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Benjamin Crouse

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Benjamin Crouse, *Worksite Raids and Immigration Norms: A "Sticky" Problem*, 92 Marq. L. Rev. 591 (2009).
Available at: <http://scholarship.law.marquette.edu/mulr/vol92/iss3/6>

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WORKSITE RAIDS AND IMMIGRATION NORMS: A “STICKY” PROBLEM

I. INTRODUCTION

Even as 2008 saw a relative lull in the heated immigration debates that fixated America’s democratic and academic institutions in 2006 and 2007, the issues continue to simmer unresolved. Legislators continue to propose reforms,¹ even as older bills² stall. Interest groups challenge government regulations.³ Political candidates square off against one another.⁴ Scholars and commentators analyze the laws and proposals.⁵ Yet as the debates rage, employers and immigrants largely ignore the laws, and the government continues to devise its own regulatory strategy. Absent effective enforcement, the policy debate is irrelevant.

In devising an effective immigration regulation strategy, it is critical to distinguish the ends from the means. Adam Cox and Eric Posner identify two distinct issues that shape immigration regulation.⁶ The first are policy decisions, so-called “first-order” issues.⁷ Here, the government makes decisions regarding the quantity and type of admissible immigrants as well as the terms of their admission.⁸ Next are the institutional design questions, or “second-order” issues.⁹ Here, the government makes decisions regarding the institutional and regulatory system that counts, sorts, and screens

1. *See, e.g.*, Protect Citizens and Residents from Unlawful Raids and Detention Act, S. 3594, 110th Cong. (2008).

2. *See, e.g.*, Secure Borders FIRST (For Integrity, Reform, Safety, and Anti-Terrorism) Act of 2007, H.R. 2954, 110th Cong.; Unaccompanied Alien Child Protection Act of 2007, S. 1639, 110th Cong.; Comprehensive Immigration Reform Act of 2006, S. 2611, 109th Cong.; Border Protection, Antiterrorism and Illegal Immigration Control Act of 2005, H.R. 4437, 109th Cong.; Secure America and Orderly Immigration Act, S. 1033, 109th Cong. (2005).

3. *See, e.g.*, Julia Preston, *Revised Rule for Employers that Hire Immigrants*, N.Y. TIMES, Nov. 25, 2007, at A34.

4. *See, e.g.*, Michael Cooper & Marc Santora, *Candidates Firm on Immigration*, N.Y. TIMES, Dec. 10, 2007, at A1; *NPR Democratic Candidates Debate* (National Public Radio broadcast Dec. 4, 2007), transcript available at <http://www.npr.org/templates/story/story.php?storyId=16898435>.

5. *See generally, e.g.*, Adam B. Cox & Eric A. Posner, *The Second-Order Structure of Immigration Law*, 59 STAN. L. REV. 809 (2007); Michael J. Wishnie, *Prohibiting the Employment of Unauthorized Immigrants: The Experiment Fails*, 2007 U. CHI. LEGAL F. 193.

6. Cox & Posner, *supra* note 5, at 814–22.

7. *Id.* at 814.

8. *Id.* at 814–17.

9. *Id.* at 819–20.

immigrants.¹⁰ Too often, however, the government fails to distinguish between first- and second-order issues; that is, the ends become blurred with the means.

The consequences of this perceptive failure are cyclical. First, second-order design flaws go unnoticed, or at least, under-analyzed. Instead, the government equates a lack of results with lax enforcement. The government inevitably “solves” this problem with more aggressive or intrusive enforcement of the flawed second-order systems. The resulting “solutions” do not remedy the real second-order design flaw but instead perpetuate or even aggravate the existing one.

Indeed, such a perceptive failure is likely occurring today with the government’s employer sanctioning laws. Widespread failures are attributed to fraud and remedied with aggressive enforcement practices.¹¹ If these failures persist, immigration reform is effectively impossible. That is, first-order decisions (e.g., guest-worker programs, paths to citizenship, etc.) will give way to the de facto illegal immigrant system that exists today.¹²

This Comment suggests that one of the unnoticed design flaws of the current employer regulation regime is that it runs counter to social norms. For years, the government has considered fraudulent documents to be the greatest cause of unauthorized employment in America,¹³ but perhaps it is not. Because of fraudulent documents,¹⁴ many employers cannot follow the law even if they want to because they cannot tell legal workers from illegal ones. Perhaps the more significant reason is that many employers have adopted pro-illegal immigrant norms. Such norms would undermine the enforcement of immigration laws in several ways. Critically, they could fuel a backlash against an aggressive antifraud campaign, which is exactly the direction in which current policy is headed.

This Comment will focus exclusively on second-order immigration issues and will not address first-order immigration policies. Part II of this Comment will describe the current employer sanctioning laws and their origins. Part III will describe employer sanctioning in practice as well as legislative proposals for reform. Part IV will outline a social-science model of social norms and will examine immigration norms through that model.

10. *Id.*

11. *See infra* Part III.B.

12. Cox & Posner, *supra* note 5, at 844–45.

13. GOV’T ACCOUNTABILITY OFFICE, IMMIGRATION ENFORCEMENT: WEAKNESSES HINDER EMPLOYMENT VERIFICATION AND WORKSITE ENFORCEMENT EFFORTS 5 (2005), *available at* <http://www.gao.gov/new.items/d05813.pdf> [hereinafter IMMIGRATION ENFORCEMENT].

14. *Id.*

II. EMPLOYER SANCTIONING LAWS

In the early 1980s, when Americans perceived Mexican migration to have reached crisis levels, public pressure for employer sanctions mounted.¹⁵ In fact, by 1981, a majority of Americans favored the idea of employer sanctions to control immigration.¹⁶ It seemed obvious that prohibiting the unauthorized employment of immigrants would curb the flow of economic migration.¹⁷ Reducing immigrants' access to jobs and income would reduce the flow of aliens into the United States and simultaneously prompt the voluntary departure of many already present.¹⁸

Enforcing an employment prohibition appears simple and logical. Legislators intuitively rely on general deterrence and criminalization models to establish an enforcement regime.¹⁹ For one, such a regime "appear[s] costless."²⁰ The infrastructure is already in place and thus requires no additional resources.²¹ The new laws simply become new tools for judges, prosecutors, and investigators. Furthermore, the deterrence model fits with certain philosophical²² and economic ideas of human behavior.²³ And if the initial scheme is not successful, lawmakers can even increase penalties with very little cost.²⁴ Indeed, by 1982, many Western nations²⁵ and at least ten states had already implemented employer sanction regimes.²⁶

15. NICHOLAS LAHAM, RONALD REAGAN AND THE POLITICS OF IMMIGRATION REFORM 94 (2000) (citing a 1981 poll revealing an "overwhelming majority" in favor of employer sanctions).

16. *Id.*

17. See Bill Ong Hing, *Immigration Policy: Thinking Outside the (Big) Box*, 39 CONN. L. REV. 1401, 1426 (2007) (calling the sanctioning of U.S. employers "the most obvious method[]" of reducing illegal immigration).

18. See, e.g., Stephanie E. Tanger, *Enforcing Corporate Responsibility for Violations of Workplace Immigration Laws: The Case of Meatpacking*, 9 HARV. LATINO L. REV. 59, 60 (2006); Steven A. Camarota, *Use Enforcement to Ease Situation*, ARIZ. REPUBLIC, Oct. 23, 2005, available at <http://www.cis.org/articles/2005/camerataoped1005.html> (predicting that with increased enforcement immigrants would "self-deport").

19. See Edward K. Cheng, *Structural Laws and the Puzzle of Regulating Behavior*, 100 NW. U. L. REV. 655, 668–69 (2006) (explaining legislatures' propensity for "fiat").

20. See *id.* at 668.

21. *Id.* In the case of immigration enforcement, Congress would rely upon the Immigration and Naturalization Service (INS) as well as the Department of Labor (DOL). See *infra* note 39.

22. Cheng, *supra* note 19, at 668.

23. See generally Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169 (1968) (discussing "how many resources and how much punishment *should* be used to enforce different kinds of legislation").

