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Visa as Property, Visa as Collateral

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VISA AS PROPERTY, VISA AS COLLATERAL

Eleanor Marie Lawrence Brown *

Abstract

Although the “tragic choice” framework has not been applied in the context of U.S. immigration law, current immigration policy is rife with tragic choices, defined as a commitment by policy elites to maintaining certain illusions which shield from public view tough policy choices that offend deeply held values. Take, for example, the issue of commodification of visas. Policy makers remain committed to maintaining the historical illusion that U.S. visas are open to well-deserving migrants, and are not being “sold.” Yet U.S. immigration practice has long made concessions to commodification at the margins. Indeed, some migrants “pay” very high prices to obtain the right to enter the U.S. For example, certain elite visa applicants must invest significant sums in the U.S. economy as a condition of both obtaining and maintaining their visas. 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 U.S., the poor migrant has no such option. Rather, the poor migrant faces another kind of “tragic choice.” She may pay a coyote an astronomical fee to transport her across the border illegally, or she simply cannot come.

Why this tragic choice? A primary challenge of immigration law is that it is notoriously difficult to screen poor visa applicants. In a quintessential problem of informational asymmetry, the typical applicant knows much more

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about her likely behavior in the U.S. than the government; the government typically has no way of evaluating the sincerity of her promise to be law-abiding. Reflecting the long-time recognition in the common law that a contracting party is more likely to abide by her commitment if she pledges something of value, this Article recommends that the applicant should have to post a bond as a condition of receiving her visa. In the event that the applicant later fails to keep her promises, including an assurance not to overstay her visa, she would forfeit this bond.

However, there are problems with bonding regimes in the U.S. context. Bonding regimes appear to offend deeply held public values. For example, bonding systems may reinforce perceptions that market-based mechanisms are being utilized to determine who receives visas, thus potentially excluding the poor. Yet, ironically, bonding systems may actually improve the opportunity sets of the poor. For example, a bonding system should raise the costs of non-compliance with visas and in so doing, make it more likely that a poor applicant will receive a visa. Thus, bonding systems may also improve access for the poor migrant to the U.S., where she typically significantly improves her earnings.

Herein lies the crux of the matter. The real issue is not the bonding requirement. After all, immigration law already routinely uses market-based mechanisms to screen rich migrants. The question becomes why poor migrants should not have similar opportunities. The real issue is the absence of opportunities in developing countries for poor people to access transparent credit facilities from formal financial institutions to finance bonds, leaving poor migrants at the mercy of black-market money lenders.

This Article seeks to make labor mobility bankable by advocating a re-conceptualization of guest worker visas as a type of property, namely, licenses for temporary admission to the U.S. If appropriately designed, these visa-licenses could be collateral-like devices, which allow poor migrants to access transparent law-bound credit markets.

TABLE OF CONTENTS

INTRODUCTION	6
I. IMPROVING SCREENING; BONDING AT THE BOTTOM OF THE PYRAMID	17
A. <i>A Disproportionate Emphasis on Due Diligence and Assurances</i>	17
B. <i>A Potential Solution: the Kuwaiti Approach</i>	20
C. <i>Designing a Bond</i>	22
D. <i>The Implications of the Involvement of Financial Intermediaries</i>	24
E. <i>The Relative Advantages of Bonding Arrangements</i>	26
1. <i>Context Sensitivity</i>	26
2. <i>Changing the Default Rule of Non-Enforcement</i>	27
II. INCENTIVITIZING FINANCIAL INTERMEDIARIES	29
A. <i>Interviews with Jamaican Guest Workers and Lenders</i>	31
B. <i>Methodology</i>	32
C. <i>Summary of Focus Group Findings</i>	33
D. <i>How Migrants Currently Finance their Relocation Costs</i>	35
E. <i>The Background Legal Context</i>	37
F. <i>The Four Principles Underlying the Extension of Credit to the Poor</i>	38
1. <i>The Difficulties Surrounding Collateral May Lead Banks to Forego Collateral or Enforcement of Their Repossession Rights</i>	39
2. <i>Banks Structure Contacts That Enable Them to Extract a Penalty from the Borrower, Without Resorting to the Formal Legal System</i>	40
3. <i>Synergies with Relational Theories of Financing</i>	41
G. <i>Visas as New “New Property”</i>	43
1. <i>The Reich Analogy and a Visa as a Franchise or License</i>	43
2. <i>A Visa’s Other Property-Like Characteristics: Reputation</i>	45

III.	INSTITUTIONAL DESIGN BENEFITS	48
	A. <i>Is This Proposal Politically Practicable?</i>	48
	1. <i>The Key Features of Financial Intermediaries to the Poor</i>	49
	2. <i>Financial Intermediaries as Gate-Keepers and Policing the Gate-Keepers</i>	50
	B. <i>The Enforcement Question</i>	53
	1. <i>Migration's Network Nature and the Difficulty of Enforcement</i>	53
	2. <i>Financial Intermediaries May Be Motivated to Find Non-Compliant Aliens</i>	55
	3. <i>Mitigating the Risks of Snitching</i>	57
IV.	THE COMMODIFICATION CRITIQUE	58
	A. <i>Background: Levmore's Puzzle</i>	58
	B. <i>Commodification Critiques</i>	60
	C. <i>Visa-as-Collateral Differs in Critical Ways from Traditional Market-Based Proposals</i>	61
	D. <i>The Official Public and Academic Posture: Non-Commodification</i>	62
	E. <i>Tragic Choice Framework</i>	64
	CONCLUSION: <i>If We are Going to Commodify, We Cannot Exclude the Bottom of the Pyramid</i>	65

Introduction

Fully three decades ago Calabresi and 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.² 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. policy makers remain deeply committed to maintaining an illusion that U.S. visas are not being “sold.”³ For example, in the current financial crisis, U.S. policy makers have not auctioned visas to wealthy overseas investors who are willing to invest in depressed real-estate, a policy suggestion that gained considerable currency as a mechanism of stemming the sub-prime crisis.⁴

² GUIDO CALABRESI and 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 health care rationing. *See, e.g.*, Leonard Fleck, *Just Health Care Rationing: A Democratic Decisionmaking Approach*, 140 U. PA. L. REV. 1597 (1992) For example, how do we decide which sick patients receive expensive liver transplants? Their moral culpability in damaging their current liver, for example, through alcoholism? Their ability to pay for the transplant? Their likelihood of long-term survival? Their historical or future contribution to society?

³ 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*, THE ECONOMIST, June 24, 2010 available at 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 Bornha and James M. Stearns, *The Ethics and Efficacy of Selling National Citizenship*, 37 J. OF BUS. ETHICS, 193 (May 2002).

⁴ The 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, *The Open Door Bailout*, N.Y. TIMES, Feb. 10, 2009, at A31.

Yet, U.S. immigration practice has long made concessions to commodification. First, there are the “unofficial concessions” to commodification at the margins. 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.⁵ Notably, 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).⁶ There are also the official concessions to commodification. Indeed, the INA mandates that some migrants “pay” very high prices to obtain the right to enter the U.S. A case in question is certain elite visa applicants who must invest significant sums in the U.S. economy as a condition of both obtaining and maintaining their visas.⁷

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 U.S., the poor migrant has no such option.⁸ Rather, the poor migrant faces another kind of “tragic choice.” She may pay a coyote an astronomical fee to

⁵ I learned this through an interview with the sociologist, David Spener who has conducted ethnographic research on coyote transportation networks and the exorbitant fees that undocumented migrants pay to coyotes and brokers.

⁶ See, e.g., Evan Perez and 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 a Russian billionaire, Oleg Deripaska who had previously been barred from the U.S. due to concerns regarding links to organized crime).

⁷ For example see 8 U.S.C. §1153(b)(5) (1994) (providing for visas to be issued to immigrants who invest at least one million dollars in a start-up American business that generates full-time jobs for ten United States citizens or lawful residents.) For a description of how this works in practice, see *The Economist* Blog, http://www.economist.com/blogs/freeexchange/2010/06/immigration_0.

⁸ This is true in rich Asian countries such as Singapore and in nearly all of the Middle Eastern states who rely heavily on migrant workers. See Dovelyn Rannveig Agunias and Kathleen Newland, *Circular Migration and Development: Trends, Policy Routes, and Ways Forward*, (Migration Pol. Inst.), April 2007, available at http://www.migrationpolicy.org/pubs/MigDevPB_041807.pdf; see also ORN BODVARRSON and HENDRIK VAN DEN BERG, TEMPORARY MIGRATION INVOLUNTARY MIGRATION AND OTHER VARIATIONS ON THE STANDARD MODEL 261-84 (2009).

transport her across the border illegally at great risk to her personal safety, or she simply cannot come. There is a reason for this tragic choice, namely, a failure of U.S. policy makers to face head-on a primary challenge of immigration law: it is notoriously difficult to screen a poor low-skilled visa applicant who is typically not well placed to provide documentary evidence of credible ties to her country of origin, which will lead her to return home at the end of her visa's tenure. Typically, the poor low-skilled applicant pledges to be law-abiding during her tenure in the U.S., specifically promising to avoid visa-overstay. Yet, the high rates of visa overstay among migrants generally and among poor low-skilled temporary workers in particular,⁹ is evidence of a quintessential problem of information asymmetry.¹⁰ That is, the typical applicant knows much more about whether she will return to her home country than the U.S. government; the government typically has no way of evaluating the sincerity of her commitments. To overcome this

