Monetary Mechanisms in Work Migration

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This Article explores the institutional role monetary mechanisms play, or could play, in work migration programs. The Article first explores the role of informal recruitment fees in this context. Those fees are commonly paid by temporary, low-skilled migrants to private recruiters and labor brokers to facilitate their legal and documented admission to the host country. In practice, in addition to financially benefitting informal middlemen, such fees improve the screening process of migrant candidates by inducing self-selection. Migrants that expect to sustain successful employment are more likely to assume the burden of borrowing money to afford the upfront fees. Understanding this institutional role is important for the design of any reform proposal that seeks to eliminate these otherwise costly and exploitative fees. The Article then analyzes different monetary bond and reward models and the ways in which they can address the screening and enforcement challenges that are created by the structure of guest worker programs and exacerbated by fees. Acknowledging the virtues as well as the limitations of monetary regulation in the context of work migration calls for further creative thinking about institutional design in this field.

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INTRODUCTION

In the nineteenth century, several states, including Massachusetts, New York, and California, used monetary mechanisms to limit the number of poor immigrants.[1] One group of laws focused on taxing immigrants with state taxes in order to deter those who cannot afford it from coming. Another set of laws ordered shipmasters to post monetary bonds to assure that their passengers would be productive workers and self-sufficient in the new land.[2] After the Supreme Court ruled that immigration was the exclusive province of the federal government, these state immigration regimes were gradually abandoned and the monetary mechanisms were largely discarded. Since then, the immigration system has officially favored quotas and other non-monetary mechanisms.[3]

In recent years, economists and legal scholars have advocated for reforms that would reintroduce monetary mechanisms—in the form of taxes, auctions, or bonds—to supplement the current system and to mitigate screening and enforcement challenges.[4] These proposals, however, seem at odds with the basic elements of existing immigration law. In the context of labor migration, the general concern is that high "monetary fences" would limit or even diminish the ability of low-skilled workers, with meager resources, to migrate to the United States. The engine of labor migration is the scarcity of resources in developing States. Laborers from these countries rarely have access to the mainstream borrowing necessary to fund migration. Asking them to pay for access upfront raises the concern of *de facto* shutting the migration door.[5]

Nevertheless, a closer look reveals that the American immigration system already heavily relies, albeit informally, on a mone-

1. *See* GERALD NEUMAN, STRANGERS TO THE CONSTITUTION: IMMIGRANTS, BORDERS AND FUNDAMENTAL LAW 25–28, 48 (Princeton University Press, 2010).

2. *See* HIROSHI MOTOMURA, AMERICANS IN WAITING, THE LOST STORY OF IMMIGRATION AND CITIZENSHIP IN THE UNITED STATES, 21 (Oxford University Press, 2006).

3. *See* Eleanor Marie Lawrence Brown, *Visa as Property*, *Visa as Collateral*, 64 VAND. L. REV.1047, 1062, 1101–2 (2011). Brown asserts that this commitment is more of an illusion than the reality. *Id.* at 1049, 1097–1098, 1104. There are also some official exceptions in the Immigration and Nationality Act (the INA) that 'sell' visas for elite investors, especially through the E status based upon Treaty Trader or Treaty Investor Visa. *See E-Visas*, U.S. CITIZENSHIP & IMMIGR. SERV., https://www.uscis.gov/uscis-tags/unassigned/e-visas [https://perma.cc/9WS8-TNJJ]; *see also* Brown at 1098.

4. *See infra* Part II.A.2.iii and Part III.A.2.

5. *See infra* Part I.C. and Part II.A.2.iv.

tary mechanism in the form of informal fees.[6] These fees, collected by intermediary recruiters, facilitate not only the shadowy market of illegal border-crossings and undocumented entrances, but also the legal and well-documented guest worker programs in the United States. In theory, these fees are prohibited by American immigration regulations.[7] However, a potential candidate for migration, interested in acquiring an H-2A or H-2B visa for low-skilled, temporary, legal, and documented work in the United States, must find a way to cover travel and visa costs. Costs often include payments to recruiters, who link unskilled workers in source countries with employers in the United States.[8] Potential candidates may have to pay hundreds of dollars for each short-term entrace and as much as $20,000 for recruiters' services for migrants coming from afar.[9]

6. Brown acknowledges the concession to commodification that the U.S. immigration practice has long made at the margins, where labor recruiters and coyotes charge fees for undocumented border crossing or where elite applicants pay high fees to attorneys and lobbyists to navigate the complex visa process for them. Brown, *supra* note 3, at 1050, 1104. This Article focuses on the informal fees paid by low-skilled migrants to facilitate their legal admission. The Article argues that those informal fees play a central institutional role in the screening process of guest workers and their informality is exactly the feature that makes them effective and alive. Therefore their grip on the formal system is substantial.

7. According to Department of Labor (DOL) and Department of Homeland Security (DHS) regulations, employers are prohibited from shifting recruitment costs to workers and are obliged to prohibit their recruiters from doing so. *See also* Eleanor G. Carr, *Search for a Round Peg: Seeking a Remedy for Recruitment Abuses in the US Guest Worker Program*, 43 COLUM. J.L. & SOC. PROBS. 399, 410 (2009). Watkins indicates that recruitment fees are illegal in both the United States and Mexico but nevertheless remain a common and pervasive practice. *See* Elyse T. Watkins, *Inhospitable Hosts: Fundamental Flaws in Recruitment Practices of H-2A Guest Workers and Recommendations for Change*, 8 KY. J. EQUINE, AGRIC., & NATURAL RES. L. 467, 481 (2015).

8. Carr, *supra* note 7, at 405–10. *See also* Jennifer Gordon, *Joint Liability Approaches to Regulating Recruitment* (Fordham Law Legal Studies, Working Paper No. 2518519, 2014, (November, 2014), available at https://papers.ssrn.com/sol3/papers2.cfm?abstract_id=2518519 [https://perma.cc/4ZYV-YQS3]; Sanam Yasseri, *Out Of The Shadows: A Call To End The Exploitation of Non-Agricultural Migrant Workers by Reforming the U.S. H-2B Guest Worker Program*, 15 S.W. J. INT'L LAW 361, 362, 369 (2009).

9. S. POVERTY L. CTR., SEE CLOSE TO SLAVERY: GUESTWORKER PROGRAMS IN THE UNITED STATES 9 (2013) *available at* https://www.splcenter.org/20130218/close-slavery-guestworker-programs-united-states [https://perma.cc/6JJK-P4WU]. Gordon asserts that "[f]ees and costs are often much higher than the average annual income in the migrant's origin country." Gordon, *supra* note 8, at 10. Yesseri indicates that "[d]ishonest labor recruiters charge guest workers thousands of dollars more than what is necessary to cover visa and travel costs." *See* Yesseri, *supra* note 8, at 370. Schmitt explains that generally Thai workers pay bigger fees than do Latin-American guest workers who come to the U.S. While the average annual salary in Thailand is just over $2,000, the fees paid to recruiters range from $8,000 to $20,000. *See* Andrea L. Schmitt, *Ending the Silence: Thai H-2A Workers*,

Recruiters and affiliated financiers offer informal lending schemes for those who cannot pay for travel or visa costs upfront. These informal lenders often deploy more rigorous (and legally dubious) collection methods than could the host country, its employers, or formal financial institutions. Potential candidates for immigration have to be confident in their ability to pay back their loans before they seek a recruiter's pricey services. Put differently, the fees applicable in practice—often informal, illegal, and exploitative—could be viewed as an institutional sorting mechanism.

The costs and negative externalities of fees are vast, both for migrant workers and host countries.[10] Reform suggestions in the legal scholarship tend to focus on the exploitation of migrant workers and call for a reduction or elimination of labor recruitment fees.[11] Conventional wisdom is that these fees are symptomatic of a dysfunctional immigration system, in which both host and source countries fail to enforce their own laws against recruiters and employers, who highly benefit from the financial scheme.[12] This Article supports and reinforces the call for the elimination of fees but suggests that reformers must first acknowledge the institutional role played by fees. Understanding that role might solve the puzzle of why—despite significant costs inflicted on migrants and host countries alike, and with no apparent benefits—the phenomenon is so central

Recruitment Fees, and the Fair Labor Standards Act, 16 PAC. RIM L. & POL'Y J. 167, 168–170, 175–176 (2007). See more about the scope and characteristics of the fees phenomenon *infra* Part I.B.

10. *See infra* Part I.C.

11. *See, e.g.*, *Recruitment Revealed: Fundamental Flaws in the H-2 Temporary Worker Program and Recommendations for Change*, CENTRO DE LOS DERECHOS DEL MIGRANTE, INC., http://www.cdmigrante.org/recruitment-revealed-fundamental-flaws-in-the-h-2-temporary-worker-program-and-recommendations-for-change/ [https://perma.cc/5K94-JV56]; THE INT'L LAB. RECRUITMENT WORKING GROUP, THE AMERICAN DREAM UP FOR SALE: A BLUEPRINT FOR ENDING INTERNATIONAL LABOR RECRUITMENT ABUSE (2013). available at https://fairlaborrecruitment.files.wordpress.com/2013/01/final-e-version-ilrwg-report.pdf [https://perma.cc/WX42-Y65W].

Carr's reform proposal includes three basic elements: a clear definition of what would be considered exploitative fees accompanied by a clear private right of actions for workers to initiate enforcement and recovery against employers who would be held with strict liability of any recruitment fees payment occurs. Carr, *supra* note 7, at 437. Gordon, *supra* note 8, proposes to create strong economic incentives for the local employers at the host country to end the recruitment abuses mainly by holding them liable for those abuses.

12. The DOL and DHS rarely enforce their own regulations against recruitment fees. Carr, *supra* note 7, at 401, 410–411. Gordon carefully analyzes the map of interests in which host and source countries seem to be indifferent or too weak to enforce their laws and regulate the recruitment industry while the other gatekeepers—recruiters and employers—are highly motivated to maintain things as they are. *See* Gordon, *supra* note 8, at 8, 11–20.

and persistent. The answer is embedded in the screening challenge these programs create.

From the host country's perspective, an ideal sorting system might charge a substantial upfront fee, or deposit, that would be forfeited in case of a migrant's noncompliance with domestic law or guest-worker program terms. In practice, however, low-skilled workers do not have the resources to pay such deposits, and host countries find it more feasible to rely on private recruiters who collect on loans to guest workers. Though informal fees do not directly enrich a host country, they provide the same screening functions as formal fees or bonds would. They smooth the transaction between host countries and labor migrants and mitigate host countries' information asymmetry problem. They shift the risk of admission from the host country to the migrants themselves, thus encouraging self-selection of workers who expect their future earnings to exceed the required fees.

Understanding the full impact of fees requires consideration of their ex-post effects. Fees initially increase incentives for compliance with domestic law. Eventually, however, those incentives are undermined as workers' visas approach expiration. Fees then encourage default or violation rather than compliance. Repayment of a loan during the first months of a visa period makes it even more tempting for the worker to overstay at the end and continue earning an income. In addition, if each visa application comes with high fees, a migrant will have reason to overstay the visa period in order to avoid the costly re-admission fees. In other words, fees incentivize violation exactly at the stage where deportation loses its sanctioning grip.

Fees are thus at odds not only with migrants' interests and welfare but also with host countries' enforcement goals, such as preventing migrants from overstaying their visas. The annulment of fees should therefore also be considered as an institutional priority for host countries. Yet, any such change would have to compensate for the screening benefits that would be lost by eliminating fees.

This Article then turns to explore the merits and limitations of other formal and informal monetary mechanisms in addressing screening and enforcement challenges. Thus, for example, fines, the basic monetary sanction, would not be effective enough in the setting of guest worker programs, where the target audience is without savings, judgment proof, and difficult to locate in the event of visa overstays. A regular bond, fully posted pre-admission, would not be realistic either due to the difficulty low-earning candidates face in raising the required sums in advance through formal, or legitimate, financial institutions. These problems can be partially solved by deducting

amounts from each guest worker's earnings in a way that produces a bond, which grows over time—and is of significant size just when the guest worker is least influenced by the threat of deportation. And yet, migrants' low earnings and short terms of work also limit the efficiency of the monetary "ex-post bond." The expected benefit from overstaying for long-term periods will often exceed the bond, discounted by the probability of enforcement. In addition, the double monetary "indenture" mechanism, applied ex-ante informally by recruiters and applied ex-post formally and incrementally by the State, ought to be excessively punitive on migrants and therefore disturbing from public policy standpoint.

