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## Visa as Property, Visa as Collateral

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## INTRODUCTION

Three decades ago Guido Calabresi and Philip Bobbit famously wrote about “tragic choices,” namely tough policy choices which offend deeply held values, and the accompanying “subterfuges,” that is, efforts by policy elites to shield such choices from public view.<sup>1</sup> Strangely, the “tragic choice” framework has not been applied in the context of U.S. immigration law, although current immigration policy is rife with tragic choices and subterfuges. A case in question is the issue of commodification of visas. It is clear that U.S. policymakers remain deeply committed to maintaining an illusion that U.S. visas are not being “sold.”<sup>2</sup> For example, in the subprime mortgage financial

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1. GUIDO CALABRESI & PHILIP BOBBITT, TRAGIC CHOICES (1978). The term “subterfuge” is from Calabresi. GUIDO CALABRESI, IDEALS, BELIEFS, ATTITUDES, AND THE LAW 88 (1985). The tragic choice framework has most famously been applied to the issue of healthcare rationing. See, e.g., Leonard Fleck, *Just Health Care Rationing: A Democratic Decisionmaking Approach*, 140 U. PA. L. REV. 1597, 1612 (1992). For example, how do we decide which sick patients receive expensive liver transplants? Their moral culpability in damaging their current liver, such as through alcoholism? Their ability to pay for the transplant? Their likelihood of long-term survival? Their historical or future contribution to society? As far as I can tell, the tragic choice framework has not typically been applied to the challenges of immigration law and policy-making. An exception is David Martin, Keynote Address, 1981 Friedmann Conference, The Inter-American Refugee Crisis: In Search of International Legal Solutions, Columbia Law School (Apr. 3, 1981) (on file with author).

2. Indeed a recent article in *The Economist* makes precisely this point. See *The Price of Entry: A New Proposal from Gary Becker to Make a Market in Immigration*, ECONOMIST, June 26, 2010, at 80, available at [http://www.economist.com/node/16424085?story\\_id=16424085](http://www.economist.com/node/16424085?story_id=16424085) (noting that Becker’s proposal to auction visas, while innovative, has almost no chance of success, given the background hostility to such ideas). This public posture of elites fits with a broader public suspicion of selling visas as evidenced by polling, since visas often signify a potential route to citizenship. See generally the polling data discussed in Shaheen Borna &

crisis that began in 2007, U.S. policymakers declined to auction visas to wealthy overseas investors who would be willing to purchase depressed real estate, a policy suggestion that gained considerable currency as a means of buttressing property values.<sup>3</sup>

Yet, U.S. immigration practice has long made unofficial concessions to commodification, that is, concessions at the margins. Notably, the government generally derives no direct benefit from such concessions, although other parties may extract significant rents. One might call these “informal subterfuges,” as a cottage industry has developed with labor brokers and coyotes charging applicants high fees to gain entry to the United States.<sup>4</sup> Strikingly, these fees are pervasive, not only in the “black” and “gray” markets (that is, markets outside of the formal economy, sometimes involving inherently illegal activities such as undocumented border crossings). They are also pervasive in the “white” markets (within the formal economy). For example, elite applicants typically employ attorneys and sometimes lobbyists who charge high fees to navigate the complexities of the Immigration and Nationality Act (“INA”).<sup>5</sup> There are also official concessions to commodification. Indeed, the INA mandates that some migrants “pay” very high prices to obtain the right to enter the United States. Certain elite visa applicants, for example, must invest significant sums in the U.S. economy as a condition of both obtaining and maintaining their visas.<sup>6</sup>

While in other countries, the poor migrant, like the rich migrant, may pledge something of value as a condition of receiving her visa, in the United States, the poor migrant has no such option.<sup>7</sup>

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James M. Stearns, *The Ethics and Efficacy of Selling National Citizenship*, 37 J. BUS. ETHICS 193, 196–98 (2002).

3. *New York Times* columnist Thomas Friedman is the most notable proponent of this policy. Friedman interviewed Indian elites, who cited the willingness of Indian investors to invest in foreclosed U.S. properties if immigration benefits would attach to such investments. Thomas Friedman, Op-Ed., *The Open-Door Bailout*, N.Y. TIMES, Feb. 10, 2009, at A31.

4. I learned this through an interview with Professor David Spener, whose subjects have described coyote transportation networks and the exorbitant fees that undocumented migrants pay to coyotes and brokers. Interview with David Spener, Professor, Trinity Univ. (June 4, 2009).

5. See, e.g., Evan Perez & Gregory White, *FBI Lets Barred Tycoon Visit U.S.*, WALL ST. J., Oct. 30, 2009, at A1 (noting that the lobbyist and former Presidential candidate Bob Dole successfully lobbied for a visa for Russian billionaire Oleg Deripaska, who had previously been barred from the United States due to concerns regarding links to organized crime).

6. See, e.g., 8 U.S.C. § 1153(b)(5) (2006) (providing for visas to be issued to immigrants who invest at least one million dollars in a start-up U.S. business that generates full-time jobs for ten United States citizens or lawful residents). For a description of how this works in practice, see *Just Pay the Cover*, ECONOMIST, June 25, 2010, [http://www.economist.com/blogs/freeexchange/2010/06/immigration\\_0](http://www.economist.com/blogs/freeexchange/2010/06/immigration_0).

7. This is true in rich Asian countries, such as Singapore, and in nearly all of the Middle Eastern states that rely heavily on migrant workers. See DOVELYN RANNVEIG AGUNIAS &

Rather, the poor migrant faces another kind of “tragic choice.” She could pay a coyote an astronomical fee to transport her across the border illegally at great risk to her personal safety, or she could simply not come.<sup>8</sup> There is a reason for this tragic choice, namely, a failure of U.S. policymakers to confront a primary challenge of immigration law: screening these applicants is notoriously difficult because they typically are not well placed to provide documentary evidence of credible ties to their country of origin, which will lead them to return home at the end of their visa’s tenure. Typically, the poor, low-skilled applicant pledges to be law-abiding during her tenure in the United States, specifically promising to avoid visa overstay. Yet, the high numbers of visa overstays among migrants generally, and among poor, low-skilled temporary workers in particular,<sup>9</sup> is evidence of a quintessential problem of information asymmetry.<sup>10</sup> The typical

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KATHLEEN NEWLAND, MIGRATION POL’Y INST., CIRCULAR MIGRATION AND DEVELOPMENT: TRENDS, POL’Y ROUTES, AND WAYS FORWARD 3–8 (2007), *available at* [http://www.migrationpolicy.org/pubs/MigDevPB\\_041807.pdf](http://www.migrationpolicy.org/pubs/MigDevPB_041807.pdf) (describing the evolution of circular migration and migrants as “active agents of their own mobility”); ORN BODVARSSON & HENDRIK VAN DEN BERG, TEMPORARY MIGRATION, INVOLUNTARY MIGRATION, AND OTHER VARIATIONS ON THE STANDARD MODEL 261–84 (2009) (describing variations on the standard immigration model).

8. Given the limited number of guest-worker visas, a low-skilled person without ties to family in the United States to “sponsor” them has no practical mechanism of entry. There are strict numerical limits on the number of guest workers. 8 U.S.C. § 1101(a)(15)(H) (2006) (guest-worker provisions). For a candid acknowledgement of the fact that the numerical limits on guest workers make it virtually impossible for low-skilled persons to come, see Press Release, The White House, President Signs Homeland Security Appropriation Act for 2006 (Oct. 18, 2005), *available at* <http://georgewbush-whitehouse.archives.gov/news/releases/2005/10/20051018-2.html>.

9. Nearly half of the undocumented population of twelve million overstayed their visas. See Ted Robbins, *All Things Considered: Nearly Half of Illegal Immigrants Overstay Visa* (NPR radio broadcast July 14, 2006), <http://www.npr.org/templates/story/story.php?storyId=5485917>. Moreover, the United States is unable to trace most persons who overstay their visas. See James C. McKinley & Julia Preston, *U.S. Can’t Trace Foreign Visitors on Expired Visas*, N.Y. TIMES, Oct. 11, 2009, at A1 (noting that over forty percent of the undocumented migrants were previously documented and overstayed). Although overstay rates among guest workers are lower now than they were in the past, historically, high overstay rates among guest workers were a primary contributor to the size of the undocumented population. Philip L. Martin & Michael S. Teitelbaum, *The Mirage of Mexican Guest Workers*, FOREIGN AFF., Nov.-Dec. 2001, at 117. The size of the undocumented population (of twelve million) is taken from the work of Douglas Massey, a sociologist and leading authority on this issue. See Douglas S. Massey, *Borderline Madness: America’s Counterproductive Immigration Policy*, in DEBATING IMMIGRATION 129–38 (Carol Swain ed., 2008). Other estimates generally indicate that there are between ten and fourteen million undocumented persons. See DAVID A. MARTIN, MIGRATION POL’Y INST., TWILIGHT STATUSES: A CLOSER EXAMINATION OF THE UNAUTHORIZED POPULATION 1 (2005), *available at* [http://www.migrationpolicy.org/pubs/MPI\\_PB\\_6.05.pdf](http://www.migrationpolicy.org/pubs/MPI_PB_6.05.pdf); JEFFREY S. PASSEL, PEW HISPANIC CTR., UNAUTHORIZED MIGRANTS: NUMBERS AND CHARACTERISTICS 3 (2005), *available at* <http://pewhispanic.org/files/reports/46.pdf>.

10. Adam B. Cox & Eric A. Posner, *The Second-Order Structure of Immigration Law*, 59 STAN. L. REV. 809, 824–27 (2007) (pointing out the difficulties of information asymmetry); see also HIROSHI MOTOMURA, AMERICANS IN WAITING: THE LOST STORY OF IMMIGRATION &

applicant knows much more about whether she will return to her home country than the U.S. government, while the government typically has no way of evaluating the sincerity of her commitments. To overcome this challenge, this Article recommends what economists popularly term “hostage taking”—requiring that a visa applicant post bond.<sup>11</sup>

While a bonding proposal initially may seem radical, bonding has a long heritage in many aspects of the common law and appears to have been utilized heavily by the states early in U.S. history.<sup>12</sup> Moreover, the U.S. government already is heavily involved with bonding regimes on its overseas military bases, albeit indirectly. Immigration authorities in the Middle East typically require guest workers to post bonds. In keeping with these requirements, Halliburton, the military contractor, fills many of the housekeeping positions on U.S. military bases in the Gulf by posting bonds for guest workers.<sup>13</sup> Yet despite the obvious applicability of bonding to U.S. immigration challenges in a modern globalized world in which people

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CITIZENSHIP IN THE UNITED STATES 15–37 (2006) (pointing out a further difficulty that even a sincere visa applicant who promises to return to his home country may change his mind once he has been in the United States for a period of time).

11. The term “hostage taking” comes from the economics literature. *See generally* Oliver E. Williamson, *Credible Commitments: Using Hostages to Support Exchange*, 73 AM. ECON. REV. 519 (1983). In this particular context, the pejorative term “hostage” refers to a government’s ability to hold hostage something of value to the alien until he exits the country.

12. *See, e.g.*, GERALD NEUMAN, STRANGERS TO THE CONSTITUTION: IMMIGRANTS, BORDERS AND FUNDAMENTAL LAW 25–30, 39, 48, 146–47 (1996) (discussing several examples of bonding in early attempts to regulate the movement of persons, including a colonial system of demanding security from masters of vessels for immigrants deemed likely to become paupers, which was later adopted in Massachusetts and other states in several iterations of statutes requiring bonds from vessels to indemnify the state for expenses arising from any passenger who lacked a settlement in the state and would likely become a public charge). Notably, some of these bonding systems were invalidated by the U.S. Supreme Court and state courts as impermissible attempts by the states to regulate foreign and interstate commerce in the absence of federal laws and treaties, but sometimes even after invalidation these bonding systems reappeared in other forms. *See generally* Gerald Neuman, *The Lost Century of American Immigration Law*, 93 COLUM. L. REV. 1833 (1993) (discussing bonding in early U.S. history). For a discussion of bonding in other contexts, including some historical discussion, *see generally* THE LAW OF MISCELLANEOUS AND COMMERCIAL SURETY BONDS (Todd C. Kazlow & Bruce C. King eds., 2001) (leading text on bonding in the commercial context); Eric Helland & Alexander Tabarrok, *The Fugitive: Evidence on Public Versus Private Law Enforcement from Bail Jumping*, 47 J.L. & ECON. 93, 118 (2004) (discussing the effectiveness of bail bonding systems in diverse contexts); *Bail*, 37 GEO. L.J. ANN. REV. CRIM. PROC. 311 (2008) (summary of the current law on bail bonding in the criminal law context).

13. Halliburton typically hires South Asians for these positions. Nizar Latif, *Iraqis Angry at Loss of Jobs to Asians*, NATIONAL (Abu Dhabi), Nov. 8, 2009, <http://www.thenational.ae/apps/pbcs.dll/article?AID=/20091108/FOREIGN/711079862/1135>.

move more easily than in previous times,<sup>14</sup> it is curious that there has been little discussion of broader bonding proposals.<sup>15</sup> This Article is an effort to begin that dialogue.

Admittedly, there are problems with bonding regimes in the U.S. context, which justify the utilization of the “tragic choice” metaphor. In a country resolutely committed by its historical Ellis Island metaphors to the notion that it opens its borders to deserving migrants,<sup>16</sup> regardless of their socioeconomic status, bonding systems may create a view that visas are being “sold.” However, immigration law already routinely uses market-based mechanisms to screen rich migrants. The question becomes: Why should poor migrants not have similar opportunities? The real issue is not the bonding requirement, but rather the absence of opportunities in developing countries for poor people to access credit facilities to finance bonds.

While proposals for visa bonding of guest workers are rarely discussed, skeptics more generally cite the justice concerns associated with any proposal that fails to address the extreme inequities in life prospects that necessarily underlie any migrant’s willingness to bond herself.<sup>17</sup> Then there is the Dickensian free-for-all that preceded modern immigration law: In the early days of the American Republic, employers bonded fully half of white migrants as a condition of their passage with the implicit cooperation of the government, which enforced the bonds. Upon arrival, migrants labored to pay off bonds in

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14. Indeed, bonding is currently utilized in limited circumstances in the INA. INA § 212(d)(3)(A), 8 U.S.C. § 1182(d)(3)(A) (2006) (“The Attorney General shall prescribe conditions, including the exaction of such bonds as may be necessary, to control and regulate the admission and return of inadmissible aliens applying for temporary admission under this paragraph.”); § 213 (regarding admission of aliens upon giving bond or undertaking and its return upon permanent departure); § 214 (“The admission to the United States of any alien as a nonimmigrant shall be for such time and under such conditions as the Attorney General may by regulations prescribe, including when he deems necessary the giving of a bond with sufficient surety in such sum and containing such conditions as the Attorney General shall prescribe . . . .”); see also THOMAS ALEINIKOFF ET AL., IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY 748 (6th ed. 2008); STEPHEN LEGOMSKY & CRISTINA RODRIGUEZ, IMMIGRATION AND REFUGEE LAW AND POLICY 651, 818 (5th ed. 2009).

15. The exceptions are Jeffrey Manns and Peter Schuck. Manns’s exploration of the role of gatekeepers in immigration enforcement includes a brief discussion of bonding. Jeffrey Manns, *Private Monitoring of Gatekeepers: The Case of Immigration Enforcement*, 2006 U. ILL. L. REV. 887, 889–90. Peter Schuck also briefly discusses bonding. Peter H. Schuck, *INS Detention and Removal: A “White Paper”*, 11 GEO. IMMIGR. L.J. 667, 682–85 (1997).

16. See ARISTIDE ZOLBERG, A NATION BY DESIGN: IMMIGRATION POLICY IN THE FASHIONING OF AMERICA 1–24 (2006) (detailing the evolution of this Ellis Island metaphor of the “deserving migrant”).

17. Ayelet Shachar is a skeptic. See AYELET SHACHAR, THE BIRTHRIGHT LOTTERY: CITIZENSHIP AND GLOBAL INEQUALITY 22 (2009) (“[T]he greater promise lies in diminishing the extreme inequities in life prospects that are presently attached to ascribed membership status under the existing birthright regime.”).

slave-like conditions; in contemporary times, bonded workers in the Gulf have been described as indentured servants.<sup>18</sup> Yet these concerns seem strangely out of place in the modern United States, where bonds are enforceable with appropriate human rights protections. Moreover, critics face an undeniable irony: the average migrant worker sees the value of her labor increase more than four-fold in the United States.<sup>19</sup> By lowering overstay, bonding systems may improve U.S. labor market access for poor migrants whose welfare motivates distributive justice critiques in the first place.<sup>20</sup> Thus, the goal should be to pursue transparent bonding proposals, while mitigating distributive justice concerns. One solution would be to provide incentives for employers to finance bonds. However, there will always be worthy applicants who cannot find employers that will post bonds on their behalves.<sup>21</sup> Thus, applicants should be able to finance bonds on their own initiative.<sup>22</sup>

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18. See ERIC FONER, *GIVE ME LIBERTY!: AN AMERICAN HISTORY* 47–48 (2005) (discussing early white migrants); HUMAN RIGHTS WATCH, *SWEPT UNDER THE RUG: ABUSES AGAINST DOMESTIC WORKERS AROUND THE WORLD* (2006), available at <http://www.hrw.org/en/reports/2006/07/27/swept-under-rug-0> (discussing the working conditions of bonded workers in the Middle East). Although indentured laborers often worked under difficult conditions, indentured servitude was distinct, of course, from slavery. Foner's text famously elucidates the distinction between the two institutions. In modern times, the distributive justice questions have particular resonance given that poor bonded migrants are disproportionately likely to be racial minorities. This is certainly the case in the Middle East where bonded migrants are comprised almost entirely of South Asians. Critics have raised the prospect of a separate underclass of poor migrants. In the U.S. context, although bonding regimes are not yet widely utilized, this concern of a separate underclass has particular resonance and is raised in several law review articles, especially in the context of guest-worker programs. For skeptical discussions of guest-worker programs more generally, see MOTOMURA, *supra* note 10, at 15–37. For more targeted critiques of guest-worker programs, see Jennifer Gordon, *Transnational Labor Citizenship*, 80 S. CAL. L. REV. 503 (2007) (discussing the concept of "labor citizenship"); Cristina M. Rodríguez, *Guest Workers and Integration: Toward a Theory of What Immigrants and Americans Owe One Another*, 2007 U. CHI. LEGAL F. 219 (arguing that a guest-worker program will neither solve illegal immigration nor labor woes, and that it will create further resistance on the part of guest workers to integrating into the U.S.).

19. See Michael Clemens et al., *The Place Premium: Wage Differences for Identical Workers Across the U.S. Border* (Ctr. for Global Dev., Working Paper No. 55, 2008), available at <http://www.cgdev.org/content/publications/detail/16352> (discussing the "place premium," namely the wage gain accruing to foreign workers who arrive in the United States and finding that migration has a much more immediate impact on poverty alleviation than any other policy since the wage differentials between the United States and most developing countries are so great).

20. Indeed, bonding proposals have recently gained currency in Britain for precisely this reason. For example, South Asian lobby groups have advocated bonding proposals on the grounds that it would improve access for South Asians to Britain. Jenny Booth, *Britons Face Jail if Relatives Overstay Their Visa*, TIMES ONLINE (London), June 25, 2008, <http://www.timesonline.co.uk/tol/news/politics/article4211653.ece>.

