants, the first prong contends that the United States should execute flexible bilateral arrangements with source labor countries to partially outsource the ex-ante screening function.⁶⁹ The source-labor country will then leverage its proximity to its nationals, to aid in the process of screening for those who are likely to be compliant with their visas.⁷⁰

⁶⁹ Transparency concerns are also significant in light of the partial outsourcing proposal, particularly given extensive evidence that corruption was rife in previous iterations of such programs, such as the Bracero program, and also that there was systematic exclusion of particular groups of persons who were disenfranchised within their own societies. *See generally*, DRISCOLL, GALARZA, and CALAVITA, *supra* note 22. This subject is a fertile area for further research, but to remain true to its own liberal egalitarian principles and to mitigate such concerns, it seems clear that at a minimum, the United States should only enter into bilateral labor agreements with liberal egalitarian democracies. Although the academic literature widely acknowledges that democratic mechanisms of accountability are at best imperfect, democratic mechanisms are helpful in holding both political and administrative actors accountable for transparent non-corrupt administration. *See Introduction* in *DEMOCRACY AND THE CULTURE OF SKEPTICISM* (2006) (Mathew Cleary and Susan Stokes eds.) for a discussion of the imperfections of liberal democracies in monitoring the actions of politicians and administrators and DOUGLAS ARNOLD, *CAN INATTENTIVE CITIZENS CONTROL THEIR ELECTED REPRESENTATIVES IN CONGRESS RECONSIDERED* (1993) (Lawrence Dodd and Bruce Oppenheimer eds.) This is particularly the case if the contracting country has a vibrant civil society with a network of interest groups, which function alongside a free press to monitor politicians and administrators. This has certainly been the case in Jamaica where political actors are disinclined to interfere with the program given its overwhelming popularity with the electorate.

⁷⁰ This article focuses on the community for generating norm entrepreneurs and enforcers. Yet simultaneously it focuses on the nation for screening and compliance. This leads to an obvious question? Is the nation the best unit for generating the norms that are necessary to a model of normative deterrence? It bears emphasizing that in all of the analytical models that I utilize in this work (including McAdams and Posner), the state is assumed to be the most effective agent of norm generation primarily because it is able promulgate and enforce rules. However, the state and the nation are not necessarily synonymous and I acknowledge that the small size of Jamaica (and the corresponding proximity of the state to the communities in which these norms are being promulgated) may have influenced the ability of the state in this particular context to influence norms.

Nevertheless, it appears that Jamaican situation is a “hard case” for a variety of reasons including high levels of crime, visa non-compliance and deportation from the United States, Canada and the United Kingdom. It is notable that even in this hard case, the model still appears to work. This might speak to the model’s generalizable nature with respect to other less difficult contexts (i.e. with lower visa non-compliance rates). However, there may be differences in the applicability of this model to different societies depending on a variety of factors, including proximity to the United States, the credibility and effectiveness of the state as an actor in the communities from which guest workers originate, the extent to which communities are closely knit, the pervasiveness of reputational effects and so on. One could also imagine instances in which the nation might not be the best unit of either screening or enforcement. This leads to the intuition that the model might be modified to suit particular society-specific contexts (depending on the proximity of the source-labor nation-state to the communities from which guest workers originate).

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This proposal does not advocate the wholesale outsourcing of the screening function. Rather, under this partial outsourcing proposal, the United States would set the screening rules, while incentivizing the source-labor country to administer them.⁷¹ The aim is to provide appropriate oversight, but allow sufficient flexibility for the source-labor country to adapt the screening rules to their own conditions on the ground, with the United States intervening only when source-labor innovations appear to be inappropriate.⁷² Simultaneously, to improve the deterrence function, the second prong contends that the United States should enlist the support of the source-labor country in imposing sanctions.

One mechanism of augmenting the likelihood of appropriate screening and sanctioning is the utilization of collective sanctioning systems. These have historically been employed historically effectively to improve compliance in a variety of informal arenas in which formal legal structures were either not present or insufficient, and in modern times “as a regulatory

⁷¹ I do not address the issue of how the costs associated with administering this model should be shared between guest workers, employers, the source-labor country and the United States. This is a potentially rich area for later research, but a reasonable initial response would be to note that there will generally be significant differentials in the capability of the source-labor nations and the United States to bear the costs, and that the principles of distributive justice (embodied in the work of a range of liberal theorists including Ackerman, Walzer and Rawls), should apply. BRUCE ACKERMAN, *SOCIAL JUSTICE IN THE LIBERAL STATE* (1980); JOHN RAWLS, *A THEORY OF JUSTICE* (1971); WALZER, *supra* note 33. It seems reasonable to argue that the labor-importing countries, which are undoubtedly richer as measured by a variety of indices (and who arguably benefit disproportionately from labor importation) should bear the more significant proportion of the costs associated with the administration of such programs.

⁷²In this regard, there are similarities to Ayres and Braithwaites’s concept of regulatory pyramids of enforcement. IAN AYRES & JOHN BRAITHWAITE, *RESPONSIVE REGULATION: TRANSCENDING THE DEREGULATION DEBATE* (1992).

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strategy of delegating deterrence.”⁷³ The third prong argues that the United States should structure the bilateral arrangements so as to penalize the source-labor country by reducing available visas if the overstay rates of its nationals become too high.⁷⁴ In turn, the source labor country is likely to discount the likelihood that members of any given community will become guest workers if

⁷³Daryl Levinson, *Collective Sanctions*, 56 STAN. L. REV. 345, 348 (2003). Levinson provides a brief overview of the utilization of collective sanctions both historically and in modern times, with an emphasis on functional rationales for collective sanctioning, emphasizing that central features of modern legal systems, including, vicarious, joint and several, and corporate liability are justified utilizing similar functional rationales. For a further discussion in the law review literature of the moral and functional justifications for collective sanctions, see also Saul Levmore, *Ancient Rights and Wrongs: Rethinking Group Responsibility and Strategic Threats in Biblical Texts and Modern Law*, 71 CHI.-KENT L. REV. 85, 89-90 (1995).

Beyond the law review literature, the economics literature also has an extensive discussion of functional rationales for collective sanctioning. For example, economic historians credit collective sanctioning for facilitating a commercial revolution in late medieval times by allowing long-distance commercial exchange between parties who had no prior knowledge of each other. See Avner Greif, *Contract Enforceability and Economic Institutions in Early Trade: The Maghribi Traders' Coalition*, 83 AM. ECON. REV. 525 (1993); Avner Greif, *Reputation and Coalitions in Medieval Trade: Evidence on the Maghribi Traders*, 49 J. ECON. HIST. 857 (1989). In the Jamaican context, collective sanctioning appears to work well when applied to micro-lending. For a broader discussion of the importance of collective sanctioning to micro-finance, (in the form of joint liability lending) see Maitreesh Ghatak, *Screening by the Company You Keep: Joint Liability Lending and the Peer Selection Effect*, ECON. J., Vol. 110, No. 465. (2000) at 602.

⁷⁴One could argue that the country and the community are standing behind the guest worker as guarantors in a very loose utilization of the term. There are analogies to the economic rationales for using guarantees, with the community playing an analogous role. See Avery Katz, *An Economic Analysis of the Guaranty Contract*, 66 U. CHI. L. REV. 47 (1999). The utilization of the term “guaranty” is controversial; indeed, this proposal may call to mind Soviet-era “guest worker” programs in which communities were utilized to secure the return of guest workers, involving threats against communities. See, e.g., Oliver E. Williamson, *Credible Commitments: Using Hostages to Support Exchange*, AM. ECON. REV., 73, 519-40 (1983). It bears emphasizing that the program discussed herein recommends the “soft” utilization of group accountability and as such, the proposal would not countenance any such abuses. In any event, the issue of ensuring individual human rights protections in programs such as these is a fertile area for future work. As a preliminary matter, this article recommends that the United States enter into outsourcing programs only with liberal egalitarian democracies partly in an effort to guard against such abuses.

It bears emphasizing that there is an evolving international norm against collective punishment. See Levinson, *supra* note 73. The question becomes: Does it matter whether the sanction recommended really involves the selection of a country for the privilege of involvement in a guest worker program, rather than exclusion of a country from generally available migration privileges. I would argue that the key difference is that a collective reward is being withheld (as opposed to a collective punishment being imposed) although the literature uses the term sanctioning more broadly to reference both group punishments and rewards. See, e.g., Levinson, *Collective Sanctions supra* note 73 at 376. Nevertheless, the utilization of group accountability principles raises significant justice concerns, which present a fertile area for later work. In the philosophy literature, there is a generally view that collective sanctioning conflicts with the liberal obligation to prioritize individuals as moral agents. See, e.g. COLLECTIVE RESPONSIBILITY (1991) (Larry May & Stacey Hoffman eds.); PETER A. FRENCH, COLLECTIVE AND CORPORATE RESPONSIBILITY (1984); GROUPS AND GROUP RIGHTS (2001) (Christine Sistare, Larry May & Leslie Francis eds.); LARRY MAY, THE MORALITY OF GROUPS (1987); Joel Feinberg, *Collective Responsibility*, 65 J. PHIL. 674 (1968).

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their fellow community members abscond. This creates incentives for community members to alert the authorities if they are in danger of selecting a neighbor who is not a short-term type. Community members are also incentivized to monitor the compliance decisions of their neighbors since their own prospects of future work as guest workers are compromised if their neighbors abscond.

In a practical micro application of this macro principle, the model's fourth prong advocates that the source-labor country should designate intermediaries in communities from which guest workers originate to both screen and sanction.⁷⁵ Typically, these intermediaries should be community leaders who are trusted both by the authorities and their communities. In instances when an applicant's type is not readily apparent to the authorities, these intermediaries will share inside information, which helps with type prediction. When persons abscond, future references from these intermediaries should be discounted. In so doing, the authorities will be sanctioning intermediaries, and indirectly sanctioning the communities that depend on them for access to the program. Collective sanctioning will still apply but in a "thin" rather than "thick" version.

The central role of the community in improving compliance is not coincidental. The fifth prong argues that communal norms may exercise more influence on visa-compliance decisions than the formal legal framework.⁷⁶ If visa-compliance decisions are norms-based, these intermediaries in trust may fulfill another important function. As community leaders, they are also typically norm influencers who are well placed to both identify and recommend only those who subscribe to norms which prioritize visa compliance and to stigmatize and sanction those who do not.

Another potential benefit of a partial-outsourcing approach is that the United States could enlist the support of the source-labor country in imposing sanctions on overstaying workers. Notably, these sanctions could operate not only (directly) against visa violators who are found and deported to the source labor country, but also (indirectly) against violators who are underground in the United States. More specifically, informal sanctions may be activated against a particular worker if the United States knows that the worker has overstayed and is unable to locate him, because the worker's ongoing voluntary contacts with the intermediary

⁷⁵The term intermediary is influenced by the utilization of the term "intermediary in trust" in the sociology literature. See JAMES S. COLEMAN, *FOUNDATIONS OF SOCIAL THEORY* Chapter 9 (1990) for a general discussion.

⁷⁶ This model is influenced by the norms literature in its recognition that subjects feel obligated to follow certain rules, irrespective of formal legal arrangements because of an internalized moral commitment or fear of informal sanctions. Surprisingly, immigration law appears largely untouched by the norms scholarship. It is an account of legal influence (as opposed to legal centralism). Although in modern discussions of "norms" scholarship, the economics literature appears to be most influential, the discussion of "norms" has a distinguished heritage that predates this contribution with interdisciplinary contributions from the fields of Anthropology and Sociology. For a summary of anthropological and sociological work in this area, see Sally Falk Moore, Introduction *in* *LAW AND ANTHROPOLOGY: A READER 2* (2005) (Sally Falk Moore ed.); Sally Falk Moore, *LAW AS PROCESS: AN ANTHROPOLOGICAL APPROACH* (1978) and Richard Abel, Introduction *in* *THE LAW AND SOCIETY READER* (1995) (Richard Abel ed.). The landmark text in the law and economics literature is ROBERT C. ELLICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* (1991) [hereinafter ELLICKSON, *ORDER WITHOUT LAW*].

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who originally recommended him and his entire community of origin will give members an opportunity to express disapproval.

There is a yet a further subtle point to be made. In this model, the power to sanction is derivative of the power to screen. Even if the source-labor government has no legal authority to sanction persons for visa infractions on American soil, they are nevertheless able to credibly wield the threat of sanction not only against visa violators but also against their communities, through their power to deny visa-violators future access to guest worker visas, and their power to discount recommendations from community leaders, and thereby indirectly penalize the community.⁷⁷

The recognition of the impact of norms on deterrence is a recognized concept in other areas of the law; it appears not to have been applied to immigration law. In emphasizing informal sanctions, this proposal is unusual in the current environment in which sanctioning is synonymous in the popular discourse with a range of punitive proposals including increased detentions.⁷⁸ While such punitive proposals may fulfill an “expressive” function,⁷⁹ they are not in keeping with “progressive credentials” of the original Benthamite conceptions of deterrence,⁸⁰ which in “the most theoretically elegant applications . . . have always involved showing how *less* can be *more*.”⁸¹ In the spirit of showing how *less* can be *more*, this model posits an unconventional, norms-based, approach to augmenting deterrence.

