

# NATIONAL AFFAIRS



## Splitting the Difference on Illegal Immigration

*Peter Skerry*

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**I**N THE CONTROVERSY OVER ILLEGAL IMMIGRATION THAT has roiled our politics for decades, the image of "living in the shadows" has been invoked by all sides. For immigrant advocates, "the shadows" are where the undocumented are harassed by overzealous law-enforcement officers and exploited by unscrupulous landlords and employers. For many other Americans, "living in the shadows" conjures vaguely sinister intruders using public services to which they are not entitled and preying on law-abiding Americans through illicit activities and crime.

Yet regardless of one's views on the issue, this imagery is profoundly misleading. It helps to perpetuate the myths and exaggerations that have made our immigration debate so fruitless. Undocumented immigrants are hardly mere victims of economic or political forces beyond their control.

But neither are they dangerous criminals or public charges lurking on the fringes of our society. Rather, they are responsible agents who have made difficult choices in a complicated and risky environment — an environment for which all Americans bear some blame.

These choices produce both beneficial and negative consequences for the nation and for the immigrants themselves. And our policies must contend with both sets of effects. If we are to find our way to a solution, we must examine the genuine predicament of the millions of illegal immigrants in our midst without ignoring the legitimate concerns millions of Americans have about their presence.

If we succeeded in removing the hyperbole and stereotypes from the immigration debate, our politics might open itself to a balanced approach to the problem: legalization for as many undocumented immigrants as possible, but citizenship for none of them. Under this proposal, illegal immigrants who so desired could become "permanent non-citizen residents" with no option of ever naturalizing.

Such a policy would do much to address the predicament faced by the undocumented while at the same time respecting and addressing the concerns of those Americans who have long demanded that illegals be penalized for breaking the law. It would respond to the challenge of illegal immigration in its genuine complexity and ambiguity. And only when we acknowledge that complexity, looking beyond the simple caricatures that too

often shape the immigration debate, can we see our way to a plausible policy solution.

## **SHEDDING LIGHT ON "LIFE IN THE SHADOWS"**

The first step in clarifying our debate is to move beyond some familiar distortions about just who illegal immigrants are, how they live, and how and why they got here. Based on a variety of surveys and estimates, we actually have a decent understanding of the illegal-immigrant population in America. The latest figures compiled by the Pew Hispanic Center indicate that there are more than 11 million undocumented immigrants, a number that includes more than one million children under the age of 18. Overall, the undocumented represent approximately 4% of the nation's population, 5% of its labor force, and 28% of its foreign-born population.

These numbers understate things somewhat, for the simple reason that the undocumented often live with relatives who are here legally. Some illegals have spouses who are either legal immigrants or citizens. Still more numerous are the 4.5 million native-born (and therefore citizen) children under 18 with at least one illegal parent. As a result, the total number of individuals living in households with at least one illegal immigrant exceeds 15 million, representing about 6% of the population.

The classic image of illegal immigrants entering our country is one of silhouetted figures sneaking across the

Mexican border. About half of the undocumented arrived this way; less noted, however, is that the remainder initially came legally — typically on work or tourist visas — but then overstayed their allotted residency periods. While there are sizable contingents of illegals from Asia, Europe, Africa, and Canada, almost 60% are from Mexico, and about 20% more are from Central and South America or the Caribbean. Therefore, about 80% of illegal immigrants are Latinos.

Today's figure of roughly 11 million illegals living in the U.S. is actually lower than the record high of 12 million in 2007. This decline reflects decreased inflows since the Great Recession of 2008, though there does not appear to have been much, if any, increase in the number of illegals voluntarily returning home in recent years. This lower number is also the result of steadily tightening border enforcement, including increased deportations initiated by the Bush administration and now sustained by the Obama administration.

Because of these developments, the undocumented population is now generally believed to have stabilized at this lower number. And one result of this stabilization is an increase in the length of time the average illegal immigrant has resided in the United States. In 2011, Pew estimated that more than three-fifths of adult illegals had been living in the United States for at least ten years. More than a fifth had lived here between five and nine years. And only 15% had been here less than five years. By contrast, in 2000,

Pew reported that 44% of adult undocumented immigrants had been living in the United States for at least ten years and about one-third for less than five years.

However long they have been here, the undocumented are strikingly young. Pew reports that the median age of undocumented adults is 36.2, compared to 46.1 for legal-immigrant adults and 46.5 for native-born American adults. These numbers reflect the fact that the many risks associated with illegal status — travel through dangerous terrain, larcenous smugglers, unscrupulous employers — are more easily negotiated by the young, and particularly by young men. This is one reason why men significantly outnumber women among the illegal-immigrant population: Of the undocumented immigrants over the age of 18 currently residing in the U.S., there are approximately 5.8 million males, compared to 4.2 million females.

The age and gender profiles of the undocumented translate into a large cohort of young, unattached males — with no spouses, partners, or children, at least in this country. According to Pew, nearly half of illegal-immigrant men are "unpartnered adults without children," while fewer than one-fifth of illegal-immigrant women are. Such patterns account for the recurrent image of undocumented immigrants as single males noisily crowding into run-down apartments or hanging out on street corners looking for work and getting into trouble.

On the other hand, their youth and fertility mean that illegal

immigrants are frequently young parents. They are actually much more likely to live in a household with a spouse (or partner) and at least one child than are legal immigrants and native-born adults. Pew estimates that 45% of undocumented immigrants live in such situations, compared with 34% of legal immigrants and 21% of native-born Americans. Consequently, while illegals represent about 4% of the U.S. adult population, their children account for 8% of newborns. These numbers point to the challenges that illegal immigration poses for schools, hospitals, and other service providers. Anxiety about these challenges has translated into charges that the undocumented are here primarily to sponge off the nation.