21. See, e.g., MINISTRY FOR FOREIGN EMPLOYMENT PROMOTION & WELFARE, NATIONAL LABOR MIGRATION POLICY FOR SRI LANKA, at v (2008) (Sri Lanka), available at [http://www.ilo.org/public/english/protection/migrant/download/mpolicy\\_srilanka\\_en.pdf](http://www.ilo.org/public/english/protection/migrant/download/mpolicy_srilanka_en.pdf) (promoting minimum requirements for migrant workers seeking particular jobs). This finding justifies the



As recent history in developed countries' markets has shown, the road to extending credit to the poor is rife with potential pitfalls.<sup>23</sup> Indeed, the current state of credit markets for poor people in the developing world is not unlike the market that existed here in the United States before protections for poor borrowers proliferated at the federal and state levels.<sup>24</sup> Although it may not be widely recognized outside of specialist circles, the poor have long been able to borrow.<sup>25</sup> In each of the depressions in U.S. economic history, there has been a thriving market of money lenders.<sup>26</sup> The problem is that the poor's financiers typically operate in the black market, extracting terms that are unjustifiable in a modern market economy. Money lenders have long been understood to demand onerous terms; one need only consider the biblical condemnation of the abuses of money lenders in Jerusalem's temple.<sup>27</sup>

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emphasis on institutional innovations that allow guest workers to finance their own bonds independent of finding willing employers.

22. This distributive justice intuition—namely enhancing access to visas—is supported by the work of a number of leading political theorists. See, e.g., JOSEPH H. CARENS, *CULTURE, CITIZENSHIP, AND COMMUNITY: A CONTEXTUAL EXPLORATION OF JUSTICE AS EVENHANDEDNESS* 1–20 (2000) (criticizing “efforts at political domination and exclusion” justified by some scholars); Randall Hanson & Patrick Weil, *Introduction: Dual Citizenship in a Changed World: Immigration, Gender, and Social Rights*, in *DUAL NATIONALITY, SOCIAL RIGHTS AND FEDERAL CITIZENSHIP IN THE U.S. AND EUROPE: THE REINVENTION OF CITIZENSHIP* 1, 7–11 (Randall Hansen & Patrick Weil eds., 2002) [hereinafter *DUAL NATIONALITY*] (noting the arguments for and against dual citizenship and suggesting that the measurable and hypothesized benefits outweigh the relatively weak case against); Louis Michael Seidman, *Fear and Loathing at the Border*, in *JUSTICE IN IMMIGRATION* 136, 140–45 (Warren F. Schwartz ed., 1995) (concluding that “a regime of liberalized immigration probably constitutes the best solution to resource maldistribution in our actual world of bounded caring”); James Woodward, *Commentary: Liberalism and Migration*, in *FREE MOVEMENT: ETHICAL ISSUES IN THE TRANSNATIONAL MIGRATION OF PEOPLE AND OF MONEY* 59, 82 (Brian Barry & Robert E. Goodin eds., 1992) (noting that affluent countries “should adopt a policy of open borders” and that a contrary conclusion is inconsistent with “liberal egalitarian values”).

23. Michael Barr and Rebecca Blank's introductory chapter to their new volume makes this point particularly well. Michael S. Barr & Rebecca M. Blank, *Savings, Assets, Credit, and Banking Among Low-Income Households: Introduction and Overview*, in *INSUFFICIENT FUNDS: SAVINGS, ASSETS, CREDIT, AND BANKING AMONG LOW-INCOME HOUSEHOLDS* 1, 1–18 (Michael S. Barr & Rebecca M. Blank eds., 2009) [hereinafter *INSUFFICIENT FUNDS*].

24. See PETER J. COLEMAN, *DEBTORS AND CREDITORS IN AMERICA: INSOLVENCY, IMPRISONMENT FOR DEBT, AND BANKRUPTCY 1607–1900*, at 6–15 (1974) (describing colonial debtor-creditor relations).

25. Jill Lepore, *Annals of Finance: “I.O.U.”*, *NEW YORKER*, Apr. 13, 2009, at 34 (“Debtors’ prison was abolished, and bankruptcy law was liberalized, because Americans came to see that most people who fall into debt are victims of the business cycle, and not of fate or divine retribution.”).

26. See COLEMAN, *supra* note 24, at 16–30 (noting the existence of black markets during various nineteenth-century depressions and the accompanying bankruptcy reforms).

27. *Matthew* 21:12 (detailing Jesus’ criticisms of money lenders in the temple).

These abuses have continued in modern times. For example, South Asian guest workers who post bonds to work in the Middle East often finance their bonds by executing loan contracts with local money lenders. These money lenders may enforce contracts with implicit threats of violence.<sup>28</sup> Their threats are credible. Indeed, Nepalese farmers borrow money for fertilizer by sometimes pledging their daughters as “collateral.” The daughters then work as indentured laborers to the money lenders until the loan is paid off.<sup>29</sup> The same Nepalese farmer may need a loan to underwrite a bond for a work visa in Dubai, where he can increase his earnings several-fold. While it would be tragic to deny him this opportunity, in the absence of access to credit in a transparent, regulated setting, he may find himself making a similarly tragic choice that involves pledging his daughter.

This is the world *as it currently is* for the poor of developing countries who seek financing. This Article is an attempt to map a trajectory to a world *as it could be*. Our distributive justice commitments counsel providing enhanced access to visas through readily available financing. Simultaneously, we must set a certain threshold of protections that should exist for a proposal to be acceptable; at a minimum, financing for poor migrants must be obtained in a law-bound context.<sup>30</sup> One could hardly be comfortable with migrants financing the bonds that underlie their visas to the United States in the black market, with a shadowy world of money lenders and coyotes extending loans. Unfortunately, this is precisely

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28. See generally DARYL COLLINS ET AL., PORTFOLIOS OF THE POOR: HOW THE WORLD'S POOR LIVE ON \$2 A DAY (2009) (addressing the “fundamental question” of how the world’s “poor make ends meet”).

29. The Nepal Youth Foundation—an associate of Ashoka, the global association of social entrepreneurs—has widely publicized the plight of Nepalese girls who are pledged to money lenders as indentured servants. See Posting of Jake R., *Trailblazers for Good: Freeing Enslaved Girls in Nepal*, CARE2 (July 18, 2010), <http://www.care2.com/causes/trailblazers/blog/-100-buys-freedom-for-an-enslaved-girl-in-nepal/>.

30. Of course, even when financing occurs in the context of a law-bound framework, a range of problems may occur, as the recent global financial crisis has reminded us. If the experience of student borrowers and poor, subprime borrowers in the United States is any guide, prospective guest workers could be particularly susceptible to predatory lending practices. This reinforces the need for vigorous regulation of lenders. For a summary of the issues in this regard, see generally NAT'L CONSUMER LAW CTR., PILING IT ON: THE GROWTH OF PROPRIETARY SCHOOL LOANS AND THE CONSEQUENCES FOR STUDENTS (2011), available at <http://www.studentloanborrowerassistance.org/blogs/wp-content/www.studentloanborrowerassistance.org/uploads/File/proprietary-schools-loans.pdf> (summarizing predatory lending practices and their consequences for students); ELLEN SCHLOEMER ET AL., CTR. FOR RESPONSIBLE LENDING, LOSING GROUND: FORECLOSURES IN THE SUBPRIME MARKET AND THEIR COST TO HOMEOWNERS (2006), available at <http://www.responsiblelending.org/mortgage-lending/research-analysis/foreclosure-paper-report-2-17.pdf> (summarizing extensive predatory lending practices, particularly among low income U.S. residents).

what transpires now. Although there is little in the legal scholarship<sup>31</sup> on either secured or unsecured lending at the “bottom of the pyramid” in developing countries,<sup>32</sup> a realistic assessment of the current state of lending to the poor confirms that the prospects for formal financial institutions extending credit are not promising. Given that cash diversion is a particular risk in the informal economies that are typically pervasive in developing countries, formal financial institutions generally follow the maxim, “no collateral, no loan.”<sup>33</sup> For the poor, this has generally resulted in “no loan.”<sup>34</sup> Moreover, the legal systems in many developing countries do not reliably enforce loan contracts. This only exacerbates the difficulties of formal financial intermediation for the poor. How, then, can bankers in the developing world be incentivized to finance visa bonds in the formal sector? To

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31. Michael Barr and Ronald Mann’s work on financial services for low-income U.S. residents is a model of the type of work that would be helpful on financial services for the poor of developing countries. See, e.g., Michael S. Barr, *Financial Services, Saving, and Borrowing Among Low- and Moderate-Income Households: Evidence from the Detroit Area Household Financial Services Survey*, in INSUFFICIENT FUNDS, *supra* note 23, ch. 3; Ronald J. Mann, *Patterns of Credit Card Use Among Low- and Moderate-Income Households*, in INSUFFICIENT FUNDS, *supra* note 23, ch. 9. However, there is minimal work in the legal scholarship on lending to the poor in the developing world. An exception is Hal S. Scott, *The State of Banking in Developing Countries*, in ESSAYS ON COMPARATIVE COMMERCIAL AND CONSUMER LAW: PAPERS FROM THE FOURTH BIENNIAL CONFERENCE OF THE INTERNATIONAL ACADEMY OF COMMERCIAL AND CONSUMER LAW 87, 87–105 (Donald B. King ed., 1992), which includes a brief discussion on the issue.

32. The term “bottom of the pyramid” was first used by President Franklin D. Roosevelt in one of his famous fireside chats during the Great Depression. It has gained currency among development economists who study poverty in the developing world. See generally STUART HART, CAPITALISM AT THE CROSSROADS: THE UNLIMITED BUSINESS OPPORTUNITIES IN SOLVING THE WORLD’S MOST DIFFICULT PROBLEMS (2005) (popularizing the term and advocating market-based solutions to poverty); C.K. PRAHALAD, THE FORTUNE AT THE BOTTOM OF THE PYRAMID: ERADICATING POVERTY THROUGH PROFITS (2006) (same). But see Aneel Karnani, *The Mirage of Marketing to the Bottom of the Pyramid: How the Private Sector Can Help Alleviate Poverty*, 49 CAL. MGMT. J. 90, 111 (2007) (pointing out the deficiencies of the term).

33. In this particular instance, I utilize the term “collateral” in its traditional sense, namely as property that is pledged as security against a debt. BLACK’S LAW DICTIONARY 278 (8th ed. 2004). “Security” is “[c]ollateral given or pledged to guarantee the fulfillment of an obligation; especially, the assurance that a creditor will be repaid . . . any money or credit extended to a debtor.” *Id.* at 1384. Generally, I will use the terms security and collateral interchangeably in this Article. Of course, the utilization of the term “collateral” in the phrase “visa as collateral” is metaphorical rather than literal. The visa is not collateral in the traditional sense that it is something of value pledged to the lender that can be enforced against it in the event of default on a loan. The visa cannot be possessed by the lender. Instead, the loan is “secured” by the value of the visa license to the borrower, the promise of the government to revoke the visa if the borrower defaults, and the possibility that the lender may recoup some of the loan proceeds—even in the event that the borrower defaults—if the lender aids in the process of finding the noncompliant alien.

34. Phillip Bond & Ashok Rai, Collateral Substitutes in Microfinance 1 (July 3, 2002) (unpublished manuscript), available at <http://www.econ.yale.edu/seminars/develop/tdw02/rai-021118.pdf>.

address this question, I conducted a qualitative field study of guest workers and their bankers.

The key move is to mitigate the inability of bankers to enforce what this Article terms “loan-for-visa-bond contracts”—loan agreements underlying the financing that migrants will use to pay their bonds to obtain visas. This can be accomplished by making loan compliance a condition of visa renewal. That is, the U.S. government will commit to bankers that it will only renew a visa if an applicant is properly servicing the loan that underlies the bond associated with the visa. In exchange, the bank will commit to thoroughly evaluating the applicant’s risk profile as a condition of extending the loan. In so doing, the proposal seriously mitigates the challenges for bankers of enforcing loan contracts, while simultaneously alleviating the challenges for the U.S. government of evaluating the risk profiles of potential migrants. Notably, these visas would be modeled<sup>35</sup> on other government licenses that function as collateral-like devices.<sup>36</sup> In the world as it could be, labor mobility would be bankable in the formal sector.

How would the proposal work in practice? While the proposal clearly has broader applicability, I am concerned here primarily with guest-worker visas. The guest-worker provisions of the INA would be revised to codify a punitive bond arrangement that will increase the cost of a breach for a visa recipient who overstays. The reader might quite reasonably ask what precisely this proposal is bonding against. If we are asking the United States to put its “seal of approval” on private bond enforcement, then the content of the bond matters. It bears emphasis: the primary point of this proposal is not to ensure that the guest worker abides by his work contract or does not become a public charge (although these may be additional benefits). Rather, the point is to ensure that the worker leaves the country when she commits to do so.

In the new system, the visa officer in the local embassy would retain her critical role as a primary gatekeeper, but this role would be

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35. The term is Blocher’s play on Reich’s famous term “the new property.” See Joseph Blocher, *Reputation as Property in Virtual Economies*, 118 YALE L.J. POCKET PART 120 (2009); Charles A. Reich, *The New Property*, 73 YALE L.J. 733 (1964); see also *infra* Section II.H (titled “Visas as New ‘New Property’”).

36. Taxicab medallions, for example, are among the licenses that are routinely used in secured transactions. See, e.g., Katrina M. Wyman, *Is Bentham Right?: The Case of New York City Taxicab Medallions* 3–4 (Dec. 15, 2008) (unpublished manuscript) (on file with author) (“[Taxi medallions] have become valuable assets that are routinely bought and sold by individuals and firms for hundreds of thousands of dollars a piece, accepted by publicly traded companies as collateral for loans, and leased by medallion owners to the mainly immigrant drivers who actually provide taxi service in the City.”).

supplemented by a bank acting as a secondary gatekeeper. To this end, rather than issuing a visa, the visa officer would issue the prospective visa recipient a provisional “visa license.” This visa license would signify *conditional* approval, contingent on a demonstrated ability to post a bond. The prospective visa recipient would then present her conditional visa license to a bank as part of her loan application. By providing only conditional approval, the United States would be seeking further assurance from the bank that the prospective visa recipient has a good risk profile. In the event that the guest worker later defaults (on her loan or on the terms of her visa), putting the bond at risk, the bank will be properly motivated to find the defaulting guest worker. The amount of the bond that is recouped will be indexed to how quickly the bank is able to provide evidence that the noncompliant alien has exited the United States; the bank or its agent will have incentives to either “snitch” or encourage the alien to self-deport.

This Article proceeds as follows. Part I critiques the current approach of U.S. immigration law to screening guest workers and lays out the bonding proposal. Part II discusses the crux of the problem—motivating third parties to finance visa bonds. Crucially, if appropriately designed, these visas will constitute the ideal type of collateral-like device, in that they will be highly valuable to the borrower but less valuable to the lender. Part III further elucidates why visa-as-collateral would work. Legal systems in developing countries often have no credibility with their banking sectors; therefore, banks make deals, that is, specific accommodations for individual borrowers, rather than relying on rules.<sup>37</sup> In contrast, the U.S. government is considered a credible threat-maker. Banks will not have to make deals because they will be secure in the knowledge that the United States will enforce the rules and refuse to renew a visa in the event of a visa-bond loan default. Part IV focuses on a primary advantage of the proposal, namely the outsourcing of both the screening and enforcement function to bankers. The Conclusion addresses the concern that visa-as-collateral constitutes an unseemly concession to commodification<sup>38</sup> since market-based mechanisms of

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37. I am indebted to Lant Pritchett for pointing this out to me. See generally Mary Hallward-Driemeier, et al., *Deals Versus Rules: Policy Implementation Uncertainty and Why Firms Hate It* (Nat'l Bureau of Econ. Research, Working Paper No. 16001, 2010) (discussing how unstable legal regimes lead firms to make policy decisions based on “deals” rather than “rules,” and how this leads to policy uncertainty).

38. See MARGARET JANE RADIN, *CONTESTED COMMODITIES* 2–6 (1996) (offering a critique of “universal commodification,” namely the tendency to judge everything that we value according to the willingness of individuals to pay for it in the marketplace).

allocation are considered inappropriate in distributing certain quasi-public goods.<sup>39</sup> This is a classic instance of what I term “facilitative commodification,” with the classic trade-offs of proposals that seek to improve the opportunity sets of the poor, while simultaneously improving compliance. This proposal betters the legal landscape for immigration by reducing “subterfuges” and rendering the choices made somewhat less “tragic,” particularly for the poor.

## I. IMPROVING SCREENING: BONDING AT THE BOTTOM OF THE PYRAMID

### A. *Disproportionate Emphasis on Due Diligence and Assurances*

Consider the following fact pattern regularly encountered by a Kuwaiti immigration officer: A South Asian worker submits an application for a temporary guest-worker visa that would allow her to take a housekeeping position on a U.S. military base. The Kuwaiti immigration officer is concerned about two potential difficulties with the application. First, the prospective migrant may overstay her visa. Second, the applicant may impose welfare costs on the state.

Kuwait regularly requires that a bond be posted with the Kuwaiti government as a condition of entry for guest workers. Notably, the bond will be forfeited if the guest worker fails to meet any one of three conditions: (1) providing accurate information about historical behavior, that is, her record of law abidance; (2) abiding by the visa terms, including a requirement that she not impose welfare costs on the Kuwaiti government; and (3) exiting Kuwait in the prescribed time period.<sup>40</sup> Since the U.S. military employs contractors

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39. I recognize that I am utilizing the term “public good” in an unconventional sense in describing visas, and I am borrowing this utilization from RETHINKING COMMODIFICATION: CASES AND READINGS IN LAW AND CULTURE (Martha M. Ertman & Joan C. Williams eds., 2005) [hereinafter RETHINKING COMMODIFICATION]. See generally Martha M. Ertman & Joan C. Williams, *Preface* to RETHINKING COMMODIFICATION, *supra*, at 1, 1–7; Margaret Jane Radin & Madhavi Sunder, *Introduction: The Subject and Object of Commodification*, in RETHINKING COMMODIFICATION, *supra*, at 8, 8–29.

40. Typically, the amount that South Asian guest workers pay in relation to their earning power in their countries of origin are astronomical. For example, the average bond is often equivalent to the annual salary of the average Sri Lankan worker. HUMAN RIGHTS WATCH, EXPORTED AND EXPOSED: ABUSES AGAINST SRI LANKAN DOMESTIC WORKERS IN SAUDI ARABIA, KUWAIT, LEBANON, AND THE UNITED ARAB EMIRATES 22–23 (2007) (noting that bonds are typically prohibitive for the average Sri Lankan in relation to their purchasing power parity). The purchasing power parity (“PPP”) of an average citizen in Sri Lanka is US \$4,720. PPP is often utilized by development economists to reflect the real purchasing power of an average citizen in relation to a standardized basket of goods (such as food and shelter). See WORLD BANK, GROSS NATIONAL INCOME PER CAPITA 2009, ATLAS METHOD AND PPP (2010), available at <http://siteresources.worldbank.org/DATASTATISTICS/Resources/GNIPC.pdf>. The average bond appears to exceed the amount needed to deter noncompliance; it may include excess (and

who utilize guest workers in Kuwait, the U.S. government is regularly involved with such bonding arrangements, albeit often indirectly.<sup>41</sup>

Now consider a U.S. immigration officer facing a similar fact pattern: The applicant for a temporary guest-worker visa begs for favorable consideration, seeking to distinguish herself from similarly situated applicants who have been noncompliant in the past.<sup>42</sup>

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perhaps illicit) rents for labor brokers and government officials. *See* HUMAN RIGHTS WATCH, *supra*, at 23.

41. Even though the U.S. government typically does not post the bond, it usually retains a contractor, such as Halliburton, who in turn retains a labor broker who posts the bond or ensures that such bond is posted by the South Asian guest worker. Given that the guest worker is typically without access to credit, she generally borrows this money from the labor broker who arranges her visa and her job. She signs a contract under which her salary is paid to the labor broker until the loan is repaid. It appears that the implicit interest rate is very high. Interview with Dr. Nasra Shah, Faculty of Community Medicine and Behavioral Sciences, Univ. of Kuwait (May 19, 2010).