C. Evidence that this approach will work

This section lays out a statistical background for the larger argument by examining the differences in visa compliance rates for similar populations of Jamaican guest workers in Canada and the United States. This section then turns to a micro-level qualitative study of a sample of administrators and guest workers to discern the rationales that underlie their visa-compliance decision-making. It begins with a brief note on methodology.

(1) Methodology

⁷⁷ Notably, sanctioning and screening are separate and analytically distinct functions, which should be distinguished and need not necessarily be coupled. Moreover, there are other potential sanctions that could be added to the model which are not derivative of the power to screen.

⁷⁸ For examples of these punitive trends, see Legomsky, *supra* note 11; *see also*, Jacoby, *supra* note 29; Martin & Teitelbaum, *supra* note 14.

⁷⁹ See Kahan, *Alternative Sanctions*, *supra* note 59, for an articulation of the importance of the “expressive” function of punishment.

⁸⁰ Betham’s classic definition of deterrence compared the utility of benefits to the disutility of losses. As long as losses exceed benefits, or pain exceeds pleasure, then the actor is deterred from undertaking the activity. JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION (LONDON, W. PICKERING 1823) (1789).

⁸¹ Dan M. Kahan, *Gentle Nudges vs. Hard Shoves: Solving the Sticky Norms Problem*, 67 U. CHI. L. REV. 607 (2000).

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The decision to focus on the Jamaica-Canada program was driven by a number of data points.⁸² After Mexico, Jamaica supplies the largest absolute numbers of documented guest workers to both the United States and Canada, and by some preliminary estimates, low-skilled Jamaicans have the second highest representation on a per capita basis in the undocumented population in the United States.⁸³ Indeed, the metaphorical Jamaican on Saturday Night Live working nine jobs (in clear violation of immigration laws) signifies the extent to which Jamaican and “undocumented worker” are intertwined in the popular imagination. Moreover, the visa-compliance rates among Jamaican guest workers in Canada are high, even against a more mixed record of visa compliance among Jamaican guest workers in the United States. Additionally, there are clear analogies between labor markets in the United States and Canada. Canada has critical labor shortages in comparable economic sectors, and has historically relied on aliens from the same proximate markets in Latin America and the Caribbean to fill these shortages,⁸⁴ albeit in more limited numbers.⁸⁵

Given the high visa compliance rates among Jamaican guest workers in Canada, the principal objective of the study was to explore the rationales that they offer for their visa-compliance decisions. The author conducted the field work.⁸⁶ The research design was primarily qualitative and the study methodology was multi-method in focus. This is a difficult-to-reach population and, partly for this reason, the study was not randomized. Rather, utilizing referrals from guest workers and program administrators, the author developed a snowball

⁸² There are few academic studies of Jamaican guest workers in Canada. The exceptions are Cecil, R.G. & G.E. Ebanks, *The Human Condition of West Indian Migrant Farm Labour in Southwestern Ontario*, 29(3) INT. MIGR. REV. 389 (1991); Cecil, R.G. and G. E. Ebanks, *The Caribbean Migrant Farm Worker Programme in Ontario: Seasonal Expansion of*, West Indian Economic Spaces, 30(1) INT. MIGR. REV. 19 (1992).

⁸³ Jamaicans have the highest representation on a per capita basis in the undocumented population in Canada. This information was garnered from an interview with Annemarie Barnes who is the Chief Technical Officer in the Ministry of National Security in Jamaica. For a broader discussion of high levels of non-compliance by Jamaicans with immigration laws in the United States, see Madjd-Sadjadi, Z., and Dillon Alleyne, *The Potential Impact of Criminal Deportees from the United States*, Paper delivered at the Caribbean Criminology Conference, Mona, University of the West Indies (2004). Utilizing statistical modeling, they provide indicative statistics on the number of Jamaicans in the undocumented population. The statistics regarding the representation of Jamaicans among the low-skilled documented and undocumented population in both Canada and the United States arise from unpublished research of the Remittance Research Project in the Department of Economics at the Jamaica Mona Campus of the University of the West Indies. Interview notes on file with author. See also Milton Vickerman, *Jamaica in THE NEW AMERICANS, A GUIDE TO IMMIGRATION SINCE 1965* (2007) (Mary Waters and Reed Ueda eds.). Vickerman notes that the Jamaicans consistently express a high desire to migrate, and that emigration rate is propelled “by an entrenched tradition of migration and economic hardship.” Taking into account the population size, the emigration rate is very high, with migrant Jamaicans constituting a third of Jamaica’s population. In 2001, Jamaicans were the second most likely population on a per-capita basis to migrate to the US. *Id* at 478. .

⁸⁴ For a comparative discussion of American and Canadian historical approaches to immigration generally, see Will Kymlicka, *Finding Our Way: Rethinking Ethnocultural Relations in Canada* (1998).

⁸⁵ See Martin Collacott, *Canada's Immigration Policy: The Need for Major Reform* (2002).

⁸⁶ I acknowledge the work of Mr. Densil Reid, who has significant experience in fieldwork in rural populations. He conducted thirteen of the guest work interviews and participated in twenty two others.

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sample, a method which is often used in studies of subjects with similar characteristics.⁸⁷ The typical subject was an agricultural worker from a rural Jamaican community.⁸⁸

The approach was both “top down” and “bottom up.” Research participants included Jamaican guest workers, legal officers in Jamaica and Canada who negotiate the bilateral agreements, administrators in both jurisdictions who promulgate rules, admissions officers who conduct screening, industry representatives who are integrally involved in the program’s administration and NGO and union representatives who advocate on behalf of migrant farm workers. The research was designed to draw on a range of different regions from which guest workers originate, including the sugar cane producing areas, the banana producing areas and the vegetable producing areas. Interviews constituted the principal research method and detailed interviews are on file with the author. In total, interviews were conducted with 81 informants, including 50 guest workers.⁸⁹

(2) Brief Background Framework to the Jamaica-Canada Program

⁸⁷ Kathryn Edin and Laura Lein, whose work has been utilized in the law review scholarship on entitlement programs, utilized a similar methodology in their landmark study of a difficult to reach population, namely, single mothers on welfare. See KATHRYN EDIN AND LAURA LEIN, *MAKING ENDS MEET* (1997), discussed in Mathew Diller, *The Revolution in Welfare Administration: Rules, Discretion and Entrepreneurial Government*, 75 N.Y.U.L. REV. 1121 (2000). The methodology of this study was influenced by grounded theory approaches to qualitative research. See also ANSELM STRAUSS, JULIET CORBIN, *BASICS OF QUALITATIVE RESEARCH: GROUNDED THEORY PROCEDURES AND TECHNIQUES* (1998).

⁸⁸ Although tourism workers and certain tradespersons in construction are now eligible to access the Canadian labor market under more recently developed Canadian visa programs, in the Jamaican context, these persons are not understood to be low-skilled since they have received some formal training in trade schools, and complete tests to gain certifications. As such, I restricted the sample to persons who are understood in the Jamaican context to be “low-skilled,” namely agricultural workers. Their access to overseas labor markets is most restricted, since they are considered high risks for immigration infractions. They typically lack formal training, are low-income and are poorly situated to provide the collateral that is required to demonstrate their suitability for visas.

Across a broad range of visa categories, Canadian consulates have the discretion to require aliens to provide evidence of property, high educational levels or kinds of “capital” to be eligible for visas to demonstrate financial or professional ties to the country of origin (for temporary visitors). Low-skilled Jamaicans do not have such “capital,” and have typically not had legal access to Canada. As such, participants in the Jamaica-Canada program are trendsetters.

⁸⁹ Notably, in addition to the small sample size, a limitation of the study is that I was unable to locate any persons who have not complied with the visa terms, since these persons have presumably disappeared into the underground economy in violation of Canadian laws and interview subjects were either unwilling or unable to provide access to them. An online counterpart to this article contains more detailed statistical analyses. Detailed transcripts of all the interviews with guest workers are on file with the author.

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The Jamaican Seasonal Agricultural Workers Program⁹⁰ operates within bilateral administrative arrangements which are formalized in a Memorandum of Understanding (MOU)⁹¹ between Canada and Jamaica, under which the Jamaican government formally assumes partial responsibility for screening potential candidates and informally assumes responsibility for tracking visa violators, and reporting them to Canada. Under the terms of the MOU, the number of visas offered, and the criteria and terms attending admission, are entirely within the discretion of Canada.

The criteria for selection appear to be minimal. Under the MOU, the Ministry of Labor (MOL), which has administrative responsibility for candidate selection is asked to recommend healthy, able-bodied persons with no criminal record and farming experience. Although the Jamaican government may not modify the Canadian criteria, they are encouraged to augment these criteria which are a “floor” with other screening measures that are appropriate to Jamaican conditions. For example, the Jamaican government seeks evidence of ties to support an applicant’s contention that he is likely to return to Jamaica. Since applicants are not typically able to provide documentary evidence of assets which tie them to Jamaica, the MOL uses supplementary indicators. For example, the operation of a family farm is typically taken as an indication of home ties. Moreover, the MOL regularly supplements police reports (which are sometimes unreliable) by utilizing informal community networks to ensure that potential participants are not involved in criminal behavior that has not otherwise been detected by formal state measures. Parties interviewed indicated that it was atypical for Canada to reject candidates who had been recommended by the Jamaican government. The MOL is clearly motivated to improve their candidate pool by the ever-present possibility that Canada would reduce the number of visas available particularly given that the visa slots may be filled by other countries clamoring for similar bilateral arrangements.

Although it is not a matter of official policy, it appears that there is a preference for candidates from closely-knit, typically rural communities, where persons are likely to be well-known to their neighbours. The MOL currently designates persons of standing in the rural communities to refer candidates. These persons typically include parliamentary and local government representatives, clergy and social workers. These persons are assigned a certain

⁹⁰ The Jamaican Seasonal Agricultural Workers Program operates within a tripartite institutional framework within Canada. At the federal level, the program is implemented within the framework of the *Immigration Refugee and Protection Act* and *Regulations* which is premised on the “Canadians First” principle. See *Introduction* in LORNE WALDMAN, *CANADIAN IMMIGRATION LAW AND PRACTICE* (2004)). At the provincial level, the program is governed by employment labor and health regulations. The program also operates within bilateral administrative arrangements between Canada and Jamaica and employment contracts between Canadian employers and migrant workers, which are subject to review and approval by both Canada and Jamaica. The Canadian government has clearly signaled their preference for the government recruiting process by effectively offers recruiting subsidies to Canadian employers, who agree to participate in the Jamaican government recruiting system (rather than retaining private contractors which necessitate additional costs). See Veena Verma, *The Mexican and Caribbean Seasonal Agricultural Workers Program, A Report for the North South Institute*, Ottawa, Canada (2003). More information on the program is provided in an online database, see also www.outsourcingimmigrationcompliance.com.

⁹¹ A copy of the Memorandum of Understanding is on file with the author. See also Andre Irving, *The Genesis and Persistence of the Commonwealth Caribbean Seasonal Agricultural Workers Program in Canada*, 28 OSGOODE HALL L. J. 243 (1990).

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number of farm work “tickets” and are asked only to issue those tickets to community members who are likely to abide by the program’s terms.

The MOL is able to track AWOL (Absent Without Leave) rates closely since they remain in close contact with Canadian employers and typically arrange return flights to Jamaica for guest workers. Moreover, all guest workers are required to present evidence of their timely exit from Canada to the MOL upon their return to Jamaica. If a guest worker goes AWOL, he is deemed to have committed an immigration infraction, since remaining “in status” is contingent on maintaining employment with the specific employer to whom the guest worker was contracted at the time that the visa was originally granted.⁹²

The MOL is obligated to report AWOL guest workers expeditiously to Canada. It provides briefings to parliamentary representatives, with warnings issued if high AWOL rates threaten to compromise the ability of a Member of Parliament and her network of recommenders to issue further referrals. While the MOL generally does not issue outright bans on particular communities, by barring community recommenders, the MOL indirectly bars the consideration of persons from their communities. Penalties may also extend in rare instances to the entire community of origin.⁹³

The MOL appears to generously utilize their administrative discretion to tweak the program to respond to changing conditions on the ground. Administrators noted that although they did not have the legal authority to punish guest workers for going AWOL since infractions were committed in another jurisdiction, they exercised considerable power to penalize because of their ability to discount recommendations. In response to obvious justice concerns, stakeholders also emphasized that although the arrangements were informal, they were transparent since all guest workers were aware of possible penalties at their time of entry into the program, and recommenders were also advised of the reasons for their exclusion.

(3) Tale of the Numbers: AWOL Rates Against Other Indicative Data Points

(i) A Brief Comparative Background on the American H-2A Program

There are a number of data points which give us an indicative sense of the success of the Jamaica-Canada program. One such data point is the disparity in visa-compliance rates between

⁹² See MOL Jamaica-Canada program handbook (on file with author).