But while concerns about illegals' reliance on social programs may be warranted (as discussed below), most undocumented immigrants are not here looking for "freebies." Overwhelmingly, they migrate in pursuit of work. This is particularly true for undocumented males: Among all men in the U.S. between the ages of 18 and 64, illegal immigrants are the most likely to be working. In 2009, for example, 93% of undocumented men participated in the labor force, compared to 86% of legal-immigrant men and 81% of native-born men. Yet the opposite pattern is evident among women. In 2009, 58% of undocumented women were in the labor force, compared to 66% of legal-immigrant women and 72% of native-born women. So while a majority of undocumented women do work, more of them remain at home — presumably to care for their children — than do other women in America.

However hard undocumented immigrants work, their professional prospects are limited by their low skill and education levels. Almost half have not completed high school, and nearly a third have less than a ninth-grade education. Pew notes that 22% of U.S. residents between the ages of 25 and 64 with less than a high-school education are undocumented immigrants.

Their incomes are commensurately meager. Even though undocumented-immigrant households contain, on average, more workers than do households composed of native-born Americans, the former's median annual income in 2007 was \$36,000, compared to the latter's \$50,000. And while legal-immigrant households have experienced significant income gains over time, illegal-immigrant households have not. Moreover, the latter's poverty rates are also disproportionately high: About one-third of the children of undocumented immigrants are poor, compared to about a fifth of the children of native-born parents.

Little of this comes as news to most Americans, who are not surprised to hear that illegals are concentrated in jobs that are unpleasant, unsafe, or low-paying — and sometimes all of the above. For example, as of 2008, illegal immigrants were 21% of parking-lot attendants, 25% of farm workers, 27% of maids and housekeepers, 28% of dishwashers, 37% of drywallers, and 40% of brick masons. By industry, again as of 2008, the undocumented were 10% of workers in leisure and hospitality, 14% in construction, 20% in dry cleaning and laundry, 23% in private household

employment, and 28% in landscaping. In addition to what these data tell us about living standards among the undocumented, they highlight a particularly difficult aspect of the nation's illegal-immigration challenge: Important sectors of the U.S. economy have become dependent on undocumented workers.

These are sectors where workers are often vulnerable to exploitation by small businessmen, many of them fellow immigrants. In such jobs, wages are meager and benefits are often non-existent. So it's not surprising that, as of 2008, three-fifths of undocumented adults lacked health insurance, compared to 24% of legal-immigrant adults and 14% of native-born adults. Yet it is too easy to overlook the corollary of this statistic: that two-fifths, or 40%, of illegals *do* have health insurance. "Life in the shadows" is not uniformly dark.

Similarly, the Pew Hispanic Center reports that, as of 2008, "[o]nly 35 percent of unauthorized immigrant households [were] homeowners, half the rate of US-born households" (emphasis added). Pew goes on to note that, among undocumented immigrants who have lived here for a decade or more, "*only* 45 percent own their own homes" (again, emphasis added).

These data are doubly revealing. At one level, they indicate a degree of material well-being that would not be anticipated from the household-income figures cited above. But they also suggest, once again, that the undocumented

have not exactly been cowering in the shadows. Rather, these immigrants have taken major steps toward entering the American mainstream, like buying homes. They have been encouraged to do so by an assortment of public policies, including the Internal Revenue Service's move to supply illegal immigrants with Individual Taxpayer Identification Numbers in lieu of Social Security numbers, which has allowed undocumented workers to secure mortgages. To be sure, these immigrants relied heavily on sub-prime loans, and their home-ownership rates are undoubtedly lower today than they were before the housing bust. But the tendency to regard the undocumented as victims leads organizations like Pew — as well as much of the American public — to focus on the gap between them and the rest of us, consequently overlooking the advances made by illegal immigrants.

Similarly, illegal immigrants have been joining labor unions and participating in demonstrations, including highly visible and angry street protests in 2006 against proposed punitive legislation in Congress. Meanwhile, their undocumented children have been educated in public schools, with many preparing for higher education and loudly demanding in-state tuition at public universities. Such young people have also been visibly advocating passage of the DREAM Act, which would provide illegal immigrants who came here as minors a path to citizenship.

To be sure, none of this means that illegal immigrants live at ease in America. The Pew Hispanic Center reports that,

in 2010, 84% of undocumented Latinos worried "some" or "a lot" that a family member, a close friend, or they themselves could be deported. Only 35% of the polled illegals said they were "satisfied with the way things are going in this country today." This sentiment tracked with the response among Hispanics generally, which was 36%.

Yet what should surprise us about these numbers is not how low they are but how high they are — higher, in fact, than the 25% of *all* Americans who expressed satisfaction with the direction of the country. As Pew emphasizes, ever since this question was first asked in 2003, "Hispanics have nearly always been more positive than non-Hispanics about the direction of the country."

Similarly, after years of vituperative debates over immigration and record-high deportation rates, overwhelming majorities of undocumented immigrants still say there is more opportunity in this country than where they came from. In 2010, 79% of undocumented Hispanics told Pew that "the opportunity to get ahead is better in the United States."