⁹ Nearly half of the undocumented population of twelve million overstayed their visas. See Ted Robbins, *Nearly Half of Illegal Immigrants Overstay Visa, on All Things Considered* (July 14, 2006) available at <http://www.npr.org/templates/story/story.php?storyId=5485917>. Moreover, the U.S. is unable to trace most persons who overstay their visas. See also James C. McKinley and Julia Preston, *U.S. Can't Trace Visitors on Expired Visas*, N.Y. TIMES, Oct. 11, 2009, at A1 (noting that over 40% 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 and Michael S. Teitelbaum, *The Mirage of Mexican Guest Workers*, FOREIGN AFFAIRS, Nov./ Dec. 2001 at 117. The size of the undocumented population (of twelve million) is taken from the work of Douglas Massey, a sociologist who is a leading authority on this issue. See DOUGLAS S. MASSEY, *Borderline Madness: America's Counterproductive Immigration Policy*, in DEBATING IMMIGRATION 129 (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 (2005); 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 (2007) (pointing out the difficulties of information asymmetry); see also HIROSHI MOTOMURA, AMERICANS IN WAITING: THE LOST STORY OF IMMIGRATION & CITIZENSHIP IN THE UNITED STATES 15-37 (2006) (pointing out a further difficulty is that even a sincere visa applicant who promises to return to his home country may change his mind once he has been in the U.S. for a period of time).

challenge, this Article recommends what economists popularly term “hostage-taking,” that is, the visa applicant should have to post a bond.¹¹

While a bonding proposal initially may seem radical, bonding has a long heritage in many aspects of the common law.¹² Moreover, the U.S. government is already 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 American military bases in the Gulf by posting bonds for guest workers.¹³ Yet despite the obvious applicability of bonding to U.S immigration challenges,¹⁴ it is curious that there has been little

¹¹ The term “hostage taking” comes from the economics literature. See 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., THE LAW OF MISCELLANEOUS AND COMMERCIAL SURETY BONDS (American Bar Association, eds. TODD C. KAZLOW AND BRUCE C. KING 2001) (leading text on bonding in the commercial context); Eric Helland and Alexander Tabarrok, *The Fugitive: Evidence on Public Versus Private Law Enforcement from Bail Jumping*, 47 J. LAW & ECON. 93 (2004) (discussing the effectiveness of bail bonding systems in diverse contexts); *Annual Review of Criminal Procedure: II. Preliminary Proceedings: 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*, THE NATIONAL (Nov. 7, 2009) <http://www.thenational.ae/apps/pbcs.dll/article?AID=/20091108/FOREIGN/711079862/1135>.

¹⁴ Indeed, bonding is currently utilized in limited circumstances in the INA. INA § 212(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.”); INA § 213 (2006) (regarding admission of aliens upon giving bond or undertaking and its return upon permanent departure); INA § 214 (2006) (“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 STEPHEN LEGOMSKY AND CRISTINA RODRIGUEZ, IMMIGRATION AND REFUGEE POLICY 651, 818 (5th ed. 2009); THOMAS ALENIKOFF, ET AL., IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY 748 (6th ed. 2003).

discussion of broader bonding proposals.¹⁵ 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 in its historical Ellis Island metaphors to the notion that it opens its borders to deserving migrants,¹⁶ regardless of their socio-economic status, bonding systems may reinforce a view that visas are being “sold.” However, immigration law already routinely uses market-based mechanisms to screen rich migrants. The question becomes why poor migrants should 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 of bonding regimes cite the Dickensian free-for-all that preceded modern immigration law.¹⁷ Fully half of white migrants in the early days of the Republic were bonded by their employers 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 slave-like conditions; in contemporary times, bonded workers in the Gulf have been described as indentured servants.¹⁸ Yet these concerns seem strangely out of

¹⁵ The exceptions are Jeffrey Manns and Peter Schuck. Manns’ 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 (2006). 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 Aristide Zolberg’s details the evolution of this Ellis Island metaphor of the “deserving migrant” in his Introduction. ARISTIDE ZOLBERG, *A NATION BY DESIGN: IMMIGRATION POLICY IN THE FASHIONING OF AMERICA* 1-24 (2007).

¹⁷ Ayelet Shachar is a prominent skeptic. See AYELET SCHACHAR, *THE BIRTHRIGHT LOTTERY* 22 (2009).

¹⁸ See ERIC FONER, *GIVE ME LIBERTY* Introduction (2004) (for a discussion of early white migrants) and Human Rights Watch, *Swept Under the Rug: Abuses Against Domestic Workers Around the World*, (July 27, 2006) (for a discussion of 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

place in the modern U.S., 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 jump five times in the U.S.¹⁹ By lowering overstay rates, bonding systems may improve U.S. labor market access for poor migrants whose welfare motivates distributive justice critiques in the first place.²⁰ 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.²¹ Thus, applicants should be able to finance bonds on their own steam.²²

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); Cristina M. Rodríguez, *Guest Workers and Integration: Toward a Theory of What Immigrants and Americans Owe One Another*, U. CHI. LEGAL F. 219 (2007).

¹⁹ See Michael Clemens, et al., *The Place Premium: Wage Differences for Identical Workers Across the U.S. Border*, Working Paper 55, available at <http://www.cgdev.org/content/publications/detail/16352> (Dec. 2008) (discussing the “place premium,” namely the wage gain accruing to foreign workers who arrive in the U.S. and finding that migration has a much more immediate impact on poverty alleviation than any other policy since the wage differentials between the U.S. 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. The Times Online, *Britons Face Jail If Relatives Overstay Their Visa* (June 25, 2008), available at <http://www.timesonline.co.uk/tol/news/politics/article4211653.ece>.

²¹ See *National Labor Migration Policy for Sri Lanka*, available at http://www.ilo.org/public/english/protection/migrant/download/mpolicy_srilanka_en.pdf. This finding justifies the 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* (2000); DUAL NATIONALITY, SOCIAL RIGHTS AND FEDERAL CITIZENSHIP IN THE U.S. AND EUROPE: THE REINVENTION OF CITIZENSHIP (RANDALL HANSEN & PATRICK WEIL eds., 2002); JUSTICE IN IMMIGRATION 136, 140

As recent history in developed country markets has shown, the road to extending credit to the poor is rife with potential pitfalls.²³ Indeed, the current state of credit markets for poor people in the developing world is not unlike the market here in the U.S. before protections for poor borrowers proliferated at the federal and state levels.²⁴ Although it may not be widely recognized outside of specialist circles, the poor have long been able to borrow.²⁵ Even in the early days of the Great Depression, there was a thriving market of black market money lenders.²⁶ 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.²⁷

In modern times, this is how South Asian guest workers who post bonds to work in the Middle East often finance their bonds; they execute loan contracts with local money lenders. These money lenders may enforce contracts with implicit threats of violence.²⁸ Their threats are credible. Indeed, Nepalese farmers borrow money for fertilizer by sometimes pledging their daughters as "collateral;" their daughters work as indentured laborers to the money lenders until the loan is paid off.²⁹ The same Nepalese farmer may need a loan to underwrite a bond for a work visa in Dubai, where he can

(WARREN F. SCHWARTZ ed., 1995); 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).

²³ The Introduction to Barr and Blank's text makes this point particularly well. INSUFFICIENT FUNDS: SAVINGS, ASSETS, CREDIT, AND BANKING AMONG LOW-INCOME HOUSEHOLDS (MICHAEL BARR AND R.M. BLANK, eds. 2009).

²⁴ See PETER J. COLEMAN, DEBTORS AND CREDITORS IN AMERICA: INSOLVENCY, IMPRISONMENT FOR DEBT, AND BANKRUPTCY (1974).

²⁵ Jill Lepore, *Annals of Finance: "I.O.U.,"* THE NEW YORKER, Apr. 13, 2009 at 34.

²⁶ See COLEMAN, *supra* note 24

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

²⁸ See generally, DARYL COLLINS, ET AL., PORTFOLIOS OF THE POOR: HOW THE WORLD'S POOR LIVE ON \$2 A DAY (2009).

²⁹ Ashoka, the global association of social entrepreneurs has widely publicized the plight of Nepalese girls who are pledged to moneylenders as indentured servants. See Gregg, Tully, *Freeing Nepali Girls from Indentured Servitude*, <http://www.changemakers.com/enus/node/7822/> (last visited Jan. 12, 2010).

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 developing country poor 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 enhanced access to 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.³⁰ One could hardly be comfortable with migrants financing the bonds that underlie their visas to the U.S. in the black market, with a shadowy world of money lenders and coyotes extending loans (although ironically, this is precisely what transpires now, when undocumented workers borrow money through deferred financing from the same coyotes who surreptitiously transport them across the border). Although there is virtually nothing in the legal scholarship³¹ on either secured or unsecured lending at the “bottom of the pyramid” in developing countries,³² a realistic assessment of the current state of lending

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 sub-prime borrowers in the U.S. 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 http://www.newamerica.net/programs/education_policy/higher_ed_watch/student_loan_scan and <http://www.naacp.org/news/press/2009-03-13/index.html> (summarizing lawsuits on predatory lending).

³¹ Michael Barr and Ronald Mann’s work on financial services for low-income Americans is a model of the type of work that would be helpful on financial services for the developing country poor. See, e.g., Chapters 3 and 8 in BARR AND BLANK, *supra* note 23. 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 (DONALD B. KING ED., WILLIAM S. HEIN & CO., INC., 1992), which includes a brief discussion on the issue.

³² The term “bottom of the pyramid” was first used by President 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

to the poor (as discussed in the development finance literature) 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.”³³ For the poor, this has generally resulted in “no loan.”³⁴ 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. The question becomes: what would it take to create incentives for bankers in the developing world to finance visa-bonds in the formal sector? To elucidate this question, the author 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,” that is the 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 they

generally C.K. PRAHALAD, *THE FORTUNE AT THE BOTTOM OF THE PYRAMID* (2006) (popularizing the term and advocating market-based solutions to poverty); Stuart Hart, *Capitalism at the Crossroads* (2005) (same); *but see* Aneel Karnani, *The Fortune at the Bottom of the Pyramid: A Mirage*, 49/4 *Cal. Management J.* 90, 111 (2007) (pointing out the deficiencies of the term).

³³ In this particular instance, I utilize the term “collateral” here 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 “collateral 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 generally 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 is something of value pledged to the lender that can be enforced against 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 non-compliant alien.

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

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 evaluate the applicant's risk profile as a condition of extending the loan. In so doing, the proposal seriously mitigates the challenges of enforcing loan contracts, while simultaneously mitigating the challenges that the U.S. government currently experiences in evaluating the risk profiles of potential migrants. Notably, these visas would be modeled³⁵ on other government licenses that function as collateral-like devices.³⁶ In the world as it could be, labor mobility would have become 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. 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 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 with 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 U.S. 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 non-compliant alien has exited the U.S.; the bank or its agent will have incentives to either "snitch" or encourage the alien to self-deport.