⁹³ If guest workers are involved in (non-immigration) crimes that have the potential to compromise the program (such as narcotics trafficking), the MOL has in the past invoked a severe penalty by formally barring consideration of the entire community of origin for time-limited periods. Indeed, in one highly publicized incident in which two guest workers were found transporting drugs, the MOL barred the entire community of origin. Administrators argued that it was highly likely that community members were aware of these drug crimes, and as such, it was reasonable to expect that they would have so warned the MOL. Citing justice concerns, MOL officials indicated that such bans typically were time-limited.

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Jamaican guest workers in Canada and in the United States.⁹⁴ A more detailed statistical analysis is included in the online database, although relevant summary findings are included below. The comparable population of Jamaican guest workers in the United States are admitted under the H-2A provisions of the INA, which govern the admission of agricultural workers to the United States.⁹⁵

The American program differs from the Canadian program in a number of ways, but the following differences are worth emphasizing. The program is generally characterized as being “privatized,” which is reflected in a number of ways. First, there is no bilateral agreement which acts as a framing device, for the promulgation of supplementary rules by the Jamaican government. Second, unlike the Jamaica-Canada program, in which both governments play a critical regulatory role, in the United States, employer groups operate with relatively little oversight and appear to dominate the recruitment process. To the extent that there is Jamaican government involvement in the screening process for American guest workers, this is entirely the result of the voluntary actions of those American employers who delegate screening to the MOL, as opposed to being built into the framework of the program by bilateral agreement or incentivized by subsidies such as those offered to employers by the Canadian government.⁹⁶

Third, the Jamaican government plays no role in monitoring the compliance of Jamaicans. Unlike Canada, where the Jamaican government is integrally involved not only in arranging the return flights for the guest workers, which puts them in a position to easily identify AWOL workers, report their immigration infractions to Canada and express their disapproval to recommenders and their source-labor communities, in the United States, they play no such role. Finally, guest workers are not required to register with the Jamaican government upon their return home, as condition of receiving the “compulsory savings,” which are deducted from their salaries in Canada but not in the United States (except by voluntary arrangement). In summary, under the H-2A framework, Jamaican officials have virtually no influence in choosing guest workers (except by private arrangement), and monitoring their compliance while in the United States.

(ii) Comparative statistics

⁹⁴ The ideal approach would be a comparative study of US and Canadian guest worker programs, with the appropriate statistical controls to attempt to account for the relative contribution of competing explanatory factors to the success of the program. Agricultural guest workers who travel to Canada and the United States appear broadly similar in that they originate from similar communities, have similar skill sets and fill similar agricultural jobs; systemic differences in program design might lead the programs to attract different categories of applicants. As intimated earlier, there is a clearly the need for a comprehensive comparative study of similarly situated guest workers who participate in the US and Canadian programs, with appropriate controls, it an attempt to isolate the relative contributions of a series of factors that might account for differential compliance rates.

⁹⁵ See 8 U.S.C. § 1101(a)(15)(H). Changes to the program are currently being considered. See Press Release from the Department of Homeland Security (February 6, 2008), *DHS Proposes Changes To Improve H-2A Temporary Agricultural Worker Program, Proposed Rule Will Assist Employers by Streamlining Processing of H-2A Worker Petitions* (on file with author).

⁹⁶ In the past there has been intervention by the Jamaican authorities, who on the basis of unscrupulous actions by some private recruiters, now require all private recruiters to register with the government.

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Canadian AWOL rates were juxtaposed with the AWOL rates of a comparable sample of American workers.⁹⁷ (Please see *Appendix I – Table 1* at www.outsourcingimmigrationcompliance.com for a summary table.)⁹⁸ Between the periods 1988 to 2007 (the periods over which this analysis has been based) trends in the data show that, in general, far more workers go AWOL in the American guest worker program when compared to the Canadian program.

The AWOL rates for the 20-year period of analysis (1988-2007) show that on average, 5.3% of all American guest workers go AWOL, with a high of 9.8% in 1988. While in Canada, 3.5% of all guest workers have gone AWOL in that time, with a high of 7.2% in 1988.

It is important to note that while the differences between American and Canadian AWOL rates may appear to be marginal, they should be viewed in context of the large size of the undocumented population. There are approximately 12 million undocumented aliens, the overwhelming majority of whom are low-skilled persons who would only typically qualify for entry as guest workers.⁹⁹ As such, the difference of 1.8%¹⁰⁰ in comparative AWOL rates translates to 216,000 more persons going AWOL in the United States as compared to Canada if there were an equivalent population of undocumented aliens there.

⁹⁷ Going AWOL is in itself a violation of Canadian law, since under the terms of the visa, persons are only to remain in Canada as long as they are working with a specific employer (or for seven days beyond the final date of their labor contract). See MOU (on file with author). These workers were comprised overwhelmingly (though not exclusively) of agricultural workers, in which there was some Jamaican governmental involvement (if only minimal as described above) since workers registered with the MOL, even if the MOL had more limited power over their selection and return arrangements.

⁹⁸The username for the website is *guestworker* and the password is *guestworker*. Given the passage of the major immigration reform legislation in 1986, the Immigration Reform and Control Act (IRCA), the analysis was done utilizing figures after that date. The figures were compiled from source data that was provided by the Jamaican Ministry of Labor and Social Security through its archives, Statistical Bulletins and Washington (*See Notes for Table 1 in Appendix I_www.outsourcingimmigrationcompliance.com*). Discrepancies were identified in the AWOL numbers over the years 1997-2001 where US AWOL numbers were extremely low in comparison to other years. Administrators in both the US and Canadian programs agreed that the figures for these years appear to be atypical, and notably, were not prepared to eliminate the possibility of deficiencies in record-keeping, due to resource constraints at the MOL. As such, AWOL numbers for 1997-2001 were imputed using Maximum Likelihood (EM) Estimation (*See Notes for Table 1 in Appendix I_www.outsourcingimmigrationcompliance.com*). The Statistical Package for the Social Sciences (SPSS 16.0) was used to carry out this analysis.

⁹⁹ See Massey and Liang, *supra* note 23.

¹⁰⁰ This percent (1.8%) represents the difference between the average US AWOL rate of 5.3% and average Canadian AWOL rate of 3.5% for the 20-year period of analysis.

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Further, statistical analysis¹⁰¹ of the AWOL rates for guest workers in Canada and U.S.A. within the period being examined demonstrates that there is a statistically significant difference between the means of the two AWOL rates. The results of the T-Test¹⁰² clearly indicate that the average higher AWOL rates experienced for U.S. guest workers as compared to Canadian guest workers are not purely random. (Please see *Appendix I – Table 3* in www.outsourcingimmigrationcompliance.com) In summary, the high levels of visa compliance in the Canadian program are striking when viewed against the background of visa compliance levels among similarly situated agricultural workers in the US.

(4) Rationales Governing Compliance Decisions¹⁰³

¹⁰¹ The analysis was carried out using the Statistical Package for the Social Sciences (version 16.0). SPSS is a widely recognized statistical package utilized in social science research (See, e.g., *'Guide to Social Science Data Preparation and Archiving: Best Practice Throughout the Data Life Cycle'* by the Inter-University Consortium for Political and Social Research), <http://www.icpsr.umich.edu/access/dataprep.pdf>.

¹⁰² The AWOL rates for guest workers in Canada and USA (as shown in *Appendix I – Table 1* www.outsourcingimmigrationcompliance.com) were inputted into SPSS. An Independent Samples T-Test was performed using 'country' as the grouping variable (i.e. USA and Canada) and the AWOL rates as the test variable. The means of the test variable (i.e. AWOL rates) were compared based on the specified values (i.e. Canada and U.S.A.) of the grouping variable. This test was carried out to determine whether there was a statistically significant difference between the two sample means. The null hypothesis which was tested is that the difference between the means of the AWOL rates for guest workers in U.S. and Canadian programs over the period in review is zero. The alternative hypothesis tested is that the difference between the means is not zero. Given the results of the T-test, the null hypothesis was rejected, i.e. there is a statistically significant difference between the means (using a significance level of 5%). Imputed data was used in this analysis (See *Notes for Table 1 in Appendix I* www.outsourcingimmigrationcompliance.com).

¹⁰³ A more detailed note on the methodology in this section, which relies primarily on interviews with guest workers, is appropriate. The data was collected in two segments. The first segment focused on the legal framework that governs the Jamaica-Canada program, and exploratory interviews were conducted with key administrators who draft and enforce the rules that govern the movement of guest workers. In an effort to include a diverse range of experiences, interviewees included administrators with varying levels of seniority. The author also conducted a focus group with key administrators.

In the second phase focused on the factors that influence the visa-compliance decisions of guest workers. Detailed interviews were done with dozens of guest workers. The author acknowledges concerns regarding whether the inclination of persons to share candidly might have been compromised by the absence of anonymity. Given the small size of Jamaica, and the program in particular, and the referral methodology, faculty at the University of the West Indies, with experience in studying similar populations, indicated that it would be difficult to credibly assure

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This section seeks to unpack the reasons that subjects offer for compliance. There are a variety of sources of “law” that could potentially be influential with subjects. These include the bilateral arrangement between Canada and Jamaica, regulations promulgated pursuant to the MOL’s administrative discretion, and Canadian immigration laws. There is also a network of informal rules, which are obligatory, but fall short of formally state-enforced law. Subject interviews sought to engage the following questions: which laws and/or rules matter, how do they become obligatory and how do they derive their moral justification.

(i) The Importance of Intermediaries to Screening

Nearly all of the subjects were referred to the program on the basis of a personal relationship with a recommender. Subjects cited relationships with community leaders, including political representatives, social workers, clergy, coaches in local sports leagues, and justices of the peace (equivalent to notary publics).¹⁰⁴ A few others had more indirect relationships and were introduced to community recommenders by family members or close friends, who vouched for their character.¹⁰⁵

Subjects overwhelmingly concurred with the view that a referral from a community leader who had a relationship with the Ministry of Labor was integral to gaining access to the program.¹⁰⁶ None seemed to be perturbed by the disproportionate role played by political representatives and other connected parties in the referral process. The consensus view seemed to be that the MOL expressed a clear preference for persons from tightly-knit communities, who were well known to their neighbors and who operated family farms to which they would return. Given the lack of infrastructure in these communities, it was deemed to be impractical to access these referral networks without the support of these persons. Subjects seemed to reject any implication that selection processes were exclusionary.¹⁰⁷ Several subjects noted that the process

persons of anonymity. Given this concern, the author spent significant amounts of time cultivating confidence among individual guest-worker subjects. The number of guest workers interviewed was restricted on this basis.

More specifically, the author conducted detailed interviews with a small sample of guest workers, many of whom had been introduced by a member of a rural agricultural development agency, who regularly interacts with this population for research purposes. Although this person was employed by government, he clearly had independently earned the trust of guest worker through repeat interactions with them over decades. Having cultivated relationships through his introductions with this smaller pool, the initial interviewees then provided me with introductions to a larger pool. The criteria for selecting persons for interviews were reviewed with the assistance of a researcher at the University of the West Indies, who had previously studied the guest worker population.

¹⁰⁴ Transcripts on file with author (Subjects include CB, DD, DJ, DT, MH, CG, DW, GB, SP, RJ, RB, AS, DT, EQ, CS, WD, HR, AM, OM, MS, RB, J, RC, RR, H, G, SB, S, M, L, P, FC, EC, DR, RB, DB, CH, AS, RH, VH).

¹⁰⁵ Transcripts on file with author (Subjects include FC, EC, DR, RB).

¹⁰⁶ Transcripts on file with author (Subjects include CB, DD, DJ, DT, MH, CG, DW, GB, SP, RJ, RB, AS, DT, EQ, CS, WD, HR, AM, OM, MS, RB, J, RC, RR, H, G, SB, S, M, L, P, FC, EC, DR, RB, DB, CH, AS, RH, VH).

¹⁰⁷ Transcripts on file with author (Subjects include RC, FC, EC, DR, RB).

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was at least partly meritocratic, with some taking pains to emphasize that, they had provided references to support their contentions of character and a solid farming background.¹⁰⁸

(ii) Why intermediaries matter to subjects

The majority of subjects were repeat participants in the program, who indicated that they counted on their overseas earnings to supplement their familial income.¹⁰⁹ The majority appeared to be of the view that their repeat selection was dependent not only on positive evaluations from their employers, but also on the independent maintenance of a good relationship with the MOL.¹¹⁰ Since intermediaries represent their primary ongoing contact with the MOL for most guest workers, the maintenance of relationships with intermediaries was believed to be important.¹¹¹

(5) Overall Rationales for compliance

All of the interviewees asserted (some quite emphatically) that they had never considered the possibility of not complying with their visa. A primary purpose of the interview was to ascertain which rationales dominated their decision-making matrices. Interviewees cited a variety of reasons to account for their disinclination to go AWOL. Interviewees alternatively cited: familial expectations of visa compliance; communal expectations of visa compliance including specifically such expectations from religious groups and loose neighborhood affiliations; patriotic commitments to Jamaica; and obligations to obey the law. There was also a category of rationales which are broadly categorized as “other-worldly,” which sometimes bore religious overtones. Communal rationales appeared to predominate. The majority of subjects specifically noted that their community members expected compliance and they did not want to be held responsible for compromising either the access of their own community members or fellow Jamaicans to Canada.¹¹²

(iii) Law-related rationales

One set of rationales might be broadly construed as law-related. All appeared to be aware of the diverse sources of law, with subjects alternatively referencing at least two of the following sources: Canadian law, Jamaican law (which appeared to be synonymous with MOL promulgated rules) and the relationship between Canada and Jamaica (which appeared to be synonymous with the bilateral MOU between Jamaica and Canada). The majority appeared to

¹⁰⁸ Transcripts on file with author (Subjects include DT, MH, CG, DW, GB, SP, RJ, RB).