24. See *id.* at 183–84.

25. Maria Isabel Medina, *The Criminalization of Immigration Law: Employer Sanctions and Marriage Fraud*, 5 GEO. MASON L. REV. 669, 679 (1997) (citing GEN. ACCOUNTING OFFICE, INFORMATION ON THE ENFORCEMENT OF LAWS REGARDING EMPLOYMENT OF ALIENS IN SELECTED COUNTRIES (1982)). The notable exception to this trend was Great Britain. *Id.* at 679.

26. Carl E. Schwarz, *Employer Sanctions Laws, Worker Identification Systems, and*

Following suit in 1986, Congress passed the Immigration Reform and Control Act (IRCA), creating a number of criminal and civil sanctions for employers who hired illegal immigrants.²⁷ The law reflected a compromise between labor and business interests.²⁸ For labor groups seeking to reduce the number of foreigners in the workforce, it became illegal for an employer to hire or employ an “unauthorized alien.”²⁹ But for employers, nervous about civil and criminal liability, good faith was a complete defense.³⁰

The resulting compromise required employers to verify and attest to the legal status of each of their employees on a standard I-9 form.³¹ Under this system, an employer’s duties appear fairly simple.³² First, within three days of hiring any new employee, the employer must “physically examine” the employee’s identification documents.³³ During this inspection, the employer must determine whether the documents “appear to be genuine and to relate to the [employee].”³⁴ If satisfied, the employer must attest to compliance under the penalty of perjury.³⁵ At its core, the employer’s duty is not unlike a bar owner’s duty to verify the age of prospective consumers of alcohol.

An employer who fails to comply with the above procedures would face a wide range of civil and criminal punishments. For example, an employer who simply fails to comply with the I-9 documentation requirements could be fined as little as \$110.³⁶ In contrast, an employer who engages in “a pattern or practice” of hiring illegal immigrants could face six months in prison.³⁷ Today, an employer typically faces a \$2200 fine for a first offense.³⁸ Any

Undocumented Aliens: The State Experience and Federal Proposals, 19 STAN. J. INT’L L. 371, 373 (1983).

27. Pub. L. No. 99-603, 100 Stat. 3359 (codified in scattered sections of 8 U.S.C.); see Medina, *supra* note 25, at 671.

28. See NANCY HUMEL MONTWIELER, *THE IMMIGRATION REFORM LAW OF 1986: ANALYSIS, TEXT, AND LEGISLATIVE HISTORY* 10 (1987).

29. 8 U.S.C. § 1324a(a)(1)–(2) (2006).

30. *Id.* § 1324a(b)(6); see *Developments in the Law—Jobs and Borders, Legal Protections for Illegal Workers*, 118 HARV. L. REV. 2224, 2240 (2005) (“Completion of the I-9 generally insulates the employer from liability . . .”); see also 8 C.F.R. § 274a.4 (2008) (“An employer . . . who shows good faith compliance with the employment verification requirements . . . shall have established a rebuttable affirmative defense that the person or entity has not violated section 274A(a)(1)(A) of the Act with respect to such hiring, recruiting, or referral.”).

31. 8 U.S.C. § 1324a(b)(1)(A).

32. See 8 C.F.R. § 274a.

33. *Id.* § 274a.2(b)(1)(ii)(A). For a complete list of acceptable identification documents, see *id.* § 274a.2(b)(1)(v)(A)(1)–(5).

34. *Id.* § 274a.2(b)(1)(ii)(A).

35. *Id.* § 274a.2(a)(3).

36. *Id.* § 274a.10(b)(2).

37. 8 U.S.C. § 1324a(f)(1) (2006).

38. Julia Preston, *Farmers Call Crackdown on Illegal Workers Unfair*, N.Y. TIMES, Aug. 11, 2007, at A10.

individual who knows of a violation, or potential violation, of the above laws may file a written complaint with Immigration and Customs Enforcement (ICE).³⁹ The agency may then conduct an investigation and issue either a “Notice of Intent to Fine” or a “Warning Notice.”⁴⁰ At this point, an employer may request a hearing before an administrative law judge regarding the violation.⁴¹

In practice, these sanctions have placed employers in an awkward position.⁴² As one commentator stated, businesses were “deputize[d]” in the “fight against illegal immigration.”⁴³ But rather than train and fund these new “deputies,” authorities increasingly tend to coerce them.⁴⁴

III. EMPLOYER REGULATION IN PRACTICE

Although the statutory framework underlying worksite enforcement has remained largely unchanged for the past two decades, the priorities and strategies of the enforcement agencies have varied tremendously. Until 2001, both government and business simply ignored the laws.⁴⁵ After the terrorist attacks of 2001, the government used the laws to regulate “critical infrastructure” jobs like airport security.⁴⁶ Then, after legislative immigration reform efforts failed very publicly in 2005 and 2006, the government began relying heavily on deterrence through highly publicized worksite raids and employer sanctions.

In addition to coercing compliance from reluctant “deputies,” the government also developed several methods of assisting more cooperative employers. Specifically, the government knew that fraudulent documents and identity theft had severely undermined employers’ ability to comply with the

39. 8 U.S.C. § 1324a(e)(1); 8 C.F.R. § 274a.9(a). Initially, the enforcement of employment regulation fell upon the INS, within the U.S. Department of Justice. See IMMIGRATION ENFORCEMENT, *supra* note 13, at 1 n.2. In 2003, however, Congress shifted these responsibilities to ICE, within the new Department of Homeland Security. *Id.*

40. 8 U.S.C. § 1324a(e)(1)–(2); 8 C.F.R. § 274a.9(b)–(d).

41. 8 U.S.C. § 1324a(e)(3); 8 C.F.R. § 274a.9(e).

42. See Thomas C. Green & Ileana Ciobanu, *Deputizing—And Then Prosecuting—America’s Businesses in the Fight Against Illegal Immigration*, 43 AM. CRIM. L. REV. 1203, 1204–05 (2006); Jeffrey Manns, *Private Monitoring of Gatekeepers: The Case of Immigration Enforcement*, 2006 U. ILL. L. REV. 887, 889–90.

43. Green & Ciobanu, *supra* note 42, at 1204.

44. See *infra* Part III.

45. See Kitty Calavita, *Employer Sanctions Violations: Toward a Dialectical Model of White-Collar Crime*, 24 LAW & SOC’Y REV. 1041, 1050–51 (1990) (describing the early years of enforcement).

46. IMMIGRATION ENFORCEMENT, *supra* note 13, at 30–31.

laws.⁴⁷ It sought to develop strategies of technology and intergovernmental collaboration to assist employers with widespread document fraud.⁴⁸

A. General Neglect During the Early Years

From 1986 to 2005, employer sanctions were a relatively low priority, even among the agencies charged with immigration regulation.⁴⁹ For example, between 1994 and 1998 the Immigration and Naturalization Service (INS) devoted less than two percent of its resources to enforcing worksite compliance.⁵⁰ In real terms, a U.S. General Accounting Office audit estimated that the INS committed the equivalent of 300 full-time employees to employer monitoring in 1998.⁵¹ As a point of reference, there were an estimated 200,000 employers employing millions of unauthorized workers at the time.⁵² The number actually declined for the next five years until 2003, when only ninety employees were committed to such responsibilities.⁵³ And indeed, following September 11, 2001, the INS's efforts were directed mainly at "critical infrastructure" jobs (e.g., airport security, nuclear energy, etc.).⁵⁴

By 2003 and 2004, federal regulators were barely fining employers. ICE issued only three notices of intent to fine in 2004⁵⁵ and prosecuted only four employers in 2003.⁵⁶ ICE collected a mere \$6500 in fines in 2005.⁵⁷ In comparison, in 2004, the Department of Labor (DOL) assessed more than \$4 million in fines against employers convicted of violating child labor laws.⁵⁸ By any standard, the enforcement of immigration laws against employers was a low priority.