42. The reader should be aware that the guest-worker visas discussed in this Article raise profound questions of justice, which are beyond the scope of this Article and should be the subject of a later work. There is an ongoing and well-documented tension between the state's interest in the provision of low-cost labor and its concern with the protection of human rights more generally. These concerns include but are not limited to the following: (1) whether the presence of a large-scale population of temporary guests institutionalizes the exclusion of noncitizens from the constitutional mainstream, undermines political community, and denigrates the value of citizenship; (2) whether these programs undermine wages and workplace protections for both guests and native workers; and (3) whether such programs legitimize the application of a broader "trade paradigm" to human beings that commodifies labor. I am fully cognizant of these concerns, which provide fertile ground for further work. The following is a partial list of references that address these concerns: CARENS, *supra* note 22, at 107–22 (2000) (discussing the difficult moral questions that arise in the context of immigrants assimilating into a liberal society's culture); MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY 56–61 (1983) (opposing guest-worker programs on the grounds that they do not conform to the liberal egalitarian principles that govern full membership in a just state); Joseph H. Carens, *Cosmopolitanism, Nationalism, and Immigration: False Dichotomies and Shifting Presuppositions*, in CANADIAN POLITICAL PHILOSOPHY 17, 18 (Ronald Beiner & Wayne Norman eds., 2001) (analyzing the conflict between immigrants' moral claims and citizens' moral claims, and attempting to reconcile them); Michael Jones Correa, *Seeking Shelter: Immigrants and the Divergence of Social Rights and Citizenship in the United States*, in DUAL NATIONALITY, *supra* note 22, at 233, 234 (examining the dichotomy between citizen and immigrant social rights in the context of the argument for postnational citizenship); Seidman, *supra* note 22, at 140 (arguing that it is impossible to wholly reconcile our universal obligation to others with our desire to care more specially for those in our community); Woodward, *supra* note 22, at 82 (arguing that it is often in wealthy societies' best interest to allow even illegal immigration, but that it is fundamentally incompatible with liberal egalitarian values to treat immigrants as second-class citizens once they arrive). For discussions of the impact of low-skilled alien workers on wages of citizen workers, see GEORGE J. BORJAS, FRIENDS OR STRANGERS: THE IMPACT OF IMMIGRANTS ON THE U.S. ECONOMY 81, 86–88 (1990) (presenting empirical evidence to show that immigration has no sizeable adverse affect on the earnings of the general population, but does have an adverse impact on the earnings of native unskilled workers); MOTOMURA, *supra* note 10, at 48 (discussing how the working class has historically viewed immigrants as competition for employment); Gordon, *supra* note 18, at 505 ("Historically, unions have been restrictionist in their approach to immigration, but today most unions in the United States welcome immigrants already present in

Although rarely articulated in this manner, U.S. immigration law generally addresses this challenge by utilizing a two-fold strategy that resembles Anglo-American contract law.

First, in an effort to deal with the challenges of obtaining reliable information concerning the applicant's historical behavior, U.S. immigration officials conduct "due diligence." A web of laws allow the government to ascertain historical and likely future behavior of any visa applicant, including prospective guest workers (by mandating, for example, in certain instances that the applicant provide evidence of past good behavior, such as police reports, as well as evidence of likely good behavior in the future, such as assets in the home country to which the visa applicant is likely to return).<sup>43</sup> Second, it also asks the applicant to give assurances that the information provided is accurate.<sup>44</sup> In the event that the information shared by the

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the industries they organize, including the undocumented."); Rodríguez, *supra* note 18, at 249 (recognizing the "fickleness" of U.S. attitudes towards immigrants).

43. See, e.g., INA § 214(a)(1) ("The admission to the United States of any alien as a nonimmigrant shall be for such time and under such conditions as the Attorney General may by regulations prescribe . . . to insure that at the expiration of such time or upon failure to maintain the status under which he was admitted, or to maintain any status subsequently acquired under section 248, such alien will depart from the United States."); § 214(b) ("Every alien . . . (other than a nonimmigrant described in subparagraph (L) or (V) of section 101(a)(15), and other than a nonimmigrant described in any provision of section 101(a)(15)(H)(i) except subclause (b1) of such section) shall be presumed to be an immigrant until he establishes to the satisfaction of the consular officer, at the time of application for a visa, and the immigration officers, at the time of application for admission, that he is entitled to a nonimmigrant status under section 101(a)(15)."); § 101(a)(15)(H)(ii)(a) (defining a particular class of "nonimmigrant aliens" as someone "having a residence in a foreign country which he has no intention of abandoning who is coming temporarily to the United States to perform agricultural labor or services, as defined by the Secretary of Labor in regulations and including agricultural labor defined in section 3121(g) of . . . the Internal Revenue Code of 1986, agriculture as defined in section 3(f) of the Fair Labor Standards Act of 1938 (29 U.S.C. 203(f)), and the pressing of apples for cider on a farm, of a temporary or seasonal nature . . ."). Although the guidance from the State Department's Bureau of Consular Affairs does not appear to contain a specific reference to guest-worker visas, the reference to the obligations placed on other temporary admittees may serve as a guide. See, e.g., *Visitor Visas—Business and Pleasure* U.S. DEP'T OF STATE, [http://travel.state.gov/visa/temp/types/types\\_1262.html](http://travel.state.gov/visa/temp/types/types_1262.html) (last visited Apr. 2, 2011) ("The presumption in the law is that every visitor visa applicant is an intending immigrant. Therefore, applicants for visitor visas must overcome this presumption by demonstrating that: The purpose of their trip is to enter the U.S. for business, pleasure, or medical treatment; That they plan to remain for a specific, limited period; Evidence of funds to cover expenses in the United States; Evidence of compelling social and economic ties abroad; and [t]hat they have a residence outside the U.S. as well as other binding ties that will insure their return abroad at the end of the visit.").

44. See, e.g., U.S. Dep't of State, Nonimmigrant Visa Application DS-156, *available at* <https://evisaforms.state.gov/ds156.asp> ("41. I certify that I have read and understood all the questions set forth in this application and the answers I have furnished on this form are true and correct to the best of my knowledge and belief. I understand that any false or misleading statement may result in the permanent refusal of a visa or denial of entry into the United States. I understand that possession of a visa does not automatically entitle the bearer to enter the United States of America upon arrival at a port of entry if he or she is found inadmissible.").



migrant in the due diligence process turns out later to be false, the penalty is usually visa revocation.<sup>45</sup> However, given the high numbers of temporary visitors who overstay,<sup>46</sup> it is apparent that the traditional emphasis on due diligence and assurances and the threat of visa revocation in the face of false statements have not been effective.

### *B. Potential Solution: The Kuwaiti Approach*

The economics literature provides an obvious solution to problems of information asymmetry—the Kuwaiti answer,<sup>47</sup> which requires prospective migrants to post bonds.<sup>48</sup> There are two distinct situations in which the gatekeeper is likely to be at an informational disadvantage. The first situation involves historical facts concerning the past behavior of the applicant; for example, whether the applicant has complied with laws or imposed welfare costs on the state in the past. The second situation involves predicting the applicant's future behavior. Specifically, will she abide by the terms of her visa, exiting by the prescribed date and not imposing welfare costs on the government in the interim?

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45. See *supra* note 43 (discussing possibility of visa revocation).

46. McKinley & Preston, *supra* note 9.

47. Going forward, I will refer to the party with lesser information, who is assessing the reliability of such information, as the “gatekeeper,” and the party with better information, who seeks to convince the gatekeeper of her trustworthiness, as the “applicant.” In the Kuwaiti fact pattern, if the U.S. military employer posts the bond itself, the Kuwaiti government has essentially outsourced the gatekeeping function to the U.S. military. However, the U.S. military is likely to subcontract this function to a labor/bond broker (that is, a private company which refers workers and assumes the bond-posting responsibility), and in so doing, outsource the gatekeeping function to the labor/bond broker.

48. For a good high-level introduction to the role of bonds, see David Charny, *Nonlegal Sanctions in Commercial Relationships*, 104 HARV. L. REV. 373, 375 (1990). Charny discusses two other types of nonlegal sanctions, including reputational sanctions and the loss of psychic goods such as self-esteem. *Id.* at 393. In a previous paper, I discussed both these typologies of nonlegal sanctions in the context of immigration. See Eleanor Marie Lawrence Brown, *Outsourcing Immigration Compliance*, 77 FORDHAM L. REV. 2475, 2482 (2009).

Another good summary of the use of bonds in resolving the problems of information asymmetry is Ronald J. Mann, *Verification Institutions in Financing Transactions*, 87 GEO. L.J. 2225, 2229 (1999). Jeffrey Manns briefly discusses the potential advantages of bonds in the immigration context. Manns, *supra* note 15, at 892–93. For discussions of bonding in the context of gatekeeping, see Stephen Choi, *Market Lessons for Gatekeepers*, 92 NW. U. L. REV. 916, 955 (1998); Reinier H. Kraakman, *Gatekeepers: The Anatomy of a Third-Party Enforcement Strategy*, 2 J.L. ECON. & ORG. 53, 54 (1986). Papers discussing economic models of bonding arrangements include Benjamin Klein & Keith B. Leffler, *The Role of Market Forces in Assuring Contractual Performance*, 89 J. POL. ECON. 615, 616 (1981); L.G. Telser, *A Theory of Self-Enforcing Agreements*, 53 J. BUS. 27, 43 (1980); Williamson, *supra* note 11, at 519.

In the ensuing analysis, I distinguish between information about historical behavior and information predictive of future behavior. Why distinguish between the two? In one sense, they are inextricably intertwined—the historical behavior of a visa applicant may well predict future behavior (indeed, one could imagine making this case statistically). However, the applicant's past behavior can be differentiated from her future behavior because future commitments necessarily involve moral hazard.

In light of this, ideally, any device that seeks to mitigate the challenges of information asymmetry will not only increase the applicant's incentive to be honest about past behavior (since the applicant will have reason to believe that lies will be caught by the gatekeeper), but will also continuously motivate the applicant to abide by her visa terms in the future. Notably, the foregoing Kuwaiti bonding arrangement accomplishes both of these goals. The bond may be forfeited either in the event that the guest worker is found to have lied about historical behavior, or in the event that she does not comply with the conditions of her visa in the future. In both cases, deportation ensues. In the United States, unlike in Kuwait, there is no ongoing mechanism for motivating future compliance other than the threat of visa revocation and subsequent deportation (which lacks credibility, particularly if the likelihood of deportation is low as a practical matter).

### *C. Designing a Bond*

Let us take a moment to consider the ideal characteristics of a bond. A bond should be designed asymmetrically so that if the gatekeeper executes on the bond, the visa recipient would suffer a significant loss even as the gatekeeper realizes an insignificant gain.<sup>49</sup>

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49. The ideal "hostage" should constrain the visa recipient but not tempt the gatekeeper. The concept is often captured in the metaphor of the "ugly princess" whose father offers her as a bond to the king of a warring kingdom as evidence of his intention to abide by a peace treaty. Given familial ties, she is much more valuable to her father than she is to the other king. See Williamson, *supra* note 11, at 526–27 (discussing the hostage model in the context of unilateral and bilateral exchange). The ugly princess has since been updated to the "puny prince." See Robert E. Scott, *A Relational Theory of Secured Financing*, 86 COLUM. L. REV. 901, 930 (1986) ("Yet the concomitant risk that the creditor monarch will provoke a default and make off with the hostage is similarly reduced since the puny prince has little value to anyone else."). Other writers have recognized the importance of constraints on gatekeeper inclinations to act opportunistically, emphasizing reputation as the primary constraint on opportunistic behavior. See, e.g., Niloy Bose & Richard Cothren, *Asymmetric Information and Loan Contracts in a Neoclassical Growth Model*, 29 J. MONEY, CREDIT & BANKING 423, 429–30 (1997) (discussing reputational effects in the context of borrowers and lenders); Timothy J. Muris, *Opportunistic Behavior and the Law of Contracts*, 65 MINN. L. REV. 521, 527 (1981) (providing examples of

First we begin with the recognition that the greater the potential loss for forfeiture of the bond, the less likely it is that the applicant will provide inaccurate information. Notably, this is likely to be the case whether or not the information is historical or relates to the likely future compliance of the applicant. Regarding historical facts, the prospect of a future loss in the event that the information is later found to be inaccurate should create incentives for the applicant to be compliant. With respect to future visa compliance, the ongoing possibility of a loss should motivate the applicant to ensure that her behavior is compliant. In either event, what has been termed the bond's "verificatory" power increases as the size of the bond increases.<sup>50</sup>

However, as the size of the bond increases, so does the incentive for the gatekeeper to execute on the bond in an opportunistic manner, even if the applicant has not violated its terms. This may not seem to be a real danger in the U.S. context, where there is transparency in immigration administration and where intermediaries who finance bonds would presumably be regulated by some independent authority. However, in the Middle East, there have been allegations that government officials (in collusion with broker intermediaries, to whom guest workers sometimes pay high interest to post bonds on their behalf) have opportunistically threatened bond forfeiture to force the early exit of law-abiding aliens.<sup>51</sup> One obvious

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when reputational concerns do not deter opportunism); D. Gordon Smith, *Venture Capital Contracting in the Information Age*, 2 J. SMALL & EMERGING BUS. L. 133, 140–42 (1998) (discussing the problem of opportunism in venture capital relationships, and how reputational concerns offer a potential check).

50. Mann, *supra* note 48, at 2232.

51. See HUMAN RIGHTS WATCH, BAD DREAMS: EXPLOITATION AND ABUSE OF MIGRANT WORKERS IN SAUDI ARABIA 19–23 (2004), available at <http://www.hrw.org/en/node/11999/section/1> (discussing the exploitation of migrant workers by their employers and sponsors in Saudi Arabia). A further challenge is that bonds have sometimes not been returned, even when guest workers have met the conditions of their visas. The likelihood of such abuses even in an ostensibly law-bound regime is not low. Indeed, a similar problem occurred in the now-infamous *Bracero* ("farmhand") guest-worker program, under which hundreds of thousands of Mexican guest workers traveled to the U.S. as agricultural workers between the 1942 and 1964. As an incentive to encourage return to Mexico, the U.S. government retained Social Security contributions, with a commitment that payments would be made to guest workers upon their return home to Mexico. However, such payments were made to many guest workers only after decades of litigation. For a general discussion of the program's failings, see Douglas S. Massey & Zai Liang, *The Long-Term Consequences of a Temporary Worker Program: The US Bracero Experience*, 8 POPULATION RES. & POL'Y REV. 199, 221 (1989). The program was inaugurated under a bilateral agreement with Mexico during World War II to meet critical agricultural labor shortages and ultimately involved widespread visa overstays and deportations. For background information on the program's origins, see KITTY CALAVITA, INSIDE THE STATE: THE BRACERO PROGRAM, IMMIGRATION AND THE I.N.S. 2 (1992); BARBARA A. DRISCOLL, THE TRACKS NORTH:

institutional design solution to this challenge is to establish a transparent mechanism with independent judges to determine the circumstances under which forfeiture is appropriate. While this innovation should mitigate this danger, the institutional cost is high; thus, it would still be ideal to design a bond that reduces the incentives for the gatekeeper to act opportunistically even while it continues to provide a sufficient deterrent to the visa holder.

Other institutional design innovations might lower the likelihood of opportunism by gatekeepers. For example, in the contracting context, the literature discusses asymmetrically punitive bonds, when the applicant posts a bond that has value particular to her (and is not likely to be realized at as high a price in the marketplace). Indeed, one might think of a range of items that have some peculiar personal value to the alien (such as family heirlooms or inherited land) as meeting these criteria.<sup>52</sup> Such a bond becomes far more valuable to the applicant than to the gatekeeper.

The larger point is that an appropriately-designed bond should not be merely compensatory, but also punitive. That is, the loss to the applicant should exceed the gain from providing inaccurate information (either as it relates to historical information or predicted future compliance) divided by the probability that such inaccuracy would later be discovered.

#### *D. The Implications of the Involvement of Financial Intermediaries*

Drawing on insights from the scholarship on contracts, one could imagine a number of bond-design innovations that would ensure that the bond is close to perfectly punitive. In this Section, to mitigate distributive justice concerns, I propose that the government should provide an incentive for third-party financial intermediaries to finance the bonds in a transparent manner. An additional advantage of this approach is that bond financiers will have incentives to ensure that

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THE RAILROAD BRACERO PROGRAM OF WORLD WAR II 53–55 (1999); ERNESTO GALARZA, *MERCHANTS OF LABOR: THE MEXICAN BRACERO STORY* 15 (1964).

52. For a discussion of this type of property, see Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 959–61 (1982) (arguing that some “objects are closely bound up with personhood because they are part of the way we constitute ourselves as continuing personal entities in the world” and providing examples of “a wedding ring, a portrait, an heirloom, or a house”). There are also other institutional innovations which might be applicable. For example, Mann discusses interlocking bond arrangements in which “the process for forfeiting the bonds is structured so that the lender effectively posts *its* reputation as a bond against improper execution of the bond posted by the borrower; the result is an interlocking verification arrangement, with each party posting a bond to the other.” Mann, *supra* note 48, at 2233. Such an arrangement would perhaps have greater applicability if the government outsourced the gatekeeping function to some other entity (such as in the Kuwaiti example above).

the bonds are appropriately punitive so as to mitigate the risk of default (on both the visa and the loan).

Generally, bond financiers will have incentives to develop the appropriate innovations in bond design. Indeed, a preliminary review of the scholarship on financing arrangements at the bottom of the pyramid indicates that financial intermediaries (often working in conditions of informality, and indeed, even illegality) have a range of mechanisms for estimating and pricing risk, and for enforcing credit terms.<sup>53</sup> Some of these mechanisms of enforcement would undoubtedly be impermissible in a transparent, law-bound bond-financing program. Nevertheless, this literature supports the point that financial intermediaries at the bottom of the pyramid, like conventional financiers, are able to create innovative devices for constraining risk, such as hedging by spreading their loans among different populations. For example, money lenders will make loans to factory workers *and* farmers as opposed to *only* farmers, since farmers might all be similarly unable to service their loans in the event of an unanticipated event such as a drought. Indeed, in motivating financial intermediaries to finance visa bonds, the government in essence may be outsourcing the bond-design process.<sup>54</sup>

There is an additional advantage of the involvement of financial intermediaries. Bonding mechanisms provide additional information from sources other than the applicant (known in the literature as “second order” information), which can further assist the gatekeeper in determining the accuracy of the applicant’s original assertion (“first order” information). However, the second order information is not reliable simply because its source is some entity other than the applicant. The gatekeeper is still obligated to evaluate the second order information. This information review could be repeated iteratively until some external entity provides independent verification of the reliability of the information.<sup>55</sup> Notably, these financial intermediaries would be properly motivated to independently verify the reliability of any information on the applicant as a condition of extending a loan: indeed, this likely would constitute an essential part of their underwriting process.

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53. See, e.g., STUART RUTHERFORD, *THE POOR AND THEIR MONEY* 60 (2001) (discussing the types of entities that provide informal financial services to poor people).

54. Nevertheless, the fact that the gatekeeper is ultimately the government (instead of a private party) may impose practical limitations on some of these arrangements.

55. See Mann, *supra* note 48, at 2232 (making this point about the evaluation of second-order information).

*E. The Relative Advantages of Bonding Arrangements*

## 1. Context Sensitivity

The due diligence process provides little context sensitivity; it can both over- and under-reach, by requiring the same information of the law-abiding prospective migrant who is not an overstay risk as it does of the non-law-abiding prospective migrant who is an overstay risk. The bottom line is that due diligence processes are often ineffective and expensive.