¹⁰⁹ Transcripts on file with author (Subjects include CB, DD, DJ, DT, MH, CG, HR, AM, OM, MS, RB, J, RC, RR, H, G, SB, S, M, L, P, FC, EC, CH, AS, RH, VH, DR, RB, DB).

¹¹⁰ Transcripts on file with author (Subjects include OM, MS, RB, J, RC, RR, H, G, CB, DD, DJ, DT, MH, CG, HR, AM, RB, DB, CH, AS, RH, SB, S, M, L, P, FC, EC, DR).

¹¹¹ Transcripts on file with author (Subjects include OM, MS, RB, J, RC, RR, H, G, CB, DD, DJ, DT, MH, CG, HR, AM, RB, DB, CH, AS, RH, SB, S, M, L, P, FC, EC, DR).

¹¹² Transcripts on file with author (Subjects include CB, DD, DJ, DT, MH, CG, DW, GB, SP, RJ, RB, AS, DT, EQ, CS, WD, HR, AM, OM, MS, RB, J, RC, RR, H, G, SB, S, M, L, P, FC, EC, DR, RB, DB).

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distinguish between formal legal obligations (the breach of which carries the threat of state sanction) and informal obligations, whether they derived from family, community or other-worldly commitments.¹¹³ However, amongst all subjects, law-related rationales appeared to be of only secondary importance in relation to other rationales. Notably, many subjects indicated that their obligations to family, community, intermediaries and church, were so important that these eclipsed formal legal obligations.

(iv) Norms-based Rationales

All of the subjects provided reasons that might be broadly characterized as “norms-based,” with their rationales reflecting a clear notion that returning to Jamaica was not only preferable but also “right” (a term utilized repeatedly by some interviewees) or “Christian”¹¹⁴ Subjects cited a range of value systems, which are complementary and which are broadly sympathetic to compliance. Several subjects indicated that they would never consider absconding for the same reasons that they would never consider breaking other laws, which is, absconding was not consistent with value systems that they held.¹¹⁵ One subject utilized a patois phrase to connote the importance of a clear conscience. He had never had reason to “look over his shoulders” before, and had no desire to start now (translation).¹¹⁶

Other subjects cited religious commitments. One subject referred to his own need to “be at peace with his God.”¹¹⁷ As such, choosing not to return was viewed as a morally inferior course of action. Choosing not to return home was alternatively characterized as “wutless” (worthless) or behaving like a “bwoy” (connoting a young irresponsible person).¹¹⁸ The perception that going AWOL was immoral seemed to be deeply intertwined with interviewees’ perceptions of familial, communal and national obligations.¹¹⁹

(v) Communal based rationales and the competition for esteem

Attachments that might be broadly characterized as communal, included obligations to their fellow farmers, social clubs, sporting leagues and church groups. The importance of communal attachments, and the esteem that derives from such attachments was implied in that several subjects indicated that they would not have been selected if they had not been held in

¹¹³ Transcripts on file with author (Subjects include CB, DD, DJ, DT, MH, RB, DB, CH, AS, RH, VH, CG, HR, AM, OM, MS, RB, J, RC, RR, H, G, SB, S, M, L, P, FC, EC, DR).

¹¹⁴ Transcripts on file with author (Subjects include DJ, DT, MH, CG, HR, AM, OM, MS, RB, J, RC, RR, H, G, SB).

¹¹⁵ Transcripts on file with author (Subjects include MH, CG, HR, AM, OM, MS, RB, J, RC, RR).

¹¹⁶ Transcripts on file with author (Subject H).

¹¹⁷ Transcripts on file with author (Subject H).

¹¹⁸ Transcripts on file with author (Subject CG).

¹¹⁹ Transcripts on file with author (Subjects include CB, DD, DJ, DT, MH, CG, RC, RR, H, G, SB, S, M, L, P, FC, EC, DR, RB, DB, CH, AS, RH, VH, HR, AM, OM, MS, RB, J).

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high regard. One subject indicated that he was recommended because the community believed “yu a represent” that is, “you will represent us well”(translation).¹²⁰ Indeed, some subjects indicated that they derived further respect from fellow community members each time they were selected for the program, and they seemed unwilling to compromise this status.

Subjects spoke not only of their own obligations to community, but also independently of their perceptions of the communal disapproval that would befall them and their families if they did not return.¹²¹ Several specifically referenced a prominent person in the community who had provided them a referral or had introduced them to a recommender who was anticipating their return.¹²² In sum, it was clear that during their time in Canada, subjects maintained contact with a broader circle of community members, who communicated their expectations, which appeared to be relevant to subjects’ decision-making.¹²³

(vi) Views of absconders

The majority had either personal knowledge of or individual contact with a Jamaican guest worker who had gone AWOL.¹²⁴ Notably, all of the subjects emphasized that they did not maintain ongoing relationships with these persons and emphasized that these persons had not come from their communities. Only one person noted that he had personal knowledge of someone in his community who had gone AWOL. All of the interviewees were deeply intolerant of persons who went AWOL and some interviewees seemed offended at the notion that they would ever associate with such persons.

A majority of those interviewed seemed to sympathize with the view that there was a significant minority (but nevertheless, they emphasized a minority) of potential guest workers who sought access to the program, with either an intention to abscond in Canada or at least a willingness to consider the possibility of absconding in Canada.¹²⁵ As one interviewee put it, “[g]rowing up, we all heard of persons who had gone away to farm, and then disappeared.”¹²⁶ (translation). While each of the interviewees contended that they personally never go AWOL or even consider going AWOL, the consensus view seemed to be that persons from “country” (that

¹²⁰ Transcripts on file with author (Subject RH).

¹²¹ Transcripts on file with author Transcripts on file with author (Subjects include WD, HR, AM, OM, MS, RB, J, RC, RR, H, G, SB, S, M, L, P, FC, EC, DR, RB, DB, CH).

¹²² Transcripts on file with author (Subjects CB, DD, DJ, DT, MH, CG, DW, GB, SP, RJ, RB, AS, DT, EQ, CS, WD, HR, AM, OM, MS, RB, J, RC, RR, H, G, SB, S, M, L, P, FC).

¹²³ Transcripts on file with author (Subjects CB, DD, DJ, DT, MH, CG, HR, AM, OM).

¹²⁴ Transcripts on file with author (Subjects include CB, DD, DJ, DT, MH, EC, DR, RB, DB, CH, AS, RH, VH, CG, DW, GB, SP, RJ, RB, AS, DT, EQ, CS, WD, HR, AM, OM, MS, RB, J, RC, RR, H, G, SB, S, M, L, P, FC).

¹²⁵ Transcripts on file with author (Subjects include CB, DD, DJ, DT, MH, DR, RB, DB, CH, AS, RH, VH, CG, DW, OM, MS, RB, J, RC, RR, H, G, SB, G, SB, S, M, L, P, FC, EC).

¹²⁶ Transcripts on file with author (Subject VH)

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is rural Jamaicans) were different from “town persons.”¹²⁷ The key differentiating factor between “town” and “country” persons in subjects’ minds was communal ties. Subjects noted that there was some incongruence between the broader social definitions of illegality with respect to immigration, and the formal definition of illegality, particularly among “town persons.” One noted that among many such persons, illegal immigration was not perceived to be a big deal (“ah nuh nutten” in Jamaican patois).¹²⁸ In the context of this broader ambivalent view of illegality, they seemed to believe that disappearance was entirely understandable, even as they viewed it negatively.

(vii) Group accountability and views of sanctions

The perceived certainty and severity of sanctions appeared to be relevant to decision-making. Several interviewees noted their awareness of the certainty and severity of sanctions in the event that they absconded. Notably, they were far less likely to cite the formal sanctions that were likely to be levied by Canada, than the sanctions that would be levied by the Jamaican government and the loss of respect that they would experience in their communities.¹²⁹

The overwhelming view among subjects was that the MOL’s utilization of collective sanctions was fair, particularly since it was perceived that such sanctions were utilized sparingly. One subject, utilizing a biblical reference pointed out that there were many Old Testament examples of holding the group accountable for the “sins” of a few.¹³⁰ Only one subject questioned the appropriateness of collective sanctioning. Another subject noted that residents of rural communities were far better placed than the authorities to identify and bring pressure to bear on those who were at risk of being non-compliant. Importantly, subjects seemed sympathetic to the rationale that had been offered by MOL officials for their inclination to penalize community leaders who recommended absconders (and thus indirectly the community) by noting that these principles were already built into the program by Canada, since Jamaicans as a whole would risk losing visa slots if AWOL rates become unacceptable. As such, given this

¹²⁷ Transcripts on file with author (Subjects include, S, M, L, P, FC, EC, DR, RB, DB, CH, AS, RH, VH, CB, DD, DJ, DT, MH, CG, DW, G, SB).

¹²⁸ Transcripts on file with author (Subject MH).

¹²⁹ The subjects clearly understood deportation to be a sanction, although one might quite reasonably question, the basis on which deportation might reasonably be construed as a sanction. If a guest worker overstays his visa, and the host country deports him, why isn’t this simply an enforcement of a contractual obligation that the guest worker agreed to (as a condition of his visa) in the first place? This question seems particularly pertinent, particularly in light of the longtime debate in the immigration law literature as to whether deportation should in fact be viewed as a punishment. *See Fong Yue Ting v. United States*, 149 U.S. 698, 730 (1893) (holding that an order of deportation is not a punishment for crime). *Cf. Legomsky, supra* note 11. Legomsky has argued that theories of deportation overlap so substantially with those of criminal punishment that deportation should at least sometimes be regarded as a form of punishment. *See generally* Annmarie Barnes, *Transnational Dislocations: Use of Deportation as Crime Control* (2007) (Dissertation), University of Toronto, Center for Criminology.

¹³⁰ Subject MZ.

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broader constraint that was perceived to be connected to the inherently competitive Canadian labor market, the MOL's actions were deemed to be reasonable.

While subjects did not make specific references to the Jamaica-Canada bilateral arrangements, they seemed generally to recognize that there was a formal process in which Jamaica was being held accountable to Canada. It also seemed clear that they recognized that the rules of the MOL were formulated pursuant to this process. Indeed, several subjects noted that they believed that Jamaica would “embarrass” (i.e. lose face) with the Canadians if too many persons went AWOL¹³¹. These subjects also seemed to believe that this would compromise Jamaica's negotiating position, since they specifically referenced their fears that Jamaicans would lose precious farm work slots. One subject argued that law-abiding Jamaicans had suffered because of the generally poor reputations of Jamaicans overseas, and MOL had an obligation to prevent persons from going overseas who would further contribute to these negative perceptions.

(viii) Concluding Thoughts

Generally, subject interviews support the notion that legal rules are influential in a formalistic sense, but more importantly, as they are mediated by community norms. Community norms are influential, independent of their relationship to formal legal rules. While it is debatable whether many of the sources of obligation are in fact “law,” they are clearly important in the subjects' decision-making matrices.¹³² Both formal and informal sanctions appeared to

¹³¹ This message is clearly communicated in the MOL's orientation literature. MOL orientation booklet on file with author. The relevant subject interviews are H, G, SB, S, M, L, P, FC, EC, DR, RB, DB, CH, AS, RH, VH.

¹³² In exploratory interviews with economists at the University of the West Indies who study migratory networks (including Jamaican guest workers), competing rationales emerged for the differential levels of visa compliance for Jamaican guest workers in Canada and the United States. There are a myriad of competing explanatory factors, which clearly offer a fertile area for further study and of which only a few are offered here. First, there may be differential perceptions among Jamaicans of the comparative attractiveness of the United States and Canada as immigrant-receiving societies, with a clear preference for the United States. Second, it may be broadly perceived that the United States has higher tolerance levels for undocumented immigrants generally. Third, there are more extensive Jamaican networks in the United States. These networks may assimilate undocumented aliens easily, with a corresponding reduction in the real and perceived costs borne by individual undocumented aliens to assimilate in the United States. Moreover, undocumented Jamaicans, who are overwhelmingly dark skinned persons of African descent, may be more easily identified as undocumented aliens in Canada, which has a smaller population of persons of African descent than the United States (although a national view of the black population in Canada may be misleading since there are sizeable populations of African persons concentrated in certain urban centers in Canada)

Fourth, although agricultural guest workers who travel to Canada and the United States appear broadly similar in that they originate from similar communities, have similar skill sets and fill similar agricultural jobs; systemic differences in program design might lead the programs to attract different categories of applicants. That is, the Canadian program might be more attractive to Jamaicans who have some broader set of characteristics that are correlated with risk aversion, who might be more inclined to participate in a program in which the Jamaican government assumes a clear “caretaker” role, while Jamaicans who have some broader set of characteristics that are correlated with a larger risk appetite might be more inclined to choose the United States, where there is more minimal Jamaican government involvement. These characteristics (that are correlated with risk appetite) might bear some relation to the likelihood that individuals will become undocumented. (Please note that I am utilizing the term risk aversion in a general sense and not in the more specific academic sense that it is conventionally utilized in economics and finance to refer to the behavior of consumers in conditions of uncertainty.) Interviews with Darron

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comport with their notions of just deserts. There are clearly persons who play a disproportionate role in the norm enforcement process. These persons are precisely the persons who have been selected by the MOL to screen sanction and generally help ensure compliance.