## **HALF-OPEN ARMS**

The ambiguous circumstances of illegal immigrants parallel the complex history of America's interactions with them, and in particular our complicated history with the country from which most of them originate: Mexico. The United States has invited illegal immigrants even as it has pushed

them away, and a century of policies facilitating the recruitment and hiring of unskilled Mexican laborers — regardless of whether those workers were legal or illegal — set in motion social and economic forces that have proven difficult to control. Only during the last third of the 20th century did we even begin to focus on managing migration from Mexico, and only in the past quarter-century have we gotten remotely serious about securing our southern border or restricting the employment of people who are here illegally.

Toward the end of the 19th century — when the United States first began to impose meaningful restrictions on immigration — we carved out exemptions for our neighbors in the Western Hemisphere, especially Mexico. Mexicans were effectively exempted from the 1885 prohibition on contract labor that marked the first major federal restriction on immigration. When head taxes and other entrance fees were imposed on immigrants in 1907, Mexicans were again given a pass. And when the United States first implemented a literacy test for immigrants (conducted in their native languages) in 1917, Mexicans were specifically exempted from this policy as well.

Most notably, when in the 1920s the U.S. assigned discriminatory, racially motivated quotas that varied among the most common countries of origin, no such limits were imposed on nations in the Western Hemisphere. This substantial carve-out reflected concessions to agricultural employers. But it was also a nod to business interests eager

to keep markets open, as well as to the foreign-policy establishment, which worried about offending our neighbors.

These much-reviled quotas remained in place until 1965, when the Hart-Celler Act replaced them with the framework that remains the basis of today's policy: non-discriminatory, formally equal treatment of all nations. But country-specific quotas were not immediately applied to the Western Hemisphere. The 1965 act provided for an annual ceiling of 120,000 immigrants for the entire region without country-specific limits, a policy that worked to the advantage of neighboring Mexico. By contrast, nations outside our hemisphere were assigned annual quotas of 20,000 immigrants each. Only in 1976 was that 20,000-immigrant cap imposed on Western Hemisphere countries, finally ensuring formally equal treatment of all nations. Today, that number has increased to about 26,000, and the annual per-country quotas remain in place.

But the legacy of a "Mexican exception" persists, and continues to subvert the principle of equal treatment of all nations upon which our immigration policy is nominally based. Thus, each year, we welcome many more *legal* immigrants from Mexico than from any other country. In fiscal year 2011, for example, 13.5% of the people granted legal permanent resident (or "green card") status were from Mexico; 8.2% were from China; and 6.5% were from India. These numbers in part reflect the second pillar of our post-1965 immigration policy: family unification. The law

affords immediate relatives of U.S. citizens admission without limit, outside of annual per-country quotas. But Mexico's over-representation also reflects the fact that many of these legal immigrants are not actually new arrivals; rather, they are former illegals who were already living here and managed to get their status adjusted. Once these immigrants become citizens, they too can bring in immediate family members outside Mexico's annual quota.

Throughout most of the previous century, agricultural interests in the South and the Southwest were the dominant forces pushing to exempt Mexico and the rest of the hemisphere from per-country immigration quotas. What little opposition they aroused came from a few labor unions, including César Chávez's United Farm Workers, which supported (albeit tepidly) Border Patrol crackdowns on migrants whom union organizers referred to as "wetbacks."

Crucial to understanding this period is the Bracero Program, which began in 1942 in response to wartime shortages of agricultural laborers. The program involved the importation of temporary contract laborers (or "guest workers"), who were allowed to be employed in America for a set period after which they were then expected to return home. By the time the program ended in 1964, more than 4.6 million Mexican guest workers had participated through contracts that bound them to specific employers for stipulated periods of time. Living and working conditions were sufficiently harsh that contractees often dropped out of

the program. Many failed to return home to Mexico, remaining here illegally.

Though at times justified as a way of stemming illegal immigration, the Bracero Program is widely seen as having exacerbated it. Not only did this program whet the appetite of growers for cheap, low-skill labor, it also opened the eyes of hundreds of thousands of Mexican workers to opportunities in the United States. Seeking to explain the emergent problem of illegal immigration in a 1975 *Public Interest* article, Elliott and Franklin Abrams pointed to Bracero a decade after its termination and wryly observed that "the program may be said to be continuing on an unofficial basis."

Bracero and its aftermath led eventually to the first major effort to deal with the consequences of mass illegal immigration. In 1986, a bipartisan majority in Congress passed, and President Ronald Reagan signed, the Immigration Reform and Control Act (or IRCA), which granted legal status and a path to citizenship to nearly 2.7 million undocumented immigrants. Widely recognized as having facilitated hundreds of thousands of fraudulent legalization claims, IRCA has since rendered the term "amnesty" virtually unspeakable by American politicians and public officials.

Almost as notorious are IRCA's employer sanctions, which were the quid pro quo for the amnesty at the heart of IRCA's legislative compromise. Those sanctions imposed

penalties on employers who knowingly hire immigrants not authorized to work in the United States. But because immigrants can establish "authorization" with identity documents that are easily counterfeited, the sanctions have proved ineffective. Over the years, several programs have been implemented that rely on more effective verification methods. But these initiatives have largely been stymied by a coalition of employers, immigrant advocates, and civil libertarians opposed to anything resembling a "national identity card."

Few Americans now recall that, prior to IRCA, it had never been against federal law to hire a non-citizen lacking work authorization. Today, individuals who hire fewer than ten illegal workers during any 12-month period are unlikely to be prosecuted. This conveniently offers relief to many small-business owners and most home owners hiring gardeners, painters, or cleaning ladies. Politicians and nominees for high-profile government appointments have sometimes been embarrassed by their employment of illegals, and any American might be legally vulnerable for failing to pay Social Security taxes for undocumented workers. But the average American can still drive down to the local Home Depot parking lot and hire a day laborer without fear of being charged with violating the law. And for those who do overstep these generous boundaries, counterfeit identification affords protection from prosecution under the provision that they did not *knowingly* hire undocumented workers.