In revealing the limitations of other potential monetary mechanisms the systematic analysis in this paper thus clarifies the challenge for regulators who strive to improve the efficiency as well as the decency of temporary work migration programs. Creative and effective solutions would have to go beyond migrants' monetary assets while avoiding being over-punitive in other dimensions.

This Article proceeds as follows: Part I discusses the role of fees in the U.S. admissions process for guest worker programs. Part II explores the screening role served by recruitment fees in guest worker programs in the United States and around the world. Part II then shifts focus from the institutional benefits fees provide to the institutional costs they inflict during the pre-entry sorting phase and especially during the post-entry phase. Part III analyzes the virtues and limitations of different possible bond models in addressing the screening and enforcement challenges created by the structure of guest worker programs and exacerbated by fees. This Article concludes with a short discussion about ideas for alternative mechanisms, in the form of monetary and non-monetary rewards and reputation, to address the major institutional challenges in more efficient and less punitive methods.

I. THE INFORMAL COST OF ADMISSION

Governments around the world adopt guest worker programs that invite low-skilled, temporary migrant workers to fill gaps in their labor markets.[13] These programs entail many benefits. For host countries, they provide much-needed laborers without the costs of offering them permanent residency. For source countries, they promote development through a steady flow of remittances and return of

13. PIYASIRI WICKRAMASEKARA, GLOBAL UNION RESEARCH NETWORK, *CIRCULAR MIGRATION: A TRIPLE WIN OR A DEAD END* (2011).

skills. Of course, for the migrants, these programs provide the opportunity to earn significantly higher wages outside their home countries and in some cases to acquire new skills.[14] The potential gains for migrants to developed countries are high because of the large and increasing wage gap between developing and developed nations. Indeed, some scholars consider the temporary relocation of workers the single most useful "policy" to help developing nations.[15]

The costs and negative externalities of guest-worker programs for host countries, source countries, local workers, and migrant workers are also vast. Accordingly, political opposition to these programs is significant across the political spectrum.[16] To enable the

14. *Id.*

15. *See, e.g.*, Weyl E. Glen, *The Openness-Equality Trade-Off in Global Redistribution*, THE ECON. J. (forthcoming 2016) https://papers.ssrn.com/sol3/Papers.cfm?abstract_id=2509305 (last visited Feb. 20 2017) [https://perma.cc/J8YP-47W7]; Michale Clemens, Claudio Montenegro &Lant Pritchett, *The Place Premium: Wage Differences for Identical Workers Across the US Border* (World Bank Policy Research, Working Paper No. 4671, 2008)., https://papers.ssrn.com/sol3/papers2.cfm?abstract_id=1233047 (last visited Feb. 20 2017) [https://perma.cc/6USF-2DWU].

16. The ongoing debate about guest worker programs focuses primarily on whether to expand or contract them. Despite the significant benefits these programs provide host countries, source countries and migrants, there has long been a fierce and well-intentioned opposition to their expansion for several different rationales. Facing persistent (and ultimately failed) attempts to expand and redesign guest-worker programs in the United States as part of more comprehensive immigration reforms, a vast academic scholarship has emerged over the years, debating the function, the desirability and the normative flaws of those programs. The skeptic commentators highlight the systematic externalities guest-worker programs impose. The concern for local workers, who might be affected by lower wages, declining workplace conditions and loss of job prospects, is a prominent example. *See* Andrew J. Elmore, *Egalitarianism and Exclusion: US Guest Worker Programs and a Non-Subordination Approach to the Labor-Based Admission of Nonprofessional Foreign Nationals*, 21 GEO. IMMIGR. L.J. 521, 529–30 (2007). An additional concern is related to the development of long-term dependency on the temporary migration model. Critics maintain that guest worker programs only exacerbated the problems of illegality and non-return. Therefore, the idea to control illegal immigration through guest worker programs seems ironic to them. In reality, they explain, only specific groups of influential employers and politicians benefit from these programs while others subsidize those narrow private gains without enjoying the benefits of real temporary migration. *See, e.g.*, Tanya Basok, *He Came, He Saw, He . . . Stayed. Guest Worker Programmes and the Issue of Non-Return*, 38 INT'L MIGRATION 215, 224 (2000). Other critics highlight that the remittances received from emigrants also lead to hurdles and costs for the sending county. The influx of cash can drive up real estate prices, for example, and create unequal distribution, or stimulate conspicuous consumption. Moreover, remittances tend to decline over time unless there is a constant growth in emigrants with the cost of skills waist for the source country. *See* Cindy Hahamovitch, *Creating Perfect Immigrants: Guestworkers of the World in Historical Perspective*, 44 LABOR HIST. 83, 93–94 (2003). The liberal criticism analyzes various additional

feasibility and success of these programs, host countries need to define their immigration policy goals and priorities and then design mechanisms to promote their policies accordingly.[17] Usually, host countries' first-order goals in guest-worker programs are to admit workers that will contribute to the economy while maintaining their commitment to transience and lowering costs. The policy choices are reflected in the administration of the program, including screening practices and enforcement mechanisms.[18]

A. The Design of Admission Policy

Immigration admission policies generally have to address questions of quantity, quality, and status.[19] For guest-worker programs, a host country needs to decide how many migrant workers to admit annually, what characteristics admits should have, and how to screen for those characteristics. It must also determine how to designate migrant workers' post entry status.

In the United States, there are two main H class guest-worker programs;[20] one for high-skilled workers, and one for low-skilled workers.[21] Up to 65,000 H-1B visas per year can be issued to high-

concerns and risks those programs impose upon constitutional, democratic and liberal values. They fear that the presence of a large-scale population of temporary guests institutionalizes the exclusion of noncitizens and degrades the value of citizenship. *See, e.g.*, Linda Bosniak, *Being Here: Ethical Territoriality and the Rights of Immigrants*, 8 THEORETICAL INQ. L. 389 (2007). Walzer rejected the very idea and legitimacy of guest-worker programs, asserting that there can exist no just system of temporary labor migration. *See* MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY (1983). Others criticize past and current guest-worker programs but recognize their possible instrumental benefits and therefore offer to reform them according to normative and liberal commitments while usually also designing transience as a milestone, as a test period, before citizenship. *See, e.g.*, Hiroshi Motomura, *Designing Temporary Worker Programs*, 80 U. CHI. L. REV. 263, 282–285 (2013); Cristina M. Rodriguez, *Guest Workers and Integration: Toward a Theory of What Immigrants and Americans Owe One Another*, 2007 U. CHI. LEGAL F. 219 (2007); Howard F. Chang, *The Immigration Paradox: Poverty, Distributive Justice, and Liberal Egalitarianism*, 52 DEPAUL L. REV. 759 (2003).

17. See generally for a theoretical analysis of the relation between first-order immigration policy goals and second-order institutional design strategies to achieve those goals, Adam B. Cox and Eric A. Posner, *The Second-Order Structure of Immigration Law*, 59 STAN. L. REV. 809 (2007).

18. Basok, *supra* note 16, at 222.

19. Cox & Posner, *supra* note 17, at 814.

20. The Immigration and Nationality Act (INA) of 1952, 8 U.S.C. § 1101 et seq., is the basis of current immigration law.

21. There are other temporary work visa programs in addition to the central H pro-

skilled workers, who must have, at minimum, a college education.[22] This Article focuses on low-skilled workers, who are eligible for H-2 visas.[23] H-2 visas include H-2A visas for agricultural workers and H-2B visas for non-agricultural workers in various occupations and industries.[24] While the H-2A program is uncapped,[25] at most 66,000 H-2B visas can be issued in a given year.[26] Together, the H-2 programs accommodate over 120,000 guest-workers annually.[27]

gram. Most notable is the J-1 Exchange Visitor Program. This program, originally created to facilitate educational and cultural exchange with other nations, is now used primarily as a temporary worker program and has authorized approximately 300,000 internationally recruited workers annually, more than any other temporary work visa program in the United States. *See* THE INT'L LAB. RECRUITMENT WORKING GROUP, *supra* note 11, at 9.

22. INA § 101(a)(15)(H), 8 U.S.C. § 1101(a)(15)(H). *See also* MARY GIOVAGNOLI, IMMIGR. POL'Y CTR., *OVERHAULING IMMIGRATION LAW: A BRIEF HISTORY AND BASIC PRINCIPLES OF REFORM* (2013)., https://www.americanimmigrationcouncil.org/sites/default/files/research/perspectivescirprimerwe111213.pdf [https://perma.cc/QHL7-VPGQ].

23. In 1942, the U.S. government signed its first formal labor agreement with Mexico, which was officially named the "Emergency Farm Labor Supply Program", more commonly known as the "Bracero Program." This program came to its end during the 1960s. A revival of guest worker programs, based on H visas, occurred in 1986 through the legislation of the Immigration Reform and Control Act. The 1986 IRCA amended the INA and subdivided the H-2 program into the current H-2A agricultural worker program and the H-2B nonagricultural worker program. *See* INA § 101(a)(15)(H)(ii)(a). *See also* 8 C.F.R. § 214.2(h)(5). These visas are issued to foreign nationals authorized to perform temporary or seasonal work. *See S.* POVERTY. L. CTR., *supra* note 9, at 5. *See also* GIOVANNI PERI, BROOKINGS INSTITUTE, RATIONALIZING U.S. IMMIGRATION POLICY: REFORMS FOR SIMPLICITY, FAIRNESS, AND ECONOMIC GROWTH, (2012)., http://www.brookings.edu/research/papers/2012/05/15-immigration-peri [https://perma.cc/B635-CMR6].

24. Relevant industries are, for example, construction, food service and processing, landscaping and forestry, healthcare, manufacturing, services (in hotels, restaurants, amusement parks, leisure facilities), and more. The primary source countries for these workers are Mexico (about 80%), Jamaica, and Guatemala but other source countries (India, China, Thailand and more) participate too. *See S.* POVERTY. L. CTR., *supra* note 9, at 5.

25. I.N.A. § 101(a)(15)(H)(ii)(a), 8 U.S.C. § 1101(a)(15)(H)(ii)(a).

26. The Immigration and Nationality Act (INA) of 1952, § 214(g)(1)(B), 8 U.S.C. § 1184(g)(1)(B). The popularity of the H-2B program for temporary, seasonal, non-agricultural guest workers is reflected in the increase of visas issued from 15,706 in 1997 to 129,547 in 2007. The Save Our Small and Seasonal Business Act (SOSSBA), passed by Congress in 2005, provided an exemption for returning H-2B workers, who were issued H-2R visas, so that they would not count toward the annual 66,000 cap on H-2B visas. In this way, the Act pushed the total number of H-2B/H-2R's to 129,547 in 2007. *See* David Seminara, *Dirty Work: In-Sourcing American Jobs with H-2B Guestworkers*, CENTER FOR IMMIGRATION STUDIES (Jan. 2010) https://www.cis.org/sites/cis.org/files/articles/2010/h-2b.pdf [https://perma.cc/P8FM-PC2A].

27. For an overview of both programs, see U.S. DOL website. For H-2A program: *H-2A Temporary Agricultural Program*, DEP'T OF LAB.,

Both H-2 programs target transient workers.[28] An eligible guest worker's contract must stipulate a period of time following which the worker is required to return to the source country.[29] The job offered by the host employer must reflect a temporary need.[30] H-2 visas can be renewed annually for two years, such that a worker's stay can last, but cannot exceed, three consecutive years.[31] In order to qualify for subsequent readmission, a worker must exit the United States and remain outside the country for at least six months before reapplying.[32]

https://www.foreignlaborcert.doleta.gov/h-2a.cfm [https://perma.cc/BU3W-3MJS]; and for H-2B program: H-2B Certification for Temporary Non-Agricultural Work, DEP'T OF LAB., https://www.foreignlaborcert.doleta.gov/h-2b.cfm [https://perma.cc/SD95-U7P4]. In FY 2014 89,274 H-2A visas were issued and 68,102 H-2B visas. *See* Carr, *supra* note 7, at 400. New research has estimated that the numbers of nonimmigrant temporary foreign workers is actually higher than what is indicated by the government estimations. According to this research in 2013, there were around 170,000 workers on H-2A and H-2B visas in the U.S. See DANIEL COSTA AND JENNIFER ROSENBAUM, ECON. POL'Y INST., TEMPORARY FOREIGN WORKERS BY THE NUMBERS, NEW ESTIMATES BY VISA CLASSIFICATIONS, www.epi.org/120773 [https://perma.cc/2TN8-VKE3].