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 Eleanor Brown, *Visa as New "New Property," (Work in Progress)*.

³⁶ Taxi-cab medallions, for example, are among the licenses that are routinely used in secured transactions. See, e.g., Katrina Wyman, *Is Bentham Right?: The Case of New York City Taxicab Medallions* (on file with author).

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. Developing country legal systems may have no credibility with their banking sectors. Banks make deals, that is, specific accommodations for individual borrowers, rather than relying on rules.³⁷ In contrast, the American government is considered a credible threat-maker. Banks will not have cut deals because they will be secure in the knowledge that the U.S. 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 commodification³⁸ since market-based mechanisms of allocation are considered inappropriate in distributing certain quasi-public goods.³⁹ 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 accomplishes immigration law goals in a manner that reduces “subterfuges,” and renders the choices made somewhat less “tragic,” particularly for the poor.

³⁷ I am indebted to Lant Pritchett for pointing this out to me. See Hallward-Dreimer, et al., *Deals versus Rules: Uncertainty in Policy Implementation in Africa* (Feb. 27, 2009)(unpublished manuscript, National Bureau for Economic Research).

³⁸ See MARGARET RADIN, *CONTESTED COMMODITIES* (1996) (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).

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 the *RETHINKING COMMODIFICATION* (MARTHA ERTMAN AND JOAN WILLIAMS, eds 2005.), See Martha M. Ertman & Joan C. Williams, *Preface: Freedom, Equality, and the Many Futures of Commodification*, 1-7; Margaret Jane Radin and Madhavi Sunder, *Introduction: The Subject and Object of Commodification*, 8-29 in *RETHINKING COMMODIFICATION: CASES AND READINGS IN LAW AND CULTURE* (eds. MARTHA M. ERTMAN and JOAN C. WILLIAMS, 2005).

Part 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 him to take a house-keeping position on an American 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 past 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.⁴⁰ Since the military employs contractors who utilize guest workers in Kuwait, the American government is regularly involved with such bonding arrangements, albeit often indirectly.⁴¹

⁴⁰ Typically, the amounts 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* (Nov. 13 2007) at iv. noting that bonds are typically prohibitive for the average Sri Lankan in relation to their PPP (purchasing power parity). The PPP of an average citizen in Sri Lanka is USD 4,460. 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 (food, shelter etc.) World Bank, *Gross National Income Per Capita, Atlas Method and PPP*, <http://siteresources.worldbank.org/DATASTATISTICS/Resources/GNIPC.pdf>. The average bond appears to exceed the amount needed to deter non-compliance; it may include excess (and perhaps illicit) rents for labor brokers and government officials.

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

Now let us move to the United States and consider an American 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 non-compliant in the past.⁴² Although rarely articulated in this manner, U.S. immigration law generally addresses this challenge by utilizing a two-fold strategy that is familiar from 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

who posts the bond or ensures that such bond is posted by the South Asian guest worker. Given that the guest worker is typically unbanked with no access to credit; he generally borrows this money from the labor broker who arranges his visa and his job. He signs a contract under which his salary is paid to the labor broker until the load is repaid. It appears that implicit interest rate is very high. Interview with Nasra Shah, University of Kuwait.

⁴² The reader should be aware that the guest worker visas that are discussed in this Article raise profound questions of justice, which are beyond the scope of this paper 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: 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; whether these programs undermine wages and workplace protections for both guests and native workers; and whether such programs legitimate 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. *See, e.g.*, 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); *see also* CANADIAN POLITICAL PHILOSOPHY AT THE TURN OF THE CENTURY: EXEMPLARY ESSAYS (R. BEINER and W. NORMAN eds., 2000); JOSEPH H. CARENS, CULTURE, CITIZENSHIP, AND COMMUNITY: A CONTEXTUAL EXPLORATION OF JUSTICE AS EVENHANDEDNESS (2000); DUAL NATIONALITY, SOCIAL RIGHTS AND FEDERAL CITIZENSHIP IN THE U.S. AND EUROPE: THE REINVENTION OF CITIZENSHIP (RANDALL HANSEN & PATRICK WEIL eds., 2002); Louis Michael Seidman, *Fear and Loathing at the Border*, in JUSTICE IN IMMIGRATION 136, 140 (WARREN F. SCHWARTZ ed., 1995); 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). For a discussion of the impact of low-skilled alien workers on wages of citizen workers, see generally GEORGE BORJAS, FRIENDS OR STRANGERS: THE IMPACT OF IMMIGRANTS ON THE U.S. ECONOMY (1990) (noting the disproportionate impact on the most disadvantaged, including urban residents and African Americans). *See also* MOTOMURA, AMERICANS IN WAITING *supra* note 10; Jennifer Gordon, *Transnational Labor Citizenship*, *supra* note 18; Cristina M. Rodríguez, *Guest Workers and Integration*, *supra* note 18.

ascertain historical and likely future behavior of any visa applicant, including prospective guest workers (by mandating, for example, in certain instances that the applicant must provide evidence of past good behavior such as police reports and the evidence of likely good behavior in the future such as assets in the home country to which the visa applicant is likely to return).⁴³ Second, in an effort to buttress the accuracy of the applicant's assertions regarding historical behavior, it also asks the applicant to provide assurances and that the information provided is accurate.⁴⁴ In the event that the information

⁴³ See INA §§ 101, 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. [. . .]; (b) Every alien 10/ (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) (ii) (a) 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 3bbb/ 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., U.S. Department of State, *Visitor Visa- Business and Pleasure*, available at http://travel.state.gov/visa/temp/types/types_1262.html, (“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 That 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 DS-156: Department of State Nonimmigrant Visa Application, available at <https://evisaforms.state.gov/ds156.asp>, (“41. I certify that I have read

shared by the migrant in the due diligence process turns out later to be false, the penalty is usually visa-revocation.⁴⁵ However, given the high overstay rates among temporary visitors,⁴⁶ it is apparent that the traditional emphasis on due diligence and assurances, and the threat of visa revocation in the face of false statements, has not been effective.

B. *A Potential Solution: The Kuwaiti Approach*

This is a quintessential case of information asymmetry, in which one party to the transaction knows more about a relevant fact than the other party. The applicant is highly likely to know more than the immigration officer about facts which are critical to determining whether she should receive a visa. 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.”⁴⁷ The economics literature provides an obvious solution to problems of information

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.”).

⁴⁵ 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 warnings to other temporary admittees of the possibility of visa-revocation may serve as a guide. U.S. Department of State, *Visitor Visa- Business and Pleasure*, available at http://travel.state.gov/visa/temp/types/types_1262.html (“Misrepresentation of a Material Facts, or Fraud: Attempting to obtain a visa by the willful misrepresentation of a material fact, or fraud, may result in the permanent refusal of a visa or denial of entry into the United States.”).

⁴⁶ McKinley and Preston, *supra* note 9.

⁴⁷ In the Kuwaiti fact pattern, if the American military employer posts the bond itself, the Kuwaiti government has essentially outsourced the gate-keeping function to the American military. However, the American 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 gate-keeping function to the labor/bond-broker.

asymmetry and it is the Kuwaiti answer: prospective migrants should be required to post bonds.⁴⁸

There are two distinct situations in which the gate keeper 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?

In the ensuing analysis, I distinguish between information regarding 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 be a predictor of future behavior (indeed, one could imagine making this case statistically). However, the applicant's historical behavior can be differentiated from her future behavior because future commitments necessarily involve moral hazard.

⁴⁸ For a good high-level introduction to the role of bonds in the legal scholarship, David Charny, *Nonlegal Sanctions in Commercial Relationships*, 104 HARV. L. REV. 375 (1990) Charny discusses two other types of non-legal sanctions including reputational sanctions and the loss of psychic goods such as self-esteem. In a previous paper, I discussed both these typologies of non-legal sanctions in the context of immigration. See Eleanor Brown, *Outsourcing Immigration Compliance*, 77 Fordham Law Review 2475 (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 (1999). Jeffrey Manns briefly discusses the potential advantages of bonds in the immigration context. Jeffrey Manns, *supra* note 15. For discussions of bonding in the context of gatekeeping, see also, Stephen J. Choi, *Market Lessons for Gatekeepers*, 92 NW. U. L. Rev. 916 (1998); Stephen J. Choi, *Regulating Investors Not Issuers: A Market-Based Proposal*, 88 CAL. L. REV. 279 (2000); Reinier H. Kraakman, *Gatekeepers: The Anatomy of a Third-Party Enforcement Strategy*, 2 J.L. ECON. & ORG. 53, 54 (1986). Papers which discuss economic models of bonding arrangements include Klein & Leffler, *The Role of Market Forces in Assuring Contractual Performance*, 89 J. POL. ECON. 615 (1981); L. Telser, *A Theory of Self-Enforcing Agreements*, 53 J. BUS. 27 (1980); and the seminal Williamson article, *supra* note 11, at 519.

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 she will be caught lying by the gatekeeper); it will also have an ongoing effect, so that the applicant is continuously motivated to abide by her visa terms in the future. Notably, the foregoing Kuwaiti bonding arrangement accomplishes both 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, and in both cases, deportation ensues as well. In the American fact pattern, unlike the Kuwaiti fact pattern, there is no ongoing mechanism of motivating future compliance other than the threat of visa-revocation and subsequent deportation (which lack 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.⁴⁹

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

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 14. The ugly princess has since been updated to the "puny prince." See Robert Scott, *A Relational Theory of Secured Financing*, 86 COLUM. L. REV. 901, 930 (1986). Other writers have recognized the importance on 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); Timothy J. Muris, *Opportunistic Behavior and the Law of Contracts*, 65 MINN. L. REV. 521, 527 (1981); D. Gordon Smith, *Venture Capital Contracting in the Information Age*, 2 J. SMALL & EMERGING BUS. L. 133, 138-40 (1998).

applicant. If it relates to 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.⁵⁰

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 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.⁵¹ One obvious institutional design solution to this challenge is to ensure the establishment of a transparent mechanism with independent judges to determine the circumstances under which forfeiture is appropriate. While this innovation should mitigate this danger, it would still be ideal to design a bond that reduces the incentives for the gatekeeper to act

⁵⁰ Mann, *supra* note 48.