47. See, e.g., GEN. ACCOUNTING OFFICE, *ILLEGAL ALIENS: SIGNIFICANT OBSTACLES TO REDUCING UNAUTHORIZED ALIEN EMPLOYMENT EXIST* 9 (1999), available at <http://www.gao.gov/archive/1999/gg99033.pdf> [hereinafter *ILLEGAL ALIENS*].

48. *Id.* at 11, 18.

49. *Id.* at 15–18.

50. *Id.* at 16. In contrast, the INS was spending seventy percent of its resources on border inspections and patrols. *Id.* at 17 fig.1.

51. *Id.* at 16. This number is an estimation based on the concept of "workyears," by which the INS maintained internal records. *Id.*

52. *Id.* at 17.

53. IMMIGRATION ENFORCEMENT, *supra* note 13, at 32.

54. *Id.* at 32 n.53.

55. *Id.* at 35 fig.4; Spencer S. Hsu & Kari Lydersen, *Illegal Hiring Is Rarely Penalized*, WASH. POST, June 19, 2006, at A1.

56. Hsu & Lydersen, *supra* note 55.

57. Press Release, ICE, ICE Arrests 28 Workers at Area Nursery, Landscaping Business (Apr. 25, 2008), available at <http://www.ice.gov/pi/news/newsreleases/articles/080425elpaso.htm>.

58. DOL, WAGE & HOUR DIV., 2004 STATISTICS FACT SHEET, available at <http://www.dol.gov/esa/whd/statistics/200411.htm>.

These minimal efforts had little effect, and employers largely ignored the law.⁵⁹ By March 2005, illegal immigrants constituted approximately five percent of the total U.S. labor force.⁶⁰ That proportion was greater still in the low-wage, low-skill labor markets.⁶¹ For example, nearly a quarter of the nation's agricultural workers were unauthorized.⁶² Similarly, illegal immigrants made up more than ten percent of the nation's cleaning, construction, and food service workers.⁶³

In light of the government's failure to stem the flow of immigrants, some commentators called for the abandonment of employer sanctions as a means of immigration regulation.⁶⁴ Far from giving up, however, the government responded to its failures by redoubling its efforts.

B. High-Profile Crackdowns

Beginning in 2006, the government implemented a series of high-profile crackdowns on companies that employed illegal aliens.⁶⁵ It relied more heavily on criminal prosecutions and the seizure of company assets, rather than civil fines.⁶⁶ Many of the targets were big businesses that employ many illegal aliens.⁶⁷ After years of investigations, officers would raid a business and sometimes arrest employers and supervisors.⁶⁸ The government followed the raids with massive criminal prosecutions of the immigrant employees for identity theft.⁶⁹ Tellingly, in 2007, approximately one-tenth of ICE's worksite enforcement criminal arrests were of supervisors.⁷⁰

59. See Calavita, *supra* note 45, at 1050–51. For example, in a survey of immigrant-dependent employers taken in the immediate aftermath of the IRCA, eight percent of employers said that the law did not affect their hiring practices “in any way.” *Id.*

60. JEFFREY S. PASSEL, PEW HISP. CTR., THE SIZE AND CHARACTERISTICS OF THE UNAUTHORIZED MIGRANT POPULATION IN THE U.S. 9 (2006), available at <http://pewhispanic.org/files/reports/61.pdf>.

61. *Id.* at 11.

62. *Id.*

63. *Id.*

64. See, e.g., Hing, *supra* note 17, at 1401; Wishnie, *supra* note 5, at 193.

65. See, e.g., Press Release, ICE, Factsheet: Worksite Enforcement (Nov. 25, 2008), available at <http://www.ice.gov/pi/news/factsheets/worksite.htm> [hereinafter Worksite Factsheet] (documenting a dramatic increase in administrative and criminal arrests through worksite raids in 2006 and 2007); Steven Greenhouse, *Immigrant Crackdown Upends A Slaughterhouse's Work Force*, N.Y. TIMES, Oct. 12, 2007, at A1 (reporting a raid on the world's largest hog butchering plant and another on a poultry plant that netted more than 100 workers).

66. Worksite Factsheet, *supra* note 65.

67. See Greenhouse, *supra* note 65.

68. Worksite Factsheet, *supra* note 65.

69. Julia Preston, *270 Immigrants Sent to Prison in Federal Push*, N.Y. TIMES, May 24, 2008, at A1.

70. Worksite Factsheet, *supra* note 65. According to the fact sheet, of the 2007 criminal arrests, “more than 90 individuals [were] in company supervisory chains.” *Id.* There were 863 total

High-profile raids on big businesses are attractive to ICE as an efficient deterrence strategy. This is in part because when ICE raids a large employer, agents may detain hundreds of illegal immigrants. The numbers help capture headlines, which in turn serve as a warning to other employers. Then, even if the employer is never prosecuted, the raid should nevertheless have a deterrent effect on employers and employees. Because investigations of employers may be costly and time-consuming,⁷¹ raids on large employers appear to be efficient.

The government took the first step in 2005 when ICE began to dedicate greater resources to worksite enforcement.⁷² Although it is difficult to determine how many more resources ICE has committed to worksite enforcement, a 2007 Government Accountability Office audit suggests a significant increase.⁷³ Specifically, government auditors found that between 2003 and 2007 there had been a “six-fold increase in the number of new officers dedicated to worksite enforcement operations.”⁷⁴

As a result of the strategy shift and increased resources, employers have faced increasing criminal sanctions.⁷⁵ In 2007, for example, a California fence building company forfeited nearly \$5 million, and a federal judge sentenced its president and vice president to serve six months’ house arrest and to pay six-figure fines.⁷⁶ “Meaningful employer sanctions . . . are an important component of criminal enforcement of illegal immigration across our border with Mexico,” said United States Attorney Karen P. Hewitt.⁷⁷ Further evidence of the increased sanctions can be found in the recent large

criminal arrests that year. *Id.*

71. The raid of one Iowa meatpacker cost ICE an estimated \$5.2 million. William Petroski, *Taxpayers’ Costs Top \$5 Million For Raid at Postville*, DES MOINES REGISTER, Oct. 14, 2008, at 1A.

72. See GOV’T ACCOUNTABILITY OFFICE, IMMIGRATION ENFORCEMENT: ICE COULD IMPROVE CONTROLS TO HELP GUIDE ALIEN REMOVAL DECISION MAKING 23–24 & fig.2 (2007), available at <http://www.gao.gov/new.items/d0867.pdf>.

73. *Id.*

74. *Id.* at 23. However, because 2003 was a low point in worksite enforcement operations, IMMIGRATION ENFORCEMENT, *supra* note 13, at 33 fig.3, this number reflects a bit of bureaucratic back-patting.

75. The total dollar amount of criminal sanctions in 2007 was over \$30 million. Worksite Factsheet, *supra* note 65; see also Preston, *supra* note 38 (quoting DHS Secretary Michael Chertoff as claiming a record number of felony criminal charges against employers in 2006 and 2007).

76. See, e.g., Press Release, ICE, Company Executives Sentenced for Hiring Illegal Alien Workers (Mar. 28, 2007), available at <http://www.ice.gov/pi/news/newsreleases/articles/070328sandiego.htm>; \$5 Million Fine for Hiring Illegal Immigrants, N.Y. TIMES, Dec. 15, 2006, at A38.

77. ICE, *supra* note 76.

settlements. For example, ICE agreed to an \$11 million settlement with Wal-Mart for employing illegal aliens in twenty-one states.⁷⁸

The raids of two large meatpacking plants exemplify ICE's deterrence-based raid strategy. The largest of such raids occurred on December 12, 2006, when ICE raided plants owned by Swift and Co., a meatpacking business.⁷⁹ The raids resulted in more worksite arrests than ICE had made in all of fiscal year 2005 and more than a third of all administrative arrests made in 2006.⁸⁰

A similar raid took place in 2008 at the nation's largest kosher meatpacking plant.⁸¹ Beginning in early 2006, ICE learned of widespread immigration and labor violations at the Postville, Iowa, plant from a number of former employees and managers.⁸² A former manager told ICE that as many as eighty percent of the company's workers were not authorized to work in the United States.⁸³ On May 12, 2008, ICE raided the facilities and detained nearly 400 employees.⁸⁴

The consequences of this particular raid have been tremendous. For the immigrants, several hundred were sent to federal prison on identity theft charges.⁸⁵ For the owners, the state of Iowa charged company owners and executives with more than 9000 criminal counts of child labor violations,⁸⁶ and federal authorities charged them with criminal immigration violations.⁸⁷ Tellingly, federal authorities did not charge the owners with knowingly employing illegal immigrants.⁸⁸ Shortly after the raid, the business filed for bankruptcy.⁸⁹

78. Press Release, ICE, Wal-Mart Stores, Inc. Agrees to Pay a Record \$11 Million to ICE to Settle Nationwide Worksite Enforcement Investigation (Mar. 18, 2005) (on file with the Marquette Law Review).