28. H-2A and H-2B visas define guest workers as those who come temporarily to the United States to perform work in agriculture or some other temporary position for which there are no available U.S. workers. *See* 8 U.S.C. § 1101(a)(15)(H) (2012).

29. H-2B petitions, for example, must establish that the need is for "temporary" labor—a "one-time occurrence, a seasonal need, a peak load need, or intermittent need." 8 U.S.C. § 1101(a)(15)(H)(ii)(a) (2012) for H-2A and 8 C.F.R. § 214.2(h)(6)(ii)(B) (2017) for H-2B.

30. This is defined as less than one year for H-2A and less than ten months for each section of the H-2B program (with a maximum stay of three years). *See* 8 U.S.C. § 1101(a)(15)(H)(ii)(a) (2012); 8 C.F.R. § 214.2(h)(6)(ii)(B) (2017). DOL H-2A certification defines the temporary employment as: "employment performed at certain seasons of the year, usually in relation to the production and/or harvesting of a crop, or for a limited time period of less than one year when an employer can show that the need for the foreign workers is truly temporary." *See* DEP'T OF LAB., *supra* note 27. *See also* Howard F. Chang, *Liberal Ideals and Political Feasibility: Guest-Worker Programs as Second-Best Policies*, 27 N.C. J. INT'L L. & COM. REG. 465, 469–70 (2001).

31. 8 C.F.R. §§ 214.2(h)(5)(viii)(C), (15)(ii)(C); 20 C.F.R. § 655.103(d); USCIS (2016b). For H-2B visa: 20 C.F.R. 655.6(c); 8 C.F.R. 214.2(h)(6)(ii); USCIS 2016c.

32. 8 C.F.R. § 214.2(h)(10)(13)(iv)(2017). If H-2B workers spend less than 18 consecutive months in the United States, then they only need to depart for 45 days to be eligible to reapply; if they were in the United States for more than 18 months, but for less than 3 years, then they need to reside outside the United States for 60 days before returning on an H-2B visa. *See* Seminara, *supra* note 26, at 2. Proposals to shift the H-2 programs to "short-term" labor instead of seasonal have failed. *See* ANDORRA BRUNO, CONG. RESEARCH SERV., , IMMIGRATION OF TEMPORARY LOWER-SKILLED WORKERS: CURRENT POLICY AND RELATED ISSUES 22 (2012)., http://www.fas.org/sgp/crs/homesec/R42434.pdf [https://perma.cc/M3HE-V2JL].

Additionally, a migrant worker's visa status, and his or her ability to remain in the United States, is tied to the sponsoring employer.[33] If a worker quits or is fired prior to the termination of the employment contract, that worker is in violation of his or her visa, risks deportation, and is disqualified from future admission options.[34]

The above features define two out of the three central components of an admission policy**:** quantity and status. The third component—quality, or *who to admit?*—is the focus of this article.

B. Admission in Action

In the early days of American immigration law, no numerical ceilings or national-origin quotas existed. The selection process took place at the port of entry and employed qualitative exclusion criteria. On Ellis Island, inspectors reviewed and excluded those who looked too poor, sick, or old, as well as those too weak to support themselves.[35] Starting with the Immigration Act of 1924, U.S. immigration law shifted from reliance on *ad hoc* selection processing at ports of entry to the screening of candidates in their source countries.[36]

Today, candidates for a temporary stay must first secure a nonimmigrant visa from a U.S. consular officer in a foreign country.[37] Visa candidates bear the burden of proving that they qualify for a temporary nonimmigrant visa.[38] If the visa application is approved, the next phase of screening takes place at a port of entry, where an officer of the Bureau of Customs and Border Protection of the Department of Homeland Security ("DHS") inspects visas. Customs and Border Protection officers are not bound by consular officers' prior decisions on admissibility.[39]

The H-2 programs are co-administered by the Department of

33. *See* Seminara, *supra* note 26, at 4.

34. *See* Carr, *supra* note 7, at 404.

35. *See* MOTOMURA, *supra* note 2, at 48.

36. THOMAS ALEXANDER ALEINIKOFF, DAVID A. MARTIN, HIROSHI MOTOMURA & MARYELLEN FULLERTON, IMMIGRATION AND CITIZENSHIP, PROCESS AND POLICY 496 (7th ed. 2011).

37. *Id.* at 501.

38. Candidates may still be rejected if any of the statutory grounds for inadmissibility applies to them. The inadmissibility grounds, specified in article 212(a) to the Immigration and Nationality Act (INA), relate to, *inter alia*, immigration control, public health, and national security. *See* 8 U.S.C. § 1182.

39. *See* ALEINIKOFF ET AL., *supra* note 36, at 502, 504.

Labor ("DOL")[40] and DHS.[41] The H-2 visa application process requires employers to secure a labor certification from DOL and then win approval for a visa petition filed with DHS.[42] Employers must demonstrate to both DOL and DHS that incoming workers will not displace U.S. citizens or cause U.S. citizens' working conditions to suffer.[43] This requires a showing that there is (1) an insufficient supply of U.S. workers who are "able, willing, qualified, and available" to perform work at the place and time needed and (2) that the arrival of guest-workers will not adversely affect existing U.S. workers' wages and working conditions.[44]

The labor certification and visa petition rules do not indicate, however, how employers locate and select far-flung migrants in the first place. A key link in the system is the informal recruitment process. The first contact a foreign national has with a U.S. guest-worker program is usually a recruiter in the source country, who works for U.S. employers.[45] The costs of the recruitment and immigration processes are largely passed on to the migrant workers through recruitment fees that also allow recruiters to earn considera-

40. Specifically, the Employment and Training Administration in DOL.

41. Specifically, U.S. Citizenship and Immigration Services in DHS.

42. *See* SARAH EVERHART, UNIVERSITY OF MARYLAND AGRICULTURE LAW EDUCATION INITIATIVE, LEGAL RESPONSIBILITIES WHEN HIRING MIGRANT, SEASONAL, AND H-2A VISA WORKERS 4 (2015)., http://drum.lib.umd.edu/bitstream/handle/1903/17160/Hiring%20Migrant%20Workers_FINAL%20D_Oct_2015.pdf [https://perma.cc/AJ3A-E6C7].

43. *See* Kara Stockdale, *H-2A Migrant Agricultural Workers: Protected From Employer Exploitation On Paper*, Not In Practice, 46 CREIGHTON L. REV. 755, 760–61 (2013).

44. 8 U.S.C. § 1188(a)(1)(A), (B) (2012); 8 U.S.C. § 212(a)(5)(A)(i) (2012); *see also* U.S. DOL, *supra* note 27, Yasseri, *supra* note 8, at 366. Those labor certification rules have been widely criticized as archaic, ineffective, and impossible to implement. *See, e.g.*, Panteha Abdollahi, *The Labor Certification Process: Complex Ethical Issues for Immigration Lawyers*, 17 GEO. IMMIGR. L.J. 707, 707 (2002); *see also* Seminara, *supra* note 26.

45. This linkage between U.S. employers, source country recruiters and guest workers is strong and central to the process and is largely recognized in the literature that documents and discusses guest worker programs in the U.S. and beyond. *See, e.g.*, S. POV. L. CTR., *supra* note 9; Carr, *supra* note 7; Gordon, *supra* note 8; EVERHART, *supra* note 42; Watkins, *supra* note 7, WICKRAMASEKARA, *supra* note 13*; see also* PIYASIRI WICKRAMASEKARA, REGULATION OF THE RECRUITMENT PROCESS AND REDUCTION OF MIGRATION COSTS: COMPARATIVE ANALYSIS OF SOUTH ASIA (2013), https://papers.ssrn.com/sol3/papers2.cfm?abstract_id=2478461 [https://perma.cc/2PPV-387B]; JENNIFER LEE, MIGRANT FARM WORKER DIVISION OF COLORADO LEGAL SERVICES, OVERWORKED AND UNDERPAID: H-2A HERDERS IN COLORADO (2010) https://fairlaborrecruitment.files.wordpress.com/2013/01/overworked-and-underpaid-h-2a-herders-in-colorado.pdf [https://perma.cc/T98X-4SG2].

ble profits.[46] The recruitment process is unregulated by legislation or any U.S. administrative agency.[47] For both H-2 programs, the written protections mainly function as theoretical standards while de-facto enforcement tends to be infamously weak.[48]

Inasmuch as most H-2 program participants are poor and unable to pay any fees in advance of their relocation and employment, they must borrow, usually under high interest rates.[49] Upon arrival, guest workers sometimes must borrow additional funds to pay living costs while awaiting their first paychecks.[50] Unsurprisingly, there is anecdotal evidence of workers in hopeless debt, even as they begin what was intended to be a journey of economic self-betterment. Andrea Schmitt compellingly recounts the story of Thai migrants on H-2A visas who came to work in Washington apple orchards.[51] The migrants testified that "they were not earning nearly as much as they had been promised by their recruiters in Thailand, and they feared they would not be able to pay back the enormous loans that they had

46. *See* Yasseri, *supra* note 8, at 370; Watkins, *supra* note 7, at 468, 481; Carr, *supra* note 7, at 405-410; Gordon, *supra* note 8, at 4-9; THE INT'L LAB. RECRUITMENT WORKING GROUP, *supra* note 11, at 7, 9-10. *See also* Janie A. Chuang, *Exploitation Creep and the Inmaking of Human Trafficking Law*, 108 AM. J. INT'L L. 609 (2014). *See generally* KLARA SKRIVANKOVA, BETWEEN DECENT WORK AND FORCED LABOUR: EXAMINING THE CONTINUUM OF EXPLOITATION (2010).

47. Elmore, *supra* note 16, at 536–38. *See also* Carr, *supra* note 7, at 405; Gordon, *supra* note 8, at 9–20. Interestingly, while the courts have knowledge of these fees, as reflected in their decisions, they refrain from discussing their illegality. Instead they are mostly discussing whether the fees should be counted as expenses through an agency theory. Courts have been split on this. Some decided to force companies to factor in those fees for compensation calculations. Others asserted that growers were not required to reimburse farmworkers for fees charged by recruiters in Mexico. *See, e.g.*, Arriaga v. Florida Pac. Farms, L.L.C., 305 F.3d 1228 (11th Cir. 2002); De Leon-Granados v. Eller & Sons Trees, Inc., 581 F. Supp. 2d 1295, 1302 (N.D. Ga. 2008); Ramos-Barrientos v. Bland, 661 F.3d 587, 591 (11th Cir. 2011).

48. *See* Watkins, *supra* note 7, at 481; THE INT'L LAB. RECRUITMENT WORKING GROUP, *supra* note 11, at 10; Carr, *supra* note 2; Gordon, *supra* note 8. Workers must often bear the whole package of travel and visas expenses, in addition to informal payments requested by recruiters.

49. *See* S. POV. L. CTR., *supra* note 9, at 11; Gordon, *supra* note 8, at 10; THE INT'L LAB. RECRUITMENT WORKING GROUP, *supra* note 11, at 7, 10; Lee, *supra* note 45, at 9; Watkins, *supra* note 7, at 481.

50. *See* Elmore, *supra* note 16, at 536–38.

51. *See* Schmitt, *supra* note 9. *See also* Kati L. Griffith, *US Migrant Worker Law: The Interstices of Immigration Law and Labor and Employment Law*, 31 COMP. LAB. L. & POL'Y J. 125, 138 (2009) (discussing Indian H-2B workers who came to the United States after Hurricane Katrina).

taken out to pay labor recruiters in Thailand."[52]

Workers and their recruiters deploy unconventional collaterals.[53] Some workers secure their debts with the deeds to their lands or homes. Others entrust their passports and visas to recruiters and employers as a means of guaranteeing that they will not leave the worksite prior to repayment.[54] Others still pledge their family as a surety.[55]

Recruitment fees and loans are not limited to guest workers in the United States. In Qatar, for example, low-skilled workers frequently arrive heavily in debt to middlemen; fees in the *kafala* sponsorship system, popular in the Gulf region, can be as much as one year's wages.[56] Prior to legal reforms in 2012-2013, fees also played a central role in Israeli guest-worker programs and still do in the caregiving industry.[57] All admitted workers used to pay fees to pri-

52. *See* Schmitt, *supra* note 9. *See also* S. POV. L. CTR., *supra* note 9, at 10 (describing the plot of Indian workers who came to the United States after Hurricane Katrina and were forced to pay between $11,000–$18,000 each.