III. WHY THIS NEW APPROACH WORKS

A. Information Asymmetry

Recall that the primary goal of any immigration law regime is only to admit persons who comport with expressed immigration goals. For guest worker regimes, a primary criterion is short-term tenure. Recall also that typically an applicant's type is not apparent to the screener. Indeed in some instances, even the applicant may be unaware of her type. Consider for example, Applicant X who is genuinely unsure whether or not she would prefer to enter the United States for the short-term or the long-term, but decides to apply for short-term entry. Consider Applicant Y who knows that she wants to enter for the long-term, but given her low skill level, is unable to enter the United States other than as a guest worker. Notably, neither Applicant X nor applicant Y will reveal her type to screeners although their motives are completely different. Applicant X is genuinely not in a position to reveal her type, while Applicant Y will not reveal her type since it will undermine her application if she does so.

The controversy surrounding President Bush's proposal to revise the guest worker provisions of the INA reflects in part a widespread view that the American government is poorly placed to either access or evaluate ex-ante predictive information about which types are really short-term. The Jamaica-Canada case study seems to suggest that by virtue of proximity to their nationals, source-labor countries may be better placed to access information that might be utilized as proxies for visa-compliance. It seems reasonable to generalize this intuition regarding institutional design beyond the particulars of the Jamaica-Canada case study.

Indeed, at first glance, this point seems obvious. After all, the source labor country is more proximate to the predictive information. But there is a more subtle and arguably more important point. Among high-skilled or high-income applicants who seek to travel to the United States temporarily, there are regularly utilized proxies for short term type, such as ties to the home-country as evidenced by financial assets or professional ties. Low-skilled persons are generally not in a position to provide such evidence. In developing countries such as Jamaica, where informality is pervasive in institutions, source-labor governments are better placed to identify proxies for short-term type and to evaluate this proxy information.

For example, in the Jamaican context, MOL officials favor applicants with a history of agricultural work, and show a particular preference for small farmers who work on their own farms. Successful operation of one's own farm is taken to be a proxy for short-term type. Since the formal system of land titling is poor, it is generally not realistic to expect farmers to provide

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documentary evidence that they own farms, much less independent evidence that they operate such farms.

This is where insiders, who are the subject of the next section, become critical.¹³³ Although applicants may not have independent documentation, through insiders, MOL officials are able to access communal networks, which allow them to audit applicant's contentions that they work their own farms. Moreover, references from insiders serve as testimonials to character. These are essentially substitutes for more formal proxies of home-country ties, which the United States is far less placed to either access or evaluate.

B. Insiders

Notably, the program's results appear to be at least partially contingent on the utilization of recommenders who have close ties with a network of persons in rural communities and are in a position to evaluate and share with the authorities their evaluations of visa applicants. In one sense, this finding is unremarkable. These persons appear to be prototypical insiders, in that they have access to inside information that is valuable but is not readily available to others. They have been incentivized by the government to share such information.

Yet, while it is technically accurate to characterize community leaders as insiders, this term does not begin to capture the full extent of the role of community leaders. The government has ongoing relationships with guest workers, which are mediated at least partially through them. Community leaders play a critical compliance-maintenance role through their ongoing relationships which allows them to monitor persons whom they have recommended. Moreover, when persons defect, they play a role in sanctioning. As such, their activities arguably have penumbra deterrence effects. Through their activities, the United States appears to have simultaneously benefitted from an outsourcing of the compliance norm-reification function (with its arguably positive effects on visa-compliance rates).

As such, given the ongoing mediating relationships provided by community leaders, they are prototypical intermediaries in trust.¹³⁴ A striking feature of the inquiry is that both administrator and guest worker interviewees noted that the program will not generally take persons from particular communities if they do not have an effective intermediary in this community. The rationale for this institutional design choice was that community leaders play a much broader role than simply information gathering and evaluation. Interviewees also emphasize their role as the guardians and enforcers of compliance norms, which is the subject of the next section.

C. Intermediaries in Trust as Guardians of Compliance Norms

¹³³ Insiders are referred to as intermediaries in trust in the next section.

¹³⁴ The concept of an intermediary in trust is captured in the following: If Party A and Party B are considering a relationship that will be based at least partially on trust but have no reason to trust each other. A and B may be willing to enter into such a relationship if there is an intermediary (Party C) with whom they both have a trusting relationship (that is, A comes to trust B because both A and B trust C). See COLEMAN, *supra* note 75.

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(1) Connecting the Ethnographic Research to the Theory

There is a longstanding expansive and sometimes unwieldy inquiry into the impact of norms on law abidance arising from interdisciplinary studies of law, anthropology, sociology and economics.¹³⁵ Like much of the law and norms literature, the evidence here cited is largely illustrative and qualitative rather than systematic and quantitative. Although the debate about what is “legal” is beyond the scope of this paper,¹³⁶ subjects feel obligated to follow certain rules, irrespective of formal legal arrangements because of an internalized moral commitment or fear of informal sanctions. They understand that these obligations derive not only from the immigration laws of the labor-importing country (and the corresponding formal sanctions), but also from informal bilateral obligations, rules formulated under source-country administrator discretion and rules enforced by community level leaders. The range of sources of “law” (beyond formal enforceable Canadian and Jamaican law) strengthens not only the legitimacy of law, but also compliance with law. Of all of these sources, communal norms appear to be most influential, since subjects understand them to be constitutive. Communal norms are clearly deeply intertwined with perceptions of legal obligation.

For reasons of analytical simplicity, this article distinguishes between two sets of norms. It appears that there are a group of norms, which are complementary and which are broadly sympathetic to compliance. I refer to these in shorthand as compliance norms. Simultaneously, it also appears that there are a group of norms that are in tension with the first set of norms and are broadly dismissive of compliance. I refer to these as non-compliance norms. However, in a complex social world, we may reasonably intuit that norms are inevitably fluid, contested, complex and at times even contradictory. The experiences of the subjects confirm this intuition. Subjects’ decision-making becomes especially complex when norms cut in different directions.

Surprisingly, immigration law appears largely untouched by the norms scholarship in any of its manifestations. The following section argues that the proposal is effective partly because institutions have been designed to grant esteem so as to leverage the power of intermediaries in trust to augment norms, and in so doing, increase the likelihood of visa compliance.

(2) The role of intermediaries in trust in granting esteem and buttressing norms.

¹³⁵For excellent summaries of the anthropological and sociological contributions to the norms literature see Moore, *supra* note 76 and Abel, *supra* note 76; see also Robert C. Ellickson, *A Critique of Economic and Sociological Theories of Social Control*, 16 J. LEGAL STUD. 67 (1987); Robert C. Ellickson, *Of Coase and Cattle: Dispute Resolution Among Neighbors in Shasta County*, 38 STAN. L. REV. 623 (1986). Richard McAdams’ article contains a discussion of the secondary economics influenced norms literature. See Richard McAdams, *The Origin, Development, and Regulation of Norms*, 96 MICH. L. REV. 338, 339-50 and accompanying notes (1997). See also Robert Cooter, *Expressive Law and Economics*, 27 J. LEGAL STUD. 585 (1998); Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943, 962-91 (1996); Lawrence Lessig, *Social Meaning and Social Norms*, 144 U. PA. L. REV. 2181 (1996); Lawrence Lessig, *The New Chicago School*, 27 J. LEGAL STUD. 661 (1998); Lawrence Lessig, *The New Chicago School*, 27 J. OF LEGAL STUD. 661 (1998); ERIC POSNER, *LAW AND SOCIAL NORMS* (2000) [*hereinafter* POSNER: *SOCIAL NORMS*]; Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903 (1996). For an example of norms enthusiasm in the criminal context, see Dan M. Kahan: *Social Influence*, *supra* note 58.

¹³⁶ Moore, *supra* note 76.

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McAdams contends that “the initial force behind the creation of social norms was the desire individuals have for *respect* or *prestige*, that is, for the relative *esteem* of others.”¹³⁷ Individuals care about how they are evaluated not in the abstract, but in relation to others and as such the competition for esteem is inherently relative. Interviews with subjects confirm the importance of the MOL’s nomination/referral system which identifies participants, by privileging particular categories of recommenders. It is not coincidental that the screening function has been partially delegated to these community leaders. They are effective screeners at least partly because as intermediaries in trust, they care about the esteem in which they are held by government and the larger community. Moreover, they play a critical role in granting esteem within their communities. Notably, some subject interviewees expressed the view that their own prioritization of visa-compliance was driven at least partially by the need to avoid disapproval (which, of course, is the converse of the competition for approval) from their recommenders.

These intermediaries are persons who are not only influential in the community, but who also independently experience intrinsic rewards in learning about these norms and spreading them.¹³⁸ For example, clergy who presumably experience intrinsic rewards in identifying and articulating norms in their sermons, often play this role.¹³⁹ The same is true of social workers, justices of the peace, and so forth. These persons are analogous to those who are known in the norms literature as mavens,¹⁴⁰ namely, persons who exercise particular sway in the norm generation process.¹⁴¹ When persons who have been nominated by these mavens go AWOL or engage in criminal offenses, the government officials discount future recommendations from

¹³⁷ McAdams, *supra* note 136 at 343 (emphasis in the original).

¹³⁸ The sociology literature refers to these persons as “intermediaries in trust.” See COLEMAN, *supra* note 75, chapter 9 for a general discussion.

¹³⁹ For example, some interviewees cited the importance of religious leaders and coaches in guiding their decision-making more generally, and in this area in particular.

¹⁴⁰ Gladwell has offered a theory of how fads reach a tipping point and then cascade. MALCOLM GLADWELL, *THE TIPPING POINT: HOW LITTLE THINGS CAN MAKE A BIG DIFFERENCE*, 140-46 (2000). In Gladwell's terminology, a “maven” finds her participation in the norm-generation process intrinsically rewarding and is incentivized to learning about emerging norms and then sharing that knowledge freely with others. As such, information is spread widely and at a low-cost. *Id.* at 62. A “connector,” on the other hand, contributes to the norm-generation process simply by virtue of her large number of personal contacts and relationships which allows her to “connect” to large numbers of persons. Gladwell's argument is that fads spread through mavens and connectors until they reach a “tipping point.” *Id.* at 255-56. This argument clearly has implications for the norm-generation process. *See also* Randal C. Picker, *Simple Games in a Complex World: A Generative Approach to the Adoption of Norms*, 64 U. CHI. L. REV. 1225, 1228 (1997) (developing game theoretic models of normative cascades); Sunstein, *supra* note 136, at 2035-36 (on the role of norm-entrepreneurs).

¹⁴¹ These persons are referred to in the law review literature utilizing a variety of terms. For example, Sunstein uses the term norm entrepreneurs to speak of actors who promote the change of norms. Sunstein, *Social Norms*, *supra* note 136. Robert Ellickson utilizes a variety of terms to distinguish between the differing roles of those who supply and enforce new norms. *See* Robert Ellickson, *The Market for Social Norms*, 3 AM. LAW & ECON. REV. at 10-12 (2001). For example, “change agents” are relatively early suppliers and enforcers of new norms. *Id.* Within change agents, he distinguishes among several categories of persons including, self-motivated leaders, norm entrepreneurs, and opinion leaders. *Id.* *See also* Lior Strahilevitz, *Charismatic Code, Social Norms and the Emergence of Cooperation on File Swapping Networks*, 89 VA. L. REV. 505 (2003); Lior Strahilevitz, *A Social Network Theory of Privacy*, 72 U. CHI. L. REV. 919 (2005).

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these mavens, and in rare instances, prevent them from providing further recommendations and in so doing, deny their community members access to the program for a limited period. In so doing, they incentivize mavens to screen carefully, and to be judicious guardians of the norms that they have played a role in either generating or articulating. These mavens appear to be prototypical governmental advisors in that they interface with the MOL on behalf of potential guest workers from their communities. Although they do not act as guarantors in the conventional sense, if their advice proves to be faulty, they do experience the following critical loss, namely, credibility.¹⁴² This has significant implications for the ability of mavens to credibly lobby the government on behalf of future potential guest workers.¹⁴³

The critical point is that competition for esteem plays a significant role at all levels of the process. First, recommenders are competing for esteem from the government. Notably, when Jamaican authorities discount the references of recommenders (when AWOL rates become too high), they are essentially “dressing-down” persons of standing in their communities, and in so doing, publicly questioning the value of their judgments. Second, guest workers are competing for esteem from recommenders. Third, guest workers are competing for esteem within their communities. Although guest workers command esteem in their communities (as “man a yard,” or “big man” in Jamaican parlance), this esteem is highly contingent on the guest workers’ ability to play a continuing role as providers.