79. Press Release, ICE, U.S. Uncovers Large-Scale Identity Theft Scheme Used By Illegal Aliens to Gain Employment at Nationwide Meat Processor (Dec. 13, 2006), *available at* <http://www.visaserve.com/CM/Articles/CIS%20Press%20Release%20on%20Identity%20Theft.pdf>.

80. *Compare id.* (reporting 1282 administrative detentions in the Swift raids) *with* Worksite Factsheet, *supra* note 65 (reporting 1116 total administrative arrests in 2005 and 3667 in 2006).

81. Preston, *supra* note 69.

82. Affidavit of David M. Hoagland at 2, 7 (May 9, 2008), *available at* http://www.desmoinesregister.com/assets/pdf/ice_application.pdf (suggesting that Source #1 contacted ICE in January 2006, nearly two-and-a-half years before the raid).

83. *Id.* at 7.

84. Preston, *supra* note 69.

85. *Id.*

86. Complaint, Iowa v. Agriprocessors, Inc., No. SMC009340-9345 (Iowa Dist. Ct. Sept. 9, 2008), *available at* http://www.state.ia.us/government/ag/latest_news/releases/sept_2008/Agriprocessors_COMPLAINT.pdf.

87. Complaint, United States v. Agriprocessors, Inc., No. CR08-1324 LRR (N.D. Iowa Nov. 20, 2008), *available at* <http://www.desmoinesregister.com/assets/pdf/AgriprocessorsIndictment.pdf>.

88. *Id.*

89. Julia Preston, *Large Iowa Meatpacker in Illegal Immigrant Raid Files For Bankruptcy*,

C. Other Strategies: Fraud, Technology, and Collaboration

In addition to deterrence, the government has tried a number of other strategies to reduce the number of illegal immigrants in the workforce. First, citing widespread fraud, it has ratcheted up document requirements and increased the use of technology.⁹⁰ Additionally, to achieve the above objective, the government has tried to divide immigration regulation among a variety of government agencies.

Many of the government's recent immigration laws combined technology and fiat to combat perceived fraud. Decades of government audits, studies, and commissions concluded that the "widespread use of fraudulent documents" was the greatest factor undermining employer-based immigration regulation.⁹¹ The first step of the government's war on fraud was to reduce the number of acceptable forms of identification. The INS began that process in 1993 by proposing a rule that would have eliminated certain forms of identification from the list of acceptable I-9 verification documents.⁹² In 1996, Congress stepped in and prohibited the use of other documents, including birth certificates, as proof of worker eligibility.⁹³ Then, in each of the following three years, the INS proposed increasing document restrictions.⁹⁴ In a similar vein, Congress passed the REAL ID Act of 2005, requiring that all states verify the immigration status of its residents before issuing them state identification or driver's licenses.⁹⁵

The second prong of the government's assault on fraud is technology. As one example, the INS began to use technological advancements to prevent fraud of its own identification documents.⁹⁶ Similarly, Congress required that the Social Security Administration (SSA) develop counterfeit-proof documents in 1996.⁹⁷ Most significantly, however, the government has

N.Y. TIMES, Nov. 6, 2008, at A21.

90. ILLEGAL ALIENS, *supra* note 47, at 9–12; IMMIGRATION ENFORCEMENT, *supra* note 13, at 5.

91. ILLEGAL ALIENS, *supra* note 47, at 3, 9.

92. *Id.* at 13–14.

93. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 412, 110 Stat. 3009-666 (1996) [hereinafter IIRIRA].

94. ILLEGAL ALIENS, *supra* note 47, at 14.

95. Pub. L. No. 109-13, 119 Stat. 302 (codified at 49 U.S.C. § 30301 (2000)). One of the many collateral costs of this strategy, however, is less driver education and car insurance for illegal immigrant motorists. David Zaring & Elena Baylis, *Sending the Bureaucracy to War*, 92 IOWA L. REV. 1359, 1382 (2007). It is difficult to determine the lawmakers' purpose behind the REAL ID Act because it was wedged into an emergency appropriations bill that funded both the Iraq War and Tsunami relief. See Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, Pub. L. No. 109-13, 119 Stat. 231 (2005).

96. ILLEGAL ALIENS, *supra* note 47, at 15 (describing how the INS began using holograms on its identification documents in 1997).

97. Pub. L. No. 104-208, § 401, 110 Stat. 3009-655 (1996). Although in the end, the SSA did

pinned its aspirations of immigration regulation to electronic employee verification systems.⁹⁸ At the urging of Congress, the Attorney General first introduced such a system in 1997.⁹⁹ Known originally as “Basic Pilot,”¹⁰⁰ it is a voluntary tool by which employers can check an employee’s reported Social Security number against an SSA database.¹⁰¹ Since its inception, it has been met with qualified praise from government officials,¹⁰² but with hesitation from employers.¹⁰³

Finally, the government has tried to split up the employer enforcement duties among multiple government agencies.¹⁰⁴ But relying on other agencies has proven difficult because immigration enforcement often conflicts with the primary goals of the other agency.¹⁰⁵ Specifically, the DOL resisted collaboration with the INS because it relied heavily on employee complaints.¹⁰⁶ Any involvement with INS, it was feared, would reduce employees’ willingness to cooperate with the DOL.¹⁰⁷

Collaboration with the SSA has also proven difficult. Every year, the employers of illegal aliens generate millions of W-2 forms that do not match SSA records.¹⁰⁸ In response, the SSA sends hundreds of thousands of “no match letters” to employers.¹⁰⁹ In August 2007, the Department of Homeland

not put the cards into use.

98. See IMMIGRATION ENFORCEMENT, *supra* note 13, at 42–44.

99. IIRIRA required the Attorney General to create a voluntary program for employers. Pub. L. No. 104-208, § 401, 110 Stat. 3009-655 (1996).

100. The name has since been changed to “e-Verify.” Press Release, U.S. Citizenship & Immigration Servs., Fact Sheet: E-Verify (Sept. 25, 2007), *available at* <http://www.uscis.gov/files/pressrelease/EVerifyFS25Sep07.pdf>.

101. *Id.*; see also Stephen A. Brown, Comment, *Illegal Immigrants In The Workplace: Why Electronic Verification Benefits Employers*, 8 N.C. J. L. & TECH. 349, 381–83 (2007) (detailing the history of the project).

102. See, e.g., IMMIGRATION ENFORCEMENT, *supra* note 13, at 20 (The Government Accountability Office concluded that it “shows promise.”); Press Release, White House, Fact Sheet: Basic Pilot: A Clear and Reliable Way to Verify Employment Eligibility (July 5, 2006), *available at* http://www.jbsswift.com/media/releases/White_House_Basic_Pilot_Fact_Sheet.pdf (“It’s working.”).

103. By 2004, only 2300 employers had signed up for the system. IMMIGRATION ENFORCEMENT, *supra* note 13, at 20–21. By 2007, that number had reportedly grown to 23,000. U.S. Citizenship & Immigration Servs., *supra* note 100. In fact, when INS originally failed to meet its target participation numbers, it credited employer reluctance. ILLEGAL ALIENS, *supra* note 47, at 12.

104. See Tanger, *supra* note 18, at 66.

105. *Id.* at 71.