53. *See, e.g.*, Michael Holley, *Disadvantaged by Design: How the Law Inhibits Agricultural Guest Workers from Enforcing Their Rights*, 18 HOFSTRA LAB. & EMP. L.J. 575, 596 (2000). *See also* Mary Lee Hall, *Defending the Rights of H-2A Farmworkers*, 27 N.C. J. INT'L L. & COM. REG. 521, 533 (2001); Schmitt, *supra* note 9, at 173.

54. S. POV. L. CTR., *supra* note 9, at 11; Yasseri, *supra* note 8, at 370; Watkins, *supra* note 7, at 481; THE INT'L LAB. RECRUITMENT WORKING GROUP, *supra* note 11, at 10; Gordon, *supra* note 8, at 9–11; For more, *see* Chapter II Part A.2.iv, *infra*.

55. A report by the Southern Poverty Law Center (SPLC) describes a group of Guatemalan workers who paid $2,000 fees to obtain H-2B forestry jobs in the United States. Lacking resources, they turned to loan sharks: "Each of the workers paid between $3500 and $5,000 to cover recruiting fees, travel and visas. Like many other guest workers, they plunged their families into debt to raise this money. For most workers, it was more than a year's salary." S. POV. L. CTR., *supra* note 9, at 10. One worker apparently signed an agreement calling for his spouse to be responsible in the event of default. The worker was uncertain about what, exactly, would be required of his wife: "I didn't understand exactly what this threat meant but knew that my wife would have to sign if I was going to get the visa . . . the work was very hard, but I worried about leaving because my wife signed this form to get me the job and I worried about her." *Id.* at 11.

56. *See* WICKRAMASEKARA, *supra* note 45; WORLD BANK, THE NEPAL-QATAR REMITTANCE CORRIDOR: ENHANCING THE IMPACT AND INTEGRITY OF REMITTANCE FLOWS BY REDUCING INEFFICIENCIES IN THE MIGRATION PROCESS (2011), http://siteresources.worldbank.org/FINANCIALSECTOR/Resources/Nepal-Qatar.pdf [https://perma.cc/3KRL-TT9K].James, Dorsey, *Study Asserts that Controversial Gulf Labor Regime Reduces Global Inequality*, HUFFINGTON POST (Feb. 20, 2017), http://www.huffingtonpost.com/james-dorsey/study-asserts-that-contro_b_6131756.html [https://perma.cc/54SG-RWDJ].

57. Israel is a destination country for low-skilled workers from Thailand, China, Nepal, the Philippines, India, Sri Lanka, Romania, Turkey, Bulgaria and other Eastern European countries. These migrants arrive voluntarily and legally for temporary work opportunities (a

vate recruiters and agencies. The annual payments, illegal under Israeli law, amounted to hundreds of millions of dollars a year, largely unreported and untaxed.[58] The fees were prohibitive and constantly increasing, ranging from $8,000 to $30,000, depending on the migrants' origin and industry destination.[59] A regulatory change in 2006 allowed fees but limited them to roughly $895 per worker. Despite the regulation, fees increased.[60] In 2012 and 2013, Israel con-

maximum period of 63 months with some exceptions - Article 3a(a) of the Law of Entrance to Israel (1952) determines that the maximum period of work in Israel for a foreign worker is five years and three months. There are some exceptions to the rule, mainly in the caregiving industry, where the needs of the employer require a longer stay (article 3a(b)). The exceptions also maintain the temporariness aspect and strictly supervise the extension of stay, as they do for workers in construction and agriculture. *See* Gilad Natan, *The Management of the Collection of Illegal Recruitment Fees from Foreign Workers*, (הטיפול בגביית דמי תיווך מעובדים זרים שלא כחוק), KNESSET RES. & INFO. CTR. (Jan. 25, 2011), http://www.knesset.gov.il/mmm/data/pdf/m02782.pdf [https://perma.cc/T9D6-Q58E]. *See also* Conference Report, Workers' Hotline 2013 Conference, Idit Lebovitch & Zehavit Friedman, Black Money, Black Labor: The Collection of Brokerage Fees from Migrant Caregivers in Israel (Dec. 2013), http://www.idwfed.org/en/resources/black-money-black-labor-collection-of-brokerage-fees-from-migrant-caregivers-in-israel/@@display-file/attachment_1 [https://perma.cc/47W6-DTW8].

58. In 2010, for example, the estimation of revenues from the collection of illegal fees was 112 million dollars. *See* Gilad Natan, *The Collection of Illegal Recruitment Fees from Foreign Workers, (*גביית דמי תיווך מעובדים זרים שלא כחוק), KNESSET RES. & INFO. CTR. (Feb. 14, 2007), https://www.knesset.gov.il/mmm/data/pdf/m01729.pdf [https://perma.cc/M2CB-BP86]. *See also* U.S. DEPT. OF STATE, OFFICE TO MONITOR AND COMBAT TRAFFICKING IN PERSONS, TRAFFICKING IN PERSONS REPORT (2013).

59. *See* Natan, *supra* note 57, *see also* Danna Shaked, רב הנסתר על הגלוי: החלט הממשלה להארכת שהיית העובדים הסינים בישראל [*More Unknown than Known: Governmental Decision to Extend Visa Term of Chinese Workers in Israel*], KAV-LA'OVED (June 22, 2011), http://www.kavlaoved.org.il [https://perma.cc/4JNT-LPYF].

60. While the average fee collected from construction workers between the years 2001 and 2004 was $9,400, it climbed to $15,760 and from there to sums ranging between $18,000 and $20,000 in 2006–2007. *See* WORKERS' HOTLINE & HOTLINE FOR MIGRANT WORKERS, FREEDOM INC.: BINDING MIGRANT WORKERS TO MANPOWER CORPORATIONS IN ISRAEL (2007), https://hotline.org.il/wp-content/uploads/FreedomInc072507.pdf [https://perma.cc/WG5J-6G92].

In 2008, the fees collected from Chinese migrant workers in the construction industry reached $31,000 for each worker. *See* ASS'N FOR HUM. RTS. IN ISRAEL, THE LABYRINTH: MIGRATION, STATUS AND HUMAN RIGHTS (2015), http://www.acri.org.il/en/wp-content/uploads/2016/01/The-Labrynth-English.pdf [https://perma.cc/FJ78-YVNJ].

In agriculture, fees were more moderate, ranging from an average of $7,240 per worker in 2005 to an average of $8,827 in 2007, and then to the $9,000–$13,000 range in the years 2008-2011. In the caregiving industry, where fees are still collected today, the rates also have been increasing. It has been reported that in 2006, migrant workers from the Philippines paid on average $4,257 in fees, in 2008 the average reported sum went up to $5,544, and in 2013 the average fee reached $7961 per worker. *See Black Money, Black Work*, *su-*

cluded bilateral agreements with source countries to ban fees in the agriculture and construction industries.[61] In New Zealand, nurses from the Philippines were found living in "slave-labor conditions" as they paid off thousands of dollars of recruitment-fee debts.[62] As with Israel, this practice prompted New Zealand to negotiate directly with the Philippines in an effort to bypass private agents.[63]

The profitability of fees has created and normalized an entire migration and emigration industry—comprising recruiters, banks (that process money transfers), lawyers, agencies, and smugglers—in source countries.[64] Indeed, in Thailand, private recruiters dominate the migration process, notwithstanding the fact that the Thai Ministry of Labor provides lower cost labor migration services.[65]

C. The Puzzle of Fees

Fees are prevalent in guest-worker programs in the United States and around the world. The widespread partnerships between middlemen and employers in host countries may explain the breadth and strength of the fee system. The puzzle is not why these fees have developed but rather why host countries permit this fee system. Fees provide no direct benefit to the government and come with serious costs. Fees may encourage recruiters to import more workers than a

pra note 57, at 18. Moreover, during the last five years, recruiting agents have been favoring migrant workers from South Asia over the Philippines, because of the higher potential profits; fees collected from South Asia were higher on average by $3,000 for each worker. In 2011–2012, the average from South-Asian workers was $9,500 per worker. In 2007, 54 percent of the workers came from the Philippines and 35 percent from South Asia, while in 2012 the ratios flipped to 40 percent from the Philippines and 49 percent from South Asia. *Id.* at 20–22.

61. This reform has taken place in the construction and agriculture industries, but has not yet included the caregiving industry, in which the collection of fees continues. *See* Natan, *supra* note 57.

62. Jessie Williams, *Low Skill Temporary Migration in New Zealand: Labor Market and Human Rights Law as a Framework for Managing Future Migration* 1, 29 (Inst. Pol. Stud., Working Paper No. 09/09, 2009), http://ips.ac.nz/publications/files/ab2b7a9af7b.pdf [https://perma.cc/FX4R-M72K].

63. *Id.*

64. Xiang Biao, *Emigration from China: A Sending Country Perspective*, 41 INT'L MIGRATION 21, 34–35 (2003); WICKRAMASEKARA, *supra* note 45.

65. A study of Thai workers seeking work in Singapore showed that the number of workers who used private agencies was more than 300 times the number of those who used the Thai Ministry of Labor program. Schmitt, *supra* note 9, at 177. Interest rates of as much as 60% per year are common for these loans, which often come from money lenders rather than from banks. *Id.* at 176.

host country's labor market can support, and participants in the host country's labor market may suffer from the influx of workers. In addition, the *de facto* privatization of immigration rules is troubling and inconsistent with the proper functioning of government.

Fees inflict costs not only on host countries but also on guest workers, and they significantly contribute to the imbalance of power between migrant workers and their employers.[66] Recall that migrants who quit or are fired immediately become deportable. For migrant workers, deportation typically means economic catastrophe and "a life in the shadow of huge debts that [the worker] will never be able to repay."[67] Once a migrant has borrowed heavily in order to pay the requisite fees, and is admitted to a specific host state, the die is cast. Exit options are severely limited. Borrowing anticipates and requires substantial earnings in the host country. Failure to repay a loan—as is likely in the event of an early return home— puts the migrant and his or her family at risk.[68] Therefore, the guest worker must avoid deportation and, in turn, work hard to ensure that the host employer will not regard the worker with disfavor. Once admitted, migrants' bargaining power is thus diminished and the fear of deportation keeps migrant workers weak and obedient.[69] Employers can re-engineer terms of employment as they please, secure in the knowledge that guest workers dare not object to the breach of the original labor agreement.[70]

In the parlance of contract law, the employer enjoys "hold up" power over the worker.[71] The migrant commits herself to a relationship with a specific host country and employer and makes a specific investment. The investment is a sunk cost that is lost to the migrant if the migrant leaves this employer and country. Yet the employer can alter the terms of employment to the worker's disadvantage, and the migrant will not leave so long as the loss to the

66. *See* S. POV. L. CTR., *supra* note 9; Carr, *supra* note 7, at 405–410.

67. *See* HCJ 4542/02 Kav LaOved Worker's Hotline v. Israel 265 (2006) (Isr.).

68. *See* Lisa Guerra, *Modern-Day Servitude: A Look at the H-2A Program's Purposes, Regulations and Realities*, 29 VT. L. REV. 185, 208 (2004); *see also* Carr, *supra* note 7, at 404.

69. Maria L. Ontiveros, *Noncitizen Immigrant Labor and the Thirteenth Amendment: Challenging Guest Worker Programs*, 38 U. TOL. L. REV. 923, 938 (2006)*; see also* Holley, *supra* note 53, at 595.

70. *See* Guy Mundlak, Neither Insiders Nor Outsiders: The Contractual Construction of Migrant workers' Rights and the Democratic Deficit, (חוזה ?עובדים או זרים בישראל התשתית והדפיציט הדמוקרטי), 27 IYUNEI MISHPAT [TEL-AVIV U. L. REV.] 423, 440–442 (2003).

71. *See* ERIC A. POSNER, CONTRACT LAW & THEORY, 20 (2011).

worker is not as great as the loss would be from departing and investing anew in another country. In some contractual settings, the problem with hold-ups is that one party will underinvest, so as not to be put in a compromising position.[72] Here, however, the investor-worker must fully sink costs in order to be admitted to the host country. There is no underinvestment by the worker, and the hold-up power of the employer is complete because the worker's investment is not portable.

Why, given these serious costs, has the fee system persisted? What is the right way to institutionally and normatively address the fee system's persistence? This Article argues that the fee system should be understood as a response to the substantial screening and information challenges host countries confront in guest-worker programs. The next Part analyzes those challenges while exploring different ways to mitigate them and establishing an understanding of the way informal fees *de facto* address them. It also reveals additional costs that fees inflict upon the system that have not received much attention in the legal scholarship.