⁵¹ Human Rights Watch, *Bad Dreams: Exploitation and Abuse of Migrant Workers in Saudi Arabia* (July 13, 2004). 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 travelled 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 (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. See KITTY CALAVITA, *INSIDE THE STATE: THE BRACERO PROGRAM, IMMIGRATION AND THE I.N.S.* (1992); BARBARA A. DRISCOLL, *THE TRACKS NORTH: THE RAILROAD BRACERO PROGRAM OF WORLD WAR II*, at 53–55 (1999); ERNESTO GALARZA, *MERCHANTS OF LABOR* (1964).

opportunistically even while it continues to provide a sufficient deterrent to the visa-holder.

There are other institutional design innovations that might lower the likelihood of opportunism by gatekeepers. For example, in the contracting context, the literature discusses asymmetrically punitive bonds, in which the applicant posts a bond which has value that is 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, inherited land et al.), and as such, might meet these criteria.⁵² In so doing, the bond becomes far more valuable to the applicant than to the gatekeeper.

The larger point is that an appropriately designed bond should be not 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 the next 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

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, *supra* note 48, 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." Such an arrangement would perhaps have greater applicability if the government outsourced the gate-keeping function to some other entity (such as in the Kuwaiti example above).

financiers will have incentives to ensure that 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 of estimating and pricing risk, and enforcing credit terms.⁵³ 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.⁵⁴

There is an additional advantage of the involvement of financial intermediaries. Bonding mechanisms provide additional information from other sources (known in the literature as “second order” information), which allows the gatekeeper a more reliable mechanism of determining the accuracy of the applicant’s original assertion (“first order” information). Notably the reliability of the second order information does not arise simply from the fact that its source is some entity other than the applicant. Rather, 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.⁵⁵ An additional advantage of such a proposal would be that financial intermediaries would be properly motivated to independently verify the reliability of the information as a condition of extending a loan: indeed, this likely would constitute an essential part of their underwriting process.

⁵³ STUART RUTHERFORD, *THE POOR AND THEIR MONEY*, Introduction, (2001).

⁵⁴ *Id.* 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 Professor Mann makes this point. Mann, *supra* note 48.

E. The Relative Advantages of Bonding Arrangements

1. Context Sensitivity

The due diligence process provides little context sensitivity; at times the due diligence process over-reaches, and at other times it under-reaches, 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.⁵⁶ 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.⁵⁷

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

⁵⁶ Martin and Teitelbaum, *supra* note 9; Demetrios G. Papademetriou, *Migration*, 109 FOREIGN POLICY, Winter 1997-98, at 15-31; Demetrios G. Papademetriou and Nicholas DiMarzio, *A Preliminary Profile of Unapprehended Undocumented Aliens in Northern New Jersey: A Research Note*, 19 INT'L MIGRATION REV., 746-59 (Winter 1985); Demetrios G. Papademetriou, *European Labor Migration: Consequences for the Countries of Worker Origin*, 22 INT'L STUDIES QUARTERLY 3, 377-408 (1978).

⁵⁷ Martin and Teitelbaum, *supra* note 9.

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

2. Changing the Default Rule of Non-Enforcement

Moreover, not only do bonding systems theoretically provide context sensitivity, they also change what I will refer to as the “default rule of non-enforcement” for visa non-compliance. Economic sociologists who study immigration have demonstrated that documented aliens who become undocumented are easily absorbed into dense ethnic networks that facilitate employment in the absence of documentation.⁵⁸ Public enforcers generally are unable to penetrate these networks without incurring extraordinary costs.⁵⁹ 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.⁶⁰

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 non-enforcement.⁶¹ On the other end of the continuum is enforcement under a

⁵⁸ See Alejandro Portes, *Preface*, in *THE ECONOMIC SOCIOLOGY OF IMMIGRATION: ESSAYS ON NETWORKS, ETHNICITY, AND ENTREPRENEURSHIP* (ALEJANDRO PORTES ed. 1995).

⁵⁹ See Introduction in DAN KANSTROOM, *DEPORTATION NATION: OUTSIDERS IN AMERICAN HISTORY* (2007).

⁶⁰ For good reason, Manns refers to the typical undocumented alien as “judgment proof.” Jeffrey Manns, *supra* note 17.

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. Stephen H. Legomsky, *The New Path of Immigration Law*, *supra* note 13 at 469 (arguing that theories of deportation overlap so substantially with those of criminal punishment

bonding system, under which full enforcement against a non-compliant 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 non-enforcement particularly if an applicant defaulting on a bond (and presumably on the loan) tarnishes her reputation with her home-country bank and neighbors.⁶²

Moreover, with institutional design innovations, one may substantially increase the likelihood of deportation and thus, full enforcement. For example, as discussed in Section 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 arranging for part of the bond to be given back to the alien, on the condition of her return home. While some may argue that 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),⁶³ self-deportation nevertheless accomplishes the same practical purpose – excluding the alien from the United States.⁶⁴ Moreover, such alien

that deportation should at least sometimes be regarded as a form of punishment) and Daniel Kanstroom, *Deportation, Social Control, and Punishment: Some Thoughts about Why Hard Laws Make Bad Cases*, 113 HARV. L. REV., 1890-1935 (2000).

⁶² Indeed, one might even argue that as long as the government retains the bond, the “half-way” 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 also*, KANSTROOM, *supra* note 64, at Introduction; Dan M. Kahan, *Between Economics and Sociology: The New Path of Deterrence*, 95 MICH. L. REV. 2477 (1997) (articulating the importance of the “expressive” function of punishment); *see also* Tracey L. Mearns, *Social Organization and Drug Law Enforcement*, 35 AM. CRIM. L. REV. 191 (1998) (same); Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903 (1996) (same).

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. *See* WALL ST. J. OPINION ARCHIVES, *Is Cannon Fodder? One GOP Congressman May Lose His*

exclusion would have been accomplished at a substantially lower cost than typically is incurred by the government under the current system.⁶⁵

Part II: INCENTIVITIZING FINANCIAL INTERMEDIARIES

The Proposal in Broad Outline

This section will discuss why unconventional mechanisms of enforcing loan agreements are essential to banks in developing countries. The proposed institutional innovations for visa-as-collateral are inspired by these insights.⁶⁶ I begin by laying out the proposal in broad outline.

Seat for His Pro-Immigration Views, While Another Offers a Compromise, <http://www.opinionjournal.com/diary/?id=110008446> (last visited January 10, 2010). Blog postings indicate that some immigration law scholars and practitioners are skeptical. *See, e.g.*, Posting of Frank Sharry to ImmigrationProf Blog, <http://lawprofessors.typepad.com/immigration/2008/07/ice-self-deport.html> (July 30, 2008) (expressing skepticism); Posting of Kevin Johnson to ImmigrationProf Blog, <http://lawprofessors.typepad.com/immigration/2008/08/government-ads.html> (Aug. 13, 2008) (same).

⁶⁵ *See* Jacoby, *supra* note 64.

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 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. I briefly mention a few obvious differences. First, visas are not typically assignable. (For a discussion of how this might theoretically be done, the software model is useful, *see*, Ronald Mann *Secured Credit and Software Financing*, 85 CORNELL L. REV. 134, 151-53 (1999).) Thus, they would hardly constitute general intangibles in U.C.C. terms. (*See* American Law Institute 2005 discussion of U.C.C. § 9-106) 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*, 82 CORNELL L. REV. 1373, 1386-87 (1997) (noting that there are ethical lines which limit security such as the prohibition on servitude). For a general discussion of the prohibition of debt servitude *see*, *see* Lynn M. LoPucki & Elizabeth Warren, *Secured Credit: A Systems Approach* 759-72 (2009). 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

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 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 not only with respect to financial compliance. Although this would normally be the bank’s primary concern, for its own underwriting purposes the bank will also be obligated to assess the likelihood of visa-compliance.

Recall that it is unlikely that the typical applicant will 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 U.S. 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 gate-keeping function and finance the bond, the critical move is for the U.S. government to address the bank’s own difficulties in enforcing loan contracts. To this end, the U.S. government will tie visa compliance to loan compliance.

The U.S. government would make 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

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 mean 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.

event of a default, the bank can be secure in the knowledge that there is an implicit penalty, namely non-renewal of a visa.

Second, if the applicant does not comply with her visa terms, thus 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 non-compliant 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.

A. *Interviews with Jamaican Guest Workers and Lenders*

The author 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. These consisted of focus groups with Jamaican subsistence farmers who have traveled to North America as agricultural guest workers.⁶⁷ The findings are summarized as follows.

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

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 Ronald Mann, *Secured Credit and Software Financing*, 85 CORNELL L. REV. 134, 151-53 (1999) (conducting a qualitative field study of software companies and their bankers). For an article that summarizes the influence of ethnographic work on compliance in the context of criminal law, see Dan M. Kahan, *Between Economics and Sociology: The New Path of Deterrence*, 95 MICH. L. REV. 2477 (1997). See also Tracey L. Meares, *Social Organization and Drug Law Enforcement*, 35 AM. CRIM. L. REV. 191 (1998) (same), Tracey L. Meares & Dan M. Kahan, *Law and (Norms of) Order in the Inner City*, 32 LAW & SOC’Y REV. 805, 809–13 (1998) (same).

bifurcation in their attitudes towards formal financial intermediaries. While they generally had skeptical attitudes to formal financial intermediaries because of perceived hostile lending practices, they simultaneously believed that they had a better chance of obtaining loans than their similarly situated non-migrant peers, because of their healthy revenue streams while working overseas in the form of remittances.

The author 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 re-possession of collateral by state actors, even if they received favorable judgments in Jamaican courts.

