

EIGHT MYTHS ABOUT IMMIGRATION ENFORCEMENT

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The debate over immigration enforcement has pitched through some striking twists and turns over recent years, and the roller coaster has certainly not completed its course. The mid-1990s were marked by political competition to show which party could be the toughest enforcer, producing crackdown legislation in 1996¹—massive, showy, and tough-sounding, productive of real individual hardship, but, as we now know, ineffectual in controlling illegal migration.² Well before its effectiveness could be tested, however—in fact, shortly after the reelection of President Bill Clinton to the White House—the political parties woke up to the fact that Congress’s 1996 approach seemed to drive away many Latino voters, one of the fastest-growing demographic groups among the electorate.³ Enforcement enthusiasm then took a back seat, and two measures that might properly be called amnesties, covering certain Central Americans and Haitians, found a

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1. Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214; Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, 110 Stat. 3009-546.

2. See DEP’T OF HOMELAND SECURITY, OFFICE OF IMMIGRATION STATISTICS, FACT SHEET: BORDER APPREHENSIONS: 2005, fig.1 (2006) (showing apprehension levels since 1996, one rough indicator of overall unauthorized migration flows, as increasing every year except 2000–2002), http://www.dhs.gov/xlibrary/assets/statistics/publications/ois_apprehensions_fs_2004.pdf; Nancy Morawetz, *Understanding the Impact of the 1996 Deportation Laws and the Limited Scope of Proposed Reforms*, 113 HARV. L. REV. 1936, 1936–38 (2000) (describing the harsh consequences of AEDPA and IIRIRA for immigrants).

3. See BUREAU OF THE CENSUS, ECON. & STATISTICS ADMIN., U.S. DEP’T. OF COMMERCE, P25-1130, POPULATION PROJECTIONS OF THE UNITED STATES BY AGE, SEX, RACE, AND HISPANIC ORIGIN: 1995 TO 2050, 1996 CURRENT POPULATION REPORTS 14, tbl.K; Rodney Hero et al., *Latino Participation, Partisanship, and Office Holding*, 33 PS, POL. SCI. & POL. 529, 529–30 (2000).

quiet way to passage.⁴ President George W. Bush then came into office hinting at a grand bargain with Mexico that might mean far more migration opportunities for Mexicans.⁵ The September 11th attacks brought enforcement back into vogue, but by January 2004, President Bush judged the time opportune once again to focus on new admissions in the form of a massive temporary worker program.⁶ By the time Congress took up the issue in earnest, in late 2005 and 2006, however, hard-line enforcement challenges on the campaign trail produced legislative deadlock. The Democrat-controlled 110th Congress would seem more hospitable to measures emphasizing a “path to citizenship” for long-time unauthorized residents, but the Bush administration and the Republican leadership began to toy with a more severe enforcement stance in March 2007.⁷ A new compromise bill, somewhat tougher on enforcement, did reach the Senate floor in May, but its prospects do not look bright as of the time of this writing.⁸

Throughout this turbulent ride, arguments have often rested on enduring and sometimes contradictory myths about the nature of enforcement and the problems and opportunities now before us. In this article, I identify and explore eight of these myths. Probing the various factions’ assertions about enforcement and identifying the hollow spots can help to map the scope of the challenge if we are to build sound and comprehensive immigration reform.

The one truly indispensable component of viable immigration reform must be steps that will steadily build a stable, enduring, and functional enforcement system. In my view, only by developing the capacity to enforce the deliberate choices that the nation makes about immigration can we reduce the bitter polarization these issues have produced and thereby calm the wild swings of policy that we have witnessed for two decades. Demagoguery on immigration feeds on many dark impulses, but it also taps into a more admirable one, re-

4. Nicaraguan Adjustment and Central American Relief Act of 1997 (NACARA), Pub. L. No. 105-100, §§ 202–03, 111 Stat. 2160, 2193–2201; Haitian Refugee Immigration Fairness Act of 1998 (HRIFA), Pub. L. No. 105-277, § 101(h), 112 Stat. 2681, 2681-538 to -542.

5. See *U.S., Mexican Governments Meet for First in Series of High-Level Immigration Talks*, 78 INTERPRETER RELEASES 642, 642 (2001).

6. See *President Bush Announces Immigration Initiative*, 81 INTERPRETER RELEASES 33, 33 (2004).

7. See Darryl Fears, *Guest-Worker Program Part of Government’s Immigration Plan*, WASH. POST, Mar. 30, 2007, at A8; Editorial, *Talking Nonsense: The Bush Administration’s Plan on Immigration Is Divorced from Reality*, WASH. POST, Apr. 2, 2007, at A14.

8. See Jonathan Weisman, *Immigration Overhaul Bill Stalls in Senate*, WASH. POST, June 8, 2007, at A1.

spect for the rule of law. It can continue to claim wider support, to the detriment of generous admissions policy, so long as the citizenry lacks confidence that the nation really can enforce the deliberate choices it makes about immigration. Restoring confidence need not mean, of course, that the system becomes completely bulletproof against law-breaking. Rather, it requires that lawbreaking becomes a marginal practice instead of a massive and profitable enterprise.

Because the myths about immigration enforcement are best viewed through the lens of recent legislative efforts, I first offer an overview of immigration reform proposals of the last several years. The first four myths I describe were popular in the first few years of this decade, when most of those expressing views on broad immigration reform focused on opening up new benefits for those already here illegally or for employers allegedly in need of new and legal labor flows. Once those proposals started to pick up momentum, however, opponents became better organized and began pressing for legislation that would reject amnesty or extensive new admissions and would instead concentrate on enforcement. Their arguments often incorporated the latter four myths.

RECENT PROPOSALS FOR IMMIGRATION REFORM LEGISLATION

President Bush's January 2004 speech can be taken as the opening gun in the recent immigration reform debate.⁹ The President proposed a large scale guestworker plan, permitting persons currently present in the United States without authorization to gain legal status, but only for a maximum of six years. Permanent status was precluded, the President suggested, because that would amount to an amnesty for illegal migrants—thus bowing to the apparent unpopularity of any policy that might be tagged with the amnesty label.¹⁰ His plan also would set up a permanent arrangement for any employer to gain admission of new temporary foreign workers once they showed, through a “quick and simple” process, that they could not find American workers.¹¹ He said almost nothing about enhancing enforcement or about the manifold administrative challenges that his guestworker plans posed, and he never offered a detailed legislative proposal to

9. President George W. Bush, Remarks on Immigration Reform (Jan. 7, 2004), <http://www.whitehouse.gov/news/releases/2004/01/20040107-3.html>.

10. Some sources suggest that politicians' efforts to avoid use of the term “amnesty” stems from focus groups conducted by the advocacy organization La Raza in 2001, which detected popular opposition. See Michelle Mittelstadt, *Legalization, Amnesty, or What?*, DALLAS MORNING NEWS, Aug. 9, 2001, available at <http://www.freerepublic.com/forum/a3b725eff3a59.htm>.

11. President George W. Bush, Remarks on Immigration Reform, *supra* note 9.

flesh out his plans for addressing those difficulties.¹² Perhaps for that reason, Congress gave no serious consideration to immigration reform during that year.

The 109th Congress did take up the challenge. Significantly, both of the bills that passed the respective chambers in 2005 and 2006 addressed enforcement more than one might have expected, given the President's inattention in January 2004.¹³ The House leadership, led by James Sensenbrenner, Chairman of the House Committee on the Judiciary, seized the initiative in December 2005 by passing an enforcement-only bill, incorporating no temporary worker plans and certainly nothing to legalize the status of the 10–12 million persons illegally present in the United States.¹⁴ The House bill essentially dared the Senate to depart from that tough-minded framework. Notable provisions included plans for extensive fencing along the southwest border and proposals to make it a felony to enter without inspection or to overstay a legal admission period.¹⁵ The bill recommended further changes in the criminal laws that would have broadened the prohibition on any form of assistance to a person with knowledge or in reckless disregard of the fact that the person was illegally in the country.¹⁶ This caused churches and other charitable organizations to fear indictment if they carried out their normal missions of providing aid to the needy in their communities.¹⁷

The Senate bill did not come up for a floor vote until mid-2006, when evidence of popular backlash against illegal immigration, at least in some salient segments of the electorate, made most legislators

12. For criticism of the administration's early plan, see David A. Martin, Editorial, *Migrating Toward Trouble*, WASH. POST, Jan. 11, 2004, at B7. For reflections on later changes in the President's approach, see David A. Martin, *What Lures Them Here: Changes to Immigration Law Should Focus Less on the Border and More on the Job*, LEGAL TIMES, May 29, 2006, at 66.

13. See generally Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005, H.R. 4437, 109th Cong. (as passed by House, Dec. 16, 2005); Comprehensive Immigration Reform Act of 2006, S. 2611, 109th Cong. (as passed by Senate, May 25, 2006). For a comparison of the two bills, see *Senate Passes Immigration Bill, Conference Needed to Resolve Senate and House Differences*, 83 INTERPRETER RELEASES 1037, 1037 (2006).

14. See *House Judiciary Committee Passes Enforcement Bill on to Full House for Consideration*, 82 INTERPRETER RELEASES 1956, 1956 (2005).