106. ILLEGAL ALIENS, *supra* note 47, at 16, 19.

107. *Id.*

108. Roger Tsai, *The Immigration Crackdown on Employers*, BUS. L. TODAY 45, 47 (July–Aug., 2007). But because typographical errors or name changes may prompt a no-match letter, the letter does not prove that a worker is unauthorized.

109. NAT’L IMMIGRATION LAW CTR., WHAT THE ORDER GRANTING A PRELIMINARY

Security (DHS) issued a rule stating that all letters were constructive knowledge of an employee's unauthorized status, unless the employer followed its safe-harbor provisions.¹¹⁰ But DHS withdrew the rule by the end of the year, after labor and civil liberties groups challenged the law in court.¹¹¹ Thus, it is not clear how SSA's resources may be used to regulate employers.

D. Proposed Legislative Changes

Although immigration enforcement is controlled by executive agencies like ICE, legislators have proposed a variety of laws that would affect the agencies' tactics.¹¹² Four bills proposed in 2007 and 2008 contained as wide a variety of first-order policy goals¹¹³ as second-order regulatory schemes.¹¹⁴ Two were immigration reform bills of 2007, one from the House and one from the Senate. Both bills focused on fraud prevention through document restrictions and increased technology,¹¹⁵ and the House bill supplemented this effort with heightened punishments for knowing violations of the law.¹¹⁶ Next was a narrower 2008 bill, codifying aliens' rights during detention and limiting the government's enforcement tactics.¹¹⁷ The final one was a DHS appropriations bill, in which legislators sought to direct a large portion of

INJUNCTION MEANS FOR THE DHS RULE ABOUT SOCIAL SECURITY "NO-MATCH" (2007) (stating that the SSA planned to send 140,000 letters); David P. McCauley, *Employing Foreign Workers in the U.S. Construction Industry: Possibilities, Pitfalls, and Lessons Learned*, 27 CONSTRUCTION LAW. 17, 21 (2007) (reporting that 900,000 letters were sent because of 6 million to 7 million unmatched W-2s in 2002); Tsai, *supra* note 108, at 47 (reporting that 126,250 letters were sent out of 7.5 million unmatched W-2s in 2003).

110. 72 Fed. Reg. 45,611, 45,612–13 (Aug. 15, 2007) (amending 8 CFR § 274a.1(i)(1) (2007)). The safe-harbor provisions give an employer thirty days to resolve any discrepancy with its employee, by reviewing documents to check for errors and confirming the correction with the SSA or DHS. *Id.*

111. Mary Lou Pickel, *Firms Get Reprieve; ID Plan on Hold*, ATLANTA JOURNAL-CONSTITUTION, Dec. 25, 2007, at 1A; Preston, *supra* note 3.

112. See, e.g., Protect Citizens and Residents from Unlawful Raids and Detention Act, S. 3594, 110th Cong. (2008); Department of Homeland Security Appropriations Act, 2009, H.R. 6947, 110th Cong. (2008); Secure Borders FIRST (For Integrity, Reform, Safety, and Anti-Terrorism) Act, H.R. 2954, 110th Cong. (2007); Unaccompanied Alien Child Protection Act of 2007, S. 1639, 110th Cong. tit. VIII, subtit. A.

113. For example, the Unaccompanied Alien Child Protection Act provided for interpreters to help screen for asylum claimants. S. 1639, § 142(d). In contrast, the Secure Borders FIRST Act would, for example, deny entry to all foreign nationals of countries that refuse to accept their own deported nationals, H.R. 2954, § 108, and would declare English the official language, *id.* § 503.

114. See, e.g., S. 3594, § 4(f)(1)(A) (forbidding immigration authorities from conducting raids near churches or schools); H.R. 2954, § 305 (increasing punishments for employers who knowingly hire illegal immigrants).

115. See H.R. 2954, § 303; S. 1639, § 302(a).

116. H.R. 2954, § 305.

117. S. 3594, § 4.

ICE's funding away from immigration raids.¹¹⁸ None of the above laws were enacted before the end of the 2007–2008 session of Congress.

The Senate's 2007 immigration reformation bill would have modified employer regulation in four main ways.¹¹⁹ First, the law would have mandated participation in an electronic worker eligibility program.¹²⁰ Second, it would have made illegal the "reckless" employment of unauthorized aliens.¹²¹ Reducing the minimum culpability for a conviction would have reduced the costs of investigating and prosecuting employers.¹²² Third, the bill would have further tightened the documentation requirements facing employers.¹²³ Specifically, the law would have required employers to demand a state issued driver's license or identification card.¹²⁴ Finally, the bill would have created a voluntary program by which employers could verify their employees' employment eligibility by submitting employee fingerprints to DHS.¹²⁵

The House's immigration reform bill was conceptually similar in its focus on fraud but was accompanied by increased fines for employers.¹²⁶ First, the bill would have created a national "Employment Eligibility Database" under the management of DHS.¹²⁷ The database would have contained more information than e-Verify but would have built on its framework to the extent possible.¹²⁸ Second, the bill would have required the SSA to create new Social Security cards.¹²⁹ The cards would have had to include a photograph and an encrypted, machine-readable strip for added security.¹³⁰ Employers would be forbidden from hiring without requiring this card and verifying it

118. Department of Homeland Security Appropriations Act 2009, H.R. 6947, 110th Cong. (2008).

119. S. 1639, 110th Cong. § 302 (2007) (amending 8 U.S.C. § 1324a (2006)).

120. *Id.* § 302(a).

121. *Id.* (although knowledge would still be required to incur criminal sanctions).

122. *See, e.g.*, STEVEN SHAVELL, *ECONOMIC ANALYSIS OF ACCIDENT LAW* 5–17 (1987).

123. *Compare* S. 1639, § 302(a) with 8 U.S.C. § 1324a(b)(1)(B)–(D) (2006) (S. 1639, § 302(a) allows employers to rely on identity documents only if they contain higher levels of anti-fraud protections than currently required in 8 U.S.C. § 1324a(b)(1)).

124. S. 1639, § 302(a). Here the bill included a redundant verification process because the only acceptable state IDs were ones that were issued in compliance with the REAL ID Act of 2005, Pub. L. No. 109-13, div. B, 119 Stat. 302 (codified in 49 U.S.C. § 30301 (2000)).

125. S. 1639, § 307.

126. Secure Borders FIRST Act of 2007, H.R. 2954, 110th Cong. § 305.

127. *Id.* § 303(a).

128. *Id.* § 303(a)–(b).

129. *Id.* § 302(a).

130. *Id.* § 302(a)(ii). Although the bill later suggests that employers would have access to card readers, it is not clear how or when this would happen—only that the readers should be provided at "minimal cost to [employers]." *Id.* § 304(a).

against the DHS database.¹³¹ Finally, the bill would have dramatically increased the penalties for employer violations.¹³² Most of the minimum authorized fines would have been increased ten to twenty times,¹³³ and the bill also required a minimum one-year imprisonment for repeat offenders.¹³⁴

In September 2008, Senator Robert Menendez of New Jersey introduced a bill limiting enforcement tactics during immigration enforcement actions.¹³⁵ For one, the bill would have required DHS (and therefore ICE) to avoid apprehending individuals near churches, schools, courts, hospitals, and similar “community institutions.”¹³⁶ Before large-scale raids, ICE would have been required to notify state and local child-welfare services.¹³⁷ After raids, the bill would have required the government to screen out and parole members of “vulnerable population groups” like primary caregivers and victims of human trafficking.¹³⁸ To ensure administrative compliance, the bill would have installed an ombudsman within DHS.¹³⁹

The House version of the 2009 DHS appropriations bill reflects a more indirect effect. Specifically, the bill would direct a large portion of ICE’s funding toward the arrest of criminal aliens.¹⁴⁰ Although this is not a direct indictment of worksite raids, it necessarily de-prioritizes them as an ICE strategy. In fact, the House Appropriations Committee recommended a slight decrease in funding for worksite enforcement.¹⁴¹

IV. SOCIAL NORMS AND EMPLOYER REGULATION

To evaluate any of the above proposals, one must determine why the government has been so unsuccessful at keeping immigrants from getting jobs. Widespread document fraud is undoubtedly one such reason. Forged documents effectively shift the risk of prosecution from employers to employees because employers face punishment only for “knowing”

131. *Id.* § 304(a).