The proposed institutional innovations of visa-as-collateral discussed in the ensuing section (IV) are influenced by the interview findings.

B. 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.⁶⁸ The research design was entirely qualitative and the study methodology was multi-method in focus.⁶⁹ 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. The typical subject was a resident of a rural Jamaican community, who had previously been a guest worker visa and

⁶⁸ See, e.g., RUTHERFORD, *supra* note 53; See also COLLINS, *supra* note 24.

⁶⁹ I acknowledge the work of Mr. Densil Reid, who has significant experience in fieldwork in rural agricultural populations.

expressed an interest in working in North America again.⁷⁰ All interviews and interview notes are on file with the author.⁷¹

C. Summary of Focus Group Findings

The author explained the bonding proposal to the focus-group participants. Although the author 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 North America.⁷²

Most respondents described themselves as being "well-off" in relation to their similarly situated non-migrant neighbors, due largely to their overseas earnings. Most emphasized that prior to their initial receipt of a

⁷⁰ Although tourism workers are now eligible to access the U.S. as guest workers, in the Jamaican context, these persons are not understood to be low-skilled since they have received some formal training in trade schools, and complete tests to gain certifications. As such, I restricted the sample to persons who are understood in the Jamaican context to be "low-skilled," namely agricultural workers. Their access to overseas labor markets is 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 in 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., 378-411 (1982).

⁷¹ In keeping with 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.

⁷² 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 American guest workers (as opposed to Canadian guest workers). See also Survey of Living Conditions, published by Sir Arthur Lewis Institute of Social and Economic Studies, University of the West Indies and the Planning Institute of Jamaica. The most recent online data set is for 2007. <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 U.S. The average 35 year old Jamaican in the U.S. with 9 years of education earns 3.63 times what he would earn in Jamaica. See Clemens et al, *supra* note 19.

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.

Focus group participants also indicated that they might have access to financing through other sources; notably, these sources were all informal. The predominant mechanism of financial intermediation appeared to be informal savings clubs or “partners,” the indigenous parlance for Rotating Savings and Credit Associations (ROSCAs),⁷³ organized by church groups, community clubs and farming associations.⁷⁴ 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).⁷⁵ However, although they were aware of this program in the abstract, they appeared overwhelmingly skeptical that they would be 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

⁷³ Timothy Besley et al., *The Economics of Rotating Savings and Credit Associations*, in READINGS IN THE THEORY OF ECONOMIC DEVELOPMENT (DILIP MOOKHERJEE & DEBRAJ RAY eds., 2001) at 792-93, describe ROSCAs as follows: “members 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.”

⁷⁴ 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* (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>.

⁷⁵ This institution is Jamaica National.

many seemed unwilling to put at risk.⁷⁶ Nevertheless, they expressed the view that, theoretically, they should be in a better position than their peers to access loan financing given that they already had superior access to informal financial intermediation (in the form of ROSCAs) and they were known in their communities for their overseas earnings.⁷⁷

D. *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

⁷⁶ Indeed, Field et al. and Galiani et al. have found a similar unwillingness to put homes at risk to access loans among the urban poor in several Latin American cities. Sebastian Galiani and Ernesto Schargrotsky, *Property Rights for the Poor: Effects of Land Titling*, Centro de Investigacion en Finanzas at 26 (Working Paper, Aug. 9, 2005), available at http://www.utdt.edu/Upload/CIF_wp/wpcif-062005.pdf; Erica Field and Maximo Torero, *Do Property Titles Increase Credit Access Among Urban Poor? Evidence from a Nationwide Titling Program* at abstract (Working Paper, Jan. 2004) at 5, available at <http://www.economics.harvard.edu/faculty/field/files/FieldToreros.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, there was a sudden surge of Pakistani farmers traveling overseas as guest workers. Economists found 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 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 “a vacuum in . . . rural credit facilities.” Interestingly, the rate of migration was highest among members of the land-owning castes that had title to their land, but were generally unable to access credit at home. Having migrated, they were then better able to access credit than their non-migrant peers. Alain Lefebvre “International Labor Migration from Two Pakistani Villages with Different Forms of Agriculture,” *Pakistan Development Review*, 29: 1-20 (1990) in MASSEY ET AL (EDS.), *WORLDS IN MOTION: UNDERSTANDING INTERNATIONAL MIGRATION AT THE END OF THE MILLENNIUM* (2005). A similar study of migration patterns of Egyptian guest workers who had previously been farmers found similar results. The primary rationale for migration appeared the inability to access credit at home to upgrade their farms. Richard H. Adams, *Worker Remittances and Inequality in Rural Egypt*, 38 *ECONOMIC DEVELOPMENT AND CULTURAL CHANGE* 45-71 (1989).

⁷⁷ Manuel Orozco, *Remittances in Latin America and the Caribbean: Their Impact on Local Economies and the Response of Local Governments* in the *DECENTRALIZATION AND THE CHALLENGES TO THE DEMOCRATIC GOVERNANCE BY THE ORGANIZATION OF AMERICAN STATES* (Oct. 2008) at 35.

informal economy⁷⁸ and the same is true for poor migrants. Typically poor migrants are unable to obtain visas and must locate a “coyote,” namely, an underground broker⁷⁹ who is willing to transport them through clandestine cross-border networks and then seek financing for coyote fees.⁸⁰ Coyote fees are typically prohibitive for the average migrant.⁸¹ Migrants who already have social networks in the United States can take low-interest loans from their friends or family or from informal savings clubs, which are generally sustained by remittances from relatives overseas; this appears to be a popular method of financing.⁸² 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% to 120% depending on the particulars of the local market).⁸³

Migrants also have another option: they may obtain financing from a coyote. The implicit interest rates charged by coyotes appear to be

⁷⁸ RUTHERFORD, *supra* note 53, at 32.

⁷⁹ The sociologist, David Spener has conducted ethnographic research on how Mexican migrants finances, which includes informal work on coyote transportation. For a representative publication that includes some of this work see, David Spener, *Self-Employment Concentration and Earnings Among Mexican Immigrants in the U.S.*, 77 SOCIAL FORCES, (Mar. 1999). 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.

⁸⁰ For example, the average coyote fee from Mexico is US\$2500, 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 US\$7600, rural Mexicans are considerably poorer. World Bank, *Mexico at a Glance*, http://devdata.worldbank.org/AAG/mex_aag.pdf.

⁸¹ The equivalent figure from Guatemala is roughly US\$10,000 -- which is nearly three times the average per capita income of a Guatemalan and from El Salvador the figure is in excess of US\$10,000, which is more than three times the average per-capita income. Interview with Spener, World Bank, *Gross National Income Per Capita, Atlas Method and PPP*, <http://siteresources.worldbank.org/DATASTATISTICS/Resources/GNIPC.pdf>. Miriam Jordan, *Latest Immigration Wave: Retreat*, WALL ST. J., (Oct. 2, 2008) (finding that Guatemalan migrant paid \$5,700 in initial coyote fees, but after interest amount totaled \$10,000).

⁸² Jordan, *supra* note 81.

⁸³ *Id.*

exorbitant, exceeding even the very high rates of local money-lenders.⁸⁴ The willingness of coyotes to extend credit appears to depend on a number of factors beyond the perceived default-risk of the client, including the coyote's capability to enforce informal "loan contracts" if a borrower defaults, their historical tenure in the coyote business and their overhead costs.⁸⁵ There is evidence that even under conditions where border passage is not clandestine, these conditions may still persist. For example, although migration from South Asia to the Gulf is almost entirely documented (i.e. migrants have valid visas), money lenders and labor brokers appear to enforce loan contracts for migration expenses with explicit and implicit threats of violence.

E. *The Background Legal Context*

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

Oscar R. Benavides, Former President of Peru⁸⁶

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 non-collateral based (i.e. unsecured) lending, most engage in micro-lending.

Lenders cited as a primary factor in firms' reluctance to lend to the poor was 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;

⁸⁴ *Id.*

⁸⁵ Interview with Spener. 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; *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).

⁸⁶ I am grateful to Lant Pritchett for pointing out this quotation to me.

- 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. Notably, the interviewees articulated two independent stains of concerns regarding institutional quality. First, there is a concern regarding the institutional quality of the judicial branch (i.e. 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.

F. *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.⁸⁷ 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.⁸⁸ Yet, the empirical evidence regarding this particular

⁸⁷ This finding is also supported by Galiani et al, *supra* note 76; Field et al, *supra* note 76.

⁸⁸ Hernando De Soto's work advocacy of titling programs among the third world poor is the most well-known example of this approach. HERNANDO DE SOTO, *THE OTHER PATH: THE ECONOMIC ANSWER TO TERRORISM* (1989); HERNANDO DE SOTO, *THE MYSTERY OF CAPITALISM: WHY CAPITALISM TRUMPS IN THE WEST, AND FAILS EVERYWHERE ELSE* (2000). *See also*, Introduction to ROBERT COOTER AND HANS-BERND SCHAEFER, *LAW AND POVERTY OF NATIONS*, (Jan. 10, 2010) (unpublished book manuscript, on file at http://works.bepress.com/robert_cooter/144); Michael J. Trebilcock & Paul-Erik Veel, *Property Rights and Development: The Contingent Case for Formalization*, 30 U. PA. J. INT'L L. 397 (2008); Paul G. Mahoney *The Common Law and Economic Growth: Hayek Might Be Right*, 30 J. LEGAL STUD. 503 (2001); Richard A. Posner, *Creating a Legal Framework for Economic Development*, *The World Bank Research Observer*, Vol. 13, No. 1 (1998), *but see* Introduction to MARK GOODALE AND SALLY E. MERRY, *THE PRACTICE OF HUMAN RIGHTS: TRACKING LAW BETWEEN THE*

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.⁸⁹ My interviews in Jamaica suggested that the fundamental challenge is as follows: just as important as recognizing an owner's possession (and the repossession rights of a secured creditor in the event of a default) is the existence of a reliable legal system to which a bank can turn to enforce a loan contract and its repossession rights.⁹⁰

2. Bank Structure Contracts That Enable Them to Extract a Penalty From the Borrower, Without Resorting to the Formal Legal System

When these bankers typically 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: 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.⁹¹ It is this innovation that appears to account 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

GLOBAL AND THE LOCAL (2007) (expressing doubts about the faith other scholars have placed in asset building as a strategy for poverty alleviation).