In these many ways, the United States has long expressed a profound ambivalence toward illegal immigrants.

Americans do not, by and large, approve of those who reside here without permission, yet we implicitly invite them to do so and only reluctantly crack down on their employers. Just as the circumstances faced by illegal immigrants in our country are simultaneously threatening and encouraging, so the nation's attitude toward illegals has long been at once hostile and welcoming.

### **VICTIMS OR RISK-TAKERS?**

This ambivalence toward undocumented immigrants is evident even among those responsible for enforcing our immigration laws. In scores of interviews with Border Patrol agents over the years, I have been struck by two contradictory comments they invariably volunteer. The first is the defensive assertion that "we are federal law-enforcement agents, as good as those from any other agency — including the FBI." The second, which no agent I have ever talked with has failed to voice unprompted, is, "If I were in [the illegals'] shoes, I'd be doing the same thing and crossing that border to better things for me and my family."

Herein lies the unique challenge of immigration-law enforcement. While insisting on their standing as effective federal agents, Border Patrol personnel point to the one facet of their jobs that distinguishes them from other law enforcement — and that compromises their mission. By

contrast, local police are unlikely to be defensive about their status as law-enforcement professionals. Nor are they likely to be heard saying, "If I were in that guy's shoes, I'd be dealing drugs or robbing convenience stores." No wonder that, among Border Patrol agents, morale has long been so low and attrition so high.

The same ambivalence is evident among Americans in general. Despite popular outrage over illegal *immigration*, there has been remarkably little hostility directed toward illegal *immigrants*, and indeed many people express sympathy for them. This relative tolerance stems, in part, from the fact that (as we have seen) important sectors of our economy depend on undocumented laborers. But those accepting of illegal immigrants are not only business owners driven by market competition and the desire to avoid more burdensome requirements for verifying the legal status of new hires. They are also home owners motivated by convenience and empathy, as well as social-service providers and educators who, unsurprisingly, are not eager to inquire into the immigration status of the men, women, and children seeking their help. And local law-enforcement officials are generally reluctant to get drawn into immigration issues, especially pertaining to illegals.

Such responses can be acknowledged, and perhaps even applauded, without taking the additional step of regarding the undocumented as blameless victims of forces beyond their control. Illegals are well aware of the serious risks they incur. They know they are breaking the law, and they

are willing to take difficult jobs under poor conditions, all in pursuit of longer-term goals for themselves and their families.

All things considered, it is quite rational for immigrants to take these risks — because the rewards are substantial. The economic consequences of immigration (both legal and illegal) are difficult to assess, and are subject to much controversy among economists. Yet one conclusion is clear and consistent: The big winners are the immigrants. As economist Gordon Hanson reports, a 25-year-old Mexican male with nine years of education almost quadruples his hourly wage by migrating to the United States. It is not difficult to see why a young person would take major risks to reap this sort of reward.

Assessing the costs and benefits of immigration for the United States as a whole is another matter. At the lowest end of the labor market, there is evidence that the influx of unskilled immigrants in recent decades (a substantial portion of whom are illegals) has reduced the wages of workers with less than a high-school education. These workers, many of whom are African-Americans, are already the least advantaged in our society, and the effect of immigration on their circumstances certainly deserves more attention than it receives from journalists and policymakers. Nevertheless, the overall negative impact of illegal immigration on Americans' wages is limited.

At the same time, however, the economic *benefit* of illegal

immigration is also frequently overstated. Contrary to the received wisdom, in recent decades, the net economic contribution of immigrants — legal and illegal, skilled and unskilled — has been quite small. Economists again disagree; overall, however, they calculate a gain of at most a few tenths of one percent of annual gross domestic product as a result of immigration.

Yet if immigration has only slightly increased the overall size of the national economic pie, it has affected how that pie gets sliced up. The owners of capital, business entrepreneurs, and people who can afford the services provided by low-skilled immigrants have clearly benefited. In effect, low-skilled immigrants increase the productivity and national-income share of those who employ them. It should thus come as no surprise that millions of less affluent Americans perceive immigrants as a threat, while the more comfortable and wealthy tend to regard them as helpful employees — the nannies, gardeners, waiters, maids, and laborers who provide them with valued services.

This uneven distributional impact of immigration has occurred during a period of increasing income inequality. Indeed, wage stagnation over the past few decades has roughly coincided with the steadily increasing numbers of immigrants arriving since the 1965 reform. Incorrectly, but perhaps not surprisingly, many Americans attribute their economic woes to immigrants. As economists Kenneth Scheve and Matthew Slaughter observe: "Less-skilled people prefer more restrictive immigration policy, and

more-skilled people prefer less restrictive immigration policy." Indeed, their simulations lead them to conclude: "If you could put a high school dropout with roughly 11 years of education through both high school and college, ending up with about 16 years of education, then the probability that this individual supports immigration restrictions would fall by some 10 to 14 percentage points."

The other frequent complaint against immigrants is that they pose a fiscal burden. Illegals in particular are criticized as "freeloaders" who use public services but pay no taxes. Here again, the reality is more complicated. Immigrants — illegal and legal alike — do pay taxes, especially sales taxes and property taxes (directly as home owners, and indirectly as renters). Many also pay Social Security and other payroll taxes, and some pay federal and state income taxes.