II. UNRAVELING THE PUZZLE OF FEES

A. Screening through Fees

1. The Problem of Information Asymmetry

The sorting problem is at the core of immigration policy. How can host countries verify the quality of potential entrants, so as to admit the best candidates from a pool of potential migrants?[73] The host country must invest resources upfront for screening in order to avoid paying a steeper price later on, when it comes to enforcing domestic laws and immigration rules. Of course, the host country seeks healthy, law-abiding, and reliable guest workers[74] who will thrive and contribute to the enterprise.

The host countries would tend to design their screening pro-

72. Patrick W. Schmitz, *The Hold-Up Problem and Incomplete Contracts: A Survey of Recent Topics in Contract Theory*, 53 BULLETIN ECON. RES. 1, 4–6 (2001).

73. Cox & Posner, *supra* note 19, at 824–825.

74. *Id*. The criterion of good health may be based on the motivation to prevent the spread of diseases; *see* Yen-fen Tseng & Hong-zen Wang, *Governing Migrant Workers at a Distance: Managing the Temporary Status of Guestworkers in Taiwan*, 51 INT'L MIGRATION 1, 8–9 (2013). Moreover, it is meant to ensure some standard of quality of work as well as to prevent excessive public welfare costs.

cesses using reliable predictors of compliance with the program's terms.[75] As an example, a host country might look for workers with independent incentives to return home and who accordingly are likely to comply with a visa's exit requirement. Some States tend to prefer to admit heads of households who leave their dependents behind in the source countries—if over time the State learns that these workers will reliably stay on the job, abide by local law, send earnings home to their families—and then exit on schedule in order to return to their families. Following this cold logic, host countries will disallow family reunification in the host country because workers may be less eager to leave on schedule, especially when departure brings on the cost of relocating the entire family back to the source country.[76]

Unlike family ties, most information used in screening processes is not easily discoverable. Because information about applicants' character, incentives, health, and training is relatively hidden and costly to gather, host countries are asymmetrically ill-informed.[77] The host would like to distinguish among workers who intend to comply, those who intend to remain illegally, and those who are uncertain about their future plans. This, however, is a difficult task, when all applicants know to present themselves as law-abiding and hardworking.[78]

A straightforward step for host countries is to investigate the accuracy of information provided by candidates. This sort of background check may include national security screening, health checks, review of criminal records, and review of previous employment rec-

75. Eleanor Marie Lawrence Brown, *Outsourcing Immigration Compliance*, 77 FORDHAM L. REV. 2475, 2491, 2496 (2008).

76. Spain, for example, developed a circular migration program with Morocco based on rules that only mothers under the age of 40 with dependent children may participate—but leave the kids behind. They received a guarantee of return to those who comply with the rules. The return rates became very high following the launch of these rules while before they were enacted the program suffered from low returns back to home countries. *See* Everhart, *supra* note 42. In Israel, for example, guest workers are not allowed to bring or reunite with family members or establish, or become involved with, new familial relations during their stay. See, article 1.4 to Administrative Procedure no. 5.3.0001, art 1.4 in נוהל העסקת עובד זר בסיעוד[Procedure Regarding the Invitation of Foreign Worker from Abroad], (Jan. 30, 2017), https://www.gov.il/BlobFolder/policy/foreign_worker_employment_procedure/he/5.3.0002_0.pdf. The United Arab Emirates also apply severe restrictions on family reunification of guest workers. *See* Williams, *supra* note 62. Even in countries that theoretically allow families to join their guest workers, like the United States, other terms of the programs, especially the seasonal-circular ones, de-facto prevent it.

77. Cox & Posner, *supra* note 17, at 813–14 & 813 n.11.

78. Brown, *supra* note 75, at 2513.

ords.[79] Property ownership, employment histories, and educational records are difficult to verify and often nonstandard.[80] The difficulty of managing an effective screening program, particularly for distant host country officials unfamiliar with source countries' cultural contexts, makes screening a natural candidate for outsourcing.

2. Outsourcing the Screening Task

i. Host employers as screening agents

Outsourcing the screening process to agents who can better discern the qualities and intentions of candidates for admission is an obvious strategy for host countries. One possible agent is the employer who sponsors and intends to hire guest-workers. In *Delegation and Immigration Law*,[81] Adam Cox and Eric Posner suggest that the United States handles the screening challenge by outsourcing the selection process to third parties, including employers, families, and source countries.

A common means of involving the employer is to require an employer petition in support of each temporary guest worker. When high-skilled workers are concerned, employers are especially likely to be adept screeners of ability. Moreover, delegation of immigration policy to employers promises something of a match between the supply and demand for high-skilled labor; employers will choose the guest workers they want from a pool numbering in the millions. In contrast, where low-skilled workers are concerned, employers cannot simply evaluate educational credentials and professional accomplishments. It is unlikely that employers have a comparative advantage in screening. The host country's immigration authority might simply want some indication of the number of low-skilled employees sought by domestic employers in order to set quotas and allocate visas.[82] These employers of low-skilled workers thus do not serve as screening agents but they remain closely tied to the private

79. Such an admission investigation is referred to as "Due Diligence." *See* Brown, *supra* note 3, at 1062.

80. Eric A. Posner, The Institutional Structure of Immigration Law, 80 U. CHI. L. REV. 289, 310 (2013).

81. Adam B. Cox & Eric A. Posner, *Delegation in Immigration Law*, 79 U. CHI. L. REV. 1285 (2012).

82. There is a related question of how to redistribute the economic benefits of migration—how to decide which employers will enjoy the benefit of hiring a foreign workforce. Permits could be allocated by merit, by auction, or by price market mechanism. *See* Motomura, *supra* note 2, at 268–69.

recruitment industry.

ii. Source countries

Local entities may have informational and administrative advantages over foreign officials and employers because of their proximity to, and familiarity with, local conditions. They are better positioned to discover relevant details, such as familial status and obligations, criminal records, and family assets. Access to information might simply follow from geographic proximity and knowledge of kinship groups and local history.[83] Local agents suffer less from information asymmetry, and when they do need information, they can often inquire with local sources.

The involvement of local agents, working on behalf of the source country and in concert with host countries, affects the types of migrants that pass the screening process. Applicants from tightly-knit communities that are known to the intermediaries are likely to benefit. In contrast, residents of less intimate urban communities continue to present information asymmetries, and they are likely to lose out.[84]

Bilateral agreements between source countries and host countries often reflect a decision to delegate screening to the source country, with its local screening advantages. For example, pursuant to bilateral agreements, the Mexican and Caribbean governments screen and sort workers for a Canadian work migration program. Canadian authorities determine the number of workers needed, and those source countries select workers in accordance with the number.[85]

In the bilateral model the source country can delegate decision-making to community leaders, or what Eleanor Brown calls "intermediaries in trust."[86] In this system there are two tiers of outsourcing: first at the national level and then at the community

83. Karla Hoff & Joseph E. Stiglitz, *Introduction: Imperfect Information and Rural Credit Markets: Puzzles and Policy Perspectives*, WORLD BANK ECON. REV. 235, 240–41 (1990).

84. *See* Brown, *supra* note 75, at 2508, 2522–24.

85. *See* Carr, *supra* note 7, at 441. *Hire a Temporary Worker Through the Seasonal Agricultural Worker Program – Overview*, GOV'T OF CANADA, https://www.canada.ca/en/employment-social-development/services/foreign-workers/agricultural/seasonal-agricultural.html [https://perma.cc/SZ2M-NXN7] (explaining the Canadian Seasonal Agriculture Worker Program and the role of source countries according to the bilateral agreements and relations).

86. *Id*. at 2495, 2515–16, 2530.

level.[87]

Despite the ostensibly significant benefits of the bilateral model, the United States has not concluded bilateral agreements regarding its guest-worker programs since the Bracero program.[88] In 1942, the U.S. government signed its first formal labor agreement with Mexico, which was officially named the "Emergency Farm Labor Supply Program," more commonly known as the Bracero Program.[89] In contrast to former labor-migration programs, the Bracero Program was based on a bilateral relationship, whereby both the sender and the host were responsible for the workers. At its height, the Bracero Program employed more than 400,000 Mexican workers annually.[90] Through this program, which was used until 1964, Mexican citizens filled about 4.5 million jobs in total.[91]

While at first successful, the Bracero program soon began to fail, for various reasons, amongst them a surge in illegal immigration during the same period, the program's alleged negative effect on domestic labor conditions,[92] and increasing mechanization of agriculture.[93] Ultimately, the Bracero Program was discontinued in 1964. Today, the program is criticized for being excessively exploitative towards migrant workers and creating the conditions for the subsequent boom in unauthorized migration from Mexico to the United States,[94] and serves as a warning sign against the possible expansion of guest-worker programs. [95]

Some other probable explanations of the United States's reluctance in signing bilateral agreements since the Bracero era include: a fear of corruption, rent-seeking intermediaries,[96] and a re-

87. *Id.* at 2493.

88. *See* Jennifer Gordon, *People Are Not Bananas: How Immigration Differs from Trade*, 1004 NW. U. L. REV. 1109, 1127 (2010). The Bracero program was based on the first formal labor agreement the U.S. government signed with Mexico in 1942. At its height, the Bracero Program employed more than 400,000 Mexican workers annually. Through this program, in use until 1964, Mexican citizens had filled about 4.5 million jobs in total. *See* Hahamovitch, *supra* note 16, at 81. *See also* S. POV. L. CTR., *supra* note 9, at 4.

89. Bracero means "strong-armed."

90. Bruno, *supra* note 32, at 1; Basok, *supra* note 16, at 226.

91. S. POV. L. CTR., *supra* note 9, at 3.

92. *Id*. at 4.

93. Basok, *supra* note 16, at 220.

94. S. POV. L. CTR,, *supra* note 9, at 4.

95. Kerry Howley, *Guests in the Machine*, REASON (Jan. 2008), http://reason.com/archives/2007/12/17/guests-in-the-machine [https://perma.cc/SNK6-S2LE].

96. Brown, *supra* note 75, at 2524–26. Brown recognizes this problem and therefore

luctance to rely on source countries' weak formal institutions.[97]

Some scholars have suggested that the United States has avoided the bilateral model because of an American preference for unilateral action, an approach that characterizes immigration law and U.S. policy. In other words, the United States might be reluctant to outsource a core immigration function to foreign entities, particularly community-level agents, outside the territory of the United States.[98] This suggestion, however, seems unconvincing, considering the reality of implicit outsourcing to private and informal intermediaries located in source countries. This *de facto* outsourcing, will be discussed in the following sections.

iii. Self-Selection

Thus far, this Article has examined methods that rely on agents to sort migrant candidates. Self-selection is a different sorting strategy.

Inasmuch as workers themselves are well-informed about their own characteristics, an ideal screening system would encourage workers to use their private information to self-sort.[99] Entry fees can foster self-selection by discouraging those who self-assess as low earners, whether because of their work productivity or likelihood of violating local laws, from applying and incurring substantial fees that they will not be able to pay back. If workers base their decisions to apply on their expected earnings in relation to the fees, the task of local recruiters changes. They will be in the business primarily of advertising opportunities and collecting fees, rather than evaluating applicants. The recruiters will anticipate that reliable workers will screen themselves and then apply, without much work on the recruiters' part.

The academic literature includes some enthusiastic supporters of self-selection through fees in the context of migration law. For example, Gary Becker and Diane Coyle proposed selling the right to immigrate, as well as using auctions to allocate entry permits, anticipating that individuals who expect to earn the most would pay the

asserts that bilateral agreements should be sought only with "liberal democracies." *Id.* at 2491 & n.69. This solution, though, significantly reduces the reach of the bilateral approach.

97. *See* Gordon, *supra* note 8, at 19.

98. *See* Brown, *supra* note 75, at 2529.

99. *See generally* Oren Bar-Gill and Omri Ben-Shahar, *The Uneasy Case for Comparative Negligence*, 5 AM. L. AND ECON. R. 433 (2003).

most for the right to work in a host country.[100] Howard Chang has advocated immigration tariffs, which operate similarly as a screen.[101] Indeed, these proposals go back to the origins of American immigration law in the nineteenth century, when taxes and bonds were prevalent.[102]

When the fee system is privatized and unregulated, the State does not benefit from the revenues of the fees *but nevertheless may benefit from the self-selection effects*. This institutional benefit disentangles the puzzle of fees. It provides an additional and substantial explanation for the general lack of motivation of host countries to regulate—or in the U.S. case, enforce existing laws regarding—the profitable informal industry of recruitment fees.