⁸⁹ Galiani et al., *supra* note 76; Field et al., *supra* note 76.

⁹⁰ 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 Outreach and Performance: A Global Analysis of Leading Microbanks* 117 *Economic Journal* 107 (2007).

⁹¹ Notably, in most micro-lending 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 ARMENDARIZ DE AGHION, et al., *THE ECONOMICS OF MICROFINANCE*, Ch. 3 (2005).

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. Synergies with Relational Theories of Financing

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.⁹² 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.⁹³ 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.⁹⁴ In conditions of informality, cash diversion is more likely to occur and more difficult to detect. In response to these challenges, traditional financial institutions have generally required collateral.⁹⁵

While the traditional view has been that lenders value the right of liquidation in a secured transaction, this theory is less plausible under these 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.⁹⁶ Relational theories are skeptical of the notion that lenders pursue secured

⁹² *Id.* at 21.

⁹³ A good summary is included in Bond and Rai, *supra* note 30.

⁹⁴ The Introduction to ARMENDARIZ DE AGHION et al., *supra* note 91, provides an excellent summary of this literature.

⁹⁵ *Id.*

⁹⁶ 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.

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.⁹⁷

Notably, 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.⁹⁸

It seems particularly applicable in the conditions of informality which characterize the 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 a range of risk-pooling arrangements 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.⁹⁹ In such close-knit communities, it is difficult for a borrower to keep private his difficulties with

⁹⁷ 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 "[p]ower [as opposed to monitoring] "); Ronald J. Mann, *The Role of Secured Credit in Small-Business Lending*, 86 GEO. L.J. 1, 11-26 (1997) [hereinafter Mann, *Small-Business Secured Credit*] (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); Ronald J. Mann, *Verification Institutions in Financing Transactions*, 87 GEO. L.J. 2225, 2244-47 (1999) [hereinafter Mann, *Verification Institutions*] (same); 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 47, 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).

⁹⁸ Triantis, *supra* note 97. While Triantis does not use the phrase in this context, it seems particularly applicable.

⁹⁹ See generally, Barr et al., *supra* note 74, at 25. (Abigail Barr, et al.)

his bankers. Rural Jamaican farmers are like the famous Ellicksonian ranchers;¹⁰⁰ “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.¹⁰¹

G. *Visas as New “New Property”*¹⁰²

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 conceptualize a visa in this manner?

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

In a seminal article forty years ago, Reich noted that an increasing number of persons derived their wealth from their relationships with the federal government. He identified a range of benefits which derived from government largesse and famously named them “the new property.”¹⁰³

¹⁰⁰ ROBERT C. ELLICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* (1991).

¹⁰¹ 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 14.

¹⁰² The term is Blocher’s play on Reich’s term. See Blocher, *supra* note 35.

¹⁰³ 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. The proposal is not that the visa would constitute actual collateral, but rather that the visa would serve similar purposes for a secured lender 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. I briefly mention a few obvious differences. First, even if the federal government were to create property rights in visas, visas are not typically assignable. (For a discussion of how this might theoretically be done, the software model is useful, *see*, Ronald 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* American Law Institute 2005 discussion of U.C.C. § 9-106) Second, even if there were an assignable property right in a federally issued visa (as a license), there

Specifically, Reich noted that public law entitlements were increasingly fulfilling goals that had traditionally been associated with private law and a market economy, for example, providing millions of Americans 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 it is true that 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 (e.g., 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

would undoubtedly be concerns regarding debt servitude. *See, e.g.*, Elizabeth Warren, *Making Policy with Imperfect Information*, 82 Cornell L. Rev 1373, 1386-87 (1997) (noting that there are ethical lines which limit security such as the prohibition on servitude). For a general discussion of the prohibition of debt servitude see, see Lynn M. LoPucki & Elizabeth Warren, *Secured Credit: A Systems Approach* 759-72 (2009). For a more detailed discussion of the evolution of the prohibition on debt servitude, see Peter J. Coleman, *Debtors and Creditors in America: Insolvency, Imprisonment for Debt, and Bankruptcy, 1607-1900*, at 41, 77, 138, 147 n.11, 164-65, 218-19 (1974). 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.

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. Indeed, some economists have pointed out that visas bear strong analogies to partial monopolies in other arenas.¹⁰⁴ In part by limiting their number, the government has made U.S. visas extremely remunerative for the lucky few who receive them.¹⁰⁵ It is difficult to dispute that visas create huge financial windfalls for recipients.¹⁰⁶

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.”¹⁰⁷ Sociological studies demonstrate that visas confer reputational benefits on visa recipients that they are able to monetize in myriad ways while they are in the United States.¹⁰⁸ Moreover, these reputational benefits extend to their

¹⁰⁴ 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 needed and which have few natural barriers to entry.

¹⁰⁵ 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 (discussing testimony of Bill Gates on highly skilled visas).

¹⁰⁶ 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.

¹⁰⁷ *See generally* Blocher, *supra* note 35. 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.

¹⁰⁸ Sociological studies demonstrate that because visa recipients from certain communities have historically done well in the United States, they have built reputational capital from which future visa recipients also benefit. For example,

families in their countries and communities of origin, where they also are monetized.

Reputations, and the corresponding ability to monetize them, may be augmented or diminished depending on whether aliens maintain their visas and remain providers for their families and communities of origin. While there is little doubt that simply by virtue of the countries and communities from which they originate¹⁰⁹ migrants remain subject to extreme credit rationing,¹¹⁰ the interviews of Jamaican migrant workers and professional lenders support other studies indicating that visas confer reputational benefits

Cuban migrants generally are 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 U.S. for which there typically have been high barriers to entry for native-born Americans. See Alejandro Portes, *The Social Origins of the Cuban Enclave Economy of Miami*, 30 SOCIO. PERSP. 340, 363 (1987); Robert W. Fairlie and Bruce D. Meyer, *Ethnic and Racial Self-Employment Differences and Possible Explanations*, 31 J. OF HUM. RESOURCES 757-93 (1996); Alejandro Portes and Leif Jensen, *The Enclave and the Entrants: Patterns of Ethnic Enterprise in Miami Before and After Mariel*, 54 AM. SOCIO. REV. 929-49 (1989).

¹⁰⁹ As economists have sought to explain why firms in developing countries do not always avail themselves of the best opportunities that are available, a primary contributing factor appears to be credit constraints. For a good summary of this literature, see Abhijit Banerjee and Esther Duflo, *Reputation Effects and the Limits of Contracting: A Study of the Indian Software Industry*, 115 Q. J. OF ECO. 989 (2000); Oded Galor and Joseph Zeira, *Income Distribution and Macroeconomics*, 60 REV. OF ECO. STUD. 35 (1993).

¹¹⁰ 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 Niloy Bose & Richard Cothren, *Asymmetric Information and Loan Contracts in a Neoclassical Growth Model*, 29 J. MONEY, CREDIT & BANKING 423, 429-30 (1997) (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 Introduction to the 1989 World Bank Annual report. World Bank, *Financial Systems and Development* (1989). Two other works that provide excellent summaries are BASU KAUSHIK, *THE LESS DEVELOPED ECONOMY: A CRITIQUE OF CONTEMPORARY THEORY* (1984); James R. Tybout, *Credit Rationing and Investment Behavior in a Developing Country*, 65 Review of Economics and Statistics, 598-607 (1983).

that allow some recipients to obtain credit that normally would not be available to them.¹¹¹

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 derivative of the reputational benefits associated with visas. Banks appear more willing to extend credit if some external entity has vetted the prospective borrower. 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,¹¹² 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.¹¹³

¹¹¹ The discussion in footnote *supra*, note 76, concerning improved credit access for Pakistani and Egyptian migrant farmers supports this conclusion.

¹¹² 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 (2007).

¹¹³ My interviews with loan officers in the formal Jamaican banking sector who service the poor supported these views. I identified a few banks which 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 Central 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 Jamaica National Building Society (“JN”), which services Caribbean nationals and Banco Pichincha, which services Central American nationals and 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 nationals from returning safely. Following the recent earthquake, undocumented Haitian nationals received TPS. See <http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=848f7f2ef0745210VgnVCM100000082ca60aRCRD&vgnnextchannel=848f7f2ef0745210VgnVCM100000082ca60aRCRD> (last visited June 10, 2010)

Part 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 U.S. is not a party.¹¹⁴ This skepticism is reasonable since in matters of immigration, distributive justice concerns historically have not been a major concern for Congress.¹¹⁵ 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.¹¹⁶ 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 informational asymmetry, governments often seek to identify private parties who have better access to information, to aid in their gate-keeping and enforcement functions.¹¹⁷ Given the weak institutional

¹¹⁴ 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 U.S., which have been routinely upheld by the courts even when they bear no clear relation to immigration policy goals. See LEGOMSKY AND RODRIGUEZ, *supra* note 14 at 514-520, 544- 589.

¹¹⁵ Introduction to ZOLBERG, *supra* note 16.

¹¹⁶ *Id.* Indeed, a recent report by the Pew Research Center for the People & the Press confirms that a majority of Americans 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 Research Center (Nov. 23, 2009) available at <http://pewresearch.org/pubs/1421/where-the-public-stands-on-immigration-reform>.

¹¹⁷ 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 . . .).

framework and pervasive informality in many developing countries, the challenges of enlisting uncoordinated private actors as gate-keepers 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.¹¹⁸ Indeed, a detailed ethnographic study 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. 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 record-keeping, informal financial intermediaries in developing countries must visit their clients on a nearly 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 appear 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.

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.¹¹⁹ Moreover, they appear to be

¹¹⁸ DARYL COLLINS et AL., *PORTFOLIOS OF THE POOR: HOW THE WORLD'S POOR LIVE ON \$2 A DAY* (2009).