15. H.R. 4437, §§ 102, 203.

16. See *id.* § 202.

17. *Whether Attempted Implementation of Senate Immigration Bill Will Result in a National Security Nightmare: Hearing Before the H. Subcomm. on Immigration, Citizenship, Refugees, Border Security, and Int'l Law of the H. Comm. on the Judiciary*, 109th Cong. 9 (2006) (statement of Most Reverend Nicholas DiMarzio, Bishop of Brooklyn, N.Y., Chairman, Catholic Legal Immigration Network, Inc.), <http://www.cliniclegal.org/Announcements/DiMarziosentaestimony0706.pdf>.

wary of seeming soft on enforcement, whatever their underlying policy inclinations.¹⁸ Still, the Senate took a different approach from the House, ultimately passing a bill embodying what proponents called “comprehensive immigration reform” because it included all three of the major components running through the recent immigration reform debate: enforcement, guestworker provisions, and legalization of most of the current unauthorized population.¹⁹ By the time the Senate acted, however, direct legalization was seen as too risky politically. Instead, that bill provided a convoluted “path to citizenship” that would proceed through multiple stages and would require of many a trip back to the home country to complete the necessary paperwork.²⁰

The net result was essentially deadlock in the 109th Congress. Instead of convening a conference committee to iron out the differences between the two bills, the House Republican leadership used the late summer recess to hold a series of hearings around the country slanted to show the virtues of enforcement and the evils of the Senate bill.²¹ President Bush in the meantime declared his preference for the Senate’s basic approach.²² Nonetheless, mindful of the growing popularity of immigration enforcement themes as the election campaign roared to life, he sought to show greater toughness. The most visible initiative was the deployment of six thousand National Guard troops to the southwest border, announced in a major presidential address to the nation on May 15, 2006.²³ The assignment was meant to last approximately two years, during which time the President proposed to

18. See, e.g., David D. Kirkpatrick, *Demonstrations on Immigration Harden a Divide*, N.Y. TIMES, Apr. 17, 2006, at A16.

19. Comprehensive Immigration Reform Act of 2006, S. 2611, 109th Cong. (as passed by Senate, May 25, 2006). A useful summary of that bill was produced by the National Immigration Forum. See NAT’L IMMIGRATION FORUM, SUMMARY OF SENATE IMMIGRATION REFORM LEGISLATION, June 9, 2006, http://www.immigrationforum.org/documents/PolicyWire/Legislation/SenBillPassedSummary_web.pdf; *Senate Passes Immigration Bill, Conference Needed to Resolve Senate and House Differences*, *supra* note 13, at 1037.

20. See S. 2611 §§ 601–15; *Senate Passes Immigration Bill, Conference Needed to Resolve Senate and House Differences*, *supra* note 13, at 1041–42; Rachel L. Swarns, *Senate Republicans Strike Immigration Deal*, N.Y. TIMES, Apr. 6, 2006, at A21.

21. See *House Judiciary Subcommittee Weighs-in on Reform Fight with More Hearings*, 83 INTERPRETER RELEASES 1612, 1612 (2006). See, e.g., *Whether Attempted Implementation of Senate Immigration Bill Will Result in a National Security Nightmare: Hearing Before the H. Subcomm. on Immigration, Citizenship, Refugees, Border Security, and Int’l Law of the H. Comm. on the Judiciary*, 109th Cong. (2006).

22. See *House Hearings Threaten Senate Immigration Bill*, CNN.COM, June 21, 2006, <http://www.cnn.com/2006/POLITICS/06/20/immigration.hearings/index.html>.

23. President George W. Bush, Address to the Nation on Immigration Reform (May 15, 2006), <http://www.whitehouse.gov/news/releases/2006/05/20060515-8.html>.

expand the Border Patrol by roughly the same number.²⁴ Emphasis on interior enforcement also increased, marked by highly visible raids on meatpacking plants and other businesses, which rounded up unauthorized workers.²⁵ During this period, illegal entries declined even though the Guard served largely in desk jobs or as delivery workers.²⁶ Indeed, history has shown that almost any change in enforcement tactics brings a temporary reduction in illegal migration and thus temporary political benefits to those responsible for the altered course.²⁷

Congress eventually passed a vestigial bill in September 2006 calling for seven hundred miles of border fencing in the southwest, but an appropriations act quietly undercut some of that mandate.²⁸ This result of 2006 legislative efforts came as a relief. A fence is unlikely to be a major contributor to real improvements in enforcement, but at the same time it will not be terribly harmful or expensive. Better to build a fence than to make the status of current lawful permanent residents more vulnerable to sudden legal changes (as happened in 1996)²⁹ or to impose wider mandates for detention of persons believed to be present unlawfully. Congress could have done much more harm, either by enacting vindictive measures like some of those in the House-passed bill or by launching vast but ill-designed new plans, like the Senate's guestworker provisions, without adequate lead time or sufficient care regarding the enormous administrative challenges such

24. *Id.*

25. See *Secretary Chertoff Comments on "Operation Wagon Train,"* 83 INTERPRETER RELEASES 2685, 2686 (2006).

26. Apprehensions of people crossing the border illegally dropped by 27% overall in the four months ending in January 31, 2007, while the same period saw a 51% increase in marijuana seized. Faye Bowers, *On US-Mexico Border, Illegal Crossings Drop*, CHRISTIAN SCI. MONITOR, Feb. 15, 2007, at 1 (describing the National Guard's deployment and its limited role), available at <http://www.csmonitor.com/2007/0215/p01s02-ussc.html>.

27. For example, in 1993, the Border Patrol in El Paso, Texas, initiated Operation Hold the Line. This new approach deterred attempts to enter in that sector and was credited with reducing crime in El Paso. This basic strategy was later adopted for the entire southwest region. In 1996, Border Patrol Chief Sylvestre Reyes was easily elected to Congress, in part because of the popularity of Operation Hold the Line. See PETER ANDREAS, *BORDER GAMES: POLICING THE U.S.-MEXICO DIVIDE* 92-93 (2000); GEN. ACCOUNTING OFFICE, *GAO/GGD-95-30, BORDER CONTROL: REVISED STRATEGY IS SHOWING SOME POSITIVE RESULTS* 16 (1994); About Representative Reyes Main Page, <http://wwwc.house.gov/reyes/about.asp> (last visited June 2, 2007).

28. See Secure Fence Act of 2006, Pub. L. 109-367, § 3, 120 Stat. 2638, 2638-39 (2006); Spencer S. Hsu, *In Border Fence's Path, Congressional Roadblocks*, WASH. POST, Oct. 6, 2006, at A1.

29. See Morawetz, *supra* note 2, at 1936-37 (2000) (describing how "the new immigration laws increase the likelihood that a permanent resident will face mandatory deportation for any criminal conviction").

measures would impose.³⁰ Perhaps the 2006 deadlock can afford time for more careful reflection and an opportunity for the 110th Congress to minimize these serious problems.

Congressional leaders in 2007 seem to be moving back toward broad new admission initiatives, coupled with some version of amnesty, though still never called by that name,³¹ but the national political mood on these questions remains sour. State and local politics have increasingly become the forum for venting concern about the failures of federal enforcement, and the frustration often takes the form of gratuitously harsh and ultimately counterproductive local legislation. The proposed, and sometimes enacted, measures have included: laws to deny state and local services to the undocumented, bills to require schools to collect information on immigration status of children and parents, ordinances to punish landlords for leasing to illegal migrants, and even legislation to penalize charitable organizations if they provide assistance to anyone who lacks an authorized immigration status.³² This state and local legislative drive seems likely to continue and to produce disjointed hardship until the federal government gets its own enforcement act together. Those who oppose such local measures have had some initial successes in court, arguing federal preemption,³³ but the most durable way to hold the line against them is to find a balanced and long-term enforcement solution at the federal level.

If we are to do so, we need to recognize that many arguments frequently bandied about regarding immigration enforcement are mis-

30. See generally Cristina M. Rodríguez, *Guest Workers and Integration: Toward a Theory of What Immigrants and Americans Owe One Another*, U. CHI. LEGAL F. 3–5 (forthcoming 2007), available at <http://ssrn.com/abstract=964474>.

31. See Julia Gelatt, *Elections Improve Odds for Immigration Reform in 2007*, MIGRATION INFO. SOURCE, Dec. 1, 2006, <http://www.migrationinformation.org/Feature/display.cfm?id=547>; Stephen Labaton & Steven R. Weisman, *Talking About Common Ground*, N.Y. TIMES, Nov 9, 2006, at C1.

32. See Sean D. Hamill, *Altoona, With No Immigrant Problem, Decides to Solve It*, N.Y. TIMES, Dec. 7, 2006, at A34 (describing local measures considered in twenty-one states by over sixty jurisdictions, and passed in fifteen of them, that, for example, bar business or rental licenses to persons or companies that hire or rent to illegal migrants); Oren Dorrell, *Towns Take Aim at Illegal Immigration; In Hazleton, Pa., Landlords, Employers Could Face Fines*, USA TODAY, Aug. 14, 2006, at A3; Stephanie McCrummen, *Anti-Crowding Law Repealed; Latinos Were Focus of Manassas Ban on Extended Families in Homes*, WASH. POST, Jan. 12, 2006, at A1; Michael Scholl, *Suffolk Bill Would Penalize Contractors Who Hire Illegal Aliens*, N.Y. L. J., Sept. 12, 2006, at 19–20; Editorial, *Next Stop: Underground; If Virginia Has Its Way with Illegal Immigrants*, WASH. POST, Feb. 7, 2007, at A16.