The relevant question is whether illegal immigrants contribute as much in taxes as they receive in public services and benefits. Living in households that have, on average, lower incomes and more children than those of non-immigrants, undocumented workers do receive more in public benefits than they pay in taxes. This imbalance is especially problematic for state and local jurisdictions, where the relevant services — education, health care, and social welfare — are predominantly funded and delivered. It is less evident at the federal level, where immigrants are typically net contributors. Overall, however, illegal immigrants are undoubtedly a fiscal drain in the short run and, according to Hanson, in the long run as well.

Yet focusing too narrowly on such fiscal and economic effects has impoverished our understanding of the broader set of motivations driving illegal immigrants here in the first place. As numerous studies reveal, illegals are often "target earners" who come to the U.S. without intending to stay. To maximize income, they work at several jobs; to minimize expenses, they live in spartan, often substandard conditions. This helps explain why the undocumented change residences so frequently — nearly twice as often as legal immigrants or the native born, according to the Pew Hispanic Center.

To meet their earnings targets, illegals endure long hours in unpleasant, sometimes dangerous conditions. Over time, their goals of returning home often get pushed off into the future and, as we know, many illegal immigrants end up remaining in the U.S., with family members joining them. Yet the notion of someday enjoying wealth earned in the U.S. back in their home countries typically persists, while transience and impermanence often continue to characterize their lives here — with important implications for them and for the rest of us.

Employers understand these dynamics. They avoid investing time and money training workers who might leave or get deported. Yet employers also regard illegals as ideal for occasional or undesirable jobs where high turnover is the norm. If they work "under the table," illegals don't get any benefits, but they avoid payroll taxes — which saves money and trouble for them as well as their employers. But

as Hanson points out, even on the books, undocumented workers are valuable to employers precisely because they are more flexible and responsive to market forces than are other workers.

Labor organizers have learned this the hard way. Activist lawyer Jennifer Gordon has chronicled her (ultimately unsuccessful) efforts to organize undocumented day laborers in suburban Long Island. She succinctly identifies one obstacle she could not overcome: The workers were "settlers in fact but sojourners in attitude." A veteran union organizer whom Gordon called in to assess the situation bluntly concluded: "There are just too many workers, most of whom are incredibly transient, and too few jobs, and the whole scene is so fluid and uncontrollable. The employers are too small and too varied to make organizing them practical."

Not surprisingly, such transience is not confined to the workplace. Young people detached from the constraints as well as the supports of families back home exhibit what one sociologist refers to as "instrumental sociability," characterized by transitory friendships, casual sexual encounters, and excessive drinking to a degree uncommon back home.

Such atomism helps explain why immigrant communities often lack strong leadership and organizations. In their study of four Chicago neighborhoods, Richard Taub and William Julius Wilson quote a parochial-school principal:

"Mexicans don't think they're going to be living here a long time. That makes them not invest much in their neighborhood." For similar reasons, when community policing was initiated in Chicago in the mid-1990s, participation among Hispanics was markedly lower than among other groups. So the instability that characterizes life among the undocumented does not result simply from their legal status, but reflects their own priorities and goals.

For all these reasons, illegals can be seen as entrepreneurs whose pursuit of opportunity can and does result in big gains. But like all entrepreneurs, the undocumented take risks — and the consequences are borne not only by the immigrants but also by the rest of us. In the continuing debate over immigration, however, there is little understanding or even acknowledgment of these social and communal consequences. Among policy elites, the focus is on analyzing concrete (especially economic) costs and benefits. Meanwhile, popular energy and fervor are fixated on legalities. Among those most inflamed by this issue, the chief concern is typically not the cost of illegal immigration or its social consequences, but the fact that illegal immigrants are flouting our laws and showing contempt for our society.

## **LAW AND DISORDER**

It is perhaps no surprise that the anger and deep anxiety aroused by illegal immigration are so frequently expressed in the legalistic terms of our liberal, contractarian society. It

is therefore helpful to look at the debate over illegal immigration as fundamentally a disagreement between two very different understandings — one populist and one cosmopolitan — of the role of law in American society. In this sense, the debate is an extension of the divide between populists and elites that characterizes our politics more generally. Yet this disagreement also presents an opportunity to clarify our complicated immigration problem and to find our way to a solution.

In the face of massive and threatening change, many Americans invoke the unyielding authority of law — "the rule of law," as their tribunes put it — for reassurance and continuity. By contrast, cosmopolitan elites regard law as malleable and contingent. (For the well off, well connected, and well lawyered, it often is.) In the elites' "flexible" view, laws shaped by narrow, parochial interests are unfortunate and ill-advised. But laws responsive to inevitable social and economic changes — particularly globalization and greater cultural diversity, trends generally regarded as non-threatening and beneficial — are viewed as prudent and sensible.

Yet both perspectives misapprehend the role of law in American society. The cosmopolitan view is alternately too complacent about the law's malleability and too cynical about its reflecting the arbitrary needs of powerful but narrow interests. Among academic and policy elites concerned with immigration issues, the only fixed star appears to be the needs of powerless immigrants, on whose

behalf they invoke human-rights arguments. But it is seldom clear what these rights mean, in part because they reflect cosmopolitan values that minimize the prerogatives of nation-states that could afford them real substance. In essence, the elite cosmopolitan argument becomes that whatever is good for low-skilled immigrants — whether legally in the U.S. or not — is good for America.

By contrast, the populist perspective on illegal immigration is overly rigid and unyielding. It begins with the reasonable premise that immigration policy should advance the national interest. But it then assumes that the national interest is self-evident and unchanging, rather than the outcome of continuing discussion and debate, shaped by shifting geopolitical and economic circumstances. Populists upset about undocumented immigrants regard the law as an unambiguous set of rules to be applied uniformly and consistently with minimal consideration of the consequences. Hence their refrain: "What part of 'illegal' don't you understand?"