The emphasis on assurances also appears to be ineffective. By the time the government has realized that the information provided in the due diligence process is inaccurate and assurances have been violated, the visa recipient has usually disappeared into the underground economy.<sup>56</sup> Thus, visa revocation and the accompanying threat of deportation do not constitute a meaningful penalty for many migrants when the odds of ever being caught and deported are in their favor.<sup>57</sup>

There is a more fundamental reason that the traditional approaches appear to be falling short of the goals of effective screening and sanctioning. As we have learned from the contracting context, formal legal rules are often inadequate when sensitivity to context is important to obtain appropriate commitments from parties with superior information. Through the application of formal legal rules, in isolation, the government may obtain commitments that are either disproportionate or insufficient given the special circumstances of a situation.

For analogous reasons, it is unrealistic to expect the government to create and extract appropriate commitments from particular applicants on a case-by-case basis. Indeed, even if it was possible to develop such commitments in broad form or on a case-by-case basis, enforcement through the legal process is likely to be prohibitively expensive. The benefit of a bonding system is that it draws on lessons from privately developed and enforced sanctioning

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56. Demetrios G. Papademetriou & Nicholas DiMarzio, *A Preliminary Profile of Unapprehended Undocumented Aliens in Northern New Jersey: A Research Note*, 19 INT'L MIGRATION REV. 746, 746 (1985); see also Martin & Teitelbaum, *supra* note 9, at 120 (arguing that temporary guest-worker programs lead to permanent stays in the host country); Demetrios G. Papademetriou, *European Labor Migration: Consequences for the Countries of Worker Origin*, 22 INT'L STUD. Q. 377, 394 (1978) (finding that policies aimed at curbing immigration have had at best moderate success).

57. See Martin & Teitelbaum, *supra* note 9, at 129 (pointing out that guest workers have been able to settle in a host country despite legal restraints on their ability to do so).

arrangements that have been effective largely in the absence of intervention from public enforcers.

## 2. Changing the Default Rule of Nonenforcement

Beyond providing context sensitivity, bonding systems also can change what I will refer to as the “default rule of nonenforcement” for visa noncompliance. Documented aliens who become undocumented are easily absorbed into dense ethnic networks that facilitate employment in the absence of documentation.<sup>58</sup> Public enforcers generally are unable to penetrate these networks without incurring extraordinary costs.<sup>59</sup> Since a defaulting alien may be sanctioned only if she is found, and she is rarely found, enforcement is the exception rather than the rule.<sup>60</sup>

One might envision a continuum with a variety of levels of enforcement. On one end of the continuum is the status quo—because those who breach usually elude deportation, the current default rule is nonenforcement.<sup>61</sup> On the other end of the continuum is enforcement

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58. Nancy Foner’s study of Anglophone West Indian migrant domestic workers supports this point. Many West Indian migrants overstay their tourist visas and become undocumented. Yet, even without documentation, they easily obtain work as domestic caregivers of children and the elderly through a strong referral network of fellow West Indian domestic workers. Foner also discusses qualitative field work among other migrant populations which support the same point. NANCY FONER, IN A NEW LAND: A COMPARATIVE VIEW OF IMMIGRATION 164–65 (2005); *see also* HSIANG-SHUI CHEN, CHINATOWN NO MORE: TAIWAN IMMIGRANTS IN CONTEMPORARY NEW YORK 254–55 (1992) (noting that several sociological studies have shown immigrant associations can aid immigrants in obtaining employment); Alejandro Portes, *Economic Sociology and the Sociology of Immigration: A Conceptual Overview*, in THE ECONOMIC SOCIOLOGY OF IMMIGRATION: ESSAYS ON NETWORKS, ETHNICITY, AND ENTREPRENEURSHIP 1, 24–25 (Alejandro Portes ed., 1995) (describing how immigrants who migrate into host countries where their conationals have become well-established experience greater economic opportunity).

59. *See* DAN KANSTROOM, DEPORTATION NATION: OUTSIDERS IN AMERICAN HISTORY 8–9 (2007) (describing extraordinary U.S. government efforts to foster deportation of aliens already in the country).

60. For good reason, Manns refers to the typical undocumented alien as “judgment-proof.” Manns, *supra* note 15, at 896.

61. Following the convention in the literature on the economic sociology of immigration, for practical purposes, I consider deportation to be synonymous with sanctioning. One might reasonably question this assumption: If a guest worker overstays his visa, and the host country deports him, why is this not simply an enforcement of a contractual obligation to which the guest worker agreed in the first place? Indeed, there is a longstanding debate in immigration law regarding whether deportation should be viewed as a punishment at all. The question has obvious constitutional implications, given the constitutional protections that attach when crimes are punished. *See* Fong Yue Ting v. United States, 149 U.S. 698, 730 (1893) (holding that “[an] order of deportation is not a punishment for crime”); *cf.* Daniel Kanstroom, *Deportation, Social Control, and Punishment: Some Thoughts About Why Hard Laws Make Bad Cases*, 113 HARV. L. REV. 1890, 1891 (2000) (discussing the convergence between the criminal justice and deportation systems and the questions it raises); Stephen H. Legomsky, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 WASH. & LEE L. REV. 469, 473 (2007)

under a bonding system, under which full enforcement against a noncompliant alien involves both forfeiture of the bond and deportation. One might envision an “in between” system of partial enforcement, in which the bond is forfeited, but the government does not deport. A bonding system changes the default rule. Since the government can easily confiscate the bond proceeds even in the absence of deportation, the default rule is one of partial enforcement. This “half-way” option is arguably preferable to the status quo of nonenforcement, particularly if an applicant defaulting on a bond (and presumably on the loan) tarnishes her reputation with her home-country bank and neighbors.<sup>62</sup>

Moreover, with institutional design innovations, one may substantially increase the likelihood of deportation, thus leading to full enforcement. For example, as discussed in Part III below, third-party bond financiers may be motivated to find defaulting aliens and either report them to the authorities or convince them to self-deport by giving back part of the bond to the alien, on the condition of her return home. While self-deportation may not fulfill the “expressive” public function that we typically associate with conventional sanctions (that is, communicating the deportee’s bad behavior to the public),<sup>63</sup> self-deportation nevertheless accomplishes the same practical purpose—excluding the alien from the United States.<sup>64</sup> Moreover, self-

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(arguing that theories of deportation overlap so substantially with those of criminal punishment that deportation should at least sometimes be regarded as a form of punishment).

62. Indeed, one might even argue that as long as the government retains the bond, the “halfway” default rule is a sanction unless an alien demonstrates compliance.

63. While deportation is not technically considered punishment, it is clearly understood as a shame-inducing punishment by deportees, their families, and the communities from which they originate. See KANSTROOM, *supra* note 59, at 15 (equating deportation with punishment); Dan M. Kahan, *Between Economics and Sociology: The New Path of Deterrence*, 95 MICH. L. REV. 2477, 2483 (1997) (articulating the importance of the “expressive” function of punishment); Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903, 964 (1996) (discussing the expressive function of law).

64. Tamar Jacoby, a prominent conservative thinker, has noted that the self-deportation approach is virtuous in that it represents a middle ground in the immigration debate and bypasses the cumbersome federal bureaucracy. John Fund, *Is Cannon Fodder? One GOP Congressman May Lose His Seat for His Pro-Immigration Views, While Another Offers a Compromise*, WALL ST. J. OPINION J., May 29, 2006. Blog postings indicate that some immigration law scholars and practitioners are skeptical of self-deportation. See, e.g., Bill O. Hing, *ICE Self-Deportation Plan*, IMMIGRATIONPROF BLOG (July 30, 2008), <http://lawprofessors.typepad.com/immigration/2008/07/ice-self-deport.html> (quoting Frank Sharry as saying “This sounds like a policy straight out of a ‘Saturday Night Live’ skit, not a serious proposal.”); Kevin R. Johnson, *Government Ads Nudge Immigrants to Self-Deport*, IMMIGRATIONPROF BLOG (Aug. 13, 2008), <http://lawprofessors.typepad.com/immigration/2008/08/government-ads.html> (also expressing skepticism).



deportation can be accomplished at a substantially lower cost than typically is incurred by the government under the current system.<sup>65</sup>

## II. INCENTIVIZING FINANCIAL INTERMEDIARIES

### A. *The Proposal in Broad Outline*

This Part will discuss why unconventional mechanisms of enforcing loan agreements are essential to banks in developing countries. These insights are the foundation for the proposed institutional innovations for visa-as-collateral.<sup>66</sup> I begin by laying out the proposal in broad outline.

The U.S. government is the first gatekeeper. Assume that a visa officer in the local embassy approves an applicant. The visa officer would issue the prospective visa recipient with a provisional “visa license.” This visa license would signify *conditional* approval for receiving a U.S. visa, contingent on a demonstrated ability to post a bond.

The typical applicant would be unable to post a bond without a loan. The prospective visa recipient would then present her conditional visa license to a bank in her country of origin as part of her loan application. In this proposal, the bank becomes the second

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65. See generally Fund, *supra* note 64 (discussing a proposal that would give incentives for illegal aliens to leave the country and apply to be legal guest workers).

66. The proposal is not that the visa would constitute actual collateral, but rather that the visa would serve similar purposes for a secured lender as those that have traditionally been served by secured credit. However, there are clearly significant differences between a visa as a collateral-like device and traditional secured credit. First, visas are not typically assignable—though the software model is useful to discuss how assigning visas might theoretically be done. See Ronald J. Mann, *Secured Credit and Software Financing*, 85 CORNELL L. REV. 134, 151–53 (1999). Thus, they would hardly constitute “general intangibles” in UCC terms. See U.C.C. § 9–102(a)(42) (2005) (“‘General Intangible’ means any personal property, including things in action, other than accounts, chattel paper, commercial tort claims, deposit accounts, documents, goods, instruments, investment property, letter-of-credit rights, letters of credit, money, and oil, gas, or other minerals before extraction. The term includes payment intangibles and software.”). Second, even if there were an assignable property right in a federally issued visa (as a license), there would undoubtedly be concerns regarding debt servitude. See, e.g., Elizabeth Warren, *Making Policy with Imperfect Information: The Article 9 Full Priority Debates*, 82 CORNELL L. REV. 1373, 1386–87 (1997) (noting that there are ethical lines that limit security, such as the prohibition on servitude). For a more detailed discussion of the evolution of the prohibition on debt servitude, see COLEMAN, *supra* note 24, at 41, 77, 138, 147 n.11, 164–65, 218–19. Third, there would be no actual foreclosure rights. The notion of tying loan compliance to visa compliance (and vice versa) brings to mind cross-default provisions that are common in private loan contracts. While bankers typically insist in loan contracts that borrowers meet their regulatory obligations as a condition of the loan, a default in the other direction (i.e., regulators insisting that borrowers meet their loan obligations) is unusual, and unsurprisingly, I have not been able to find a discussion of such practices (or even proposals) in the literature.

gatekeeper. By providing only conditional approval for a visa, the U.S. government would be seeking an assurance from this second gatekeeper that the prospective visa recipient has a good risk profile.

Notably, the bank will be assessing the visa applicant's risk profile with respect to not only financial compliance—normally the bank's primary concern—but also visa compliance. Recall that the typical applicant will not likely be able to service the large loan needed to post a bond solely through employment in her country of origin given her poor earning potential. She will only be able to service the loan if she is able to work in the United States by remaining compliant with her visa. Thus, a consideration of the likelihood of visa compliance is critical to the loan underwriting process.

In order to create incentives for banks to perform this gatekeeping function and finance the bond, the U.S. government must address the bank's own difficulties in enforcing loan contracts. To this end, the U.S. government will tie visa compliance to loan compliance by making two commitments to the prospective lender. First, the U.S. government would agree not to renew the visa without being satisfied that the loan is in good standing. Thus, in the event of a default, the bank can be secure in the knowledge that there is an implicit penalty, namely nonrenewal of a visa.

Second, if the applicant does not comply with her visa terms, risking default on the bond, the bank should still be able to recoup some significant portion of the bond if it is able to provide evidence to the U.S. government that the defaulting visa recipient has self-deported within some reasonable time period. The proportion of the bond recouped should be indexed to the speed of self-deportation. This will provide an incentive for banks to perform a critical function that public enforcers traditionally have found difficult, namely, the expeditious exclusion of visa overstayers from the United States.

Of course banks could always "snitch" on a noncompliant alien to the public enforcers. However, this proposal's emphasis is on self-deportation because it achieves the same goal without public intervention. Thus, banks should receive a greater proportion of the bond if deportation is accomplished at a lower cost without the intervention of the authorities.

### *B. Interviews with Jamaican Guest Workers and Lenders*

I conducted qualitative field work as a supplement to the theoretical arguments in order to aid in assessment of the importance

and practical feasibility of the proposal.<sup>67</sup> This work consisted of focus groups with Jamaican subsistence farmers who have traveled to North America as agricultural guest workers. The research in this population is instructive since Jamaicans are among the most likely populations on a per-capita basis to migrate to the United States.<sup>68</sup> Moreover, after Mexico, Jamaica supplies the largest absolute numbers of documented guest workers to the United States; additionally, preliminary estimates indicate that low-skilled Jamaicans fall within the top five nationalities on a per-capita basis in the undocumented population.<sup>69</sup> I had previously worked with this population.<sup>70</sup> The findings are summarized below.

Although interviewees discussed a range of options, the bottom line was that the subjects currently have few options to finance big-ticket items, such as visa expenses. When they do finance such expenses, they are likely to rely on family or informal financial intermediaries. There was a notable bifurcation in their attitudes towards formal financial intermediaries. While they generally had skeptical attitudes about formal financial intermediaries because of perceived hostile lending practices, they simultaneously believed that they had a better chance of obtaining loans than their similarly

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67. In other areas of legal scholarship, ethnographic research or qualitative field work has shed light on interdisciplinary analyses of compliance, both in contract law and in the criminal law. For an article that is a paradigmatic example of qualitative field work in the area of contract law and secured transactions, see Mann, *supra* note 66, at 151–53 (conducting a qualitative field study of software companies and their bankers). For articles that summarize the influence of ethnographic work on compliance in the context of criminal law, see Kahan, *supra* note 63, at 2477–78; Tracey L. Meares & Dan M. Kahan, *Law and (Norms of) Order in the Inner City*, 32 LAW & SOC'Y REV. 805, 809–13 (1998); Tracey L. Meares, *Social Organization and Drug Law Enforcement*, 35 AM. CRIM. L. REV. 191, 193 (1998).

68. Milton Vickerman, *Jamaica*, in THE NEW AMERICANS: A GUIDE TO IMMIGRATION SINCE 1965, at 479 (Mary C. Waters & Reed Ueda eds., 2007). Vickerman notes that the Jamaicans consistently express a high desire to migrate and that the emigration rate is propelled “by an entrenched tradition of migration and economic hardship.” *Id.* Taking into account the population size, the emigration rate is very high, with migrant Jamaicans constituting a third of Jamaica’s population. *Id.* Vickerman states that as recently as 2001, Jamaicans were the second most likely population on a per capita basis to migrate to the United States. *Id.*

69. For a broader discussion, which includes a short section on high levels of noncompliance by Jamaicans with immigration laws in the United States, see Zagros Madjd-Sadjadi & Dillon Alleyne, *The Potential Jamaican Impact of Criminal Deportees from the U.S.*, 5 J. ETHNICITY & CRIM. JUST. 29 (2007). Utilizing statistical modeling, the authors provide indicative statistics on the number of Jamaicans in the undocumented population. The authors’ estimates regarding the representation of Jamaicans among the undocumented population in the United States arise from research conducted by the Remittance Research Project in the Department of Economics at the Jamaica Mona Campus of the University of the West Indies. *See also* Vickerman, *supra* note 68, at 479 (providing data about Jamaican immigration to the U.S.).

70. Brown, *supra* note 48, at 2475–76.

situated nonmigrant peers, because of their healthy revenue streams while working overseas in the form of remittances.

I then conducted interviews with formal financial intermediaries to assess whether their experience of providing financial services to poor, rural Jamaicans coincided with the views of the focus group participants. Most financial intermediaries conceded that they usually insisted on collateral for loans, a practice which excluded most prospective migrant clients. While the banks rarely expected to recoup value in the event of a loan default, the primary rationale offered for an insistence on collateral was that it allowed them to issue strategic threats to potential defaulters. However, the banking interviewees had significant concerns regarding enforcement of loan terms. Bankers believed that it would be difficult to secure repossession of collateral by state actors, even if they received favorable judgments in Jamaican courts.

The proposed institutional innovations of visa-as-collateral discussed in Part IV are influenced by the interview findings.

### *C. Methodology*

The study was not meant to be a detailed study of financial intermediation, for which the gold standard of economic ethnographic work is a review of diaries in which subjects keep precise records of their financial transactions.<sup>71</sup> The research design was entirely qualitative and the study methodology was multi-method in focus.<sup>72</sup> This is a difficult-to-reach population and partly for this reason, the study was not randomized. Utilizing referrals from previous work in this population, I developed a snowball sample, a method which is often used in qualitative field work for subjects with similar characteristics.<sup>73</sup> The typical subject was a resident of a rural

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71. See, e.g., RUTHERFORD, *supra* note 53, at vii–viii (describing his methodology, based largely on personal investigation and research); see also COLLINS ET AL., *supra* note 28, at 2–3 (describing why traditional economic and anthropological tools are problematic in studying how the poor manage their money).

72. I acknowledge the help of Mr. Densil Reid, who has significant experience in fieldwork in rural agricultural populations.

73. Kathryn Edin and Laura Lein, whose work has been utilized in the legal scholarship on entitlement programs, employed a similar methodology in their landmark study of a difficult-to-reach population, namely, single mothers on welfare. See Matthew Diller, *The Revolution in Welfare Administration: Rules, Discretion and Entrepreneurial Government*, 75 N.Y.U. L. REV. 1121, 1171–72 (2000) (citing KATHRYN EDIN & LAURA LEIN, MAKING ENDS MEET: HOW SINGLE MOTHERS SURVIVE WELFARE AND LOW-WAGE WORK 220 (1997)). The methodology of this study was influenced by grounded theory approaches to qualitative research. See ANSELM STRAUSS & JULIET CORBIN, BASICS OF QUALITATIVE RESEARCH: GROUNDED THEORY PROCEDURES AND

Jamaican community, who had previously had a guest-worker visa and expressed an interest in working in the United States again.<sup>74</sup> I have all interviews and interview notes on file.<sup>75</sup>

#### *D. Summary of Focus Group Findings*

I explained the bonding proposal to the focus-group participants. Although I did not provide an estimate of the average value of a deterrent bond, focus group participants understood that it would be significant since the average Jamaican agricultural worker quadruples his family's earnings as a guest worker in the United States.<sup>76</sup>

Most respondents described themselves as being "well-off" in relation to their similarly situated nonmigrant neighbors, due largely to their overseas earnings. Most emphasized that prior to their initial receipt of a guest-worker visa, they had found it difficult to raise funds for migration-related costs, such as passport and visa fees. Given the difficulty in raising funds for these relatively modest costs, interview subjects felt sure that the cost of a bond would be prohibitive for those who did not have access to a loan.

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TECHNIQUES 21 (1990) (describing different methods of qualitative research and their relative benefits).

74. Although tourism workers are now eligible to access the United States as guest workers, in Jamaica, these persons are not understood to be low-skilled because they have received some formal training in trade schools, and complete tests to gain certifications. As such, I restricted the sample to persons who are understood to be "low-skilled," namely agricultural workers. Their access to overseas labor markets is the most restricted, since they are considered high risks for immigration infractions. They typically lack formal training, are low-income, and are poorly situated to provide the evidence of formal ties to Jamaica (including hard assets such as land) that are typically required to demonstrate their suitability for visas. For a description of the snowball sampling technique as it has been applied in studies of low-skilled migrants, see Wayne Cornelius, *Interviewing Undocumented Immigrants: Methodological Reflections Based on Fieldwork in Mexico and the United States*, 16 INT'L MIGRATION REV. 378, 378–411 (1982).