¹¹⁹ Providing financial intermediation in the formal lending sector will potentially have spillover effects. Moneylenders may provide credit, but they rarely

replicating the strategies of their informal competitors. For example, rather than setting up formal branches, they too provide home-based 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.

Finally, as developing countries have modified their regulatory frameworks to create incentives for formal financial intermediaries to service the poor, in many countries, the market at the bottom of the pyramid is becoming increasingly competitive.¹²⁰ As barriers to entry fall and competition for making loans increases, lenders' business reputations matter for recruiting potential clients. The preliminary evidence is that interest rates have fallen, customer service has improved, and unscrupulous practices have declined.¹²¹

2. Financial Intermediaries as Gatekeepers and Policing the Gatekeepers

The foregoing speaks to several key features of financial intermediaries that make them appropriate gatekeepers.¹²² Recall that the information

offer a gateway to other asset-building services, such as insurance, annuities, and so forth. As one banker pointed out in his interview, informal money-lenders are not in a position to execute contracts with re-insurers! Indeed, studies of the clients of the most famous micro-credit 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. Introduction to DE AGHION, *supra* note 91.

¹²⁰ 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 the size of the market serves to 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). Introduction to C.K. PRAHALAD, *supra* note 32.

¹²¹ JAMES R. BARTH et al., *RETHINKING BANK REGULATION: TILL ANGELS GOVERN* (2005).

¹²² 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 intermediary(ies)"); Assaf Hamdani,

needed to assess trustworthiness of a potential migrant is hyper-local; it is difficult to access or evaluate ex-ante predictors of reliability on a non-local 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 are only able to stay in business if they 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 U.S. 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

Gatekeeper Liability, 77 S. CAL. L. REV. 53, 63 (2003) (defining gatekeepers as parties who “offer a service . . . that is necessary . . . 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, 1050-54 (1993) (noting that gatekeepers often provide “indispensable” services); Reinier H. Kraakman, *Gatekeepers: The Anatomy of a Third-Party Strategy*, 2 J.L. ECON. & ORG. 53, 53 (1986) (noting that gatekeepers “are able to disrupt misconduct by withholding their cooperation”).

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.¹²³ Thus, the foregoing proposal is contingent on the existence of a robust regulatory system in which banks are overseen by some external entity, a situation that does not currently pertain in many developing countries from which guest workers typically originate.¹²⁴

For obvious reasons, it is difficult for the U.S. to influence rule-making and enforcement on the ground in a developing country. There is a larger potential benefit that perhaps dwarfs the others 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 U.S. 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, then what incentive does the bank have to get the worker to leave the U.S.? 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.¹²⁵

¹²³ Richard L. Meyer & Geetha Nagarajan, *Rural Finance: Recent Advances and Emerging, Lessons, Debates, and Opportunities* 76 (Department of Agricultural, Environmental, and Development Economics, Working Paper No. AEDE-WP-0041-05, 2005).

¹²⁴ *Banking and the State*, The World Bank: Crisis Talk: Emerging Markets and the Financial Crisis, <http://www.typepad.com/services/trackback/6a00d834515e9269e2010536e73864970b> (last visited Jan. 18, 2010). Some economists 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 156.

¹²⁵ Of course it takes “two to tango” and the U.S. 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

The bottom line: in a context in which banks cannot count on rules, they make deals with individual borrowers.¹²⁶ By borrowing against a U.S. visa, migrants will be in essence signing unto 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 experience with poor borrowers, allowing them to create actuarial tables calculating risks, and thereby encouraging the growth of a market, in visa-as-collateral lending. Additionally, local regulators will have an incentive to tighten their rules and banks will abide by the local regulatory framework if the U.S. insists that these are conditions of local banks participating in the program. 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.¹²⁷

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 trans-nationally. 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

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 U.S. 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* (2010) at <http://database.gmfus.org/rs/ct.aspx?ct=24F76C1FD6E40AEDC1D180ACD22F921ADCBE5588F8A52DA2349D55444994EE21FC480CCED0D813CA335D773AA95658FE9FEA874847170E4EFF895E528EA32B9BC0599DFB0600D5A3404D276334C62FA51D8F2756E6638A3D1257F04> (German Marshall Fund, last visited July 10, 2010).

¹²⁶ Hallward-Dreimer et. al., *supra*, note 37.

¹²⁷ Indeed, there is evidence that the Grameen model has had precisely this effect in Bangladesh. DE AGHION et al., *supra* note 91.

migrants even when they lack documentation.¹²⁸ Unsurprisingly, these same transnational networks facilitate the incorporation of persons who previously have been documented. When 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.¹²⁹ 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.¹³⁰ Moreover, even when they are successful in penetrating these networks and conduct raids in the communities, they generally incur extraordinary social and economic costs.¹³¹

For example, although polling data shows that a majority of Americans 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

¹²⁸ PORTES *supra* note 58, at 22. 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 Michael B. Aguilera & Douglas S. Massey, *Social Capital and the Wages of Mexican Migrants: New Hypotheses and Tests* 82 *Social Forces* 671 (2003). Important supplementary work has been done as well. See, e.g., DAVID KYLE, *TRANSNATIONAL PEASANTS: MIGRATIONS, NETWORKS, AND ETHNICITY IN ANDEAN ECUADOR*, (2000) (same point made in relation to Ecuadorian migration); CECILIA MENJIVAR, *FRAGMENTED TIES: SALVADORAN IMMIGRATION NETWORKS IN AMERICA*, (2000) (same point made in relation to Salvadorian migration); Nestor P. Rodriguez & Jaqueline Maria Hagan, *Maya Urban Villagers in Houston: the Formation of a Migrant Community from San Cristobal Totonicapan, 197-210* in JAMES LOUCKY & MARILYN MOORS (eds.), *THE MAYA DIASPORA: GUATEMALAN ROOTS, NEW AMERICAN LIVES* (2000) (same point made in relation to Guatemalan migration).

¹²⁹ PORTES *supra* note 58, at 22.

¹³⁰ Manns, *supra* note 15.

¹³¹ Robert Hildreth, *ICE Immigration Raids Waste Time and Money*, *New American Media*, Dec. 26, 2008, at http://news.newamericamedia.org/news/view_article.html?article_id=3823e62e972ef6fec715fe8298a3045e; See also Blog, "Stop the Raids," *N.Y. TIMES*, available at <http://www.nytimes.com/2007/10/04/opinion/04thur2.html> (Oct. 7, 2007).

range of religious, business and non-governmental actors.¹³² In summary, such immigration raids increase levels of distrust within communities and undermine “communal efficacy,” as persons who have historically played critical roles in families and the broader community are displaced.¹³³ Essentially, a consensus seems to be emerging that forced deportation as a cure may be worse than the disease.¹³⁴ Through encouraging self-deportation, visa-as-collateral may provide a better alternative.

2. Financial Intermediaries May Be Motivated to Find Non-Compliant 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 non-compliant 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 non-compliant with the conditions of the visa. Indeed, in Singapore where bonding systems are also regularly utilized, once the alien becomes non-compliant, the bond is generally forfeited in its entirety.¹³⁵ In contrast to this

¹³² See Monica Rhor, *Impact: Immigration Raids Split Families*, Boston Globe at A 9 (Mar. 11, 2007) (raids spur church opposition); Nina Bernstein, *Church Works with U.S. to Spare Detention*, N.Y. Times, Dec. 12, 2009, at A1 (same); See Julia Preston, *Employers Fight Tough Measures on Immigration*, N.Y. TIMES (Page cite) (July 6, 2008) (finding that local businesses are banding together to voice their concerns regarding the negative implications of stringent immigration enforcement for business). See also Roger Lowenstein, *The Immigration Equation*, N.Y. TIMES MAGAZINE at 36 (July 9, 2006) (pointing out that local businesses benefit from the consumption of products and services by undocumented migrants. Conversely, these firms lose business when undocumented migrants leave).

¹³³ See Rhor, *supra* note 132, at 54.

¹³⁴ See Preston, *supra* note 132; Lowenstein *supra* note 132. See also Steve Dinnen, *How an Immigration Raid Changed a Town: Tiny Postville, Iowa, Struggles to Regain its Footing One Year After the Largest Immigration Sweep in US History*, CHRISTIAN SCIENCE MONITOR, June 5, 2009 at 9.

¹³⁵ See Dovelyn Rannveig Agunias and Kathleen Newland, *Circular Migration and Development: Trends, Policy Routes, and Ways Forward*, (Migration Pol. Inst.), Apr. 2007, available at http://www.migrationpolicy.org/pubs/MigDevPB_041807.pdf; see also ORN BODVARRSON and HENDRIK VAN DEN BERG, TEMPORARY MIGRATION INVOLUNTARY MIGRATION AND OTHER VARIATIONS ON THE STANDARD MODEL 261-84 (2009).

approach, the proposal herein advocates a system of “staged” or “tiered” forfeiture.

The first institutional design innovation is that even if an alien is non-compliant 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 should 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.¹³⁶

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 U.S. 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.¹³⁷ 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.¹³⁸ 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

¹³⁶ PORTES, *supra* note 56.

¹³⁷ The analogies to the current system of bail-bondsmen in the criminal justice system are evident. For a good summary of the bail bondsmen system see, Section 7.III.C at 936 in STEPHEN SALTZBURG AND DANIEL CAPRA, *AMERICAN CRIMINAL PROCEDURE* (2007).

¹³⁸ *Id.* Indeed, institutional design innovations to mitigate the possibility of abuses by bail-bondsmen may also be appropriate in this context. *See Behind the Bail Bond System, All Things Considered*, <http://www.npr.org/templates/story/story.php?storyId=122954677> for a discussion of charges of abuses by bail bondsmen. The American Bar Association has standards concerning pre-trial release that includes institutional innovations to aid in the regulation of bail-bondsmen. *See* Section 5.4, *ABA Standards on Pretrial Release available at* www.abanet.org/crimjust/standards/pretrialrelease_toc.html. The Uniform Bail Bond Act also regulates the practices of bondsmen. However, it has only been adopted in some states. *See* the Summary of Uniform Bail Bond Act, National Association of Insurance Commissioners *available at* www.naic.org/.../committees_ex_pltf_plwg_uniformity_std_wclar.pdf.

been developed for defendants in the criminal law context into the immigration context.¹³⁹ 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 non-compliant 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. In so doing, “snitching” is a quintessential gatekeeper role. However, in this instance, rather than “snitching,” the gatekeeper may fulfill the ultimate enforcement function by encouraging the wrong-doers 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.¹⁴⁰ In the criminal justice context snitching may augment distrust of law enforcement officials.¹⁴¹ This is likely to be true in the immigration context also, 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.¹⁴² Thus, the

¹³⁹ SALTZBURG AND CAPRA, *supra* note 137, at 936.