Americans voicing this view would be surprised to hear that it resonates more with European civil law than with our own common-law tradition. In Europe, the law is indeed authoritative, reflecting the workings of shielded, hierarchical institutions. These institutions are staffed by lifelong jurists, trained to impartially apply a logically coherent set of principles and rules. And though these powerful jurists do not operate within a regime of formally separated powers, they are nevertheless insulated from

politics by their professional stature and authority.

By contrast, in America, the legal system is open and adversarial. Judges often begin their careers in politics, with many judicial positions across the country filled through elections. Our legal system is thus heavily influenced by demands for democratic accountability. More to the point, judges and their courts are relatively passive before lawyers, who are accorded the initiative not in pursuit of any expert or objective findings, but on behalf of the interests of their clients. Legal decisions are typically open to subsequent challenges and ongoing disputation. As legal scholar Robert Kagan has noted, in America, "[l]egal conflict and uncertainty vitiate legal authority."

Because our judges are not narrow specialists insulated from societal and political forces, they resolve legal disputes in light of precedent, historical context, and the concerns of the wider community. In America, federal judges — including, of course, Supreme Court justices — not only read the newspapers but also appear on television. They understand that their decisions are not commands from on high, but part of a conversation — a colloquy, as legal scholar Alexander Bickel put it decades ago — with the other branches of our government and with the American people. As Bickel argued:

For the basis of all law...is consensual. We are willing, and ought to be willing, to pay only a limited price in coercing minorities. Whenever a minority is sufficiently large or determined or...strategically placed, we do not quite have law. We must then generate a greater measure of consent, or reconsider our stance on the minority's position. We must, in such circumstances, resort to methods other than coercive law; methods of persuasion and inducement, appeal to reason and shared values, appeal to interest, and not only material but political interest. We act on the realization that the law needs to be established before it can be effectively enforced, that it is, in a quite real sense, still provisional.

Law, then, is not the exclusive purview of the courts or the legislatures. As social theorist Philip Selznick has put it:

A responsive legal order is not set over society....  
[L]egislatures and courts are only two among the diverse forms of legal order that regulate people's lives. The vitality of a social order comes from below, that is, from the necessities of cooperation in everyday life.

All of this suggests that the challenge posed by illegal immigration is social and political as much as it is legal in nature. Illegal immigrants break the informal rules of neighborhood and civic life as much as the formal rules of legislatures and courts. But because the resulting strains are

not felt evenly across society, and indeed because many Americans see themselves benefiting from illegal immigration, responses to these strains vary greatly. The ensuing debate has been cast in terms that not only reflect different reactions to illegal immigrants but divergent understandings of the law.

## **NORMALIZATION WITHOUT CITIZENSHIP**

The way forward requires an approach less burdened by legalisms and more attuned to the balancing of political interests. We need to move beyond viewing the undocumented merely as criminals or victims. Some of us need to acknowledge that most of the 11 million illegals in our midst are here to stay. Others among us need to recognize that insistence on "a path to citizenship" may be — in political terms — a dead end.

All of us should stop to appreciate that America is a remarkably open and absorptive society, where newcomers and their children put down roots and develop ties rapidly. Indeed, these forces are so powerful that they overcome much of the indecision and ambivalence of illegals who typically do not arrive planning to stay here. We should allow ourselves to feel good about this, and use such positive sentiments to help us address a dilemma that, in its intractability, does not reflect well on any of us.

Yet the equities that illegal immigrants build up over time cannot become an excuse to ignore or deny the

understandable anxieties, and even outrage, that many Americans feel in response to their presence here — however intemperately such sentiments may at times be expressed. And while we should criticize politicians who pander to not irrational but nevertheless highly volatile fears about illegals, we must not lose sight of the need to sanction those same illegals. As President Obama put it at American University in 2010, "We have to demand responsibility from people living here illegally." Indeed, as we have seen, the undocumented are hardly blameless for the difficult circumstances in which they now find themselves. Yet holding them accountable for their decisions need not be done in a punitive or vindictive spirit.

To strike this balance, we should offer lenient terms of legalization to illegal immigrants but prohibit them from ever becoming eligible for naturalization. They should instead become "permanent non-citizen residents."

The specific details of any such status would obviously need to be determined through the back and forth of the legislative process. But several points are worth considering now. The conditions for eligibility should be minimal — for example, excluding only those undocumented immigrants with serious criminal records. This new legal status should be granted on a one-time basis to as many of the undocumented as possible, as quickly as possible. Of course, to be eligible, illegals now in the U.S. would have to prove that they had begun residing here before some set date. But this date should be as recent as possible in order

to maximize the number of individuals legalized.

The key to this proposal is the straightforward, credible penalty that would be imposed. In the wake of the widespread fraud committed under IRCA's amnesty program, subsequent proposals have gotten bogged down in complicated rules defining eligibility and penalties — such as requiring the undocumented to return home for a specified period, after which they could apply for visas to re-enter the United States. Such stipulations may lessen public outrage, but we almost certainly lack the administrative capacities, not to mention the political will, to enforce them.

This penalty, it should be noted, would apply only to individuals who arrived here illegally as adults (age 18 and older). All those who came as minors would be granted full citizenship as quickly as possible. To deny these young people the opportunity for citizenship — to hold them accountable for decisions presumably made by their parents — would be unfair and inappropriate, particularly if our goal is to emphasize individual accountability. In this respect, this proposal is actually more consistent with an ethic of responsibility, and is more generous, than President Obama's recently announced (and highly controversial) Deferred Action for Childhood Arrivals program, which affords undocumented immigrants who arrived here as minors only a two-year reprieve from the threat of deportation.