It is plausible that the granting of esteem is bidirectional between recommenders and guest workers (that is, just as recommenders can deny esteem to guest workers, guest workers can deny esteem to recommenders if, through poor judgment, they compromise their ability to deliver future recommendations to community members). This raises an obvious further question. Is the denial of esteem also bidirectional between guest workers and government and recommenders and government? Theoretically, the denial of esteem may be bidirectional between guest workers and the government, and recommenders and the government. Yet, as a practical matter, guest workers and recommenders appear to lack tangible mechanisms of denying esteem to the MOL officials if they make unfair judgments or if they, through their own poor screening, compromise the overall program since the Jamaican Prime Minister or Cabinet appear unlikely to overturn MOL decisions. However, guest workers and recommenders do, in fact, have a mechanism of denying esteem since the Minister, the most senior official at the MOL, with administrative responsibility, is an elected official. Indeed, the voting booth may represent the ultimate mechanism of denying esteem. As such, the denial of esteem may theoretically also be bidirectional between guest workers and the government.

(3) Setting the Framework for Government Intervention

Interviewees suggested that visa-compliance norms were not prioritized in the broader population and specifically among “town” people. There is convincing evidence that historically visa-compliance norms have not been influential in the context of the broader Jamaican society,

¹⁴² As Coleman notes, “the advisor’s only stock in trade is the credibility of his advice, and if his advice proves incorrect, his loss is the trustworthiness of his judgment in the eyes of those who he has advised.” COLEMAN, *supra* note 75 at 205.

¹⁴³ As such, although they do not experience the financial loss typically associated with a guarantor, they do experience loss in their primary currency, namely, credibility and the loss is nevertheless significant.

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and more specifically in the urban communities that comprise over half of the population.¹⁴⁴ This evidence arises from a variety of sources, including more generally socio-historical studies of Jamaican attitudes to offences committed overseas including immigration offences. Indeed, one commentator utilizes the term “normative inversion,” to capture the “incongruence between social and legal definitions of crime.”¹⁴⁵ This manifests itself in a broader tendency to exempt persons who have committed crimes overseas (including immigration-related crimes), which result in deportation, from negative moral judgments, since their activities are justified as entrepreneurial attempts to survive in a difficult economic climate.¹⁴⁶ Indeed, visa non-compliance was viewed as a relatively benign activity because it was not perceived as compromising a person’s abilities to enter into the cooperative contractual arrangements that are necessary for economic survival. (Indeed, administrators noted that many persons justified their visa non-compliance as a mechanism of ensuring their continuing ability to provide for their families economically).¹⁴⁷

Some interviewees contend that these attitudes manifest themselves in evidence of non-compliant behavior overseas. In the absence of comprehensive research, some preliminary indicators are in order. Jamaica has the highest per-capita rate of deportation from both Canada and the United States in the world,¹⁴⁸ and a recent study provides further preliminary evidence

¹⁴⁴ The anthropologist of law, Sally Merry has contended that law-making in ex-colonial societies, remains deeply influenced by a colonial infrastructure, and the purpose that law had served in such an infrastructure, namely, policing social boundaries, which has undermined the legitimacy of law in the wider population. See Sally Engle Merry, *The Criminalization of Everyday Life*, in EVERYDAY PRACTICES AND TROUBLE CASES 14 (1998) (Austin Sarat et al eds.). It is in this broader historical context that the Jamaican attitudes to law-abidance generally have been contextualized. While there has not been comprehensive survey data on Jamaican attitudes to law-abidance, there is extensive evidence that law-making suffers from a legitimacy gap in urban communities, which manifests itself at least partly in dismissive attitudes towards law-abidance. See ANTHONY HARRIOTT, POLICE AND CRIME CONTROL IN JAMAICA: PROBLEMS OF REFORMING EX-COLONIAL CONSTABULARIES (2000); see also DENIS BENN, THE CARIBBEAN – AN INTELLECTUAL HISTORY 1774-2003. (2004); GORDON LEWIS, MAIN CURRENTS IN CARIBBEAN THOUGHT –THE HISTORICAL EVOLUTION OF CARIBBEAN SOCIETY IN ITS IDEOLOGICAL ASPECTS, 1492-1900 (1983) (Kingston: Heinemann Educational Books); BRIAN MEEKS, NARRATIVES OF RESISTANCE: JAMAICA, TRINIDAD, THE CARIBBEAN,(2000).

¹⁴⁵ HARRIOTT, *supra* note 145. Harriott’s work bears similarities to the landmark ethnographic study that was conducted by Elijah Anderson in Philadelphia. See ANDERSON, *supra* note 13. See also MEEKS, *supra* note 145. Randall Kennedy and Regina Austin have offered comparable arguments to account partially for high levels of crime in American urban centers. RANDALL KENNEDY, RACE, CRIME AND THE LAW (1998); Regina Austin, the Black Community, Its Lawbreakers and a Politics of Identification, 65 S. CAL. L. REV. 1769 (1992).

¹⁴⁶ HARRIOTT, *supra* note 145.

¹⁴⁷ *Id.*.

¹⁴⁸ This information was garnered from an interview with Annemarie Barnes who is the Chief Technical Officer in the Ministry of National Security in Jamaica; see also Annemarie Barnes & Andrea McCalla, A Study on Criminal Deportation, Prepared for the Ministry of National Security and the Planning Institute of Jamaica (2006). The figures for the United Kingdom are similarly high.

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that high proportions of Jamaicans commit immigration-related offences in the United States.¹⁴⁹ Unlike other Latin-American countries whose nationals have high rates of immigration-related offences, very few Jamaicans enter as undocumented aliens.¹⁵⁰ Virtually all Jamaicans who enter the United States are visa-recipients who have presumably been pre-screened.¹⁵¹ These high rates of visa non-compliance have been a source of ongoing concern to successive governments, who contend that such behavior undermines the likelihood of overseas travel by other Jamaicans and in so doing threatens to compromise remittances, which play a critical role in the economy.¹⁵² The institutional design innovations discussed here arise in part from a concerted effort to develop a program which screens effectively and holds non-compliant Jamaicans accountable.

In this context, it is significant that this study suggests that among a certain subset of guest workers, the social meanings attributed to immigration violations are entirely different from the indifference with which they appear to be treated in other sections of the society. Among the subjects in this study, there was no evidence of “normative inversion” as manifested in dismissive attitudes to non-compliant behavior. There was minimal evidence of a tendency to discount the seriousness of going AWOL. Rather, workers were strikingly consistent in their moral condemnation of those who did not comply with visa terms who were alternatively described as “selfish” “foolish” and “wutless” among other condemnatory descriptions. They view their own decisions to comply not just as rational economic decisions, but as evidence of their moral fiber, which distinguishes them from those who go AWOL.

(4) Government signaling through institutional design

There is little doubt that the symbolic meanings attributed to immigration violations are decidedly negative in the communities from which the interview subjects originate. Eric Posner’s account of the development and evolution of norms may be helpful in this instance.¹⁵³ Posner

¹⁴⁹ For a broader discussion of high levels of non-compliance by Jamaicans with immigration laws, see Madjd-Sadjadi, Z., and Dillon Alleyne, *supra* note 83.

¹⁵⁰ Jamaica and other Caribbean countries are often referred to as part of the larger Latin-American region given its proximity to Latin American neighbors. Other Latin-American countries whose nationals appear to have very high rates of non-compliance with immigration laws as indicated by rates of deportation include, Honduras, El Salvador, Columbia, Mexico, Guatemala, Haiti and the Dominican Republic, see David Brotherton, *The Deportees*, NACLA REPORT ON THE AMERICAS XXXVII (No. 2): 8-11.(2003); Donna DeCesare, *Deported 'Home' to Haiti*, NACLA REPORT ON THE AMERICAS XXXII (No. 3):6-10 (1998).

¹⁵¹ See Madjd-Sadjadi, Z., and Dillon Alleyne, *supra* note 83.

¹⁵² A former Jamaican Prime Minister has argued that this tendency to discount deportation-related offences has had profoundly negative implications for Jamaica’s social and economic development. See Statement of the Honorable Prime Minister P.J. Patterson, Opening of the Twenty-Fifth Meeting of the Conference of Heads of Government of CARICOM on 4 July 2004, in Grenada (on file with author); see also Marc Lacey, *No Paradise for Criminals Deported to Jamaica*, NEW YORK TIMES, March 21, 2007; Keynote Address of Jamaican Prime Minister, the Most Honorable Portia Simpson-Miller to the World Bank 20/20 Conference on the Caribbean, Washington, D.C., June 2007 (on file with author).

¹⁵³ Eric A. Posner, *Symbols, Signals, and Social Norms in Politics and the Law*, 27 J. LEGAL STUD. 765 (1998).

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prioritizes the link between symbols (and symbolic behaviors) and norms since “people’s effort to show respect for them (i.e. symbols) lead to significant forms of conformity that can be described as social norms.”¹⁵⁴ Posner utilizes a cooperative game model in which persons engage in symbolic behaviors to encourage others to cooperate with them by sending signals. Prioritizing a particular norm allows a person to signal to the community that he is a “good type” who seeks to enter into a cooperative relationship.

Although sending a signal entails costs, those who value the gains that are associated with cooperative relationships will invest in sending signals to provide evidence of their “type.” If enough persons invest in sending signals, the result is what Posner terms a “signaling equilibrium,”¹⁵⁵ in which several outcomes may occur. For example, the good types may consistently send signals and thus match up with other good types (thus distinguishing themselves from the bad types, who choose not to send the signal). There may also obtain instead a “pooling equilibrium” in which both good types and bad types have similar assessments of the relative costs and gains associated with signals, and as such, either all choose to invest or all choose not to invest in signaling leading to no real differentiation between the types.

In this cooperative game approach, a state seeking to influence norms has several choices, which appear to have been utilized in varying degrees by the Jamaican officials. First by subsidizing the cost of sending a “good type” signal and increasing the cost of sending a “bad type” signal, the state can augment the good signals, which accompany compliance norms.

Indeed, this is precisely what the Jamaican government did by providing clear esteem-based (and by extension, economic) benefits to “good types,” and simultaneously highlighting the disadvantages of being a “bad type.” When persons become guest workers, they significantly improve their economic standing and there are clear spin-off effects for the broader community. By publicly advertising that “good types” may be eligible for a range of benefits (including recognition as recommenders), the government may also have affected the benefits that norm entrepreneurs gained from both sending signals and constructing new signals (that are supportive of visa compliance). Moreover, through communal networks, the government publicizes its knowledge of defectors, while emphasizing that the MOL was likely to look more skeptically at other applicants from the same community. Through such repeated public denunciation of defectors, it appears that the government imposed a real cost on defectors and their families. Government signaling appears to have been particularly influential in certain small rural communities, since it is virtually impossible to keep designation as a “bad type” confidential in these communities.

This governmental action may have had a secondary important impact. The government may have influenced beliefs about the relative prevalence of both good and bad types. Indeed, this may have been reflected in the general view among interviewees that while there were bad

¹⁵⁴ POSNER; SOCIAL NORMS, *supra* note 136.

¹⁵⁵ *Id.*

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types in other communities, such bad types did not generally belong to their communities. They were generally likely to see their neighbors consistently as “good types.”¹⁵⁶

IV. ANSWERING OBJECTIONS: THE HALLIBURTON QUESTION, VERTICAL OUTSOURCING AND IMPLICATIONS FOR INSTITUTIONAL DESIGN

A. Anticipating Critiques and a Minimalist Model

Any proposal which advocates even the partial outsourcing of screening and sanctioning functions, which have traditionally been considered to be at the core of the immigration power, is likely to be controversial. In the larger public political discourse, opponents of such measures point to what they perceive to be instances of “outsourcing,” in immigration policy, which proved unsuccessful.¹⁵⁷ The potential for corruption is clear.¹⁵⁸ Even when corruption is not clearly pervasive, critics could also point to modern day unsuccessful instances of programs that are regularly branded as examples of “outsourcing.” For example, to the extent that the government has at least partially “outsourced” the post-entry verification of immigration documentation to employers, this system also appears to have been ineffective.¹⁵⁹ Thus, the term “outsourcing” has taken on a pejorative tone, particularly against a backdrop in which immigration and national security are deeply intertwined.

These critiques all implicate the potential disadvantages of relying on an entity external to the United States as even a partial substitute for performing functions that have traditionally been conceived as constituting the core of the immigration power. Loosely speaking, in the model proposed, the source-labor government would be acting as an “agent” for the American government. In turn, the community level screeners would be acting as agents for the source-labor government. I use the term agent broadly, to mean any relationship in which one entity engages another to perform a service under circumstances that involve delegating some

¹⁵⁶ In so doing, at the risk of stating the obvious, by imposing group accountability rules (even indirectly), the government is also increasing the (perceived) payoff that both senders and receivers will gain from cooperation.