132. *Id.* § 305.

133. *Id.* Indeed, a paperwork violation would carry a minimum \$1000 fine. *Id.*

134. *Id.* § 305(4).

135. Protect Citizens and Residents from Unlawful Raids and Detention Act, S. 3594, 110th Cong. (2008).

136. *Id.* § 4(f).

137. *Id.* § 5(3).

138. *Id.* § 7.

139. *Id.* § 10.

140. Department of Homeland Security Appropriations Act, 2009, H.R. 6947, 110th Cong. (2008).

141. See H.R. REP. No 110-862, at 51–52 (2008). The House Appropriations Committee recommended that ICE allocate \$90 million toward worksite enforcement. *Id.* This would be a slight decrease in funding from the \$92 million budgeted for 2008. *Id.* For some context, the Postville, Iowa, raid, discussed above, cost more than \$5 million. Petroski, *supra* note 71.

violations.¹⁴² And given the high quantity of labor demanded at the federal minimum wage, immigration seems almost inevitable.¹⁴³ In fact, one commentator has argued that “market forces are simply too strong to be overcome by standard responses of strengthening border enforcement or renewing employer sanction efforts.”¹⁴⁴

Lost in the discussion of fraud and wages, however, is any discussion of social norms. The fact is, many employers deliberately violate federal laws. Even if new fraud prevention technology worked perfectly, such technology may have little impact on employers who feel economically compelled and morally justified when hiring illegal immigrants. To those employers, the twin strategies of deterrence and fraud prevention may not be effective. Although the data are not sufficient to determine the number of such employers, one can be reasonably certain of their existence.

A. *The Model*

An increasing body of literature¹⁴⁵ explains legal compliance as a product of social norms.¹⁴⁶ Indeed, social norms often influence behavior more than “instrumental” influences (e.g., risk of legal sanction).¹⁴⁷ Thus, the decisions to comply with the law rarely reflect a rational calculation of risk versus reward.¹⁴⁸ Instead, the decisions reflect internalized notions of morality or

142. Employees who use false documents to get a job often are prosecuted under felony identity theft laws intended to deter theft. John Leland, *Some ID Theft Is Not for Profit, But to Get a Job*, N.Y. TIMES, Sept. 4, 2006, at A1. But DHS Secretary Chertoff sees the relationship between immigration laws and identity theft laws differently: “[E]ntering the country illegally can serve as a gateway to other crimes including identity theft and document fraud.” Press Release, ICE, ICE Makes Additional Criminal Arrests at Swift & Company Plants (July 11, 2007), available at <http://www.ice.gov/pi/news/newsreleases/articles/070711washingtondc.htm>.

143. See M. Isabel Medina, *Wal-Mart, Immigrant Workers and the U.S. Government—A Case of Split Personality*, 39 CONN. L. REV. 1443, 1459 (2007).

144. Hing, *supra* note 17, at 1401.

145. See generally, e.g., TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* (1990); Ben Depoorter & Sven Vanneste, *Norms and Enforcement: The Case Against Copyright Litigation*, 84 OR. L. REV. 1127 (2005); Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 MICH. L. REV. 338 (1997); Tracey L. Meares, *Norms, Legitimacy and Law Enforcement*, 79 OR. L. REV. 391 (2000); Eric A. Posner, *Law and Social Norms: The Case of Tax Compliance*, 86 VA. L. REV. 1781 (2000).

146. Richard McAdams defines social norms as “informal social regularities that individuals feel obligated to follow because of an internalized sense of duty, because of a fear of external non-legal sanctions, or both.” McAdams, *supra* note 145, at 340.

147. See Depoorter & Vanneste, *supra* note 145, at 1139; Meares, *supra* note 145, at 392.

148. Indeed, risk perception and calculation are distorted by so many cultural and normative factors that it is questionable whether hiring decisions would appropriately respond to regulation. See, e.g., Dan M. Kahan, *Two Conceptions of Emotion in Risk Regulation*, 156 U. PA. L. REV. 741 (2008).

legitimacy.¹⁴⁹ For example, people pay their taxes even though the risk of an audit multiplied by the costs of potential penalties is significantly less than the cost of paying.¹⁵⁰ They do so in part because of social norms.¹⁵¹

Although norms can be influenced by a variety of factors, including the law, they are very difficult to engineer.¹⁵² On one hand, “individuals prefer to carry out their legal obligations.”¹⁵³ Thus, when lawmakers call something (or someone) illegal, it has an effect on an individual’s internalized “moral appraisal” of related behaviors.¹⁵⁴ However, the normative force of a law may be overcome by both internal and external influences. Internally, norms may be influenced by an individual’s desire to avoid cognitive dissonance.¹⁵⁵ That is, individuals sometimes adjust their beliefs to conform with their behavior, thus reducing the uncomfortable cognitive dissonance between belief and behavior.¹⁵⁶ Externally, norms are shaped by the perceived actions and beliefs of an individual’s peers.¹⁵⁷ Therefore, the public enforcement of a law may even be counterproductive if it demonstrates widespread violation by one’s peers.¹⁵⁸

All of the above influences can be found in the case of Internet piracy.¹⁵⁹ A 2005 study revealed two reasons why heavy-handed copyright enforcement against file-sharers is counterproductive.¹⁶⁰ First, the public enforcement of copyrights raised awareness among inexperienced downloaders of what their peers were doing.¹⁶¹ Second, harsh copyright enforcement prompted a backlash from experienced downloaders, whose anti-copyright norms were

149. See Meares, *supra* note 145, at 398–99.

150. Posner, *supra* note 145, at 1783.

151. *Id.* at 1785.

152. *Id.* at 1791–92; see also Dan M. Kahan, *Gentle Nudges vs. Hard Shoves: Solving the Sticky Norms Problem*, 67 U. CHI. L. REV. 607, 607–09 (2000).

153. Kahan, *supra* note 152, at 612–13 (describing the influence of a behavior’s legal status as “significant, albeit modest”).

154. *Id.*; see also Nigel Walker & Michael Argyle, *Does the Law Affect Moral Judgments?*, 4 BRIT. J. CRIMINOLOGY 570, 570 (1963).

155. See LEON FESTINGER, A THEORY OF COGNITIVE DISSONANCE 1–31 (1957).

156. *Id.* at 6.

157. Walker & Argyle, *supra* note 154, at 576–77 (noting the effect of perceived public opinion on individuals’ moral appraisal of using obscene language in public).

158. The classic example is the daycare center that introduced a fine to penalize late parents; rather than deterring them, however, it resulted in later parents. Uri Gneezy & Aldo Rustichini, *A Fine Is a Price*, 29 J. LEGAL STUD. 1 (2000).

159. Depoorter & Vanneste, *supra* note 145, at 1157–58.

160. *Id.*

161. *Id.* at 1157.

strengthened by heavy-handed tactics.¹⁶² Smaller punishments, however, caused less of a normative backlash among experienced downloaders.¹⁶³

Indeed, the results of the file-sharing study are predicted by Dan Kahan's "sticky norms" model.¹⁶⁴ According to Kahan, if the law condemns a punishment "substantially more than does the typical decisionmaker, the decisionmaker's personal aversion to condemning too severely will dominate her inclination to enforce the law."¹⁶⁵ This principle expands on Oliver Wendell Holmes's statement that "a law which punished conduct which would not be blameworthy in the average member of the community would be too severe for that community to bear."¹⁶⁶ And Kahan takes the point one step further, arguing that sometimes the more effective laws are those that Kahan refers to as "gentle nudges" rather than "hard shoves."¹⁶⁷ For example, he contrasts American smoking laws with European ones.¹⁶⁸ The American model of "zoning or segmentation" represented a gentle nudge, pushing smokers away from non-smokers and nurturing the stigma of smoking.¹⁶⁹ In contrast, Europeans "contemptuously def[y]" the harder public smoking bans.¹⁷⁰

Whether these decisionmakers are judges, jurors, voters, or small business owners, their aversion for excessive enforcement may have any number of ill effects. Jurors, for example, may refuse to convict a defendant, judges may impose reduced sentences, or lawmakers may overturn the law entirely.¹⁷¹ Thus, the more effective punishment would be tailored to match the typical decisionmaker's expectations.¹⁷²

B. Norm Data

Although empirical data gauging immigration norms are hard to come by, evidence suggests that some groups have developed pro-illegal immigrant norms. From farmers to Catholics to Hispanics, many Americans seem reluctant to condemn illegal immigrants or their employers. That is not to say that employer sanctions do not have support, or even that most Americans

162. *Id.*

163. *Id.* at 1158.