75. The final sample included eighteen workers. In keeping with the practice in such studies to maintain the privacy of interviewees in these small, closely knit communities, they are identified by their initials. They include DR1, MK, DR2, AB, WM, LM, FC, CL, BR, EC, JH, DD, DO, MS, DM, LM, DD and DP.

76. This estimate is based on a survey of funds remitted by guest workers conducted by the Remittance Research Group in the Department of Economics at the University of the West Indies. Notably, it was not possible based on the available research to segregate the earnings of U.S. guest workers (as opposed to Canadian guest workers). See SIR ARTHUR LEWIS INST. OF SOC. & ECON. STUD., JAMAICA SURVEY OF LIVING CONDITIONS 2007, available at <http://salises.mona.uwi.edu/databank/slc2007/survey0/index.html>. Jamaicans who are able to travel to the United States to work experience a substantial "place premium," namely the wage gain accruing to foreign workers who arrive in the United States. The average thirty-five-year-old Jamaican in the United States with nine years of education earns 3.63 times what he would earn in Jamaica. Clemens et al, *supra* note 19, at 11.

Focus group participants also indicated that they might have access to financing through informal sources. The predominant mechanism of financial intermediation appeared to be informal savings clubs or “partners,” the indigenous parlance for Rotating Savings and Credit Associations (“ROSCAs”),<sup>77</sup> organized by church groups, community clubs, and farming associations.<sup>78</sup> Respondents’ attitudes towards formal financial institutions demonstrated an interesting bifurcation. They seemed aware of one lending program offered by a prominent local financial institution, which was specifically targeted at migrants who were regular remitters (that is, migrants who sent funds regularly back to Jamaica while working overseas).<sup>79</sup> However, even though they were aware of this program in the abstract, they appeared overwhelmingly skeptical about being able to borrow from any formal financial institutions. Even though only one respondent had ever approached a formal financial institution for a loan, they repeatedly stated that the institutions’ lending policies were not conducive to rural farmers since most did not have collateral other than their farms, which many seemed unwilling to put at risk.<sup>80</sup>

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77. Timothy Besley et al., *The Economics of Rotating Savings and Credit Associations*, in READINGS IN THE THEORY OF ECONOMIC DEVELOPMENT 386 (Dilip Mookherjee & Debraj Ray eds., 2001), describe ROSCAs as follows:

[M]embers commit to putting a fixed sum of money into a ‘pot’ for each period of the life of the ROSCA. Lots are drawn, and the pot is randomly allocated to one of the members. In the next period, the process repeats itself, except that the previous winner is excluded from the draw for the pot. The process continues, with every past winner excluded, until each member of the ROSCA has received the pot once. At this point, the ROSCA is either disbanded or begins over again.

78. Indeed, respondents appeared to be involved in other risk-pooling arrangements, such as informal agricultural insurance arrangements. For example, farmer A commits to sharing his crop with farmer B if a catastrophic event such as a fire occurs and vice versa. For a good summary of some of the research in this area, see Abigail Barr, Marleen Dekker & Marcel Fafchamps, *Risk Sharing Relations and Enforcement Mechanisms* 26 (Ctr. for the Study of African Economies, Working Paper No. 2008–14, 2008), available at <http://www.csae.ox.ac.uk/workingpapers/wps-list.html>.

79. This institution is the Jamaica National Building Society (“JN”).

80. Indeed, studies by Erica Field and Maximo Torero and by Sebastian Galiani and Ernesto Schargrodsky have found a similar unwillingness to put homes at risk to access loans among the urban poor in several Latin American cities. Erica Field & Maximo Torero, *Do Property Titles Increase Credit Access Among Urban Poor? Evidence from a Nationwide Titling Program* 5 (Mar. 2006) (unpublished manuscript), available at <http://www.economics.harvard.edu/faculty/field/files/FieldToreroocs.pdf>; Sebastian Galiani & Ernesto Schargrodsky, *Property Rights for the Poor: Effects of Land Titling* 26 (Centro de Investigacion en Finanzas, Working Paper No. 06/2005, 2005), available at [http://www.utdt.edu/Upload/CIF\\_wp/wpcif-062005.pdf](http://www.utdt.edu/Upload/CIF_wp/wpcif-062005.pdf).

The difficulty that farmers experience in accessing credit in developing countries is supported by other research. Indeed, this appears to be a primary motivator for migration. In the 1990s, a sudden surge of Pakistani farmers traveled overseas as guest workers. Research indicates that lack of access to credit was the major factor accounting for the upsurge. Pakistani farmers seeking to take advantage of the Green Revolution found themselves unable to buy

Nevertheless, they believed that they were better positioned than their peers to access loan financing given that they already had superior access to informal financial intermediation (in the form of ROSCAs) and were known in their communities for their overseas earnings.<sup>81</sup>

### *E. How Migrants Currently Finance Their Relocation Costs*

The economic ethnography literature demonstrates that virtually all financial intermediation services currently utilized by the poor exist in the informal economy,<sup>82</sup> and the same is true for poor migrants. Typically, poor migrants are unable to obtain visas and must locate a “coyote,” namely, an underground broker<sup>83</sup> who is willing to transport them through clandestine cross-border networks and then seek financing for coyote fees.<sup>84</sup> Coyote fees are typically prohibitive for the average migrant.<sup>85</sup> Migrants who already have

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expensive fertilizers. A primary rationale for migration was either to generate funds for their own farms or to generate excess cash to make loans to other farmers. Thus, migration emerged as an innovative credit mechanism to deal with “a vacuum in . . . rural credit facilities.” Alain Lefebvre *International Labor Migration from Two Pakistani Villages with Different Forms of Agriculture*, 29 PAK. DEV. REV., 59, 73 (1990), available at <http://www.pide.org.pk/pdf/PDR/1990/Volume1/59-90.pdf>. Interestingly, the rate of migration was highest among members of the land-owning castes that had title to their land. In anticipation of the remittances that migration would generate (allowing them to service a loan), they were then better able to access credit from informal sources such as social networks than their nonmigrant peers. When they earn funds overseas, they prioritize paying back these loans to maintain family honor. *Id.* at 77–78. A similar study of migration patterns of Egyptian guest workers who had previously been farmers found similar results. The primary rationale for migration appeared to be the inability to access credit at home to upgrade their farms. Richard H. Adams, *Worker Remittances and Inequality in Rural Egypt*, 38 ECON. DEV. & CULTURAL CHANGE 45, 45–71 (1989).

81. Manuel Orozco, *Remittances in Latin America and the Caribbean: Their Impact on Local Economies and the Response of Local Governments*, in DECENTRALIZATION AND THE CHALLENGES TO THE DEMOCRATIC GOVERNANCE 25, 27–28 (Org. of Am. States ed., 2008), available at <http://www.oas.org/sap/publications/2008/English%20Decentralization.pdf>.

82. RUTHERFORD, *supra* note 53, at 32.

83. Professor David Spener has conducted ethnographic research on coyote transportation. For a representative publication that includes some of this work, see DAVID SPENER, *CLANDESTINE CROSSINGS* (2009). There is preliminary evidence that these coyote networks have been taken over by transnational drug gangs, which are cash-rich and able to provide loans to finance transportation and to penalize defaulters. Joel Millman, *Immigrants Become Hostages as Gangs Prey on Mexicans*, WALL ST. J., June 10, 2009, at A1.

84. For example, the average coyote fee from Mexico is \$2,500, which is more than one-third of the average per-capita income of a rural Mexican national. Although the per-capita GNI of Mexico is approximately \$7,600, rural Mexicans are considerably poorer. WORLD BANK, MEXICO AT A GLANCE 1 (2009), available at [http://devdata.worldbank.org/AAG/mex\\_aag.pdf](http://devdata.worldbank.org/AAG/mex_aag.pdf).

85. The equivalent figure from Guatemala is roughly \$10,000—nearly three times the average per capita income of a Guatemalan—and from El Salvador the figure is in excess of \$10,000—more than three times the average per-capita income. Miriam Jordan, *Latest*

social networks in the United States can take low-interest loans from their friends, family, or informal savings clubs, which are generally sustained by remittances from relatives overseas; this appears to be a popular method of financing.<sup>86</sup> If these sources are unavailable, migrants typically seek to obtain financing from a local money lender, where interest rates appear to be extremely high (studies estimate these on an annualized basis as ranging from 50 percent to 120 percent depending on the particulars of the local market).<sup>87</sup>

Migrants also have another option: they may obtain financing from a coyote. The implicit interest rates charged by coyotes appear to be exorbitant, exceeding even the very high rates of local money lenders.<sup>88</sup> The willingness of coyotes to extend credit appears to depend on a number of factors beyond the perceived default risk of the client, including coyotes' capability to enforce informal "loan contracts" if a borrower defaults, their historical tenure in the coyote business, and their overhead costs.<sup>89</sup> There is evidence that even when border passage is not clandestine, these conditions may still persist. For example, although migration from South Asia to the Gulf is almost entirely documented (that is, migrants have valid visas), money lenders and labor brokers appear to enforce loan contracts for migration expenses with explicit and implicit threats of violence.<sup>90</sup>

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*Immigration Wave: Retreat*, WALL ST. J., Oct. 2, 2008, at A1 (finding that Guatemalan migrant paid \$5,700 in initial coyote fees, but after interest amount totaled \$10,000).

86. *Id.*

87. *Id.*

88. *Id.*

89. Interview with David Spener, *supra* note 4. Notably, the coyote's capability to enforce loan contracts appears to be high, particularly if they operate as subsidiaries of illegal narcotics gang networks. Josh Meyer, *Drug Cartels Raise the Stakes on Human Smuggling*, L.A. TIMES, Mar. 23, 2009, <http://www.latimes.com/news/nationworld/nation/la-na-human-smuggling23-2009mar23,0,3465454.story>; see also Hussein Sadruddin, Natalia Walter & Jose Hidalgo, *Human Trafficking in the United States: Expanding Victim Protection Beyond Prosecution Witnesses*, 16 STAN. L. & POL'Y REV. 379, 382–84 (2005) (discussing factors that influence coyotes' business).

90. For instances of this phenomenon, see generally FRITZ BOUMAN, SMALL SHORT AND UNSECURED: INFORMAL RURAL FINANCE IN INDIA (1989); PRABHU GHATE & ARINDAM DAS-GUPTA, INFORMAL FINANCE: SOME FINDINGS FROM ASIA (1992); Ifran Aleem, *Imperfect Information, Screening and the Costs of Informal Lending: A Study of a Rural Credit Market in Pakistan*, 4 WORLD BANK ECON. REV. 329 (1990); A. Braverman & T.N. Srinivasan, *Credit and Sharecropping in Agrarian Societies*, 9 J. DEV. ECON. 289 (1981); A.K. Ghose, *The Formation of Usurious Interest Rates*, 4 CAMBRIDGE J. ECON. 169 (1980); Meenal Patole & Orlanda Ruthven, *Metro Moneylenders: Microcredit Providers for Delhi's Poor*, 13 SMALL ENTERPRISE DEV. 36 (2001).



*F. The Background Legal Context*

For my friends, anything; for my enemies, the law.

— Oscar R. Benavides, Former President of Peru<sup>91</sup>

Lenders confirmed the views of migrant respondents that there are few formal financial services available to them. Notably, these lenders typically insisted on collateral. Among those that engage in noncollateral-based (that is, unsecured) lending, most engage in micro-lending.

Lenders cited as a primary factor in their reluctance to lend to the poor the pervasive uncertainty regarding the likelihood of enforcement of loan contracts and repossession of collateral. Specifically, the interviewees' concerns centered on six different possibilities:

1. Firms were concerned that the de jure policy surrounding loan contracts may change;
2. Firms were concerned that the de jure rules surrounding the repossession of collateral may change;
3. Even if the de jure rules surrounding loan contracts did not change, there could be a gap between de jure rules and judicial application of these rules to the facts of their case;
4. Even if the de jure rules surrounding repossession of collateral did not change, there could be a gap between de jure rules and judicial application of these rules to the facts of their case;
5. Even if the courts ruled in their favor with respect to loan contracts, there could be a gap between the courts' judgments and the de facto implementation of these judgments by state actors; and
6. Even if the courts ruled in their favor with respect to repossession of collateral, there could be a gap between courts' judgments and the de facto implementation of these judgments by state actors.

The last two factors were of particular concern. Lenders expressed more confidence in the legal rules and the judiciary responsible for their administration than they did in the likelihood that state actors would enforce favorable rulings. The interviewees articulated two independent concerns regarding institutional quality. First, there is a concern regarding the institutional quality of the

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91. I am grateful to Lant Pritchett for pointing out this quotation to me.

judicial branch (that is, the judicial application of rules to the facts of a particular case) not because of perceived corruption, but because the judicial branch is poorly resourced, resulting in long delays in rulings. Second, there is a concern regarding the institutional quality of the state actors responsible for implementing the courts' judgments into credible enforcement actions. This finding demonstrates that weak judicial systems undermine the likelihood that financial intermediaries will rely on a de jure rule being translated into a judicial decision, and in turn, weak state actors undermine the likelihood that financial intermediaries will rely on de facto implementation of judicial decisions. Given this legal context, in the event that bankers do lend, such lending is unlikely to be subject to broad-based and equally-applied rules. On the contrary, lending is more likely to be based on deals, namely, highly specific accommodations for individual borrowers or groups of borrowers.

*G. The Four Principles Underlying the Extension of  
Credit to the Poor*

Against a background of pervasive informality and legal uncertainty, Jamaican banks offered rationales for their lending practices that seem somewhat unconventional in light of traditional theories of lending in the legal scholarship. Four principles appear to undergird lending to the poor. First, banks may forego collateral-based lending altogether if they have a relationship with or share a community with the borrower and thus have ample information about him or her. Second, when they forego collateral-based lending, they structure contracts that enable them to extract a penalty from the borrower even if they are unable to recoup their funds. Third, such penalties are often extracted in a manner that minimizes the need for enforcement by a poorly developed, unreliable, and inaccessible legal system. Finally, in a context of pervasive legal uncertainty, collateral is still valuable, and where it is available, banks may accept collateral not primarily for its liquidation value, but rather for the ability that it provides banks to strategically threaten the borrower with seizure in order to motivate her repayment.

1. The Difficulties Surrounding Collateral May Lead Banks to Forego  
Collateral or Enforcement of Their Repossession Rights

Even if poor households have available collateral, banks may still be wary of accepting such collateral, and even if they accept it, they may forego enforcement of their repossession rights in the event

of a default.<sup>92</sup> This finding is surprising, particularly against the background of a plethora of scholarship in both law and economics arguing that one strategy to mitigate credit rationing is to enable asset building so that the poor are able to offer collateral.<sup>93</sup> Yet, the empirical evidence regarding this particular claim is decidedly mixed and suggests that the skepticism of collateral-based lending that I found among Jamaican banks may be widespread in the developing world.<sup>94</sup> My interviews in Jamaica suggested that banks consider the existence of a reliable legal system—through which a bank can enforce a loan contract and its repossession rights—just as important as recognizing an owner’s possession (and the repossession rights of a secured creditor in the event of a default).<sup>95</sup>

## 2. Banks Structure Contracts that Enable Them to Extract a Penalty from the Borrower, Without Resorting to the Formal Legal System

When these bankers lend to the migrant poor, they are most likely to pursue micro-credit programs. Micro-credit often has been described as the *only* advance in lending that has succeeded in expanding the availability of credit for the very poor on a macro-level. The primary innovation of micro-credit programs is group lending:

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92. This finding is also supported by Field & Torero, *supra* note 80, and Galiani & Schargrodsky, *supra* note 80.

93. Hernando De Soto’s work advocating titling programs among the developing-world poor is the most well-known example of this approach. HERNANDO DE SOTO, *THE MYSTERY OF CAPITALISM: WHY CAPITALISM TRIUMPHS IN THE WEST, AND FAILS EVERYWHERE ELSE* 196 (2000); HERNANDO DE SOTO, *THE OTHER PATH: THE ECONOMIC ANSWER TO TERRORISM* 158–72 (1989); *see also* ROBERT COOTER & HANS-BERND SCHAEFER, *LAW AND POVERTY OF NATIONS* (2009), available at [http://works.bepress.com/robert\\_cooter/144](http://works.bepress.com/robert_cooter/144); Paul G. Mahoney *The Common Law and Economic Growth: Hayek Might Be Right*, 30 J. LEGAL STUD. 503, 523 (2001) (discussing different countries’ property and contract rights); Richard A. Posner, *Creating a Legal Framework for Economic Development*, 13 WORLD BANK RES. OBSERVER 1 (1998) (outlining requirements for a nations’ prosperity in terms of property and contract rights); Michael J. Trebilcock & Paul-Erik Veel, *Property Rights and Development: The Contingent Case for Formalization*, 30 U. PA. J. INT’L L. 397 (2008) (“The conventional wisdom among economists and development scholars is that strong formal property rights are a necessary precondition for economic growth.”). *But see* MARK GOODALE & SALLY E. MERRY, *THE PRACTICE OF HUMAN RIGHTS: TRACKING LAW BETWEEN THE GLOBAL AND THE LOCAL* (2007) (expressing doubts about the faith other scholars have placed in asset-building as a strategy for poverty alleviation).

94. Field & Torero, *supra* note 80, at 29–30; Galiani & Schargrodsky, *supra* note 80, at 24–25.

95. I do not mean to single out the importance of legal rules and a reliable legal system as the most important reason for banks’ reluctance to lend to the titled poor; there are a variety of other rationales that might be offered for pervasive failures in credit markets for the poor. For a comprehensive survey of the literature, see Robert Cull et al., *Financial Performance and Outreach: A Global Analysis of Leading Microbanks*, 117 ECON. J. F107 (2007).

individuals without access to collateral form groups with the goal of obtaining a loan. While loans are made individually to members of the group, all of the members of the group will be denied access to future borrowing if any individual borrower fails to repay.<sup>96</sup> This innovation likely accounts for the consistently high repayment rates.

In accordance with the literature, some banker-interviewees stressed the existence of social collateral as a substitute for physical collateral, since those who are at risk of defaulting on their loans suffer significant peer pressure and may even be stigmatized in the larger community in the long-term if they eventually default. However, all of the banker-interviewees emphasized that in the event of a default they had minimal expectation of repayment. What appeared attractive to these interviewees about micro-credit was that peer monitoring provides a penalty that is sure and swift and that does not require dependence on a legal system that may be unreliable or inaccessible.

### 3. Relational Theories of Financing: Collateral as a Strategic Threat

There is an extensive discussion in the legal scholarship of the motivations of lenders and borrowers when considering whether to engage in secured financing. Conventionally, collateral serves the function of reducing the likelihood that borrowers will default in circumstances where they can easily divert cash flows without the knowledge of the lender.<sup>97</sup> There is virtually nothing in the legal scholarship as to how these conventional theories of secured lending may apply to financing under conditions of pervasive informality. However, this is a central theme in the development finance literature, which converges with the legal scholarship on secured lending in significant respects.<sup>98</sup> While the development finance literature discusses several potential considerations that might affect institutional lender behavior in this context, the key issue that is repeatedly emphasized is the divertibility of cash flows.<sup>99</sup> In conditions of informality, cash diversion is more likely to occur and more difficult

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96. Notably, in most microlending programs, there is no formal or legal joint liability (i.e., group members are not legally obligated to repay the pro rata portion of a defaulting member). See BEATRIZ ARMENDARIZ DE AGHION & JONATHAN MORDUCH, *THE ECONOMICS OF MICROFINANCE* 70 (2005) (detailing liability schemes).