Finally, to be credible, any such initiative would have to be backed up with an effective enforcement regime. This implies continued commitment of manpower and resources, both along our borders and in the interior. Despite resistance from businesses, immigrant advocates, and civil libertarians, far more effective work-site enforcement would be necessary, especially upgraded programs to verify work authorization (such as the internet-based E-Verify system). Without such measures, any effort to adjust the status of illegals would result in the moral hazard of encouraging renewed streams of such migrants anticipating another legalization in the future.

#### **FOUR OBJECTIONS**

The proposal offered here is of course merely an outline — a starting point for discussion and negotiation. The idea is to give federal and state lawmakers, advocacy groups, civil-society organizations, and other interested parties room to work out the specifics. One can nevertheless anticipate four major objections to this proposal.

The first and most obvious is that permanent non-citizen resident status would be so anomalous as to be unsustainable. Where and how would this new category of people fit into American society? As it happens, though, this sort of special category is in fact common — common enough that, though once controversial, we seldom think about these unique cases today. Take the example of American Samoa, an unincorporated territory of the United

States whose roughly 56,000 residents are "non-citizen nationals." Entitled to U.S. passports, American Samoans can travel freely into and out of the United States, to which they are deemed by law to owe "permanent allegiance." Yet they are not citizens.

Then there are the several hundred thousand residents of the U.S. Virgin Islands, the Northern Mariana Islands, and Guam. These are also unincorporated U.S. territories, but their residents, unlike American Samoans, *are* U.S. citizens. Still, residents of these territories have no voting representation in Congress, nor are they represented in the Electoral College.

If this situation sounds familiar, it is because it is similar to another anomaly more visible and troublesome to many Americans — the status of the District of Columbia. Its residents are obviously citizens, but are not formally represented in Congress. Thanks to the 23rd Amendment, though, they *are* represented in the Electoral College.

The most visible and problematic of these anomalies is surely the Commonwealth of Puerto Rico, which was ceded by Spain to the United States at the conclusion of the Spanish-American War. The island's 3.7 million residents are American citizens, but they are not eligible to vote in federal elections for the presidency and do not have a voting representative in Congress. Whenever there has been a military draft, Puerto Ricans have been subject to it. On the other hand, Puerto Ricans are not subject to federal

taxes on their personal incomes.

There have at times been controversies about the legal and constitutional statuses of each of these entities.

Nevertheless, these anomalies have proved stable and acceptable over time — both for the individuals involved and for the nation at large. We are clearly able to handle complex legal arrangements that arise from complicated historical circumstances.

A second objection to this proposal concerns the benefits and obligations attached to permanent non-citizen resident status. These of course would depend on the specifics of the policy, which Congress would have considerable (though hardly unlimited) latitude to formulate. To a lesser degree, so would the states. At this point, then, any discussion of these details is necessarily hypothetical. But the distinctions drawn between citizens and legal permanent residents (green-card holders) in current law and policy offer some informative examples.

In some cases, legal permanent residents are treated substantially the same as citizens. For example, the wage and overtime protections of the Fair Labor Standards Act apply to both. So do the free-speech protections of the First Amendment. Permanent residents are similarly eligible for various social-welfare programs, including the Earned Income Tax Credit and Social Security benefits (subject to a few conditions, which can differ from state to state). Not surprisingly, these green-card holders are therefore also

required to pay Social Security payroll taxes as well as federal income taxes. Like citizens, they are also required to register with the Selective Service.

In other contexts, however, legal permanent residents are sharply differentiated from citizens. For example, the Supreme Court has upheld restrictions imposed by some states barring non-citizens from serving in certain government positions — such as probation-officer jobs — but then struck down restrictions on licenses for less "political" functions, such as those for notaries and civil engineers. As University of California, Los Angeles, law professor Hiroshi Motomura notes, non-citizens are generally excluded from federal civil-service positions. He also points out that only citizens are permitted to serve on state or federal juries. And of course non-citizens are not permitted to vote in federal and state elections, though a few local jurisdictions do allow them to vote.

Legal permanent residents are also not eligible for *all* social programs. For example, since 1996, they have been ineligible to receive Medicaid benefits during their first five years in the United States, after which time their coverage is at the discretion of individual states. Similarly, legal permanent residents who have contributed to Social Security and are otherwise entitled to benefits may have them suspended if they remain outside the United States for more than six consecutive months.

In fact, travel outside the U.S. is a major issue for these

immigrants. Especially when they leave for extended periods, perhaps visiting relatives back in their countries of origin, green-card holders risk not being allowed to re-enter. As Motomura concludes, under current rulings, "the Constitution protects a returning lawful immigrant no more than a first-time entrant." More generally, permanent residents have no absolute assurance that they will be allowed to remain here. Failing to keep documents current or committing various crimes — including tax evasion and shoplifting — could result in their deportation. The status of such immigrants is therefore highly contingent, both on their own behavior and on global politics.

Finally, legal permanent residents cannot obtain U.S. visas for immediate family members outside of established quotas. In many cases, this means that such relatives must wait in line for years to get here, or take a chance and come here illegally. In contrast, naturalized citizens are permitted to bring in such family members relatively quickly, outside of the quotas. This is undoubtedly the biggest drawback of non-citizen status for most newcomers.