¹⁵⁷ The CNN commentator, Lou Dobbs is particularly well known for a pejorative use of the term outsourcing generally and more specifically in the immigration context. *See* Borowitz *supra* note 53. For a similarly critical use of the term outsourcing in the immigration context in Congressional testimony *see*, Statement of Mr. Douglas E. Lavin Regional Vice President North America International Air Transport Association, Committee on House Homeland Security Subcommittee on Border, Maritime and Global Counterterrorism, Congressional Testimony, July 16, 2008.

¹⁵⁸ Typically, the number of qualified applicants (i.e., people with the requisite work ethic and history of law abidance) will exceed the number of visa slots. Therefore the potential rent-seeking problems are apparent in that community leaders will have powerful incentives to choose, within the group of qualified applicants, those who are willing to offer bribes. The community leaders may still be able to keep their AWOL rates low, thus assuring that they will retain their positions, and they can earn some extra income in the process. So, they might figure, why not take a bribe? For a general discussion of the implications of corruption in guest worker programs see PRITCHETT, *supra* note 6.

¹⁵⁹ *See* Jacoby, *supra* note 29.

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discretion over decision-making to the service-performer.¹⁶⁰ In light of the likely skepticism, an examination of the incentives of the key players to fulfill particular functions is critical to the plausibility of the proposal. The aim of this section is to provide a "thin" minimalist model, which abstracts the key features of the program from its "thicker" aspects so as to bring into focus the incentive issue.

In its thicker form, the model involves two levels of vertical outsourcing. First, there is the partial transfer of screening and sanctioning functions from one state to another. The second vertical transfer of responsibilities involves the devolution of such functions down the "food chain" from the source-labor government to community leaders (or "intermediaries in trust" in the model's thicker version) to individual relationships at the level of the community.

The thickness of the model as it currently stands, with its utilization of two levels of vertical outsourcing and the apparent importance of inter-governmental relationships, may obscure which entities are actually integral to screening and sanctioning. The key entities in the model are those who have not only inside knowledge (which aids in screening), but also individual level relationships (which aid in sanctioning).

More specifically, the persons who have inside knowledge are community members. These persons have individual level relationships that allow them access to predictive information regarding the likelihood that someone will comply with a visa that is not readily available to others, and an accompanying ability to sanction those who do not comply with rules. The thick model refers to these persons as intermediaries in trust. I will refer to the community level person with inside information as Actor A.

In a minimalist version of the model, all that is really needed is for an incentive to be created for Actor A to screen. To do so, one could imagine that the model would simply create a mechanism of awarding something of value to Actor A, while simultaneously implicitly creating a sanction by threatening to take this valuable item away.

Consider, for example, that the entity that awards something of value is Actor X. In the thicker model (namely the Jamaica-Canada program as it currently stands), the Jamaican government performs the function of Actor X. In the thicker model, the mechanism of awarding a prize to Actor A is the official designation by Actor X of Actor A as a person of status in the community. The sanction is implicit in that Actor X may "dress down" Actor A by withdrawing

¹⁶⁰ In the economics literature an agency relationship is defined as "a contract under which one or more persons (the principal(s)) engage another person (the agent) to perform some service on their behalf which involves delegating some decision making authority to the agent." Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305, 308 (1976). This definition is much broader than the common law definition in which agency is the "fiduciary relationship that arises when one person (a 'principal') manifests assent to another person (an 'agent') that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents so to act." *RESTATEMENT (THIRD) OF AGENCY* § 1.01 (2006).

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the designation as a person of status. The same point can be made with respect to sanctioning. Actor A is best placed to sanction her fellow community members because she has the individual-level relationships that can be leveraged to shame or stigmatize a visa-violator. Here again, Actor X simply needs to incentivize Actor A to sanction.

There may also be devolution of this process of incentivization "down" the "food chain" creating a "chain" of incentivization. For example, Actor A may recognize that there is another person with better access to inside information concerning a potential visa recipient. As such, in the same way that Actor X created an incentive for Actor A, Actor A may in turn incentivize Actor B to aid in screening. Of course, Actor B may then engage Actor C, if Actor C has even better access to inside information. The analogous relationship in the thicker model is when the Ministry of Labor designates a parliamentarian who then designates a local government representative who in turn designates a community-level clergy, with each person having even better access to inside information. Notably, Actor A may also incentivize Actor B (and so on) as an intermediary in the sanctioning process.

Even as there may be a "chain of incentivization," Actor X need only deal with Actor A, with Actor A assuming responsibility for Actor B (and Actor B assuming responsibility for Actor C and so on). There are clear analogies to a principal-agency relationship in contract, where Actor X engages Actor A as the general contractor. Actor A may then choose to engage subcontractors, but Actor A retains primary responsibility and the buck stops with her.

B. Game Theoretic Analogies

(1) Background

The relationship between Actor X and Actor A calls to mind a classic iterated prisoners' dilemma, in which the game is played repeatedly. In the classic form of a prisoners' dilemma, rational choice leads each of the two players to defect even though each player's individual reward would be greater if they cooperated.¹⁶¹ As in broader game theory, each player is strictly

¹⁶¹ The classic prisoners' dilemma is characterized as follows: Two suspects, A and B, are arrested. The prosecutor has insufficient evidence to convict either of them, and offers each of them individually the same deal: if one betrays the other and the other does not, the person who betrays will go free and the person who remains silent will receive the full long sentence. If both remain silent, both prisoners will receive a short sentence. If each betrays, each receives an intermediate sentence. Each prisoner must make the choice of whether to betray the other suspect or to remain silent. However, neither prisoner knows for sure what choice the other prisoner will make. So this dilemma poses the question: How should the prisoners act?

The dilemma can be summarized as follows:

	Prisoner B Stays Silent	Prisoner B Betrays
Prisoner A Stays Silent	Each serves a short sentence	Prisoner A serves a long sentence Prisoner B goes free

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concerned with maximizing her own payoff; however, one player will always maximize her payoff by playing defect irrespective of what the other player does. As such, cooperation is overwhelmed by defection, so that the resulting equilibrium for the game is for all players to defect.

In contrast to a conventional prisoners' dilemma, in which defection is always more beneficial than cooperation, in an iterated prisoners' dilemma, which is played over several games, each player has an opportunity to sanction the other player for prior non-cooperative behavior. Cooperation may arise as an equilibrium outcome since the incentive to defect may be outweighed by the threat of sanction.

(2) Outsourcing to a high level actor

The prospect of the United States dealing with hundreds of screeners (in what can only be described as retail as opposed to a wholesale arrangement) imports extraordinary logistical and political challenges, particularly in a foreign environment.¹⁶² In light of this, it seems reasonable that the United States would outsource these responsibilities to some sort of high-level actor, which functions in a general contractor role and assumes responsibility for the hundreds of other actors who are necessary to this process.

Accordingly, it seems intuitively clear that a high-level actor is necessary to the process, with the United States stipulating certain criteria for this high-level actor to meet. Under a traditional rational choice view, the model would work as long as it is able to create incentives for those with inside information to screen and sanction. While a private actor may be properly incentivized to fulfill this function utilizing particular contractual structures and legal remedies,¹⁶³ what is less clear is that a government may be so incentivized.

Prisoner A Betrays	Prisoner A goes free Prisoner B serves a long sentence	Each serves an intermediate sentence
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The dilemma arises because both prisoners only care about minimizing their own sentence. Each prisoner has two and only two options: either to cooperate with his fellow suspect and stay quiet, or to defect and betray his fellow suspect in return for a lighter sentence. The outcome of each choice depends on the choice of the other suspect, but each prisoner must choose without knowing what his fellow suspect has chosen. See JOEL WATSON, *STRATEGY: AN INTRODUCTION TO GAME THEORY*, Chapter 1 (2002) for a good summary for the non-technical reader.

¹⁶² Indeed, there are clear analogies to certain aspects of the United States current consular relationships. It is precisely such challenges that have led the United States to rely heavily on outsourcing in its overseas consular arrangements. Notably, there is a burgeoning literature on the difficulties that the United States has faced in its consular arrangements overseas, in which commentators have noted the difficulties associated with the United States managing myriad retail relationships in a foreign environment. See ZOLBERG, *supra* note 44.

¹⁶³ Lewis's text contains a good general summary of such measures. See RICHARD LEWIS, *CONTRACT SURETYSHIP: FROM PRINCIPLES TO PRACTICE* (2000).

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(3) The Finite Game

Again utilizing game theoretic analogies, consider a hypothetical in which the United States contractually engages a private actor to conduct the screening function. Unless such a contractual arrangement is made in perpetuity, such a relationship necessarily approximates a finite game. In any given round a private actor could breach the contract, resulting in an immediate reward, namely, the avoidance of incurring the costs associated with screening (presumably even as she continues to extract pre-negotiated contractual rent from the United States). Moreover, the temptation to screen poorly may be amplified since the detection of such a breach is necessarily delayed by the nature of the transaction. That is, the contractual breach will only become evident several months into the future when the guest worker who has not been properly screened in accordance with the contractual terms absconds. Although there are clearly a variety of ways to structure contracts so as to minimize the incentive to defect (e.g. deferred compensation), in each round of the game, the question of defection necessarily arises.

The literature examines the interaction between immediate gains and long-term incentives to fulfill contractual obligations through the motif of a repeated or iterated game. The game theoretic analogies lead to the following basic insight. As long as the firm is extracting a sufficient rent from the United States government, and the firm believes that the relationship will continue in the long-term so that reputational issues are at stake, it has an incentive to fulfill its contractual arrangements.¹⁶⁴ That is, cooperation generally dominates defection.

However, any contractual arrangement will necessarily be time-limited. The literature predicts that in the final round of a finite game, there is no future ability to sanction a non-cooperative party and as such reputational issues are no longer at stake. As such, the final round will approximate a classic prisoner's dilemma, in which the players will defect even if this outcome is pareto sub-optimal. As such, unless there are sufficiently strong independent reasons for reputational issues to dominate in the final round of the game (such as separate contractual arrangements with the US government or the prospect of arrangements with other governments which depend on reputation), in the final round, the firm will always have an incentive to defect. However, the incentives to defect may be minimized and there is an extensive literature on contractual structures and legal remedies, including performance bonds, which minimize the likelihood of defection by private actors.¹⁶⁵

¹⁶⁴ Incorporating the discount factor to models of repeated games, the literature predicts that the incentive to cooperate will overwhelm the incentive to defect if two primary factors are present. First, if the discount factor is sufficiently high, the players will care about future outcomes. (Indeed, if the discount factor is sufficiently high, it is almost equivalent to having a payoff effect). Second, the game must be repeated a sufficient number of times so that the threat of retaliation is sufficiently real so as to raise reputational issues. See Watson, *supra* note 161, Chapter 1, for a good summary for the non-technical reader.

¹⁶⁵ See LEWIS, *supra* note 161, Chapter 1. There is an extensive literature on the challenges that governments face in such contracting relationships. The best discussion of the issues at stake for the non-technical reader is contained in Macho-Stadler, Ines and J. David Perez-Castillo, An Introduction to the Economics of Information Incentives and

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The following section elucidates why the incentives to defect may be minimized for a particular type of governmental actor with specific traits that augment the costs of defection. The point is not that a governmental actor may perform this function better than a private sector entity; rather the contention is simply that for a particular type of governmental entity, the costs of defection may be very high. Given the literature on comparative agency costs in government versus the private sector,¹⁶⁶ it seems counter-intuitive to contend (in an environment in which even outsourcing to the private sector is dismissed as a “Halliburton strategy”) that a foreign government may be properly motivated to screen. On the contrary, we might think that defection is particularly likely at the end of an outgoing administration (since the reputation costs would be borne by the successor government).

(4) Governmental actor and the Perpetual Game

Contracts (1997). A more technical discussion is included in McAfee R. Preston and John MacMillan, *Bidding for Contracts: A Principal-Agent Relationship*, THE RAND J. OF ECON. 17(3):326-338 (1986).

Several Gulf states outsource the screening role to private actors. Since they are required to post performance bonds, they in turn require guest workers also post such bonds. For such a critique of the operations of programs which utilize private sector screeners particularly in the Gulf States, see DOUGLAS S. MASSEY, JOAQUIN ARANGO, GRAEME HUGO, ALI KOUAOUICI, ADELA PELLEGRINO, AND J. EDWARD TAYLOR, *WORLDS IN MOTION: UNDERSTANDING INTERNATIONAL MIGRATION AT THE END OF THE MILLENNIUM*, Chapter 5 (1999). Without appropriate controls, some commentators have argued that a private outsourcing approach may result in human rights abuses.

¹⁶⁶ A good summary of this literature is contained in Andre Shleifer, *State versus Private Ownership*, 12 J. ECON. PERSP. 133 (1998) and more generally in Daryl Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345 (2000) (acknowledging the difficulties in incentivizing government employees, particularly low level officials); see also Ronald A. Cass, *Damage Suits Against Public Officers*, 129 U. PA. L. REV. 1110, 1164-68 (1981); John C. Jeffries, Jr., *In Praise of the Eleventh Amendment and Section 1983*, 84 VA. L. REV. 47, 72, 75-76 (1998).