33. See, e.g., *Lozano v. Hazleton*, No. 3:06cv1586 (M.D. Pa. Oct. 31, 2006) (order granting temporary restraining order against restrictive ordinance passed by Hazleton, Pa.), available at <http://www.pamd.uscourts.gov/opinions/Munley/06v1586TRO.pdf>.

leading or downright wrong. I explore below eight such myths. The first cluster of myths enjoyed a heyday up through early 2005, a period when most of those expressing views on immigration reform focused on opening up new benefits either for those illegally here already or for employers allegedly in need of new and legal labor flows. Once proposals of that type started to pick up momentum, however, opponents became better organized and began pressing for legislation that would reject amnesty or extensive new admissions and would instead concentrate on enforcement. Their arguments then propped a different set of myths, which appear later in the list.

MYTH 1: A LARGE GUESTWORKER PROGRAM WILL ELIMINATE
MOST NEED FOR ENFORCEMENT.

Following September 11th, some claimed that a guestworker program would bring all the well-intentioned and hard-working unauthorized migrants out of the shadows to identify themselves, permitting law enforcement to focus on a smaller and more easily separated class of terrorists and criminals.³⁴ For some, this prospect even suggested that we could significantly reduce the resources spent on preventing the migration of unauthorized foreign workers.³⁵ I had thought that sober reflection had reduced reliance on this theme in succeeding years, but President Bush recently revived it in his 2007 State of the Union address.³⁶

For this idea to have any chance of succeeding in reducing the enforcement task, whatever legalization is offered must be attractive enough to assure that the currently undocumented (estimated at

34. See ANDORRA BRUNO, CONG. RESEARCH SERV., RL 32044, IMMIGRATION: POLICY CONSIDERATIONS RELATED TO GUEST WORKER PROGRAMS 26 (2005), available at <http://fpc.state.gov/documents/organization/45976.pdf>; Press Release, White House, President Delivers State of the Union Address (Jan. 23, 2007), <http://www.whitehouse.gov/news/releases/2007/01/print/20070123-2.html>.

35. *Securing Our Borders Under a Temporary Guest Worker Program: Hearing before the S. Subcomm. on Immigration, Border Security, and Citizenship*, 103d Cong. (1994) (statement of Daniel Griswold, Associate Director, Institute for Trade Studies, Cato Institute); Press Release, White House, Fact Sheet: Comprehensive Immigration Reform: Securing Our Borders, Enforcing Our Laws, and Upholding Our Values (Mar. 27, 2006), <http://www.whitehouse.gov/news/releases/2006/03/print/20060327-1.html>.

36. Press Release, White House, President Delivers State of the Union Address (Jan. 23, 2007) (“We should establish a legal and orderly path for foreign workers to enter our country to work on a temporary basis. As a result, they won’t have to try to sneak in, and that will leave Border Agents free to chase down drug smugglers and criminals and terrorists.”), <http://www.whitehouse.gov/news/releases/2007/01/print/20070123-2.html>.

11.5–12 million)³⁷ come forth to register. That seems dubious if the plan offers only a time-limited work period.³⁸ Even if we lay that doubt aside, however, the new guestworker scheme would also have to offer enough future spaces to match new migration demand, especially by low-skilled workers. Daniel Griswold of the Cato Institute writes: “If a wide enough channel were opened so that the supply of workers from Mexico could be legally matched with the demand for their labor in the United States, the rationale for the current illegal flow would vanish.”³⁹ The “if” clause masks a truly heroic assumption. The current net inflow of illegal migration is estimated at an average of five hundred thousand annually,⁴⁰ and there is no reason to think that the current supply figure will remain stable. In fact, it is likely to increase, perhaps dramatically, once a legal avenue toward working in the United States becomes available.

Hence the only channel wide enough to reduce reliance on immigration enforcement would be a guestworker program free of fixed numerical ceilings. Under such a policy, admissions would be limited only by the quantity of petitioning employers who successfully demonstrate that they posted the job opportunity and found an insufficient response from American workers. Some early versions of what became the Senate’s Comprehensive Immigration Reform Act of 2006 envisioned such a ceiling-free system, but, as reported from Committee, the legislation imposed a ceiling of 325,000 annually.⁴¹ A floor amendment then reduced that ceiling to 200,000.⁴² Even if the current Congress could pass a ceiling-free measure, strong demand to re-impose limits would likely result from the first serious economic downturn that forces unemployment levels up for American citizens, particularly if by then the program is regularly bringing in hundreds of thousands of workers each year.

37. See JEFFREY S. PASSELL, PEW HISPANIC CTR., THE SIZE AND CHARACTERISTICS OF THE UNAUTHORIZED MIGRANT POPULATION IN THE U.S.: ESTIMATES BASED ON THE MARCH 2005 CURRENT POPULATION SURVEY I (2006), available at <http://pewhispanic.org/files/report/61.pdf>.

38. See *infra* Myth 2 (describing the incentives for immigrants to stay in the country after their term of work has expired).

39. DANIEL T. GRISWOLD, CTR. FOR TRADE POLICY STUDIES, CATO INST., WILLING WORKERS: FIXING THE PROBLEM OF ILLEGAL MEXICAN MIGRATION TO THE UNITED STATES 11 (2002), available at <http://www.freetrade.org/pubs/pas/tpa-019.pdf>.

40. Passell, *supra* note 37, at 2 (excluding the number of unauthorized migrants arriving who die, return to their country of origin, or gain legal status).

41. Comprehensive Immigration Reform Act of 2006, S. 2611, 109th Cong. § 408(g) (as introduced on Apr. 7, 2006).

42. S. 2611 § 408(g) (as passed by Senate on May 25, 2006); 152 CONG. REC. S4562 (daily ed. May 15, 2006) (statement of Sen. Bingaman introducing Senate Amendment 3981).

Moreover, the employer petitioning process set forth in the Senate's 2006 bill was far too vague to afford reliable protection for American workers, particularly since it lacked a serious enforcement mechanism to monitor employer job searches.⁴³ Employers hungry to bring in workers willing to work for lower wages will make maximum use of any enforcement loopholes or soft spots. Thus if admissions spaces do not keep up with worker interest in sending countries—and they almost surely would not—immigration officers would have to remain engaged in policing against these garden-variety violations, lest the system again lose all credibility. Immigration officials would not be able to divert much, if any, of their enforcement attention to criminals and terrorists.

Perhaps a more glaring shortcoming of new guestworker proposals is that President Bush and other proponents consistently omit any discussion of the need to enforce departures at the end of the temporary admission period. For the President, perhaps this is politically understandable. Even if plans are enacted in 2007, no guestworker admissions would expire until well after his term ends in January 2009. But such blindness is at least misleading, if not manipulative. This convenient obscuring of an inescapable component of any guestworker plan is closely linked to:

MYTH 2: THIS TIME WE CAN MAKE TEMPORARY WORKER
PROGRAMS TRULY TEMPORARY.

The history of temporary worker programs, here and in Europe, gives little confidence that guestworkers' tenure would truly be temporary, at least in the absence of serious, well-designed, and adequately resourced enforcement.

The United States Bracero program, which allowed over four million Mexican workers to enter for ostensibly temporary employment from 1942 to 1964, helped to establish employment relationships that proved far more durable than policymakers expected when they officially ended the program.⁴⁴ In the absence of effective enforcement thereafter, employers were glad to continue using workers who by then were well-trained and familiar with the farm or business.

43. See S. 2611 §§ 404, 407 (as passed by Senate on May 25, 2006).

44. See Benjamin P. Quest, *Process Theory and Emerging Thirteenth Amendment Jurisprudence: The Case of Agricultural Guestworkers*, 41 U.S.F. L. REV. 233, 250–56 (2006) (describing how the Bracero Program perpetuated slavery-like conditions for Mexican workers in the United States); Camille J. Bosworth, Note, *Guest Worker Policy: A Critical Analysis of President Bush's Proposed Reform*, 56 HASTINGS L.J. 1095, 1102 (2005) (describing how the Bracero Program increased the number of Mexicans willing to come work in the United States).

Workers likewise found it convenient to continue the cycle by sneaking across the border.⁴⁵ Moreover, they often brought friends or family members along to replenish the worker pool. Migration is a phenomenon built on social networks, and the contacts established even through temporary work can become the basis for a wider circle of migration in the future.⁴⁶ Similarly, when most European countries ended their postwar guestworker initiatives after the oil shock of 1974, millions of supposedly temporary workers remained in those countries.⁴⁷

Different results for the current United States temporary worker plans seem unlikely. The jobs at issue are mostly permanent jobs, and there would be every reason for employers to want to keep experienced employees when the temporary period expires.⁴⁸ The immigrant worker would also have strong incentives to stay after several years of growing linguistic, cultural, and technical familiarity, both with the particular job and with life in America.