¹⁴⁰ Alexandra Natapoff, *Snitching: the Institutional and Communal Consequences*, 73 U. CINN. L. REV. 645, 650 (2005).

¹⁴¹ *Id.*

¹⁴² The playwright Arthur Miler recognized this risk decades ago. These risks are discussed in John Lahr's review of Arthur Miller's seminal play. See John Lahr,

ideal scenario would be for gatekeepers to accomplish the enforcement function without snitching.

PART 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.¹⁴³ 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 U.S.¹⁴⁴ His visa may be revocable if he does not meet these conditions.¹⁴⁵ A second immigrant, "Ambrosio" is a Guatemalan construction worker who also makes a financial investment to gain U.S. labor market access.¹⁴⁶ He pools his family's meager resources to make a down-payment to a coyote.¹⁴⁷ Not only does the coyote arrange Ambrosio's 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).¹⁴⁸

Given a worldwide population of persons with resources who are willing to pay for access to the United States labor market, the Immigration and Nationality Act (INA) embodies the sentiment that it is appropriate to extract value (either in skills or capital) from those who seek visas.¹⁴⁹ Having

A View from the Bridge, NEW YORKER, Feb. 1, 2010. See also Sampson, Robert J., Stephen Raudenbush, and Felton Earls. *Neighborhoods and Violent Crime: A Multilevel Study of Collective Efficacy*, SCIENCE 277:918-24 (1997).

¹⁴³ The "Sanjay" example is taken from Matt Richtel, *Remade in America: Tech Recruiting Clashes with Immigration Rules*, N.Y. Times, Apr. 11, 2009, at B1.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ The "Ambrosio" example is taken from Miriam Jordan, *Latest Immigration Wave: Retreat*, WALL ST. J., Oct. 2, 2008 at A1.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ See 8 U.S.C. §1153(b)(5) (1994) (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.); §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

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.¹⁵⁰ 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,¹⁵¹ 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 when they are already resorting 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.¹⁵² 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, social and cultural implications of long-term commitments to new migrants.

This article’s advocacy of a visa bonding system coupled with a re-conceptualization of a visa-as-collateral may be viewed as one attempt to map out such terms. By raising the costs of non-compliance and lowering over-stay 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,

contributions to the American economy); and §1153(b)(2) (providing for visas to be issued to immigrants with advanced academic training or who possess “exceptional ability”).

¹⁵⁰ My thanks to Douglas Massey for highlighting to me the bifurcation in treatment of the Sanjay’s and Ambrosio’s of the world.

¹⁵¹ See Jordan, *supra* note 180.

¹⁵² Saul Levmore, *Unconditional Relationships*, 76 B.U. L. REV. 807, 812-14 (1996).

given its emphasis on visa compliance so as to preclude short-term guests becoming long-term residents.

B. *Commodification Critiques*

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.

“Visa-as-collateral” reasonably might be grouped with a range of proposals that fall under the umbrella of “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.¹⁵³ 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.¹⁵⁴ Moreover, since many citizens originally were temporary visa recipients, temporary visas often signify a special affiliation with the polity and, in many cases, the first step on a path to citizenship.

¹⁵³ Michael Sandel is a prominent proponent of this view. See Michael Sandel, *What Money Can't Buy: The Moral Limits of Markets*, Tanner Lectures on Human Values, Brasenose College, Oxford, 1998. See also Margaret Radin, *Market-Inalienability*, 100 *Harv. L. Rev.* 1849, 1870-87 (1987) (critiquing the sale of citizenship); MARGARET RADIN, *CONTESTED COMMODITIES*, (1996) (same); AYELET SHACHAR, *THE BIRTHRIGHT LOTTERY: CITIZENSHIP AND GLOBAL INEQUALITY* 54-58 (2009) (same).

¹⁵⁴ See Joseph Carens, *Aliens and Citizens: The Case For Open Borders*, 49 *NOTRE DAME REV. OF POL.* 251, 251-73 (1987). For an opposing view see MICHAEL WALZER, *SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY* 31-63 (1983).

These commodification critiques rely heavily on traditional accounts of political membership or affiliation, which typically treat citizenship, and even lesser affiliations with the polity as 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 section 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 Americans. 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.¹⁵⁵ Others advocate an auction to the highest bidders, while some economists would limit the auction to pre-qualified applicants.¹⁵⁶ Still others advocate proposals combining traditional and market-based approaches, whereby admission is granted to some, utilizing traditional criteria (i.e., according to qualifications), and to others according to their willingness to pay.¹⁵⁷

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 users (although this might be a side-effect of the policy). Rather, the purpose is facilitative,

¹⁵⁵ JULIAN SIMON, *THE ECONOMIC CONSEQUENCES OF IMMIGRATION* (1989).

¹⁵⁶ Gary S. Becker, *An Open Door for Immigrants -- the Auction*, *Wall St. J.*, Oct. 14, 1992 at A14.

¹⁵⁷ JAGDISH BHAGWATI, *IN DEFENSE OF GLOBALIZATION*, Ch. 14 (1997).

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,¹⁵⁸ 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, having identified first order policy goals (such as recruiting skilled persons or meeting labor-market shortages for low-skilled persons) the current system does not appropriately meet these first order policy goals.

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 likely to be at the bottom of the pyramid.

D. *The Official, Public and Academic Postures: Non-Commodification*

With rare exceptions, the official posture of the U.S. government is one of non-commodification in immigration. This is evidenced, in part, by the public pronouncements of immigration policy-makers, and explains why, despite empirical evidence from other countries of the potential benefits of auction systems,¹⁵⁹ both primary and secondary markets for visas have received very little traction in U.S. policy-making circles. Indeed, even in the current global economic crisis, in which other countries have auctioned

¹⁵⁸ 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 Schuck, *The Morality of Immigration Policy*, 45 SAN DIEGO L. REV. 865, 866 (2008).

¹⁵⁹ Don J. DeVoretz, *An Auction Model of Canadian Temporary Immigration for the 21st Century*, IZA Discussion Paper No. 1807 (Oct. 2005).

visas to investors as a mechanism of jump-starting declining sectors of their economies, the United States has remained resistant to such an approach.¹⁶⁰

This official posture of non-commodification coincides with polling data on this issue, which show that a majority of Americans oppose proposals to auction visas. The rationales offered by the polling data mirror the anti-commodification rationales in the academic literature: visas, to the extent that they signify potential access to citizenship, are understood by Americans to be quintessentially public assets,¹⁶¹ 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 who have studied 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.”¹⁶² Thus, even when confronted with evidence demonstrating the potential value of auctions in resolving immigration dilemmas, 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.¹⁶³ These cultural frames are hostile to a market-based approach in the context

¹⁶⁰ Friedman, *supra* note 4. 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. It appears possible that the H-1 visa program for highly trained migrants will 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, available at http://www.businessweek.com/blogs/money+politics/archives/2009/02/h-1b_vsas_by.html (last visited June 10, 2010); see also Alistair Barr, *Wells Told Employees It May Cut Foreign Workers*, WALL ST. J. MARKETWATCH, Mar. 31, 2009 at <http://www.marketwatch.com/story/wells-told-staff-may-cut-foreigners> (last visited June 10, 2010).

¹⁶¹ See generally Shaheen Borna and James M. Stearns, *The Ethics and Efficacy of Selling National Citizenship*, 37 J. OF BUS. ETHICS, 193-207 (May 2002).

¹⁶² *Id.*

¹⁶³ *Id.*

of immigration and thus the average American voter appears unlikely to be comfortable with the notion of utilizing the market as a primary method of visa allocation.¹⁶⁴

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.”¹⁶⁵ 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 decision-making preserving a different mix of values. We keep the levels separate so as to preserve the illusion that none of society’s values have been disregarded. This shifting trajectory of decision-making is characterized as a series of “subterfuges”¹⁶⁶ intended to shield the allocational decision-making, 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)” that we use to cope with “tragic choices.”¹⁶⁷

There is clearly an analogy in the immigration arena to this modus-operandi: while the official U.S. posture is one of non-commodification, both current and historical policy reflects concessions to commodification in significant ways. 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 U.S.¹⁶⁸ For example, as noted in the “Sanjay” example above, under current U.S. immigration law, persons 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

¹⁶⁴

Id.

¹⁶⁵

The term is from CALABRESI and BOBBITT, *supra* note 2.

¹⁶⁶

The term “subterfuge” is Calabresi’s. CALABRESI, *supra* note 2.

¹⁶⁷

Id.

¹⁶⁸

See Zolberg, *supra* note 16.

least ten U.S. residents, and their status may be revoked if they do not meet these commitments.¹⁶⁹ 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 third world, selling visas too obviously contradicts anti-commodification values held by many Americans.

CONCLUSION: IF WE ARE GOING TO COMMODIFY, WE CANNOT EXCLUDE THE BOTTOM OF THE PYRAMID

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 U.S., the onus is to explain why we would forgo similar opportunities with respect to poor migrants. The bonding proposal made herein may expose the subterfuges¹⁷⁰ that necessarily accompany the tragic choices that we make in immigration, the burdens of which disproportionately fall on the poor. This proposal accomplishes immigration law goals in a manner that reduces subterfuges and renders 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

¹⁶⁹ 8 U.S.C. § 1153(b)(5).

¹⁷⁰ See Guido Calabresi, *supra* note 2, at 202.

advantaged, while simultaneously meeting important consequentialist goals. Aspects of the proposal may seem unattractive 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.