The problem with a fee-based self-selection model is that workers, including those who anticipate earning well in excess of the fee rates, often lack the resources to pay high fees upfront.[103] For these screening devices to work, particularly for low-skilled workers, some financing mechanism must exist.[104]

iv. Lenders

When fees are involved in the admission process, migrant workers often borrow money in order to pay. Banks or other formal lenders might be expected to enter the picture as screening agents.[105]

100. *See* GARY S. BECKER & DIANE COYLE, THE CHALLENGE OF IMMIGRATION: A RADICAL SOLUTION (2011).

101. Howard F. Chang, *Migration as International Trade: The Economic Gains from the Liberalized Movement of Labor*, 3 UCLA J. OF INT'L L. & FOREIGN AFF. 371 (1998). See also Simon's proposal for selling citizenship through entry prices. JULIAN L. SIMON, THE ECONOMIC CONSEQUENCES OF IMMIGRATION (1989).

102. MOTOMURA, *supra* note 2.

103. *Cf.* Brown, *supra* note 3, at 1055–57, 1075 (discussing the ability to post a bond in advance). The same logic applies to entry fees.

104. *See* Posner, *supra* note 80, at 313. *See also* Carr, *supra* note 7, at 406 (discussing workers' self-financing efforts and resulting abuses).

105. *See* Brown, *supra* note 3, at 1067. Brown suggests the following optimal bonding solution involving banks as screeners and enforcement agents: the formal lenders will need to screen loan applicants for the same qualities that the host country and its employers seek. Indeed, the host country can think of the lender as serving both the screening and enforcement functions. The lender will want to pursue defaulting workers. Thus, the host state receives fees, which can be thought of as deposits or bonds, at the time of admission; it returns these fees when there is compliance and timely exit, but it is left with compensation in the event of default. In such a system as Brown envisions the host country state benefits in several dimensions: it benefits from the fund itself in case of default. It also benefits from self-selection on the part of workers who evaluate the fees as an investment, and it benefits from

However, formal lending institutions are ill-suited for this role. They might find it difficult to gather information about borrowers with no credit history; they face enforcement problems when borrowers are judgment-proof;[106] and they have no control over borrowers' behavior, especially when these borrowers are living and working far away. Loans also present moral hazard problems. If borrowers perceive that enforcement is weak, they may be inclined to over-borrow or risk deportation. Accordingly, banks usually are less inclined to lend money in these circumstances—especially in countries where it is difficult to enforce debts through lawsuits.[107] Rather, banks that operate in developing countries are more inclined to rely on collateral, especially land, because other contractual arrangements suffer from information asymmetries and enforcement problems.[108] Low-skilled workers are the least likely to own land or substantial resources, and so they have limited access to formal lending institutions.

Informal lenders, located near potential borrowers and often belonging to the same communities and kinship groups, are an alterative. They are likely to have lower screening and enforcement costs. Even if they do not have an information advantage vis-à-vis formal lending institutions, they have greater ability to collect debt through informal, including unlawful, means. In other words, informal lenders can issue and monitor loans that banks cannot.[109] They can, for example, offer usufruct loans, in which a lender occupies and uses the borrower's land until the principal is repaid. Some informal lenders use tree pledging, by which the harvest from the borrower's trees is pledged to pay the interest on a loan.[110] But these alternative forms of collateral also require borrowers to have some wealth in order to offer security for loans. Poor borrowers without land or other collateral require some other form of security, especially where the lender expects high enforcement costs.

Poor borrowers can offer a portion of their future earnings in order to guarantee loan repayment. The migrant worker borrows to pay fees and relocation costs and promises to repay out of the higher earnings expected in the host country, following admission. The pre-

the screening work done by lenders who assess the worker-borrower's likelihood of repayment.

106. Hoff & Stiglitz, *supra* note 83, at 237.

107. Posner, *supra* note 104, at 313. *See* Brown, *supra* note 3, at 1057, 1080, 1089.

108. Hoff & Stiglitz, *supra* note 83, 242–43. *See* Brown, *supra* note 3, at 1057, 1074, 1082–84.

109. Hoff & Stiglitz, *supra* note 83, at 240–41. *See* Brown, *supra* note 3, at 1077.

110. Such loans are transacted in Thailand to finance migration for work abroad. They are viewed as low-risk loans. *See* Hoff & Stiglitz, *supra* note 83, at 243.

dicted new source of income is the security these borrowers have to offer.[111] In turn, the screening process focuses on the likelihood of these future earnings rather than on a borrower's current financial situation. Screening is about character and capability, with an eye toward the likelihood that the future earnings will be channeled to loan repayment. This likelihood is enhanced if the candidate has left a family behind in the source country, all the more so if the lender has the ability to put pressure on the family.[112]

The value that the lender places on the borrower's family remaining in the source country, and thus being susceptible to pressure, reflects a central feature of many guest-worker programs. In some cases, as in Israel and Canada, there is an explicit bar to migration by family members. Other host countries, like the United States, design programs that are so short-term that it is impractical to bring family members along. This feature helps with formal screening and enforcement, as discussed earlier.[113] It also helps informal lenders who advance fees to migrant workers. Apparently they, too, can use temporary separation as a tool to encourage compliance, or repayment of the loan.[114]

111. *See* Yasseri, *supra* note 8, at 362 ("Everyone of us took out a loan to come here. We had planned to pay back our debt with our job here."). Gordon explains that, "[t]he primary factor shaping the market for recruitment is the vast difference between the wage that a migrant can earn at home and that available to her in a destination country . . . much of the increased wages that migrants stand to earn by leaving their home countries goes instead to these gatekeepers who are in a position to demand up-front payment." Gordon, *supra* note 8, at 16–17.

112. Brown indicates that informal lenders sometimes act as "paradigmatic hostage takers: even if borrowers disappear, moneylenders have access to relatives, against whom they may make implicit and explicit threats." Brown, *supra* note 3, at 1089. Carr asserts that "labor organizations report harassment and retaliation against migrants and their families, which ensure that guest workers remain highly dependent on their U.S. employers for compensation and continued employment." Carr, *supra* note 7, at 406. Gordon also indicates that violence against families back home is one of the threatening and pressure tools possessed by recruiters against migrant borrowers. Gordon, *supra* note 8, at 7. *See supra* note 56.

113. *See* Part II.A.1.

114. Put differently, this design choice enables use of the family as a surety for informal loan purposes, which is essential for the fees mechanism. Family as a surety has a long history. In the bail-bond system, originated in medieval England, the family served as a surety for a released defendant. That arrangement was effective in the rural and small communities of that period, when kinship and close acquaintance were central features, as they are in many source countries today. In the early bail-bond system of the common law, bail served as a virtual prison; the defendant was under the custody of the surety who was considered by the law to be the jailor. A surety who failed to secure the appearance of the accused in court was required to take her place or forfeit property or a sum of money. *See* Rebecca R. Fisher,

Informal lenders who treat families as collateral, and who are ready to act upon threats in order to secure their credibility as enforcers, are known as "biting lenders." These lenders use more rigorous means of enforcement than do formal lenders and incentivize migrants to internalize the risk of the loan.[115]

At present, admission fees, outsourced screening, and private lenders form a tripod upon which many host countries, including the United States, rely for the smooth functioning of low-skilled guest-worker programs. The host country benefits from a more efficient, albeit brutal and exploitative, system while maintaining its image as a democratic and liberal State. Payments and vigorous enforcement are cloaked by informal outsourcing.[116]

Alongside these institutional benefits, fees also inflict signifi-

History of American Bounty Hunting as a Study in Stunted Legal Growth, 33 N.Y.U. REV. L. & SOC. CHANGE 199, 207 (2009). The personalized surety system developed into a commercial bail system in the U.S. and then in England, when societies became more diverse and less centered on kinship and familiarity: "[c]ommercial bail practices filled the gap where family and friends had once stood as a disincentive to skip bail." *Id.* at 208.

115. Brown suggested a bonding model that encourages foreign formal banks to provide loans for migrants, and secure those loans by sanctioning the defaulting of loans with visa cancelation and deportation in cooperation with the host state. *See supra* note 3. For further discussion about Brown's bond model, see *infra* Part III.A.2. In order to induce banks to take on such tasks, Brown suggested that tying loans to visa renewal would enhance the legal sanctions for defaulting on the loan, as well as transferring part of the bond money to the bank if it succeeded in the detection and self-deportation tasks, thus lowering the risk associated with the loan for the banks. Brown, *supra* note 3, at 1057–59. The difficulty with Brown's suggestion is, however, that it offers a "toothless" immigration system as securities for "toothless" lenders. Since enforcement in the U.S. immigration system is weak, as Brown acknowledges, *id*. at 1069, with a very low probability to be detected or sanctioned unless criminal activity or issues concerning national security are involved, the effectiveness of the suggested securities—nonrenewal of visa and deportation—is doubtful. In addition, even if the bank succeeds in the challenging task of detecting defaulting migrants and convincing them to self-deport in a timely manner, it should be able to recoup only a portion of the bond according to Brown's suggestion. *Id*. at 1072. In addition, if the bank fails in its efforts, the U.S. government forfeits the whole bond, leaving the bank to bear the costs of a defaulted loan. In light of these risks, Eric Posner asserted that while theoretically Brown's bond model is an interesting idea, its practical value is limited. *See* Posner, *supra* note 104.

116. Studying the case of Taiwan as a host state for guest-worker programs, Yen-Fen Tseng and Hong-Zen Wang came to a similar conclusion regarding the role of outsourcing and privatization in implementing immigration regulation, which they define as "governing at a distance through society." This strategy is adopted by liberal host states not just for the benefits and efficiency that are embedded in the outsourcing itself but also because it enables those states to maintain their democratic and liberal pretense, while allowing them to implement a strict guest-worker scheme. *See* Yeng-Fen Tseng & Hong-Zen Wang, *Governing Migrant Workers at a Distance: Managing the Temporary Status of Guestworkers in Taiwan*, 51 INT'L MIGRATION 1, 16 (2013).

cant costs. The fee system dramatically deteriorates migrants' welfare and can threaten migrants' families in source countries.[117] Other costs are borne by the host countries.

B. The Institutional Costs of Fees

1. Adverse Selection and Agency Problems

An efficient and well-designed self-selection process makes use of two types of self-sorters: those who deem themselves unfit and those who self-assess as fit, or capable of taking on a loan or other risks. The first group is deterred by the terms of the loan and avoids borrowing and migrating. The second group consists of individuals who regard themselves as capable of bearing the expected risks and repaying the loan, or fees, with a net profit.

For the system to work, the sorting must be based on something more than optimism and pessimism, and it must not be overwhelmed by poor or strategic self-assessors. Those who mis-sort into the second category include optimists, risk lovers, and those who know they will fail to perform but expect to externalize costs onto others, including family members. Lenders prefer to minimize the number of these actors in the pool of loan receivers because enforcement is costly and, no doubt, unpleasant.

Self-selection alone will not prevent inefficient pooling, so lenders will charge higher fees and higher interest rates. Up to a certain point, the higher rate will cause a cross-subsidy situation, in which reliable workers pay higher rates of interest than their real market risk to offset the pooling of potential wrongdoers.[118] If, however, fees and interest rates are too high, desirable workers will turn away.[119] Indeed, if the fees are extremely high, there will be perfect separation of a perverse kind: those who will seek admission will do so in anticipation of escaping the repayment requirement and remaining in the host country.

Thus, self-selection cannot be the only mechanism in hand. It needs to be bolstered by some external screening. But recruiters' interests sometimes lead to conduct in conflict with host countries' interests. A host country has an interest in compliance, including timely exit, but the recruiter who profits from high fees may not screen out applicants who intend to overstay their welcome.

117. *See supra* Part I.C.

118. Hoff & Stiglitz, *supra* note 83, at 239.

119. Assaf Hamdani, *Gatekeeper Liability*,, 77 S. CAL. L. REV. 53, 76 (2004).

This mismatch is further evident in recruiters' use of high interest rates that reflect the risk of default. These high rates may increase the actual occurrence of default and noncompliance by placing more pressure on the migrants to meet the higher interest payments. If this sort of noncompliance leads to early deportation, such as the migrant engages in unlawful conduct to supplement his or her lawful earnings, then both the host country and the lender suffer. If the worker's noncompliance goes undetected, the lender profits, and the host country bears all of the costs of noncompliance. It follows that the interest rate charged to a worker-borrower likely understates the risk to the host country. The host country certainly does not want migrants to engage in unlawful conduct, but the lender does not necessarily lose from a borrower's misbehavior.