97. *Id.* at 21.

98. A good summary is included in Bond & Rai, *supra* note 34.

99. An excellent summary of this literature is in ARMENDARIZ DE AGHION & MORDUCH, *supra* note 96, intro.

to detect. In response to these challenges, traditional financial institutions have generally required collateral.<sup>100</sup>

While the traditional view has been that lenders value the right of liquidation in a secured transaction, this theory is less plausible under these more informal circumstances. The aforementioned legal challenges present a de facto, if not de jure, bar to a lender's ability to liquidate collateral. In this context, liquidation rights are moot. Yet banks often insist on collateral as a condition of lending to the poor. The question becomes: Why require collateral from these borrowers? Of the rationales offered in the literature, those that fall under the umbrella of indirect "relational" rationales seem most applicable.<sup>101</sup> Relational theories are skeptical of the notion that lenders pursue secured transactions because of direct enforcement effects, such as liquidation rights. Rather, these theories emphasize that security has important indirect effects on the borrower's behavior and incentives prior to the point of default.<sup>102</sup>

In accordance with these theories, several banker-interviewees emphasized that they value collateral because of the power that it allows them to wield before the possibility of default even arises. Specifically, they are able to curtail excesses of the borrower through strategic threats against the collateral. Apparently, these threats are credible even if the collateral is only notional because of the role that threats play in sending signals to the larger community regarding the health of a debtor's finances. In this manner, strategic threat making falls squarely into a "signaling" theory of secured lending.<sup>103</sup>

Using collateral as a strategic threat seems particularly applicable in the conditions of informality which characterize the

100. *Id.*

101. To the extent that these theories focus disproportionately on secured financing, I mean to emphasize not the security, but rather the relational aspects of the theories.

102. See, e.g., David Gray Carlson, *On the Efficiency of Secured Lending*, 80 VA. L. REV. 2179, 2188–89 (1994) (citing the creditor's "power to punish the debtor"); David Gray Carlson, *Secured Lending as a Zero-Sum Game*, 19 CARDOZO L. REV. 1635, 1679–80 (1998) (citing the importance of power, as opposed to monitoring); Ronald J. Mann, *The Role of Secured Credit in Small-Business Lending*, 86 GEO. L.J. 1, 11–26 (1997) (arguing that for lenders to small businesses, the ability to prevent borrowers from taking on future debt is a primary motivator for securing the debt); Mann, *supra* note 48, at 2244–47 (arguing that for lenders to small businesses, the ability to prevent borrowers from taking on future debt is a primary motivator for securing the debt); Alan Schwartz, *Priority Contracts and Priority in Bankruptcy*, 82 CORNELL L. REV. 1396, 1412–14 (1997) (arguing that firms issue secured debt to avert dilution of their claims by later lenders); Scott, *supra* note 49, at 927–29 (1986) (suggesting that collateral has "hostage-like" characteristics); George G. Triantis, *Secured Debt Under Conditions of Imperfect Information*, 21 J. LEGAL STUD. 225, 245–47 (1992) (discussing the bank's leverage with the lender as an important factor).

103. Triantis, *supra* note 102, at 241–43. While Triantis does not use the phrase in this context, it seems particularly applicable.

bottom of the pyramid. Typically, the poor depend heavily on their communities. This is not coincidental, for in resource-constrained circumstances, neighbors are indispensable to risk-pooling arrangements. The poor are likely to depend on their neighbors for risk-pooling arrangements, ranging from informal agricultural insurance to communal herding grounds to savings clubs. For obvious reasons, a person's fate is heavily intertwined with that of her neighbors.<sup>104</sup> In such close-knit communities, it is difficult for a borrower to keep private his difficulties with his bankers. Rural Jamaican farmers are like the famous Ellicksonian ranchers<sup>105</sup>—"gossip" appears to play an important role in mediating business relations. A bank's threat to enforce a loan agreement provides a signal to neighbors that the borrower is experiencing financial difficulty.<sup>106</sup>

### *H. Visas as New "New Property"*<sup>107</sup>

Visa-as-collateral has been designed with the foregoing emphasis on unconventional enforcement mechanisms in mind. The important conceptual shift is a re-conceptualization of a visa as a license, a quasi-property right with collateral-like characteristics. Why think of a visa in this manner? If a visa can be thought of as property, it is easier to conceptualize posting a bond for a visa.

#### 1. The Reich Analogy and a Visa as a Franchise or a License

In a seminal article forty years ago, Charles Reich noted that an increasing number of persons derived their wealth from their relationships with the federal government. He identified a range of benefits that derived from government largesse and famously named them "the new property."<sup>108</sup>

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104. See, e.g., Barr et al., *supra* note 78, at 25 (noting that co-group members curb their risk-taking preferences to match their group).

105. ROBERT C. ELICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES 15–28 (1991).

106. As Scott has so aptly put it, "in essence, relational security signals (to) other creditors that a policeman is walking the beat, and thus they can relax their vigilance in taking individual precautions." Scott, *supra* note 49, at 931.

107. The term is Blocher's play on Reich's term. See Blocher, *supra* note 35.

108. Like Reich, I utilize the term "property" not in the traditional Blackstonian sense that generations of lawyers now associate with alienability and "despotic" ownership, *inter alia*, but rather, as the word "property" is utilized in a modern sense to refer to a more abstract and complicated network of legal entitlements and obligations which serve not only narrow private goals, but also promote larger public goals. See generally Reich, *supra* note 35.

Specifically, Reich noted that public law entitlements were increasingly fulfilling goals traditionally associated with private law and a market economy (for example, providing millions of U.S. citizens with their primary source of income). Visas, in fact, share several “new property” characteristics. For example, like welfare benefits, although visas were initially conceived as easily revocable privileges, they have since evolved into instruments with property-like characteristics, which in many instances are only revocable if the visa recipient is provided with some due process. Like other forms of “new property,” visas provide for their holders a certain legal status bestowed by government, through which they can access a particular set of economic benefits. While visas do not share traditional characteristics of property as it conventionally has been understood (for example, visas typically may not be bought or sold and are generally understood to be categorically excluded from the market), in this manner, visas are no different from other forms of “new property” such as government-backed entitlements (for example, welfare benefits) that are inalienable but nevertheless widely recognized to have property-like characteristics.

Consider further a visa’s analogy to a franchise or a license, both prototypical examples of “new property.” Although a visa would not typically be thought of as either a franchise or a license, in fact, a visa is deeply analogous to both. Indeed, U.S. visas may be described as licenses to work in the United States. Like licenses, visas make it possible for their recipients to engage in particular kinds of work. Like other forms of licensees, visa holders are only able to receive what is usually their primary source of income because they hold visas. Thus, the “new property” analogy fits.

Further, like franchises, particular types of visas may be conceptualized as partial monopolies.<sup>109</sup> Indeed, visas bear strong analogies to partial monopolies in other arenas.<sup>110</sup> In part by limiting their number, the government has made U.S. visas extremely

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109. This analogy has been supported by electronic correspondence between the author and Lant Pritchett, a leading economist on immigration. E-Mail from Lant Pritchett, Professor, Harvard Kennedy Sch. of Gov’t, to Eleanor Brown (Apr. 9, 2011, 11:05 AM EDT) (on file with author). The franchise-like characteristics are clearly more applicable to particular categories of visas. For example, if visa recipients are competing with a large pool of undocumented persons once they arrive in the United States, the franchise-like characteristics of the visa are clearly less applicable.

110. Indeed the partial monopoly argument has been used to buttress the distributive justice concern, namely the view that requiring visas to work makes it costlier for poor people to fill jobs which they desperately need and which have few natural barriers to entry. Lant Pritchett, Professor, Harvard Kennedy Sch. of Gov’t, Remarks at Leveraging Migration for Africa, World Bank (Mar. 30, 2011).

remunerative for the lucky few who receive them.<sup>111</sup> It is difficult to dispute that visas create huge financial windfalls for recipients.

## 2. A Visa's Other Property-Like Characteristics: Reputation

Visas display another property-like characteristic as well. Recent scholarship has contended that “reputation itself—social status and the respect of others—can usefully be understood as a form of property.”<sup>112</sup> Sociological studies demonstrate that migration confers reputational benefits on migrants in their communities of origin.<sup>113</sup> Moreover, these reputational benefits extend to their associates from their communities of origin, who may secure tangible economic advantages from their associations with migrants.<sup>114</sup>

Reputations, and the corresponding ability to monetize them, may be augmented or diminished depending on whether migrants

111. This is particularly the case with respect to highly-skilled visas, which are usually limited in number and whose holders usually command substantial compensation in the marketplace. *See Gates Tells Congress What Is Needed for Better Work Force*, N.Y. TIMES, Mar. 13, 2008, at C7 (discussing testimony of Bill Gates on highly-skilled visas).

112. Blocher, *supra* note 35, at 120. The term “reputational property” generally has been utilized with respect to intellectual property such as goodwill. However, unlike reputational property without clear economic value (such as reputational property in the virtual world of social networking sites), the reputational benefits conferred by visas are monetized in concrete ways.

113. Anthropologist Nancy Foner’s qualitative field research among Anglophone West Indian migrants in New York supports this point. She finds that migrant women in particular experience a considerable elevation in status in their families and communities of origin upon migration, in large part because their increased earning power allows them to make significant financial contributions to both their families and communities of origin. FONER, *supra* note 58 at 95–98 (2005). Moreover, she cites ethnographic studies in other migrant communities demonstrating that female migrants in particular experience elevated status in their families and communities of origin. *Id.* at 96–97 (citing Dominican and Salvadorian migrants, among others, and asserting that they had experienced an elevation in status).

114. Qualitative field research among migrants demonstrates that when migrants from certain communities achieve success, they build reputational capital from which future migrants from the same community also benefit. Foner’s study of Anglophone West Indian domestic workers supports this point. *See Foner, supra* note 58, at 164 (“Once West Indian women [migrants] got a toehold in domestic service, friends and relatives followed as social networks passed along valuable information about how to find jobs . . . . [N]etwork hires inspire automatic trust; employers feel that they can find someone reliable and trustworthy to look after their children or an elderly parent through referrals . . . .”) The experience of Cuban migrants is also instructive. Cuban migrants have historically been understood in the Miami business community to be good credit risks. Even when they lack start-up capital, their perceived solid reputations have allowed them to enter certain forms of business in the United States for which there typically have been high barriers to entry, even for native-born U.S. citizens. *See Alejandro Portes, The Social Origins of the Cuban Enclave Economy of Miami*, 30 SOCIO. PERSP. 340, 363 (1987) (describing the practice of lending to Cuban immigrants, including those who lacked collateral, on the basis of their business reputation and credit history in Cuba). *See generally* Alejandro Portes & Leif Jensen, *The Enclave and the Entrants: Patterns of Ethnic Enterprise in Miami Before and After Mariel*, 54 AM. SOCIO. REV. 929 (1989).



remain providers for their families and communities of origin. There is little doubt that simply by virtue of the poor countries and communities from which they originate, migrants remain subject to extreme credit rationing.<sup>115</sup> However, the interviews of Jamaican migrant workers and professional lenders support other studies indicating that visas confer reputational benefits that allow some recipients to obtain credit that normally would not be available to them.<sup>116</sup>

To the extent that poor migrants are more likely to receive credit than their similarly situated neighbors without visas, the interviews indicate a continuum of rationales that might be offered for this result. Notable among these rationales is that bank lending is at least partly derivative of the reputational benefits associated with visas. Banks appear more willing to extend credit if some external entity has vetted the prospective borrower (although under this proposal, the United States would also be relying on the banks' vetting process.) Thus, a U.S. visa would constitute a signal that a reliable authority has vetted its recipient. In this manner, a visa may fulfill the role of more conventional due diligence,<sup>117</sup> such as credit reports, which are typically unavailable in developing countries. Moreover, migrant-borrowers already are likely to be high-status persons within their communities who would suffer some reputational loss in the event of a default.<sup>118</sup>

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115. This evidence comes from Bolivia, Mexico and the Commonwealth Caribbean. For a brief background summary of the literature on credit-rationing among the poor in developing countries, see Bose & Cothren, *supra* note 49, at 424–25 (observing that investors, particularly in developing countries, face the prospect of credit-rationing, and a favored group of firms typically enjoys access to the credit market at very low cost, while others must rely exclusively on internally generated funds.) A good summary is included in the 1989 World Development Report by the World Bank. See WORLD BANK, WORLD DEVELOPMENT REPORT 3–4 (1989). For two other works that provide excellent summaries, see generally KAUSHIK BASU, THE LESS DEVELOPED ECONOMY: A CRITIQUE OF CONTEMPORARY THEORY (1984); James R. Tybout, *Credit Rationing and Investment Behavior in a Developing Country*, 65 REV. ECON. & STAT. 598 (1983).

116. See *supra* note 80 and accompanying text (discussing improved credit access for Pakistani and Egyptian migrant farmers).

117. Indeed, one scholar argues that by effectively constraining defaults, the credit reporting system actually has created collateral. See Rashmi Dyal-Chand, *Human Worth as Collateral*, 38 RUTGERS L.J. 793, 813 (2007).

118. My interviews with loan officers in the formal Jamaican banking sector who service the poor supported these views. I identified a few banks that extend credit to migrants to fund costs associated with the regularization or extension of their immigration status in the United States. For example, two leading financial institutions in the Caribbean and Latin America have large-scale programs to extend loans to migrants for the application and legal costs associated with extending their "Temporary Protected Status" ("TPS"). These financial institutions are JN, which services Caribbean nationals, and Banco Pichincha, which services Latin American nationals, particularly Ecuadorians. The Secretary of Homeland Security may designate the nationals of a foreign country for TPS due to conditions in the country that temporarily prevent the country's

## III. INSTITUTIONAL DESIGN BENEFITS

*A. Is This Proposal Politically Plausible?*

An observer reasonably might question the political plausibility of visa-as-collateral on the grounds that the U.S. government would essentially be conditioning visa renewal not on a breach of U.S. law—or even a breach of foreign law—but on compliance with private loan contracts in a foreign jurisdiction to which the United States is not a party.<sup>119</sup> This skepticism is reasonable since in matters of immigration, global distributive justice concerns have not typically been a major concern for Congress. Rather, when making immigration law, Congress traditionally has been motivated by labor needs and economic concerns, and more recently, it appears to be motivated increasingly by public discomfort with the national security implications of the presence of a large number of unauthorized persons in the United States.<sup>120</sup> Thus, the question becomes: Does this proposal offer other institutional design benefits, which would make it attractive to Congress? The purpose of this Section is to highlight such benefits.

In conditions of information asymmetry, governments often seek to identify private parties who have better access to information to aid in their gatekeeping and enforcement functions.<sup>121</sup> Given the weak institutional framework and pervasive informality in many developing countries, the challenges of enlisting uncoordinated private

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nationals from returning safely. Following the January 2010 earthquake, undocumented Haitian nationals received TPS. *See Temporary Protected Status*, U.S. CITIZENSHIP & IMMIG. SERV., <http://www.uscis.gov/portal/site/uscis/> (follow “Temporary Protected Status” hyperlink) (last visited Apr. 2, 2011).

119. It bears emphasizing that the issue is not one of legal permissibility; indeed, the INA includes a dizzying array of bases for excluding aliens from the United States, which have been routinely upheld by the courts even when they bear no clear relation to immigration policy goals. *See* LEGOMSKY & RODRIGUEZ, *supra* note 14, at 514–20, 544–89 (discussing a wide range of deportability grounds, including immigration control, crime, and national security).

120. *Id.* at 4, 20, 69 (discussing economic development, national security, and labor needs, respectively). Indeed, a recent report by the Pew Research Center for the People & the Press confirms that a majority of U.S. citizens want tougher enforcement of immigration laws and a tough road to citizenship for those undocumented immigrants already in the country. *See* Scott Keeter, *Where the Public Stands on Immigration Reform*, PEW RES. CTR., Nov. 23, 2009, <http://pewresearch.org/pubs/1421/where-the-public-stands-on-immigration-reform>.

121. *See, e.g.,* Manns, *supra* note 15, at 889 (“The desirability of private gatekeepers turns on the fact that the goods or services they supply or demand provide them with cost-effective opportunities to detect and potentially prevent wrongdoing by customers or suppliers. For example, lawyers and accountants may be well-positioned to detect fraud by their clients . . . at significantly lower economic and social costs than public enforcers. Enlisting these types of private actors as public monitors of narrowly defined areas of wrongdoing may provide governments with cost-effective ways to outsource enforcement functions . . .”).

actors as gatekeepers and enforcers may seem especially daunting. However, there are several features of financial intermediaries that make them appropriate candidates.

### 1. The Key Features of Financial Intermediaries to the Poor

Financial intermediaries know their clients well and play critical roles in their daily lives.<sup>122</sup> Indeed, detailed ethnographic studies of the spending habits of the poor in Bangladesh, India, and South Africa found that a majority of respondents interacted with informal financial intermediaries very regularly.<sup>123</sup> Researchers find a dizzying range of financial intermediaries servicing the poor, including deposit takers, money lenders, savings clubs, and rotating savings and credit associations. In the absence of reliable financial recordkeeping, informal financial intermediaries in developing countries must visit their clients on almost a daily basis to ascertain their assets and liabilities. Indeed, they know their clients so well that they give new meaning to the term “community banker.”

By leveraging their extensive access to on-the-ground information, informal money lenders appear to have developed an expertise in pricing risk in conditions of informality. Moreover, they seem to be well hedged against down-side risk: through their extensive networks, they are able to locate defaulters and collect outstanding amounts. Indeed, they are paradigmatic hostage takers: even if borrowers disappear, money lenders have access to relatives, against whom they may make implicit and explicit threats.<sup>124</sup>

As formal financial intermediaries have recognized the size of the potential client base at the bottom of the pyramid, they too are increasingly stepping into the lending market for the poor.<sup>125</sup> Further,

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122. See COLLINS ET AL., *supra* note 28, at 46, 58 (providing evidence in the context of informal lending to the very poor).

123. *Id.* at 4, 46 (summarizing such research); see also STUART RUTHERFORD, THE PLEDGE: ASA, PEASANT POLITICS, AND MICROFINANCE IN THE DEVELOPMENT OF BANGLADESH 25–26, 33–35 (2009) (discussing examples of informal finance in Bangladesh); Daryl Collins, *Debt and Household Finance: Evidence from the Financial Diaries*, 25 DEV. S. AFR. 469, 477 (2008) (noting that in South Africa, “informal finance can be crucial to poor households”); Daryl Collins, *Social Security and Retirement: Perspectives from the Financial Diaries* 7–8 (Sept. 2007) (unpublished manuscript), available at <http://www.financialdiaries.com/files/Financial%20Diaries%20and%20retirement%20-%20EDIT.pdf> (discussing contact with an informal intermediary in South Africa).

124. See *supra* note 90 and accompanying text.

125. Halady Satish Rao, Asian Development Bank, Welcome Remarks at Banking of the Bottom of the Pyramid Conference (Sept. 20, 2007), available at <http://www.adb.org/Documents/Speeches/2007/sp2007039.asp>. Providing financial intermediation in the formal lending sector will potentially have spillover effects. Moneylenders may provide credit, but they rarely offer a gateway to other asset-building services, such as insurance, annuities, and so forth. As one

they appear to be replicating the strategies of their informal competitors. For example, rather than setting up formal branches, they too provide branchless banking. Moreover, recognizing the expertise of informal lenders in pricing local risks, when formal financial institutions seek to increase their market share, they often hire persons who were previously providers of informal financial services. These persons typically are from local communities and have pre-existing knowledge of potential clients.<sup>126</sup>

Finally, as many developing countries have modified their regulatory frameworks to create incentives for formal financial intermediaries to service the poor, the market at the bottom of the pyramid has become increasingly competitive.<sup>127</sup> As barriers to entry fall and competition for making loans increases, lenders' business reputations matter for recruiting potential clients. The preliminary evidence is that consumers have benefited.<sup>128</sup>

## 2. Financial Intermediaries as Gatekeepers and Policing the Gatekeepers

The foregoing speaks to several key features of financial intermediaries that make them appropriate gatekeepers.<sup>129</sup> First,

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banker pointed out in his interview, informal money lenders are not in a position to execute contracts with reinsurers! Indeed, studies of the clients of the most famous microcredit institution, the Grameen Bank in Bangladesh, have confirmed that once the poor begin to access credit, they simultaneously gain access to health, agricultural and funeral insurance, and retirement accounts, among other services that have heretofore been unattainable. *See* ARMENDARIZ DE AGHION & MORDUCH, *supra* note 96.