164. *Id.* at 1153; *see* Kahan, *supra* note 152, at 607–08.

165. Kahan, *supra* note 152, at 608.

166. OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 50 (1909).

167. Kahan, *supra* note 152, at 608.

168. *Id.* at 626.

169. *Id.* at 627 (Zoning or segmentation includes indoor smoking bans or the enforcement of smoking and nonsmoking sections.).

170. *Id.* at 626.

171. *Id.* at 607.

172. *Id.* at 608.

would resist employer sanctions. But some would, and perhaps enough to present a sticky norms problem that would make heightened enforcement efforts counterproductive.

On one hand, immigration laws do have a modest effect on people's moral appraisal of immigrants.¹⁷³ A nationwide poll in 2007 indicated that forty-six percent of Americans believe that *legal* immigrants have had a positive effect on their community, but only twenty-one percent of people said the same of *illegal* immigrants.¹⁷⁴ Because the only difference between the two questions was the legal status of the immigrants, the twenty-five percentage point disparity between the responses may reflect a moral appraisal based on immigrants' legal status. Capturing this moral appraisal is the slogan championed by some anti-immigration advocates: "What part of illegal don't you understand?"¹⁷⁵

On the other hand, the poll highlights the complexity of the relationship between norms and immigration law. It shows that a minority of Americans believes that illegal immigrants have a positive effect on their communities.¹⁷⁶ And because norms differ greatly among communities, or peer groups,¹⁷⁷ one would expect this number to be higher in some communities than in others. For example, a 2007 survey found that seventy-five percent of Hispanics believe that illegal immigrants help the American economy.¹⁷⁸ Although that survey does not precisely track the one above, the enormous disparity between results suggests that the condemning power of immigration laws may be lower within Hispanic communities.

Further evidence of pro-immigrant norms may be found in the public positions of certain religious organizations. Some such groups have made highly publicized stands with the immigrant community—at times in conflict with federal laws.¹⁷⁹ The Catholic Church, for example, has been said to "openly support[] immigrants' rights activists, and encourage[] parishioners to

173. See L.A. Times/Bloomberg Poll, Nov. 30–Dec. 3, 2007, available at <http://www.pollingreport.com/immigration.htm>.

174. *Id.*

175. See Mark Krikorian, *Amnesty, Again*, NAT'L REV., Jan. 26, 2004, at 28, 29; see also Julia Preston, *Employers Fight Tough Measures on Immigration*, N.Y. TIMES, July 6, 2008, at A1 (citing the phrase's use in Arizona).

176. L.A. Times/Bloomberg Poll, *supra* note 173.

177. See Depoorter & Vanneste, *supra* note 145, at 1157–58 (showing a significant difference between the copyright norms of downloaders and non-downloaders).

178. PEW HISP. CTR., 2007 NATIONAL SURVEY OF LATINOS: AS ILLEGAL IMMIGRATION ISSUE HEATS UP, HISPANICS FEEL A CHILL 21 (2007), available at <http://pewhispanic.org/files/reports/84.pdf> [hereinafter HISPANICS FEEL A CHILL].

179. See Paulette Chu Minter, Op-Ed., *Is the Catholic Church Pro-Immigrant? You Bet*, USA TODAY, Aug. 21, 2006, at 11A; Kari Lydersen, *Church Is Sanctuary as Deportation Nears*, WASH. POST, Aug. 17, 2006, at A10.

participate in protests against current policies.”¹⁸⁰ After two large Houston-area worksite raids in 2008, the director of the Catholic Legal Immigration Network compared the impact to that of a hurricane.¹⁸¹ Similarly, a Methodist church in Chicago made national news in 2006 when it provided refuge to an immigrant who had been ordered removed.¹⁸² Some commentators have even accused the church of encouraging illegal immigration.¹⁸³ In fact, when Pope Benedict XVI came to the United States in April 2008, House Representative Tom Tancredo accused him of “faith-based marketing” to Hispanic-Americans and suggested that the Pope’s motives “may have less to do with spreading the Gospel than they do about recruiting new members of the Church.”¹⁸⁴

Whether the above religious institutions actively shape or more passively gauge community norms, their positions suggest that pro-immigrant norms exist within certain communities. Such norms may motivate individuals to openly and directly undermine the enforcement of immigration laws by providing sanctuary to aliens ordered removed.¹⁸⁵ But the norms may also operate in less direct ways. Specifically, pro-immigrant norms may translate into anti-enforcement norms. Employers sympathetic to immigrants may be more likely to hire them. Jurors who believe that illegal immigrants benefit their communities may be less likely to convict their employers. Although few data exist measuring immigration enforcement norms, there are a few signs of anti-enforcement norms.

According to studies conducted in 2007 and 2008, a substantial portion of the population disapproves of worksite raids.¹⁸⁶ Seventy-five percent of Hispanics and forty-two percent of non-Hispanics disapprove of worksite raids.¹⁸⁷ Seventy percent of Hispanics oppose criminal sanctions for employers.¹⁸⁸ Although opposition to such enforcement tactics is higher

180. Rebecca van Uiter, *Undocumented Immigrants in the United States: A Discussion of Catholic Social Thought and “Mormon Social Thought” Principles*, 46 J. CATH. LEGAL STUD. 277, 287 (2007).

181. Stewart M. Powell, *Immigration Official Slammed over Crackdowns: ICE Chief Tells Conference that Agency Is Enforcing Congress’ Laws*, HOUSTON CHRONICLE, July 30, 2008, at A4.

182. See Lydersen, *supra* note 179.

183. Minitier, *supra* note 179 (citing CNN fixture Lou Dobbs of accusing the church of seeking “to add a few folks to those pews”).

184. Daniel J. Wakin & Julia Preston, *Speaking Up for Immigrants, Pontiff Touches a Flash Point*, N.Y. TIMES, Apr. 20, 2008, at A1.

185. See Lydersen, *supra* note 179.

186. HISPANICS FEEL A CHILL, *supra* note 178, at 13; PEW HISP. CTR., 2008 NATIONAL SURVEY OF LATINOS: HISPANICS SEE THEIR SITUATION IN U.S. DETERIORATING; OPPOSE KEY IMMIGRATION ENFORCEMENT MEASURES 2 (2008), available at <http://pewhispanic.org/files/reports/93.pdf> [hereinafter HISPANICS OPPOSE KEY MEASURES].