In a completely transparent system, the host country might well refuse admission to everyone in the lender's highest risk pool. Of course, the lender has no interest in transparency, and the host country is limited in its ability to look into the recruiter's privately-gathered information and individual fee pricing.

2. The Ex-Post Effects of Fees

Facially, admission fees seem like a sunk cost, with no impact on behavior once a worker is admitted to the host country. The loan system, however, gives continuing life to fees. During the initial months of their employment, most H-2 workers are laboring to pay off debts. This discourages risky behavior that might trigger deportation because, at this stage, workers have a great deal to lose from an early departure and are eager to reap the benefits of their increased income.[120]

i. The Basic Enforcement Structure: A Tale of Fading Deterrence

The functionality of any immigration program depends on the host country's willingness and capacity to enforce the terms of the program. In the absence of effective law enforcement, employers, migrant workers, and other involved stakeholders have few incentives to comply with program terms.[121] The main problem is how to design an effective enforcement strategy that achieves the optimal level of deterrence and compliance with the host country's policy

120. Holley, *supra* note 53, at 596.

121. *See* Martin Ruhs, *The Potential of Temporary Migration Programs in Future International Migration Policy*, 145 INT'L LAB. REV. 12, 16 (2006).

without inflicting excessive costs and punitive measures on migrants.

Generally, in immigration law and specifically in guest worker programs, the central and basic sanction against noncompliance is removal from the host country by preliminary detention followed by deportation.[122] The different relevant grounds for deportation in guest-worker programs reflect the inadmissibility rules, including violation of immigration status, such as illegal work or visa overstay, conviction of criminal offenses, engagement in activity that raises national security concerns, or becoming a public charge by, for instance, not working at all.

The host country is interested in the overall level of lawbreaking rather than the illegal actions of any specific individual. Therefore, a "simple sanction" mechanism, such as deportation, which is costly in its establishment and maintenance but less in its individual activation, is considered effective.[123] In addition, credible sanctions have their own deterrent effect and reduce the need for the actual sanctions.[124] That said, deportation systems have thus far proven insufficient for preventing noncompliance.

For a legally-employed guest worker, deportation terminates employment and brings an end to the associated income stream. Temporary programs, in the classic one-shot structure, are designed so that migrants return to the source country at the end of the permitted stay. Deportation may be an effective sanction when the worker has time left on the visa, but a worker who has overstayed is unlikely to view deportation as much of a threat in the one-shot structure programs.[125] The sanction ends (what has become) an illegal job, and

122. I use the term "sanction" as it is deployed in the economics literature. This Article does not address the question of whether deportation amounts to legally imposed punishment. According to the case law it is not (the precedent can be traced to Fong Yue Ting v. United States, 149 U.S. 698 (1893) and since then has been reaffirmed by many courts). Some legal commentators, on the other hand, believe that deportation should sometimes be regarded as a form of punishment. *See, e.g.*, Stephen H. Legomsky, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 WASH. & LEE L. REV. 469, 511–15 (2007).

123. Omri Ben-Shahar & Anu Bradford, *Reversible Rewards*, 15 AM. L. & ECON. REV. 156, 160 (2013). The sanction of deportation requires a large investment by the host country because it involves high administrative costs. In addition to the enforcement costs required to detect noncompliant migrants, the establishment of a deportation system requires detention facilities, allocating and training immigration police, establishing removal procedures, and then paying for hearing officers and travel arrangements. Once a system is in place, the marginal cost of activating the sanction is relatively low.

124. Steven Shavell, *The Optimal Use of Nonmonetary Sanctions as a Deterrent*, 77 AM. ECON. REV. 584, 584–85 (1987).

125. *See* Brown, *supra* note 3, at 1069.

the worker is unlikely to be worse off than if the worker had simply left on schedule.[126]

The deterrent effect of deportation is thus powerful at the beginning of the legal term of stay, but its effect diminishes as the program progresses and the migrant has less to lose from deportation.[127] The incentive structure is such that noncompliance is increasingly attractive as the expiration of the visa approaches. In turn, if the host country wishes to maintain its level of deterrence, it must increase enforcement measures. One way to tackle the problem, adopted by American immigration law, is to insert an element of repeat game to the temporary programs. In order to qualify for subsequent readmission to the United States, a worker must exit and remain outside the country for several months before reapplying. This repeat game opportunity provides a deterrent effect to deportation at the end of the visa term. Overstaying puts future opportunities at risk. A noncitizen who has been unlawfully present for a single period of more than 180 days, but less than one year, who voluntarily departs is inadmissible for three years.[128] If a formal exclusion or deportation order has been issued, or if a worker has been unlawfully present for a single period of one year or more, that worker is inadmissible for ten years.[129] The circular model therefore encourages exit because there is an anticipated benefit of successful re-entry.[130]

ii. The Reinforcement of the Basic Structure

Loan-financed fees produce contradictory incentives in the post-entry stage. On the one hand, fees encourage compliance with

126. Maurice Schiff emphasizes this point in his reform proposal. *See* Maurice Schiff, *When Migrants Overstay Their Legal Welcome: A Proposed Solution to the Guest-Worker Program* 18 (Inst. for Stud. Lab., Discussion Paper No. 1401, 2004), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=622684 [https://perma.cc/7BF8-GNTU].

127. That obsolescing dynamic corresponds with the model of obsolescing bargain (OBM), first developed by Raymond Vernon in 1971. According to this model, original bargains between multinational enterprises and a host country tend to obsolesce over time because of the shifting of bargaining power from the enterprises that had already invested assets in the host country, to the host country that uses them as hostages. In our case, the shift of incentives that leads to the obsolescing of the original bargain is opposite—from the host state to the migrant visitors. *Sovereignty at Bay: The Multinational Spread of U.S. Enterprises*, 13 INT'L EXEC. 1, 1–3 (1971).

128. *See* I.N.A. § 212(a)(9)(B)(i)(I), 8 U.S.C. § 1182(a)(9)(B)(i)(I).

129. *See* § 212(a)(9)(B)(i)(II), 8 U.S.C. § 1182(a)(9)(B)(i)(II).

130. Moran Sadeh, *Global Reputation for Guest Workers*, 47 J. LEGAL. STUD. (forthcoming 2018).

the host country's laws because the borrower is eager to avoid deportation and the enormous financial burden it will impose on the guest worker and his or her family. In that sense, the loan and its interest component serve as a disciplinary mechanism by increasing the cost of deportation. This, in turn, lowers the host country's enforcement costs. On the other hand, the worker is encouraged to earn as much money and to do so as quickly as possible in order to cast off the threat posed by the loan and the added burden of accumulating interest. The worker is thus tempted by higher-paying but illegal work, even as the penalty for engaging in such work increases due to the extra burden of the loan repayment.

The balance between these two influences hinges on the probability of detection. As the risk of detection increases, the worker is likely to be more cautious. The host country must expend resources in order to convince guest workers that the risk of detection is high. As such, there is less benefit to the host country from the loan system than first appears.

The interaction between the immigration system and domestic criminal law in the host country is also noteworthy. The primary means of detecting immigration law violations is criminal law enforcement. When a guest worker attracts the attention of criminal law enforcement officers, the host country also becomes aware of that worker's immigration law violations. High fees may reduce the incentive to participate in well-paying criminal activity because those who most fear deportation, *i.e.* those who have to pay back burdensome loans, will be most inclined to avoid the attention of the police. This is the essence of the *crimmigration* model; guest workers steer clear of deportation mostly by avoiding the criminal justice system.[131] We should expect those who fear deportation to drive more carefully, to avoid petty crimes, and so forth.

Once the loan is repaid, various incentives change. An individual who has paid off his or her loan may have a stronger incentive to overstay, in order to be able to save the salary earned. Fees also undermine the deterrent power of the repeat-play model. If each visa application comes with high fees, a migrant will have reason to overstay the visa period in order to avoid the costly re-admission process. In short, high fees burden subsequent enforcement, especially toward the exit point.

It is apparent that a host country would prefer that loan repayment coincided with the end of the visa. This would align the worker's incentives with the host country's interest in a timely depar-

131. *See* Cox & Posner, *supra* note 17, at 846.

ture. Presumably, if lenders were agents for the host country, they could achieve this sort of coordination by charging appropriate interest rates, as there is no particular reason why lenders need accelerated repayment. The "collateral" is not declining in value. At present, however, the host country has no easy means of controlling lender behavior. Workers can send their earnings home as remittances or direct them to lenders, but absent some strong relationship between the host and source countries, it is difficult to control the timing of guests' payments to their creditors.

III. BONDS AND REWARDS

Given the various costs and negative externalities inflicted by fees, annulling the fees altogether would probably better serve host countries, migrants, and possibly employers. Given the persistence of fees, the institutional role they play, and the complications in establishing a mechanism that could theoretically replace their screening force, host countries must pursue enforcement mechanisms to ensure migrants' compliance with domestic laws and visa terms, even as incentives for compliance wear off.

How can host countries design optimal and cost-effective mechanisms to promote compliance, while accommodating the interests of migrant workers and minimizing punitive means? This Part systematically addresses this question.

A. Monetary Bonds

Nonmonetary sanctions, including detention and deportation, suffer from several significant drawbacks. They are more punitive toward migrants and involve different levels of restrictions on their liberty. They are also expensive for the host country and in all likelihood socially inefficient because no one gains from these costs.[132] Monetary mechanisms hold better promise due to their milder grip on migrants' freedoms and their efficient costs distribution.[133]

In its sanctioning capacity, a bond functions basically as a secured fine. A fine transfers money from a noncompliant party to the

132. Shavell, *supra* note 124, at 584.

133. Steven Shavell, *Liability for Harm Versus Regulation of Safety*, 13 J. LEGAL STUD. 357, 373 (1984). Shavell explains here the economic structure of fine. *See* Omri Yadlin, *The Conspirator Dilemma: Introducing the Trojan Horse Enforcement Strategy*, 2 REV. L. & ECON. 42, 42–43 (2006).

state. It is an *ex post* sanction that may succeed in causing the potential wrongdoer to internalize the cost of the harmful activity.[134] Even as it encourages good behavior on one side, it also finances enforcement efforts on the other. The value of the fine should therefore be based on the costs that noncompliance inflicts upon the State, including enforcement costs, as well as the probability of detection.

1. The Virtues and Limitations of Fines

In principle, an optimal sanction and enforcement policy can bring about any desired level of deterrence. An optimally designed migration enforcement policy might deploy a very high fine with a low probability of detection in order to economize on enforcement costs.[135] The cost of apprehending and prosecuting violators has a direct relation to the probability of detection, while the cost of collecting the fine is assumed to remain the same even as the magnitude of the fine increases.[136] It is, of course, impossible to levy high fines on persons of limited means.[137] When the target group has limited resources, the efficiency of monetary fines may be compromised, especially if enforcement is imperfect.[138]

Guest workers are often insolvent, or nearly so, and have a limited ability to pay fines. The host country has no interest in attaching future wages because one of its goals is to ensure that the worker's stay is short-term. This goal of temporariness is at odds with many forms of payment. For example, the host country does not expect to collect fines from those who have exited the host country and returned home. Fines are therefore limited to a fraction of the worker's expected earnings in the host country.

At the same time, a fine must be sufficiently great to overwhelm the benefits available from illegal activity. The expected benefit of a long period of over-stay will likely exceed the expected risk

134. Shavell, *supra* note 133, at 373.

135. Mitchell Polinsky & Steven Shavell, *A Note on Optimal Fines When Wealth Varies Among Individuals*, 81 AM. ECON. REV. 618 (1991). *See* Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169 (1968).

136. RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 220–21 (7th ed. 2007).

137. A. Mitchell Polinsky & Steven Shavell, *The Theory of Public Enforcement of Law*, *in* 1 HANDBOOK OF LAW AND ECONOMICS 413–4 (A. Mitchell Polinsky & Steven Shavell eds., 2007).

138. The administrative costs of fines are of two types: there are monitoring costs (to detect the violator) and post-detection processing costs. *See* Gerrit De Geest & Giuseppe Dari-Mattiacci, *The Rise of Carrots and the Decline of Sticks*, 80 U. CHI. L. REV. 341, 358–9 (2013).

associated with any realistic monetary sanction alone.[139] The worker's overall earnings and remittances may be quite substantial, but the amount available at any given moment of sanction is likely to be modest. Noncompliance in the form of overstay will generally be worth more to the worker than the expected cost of a fine. The need to keep fines modest means that the host country cannot attack the problem with a high fine-low enforcement cost strategy.