President Bush's January 2004 proposal addressed this question with only carrots, not sticks. As an incentive to return, he suggested methods of crediting work time in the United States toward the national retirement system in the home country through social security totalization treaties.⁴⁹ That this would be a sufficient incentive seems highly dubious. Pension benefits based on perhaps six years of United

45. See Patricia Fernandez-Kelly & Douglas S. Massey, *Borders for Whom? The Role of NAFTA in Mexico-U.S. Migration*, 610 ANNALS AM. ACAD. POL. & SOC. SCI. 98, 106–07 (2007) (describing how the end of the Bracero Program resulted in increased illegal immigration).

46. See, e.g., Alejandro Portes & József Böröcz, *Contemporary Immigration: Theoretical Perspectives on Its Determinants and Modes of Incorporation*, 23 INT'L MIGRATION REV. 606, 612–14 (1989).

47. See Stephen Castles, *The Guest-Worker in Western Europe — An Obituary*, 20 INT'L MIGRATION REV. 761, 770–71 (1986). For the same author's views about recent proposals to reintroduce guestworker programs in Europe, see Stephen Castles, *Guestworkers in Europe: A Resurrection?*, 40 INT'L MIGRATION REV. 741 (2006).

48. The guestworker provisions of S. 2611, which would have created a new H-2C admission category, contained no requirement that the job be “of a temporary or seasonal nature,” in sharp contrast to the current H-2A temporary worker program. Compare Comprehensive Immigration Reform Act of 2006, S. 2611, 109th Cong. §§ 402–407 (as passed by Senate, May 25, 2006) with Immigration and Nationality Act (INA), 2007 Bender's Immigration and Nationality Act Pamphlet, § 101(a)(15)(H)(ii)(a) (LexisNexis), 8 U.S.C. § 1101(a)(15)(H)(ii)(a) (2000). H-2C workers would be admitted for a three-year period, renewable for one additional three-year term. S. 2611 § 403(f)(1) (proposed INA § 218A(f)(1)).

49. See President George W. Bush, Remarks on Immigration Reform, *supra* note 9. See generally Nicole Kersey, Note, *Misplaced Opposition: The Immigration Incentives of the Proposed Social Security Totalization Agreement with Mexico* (on file with The New York University Journal of Legislation and Public Policy).

States work—scheduled to begin only after retirement—would rarely outweigh the economic gain the worker could expect if weak enforcement permitted continuing employment at full United States wages for additional decades.

Other guestworker plans would impose harsher measures in an effort to assure that the work period remains temporary. A proposal floated in March 2007 by the Republican leadership of Congress, after a series of meetings at the White House, outlined dramatic moves in this direction, expressly in order to assure that the guestworker program remains temporary. Under that plan, most guestworkers would be permitted to come to the United States for no more than a two-year stay.⁵⁰ Two renewals would be possible, but only after the worker spent six intervening months outside the country.⁵¹ Most significantly, families would be forbidden from migrating with the worker, though the proposal adds the generous (though unfunded) observation that the proposal would permit the worker to return home freely for visits.⁵² Such a stance would mark a significant departure from the President's 2004 announcement and the "comprehensive" bills he had supported, all of which kept nuclear families together.⁵³ Other guestworker plans have suggested that a portion of wages be withheld and made available to the worker only upon return to the home country.⁵⁴

50. See Anne C. Mulkern, *Immigration Reform Sputters: A White House Plan Has Lawmakers Split Along Party Lines*, DENVER POST, Mar. 30, 2007, at A8; PowerPoint of President's Immigration Legislation Proposal 9 (Mar. 28, 2007) (on file with The New York University Journal of Legislation and Public Policy).

51. Mulkern, *supra* note 50, at A8.

52. See Darryl Fears, *Guest-Worker Program Part of Government's Immigration Plan*, WASH. POST, Mar. 30, 2007, at A8; Jonathan Weisman, *President Renewing Efforts on Immigration; Plan for Overhaul Faces Battle in Divided Congress*, WASH. POST, Apr. 9, 2007, at A1; PowerPoint of President's Immigration Legislation Proposal 9 (Mar. 28, 2007) (on file with The New York University Journal of Legislation and Public Policy). The Bush administration later explained that these ideas were "only a starting point, an emerging consensus of Republican senators and the White House." *Bush Touts Guest Worker Program Proposal*, ASSOCIATED PRESS, Apr. 10, 2007, available at <http://www.msnbc.msn.com/id/18023800/> (last visited May 8, 2007).

53. The 2006 Senate bill provided for admission of the spouse and minor children of H-2C temporary workers. S. 2611 § 402 (proposed INA § 101(a)(15)(H)(iv)). The compromise bill that reached the Senate floor in May 2007 opened a slightly wider window for families to come to the United States, in comparison with the March Republican proposal, but only if the worker can show that his or her wages can support the full family and that the family has full medical insurance. See *Immigration Reform Proposal Reached Behind Scenes; Senate Expected to Begin Debate*, 84 INTERPRETER RELEASES 1117, 1117 (2007).

54. See *Labor: Guest Workers, H-1B*, 8 MIGRATION NEWS, June 2001, http://www.migration.ucdavis.edu/mn/more.php?id=2382_0_2_0; *Presidents Bush, Fox Agree to*

Proposals in this vein recognize that, in general, wide-scale temporary worker programs have the best chance of remaining temporary only if accompanied by severe limitations and resolute enforcement. But the limited examples history affords of successful measures along these lines are almost surely measures the United States would have difficulty imposing—and indeed that we should not want to impose.⁵⁵ Occasional mass roundups of overstaying guestworkers, such as what Nigeria conducted in 1983,⁵⁶ would be inhumane, riddled with error and injustice, and quite likely unconstitutional. Preventing the workers' families from living together in effect keeps hostages in the home country. Although this would probably be constitutional, it is bad public policy. Human beings should be allowed to live with their families, as the Senate's Comprehensive Immigration Reform Act of 2006 (despite its other deficiencies) wisely recognized.⁵⁷ Yet that humane concession will make it considerably more difficult to insist on removal at the end of six years of lawful, even if nominally temporary, residence. The Swiss novelist Max Frisch captured this in his incisive comment on the European guestworker situation some thirty years ago: "We asked for workers, but human beings came."⁵⁸

If we need people for their labor, we should recognize that they will come with a full set of human yearnings and needs, including a natural inclination to sink roots and seek stability. Therefore, we should first ask hard questions about which persons or classes of workers we truly need for their labor and not just because businesses prefer to pay wages lower than the level they now find necessary in order to attract a sufficient pool of American workers. Then, if more work-related migration is truly needed, we should admit persons in

U.S.-Mexico Bilateral Working Group on Migration, 78 INTERPRETER RELEASES 414, 415 (2001); Sen. Phil Gramm, Commentary, *Benefits of a Guest-Worker Program*, WASH. TIMES, July 1, 2001, at B4; Press Release, Sen. Phil Gramm, U.S.-Mexico Guest Worker Program: A Prospectus (on file with The New York University Journal of Legislation and Public Policy).

55. See Myron Weiner, *International Migration and Development: Indians in the Persian Gulf*, 8 POPULATION & DEV. REV. 1, 26–28 (1982).

56. See Roger Gravel, *The Nigerian Aliens Expulsion Order of 1983*, 84 AFRICAN AFFAIRS 523, 524–25 (1985) (describing Nigeria's Alien Expulsion order of 1983 as a "woefully ignorant and careless" anti-immigration drive).

57. S. 2611 § 402 (proposed INA § 101(a)(15)(H)(ii)(c), (iv)) provided for admission of the spouse and minor children of H-2C temporary workers. Recent news accounts suggest that the Bush administration may be backing off from this key family-friendly provision, however, as a way of positioning the Republican Party to appear tougher on enforcement during the 2008 election campaigns. See Fears, *supra* note 7.

58. MAX FRISCH, *Überfremdung I*, in SCHWEIZ ALS HEIMAT? 219 (1990) ("Wir riefen Arbeitskräfte, es kamen Menschen.").

that narrower group, along with their families, as lawful residents. They would then be the ones to decide whether they someday want to return to the home country after a few years of U.S. earnings—as some of them certainly will, though almost surely a minority. But if they want to remain, that should be their option.⁵⁹

MYTH 3: ENFORCEMENT IS DOOMED WITHOUT A LARGE-SCALE
GUESTWORKER PROGRAM BECAUSE UNDOCUMENTED WORKERS
TAKE JOBS AMERICANS DO NOT WANT.