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If a game is infinitely repeated, the likelihood of cooperation in any given round of the game is high because reputational effects dominate.¹⁶⁷ Under particular conditions, the bilateral arrangements between the United States and another government may approximate a relationship in perpetuity. This is particularly true with proximate developing countries that have significant economic social and national security ties with the United States, which leads to a high degree of interdependence. This high degree of dependence on the United States makes the cost of defection very high. This will undermine the incentive to defect in the final round even if the bilateral arrangement is finite.

This point is borne out by an extensive literature on inter-state incentives to cooperate, which argues that classical international relations theory has underestimated "the varieties of cooperative behavior possible within ... a decentralized system."¹⁶⁸ The contention is that classical international relations theory (with its disproportionate focus on the threat of force in constraining state actions), has not understood "complex interdependence" in inter-state relations

¹⁶⁷ The literature contends that if a game is infinitely repeated, cooperation may be a sub-game perfect Nash equilibrium although there are alternative equilibrium outcomes. A quick background to this statement is as follows: In game theory a sub-game is a subset of a larger game which when viewed in isolation, constitutes a game in its own right. As such, a game may be broken into a series of sub-games, which contain a sub-set of all the available choices in the main game. Notably, the literature predicts that the cooperation that arises in the larger game is derivative of a series of cooperative equilibria that have arisen in the sub-games.

In the literature, the Nash equilibrium is a solution concept of a game involving two or more players, in which no player is able to gain by a unilateral change in strategy. That is, if each player has chosen a strategy and no player can benefit by changing her strategy while the other players' strategies are unchanged, then a Nash equilibrium results from the current set of strategy choices and the corresponding payoffs. More simply put, if Actors X and A are the principal players, A and X are in Nash equilibrium if A has made the best decision, taking into account X's decision, and X has made the best decision taking into account A's decision.

In a refinement of the Nash equilibrium, the literature has demonstrated that if the game is played in perpetuity, cooperation may become a sub-game perfect Nash equilibrium. More specifically, one of the principal uses of the notion of a sub-game is in the solution concept sub-game perfection, which stipulates that equilibrium strategy profile for the larger game necessarily involves a Nash equilibrium in every sub-game. That is if the players played any smaller game that consisted of only one part of the larger game and their behavior represents a Nash equilibrium of that smaller game, then their behavior is a sub-game perfect equilibrium of the larger game. See WATSON, *supra* note 161, Chapter 4 for a good summary for the non-technical reader.

¹⁶⁸ GRAHAM EVANS, THE PEGUIN DICTIONARY OF INTERNATIONAL RELATIONS (2000); Daniel Lutzker, *Internationalism as a Predictor of Cooperative Behavior*, J. OF CONFLICT RES. 4 (1960), 426-430; Charles McClintock et al, *Internationalism-Isolationism: Strategy of the Other Player and Two Person Game Behavior*, J. OF ABNORMAL AND SOC. PSYCH., 67 (1963): 631-636.; Snyder, Glenn, *Deterrence and Power*, J. OF CONFLICT RES. 4 (1960): 163-178.

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in which states' interests are aligned on multiple fronts.¹⁶⁹ For this reason, modern states are less inclined to behave in a non-cooperative manner (i.e. defection) than has been traditionally understood. Nowhere is this truer than in relations between proximate developing countries and their more powerful counterparts. While one should resist the temptation to characterize such developing countries as “helpless pawns in the game of international affairs,”¹⁷⁰ their “foreign policy and international relations are largely defined by more powerful actors and situations.”¹⁷¹ The incentive for a small developing country to fulfill contractual arrangements with more powerful partners in any given round (including a final round) is likely to be high because the implicit possibilities of retaliation in multiple arenas is also high.¹⁷²

C. Other reasons for the utilization of a government actor

(1) Local conditions

There are other reasons that a government may be uniquely placed to fill the role of Actor X. The Jamaica-Canada study suggests that by virtue of proximity to their nationals (and their ability to incentivize insiders to share information), source-labor countries are better placed than labor-importing countries to access information that might be utilized as predictive proxies for visa-compliance. Source-labor governments are well placed to identify persons with inside information and hold them accountable for providing accurate information because they are already likely to interact with these persons for a variety of reasons. For example, in Jamaica community leaders play a crucial role in the distribution of educational and health benefits in hard to reach rural areas. Moreover, these persons are unlikely to compromise their governmental relationships by breaching, when they have ongoing independent reasons to maintain good relations with government.

¹⁶⁹ ROBERT O. KEOHANE AND JOSEPH S. NYE, *POWER AND INTERDEPENDENCE: WORLD POLITICS IN TRANSITION* at 23 (1977), *see also* ROBERT O. KEOHANE, *AFTER HEGEMONY: COOPERATION AND DISCORD IN THE WORLD POLITICAL ECONOMY* (1984); Robert O. Keohane and Lisa L. Martin, *The Promise of Institutional Theory*, INT. SEC. 20, no. 1 (1995), 47.

¹⁷⁰ Diana Thorburn, *The Patch and the Backyard: Caribbean and Pacific Small Islands*, SOC. AND ECON. STUD. 56: 1 & 2 (2007) at 240; *see also* SMALL STATES IN WORLD POLITICS: EXPLAINING FOREIGN POLICY BEHAVIOR (2003) (Jeanne, A.K. Hey ed.).

¹⁷¹ *Id.*, discussing SECURITY IN OCEANIA IN THE 21ST CENTURY (Eric Shibuya and Jim Rolfe eds, 2003).

¹⁷² Notably, this is not only the case with Jamaica, but with many other developing countries including the other top eight countries labor-exporting countries for undocumented aliens to the United States. The other members of the “top eight” are Honduras, El Salvador, Columbia, Mexico, Guatemala, Haiti and the Dominican Republic, *see* David Brotherton, *The Deportees*, NACLA REPORT ON THE AMERICAS XXXVII (No. 2): 8-11.(2003). Indeed, multilateral development institutions have noted that developing countries place great stock on the access that their nationals have to developed markets because remittances constitute such a significant percentage of GDP in so many countries. This is significant because developing countries are aware that their nationals are fungible and can be replaced with nationals from another country in a competitive globalized labor market. For a discussion of the economic impact of remittances and the global competition among countries to provide access to “first world” markets for their nationals so as to augment remittances, *see* GLOBAL ECONOMIC PROSPECTS 2006, *supra* note 6.

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But there is a more subtle and equally important point. In Jamaica informality is pervasive in institutions and formal predictive indicators are often difficult not only to obtain but also to evaluate. The Jamaican government is well placed not only to collect such information, but also to evaluate informal proxies for visa-compliance. A source-labor country may be particularly helpful if these proxies vary according to local cultural conditions.

(2) Government may be uniquely placed to utilize esteem-based incentives

To this point, in this section, I have utilized the term incentive in the traditional sense, namely, to connote incentives appealing to self-regarding preferences.¹⁷³ The thick model is premised on the utilization of esteem-based incentives, which are other-regarding.¹⁷⁴ Government officials clearly believe that other-regarding incentives are influential in these communities, and the interviews with subject guest workers appear to confirm this impression. These other-regarding incentives include a desire to be (or to be perceived as) patriotic, communal-minded or fair. Such incentives are sometimes loosely termed “intrinsic motivation.”¹⁷⁵ The question arises: what class of incentive might be appropriate for Actor X to offer to Actor A?

My comments in this regard are only preliminary; this is clearly a fertile area for further research. It is noteworthy that all of the Jamaican government officials who were interviewed insisted that financial incentives would not only be inappropriate, but also counter-productive. They clearly distinguished reputational incentives from financial incentives, which were described as crass. Moreover, the concern was that financial incentives might simultaneously be insulting to many community leaders.

This strongly held belief is striking in light of the academic literature which suggests that policies which are designed to exploit self-regarding preferences to achieve public ends may sometimes undermine precisely the public ends that they seek to augment. Surveying the literature, Bowles has cited repeated instances of such failures when traditional policies which seek to harness self-interest compromise what he terms “the beneficial effects of intrinsic

¹⁷³ An individual’s preference scheme is self-regarding if he or she “cares only about the amount of goods and services that he or she consumes.” DONALD E. CAMPBELL, *INCENTIVES, MOTIVATION AND THE ECONOMICS AND INFORMATION* at 26 (2006).

¹⁷⁴ A definition which succinctly captures “other-regarding” preferences is as follows: “The theoretical literature on other-regarding preferences has focused on three departures from the standard self-interest model. In addition to the material resources allocated to him, a person may also care about (i) the material resources allocated to other agents in relevant reference group, (ii) the fairness of the behavior of the relevant reference agents and (iii) the “type” of reference agents i.e. whether the agents have selfish, altruistic, spiteful or “fair-minded” preferences.” *Handbook OF THE ECONOMICS OF GIVING, ALTRUISM AND RECIPROCITY VOLUME I* (Serge Christophe Kolm, Jean Mercier Ytier eds. 2006).

¹⁷⁵ Samuel Bowles, *Social Preferences and Public Economics: Are good laws a substitute for good citizens?*, Santa Fe Institute and Università degli Studi di Siena at 1.

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motivation and reciprocity as well as civic virtues such as a concern for fairness and a desire to uphold social norms.”¹⁷⁶

It is notable that Jamaican government interview subjects believe that similar risks may be present in the Jamaican context. They also believe that because of their myriad interlocking relationships with community level screeners, government is uniquely well-placed to utilize esteem-based incentives.

D. Tweaking bilateral arrangements to take account of the normative environment in source-labor communities

The case for partial-outsourcing to the source-labor country is not dependent on the presence of visa-compliance norms. To underscore the point, I appropriate a rough metaphor that was aptly utilized by one of the interview subjects. If the non-presence of visa-compliance norms signifies a population of “bad apples,” the source-labor country is still better placed to identify the “best apples” in the population of “bad apples.”

Indeed, the source-labor country’s role in screening and sanctioning will necessarily be more modest if significant portions of the community from which guest workers originate are already sympathetic to visa compliance norms. In these circumstances, the source-labor country need not play a critical role in actually molding the norms since presumably they already have a significant influence on compliance decisions. Rather, all that is needed is for the source-labor country to simply play a facilitating (but nevertheless important role) by identifying guest workers who the labor-importing country is less well-positioned to identify. That is, one is more likely to find a “good apple” in a population of “good apples,” but the source-labor country is still better positioned to find this “good apple” than the United States.

However, if visa-compliance norms are not present or latent, simply outsourcing the screening function may not suffice. Although source labor-countries may still be better placed to screen, their success rates may be compromised by the absence of a sufficient pool of applicants who take compliance seriously. That is, the best of in a pool of “bad apples” may still not be a “good apple.” As such, it is in the interest of the labor-importing country to augment the pool of applicants who take visa compliance seriously. To push the rough metaphor further, it benefits the United States to increase the representation of “good apples” in the pool so as to increase the overall likelihood that a “good apple” will be selected.

¹⁷⁶ Bowles suggests that the utilization of incentives appealing to self-regarding preferences may pervert intrinsic motivation for myriad reasons including reasons having to do with how incentives “frame” appropriate behavior (which he refers to in shorthand as “framing,”), how incentives communicate “information about intent or type” and how incentives affect perceived “self-determination.” *Id.* at 5. With respect to “framing” he notes that “[i]ncentives may signal appropriate behavior shifting the frame from ethical and other-regarding to instrumental and self-regarding,” *Id.* Moreover, “because the incentives provide a signal of the cost (to another) of the individual’s behavior, in which case self-regarding behavior modified by the incentive would seem appropriate behavior.” *Id.* With respect to “information about intent or type,” he notes that “[e]xplicit incentives may provide a negative signal about the principal’s type or beliefs, either in the form of lack of concern about the agent’s well being or lack of trust.” *Id.* Finally self-regarding incentives may undermine perceived “self-determination” because “where intrinsic motivation is present, incentives may ‘overjustify’ the activity and reduce the individual’s sense of autonomy.” *Id.*

Outsourcing Immigration Compliance

CONCLUSION

The article's partial-outsourcing normative deterrence proposal offers a theoretical claim and an empirical claim. The theoretical claim is that partially outsourcing both screening and sanctioning to source-labor countries and incentivizing these countries to use group accountability may enhance both screening and sanctioning, particularly if source labor countries are able to draw on norms in source-labor communities to improve deterrence. The empirical claim is that a particular legal approach, namely a bilateral labor arrangement, which utilizes outsourcing and group accountability to augment communal incentives to select and sanction, has helped foster both improved screening and deterrence.

Recognizing that modern aliens live increasingly transnational lives, the article critiques the historical uni-national approach to immigration law. The article posits that the United States should enter into bilateral labor agreements as a mechanism of mitigating the aforementioned asymmetry. Under such an approach, the source-labor country could then leverage its proximity to its nationals to aid in the process of screening and sanctioning. Utilizing group accountability principles, the communities from which guest workers originate, that have access to inside information about potential guest workers, can be incentivized to aid in both the screening and the sanctioning process. In a competitive globalized context in which developing countries prize the access that their nationals have to the American labor market, the repeated game nature of their interactions with the United States increases the likelihood that they will meet their screening and sanctioning commitments. Finally, this article contends that if visa-compliance decisions are norms-based, guest workers are more likely to be compliant if the authorities design legal rules which augment compliance norms that are already present in source-labor communities and incentivize community members to reinforce them.