A third objection to this proposal is that it would treat illegal immigrants too leniently and would be tantamount to amnesty. Yet it is inconceivable that any such program would not include restrictions on beneficiaries at least as stringent as those now imposed on permanent residents, who have the additional benefit of eligibility for citizenship. And if skeptics wish to see permanent non-citizen residents held at a greater distance from our society and civic life

than legal permanent residents are, they can attach further restrictions to this new status.

Finally, a fourth objection is that this proposal would be punitive. And indeed it would, though not unreasonably or vindictively so. In this same vein, some might reject this proposal as offering "second-class citizenship." Once again, that is the point: Permanent non-citizen status would be inferior to naturalization and full citizenship. In fact, ironically, the immigration debate is so polarized and terms such as "legalization" and "a path to citizenship" so indiscriminately invoked that it is necessary to point out that this proposal would offer a good deal *less* than second-class citizenship.

But it is also worth emphasizing that the force and stigma of this penalty would be strongest at the outset, and would fade over time as those on whom it would be imposed aged and eventually passed away. And if we committed seriously to stemming subsequent illegal immigration, then any stigma attaching to beneficiaries of this proposal would further dissipate over time.

### **AN ENDURING ACCOMMODATION**

No policy addressing the immense and complicated issue of illegal immigration can satisfy everyone. But an approach like the one outlined here would avoid many of the problems that have bedeviled other proposals and would more squarely confront the dilemmas we face.

There is certainly reason to believe that the vast majority of illegal immigrants would gladly accept the bargain suggested here, particularly when they compare it to the likely alternative of continued illegal status. It is similarly reasonable to assume that the primary goal of most undocumented immigrants continues to be what originally drew them here: supporting their families, whether back home or in the United States. For these individuals, something as simple as driving to work without fear of apprehension by law enforcement would constitute an enormous improvement in their circumstances. So, too, would the freedom to deal with public schools and other government agencies without fear of detention. These sorts of critical changes can be accomplished through legalization alone, without offering citizenship.

The available research certainly confirms that illegals do not necessarily seek citizenship. Ethnographic studies of undocumented Guatemalans in Houston and of illegal Irish in New York City reveal lingering indifference to any such permanent commitment to this nation. Most tellingly, by the end of 2009 — nearly a quarter-century after the IRCA amnesty program began — of the nearly 2.7 million individuals who became legal permanent residents under the program, barely 41% had gone on to exercise the option to naturalize. In other words, when offered the chance to become citizens, the overwhelming majority of the undocumented have settled for less.

Such findings have been overlooked for several reasons.

Immigrant advocates have certainly not been eager to draw attention to them. Nor would we expect those fighting for immigrant rights and empowerment to readily embrace anything short of full citizenship. But at some point we must ask whose interests are at issue — those of the undocumented or those of their advocates?

Others have ignored evidence of ambivalence or indifference toward citizenship among illegals because it does not sit easily with our fondest immigration myths. Americans find it difficult, perhaps even offensive, to believe that immigrants might cling to the notion of eventually returning home or spurn the opportunity to become Americans. Now, however, these very preferences may point the way out of the ethical and political dilemma that confronts us.

Even though the overwhelming majority of illegal immigrants would almost certainly settle for it, permanent non-citizen status would, as noted, leave its bearers vulnerable to any number of infringements on their rights and benefits. On the other hand, this proposal would put its beneficiaries in a much stronger position to withstand any such political headwinds. With their legal status resolved, permanent non-citizen residents would be afforded the opportunity to overcome their own ambivalence and indecision. As we have seen, because illegals arrive here typically not intending to stay, they limit their commitments to neighbors, co-workers, and employers, who respond in kind. Permanent non-citizen residency would highlight both

the possibility and the desirability of escaping this pattern, thereby discouraging the behaviors that engender anxiety among so many Americans.

This proposal also presents the opportunity for an even sturdier and more enduring political accommodation on this contentious issue — one that would benefit not only today's undocumented but also their children and grandchildren. It would speak directly and sympathetically to the frustrations and anger over illegal immigration felt by many Americans. And it would do so by not treating the undocumented as victims trembling in the shadows, but by calling them to step forward and assume responsibility for their decisions — and then imposing on them a clear and decisive penalty.

All this would be achieved, however, without maligning illegals or treating them as criminals. Nor would this approach pander to the overheated emotions evident among so many Americans on this issue. Instead, it would be premised on all Americans' acknowledging our societal complicity in the presence of the 11 million undocumented among us.

This last point is critical, because it offers an end to the blame game that attributes this policy dilemma either to the unreasonable zeal of immigrant advocates or the machinations of greedy businessmen. While these and other interests have often exerted disproportionate influence on immigration policy, what this debate has long lacked is a willingness on everyone's part to acknowledge ownership

of the outcomes, however imperfect, of a political process that is fundamentally fair and just. Without that acknowledgment, our policy failures will always just be the other guy's fault, and will never be remedied.

This insight brings us back to Alexander Bickel's wise warnings about the limits of abstract, formal understandings of citizenship and his corresponding emphasis on its informal social and political underpinnings. In the ongoing debate over illegal immigrants, we Americans have fixated on legal formalisms in what has often seemed like an effort to escape the social complexity of the problem. The circumstances of the 11 million undocumented immigrants in America pose a set of social challenges — to our nation and to the immigrants themselves — that are at least as important as the legal offenses involved. The proposal presented here, culminating in permanent non-citizen resident status, is intended to address both dimensions of this seemingly intractable dilemma. We cannot hope for a lasting solution if we ignore either one.

*Peter Skerry teaches political science at Boston College and is a senior fellow at the Brookings Institution.*