Some advocates of so-called comprehensive immigration reform assert that enforcement is doomed without a large guestworker provision because market forces ensure that this volume of migration will occur anyway.⁶⁰ Only by providing a legal channel to satisfy an inevitable demand can we reduce the magnitude of the enforcement task to an achievable level. Underlying this assertion is the claim that Americans just do not want the jobs that undocumented workers fill, leaving a vacuum that employers and unauthorized workers rush to fill.⁶¹ In this account, employers such as those in the hotel and restaurant field or in the construction industry, and particularly in farm work, have a demand for labor that can be met only by foreigners. It is better for them to use a legal and temporary channel than to be forced to reach out to unauthorized workers. President Bush's version of this tale, which he has often voiced, is that our system cannot realistically stand in the way of "willing employers and willing employees."⁶² He has often spoken of filling with temporary workers jobs that "Americans won't do."⁶³

59. For one important account of the moral foundations for such a stance against temporary guestworker programs, see MICHAEL WALZER, *SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY* 56–61 (1983).

60. See, e.g., Tamar Jacoby, *Immigration Nation*, 85 *FOREIGN AFF.* 50 (2006) (arguing that immigrants are necessary for the proper functioning of the U.S. economy and that the best way to regain control of immigration is to "liberalize" the system so that immigration levels line up with U.S. labor needs).

61. See, e.g., President George W. Bush, Remarks Following a Tour of the Border and an Exchange With Reporters Near El Paso, Texas (Nov. 29, 2005), <http://www.whitehouse.gov/news/releases/2005/11/20051129-2.html> ("People ought to be given a tamper-proof work card, come here, and do jobs Americans won't do, and then after a set period of time, go home.").

62. See Mike Allen, *Immigration Reform on Bush Agenda*, *WASH. POST*, Dec. 24, 2003, at A1; Elisabeth Bumiller, *Bush Would Give Illegal Workers Broad New Rights*, *N.Y. TIMES*, Jan. 7, 2004, at A1; President George W. Bush, Remarks Following a Tour of the Border and an Exchange With Reporters Near El Paso, Texas, *supra* note 61.

63. See President George W. Bush, Remarks Following a Tour of the Border and an Exchange With Reporters Near El Paso, Texas, *supra* note 61. The President's more

But in fact, every one of the employment fields cited in these discussions, even farm work, is peopled primarily by Americans. According to U.S. census data, 55% of those employed in farming (including forestry and fishing) are native-born, as are 65% of those involved in building cleaning and maintenance, 74% in construction and extraction, and 76% in food preparation.⁶⁴ Because these percentages do not include the foreign-born who are naturalized citizens or who have a legal immigration status, the numbers actually understate the involvement or availability of Americans and of authorized non-citizen workers in each of these fields.

If employers feel that there is a shortage of available workers, the normal market response to such a shortage would be an increase in pay so as to draw in a greater supply of interested workers from whatever pool is available. That market process comes into play whatever the constraints on supply. If some hypothetical hemispheric catastrophe virtually shut down the supply of new foreign workers, American farming would not end, hotels and restaurants would continue to operate, and we would still build new buildings. Prices would be affected, but the impact would be far lower than these arguments typically assert. Professor Philip Martin, an agricultural economist, calculated in 1998 that if farm wages rose by 50%, the average American family's cost for fresh fruits and vegetables would increase only \$10 in a year because farm labor accounts for only a small percentage of the cost of our food.⁶⁵

President Bush's mantra about "willing employees" thus masks the key question: willing on what terms? Many more Americans would be willing to work in these fields if the pay were higher or the working conditions better. The effect of a massive guestworker program—and surely the intent of at least some of its proponents, though

recent remarks have usually been a bit more carefully phrased. See, e.g., President George W. Bush, Remarks on Signing the Secure Fence Act of 2006 (Oct. 26, 2006), <http://www.whitehouse.gov/news/releases/2006/10/20061026.html> ("Willing workers ought to be matched with willing employers to do jobs Americans are not doing for a temporary—on a temporary basis.").

64. STEVEN A. CAMAROTA, CTR. FOR IMMIGRATION STUDIES, DROPPING OUT: IMMIGRANT ENTRY AND NATIVE EXIT FROM THE LABOR MARKET, 2000–2005, 12 *tbl.*5 (2006). Overall, the native-born make up 85% of the workforce. *Id.*

65. Philip Martin, *Factors that Influence Migration: Mexican Immigrant Workers and U.S. Food Expenditures*, in 3 *MIGRATION BETWEEN MEXICO AND THE UNITED STATES: BINATIONAL STUDY* 871, 872 (Mex. Ministry of Foreign Affairs & U.S. Comm'n on Immigration Reform eds., 1998), available at <http://www.utexas.edu/lbj/uscir/binpapers/v3a-2martin.pdf>.

never admitted—will be to keep wages low and working conditions marginal.⁶⁶

This is not to say that it will be easy to meet the employment needs in some of these fields by tweaking wages upward. In fact, if significant wage increases are required, some of the business will simply move overseas, with complex effects on American business and labor. Yet, because many of the enterprises at the center of this debate—especially hotels, restaurants, and construction—cannot relocate overseas owing to the nature of their business, they would have to find another way to adjust. If there were effective enforcement limiting these businesses to authorized workers, the firms might well face a difficult transition. But we would not wake up to find all such businesses shuttered.

Studies show that a few of the fastest-growing employment fields in the United States, such as personal and home-care aides or medical assistants, do not require extensive education and training.⁶⁷ But these trends do not prove that we must make room for vast numbers of imported temporary workers. If these labor needs truly cannot be met by wage increases or other changes in U.S. practices, then those admitted from abroad to meet these needs should come with permanent residence rights, either immediately or on terms that leave the choice to obtain permanent residence largely in the hands of workers, not employers.⁶⁸

Another problem with temporary worker programs is the temptation they pose for exploitative behavior by employers. Workers who risk deportation upon losing their jobs are unlikely to complain about unfair treatment or substandard working conditions.⁶⁹ Even if one might theoretically make up for this vulnerability through increased

66. See Robert J. Samuelson, *We Don't Need "Guest Workers"*, WASH. POST, Mar. 22, 2006, at A21.

67. See DORIS MEISSNER ET AL., MIGRATION POLICY INST., IMMIGRATION AND AMERICA'S FUTURE: A NEW CHAPTER, REPORT OF THE INDEPENDENT TASK FORCE ON IMMIGRATION AND AMERICA'S FUTURE 5, 6 tbl.3, 7 tbl.4 (2006) [hereinafter MPI TASK FORCE REPORT].

68. The MPI TASK FORCE REPORT seems to envision such a situation, though much will depend on the administrative details affecting what that report calls "provisional immigration." See *id.* at 35–41.

69. See, e.g., Mary Lee Hall, *Defending the Rights of H-2A Farmworkers*, 27 N.C. J. INT'L L. & COM. REG. 521, 527–37 (2002). Justice Robert Jackson memorably captured the dynamics of temporary worker programs (in a slightly different context):

[I]n general the defense against oppressive hours, pay, working conditions, or treatment is the right to change employers. When the master can compel and the laborer cannot escape the obligation to go on, there is no power below to redress and no incentive above to relieve a harsh overlordship or unwholesome conditions of work. Resulting depression of

centralized enforcement by the Department of Labor, resource increases of the magnitude that might be needed seem highly unlikely. Giving temporary workers more scope and freedom to change employers could ameliorate this particular problem, but only at the cost of making administration far more complicated. Could the temporary worker go only to other employers who had previously pursued the application process to show that they could not find other American workers? If not, the rationale that we are importing workers only to fill jobs unwanted by Americans would be defeated. But if so, an unfairly treated worker will have only limited real-world options for leaving the first employer, given the inevitable delays and bureaucratic hoop-jumping such a system would entail.⁷⁰ This is another reason to impose on ourselves the discipline of taking as workers only those we are prepared to admit for permanent residence. Permanent residents are fully able to leave an exploitative employer and move anywhere else in the labor market.

MYTH 4: ENFORCEMENT HAS HAD NO EFFECT, AND WE REALLY CANNOT ENFORCE THE IMMIGRATION LAWS ANYWAY.

Some depictions of border policing go beyond calling it inadequate and assert that it “stops almost no one.”⁷¹ In a variant of the myths described above, this one claims that market forces are too strong, inevitably overwhelming the state’s efforts at control. The chief evidence put forth for this assertion is the fact of continuing high-level migration, indeed an increase in the flow, through the late 1990s, even as the Border Patrol grew enormously and adopted new and seemingly better-designed patrolling strategies, such as Operation Gatekeeper in the San Diego sector.⁷²

working conditions and living standards affects not only the laborer under the system, but every other with whom his labor comes in competition.

Pollock v. Williams, 322 U.S. 4, 18 (1944).

70. The Senate’s Comprehensive Immigration Reform Act of 2006 allowed job changes, but only to other employers who have completed the full set of procedures that would make the employer eligible to participate in the guestworker program, including searching for available U.S. workers. S. 2611 §§ 403–404 (proposed INA §§ 218A(j), 218B). Moreover, such workers would not be eligible to change to any other nonimmigrant category. *Id.* § 403 (proposed INA § 218A(e)).