126. Gautam Ivatury & Ignacio Mas, *The Early Experience with Branchless Banking* 11 (Consultative Grp. to Assist the Poor (CGAP), Working Paper No. 26, Apr. 2008) ("The informal financial service providers that many poor people use are also largely founded on human interaction and personal or community relationships."); *see also Branchless Banking Country Diagnostics*, CGAP, <http://www.cgap.org/p/site/c/template.rc/1.11.1772/> (last visited Apr. 2, 2011) (discussing studies of branchless banking in Brazil, Indonesia, Kenya, Pakistan, Phillipines, Jordan, Argentina, Columbia, South Africa, India, El Salvador, and Mexico).

127. Rao, *supra* note 125. We have seen more significant forays into extending formal financial services to the poor in markets where the bottom of the pyramid is so large that it can mitigate the misgivings of financial institutions about servicing this segment of the population. These include markets such as India and Brazil (as opposed to much smaller markets such as Jamaica). *See* PRAHALAD, *supra* note 32, at 125–28, 193–4 (discussing Brazilian banking and Indian salt distribution ventures, which both target poor markets).

128. JAMES R. BARTH ET AL., *RETHINKING BANK REGULATION: TILL ANGELS GOVERN* (2006).

129. *See, e.g.,* John C. Coffee, Jr., *Gatekeeper Failure and Reform: The Challenge of Fashioning Relevant Reforms*, 84 B.U. L. REV. 301, 308–09 (2004) (defining gatekeepers as "reputational intermediar[ies]"); Assaf Hamdani, *Gatekeeper Liability*, 77 S. CAL. L. REV. 53, 63 (2003) (defining gatekeepers as parties who "offer a service . . . that is necessary for clients wishing to . . . engage in certain activities"); Howell E. Jackson, *Reflections on Kaye, Scholer: Enlisting Lawyers to Improve the Regulation of Financial Institutions*, 66 S. CAL. L. REV. 1019, 1050 (1993) (noting that gatekeepers often provide "indispensable" services); Kraakman, *supra*

recall that the information needed to assess the trustworthiness of a potential migrant is hyper-local; it is difficult to access or evaluate ex-ante predictors of reliability on a nonlocal level. Notably, screening and monitoring already are core competencies of lenders; they must perform this service well to stay in business. In the conditions of informality that are pervasive in the countries from which poor migrants typically originate, banks who now service the poor must force the convergence of the formal and the informal. They typically draw on a range of informal networks on the ground to closely scrutinize potential clients. These are precisely the hyper-local networks that the United States typically has not been able to penetrate to gather information on visa applicants. Thus, these banks constitute ideal “gatekeepers.”

Second, formal lenders are providing indispensable (or near-indispensable) services. They play a critical income-smoothing function, allowing the poor to transform irregular income streams into smoother resource flows. As formal financial intermediation becomes more standard in poor communities, bankers will become less difficult to replace, particularly if they crowd out their informal competitors through good service and competitive pricing.

Third, as formal players, reputational integrity should be important to their businesses. Theoretically, if they operate within a regulatory structure, they receive minimal (or negative) payoff for breaking the law. In this sense, they are essentially reputational intermediaries.

If the banks become the gatekeepers, who will police the gatekeepers? The potential rent-seeking problems are apparent in that without external oversight, loan officers will have powerful incentives to choose from among a group of qualified applicants those who are willing to offer bribes. A loan officer still may be able to keep the loan default rate of her clients low, thus assuring that she will retain her position and earn some extra income in the process. So, she might figure, why not take a bribe? Indeed, there is evidence of extensive rent seeking among loan programs for the rural poor in developing countries, particularly when the loans are backed by government guarantees.<sup>130</sup> Thus, the foregoing proposal is contingent on the existence of a robust regulatory system—absent from many

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note 48, at 53 (noting that gatekeepers “are able to disrupt misconduct by withholding their cooperation”).

130. Richard L. Meyer & Geetha Nagarajan, *Rural Finance: Recent Advances and Emerging, Lessons, Debates, and Opportunities* 76 (Dep’t of Agric., Envtl., & Dev. Econ., Ohio State Univ., Working Paper No. AEDE-WP-0041-05, 2005).

developing countries from which guest workers originate—in which banks are overseen by some external entity.<sup>131</sup>

For obvious reasons, it is difficult for the United States to influence rulemaking and enforcement on the ground in a developing country; however, a larger benefit may exist that dwarfs all other benefits from a developmental perspective. The United States may seek to instigate a “race to the top,” encouraging the institutionalization of regulatory best practices in developing countries, by insisting that it will only accept bonds underwritten by lenders who operate in countries that meet certain standards of regulation.

The United States should also insist that banks achieve certain levels of effectiveness in their screening processes. Consider the following: If a guest worker overstays but continues to service the loan, what incentive does the bank have to get the worker to leave the United States? An illegal immigrant might just pay off the loan, essentially to “buy off” the bank. In the worst case scenario, one might envision certain banks whose clients have such high rates of visa overstay that the banks essentially become facilitators of undocumented migration. To avoid this problem, the U.S. government must penalize banks that lend to too many visa violators by refusing to accept their bonds.<sup>132</sup>

The bottom line is that when banks cannot count on rules, they make deals with individual borrowers.<sup>133</sup> By borrowing against a U.S.

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131. Ruth De Krivoy, *Reforming Bank Supervision in Developing Countries*, in BUILDING AN INFRASTRUCTURE FOR FINANCIAL STABILITY 113, 113 (Eric Rosengren and John Jordan eds., 2000). Some researchers have argued that regulating financial disclosure requirements is the most effective contributor to banking development and protecting poor savers and borrowers in particular. See BARTH ET AL., *supra* note 128, at 255 (highlighting the effectiveness of information disclosure). See generally Laura Brix and Katharine McKee, *Consumer Protection Regulation in Low Access Environments: Opportunities to Promote Responsible Finance* (2010), available at <http://www.cgap.org/gm/document-1.9.42343/FN60.pdf> (highlighting the importance of information disclosure particularly for poor borrowers).

132. Of course, it takes “two to tango,” so the United States should also tweak its own policies to discourage visa overstay, even as it attempts to influence bank policies. For example, this proposal will work best if those who abide by the terms of their visa have some reasonable prospect of visa renewal once they return to their home countries. Visa renewal will essentially become a “reward” for good behavior (along with the United States returning the bond) and provide a further disincentive for guest workers to disappear into the underground economy. Indeed, several European Union countries have committed to renewing the visas of low-skilled workers who return home for precisely this reason. See Patrick Weil, *All or Nothing? What the United States Can Learn from Europe as it Contemplates Circular Migration and Legalization for Undocumented Immigrants* 6 (Apr. 2010) (unpublished manuscript), available at [http://www.gmfus.org/galleries/ct\\_publication\\_attachments/GMF7610\\_IM\\_Weil\\_final.pdf](http://www.gmfus.org/galleries/ct_publication_attachments/GMF7610_IM_Weil_final.pdf) (discussing such a program for seasonal workers in Italy).

133. Cf. Hallward-Driemeier et al., *supra* note 37, at 3 (discussing the prevalence of deals over rules for firms in Africa and how this creates costly uncertainty).

visa, migrants will be in essence signing onto a U.S.-influenced “loan default equals visa default” rule in the local market. If borrowers service their loans within this rule-bound framework, banks will have positive institutional experiences with poor borrowers. Such experiences will allow banks to create actuarial tables calculating risks, and thereby encourage the growth of a market in visa-as-collateral lending. Additionally, if the United States insists on this rule-bound framework for participating local banks, local regulators will have an incentive to tighten their rules, and banks will abide by the local regulatory framework. Thus, the visa-as-collateral proposal may help to accelerate a developing nation’s transition (even interstitially) from an inefficient, deal-based, opaque system of lending to a more efficient, rule-based, transparent system of lending to the poor.<sup>134</sup>

### *B. The Enforcement Question*

#### 1. Migration’s Network Nature and the Difficulty of Enforcement

A central tenet of the economic sociology of immigration is that migration is sustained by a dense web of interlocking ethnic networks that operate transnationally. Studies have demonstrated that the key factor in sustaining undocumented migration is the presence of thick cross-border ethnic networks that facilitate migration and enable the integration of migrants even when they lack documentation.<sup>135</sup> Unsurprisingly, these same transnational networks facilitate the incorporation of persons who previously have been documented. When

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134. Indeed, there is evidence that the Grameen model has had precisely this effect in Bangladesh. See ARMENDARIZ DE AGHION & MORDUCH, *supra* note 96, at 85 (noting that because repayment of Grameen loans occurs in public, “the process [is] more transparent and . . . villagers know who among them is moving forward and who may be running into difficulties”).

135. See Portes, *supra* note 58, at 22–23 (highlighting the importance of ethnic networks in sociological studies of immigration and their ability to facilitate the transition from unauthorized to legal immigration status). The landmark work in this regard has been conducted by Douglas Massey at the Office of Population Research at Princeton University, who has analyzed Mexican migratory patterns over the last century. See, e.g., Michael B. Aguilera & Douglas S. Massey, *Social Capital and the Wages of Mexican Migrants: New Hypotheses and Tests*, 82 SOC. FORCES 671, 671–72 (2003) (briefly summarizing Massey’s and others’ work on cross-border migrant networks). Other scholars have conducted research which highlight the importance of cross-border networks. See, e.g., DAVID KYLE, TRANSNATIONAL PEASANTS: MIGRATIONS, NETWORKS, AND ETHNICITY IN ANDEAN ECUADOR 198 (2000) (making same point in relation to Ecuadorian migration); CECILIA MENJIVAR, FRAGMENTED TIES: SALVADORAN IMMIGRANT NETWORKS IN AMERICA 74, 231–33 (2000) (Salvadoran migration); Nestor P. Rodriguez & Jaqueline Maria Hagan, *Maya Urban Villagers in Houston: The Formation of a Migrant Community from San Cristobal Totonicapan*, in THE MAYA DIASPORA: GUATEMALAN ROOTS, NEW AMERICAN LIVES 207 (James Loucky & Marilyn Moors eds., 2000) (Guatemalan migration).

persons become undocumented, these networks provide false documentation and facilitate their placement into jobs. Thus, migrants are generally incorporated into economic and social networks with relative ease and minimal costs, irrespective of their legal status.<sup>136</sup> Notably, all of these networks are quintessentially private. Even when public officials charged with enforcement have informal ties to these networks, they generally are unable to penetrate them to enforce immigration laws.<sup>137</sup> Moreover, even when they succeed in penetrating these networks and conduct raids in the communities, they generally incur extraordinary social and economic costs.<sup>138</sup>

For example, although polling data shows that a majority of U.S. citizens express concern about ineffective immigration enforcement in the abstract, when enforcement actually occurs, it is often controversial. Public enforcers find that they incur the wrath not only of the targets of the raid, but also of a range of religious, business, and nongovernmental actors.<sup>139</sup> Such immigration raids undermine “communal efficacy” as persons who have historically played critical roles in families and the broader community are displaced.<sup>140</sup> Essentially, some have argued that forced deportation as

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136. Cf. Portes, *supra* note 58, at 22 (noting that such networks act as “social bridges” that decrease costs and risks of immigration, and citing evidence that many immigrants obtain legal immigrant status via these networks).

137. See Manns, *supra* note 15, at 934–35 (noting that it is “extremely difficult for enforcement officials to oversee and to close off channels for illegal immigration”).

138. See Robert Hildreth, Commentary, *ICE Immigration Raids Waste Time and Money*, NEW AM. MEDIA, Dec. 26, 2008, [http://news.newamericamedia.org/news/view\\_article.html?article\\_id=3823e62e972ef6fec715fe8298a3045e](http://news.newamericamedia.org/news/view_article.html?article_id=3823e62e972ef6fec715fe8298a3045e) (noting that a raid on an Iowa meat-packing plant cost roughly \$14,000 per immigrant seized); see also Editorial, *Stop the Raids*, N.Y. TIMES, Oct. 7, 2007, at A28, available at <http://www.nytimes.com/2007/10/04/opinion/04thur2.html> (noting that immigration agents have “set off waves of fear and outrage, not only among illegal immigrants, but among citizens whose privacy and security they have violated, through unchecked aggression, carelessness and incompetence”).

139. See Nina Bernstein, *Church's Compact with U.S. Spares Immigrants Detention*, N.Y. TIMES, Dec. 12, 2009, at A1 (raids spur church opposition); Julia Preston, *Employers Fight Tough Measures on Immigration*, N.Y. TIMES, July 6, 2008, at A1 (finding that local businesses are banding together to voice their concerns regarding the negative implications of stringent immigration enforcement for business); Monica Rhor, *AP Impact: Immigration Raids Split Families*, BOS. GLOBE, Mar. 11, 2007, at A9, available at [http://www.boston.com/news/local/massachusetts/articles/2007/03/11/ap\\_impact\\_immigration\\_raids\\_split\\_families/](http://www.boston.com/news/local/massachusetts/articles/2007/03/11/ap_impact_immigration_raids_split_families/) (raids spur church opposition); see also Roger Lowenstein, *The Immigration Equation*, N.Y. TIMES, July 9, 2006, § 6 (Magazine), at 36 (pointing out that local businesses benefit from the consumption of products and services by undocumented migrants, and conversely, these firms lose business when undocumented migrants leave).

140. There has been ethnographic work documenting the disruptive effect of forced deportation on families and communities. See Jacqueline Hagan, Karl Eschbach & Nestor Rodriguez, *U.S. Deportation Policy, Family Separation and Circular Migration*, 42 INT. MIG. REV. 64 (2008).



a cure may be worse than the disease.<sup>141</sup> Through encouraging self-deportation, which is likely to be perceived as less punitive, visa-as-collateral may provide a better alternative.

## 2. Financial Intermediaries May Be Motivated to Find Noncompliant Aliens

This Section discusses further institutional innovations that would better enable banks to extract penalties when aliens default on their bonds and thus increase the likelihood that noncompliant aliens will be excluded with minimal involvement from public enforcers. The key feature of a visa-bonding system is that the bond will be forfeited if the alien becomes noncompliant with the conditions of the visa. Indeed, in Singapore, where bonding systems are also regularly utilized, the bond is generally forfeited in its entirety once the alien becomes noncompliant.<sup>142</sup> In contrast to this approach, the proposal herein advocates a system of “staged” or “tiered” forfeiture.

The first institutional design innovation is that even if an alien is noncompliant with the visa’s conditions, the bank should be able to recoup a significant proportion of the bond upon providing evidence that the alien in fact has left the United States. It is critical that the window of opportunity to recoup the bond be limited. A network theory of immigration tells us that undocumented aliens become enmeshed more thoroughly in social networks if they are out of status for long periods and thus become more difficult to find, so it is crucial that banks find them quickly.<sup>143</sup>

Thus, the second novel feature of this proposal is that the “tiering” of bond forfeiture should be indexed to the speed with which the bank is able to provide evidence that the alien has left the United

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141. See Rhor, *supra* note 139, at 54 (citing several advocates arguing that forced deportation should be reconsidered as a strategy since it undermines the integrity of families and communities). This position is also held by influential NGOs, who have been particularly critical of state and local law enforcement cooperation in efforts to identify noncompliant aliens because of the potential disruptions that deportations pose to families and communities. See, e.g., LEGAL MOMENTUM, THE 287(G) PROGRAM: HARMING IMMIGRANT WOMEN (2010), available at <http://www.legalmomentum.org/our-work/gender-equity-and-gender-bias/reports-and-resources/the-287g-program-harming-immigrant-women.pdf>; Steve Dinnen, *How an Immigration Raid Changed a Town*, CHRISTIAN SCI. MONITOR, May 31, 2009, at 17 (noting severe consequences for local business following a large immigration raid and subsequent deportations); *Detention and Deportation in the Age of ICE*, AM. CIVIL LIBERTIES UNION OF MASS. <http://www.aclum.org/ice> (last visited Apr. 2 2011).

142. See AGUNIAS & NEWLAND, *supra* note 7; BODVARSSON & VAN DEN BERG, *supra* note 7.

143. See generally Portes, *supra* note 58 (discussing how immigrants are easily enmeshed in local networks).

States. That is, the proportion of the bond that the bank can recoup could be tied to the speed of self-deportation.

One approach would be to legalize a bail-bondsman status for banking companies.<sup>144</sup> Of course, bail bondsmen are already widely utilized in the criminal law context; they have significant powers to apprehend individuals who violate the terms of their bond and flee the authorities.<sup>145</sup> This approach would undoubtedly be controversial. Indeed, enlisting the support of the immigration bar in institutionalizing such a bail-bondsman proposal would be dependent on the successful importation of protections that have been developed for defendants in the criminal law context into the immigration context.<sup>146</sup> As applied in the immigration context, bankers (and their agents) would be given the right to apprehend visa overstayers and turn them over to the authorities. The key advantage bankers may have is the ability to engage in superior information gathering. This incentive to apprehend visa overstayers would be especially powerful if the government returned to the bank some percentage of the bond that would otherwise be forfeited, in the event that the bank can successfully apprehend the visa overstayer.

### 3. Mitigating the Risks of “Snitching”

Banks will typically be better than the government at accessing hyper-local information on noncompliant aliens, irrespective of the mechanism of enforcement. But there is an additional advantage of the proposed system in that the bank’s enforcement function differs in a critical way from the classic gatekeeper function. Typically, in the event of wrongdoing, gatekeepers provide evidence that allows the government to fulfill the ultimate enforcement function. “Snitching,” therefore, is a quintessential gatekeeper role. However, in this instance, rather than “snitching,” the gatekeeper may fulfill the

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144. The analogies to the current system of bail bondsmen in the criminal justice system are evident. For a good summary of the bail bond system, see STEPHEN A. SALTZBURG & DANIEL J. CAPRA, *AMERICAN CRIMINAL PROCEDURE* § 7.III.C, at 936 (2007).

145. *Id.* Indeed, institutional design innovations to curtail abuses by bail bondsmen may also be appropriate in this context. See *All Things Considered: Behind the Bail Bond System* (NPR radio broadcast Jan. 21–22, 2010), available at <http://www.npr.org/templates/story/story.php?storyId=122954677> (discussing charges of abuses by bail bondsmen). The American Bar Association has standards concerning pretrial release that include institutional innovations to aid in the regulation of bail bondsmen. See ABA CRIMINAL JUSTICE STANDARDS ON PRETRIAL RELEASE § 10-5.4 (3d ed. 2002), available at [http://www.pretrial.org/Docs/Documents/2.1.5\\_ABA\\_STANDARDS\\_ON\\_PRETRIAL\\_RELEASE.pdf](http://www.pretrial.org/Docs/Documents/2.1.5_ABA_STANDARDS_ON_PRETRIAL_RELEASE.pdf).

146. SALTZBURG & CAPRA, *supra* note 144, at 936.

ultimate enforcement function by encouraging the wrongdoers to self-deport.