187. HISPANICS FEEL A CHILL, *supra* note 178, at 13.

188. HISPANICS OPPOSE KEY MEASURES, *supra* note 186, at 2.

among younger, less-educated Hispanics, disapproval is hardly limited to that group.¹⁸⁹

Recently, there have been small signs of a political backlash against worksite raids. In the summer of 2008, the mayors of Los Angeles, Oakland, and Seattle requested that the United States Conference of Mayors approve a resolution condemning the immigration raids.¹⁹⁰ The conference passed a resolution that called on ICE to focus *entirely* upon criminal and national security matters until Congress passed a comprehensive immigration reform act.¹⁹¹ At the very least, the mayors requested that ICE focus its worksite enforcement efforts on companies with a “history or reasonable suspicion of engaging in exploitative practices.”¹⁹²

This backlash may even be visible in Washington, particularly in the two 2008 bills described in Part III.D. Both the Senate bill expanding immigrant rights and the House DHS appropriations bill limit worksite enforcement measures to some degree.¹⁹³ These proposals may be the product of an anti-enforcement backlash. On the other hand, the Senate counterpart to the DHS appropriations bill did not limit the agency’s worksite enforcement efforts.¹⁹⁴ To the contrary, the Senate Appropriations Committee stated that it was “pleased” with ICE’s recent worksite enforcement efforts and recommended that an additional 108 full-time employees be dedicated to such efforts.¹⁹⁵ Furthermore, both of the immigration reform bills of 2007 contained increased worksite enforcement tools.¹⁹⁶

Although a thorough, methodologically sound study would greatly enhance understanding of norms and immigration laws, certain tentative conclusions may be drawn from the existing data. For one, anti-enforcement norms exist among certain groups of Americans.¹⁹⁷ Such norms seem to exist among Hispanics, and, if so, this creates a significant enforcement problem. As of 2007, the Small Business Administration estimates that Hispanics own

189. *Id.* at 2, 4.

190. Emily Bazar, *Three Mayors Fight Immigration Raids*, USA TODAY, June 20, 2008, at 5A.

191. U.S. Conference of Mayors, *Calling for Comprehensive Immigration Reform Which Promotes the Reunification of Families, Provides Legal Status with a Path to Earned Citizenship, and a Plan for Current and Future Immigrant Workers*, Res. (June 20–24, 2008), available at http://www.usmayors.org/resolutions/76th_conference/cs_j_14.asp.

192. U.S. Conference of Mayors, *U.S. Immigration and Customs Worksite Enforcement*, Res. (June 20–24, 2008), available at http://www.usmayors.org/resolutions/76th_conference/cs_j_15.asp.

193. See *supra* notes 135–41 and accompanying text.

194. See Robert Byrd, *Department of Homeland Security Appropriations Bill 2009*, S. REP. NO. 110-396, at 44 (2008).

195. *Id.*

196. See *supra* notes 119–34 and accompanying text.

197. See *supra* notes 186–89 and accompanying text.

nearly 200,000, or almost four percent, of American employer firms.¹⁹⁸ But such norms likely also exist among the employers of unskilled laborers who perceive widespread violation by their peers.¹⁹⁹ If that is true, heavy-handed enforcement tactics may be as counterproductive against the employers of illegal aliens as they were against Internet file-sharers.

There are several possible explanations for anti-enforcement norms. Internally, employers may be seeking to avoid cognitive dissonance.²⁰⁰ The economic incentive that employers have to employ illegal aliens²⁰¹ may lead employers to internalize their behavior and adapt their norms accordingly.²⁰² Externally, employers of unskilled laborers perceive widespread violations by their peers.²⁰³ A 2007 *New York Times* article quoted farmers as “saying at least 70 percent of farmworkers are illegal immigrants.”²⁰⁴ And the perception of widespread violations erodes the norms that underlie the laws themselves.²⁰⁵

Among Hispanics, anti-enforcement norms may have an additional explanation. A study shows that a majority of Hispanic-Americans believe that the recent immigration debate has made life more difficult for them.²⁰⁶ A majority of Hispanics worry about the deportation (or removal, as it is now called) of themselves, a friend, or family member.²⁰⁷ And eighty-three percent of Hispanics think discrimination is a problem in the workplace, and fifty-eight percent consider it a major problem.²⁰⁸

C. Analysis

Given the existing anti-enforcement norms, the current employer-enforcement strategy is not likely to be effective. The government’s high-profile raids may encourage an anti-enforcement backlash, especially when accompanied by criminal prosecutions of employers and employees alike. In fact, the high-profile raids seem perfectly tailored to amplify anti-enforcement

198. U.S. SMALL BUS. ADMIN., MINORITIES IN BUSINESS: A DEMOGRAPHIC REVIEW OF MINORITY BUSINESS OWNERSHIP 5 tbl.3 (2007), available at http://www.sba.gov/idc/groups/public/documents/sba_homepage/tools_reports_rs298.pdf.

199. At least, norm theories would predict that.

200. See generally FESTINGER, *supra* note 155.

201. See Manns, *supra* note 42, at 945 (“One of the fundamental challenges facing immigration enforcement is the fact that employers and undocumented aliens share an interest in subverting immigration laws.”).

202. See FESTINGER, *supra* note 155, at 19.

203. See, e.g., Preston, *supra* note 38.

204. *Id.*

205. See *supra* notes 157–58 and accompanying text.

206. HISPANICS FEEL A CHILL, *supra* note 178, at 16.

207. *Id.* at 44.

208. *Id.* at 31.

norms. By coupling employer enforcement measures with large-scale criminal prosecutions and removal of immigrants, the measures arouse the anxieties of the Hispanic population. By bankrupting large employers, the measures also jeopardize the economic future of the communities that depend on them. An effective employer-enforcement strategy would minimize anti-enforcement norms and more closely match communities' condemnation of the behavior. Such a strategy would require collaboration between the legislature and regulators.

First, the legislature should rewrite employer-sanctioning laws to reduce the cost of prosecuting employers. With lower costs, federal regulators would not need to make waves with each investigation. They could target smaller employers and seek smaller penalties, rather than seeking headlines every few months with a large raid. There are several ways that the law could be rewritten to reduce investigatory costs. The simplest legislative rewrite would be to reduce the mental state required for the offense.²⁰⁹ However, as the mental state decreases, the risk of employer discrimination increases. Employers fearing strict liability, for example, may not hire any immigrants at all. Recklessness or negligence would probably be a better standard, and for that reason, the Senate's 2007 immigration reform bill was on the right track.²¹⁰ Another way of reducing enforcement costs is to provide better tools to employers to verify the status of their employees. With such tools available, including anti-fraud identity documents and employment-eligibility verification databases, the government could more easily prove employer culpability. Both the House and Senate took steps in this direction with their immigration reform proposals.²¹¹

Next, with reduced investigative costs, the government could adopt a regulatory policy that minimizes anti-enforcement sentiment. A critical aspect of this new policy would be decoupling employer-enforcement raids from illegal alien detention and prosecution. The government would reduce the negative impact on the community if it investigated and fined businesses without detaining hundreds of employees at the same time. Another aspect of this new policy would be seeking smaller punishments that more accurately reflect the condemnation of the community. In some communities, the mere publication of a violation may result in shaming and loss of patronage. In others, administrative fines of a few hundred dollars may be appropriate. Finally, the new policy should contain protections for the community like

209. See Tanger, *supra* note 18, at 60–61 (proposing strict corporate liability).

210. Unaccompanied Alien Child Protection Act of 2007, S. 1639, 110th Cong. § 302(a) (reducing the standard to recklessness).

211. See *supra* notes 123–31 and accompanying text.

those contained in the bill proposed by Senator Menendez.²¹² Social services should be alerted before a raid, the raids should not be conducted near churches, schools, or courts, and primary caregivers should be quickly released on parole.

V. CONCLUSION

This Comment has suggested that norms may be frustrating immigration enforcement. If that is the case, the government's heavy-handed deterrence strategy may be not only ineffective, but also in fact counterproductive. The collision of government policy and social norms may be averted, however, without abandoning employer regulation altogether. Effectively calibrating penalties and enforcement strategies will require more studies and discussions than the current academic and political debate currently contains.

Finally, although this Comment has not taken a position on any first-order immigration issues, these issues logically affect immigration norms. A complete separation between first- and second-order issues is not realistic. If, for example, employers could hire guest workers to fill their positions, but simply refused to pay the administrative fees to do so, a community would likely condemn this action more severely than an employer who did not have the option of hiring a guest worker. Thus, second-order immigration reform would be most effective if accompanied by first-order reform.

BENJAMIN CROUSE*

212. *See supra* notes 135–39 and accompanying text.

* Marquette University Law School, J.D. anticipated May 2009. I thank Jennifer Allen for her support and encouragement on this Comment, and I thank the hard-working editors and members of this Law Review for cleaning it all up.