71. Tamar Jacoby, *Borderline: Why We Can’t Stop Illegal Immigration*, NEW REPUBLIC, Jan. 26, 2004, at 18, 18.

72. See DEP’T OF HOMELAND SECURITY, FACT SHEET: BORDER APPREHENSIONS: 2005, fig.1 (2006) (showing apprehension levels since 1996, one rough indicator of overall unauthorized migration flows), http://www.dhs.gov/xlibrary/assets/statistics/publications/ois_apprehensions_fs_2004.pdf. The apprehensions trend line rose throughout the late 1990s, but it dropped significantly in 2001 and has remained below the 1990s levels. *Id.*

This evidence is sobering testimony to the difficulties and disappointments of immigration enforcement, and it must be taken quite seriously in planning future immigration control initiatives. In my view, it primarily shows the inefficacy of heavy border policing without serious internal enforcement,⁷³ but the problems are multi-faceted. Nonetheless, the idea that border policing has no effect has hardly been proven. The relevant indicator is not how illegal migration levels compare before and after these deployments, but rather what migration would have looked like *during those same years* without the new deployments. We cannot empirically test this counterfactual, but it is not credible that migration would have been no higher without the Border Patrol changes of the mid-1990s. Seasoned enforcement officers do not conceive of their jobs as designed to hold illegal migration to zero, but instead understand their objective as reducing it to a level well below what it would be in the absence of their efforts.⁷⁴

At least one piece of reasonably hard evidence refutes the claim that border enforcement is futile. By nearly all accounts, smugglers' fees increased enormously during the time the Border Patrol was implementing its new strategy. A common estimate is that the prices rose from a few hundred dollars in the early 1990s to over two thousand dollars in recent years.⁷⁵ Surely some people contemplating migration found the new smuggling prices too high. That overall illegal migration stayed constant, or even increased despite the rise in prices, is likely due to other factors that were simultaneously shifting the demand curve to the right. The superheated U.S. economy of the late 1990s, with record low unemployment, surely played a role in produc-

Operation Gatekeeper reflected a new strategy of forward deployment of the Border Patrol first developed in the mid-1990s in the El Paso sector. Instead of waiting for migrants to cross into the United States and then chasing and catching only a proportion of them for return to their source countries, the INS began to station more officers in positions clearly visible throughout the patrolled area, thereby deterring attempts to cross and virtually assuring apprehension for those who tried. Where this strategy has been employed, attempted crossings have plummeted. This strategic change did result in major increases in migration in other zones, usually more forbidding desert areas, but added resources have allowed gradual expansion of forward deployment to some of the new target zones, and the long-term plan is meant to reach all of them. See GEN. ACCOUNTING OFFICE, GAO-01-842, INS' SOUTHWEST BORDER STRATEGY: RESOURCE AND IMPACT ISSUES REMAIN AFTER SEVEN YEARS 1-6 (2001); ANDREAS, *supra* note 27, at 92-93.

73. See *infra* Myths 5 and 6.

74. This summary is based on numerous conversations with enforcement officers in the course of academic research and during my tenure as INS General Counsel.

75. Jacoby, *supra* note 71, at 18, 21. See ANDREAS, *supra* note 27, at 96 (reporting that a good smuggler can make \$60,000 a year).

ing that result.⁷⁶ Many who lean toward the “enforcement is futile” perspective base their claims on a view that the market simply overwhelms state restraints. It is at least ironic for such proponents to overlook solid market evidence, in the form of this crucial price rise, that appears to negate the futility hypothesis. At the very least, they owe some explanation of why this example of supposedly market-driven behavior utterly escapes the usual market effects of price increases.

MYTH 5: IMPROVED ENFORCEMENT MEANS TIGHTER BORDER ENFORCEMENT.

Even those who spoke of immigration reform in 2004 primarily as the vehicle for new guestworker admissions have now gotten the religion of enforcement and offer at least rhetorical support to the need for better enforcement as part of an overall package.⁷⁷ But far too often such professions of faith imply that enforcement means only more Border Patrol officers, more fencing, and basically a greater emphasis on policing the frontiers.⁷⁸ Border measures are undoubtedly important as part of a sound enforcement strategy, and the last decade’s increases in the Border Patrol combined with the new forward deployment approach have given us a solid border enforcement component.⁷⁹ But the border has received disproportionate attention, because enforcement that addresses only the border is bound to fail.

As long as potential migrants believe that a single successful foray past the border defenses (even after several failed attempts) opens wide prospects in the U.S. labor market, smugglers will have a ready market for their skills, and hundreds of thousands of immigrants will still come. Even if we build fences across the entire southwest border, smugglers will find other ways to transport their clients. This

76. The post-2001 drop in apprehensions, coinciding with a cooling of the economy, lends some support to that notion. See DEPT. OF HOMELAND SECURITY, FACT SHEET: BORDER APPREHENSIONS, *supra* note 72, at 1.

77. President Bush provides the paradigmatic example. His January 2004 speech said very little about enforcement. See President George W. Bush, Remarks on Immigration Policy, *supra* note 9. By mid-2006, however, he was deploying the National Guard to the Southwest border in the hopes that a show of enforcement seriousness would improve the chances that the comprehensive bill he favored might pass Congress.

78. Even so shrewd an observer as Robert Samuelson has fallen prey to this misconception. See Robert J. Samuelson, *Build a Fence — And Amnesty*, WASH. POST, Mar. 8, 2006, at A19. More recently, Samuelson has broadened his horizons and now emphasizes both border policing and worksite verification. Robert J. Samuelson, *The Immigration Impasse: A Way Out*, WASH. POST, Apr. 5, 2006, at A23.

79. See GEN. ACCOUNTING OFFICE, *supra* note 72, at 1–6.

nation has over 88,000 miles of tidal shoreline,⁸⁰ and some migrants already arrive clandestinely on boats.⁸¹ Entry along the 5500-mile Canadian border is also a real possibility.⁸² Furthermore, an estimated 25–40% of our current unauthorized population never entered clandestinely, instead overstaying a legal admission period.⁸³ Border enforcement contributes almost nothing to the deterrence or apprehension of overstayers.

What we really need is to complement border enforcement with major new efforts at interior enforcement, especially enforcement through worksite verification of new hires. Jobs draw migrants to America. The key to winning the enforcement battle is reducing the job magnet.

Why then have we spent so much energy and money on border measures? One study found that between 1986 and 2002, about 60% of all appropriated enforcement resources went to border work, leaving only 10% for interior investigations and related enforcement.⁸⁴ Interior enforcement, through sending investigators out to track down and remove persons already illegally present, is costly and inefficient.⁸⁵ It is also unglamorous and unpopular work in the eyes of most of Homeland Security's enforcement personnel; those officers who are successful at it regularly gain less administrative credit and prestige than others who are involved in criminal alien apprehension or participation in antiterrorist initiatives.

80. Profile of the People and Land of the United States, http://nationalatlas.gov/articles/mapping/a_general.html (last visited May 15, 2007).

81. Edward Feege & Scott C. Truver, *Homeland Security: Implications for the Coast Guard*, in *GLOBALIZATION AND MARITIME POWER* 441 (Sam J. Tangredi ed., 2002), available at http://www.ndu.edu/inss/Books/Books_2002/Globalization_and_Maritime_Power_Dec_02/01_toc.htm.

82. Profile of the People and Land of the United States, *supra* note 80.

83. See Julia Gelatt, *Bush Puts Immigration Reform Back on Agenda, Approves Funding for DHS*, *MIGRATION INFO. SOURCE*, Nov. 1, 2005, available at <http://www.migrationinformation.org/USfocus/display.cfm?id=346>.

84. INDEP. TASK FORCE ON IMMIGRATION AND AMERICA'S FUTURE, *IMMIGRATION FACTS NO. 10, IMMIGRATION ENFORCEMENT SPENDING SINCE IRCA 4 (2005)*, available at http://www.migrationpolicy.org/ITFIAF/FactSheet_Spending.pdf. The balance of enforcement spending went for detention and removal as well as intelligence. *Id.*

85. DHS recently launched fugitive operation teams for more systematic efforts to locate and remove people who abscond after receiving a final removal order. Although this innovation is counted as a successful initiative, due for expansion, each team, which consists of six officers and one support staff position, is expected to produce only about 500 removals a year. David A. Martin, *Immigration Enforcement: Beyond the Border and the Workplace*, *POLICY BRIEF* No. 19 (Migration Policy Inst.), July 2006, at 1, 5.

A different specialty within internal enforcement focuses on employer compliance with the law's workplace screening requirements.⁸⁶ Enhancing this type of enforcement should be far more efficient than one-by-one apprehensions at deterring illegal migration, but ramping up worksite enforcement carries other salient disadvantages. Primarily, it imposes visible burdens on business.⁸⁷ As a result, significant interest group pressure quietly helps push Congress toward underfunding these enforcement endeavors, and there has been no equivalently organized constituency pushing back.⁸⁸ Moreover, though employers may not like the current I-9 verification process, involving the examination of work authorization documents of all new hires (albeit according to a very lax standard of scrutiny), they have become accustomed to it.⁸⁹ Proposed revisions in the employers' obligations generate determined resistance among a highly influential interest group. Border measures, in contrast, step on almost no influential toes. Border crackdowns are therefore used to demonstrate enforcement seriousness, alienating few and placating many.⁹⁰ But focusing only on the border is an ineffective way to master our enforcement problems. The key fulcrum for effectiveness is the workplace.

MYTH 6: WE HAVE TRIED EMPLOYER ENFORCEMENT,
AND IT DOES NOT WORK.