While snitches (or private informants) are utilized regularly to supplement public enforcement, snitching may have negative spillover effects, particularly in poor, urban communities where migrants are disproportionately likely to reside.<sup>147</sup> In the criminal justice context, snitching may augment distrust of law enforcement officials.<sup>148</sup> This distrust also likely exists in the immigration context, since persons are unlikely to distinguish between immigration enforcement officials and law enforcement more generally. Moreover, snitching may undermine interpersonal relationships in communities and generally threaten the social organization of a community, that is, the web of social relationships that sustain its coherence.<sup>149</sup> Thus, the ideal scenario would be for gatekeepers to accomplish the enforcement function without snitching.

#### IV. THE COMMODIFICATION CRITIQUE

##### *A. Background: Levmore's Puzzle*

Consider two migrants who represent opposite loci on the immigration continuum. “Sanjay,” a Harvard-trained Indian national is a wealthy Google shareholder.<sup>150</sup> He obtained his visa through a highly competitive process partly on the basis of a commitment to make a job-generating business investment in the United States.<sup>151</sup> His visa may be revocable if he does not meet these conditions. A second immigrant, “Ambrosio,” is a Guatemalan construction worker who also makes a financial investment to gain U.S. labor market access.<sup>152</sup> He pools his family’s meager resources to make a down payment to a coyote.<sup>153</sup> Not only does the coyote arrange Ambrosio’s

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147. See Alexandra Natapoff, *Snitching: The Institutional and Communal Consequences*, 73 U. CIN. L. REV. 645, 650 (2004).

148. *Id.*

149. The playwright Arthur Miller recognized this risk decades ago. These risks are discussed in John Lahr’s review of Arthur Miller’s seminal play “A View from the Bridge”. See John Lahr, *Devil in the Flesh*, NEW YORKER, Feb. 1, 2010, at 78–79; cf. Robert J. Sampson, Stephen W. Raudenbush & Felton Earls, *Neighborhoods and Violent Crime: A Multilevel Study of Collective Efficacy*, 277 SCIENCE 918, 918–24 (1997) (surveying residents in Chicago and finding that measures of collective efficacy are associated with variations in violence).

150. The “Sanjay” example is taken from Matt Richtel, *Remade in America: Tech Recruiting Clashes with Immigration Rules*, N.Y. TIMES, Apr. 11, 2009, at A1.

151. *Id.*

152. The “Ambrosio” example is taken from Jordan, *supra* note 85.

153. *Id.*

clandestine cross-border travel, he also serves as an informal banker, providing a “loan” to fund transportation costs (at least in the form of deferred payment arrangements).<sup>154</sup>

Given a worldwide population of people with resources who are willing to pay for access to the U.S. labor market, the INA embodies the sentiment that it is appropriate to extract value (either in skills or capital) from those who seek visas.<sup>155</sup> Having incurred significant financial costs, the prospective migrant agrees to abide by certain rules and incurs the risk of visa revocation if she does not meet her commitments. The prospective migrant also may face a financial penalty in the form of costs that she cannot recoup.

Herein lies the bifurcation in treatment that is illustrative of an uneasy consensus.<sup>156</sup> Migrants are regularly allowed to “put their money where their mouth is” at the top of the pyramid: Sanjay is a prototype of such elite access. Contrast this situation with that of Ambrosio, a prototypical immigrant at the bottom of the pyramid; given the astronomical expenses Ambrosio incurs to cross the border,<sup>157</sup> it is reasonable to assume that he, too, would be willing to pay to gain access to a temporary guest-worker visa, the only visa category to which he is likely to have legal access given his low skill base. However, there is no such option available to him.

Saul Levmore has characterized as a “puzzle” the general disinclination of political elites—who already resort to the market to allocate visas (as in the case of Sanjay)—to simultaneously finance purchases (for the Ambrosios of the world) to expand demand.<sup>158</sup> Levmore theorized that terms easily could be reached which could satisfy both the expansionist instincts of those who support more open borders and the restrictionist instincts of those who fear the economic,

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154. *Id.*

155. See 8 U.S.C. § 1153(b)(5) (2006) (providing for visas to be issued to immigrants who invest at least one million dollars in a start-up business that generates full-time jobs for ten United States citizens or lawful residents, generally known as “E” Treaty Investor Visas). While E visas made up only 0.6 percent of all nonimmigrant visas issued in 2009 and 2010, they are routinely issued. Indeed, over 34,000 E visas were issued in 2009 and over 36,000 in 2010. See U.S. DEPT OF STATE, BUREAU OF CONSULAR AFFAIRS, CLASSES OF NON-IMMIGRANTS ISSUED VISAS, FISCAL YEARS 1992–2010, <http://www.travel.state.gov/pdf/MultiYearTableXVI.pdf>; see also § 1153(b)(1)(A)–(B) (providing for visas to be issued to immigrants of “extraordinary ability” or who are “outstanding” with a significant likelihood of making innovative contributions to the U.S. economy); § 1153(b)(2) (providing for visas to be issued to immigrants with advanced academic training or who possess “exceptional ability”).

156. My thanks to Douglas Massey for highlighting to me the bifurcation in treatment of the Sanjays and Ambrosios of the world.

157. See Jordan, *supra* note 85.

158. Saul Levmore, Lecture, *Unconditional Relationships*, 76 B.U. L. REV. 807, 812–14 (1996).

social, and cultural implications of long-term commitments to new migrants.

This Article's advocacy of a visa bonding system coupled with a reconceptualization of visa-as-collateral may be viewed as one attempt to map out such terms. By raising the costs of noncompliance and lowering overstay rates, bonding systems may expand U.S. labor market access, particularly for poor migrants. Thus, it addresses the concerns of the expansionists by making it possible for more persons to enter, albeit temporarily. It simultaneously addresses the concerns of restrictionists, given its emphasis on visa compliance so as to preclude short-term guests from becoming long-term residents. I end with a brief reflection on one deeply held potential source of discomfort with "visa-as-collateral," namely the "commodification concern." Indeed, this provides a primary rationale for the persistence and vexing nature of Levmore's puzzle.

### *B. Critiques of Market-Based Approaches*

"Visa-as-collateral" reasonably might be grouped with a range of proposals that are "market-based" approaches to immigration. Market-based approaches share in common a critical approach to the traditional view of the government as the best arbiter of who should receive a visa. Rather, they assert, access to first-world labor markets should be available to those applicants who, having met certain eligibility requirements, are willing to pay a market-based price.

These "market-based" approaches have been subject to a range of critiques that broadly fall under the anti-commodification heading. Commodification criticisms usually are based on the moral intuition that a monetary value should not be attached to membership in the body politic that is conferred to citizens.<sup>159</sup> The same moral intuition extends to affiliation with the body politic as a visa recipient, since even temporary affiliation with the body politic carries certain rights and responsibilities.<sup>160</sup> Moreover, since many citizens originally were temporary visa recipients, temporary visas often signify a special

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159. Michael J. Sandel is a prominent proponent of this view. See Michael J. Sandel, *What Money Can't Buy: The Moral Limits of Markets*, in 21 THE TANNER LECTURES ON HUMAN VALUES 89 (Grethe B. Peterson ed., 2000); see also RADIN, *supra* note 38, at 152–70 (critiquing the sale of citizenship); SHACHAR, *supra* note 17, at 54–58 (same); Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1870–87 (1987) (same).

160. See Joseph H. Carens, *Aliens and Citizens: The Case For Open Borders*, 49 REV. POL. 251, 251–73 (1987). For an opposing view, see MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY 31–63 (1983).

affiliation with the polity and, in many cases, the first step on a path to citizenship.

These commodification critiques rely heavily on traditional accounts of political membership or affiliation, which typically treat citizenship, and even the lesser affiliations with the polity of a visa recipient, as a bundle of rights—a source of identity or an inalienable legal status. Given these background philosophical underpinnings, it is not surprising that market-based mechanisms of allocation of either citizenship or visas are anathema to anti-commodificationists. The primary purpose of this Part is to address the commodification critique.

*C. Visa-as-Collateral Differs in Critical Ways from Traditional  
Market-Based Proposals*

Traditional market-based approaches to immigration share an emphasis on allocating visas to the aliens who would benefit most from visas and to the aliens who would be most highly valued by U.S. citizens. The logic of selling citizenship represents the functioning of a global market for a particular factor of production, that is, human capital, which will gravitate to places where its contribution is greatest. Some economists advocate selling citizenship as a rationing mechanism in which the entry price would be set to maximize aggregate income for the native population.<sup>161</sup> Others advocate an auction to the highest bidders, while some economists would limit the auction to pre-qualified applicants.<sup>162</sup> Still others advocate proposals combining traditional and market-based approaches, whereby admission is granted to some, utilizing traditional criteria (that is, according to qualifications), and to others according to their willingness to pay.<sup>163</sup>

There is a critical distinction between visa-as-collateral and these market-based approaches. Visa-as-collateral advocates a “soft” utilization of market approaches to accomplish entirely different goals. The point of this proposal is not to allocate visas to the highest-value

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161. JULIAN L. SIMON, *THE ECONOMIC CONSEQUENCES OF IMMIGRATION* 9–11 (1989).

162. Gary S. Becker, *An Open Door for Immigrants—The Auction*, Wall St. J., Oct. 14, 1992, at A14.

163. JAGDISH BHAGWATI, *IN DEFENSE OF GLOBALIZATION* 208–20 (2004). For broader general discussions of market-based approaches to immigration, see generally Howard Chang, *The Economic Analysis of Immigration Law*, in *MIGRATION THEORY: TALKING ACROSS DISCIPLINES* 205 (Caroline Brettell & James Hollifield, eds., 2000); Michael J. Trebilcock, *Immigration Policy*, in *THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW* 259 (Peter Newman ed., 1998); Michael J. Trebilcock, *The Law and Economics of Immigration Policy*, 5 AM. LAW & ECON. REV. 271 (2003).

users (although this might be a side effect of the policy). Rather, the purpose is facilitative, namely, to accomplish the important goal of mitigating information asymmetry challenges regardless of the potential migrant's skills or ability to pay the highest price for a visa.

Yet irrespective of one's beliefs regarding the goals of immigration law,<sup>164</sup> it is generally agreed that current methods of U.S. visa allocation fail to accomplish goals that are fundamental to any successful immigration policy. That is, the present system does not adequately meet the first-order policy goals of the United States, such as recruiting skilled persons or meeting labor-market shortages for low-skilled persons.

Although this proposal does not advocate the allocation of visas to the highest-value users, I recognize that my position implicates many of the underlying sentiments against commodification. Anti-commodification critics undoubtedly would argue that this proposal would disadvantage those who are knowledge-poor, network-poor, or cash-poor. These persons are disproportionately located at the bottom of the pyramid.

#### *D. The Official, Public, and Academic Postures: Noncommodification*

With rare exceptions, the official posture of the U.S. government is one of noncommodification in immigration. This is evidenced, in part, by the public pronouncements of immigration policymakers and explains why, despite empirical evidence from other countries of the potential benefits of auction systems,<sup>165</sup> both primary and secondary markets for visas have received very little traction in U.S. policymaking circles. Even in the current global economic crisis, in which other countries have auctioned visas to investors as a

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164. Even setting aside the debate surrounding the propriety of market-based approaches, there is of course a deeply contentious debate as to what the goals of U.S. immigration law should be. Scholars have identified a range of goals including demography, assimilation, family reunification, and wealth creation. The question of which goals should be optimized is, of course, deeply dependent on background normative commitments. Peter Schuck has reasonably pointed out that these normative commitments often do not provide sufficient guidance in resolving critical policy debates. Peter H. Schuck, *The Morality of Immigration Policy*, 45 SAN DIEGO L. REV. 865, 866 (2008).

165. See, e.g., Don J. DeVoretz, *An Auction Model of Canadian Temporary Immigration for the 21st Century* 5–13 (Inst. for the Study of Labor, Discussion Paper No. 1807, 2005) (raising the potential benefits of an auction system in Canada).

mechanism of jump-starting declining sectors of their economies, the United States has remained resistant to such an approach.<sup>166</sup>

This official posture of noncommodification coincides with polling data on this issue, which show that a majority of U.S. citizens oppose proposals to auction visas. The rationales offered by those polled mirror the anti-commodification rationales in the academic literature: visas, to the extent that they signify potential access to citizenship, are understood by U.S. citizens to be quintessentially public assets,<sup>167</sup> in part because even if visas only allow temporary affiliation, many applicants overstay and later receive amnesties that permit them to become citizens. Thus, the receipt of a visa often signifies the first stage on a path to citizenship, and for this reason, selling visas often is equated with selling access to a quintessentially public asset. Indeed, visas might even be referred to as “public goods,” although this is clearly an unconventional utilization of the term.

Analysts of polling data suggest that the public’s resistance to commoditizing visas arises in part from what students of cultural cognition and behavioral economics have called a “framing problem.”<sup>168</sup> Thus, even when confronted with evidence demonstrating the potential value of auctions in resolving immigration dilemmas,

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166. Friedman, *supra* note 3. Indeed, the United States has arguably been moving in precisely the opposite direction by cutting back on programs which allocate visas based on skill or high investment levels. For example, the H-1 visa program for highly trained migrants may suffer cuts. Moreover, financial institutions, which have received subsidies through the Troubled Assets Relief Program (TARP), face greater scrutiny when they hire highly skilled aliens. Moira Herbst, *H-1B: Buy American Comes to TARP*, BLOOMBERG BUSINESSWEEK, Feb. 6, 2009, [http://www.businessweek.com/blogs/money\\_politics/archives/2009/02/h-1b\\_visas\\_buy.html](http://www.businessweek.com/blogs/money_politics/archives/2009/02/h-1b_visas_buy.html); see also Alistair Barr, *Wells Told Employees It May Cut Foreign Workers*, WALL ST. J. MARKETWATCH (Mar. 31, 2009), <http://www.marketwatch.com/story/wells-told-staff-may-cut-foreigners>.

167. Political scientists utilize the term “framing effect” to account for the inclination of individuals to take positions on an issue depending on the extent to which they prioritize certain considerations. A classic example is residents’ attitudes towards the efforts of a controversial group known for hate speech to hold a rally in their town. If a leading newspaper editorial characterizes the issue largely in terms of free speech, residents may support the rally. However, if a newspaper editorial characterizes the issue in terms of public safety, they may come to a different position. Dennis Chong & James N. Druckman, *Framing Public Opinion in Competitive Democracies*, 101 AM. POL. SCI. REV. 637 (2007); see also James Druckman & Kjersten Nelson, *Framing and Deliberation*, 47 AM. J. POL. SCI. 728 (2003); Thomas Nelson & Zoe Oxley, *Issue Framing Effects and Belief Importance and Opinion*, 61 J. POL. 1040 (1999). “Framing” appears to be a primary concern for Shaheen Bornha and James Stearns, who utilize it to explain the low likelihood that access to the United States will be commoditized. See generally Shaheen Bornha & James M. Stearns, *The Ethics and Efficacy of Selling National Citizenship*, 37 J. BUS. ETHICS, 193, 193–207 (2002). Notably, they do not utilize the precise political science language of “framing” (perhaps because they are not political scientists). This appears to be an instance in which framing is important.

168. Chong & Druckman, *supra* note 167; Druckman & Nelson, *supra* note 167; Nelson & Oxley, *supra* note 167.



social-psychological processes lead individuals to assimilate evidence in a manner that is consistent with pre-existing cultural frames that are dominant in the political marketplace.<sup>169</sup> These cultural frames are hostile to a market-based approach in the context of immigration, and thus the average U.S. voter is unlikely to endorse utilizing the market as a primary method of visa allocation.<sup>170</sup>

### *E. Tragic Choice Framework*

Calabresi and Bobbitt argue that a primary challenge in society is “to make allocations in ways that preserve the moral foundations of social collaboration.”<sup>171</sup> Their book is entitled *Tragic Choices*, to capture the idea that choices regarding the allocation of scarce goods inevitably will breach some deeply held societal values. They draw a distinction between first-order and second-order allocation decisions, with the former relating to how much of a scarce good will ultimately be produced, and the latter relating to who will get the goods.

They argue that societies generally keep these decisions separate, with each level of decisionmaking preserving a different mix of values. We keep the levels separate to preserve the illusion that none of society’s values have been disregarded. This shifting trajectory of decisionmaking is characterized as a series of “subterfuges”<sup>172</sup> intended to shield the allocational decisionmaking, or “tragic choices,” from public view. A legal subterfuge is a device that accomplishes a desirable end while masking the methodology that produced the end. Subterfuges are “useful—if dangerous—lie[s]”<sup>173</sup> that we use to cope with “tragic choices.”<sup>174</sup>

There is clearly an analogy in the immigration arena to this *modus operandi*: while the official U.S. posture is one of noncommodification, both current and historical policy reflects significant concessions to commodification. One scholar argues that even a cursory view of U.S. immigration history supports the view that persons have traditionally “paid” very high prices to obtain the right to enter the United States.<sup>175</sup> For example, as noted in the “Sanjay” example above, under current U.S. immigration law, persons

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169. See sources cited *supra* note 168.

170. See sources cited *supra* note 168.

171. CALABRESI & BOBBITT, *supra* note 1.

172. The term “subterfuge” is Calabresi’s. CALABRESI, *supra* note 1, at 60.

173. *Id.* CALABRESI & BOBBITT, *supra* note 1, at 26, 78, 195–96.

174. Calabresi, *supra* note 1, at 60.

175. See Zolberg, *supra* note 16.

seeking to obtain legal permanent residency under certain sections of the INA may be obligated to invest at least one million dollars and employ at least ten U.S. residents, and their status may be revoked if they do not meet these commitments.<sup>176</sup> Moreover, there are also concessions to commodification at the margins. One might call these “unofficial subterfuges,” as a cottage industry has developed with brokers and coyotes charging applicants high fees to gain entry to the United States. Notably, these fees are pervasive, not only in the underground markets, but also in the formal markets, since elite applicants typically employ attorneys who charge high fees to navigate the complexities of the INA. Recent investigative reporting has uncovered instances of aliens employing lobbyists to intercede on their behalf with congressional staff, who in turn intercede on their behalf with the immigration authorities.

However, since the government is not the beneficiary of these fees charged, we are more concerned with “official subterfuges.” Concerns about “selling” visa access are surmountable when dealing with candidates like “Sanjay” above, who constitute a tiny pool of very privileged applicants operating above-board in a transparent marketplace. However, we become much more concerned about the sale of visa access as we approach the bottom of the pyramid—when considered in the context of the acute poverty of visa applicants from the developing world, selling visas too obviously contradicts anti-commodification values held by many U.S. citizens.

### CONCLUSION

Precisely because we already use bond-like mechanisms to screen rich and highly-skilled migrants by requiring them to pay attorneys and make minimum investments in the United States, the onus is on us to explain why we would forgo similar opportunities with respect to poor migrants. The bonding proposal made herein may expose the subterfuges that necessarily accompany the tragic choices that we make in immigration, the burdens of which disproportionately fall on the poor. This proposal accomplishes significant goals in immigration to reduce subterfuges and render the choices made somewhat less tragic, particularly for the poor.

Visa-as-collateral embodies the classic challenges of proposals that seek to meet liberalism’s commitment to improve the lot of the least advantaged, while simultaneously meeting important consequentialist goals. Aspects of the proposal may seem unattractive

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176. 8 U.S.C. § 1153(b)(5) (2006).

to those with liberal commitments who are skeptical of initiatives which appear to increase burdens on aliens, particularly those at the bottom of the pyramid. Yet, as a practical matter, by reducing the likelihood and cost of visa breaches, this proposal improves the likelihood of access for those at the bottom of the pyramid. If the world's poorest have improved access to credit and to U.S. labor markets, there are clear positive economic implications, not only for migrants, but also for source-labor communities and countries. Thus, to the extent that there is a trade-off between ethical commitments and consequentialist goals, the trade-off is a worthy one.