It is quite true that the current version of employer enforcement does not work,⁹¹ but flaws in that system are correctable—not easily, but with the right combination of resources, smart design, and patience. Under the system established by the Immigration Reform and Control Act of 1986 (IRCA), all U.S. employers must require each new employee to present documents showing identity and demonstrating work authorization.⁹² The company must then record on Form I-9,

86. See GEN. ACCOUNTING OFFICE, GAO-05-813, IMMIGRATION ENFORCEMENT: WEAKNESSES HINDER EMPLOYMENT VERIFICATION AND WORKSITE ENFORCEMENT EFFORTS 5–8 (2005).

87. *Id.* at 8 (describing how employers who do not properly follow the I-9 verification process could face civil or administrative fines ranging from \$110 to \$1,100 for each employee).

88. See ANDREAS, *supra* note 27, at 100–12.

89. See Kitty Calavita, *Employer Sanctions Violations: Toward a Dialectical Model of White-Collar Crime*, 24 LAW & SOC'Y REV. 1041, 1055 (1990); *infra* notes 92–95 and accompanying text.

90. See ANDREAS, *supra* note 27, at 85.

91. See U.S. COMM'N ON IMMIGRATION REFORM, U.S. IMMIGRATION POLICY: RESTORING CREDIBILITY 50–56 (1994).

92. See Immigration Reform and Control Act of 1986 (IRCA), Pub. L. No. 99-603, § 101(a), 100 Stat. 3359, 3360–74 (codified at 8 U.S.C. § 1324a(b) (2000)).

signed by both employer and employee, what documents were produced.⁹³ By law, however, the employer is required to accept any document “that reasonably appears on its face to be genuine.”⁹⁴ False documents are widely available, but a company runs afoul of the antidiscrimination provisions of the immigration laws if it demands more of an employee whose documents have satisfied the facial validity test.⁹⁵ Further, as these respective enforcement regimes have evolved, employers have had more to fear from antidiscrimination enforcement than from enforcement related to the immigration screening. No wonder this system has been utterly ineffective at closing off the attraction of the U.S. job market.

A few crucial and helpful procedures have nonetheless been established by IRCA’s mechanisms. It is now commonplace for every legitimate business in the United States to go through the I-9 verification procedure, empty ceremony though it may often be. This routine is a valuable behavioral foundation upon which to build a modified worksite immigration screening system that will actually work. Employers need not be asked to adopt a whole new set of actions; they need only be led to adjust modestly an already familiar practice. The key is to give employers access to a reliable and minimally burdensome system that can verify the documents presented—and also to provide ready means to check that the person presenting them is the one to whom the documents relate.⁹⁶ This task is large but technically quite within reach. In fact, the immigration agencies already have ten years of experience with a system, known as the Basic Pilot, which has led to the development of swift computerized systems to verify the documents that a new hire presents.⁹⁷

Both of the immigration reform bills passed in 2006, one in the House and one in the Senate, contained significant provisions meant to implement this kind of computerized verification nationwide.⁹⁸ And

93. 8 C.F.R. § 274a.2(b) (2006).

94. INA § 274A(b)(1)(A), 8 U.S.C. § 1324a(b)(1)(A) (2000).

95. INA § 274B(a)(6), 8 U.S.C. § 1324b(a)(6).

96. See Tamar Jacoby, *Let’s Put This ID Plan to Work*, WASH. POST, Apr. 3, 2005, at B4 (proposing an electronic swipe card verification system, similar to credit cards, that would be connected to a database).

97. A good summary of the Basic Pilot system and the potential for converting it to a functioning nationwide verification system appears in MPI TASK FORCE REPORT, *supra* note 67, at 45–53.

98. See Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005, H.R. 4437, 109th Cong., tit. VII (as passed by House, Dec. 16, 2005); Comprehensive Immigration Reform Act of 2006, S. 2611, 109th Cong., tit. III (as passed by Senate, May 25, 2006). The drafters of the 2007 compromise Senate legislation sought no significant changes in this element of reform.

for all the striking differences in the two bills, they were not far apart in what they envisioned for this particular, crucial component. That harmony is important, but it does not mean that we should simply enact those measures as passed in 2006, for they lacked the essential patience we need to practice in calling this nationwide system into being. The bills commanded that the new process be up and running for all the nation's employers within eighteen months in the Senate's version or twenty-four months in that of the House.⁹⁹ That task entails ramping up the system from the ten thousand employers now registered for the Basic Pilot to the full range of eight million U.S. employers.

We need a longer lead time because the vital contribution of such a system is not what it can do two years after enactment; the objective is the mastering of a difficult problem for decades to come. It is far more important that the new system work well from its opening days, thereby cementing confidence in the verification endeavor (a confidence badly eroded by the inefficacy of the 1986 system), than that it start up swiftly.¹⁰⁰ Working well requires more than reliably screening out the persons not authorized to work. Equally important is that the system provide prompt positive verification of valid workers. The biggest complaints about the Basic Pilot have centered on the frustrations of those persons wrongly sent to secondary or tertiary verification steps, even though they are entitled to keep working while that process proceeds.¹⁰¹

One other deficiency of the 2006 bills is that they failed to provide a dedicated funding source that would consistently assure adequate resources to this crucial worksite verification system in the future. To be sure, such resources are meant to be provided through annual appropriations, but the history of appropriations in this field is not encouraging. As noted, Congress has quietly placated various interior constituencies over the last two decades by skewing resources in

99. S. 2611 § 301 (as passed by Senate, May 25, 2006) (proposed INA § 274A(d)(2)); H.R. 4437 § 708. The Senate's eighteen-month timetable would begin to run only from the time that Congress had appropriated \$400 million dollars to the system, whereas the House's twenty-four-month schedule was to begin on the date of enactment.

100. See *Immigration Enforcement at the Workplace: Learning from the Mistakes of 1986: Hearings Before the Subcomm. on Immigration, Border Security and Citizenship of the S. Comm. on the Judiciary*, 109th Cong. (2006) (statement of Stewart Baker, Assistant Sec'y for Policy Development, Department of Homeland Security), available at http://judiciary.senate.gov/testimony.cfm?id=1949&wit_id=5432.

101. MPI TASK FORCE REPORT, *supra* note 67, at 48–50.

the direction of the border (60%) and away from employer-focused enforcement and other interior investigative measures (10%).¹⁰²

A new verification system may attract abundant resources in the first flush of enthusiasm for a comprehensive immigration reform bill. But once the legislative debate results in new legislation, much of America, assuming that the problem has been solved, will turn its attention elsewhere, making it easy for later Congresses to reduce funding. The computer system has to be sustained with enough resources to keep it at the technological cutting edge. But more importantly, a new and truly effective system will generate more temptations for employers either to hire off the books or otherwise evade the system. Therefore, a well-funded audit and follow-up enforcement capacity has to be a critical and perpetual part of the new system. All employers must know that they run a real and substantial risk of detection if they fail to verify an employee or if they enter false information. Sending such a message requires reliable funding, sustained year after year. The best measure may be to base funding on the intake of specified fees, such as fees on employers participating in any temporary worker system or fees imposed on immigrants who enter in the occupational preferences.¹⁰³

Finally, reform of worksite verification must pay close attention to another challenge that has only recently gained close scrutiny from key officials: identity fraud.¹⁰⁴ If the new system really does reliably reject bogus Social Security numbers and false immigration documents, smugglers will work to steal the identities or documents of persons who have legitimate status. It serves no purpose to create a whole new system for verifying documents only to have it fail its real mission because of such evasions.

Reliable identity documents, bearing biometric identifiers, must be an essential part of the procedure. The REAL ID Act of 2005 launched identification improvements focused on the state systems for issuing drivers' licenses.¹⁰⁵ Whether that is the most effective way to

102. See INDEP. TASK FORCE ON IMMIGRATION AND AMERICA'S FUTURE, *supra* note 84, at 4.

103. See INA § 286, 8 U.S.C. § 1356 (2000) (showing examples of dedicated funding sources of this type, such as the Immigration Examinations Fee Account, the Breached Bond/Detention Fund, and the Fraud Prevention and Detection Account).

104. See *Immigration Enforcement at the Workplace: Learning from the Mistakes of 1986*, *supra* note 100 (statement of Stewart Baker, Assistant Sec'y for Policy Development, Department of Homeland Security).

105. Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, Pub. L. 109-13, div. B, tit. II, 119 Stat. 302, 311-16 (2005).

solve this puzzle, as opposed to a single national identification system, is being questioned by state officials as the REAL ID implementation date of May 2008 draws closer.¹⁰⁶ Congress evidently focused on the state systems so as to avoid the sensitive charge that it was building a “national identity card”¹⁰⁷—but the difference is more cosmetic than real. The experience of many European states that use national identity cards demonstrates that such systems can be run with solid protections for civil liberties.¹⁰⁸ But that is a large and separate debate.¹⁰⁹

The crucial point is that the new employment verification system must incorporate arrangements to assure that identity is reliably established by each new hire. If it takes a somewhat longer implementation schedule to develop mechanisms that will provide such assurance, the added time would be worthwhile.

If such an employment verification system can be built and sustained, we can get away from the current wrong-headed paradigm of immigration enforcement: catching people and incarcerating them until they are removed one-by-one. No law enforcement system is healthy if assuring compliance must rely primarily on direct enforcement through the personal attention of the police. Healthy systems are based on widespread voluntary compliance, leaving police to target misbehavior around the margins.

In immigration enforcement, we are miles away from such a system, but the crucial leverage for getting there lies in the workplace. If, after full implementation of a verification system, new unauthorized arrivals cannot readily find work in the American workplace, far fewer will attempt the journey. That audience—people who have not yet migrated—must remain the crucial focus of the endeavor. Deterring such new migration through strong workplace screening is an achievable goal. The transition to an effective workplace screening system will go far more smoothly, and win wider support from the employers who must implement it, if we do not at the same time ask employers to sever pre-existing relationships. This means, at a minimum, that the new verification system should not be applied to existing employees

106. See *State Opposition Growing to REAL ID Act Mandates*, 84 INTERPRETER RELEASES 352, 352 (2007).

107. For discussion of this sensitivity, see generally JOSEPH J. EATON, *CARD-CARRYING AMERICANS: PRIVACY, SECURITY, AND THE NATIONAL ID CARD DEBATE* (1986); Daniel J. Steinbock, *National Identity Cards: Fourth and Fifth Amendment Issues*, 56 FLA. L. REV. 697 (2004).

108. See generally EATON, *supra* note 107.

109. See, e.g., Nicholas Kristof, *May I See Your ID?*, N.Y. TIMES, Mar. 17, 2004, at A25; Bruce Schneier, Op-Ed, *A National ID Wouldn't Make Us Safer*, MINN. STAR TRIB., Apr. 1, 2004.

but should be focused on new hires. And it suggests that realism in immigration reform counsels incorporating some mechanism for legalizing most of those currently present, so as to minimize business opposition to new enforcement measures.

MYTH 7: SERIOUS ENFORCEMENT IS AT ODDS WITH HUMANE IMMIGRATION POLICY.

A common vignette in media coverage of immigration issues is the detention and deportation of a person, perhaps based on a years-old deportation order and in spite of relationships to citizen or lawful resident family members—relationships which may have come into existence only after the person's illegal migration, for example through the birth of a child on U.S. soil. The coverage is usually sympathetic to the individual, for understandable reasons, and it often conveys a message that enforcement—that is, assuring the person's deportation instead of allowing him or her to remain—is the antithesis of a humane immigration policy.¹¹⁰

We cannot realistically build American immigration policy on the notion that long residence, even if illegal, must always generate an equitable claim to remain. As the recent backlash against amnesty demonstrates, such a notion flies against a strong popular headwind derived from a widely held (and publicly valuable) aversion to law-breaking. It will be a sufficient achievement if this round of immigration reform can incorporate a one-time amnesty for a finite population already present. In my view, that can only happen if a wide enough segment of the public is convinced that such an amnesty would truly be a single event—primarily because of the simultaneous deployment

110. The coverage of the recent immigration enforcement raids on a New Bedford, Massachusetts, leather goods factory provides a good example. See Monica Rhor, *Immigration Raids Split Kids From Moms*, SEATTLE TIMES, Mar. 12, 2007, at A1; N.C. Aizenman, *Pleading to Stay a Family*, WASH. POST, Apr. 2, 2007, at A1.

I focus here on these types of stories for their apparent message about substantive admissions policy (suggesting that policy should not result in deportation of persons long present), not for what may be valid criticisms about particular enforcement tactics or strategies. Enforcement neither justifies nor requires either discrimination or roughshod police behavior. Resolute enforcement of the type I advocate is about a mix of inducements and deterrents that will help assure that immigration policy is followed, coupled with a determination to remove those who violate it—preferably based on early detection of a violation (before significant equities attach), a full opportunity to present any defenses or claims for relief, and reliable implementation of any removal order that then issues. Such enforcement is clearly possible while honoring both basic rights and a wider set of standards manifesting good enforcement practice.

of the resources and systems necessary to sustain resolute enforcement thereafter.

Viewed in a wider compass, the only politically durable foundation for generous legal immigration policy in the future is the assurance that immigration is under control. Without reliable enforcement, the political field is open to those who blow the negative effects of immigration out of all proportion and who seek to ride fears of widespread lawbreaking to political success. At times, such efforts even threaten to cut back on legal migration—the easiest part of our overall immigration patterns for a frustrated Congress to affect. After all, we only narrowly avoided a serious reduction in legal immigration ceilings in 1996 as part of that year's illegal migration control legislation.¹¹¹ Without reliable enforcement that dries up the job magnet, frustration with visible lawbreaking leads state and local governments to experiment with harsh measures meant to discourage illegal migration.

Frustration also sometimes leads Congress to lash out, as it did in 1996, to impose ever harsher measures on the unfortunate few who do fall within the toils of the enforcement system—visiting upon them new mandates for detention, exaggerated reactions to minor infractions, or new restrictions on forms of relief that once allowed immigration judges to take account of humanitarian reality and forgive deportation on a case-by-case basis.¹¹² Reliable enforcement would arm the opponents of such harsh measures with better arguments and

111. The influential blue-ribbon Commission on Immigration Reform, chaired by former Congresswoman Barbara Jordan, had recommended in 1995 a significant cut-back in legal permanent immigration, to 550,000 per year (from the projected 1996 level of 725,000, as determined by the Commission). See U.S. COMM'N ON IMMIGRATION REFORM, LEGAL IMMIGRATION: SETTING PRIORITIES xi–xii (1995). The initial versions of the leading immigration reform bills in both the House and the Senate incorporated similar reductions in legal immigration. Changes to legal immigration amendments were thwarted by clever maneuvering in the Senate Judiciary Committee, led by Senator Spencer Abraham, to “split the bill,” thus decoupling the popular enforcement measures directed at illegal migration from the changes in legal migration. See *Senate Committee Splits Immigration Reform Bill, House Floor Action Is Next*, 73 INTERPRETER RELEASES 313, 313–14 (1996).

112. I refer to the amendments made by AEDPA and IIRIRA to the following sections of the INA: §§ 236(c) (mandatory detention); 101(a)(43) (the growing list of offenses deemed “aggravated felonies”); and 240A (cancellation of removal, which replaced the former 212(c) waivers and suspension of deportation, but greatly restricted eligibility). See IIRIRA, Pub. L. No. 104-208, §§ 303, 304, 321, 110 Stat. 3009-546, 585–97, 627–28 (1996); AEDPA, Pub. L. No. 104-132, § 440(e), 110 Stat. 1214, 1276–79 (1996); Morawetz, *supra* note 2, at 1936–49; Elwin Griffith, *The Transition Between Suspension of Deportation and Cancellation of Removal for Non-permanent Residents under the Immigration and Nationality Act: The Impact of the 1996 Reform Legislation*, 48 DRAKE L. REV. 79, 124–36 (1999).

bring into the fold wider constituencies for resisting such harshness—perhaps someday even for rolling back some of the severity of the 1996 amendments. Reliable enforcement, in short, *empowers* generous legal immigration policy in the long run. This insight suggests one final myth deserving examination here:

MYTH 8: IMMIGRATION REFORM IS REALLY ONLY
ABOUT ENFORCEMENT.

I have focused here on enforcement, and I definitely want to see the United States develop an effective, balanced, and well-designed enforcement system, over a five- to ten-year time frame, centered around workplace verification and follow-up, though bolstered by effective border policing. Enforcement, for the reasons I have indicated, is a crucial component of reform. No combination of guestworker provisions or legal migration expansion, short of virtual open borders, will obviate or even reduce the enforcement requirement. Without effective enforcement, demagoguery and polarization on immigration will persist and eat away at generous legal immigration provisions. But enforcement is not really the most important focus for our current immigration reform debate. Instead it is merely a means—a crucial means that must be well-crafted and well-implemented—toward a greater objective.

The greater objective is to reform our laws so that we as a nation can best take advantage of the benefits of immigration in the twenty-first century. After all, we have at our disposal a huge and globally rare asset, because, by tradition and self-image, we are a nation reasonably comfortable with high levels of legal immigration. We readily admit one million persons a year for legal permanent migration,¹¹³ and, in my opinion, the citizenry would tolerate a higher level if there were wider assurance that illegal migration has come under control. Our nation struggles with ongoing problems of discrimination and excess, to be sure, but viewed on the world scene, the United States is one of only a handful of countries that has been reasonably successful in welcoming immigrants, providing real opportunity, and making good use of the restless talent of those who come to take up a new life. Immigration is important to this nation's economy, its scientific advancement, and its artistic and cultural richness.¹¹⁴ We need to get

113. See OFFICE OF IMMIGRATION STATISTICS, DEP'T OF HOMELAND SECURITY, 2005 YEARBOOK OF IMMIGRATION STATISTICS 18 (2005), available at http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2005/OIS_2005_Yearbook.pdf.

114. See MPI TASK FORCE REPORT, *supra* note 67, at 3–15.

enforcement right so that we can preserve, nurture, and expand these national advantages.