If fines for overstay are modest, the host country needs to ensure that the probability of detection is high for the expected risk of overstay to exceed overstay's anticipated value. This, however, would be prohibitively costly for host countries, as overstaying migrants actively avoid detection.

Alternatively, the design hurdles may suggest that effective monetary sanctions must alter migrants' risk/reward calculations.[140] A fine, possibly designed in the form of a bond, can assure the host country a transfer of wealth in the event of noncompliance. Collection costs can be kept low if the State must simply identify noncompliance and then claim or confiscate the prepaid fine or posted bond. Lower administrative costs could in turn keep the prepayment to a reasonable level, as is necessary for workers with limited resources.

2. Historic, Comparative and Proposed Bond Models

In the nineteenth century, several U.S. states used monetary devices to limit the number of poor migrants. Shipmasters were required to pay combinations of fees and posted bonds in order to guarantee that their passengers would be productive, self-sufficient workers.[141] For example, New York required shipmasters to report all immigrants and to post bonds, redeemable by the state or locality in the event that the migrant becomes a burden on public welfare within four years of arrival.[142] In California, the state inspector collected "support and maintenance" bonds from shipmasters.[143] These state practices, however, were ruled unconstitutional as impinging on the

139. Schiff, *supra* note 126, at 8 ("The present value of the benefit of working in the illegal job market is likely to be greater than the loss of income earned as a guest-worker, even if the government were to take the guest-worker's entire income away. If so, this component of the policy cannot by itself stop the guest-worker from joining the illegal job market.").

140. *See* Brown, *supra* note 3, at 1070.

141. *See* MOTOMURA, *supra* note 2, at 21.

142. *Id.* at 23.

143. *Id.*

federal government's exclusive power.[144]

The Bracero programs, operated by the federal government in the mid-twentieth century, established "voluntary savings plans" to ensure that foreign workers really returned home. Workers' contracts required them to contribute to these savings plans, while their U.S. employers were required to contribute ten percent of the workers' earnings to a Mexican fund payable to these workers upon their return to Mexico. Unfortunately, the policy failed in implementation inasmuch as many of the returning Bracero participants never received their money from the U.S. government. Their claims for deferred wages, now estimated in the hundreds of millions of dollars, have remained under investigation for decades.[145]

Current U.S. law does not use bonds as a means of enforcing immigration law.[146] Other countries, though, have implemented bond-based programs. For example, the aforementioned bilateral agreement between Canada and Jamaica requires that "compulsory savings" are returned to the workers-depositors only after they return to Jamaica.[147] South Korea's guest worker program withholds a portion of workers' wages until they exit.[148] In Taiwan, companies recruiting foreign workers withhold part of the workers' income and return it with interest if guest workers leave at the end of the contract period. Noncompliance leads to the forfeiture of the accumulated sum.[149] In Israel, employers are required to deposit approximately $200 (USD) each month, per worker. The payment is tied to each worker's severance package and is not deducted from the worker's salary. The severance package is transferred to the worker only after the worker leaves the country.[150] These programs share the charac-

144. *See* Chy Lung v. Freeman, 92 U.S. 275 (1876); Henderson v. Mayor of New York, 92 U.S. 259 (1876); Smith v. Turner (Passenger Cases), 48 U.S. 283 (1849). *See also* Edye v. Robertson, 112 U.S. 580, 591–94 (1884).

145. *See* Ruhs, *supra* note 121, at 30. *See also* Hahamovitch, *supra* note 16, at 86; S. POV. L. CTR., *supra* note 9, at 4.

146. Brown, *supra* note 75, at 2502. *See also* Schiff, *supra* note 126, at 2.

147. Brown, *supra* note 75, at 2502.

148. Howley, *supra* note 95.

149. Schiff, *supra* note 126, at 2.

150. The payment, following an official request filed by the worker or the corporation, is transferred under the condition that the worker had left Israel permanently. The bond is paid to the worker after she had passed the border inspection pursuant to her permanent departure. The money is paid in cash or by bank transfer, as the migrant chooses. *See* POPULATION AND IMMIGR. AUTH., נוהל פיקדון לעובדים זרים המועסקים בענף הבניין, בטכנולוגיה ייחודית ובחברות סיעוד [MINISTERIAL PROCEDURE FOR THE EMPLOYMENT OF FOREIGN WORKERS IN THE CONSTRUCTION INDUSTRY THROUGH MANPOWER CORPORATIONS] (2017), https://www.gov.il/BlobFolder/policy/deposit_monies_foreign_workers_constructions_techn

teristic of a monetary incentive on top of the threat of deportation.

Several U.S. scholars have suggested bond-based reforms to guest worker policies as a way of tackling enforcement challenges. Eleanor Brown and Anu Bradford have proposed ex-ante bond systems. Brown's bond model encourages foreign banks to provide loans for migrants to finance the bonds upfront. Any default on loan repayments would be sanctioned with visa cancellation and deportation in cooperation with the host country.[151] This, in theory, would help facilitate involvement of formal lenders, which could assess the applicants' risk profiles and future compliance with visa terms as well as with loan terms.[152] In addition, lenders' enforcement efforts for loan repayment could serve a detection function and migrants would have a strong incentive to leave.[153] Bradford's migration fund,[154] akin to a deposit system, would have migrants or their sponsors pay upfront into a fund. Migrants who comply with host country rules would recover part of their initial deposit at the end of their stay, and noncompliant workers would forfeit their deposit to the host country.[155]

Philip Martin has suggested refunding workers' share of payroll taxes once they surrender their U.S. work visa *in the source country*.[156] Howard Chang, Maurice Schiff, and Giovanni Peri have suggested different mechanisms by which the government would hold a share of guest workers' wages until workers return to their source country.[157]

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ology_procedure/he/9.0.0003_eng.pdf [https://perma.cc/4U45-ZUYM] (Isr.). *See also Deposit Procedure for Foreign Workers Employed in the Construction Sector, or in Unique Technologies or by Nursing Care Agencies*, POPULATION AND IMMIGR. AUTH. (Aug. 1, 2016), https://www.gov.il/he/Departments/policies/deposit_monies_foreign_workers_constructions_technology_procedure [https://perma.cc/V8DH-TKDS] (Isr.).

151. Brown, *supra* note 3, at 1058. See discussion about Brown's bond model *supra* note 115.

152. Brown, *supra* note 3, at 1071.

153. *Id*. at 1059. See discussion about Brown's proposal and opposing critique, *supra* note 117.

154. Anu Bradford, *Sharing the Risks and Rewards of Economic Migration*, 80 U. CHI. L. REV. 29 (2013).

155. *Id.* at 30, 54. Bradford acknowledges that her system works better for highly skilled workers with the means to place deposits; unskilled, temporary workers are unlikely to be able to obtain the required initial investment for the migration fund.

156. Philip L. Martin, *Guest Workers: New Solution or New Problem?* 2007 U. CHI. LEGAL F. 289, 296 (2007).

157. *See* Howard F. Chang, *Guest Workers and Justice in a Second-Best World*, 34 U. DAYTON L. REV. 3, 12 (2008), Schiff, *supra* note 126, at 5; DOVELYN RANNVEIG AGUNIAS,

As discussed, ex-ante models are theoretically attractive but practically deficient. Low-skilled workers would not be able to post the required bond without using exploitative recruiters. Ex-post models are imperfect but more realistic and worth considering.

3. The Gradual Deterrence of the Accumulating Bond

A migrant posts an ex-post bond by deducting a portion of her income throughout her stay in the host country. The main difference between the ex-ante and ex-post bond models is who bears the risk of default. In the ex-ante model, the State has the lower risk; it receives the full bond upfront, and the periodic payments are paid from the migrants to the lenders. In the ex-post model, the monthly payments are directed to the State-held bond account.

Initially, as small sums accumulate, the ex-post bond provides only a weak incentive for compliance. As the value of the bond increases, however, so do the incentives it provides. The value of the bond peaks at the end, rather than at the beginning, of a migrant's legal stay. This offsets migrants' incentive to overstay. In that way the ex-post bond is responsive to the inherent institutional challenges of the enforcement structure of guest worker programs.

Though the ex-post bond may secure a timely exit, its overall impact on a guest worker program is more difficult to assess. If the mechanism is based on a monthly deduction from migrants' wages, migrants may seek additional, or alternative, and perhaps unlawful sources of income.[158] Note that the ex-post bond payments may coexist with workers' repayments of their loan-financed fees. Such a combination may overwhelm migrants who stick to above-board conduct.[159]

One solution may be to look to employers for payments into the bond fund. The Israeli-style deduction system,[160] where employ-

MIGRATION POL'Y INST., FROM A ZERO-SUM TO A WIN-WIN SCENARIO?: LIT. REV. ON CIRCULAR MIGRATION (2006); Peri, *supra* note 23, at 13.

158. When discussing the "mandatory secured payments" component of his policy reform, Schiff focuses only on the point of exit, and he therefore considers the gap between the available illegal wages in the host country and the legal wages in the source country to which the migrant has to return. Schiff's focus is on the way in which the accumulated *ex post* bond can assist, at the exit point, to decrease this gap by adding the bond to the wage back at the home country. *See* Schiff, *supra* note 126, at 13.

159. *See* Posner, *supra* note 136, at 223, similarly explaining that a fine, paid in installments or based on future earnings might reduce the offender's income from lawful activity and therefore reduce also the incentives to choose the lawful activity over criminal activity.

160. *See* Part III.A.2

ers are obligated to pay benefits or "social payments" into a fund, comes with a secondary advantage for migrants, as it motivates the host country to ensure the payment of additional benefits by employers. With one tool, the State can encourage compliance with immigration law, protect migrant workers' rights, and lessen the gap between the legal and illegal labor markets.

4. The Marginal Deterrence of the Confiscated Bond

A full confiscation of noncompliant migrants' bonds obviously maximizes deterrence, but it leaves the law with no further, marginal deterrence capacity. Gradual forfeiture might optimally encourage compliance at the first step, such as when a migrant decides whether to overstay, while giving noncomplying migrants reason to comply later.[161]

The choice between absolute and gradual forfeiture depends on the kind and timing of noncompliance. If the worker's misstep warrants deportation, then full forfeiture is appropriate, as it provides maximum deterrence, and there is no need for deterrence in the future. In contrast, if the State gives a worker, who engaged in impermissible work, a second chance, the State should maintain at least a portion of the bond to encourage timely exit and future good behavior.

When the date of departure arrives, there is no work for the accumulated bond other than to guarantee timely exit. Yet a host country might want to maintain some marginal deterrence capacity, even if there is not a timely exit. In other words, by not confiscating a bond fully when there is no timely exit, the host country encourages future compliance by the overstaying guest. This creates incentives for migrants who may have overstayed to choose a late, but voluntary, departure. The State can gradually confiscate the bond so that each delay in departure increases the sanction but leaves a fraction to incentivize later compliance.[162] Thus, a gradual forfeiture creates a

161. In extreme cases, a society might rationally devote virtually all available sanctions to the most serious wrongs. *See* Polinsky & Shavell, *supra* note 135, at 432.

162. Brown suggests dividing the bond's confiscation between host countries and banks and indexing it to the speed of departure from the U.S. Her rationale is that migrants quickly become immersed in social networks in the host country, after which their overstays are difficult to detect. *See* Brown, *supra* note 3, at 1095. The Israeli bonding model, mentioned earlier has also chosen to implement gradual forfeiture in its bond mechanism in order to induce voluntary departure. *See supra* note 150. The idea is that a late voluntary departure is preferable to a forced departure or none at all. When a worker finally complies, there is a penalty, or deduction, according to the length of the migrant's overstay. If the worker did

more graduated sanction scale, with intermediate options for late departure and partial payment.[163]

The host country has an obvious interest in convincing guests that it will detect violations and deport as threatened. One way to strengthen credibility is to pre-commit the forfeiture decision. Following Ben-Shahar and Bradford's "reversible rewards" proposal,[164] the confiscation procedure could be designed so that the State promises to use forfeited bonds to locate violators and proceed with deportation. This doubles the impact of the bond, which would then affect both the risk *and* the reward components of migrants' risk/reward calculations.

The monetary stick (the bond) is limited in its scope but definite in its probability, since the fund is in the hands of the State. The resources of that monetary stick, in case of confiscation, can be channeled to increase the probability of the non-monetary stick (deportation) that will end the illegal stay and with it, all expected monetary benefits from overstaying.

5. Conclusion

The Part above reviewed the significant institutional virtues of the bonding mechanism as well as its weighty limitations. One such caveat is that the bonding mechanism financially constrains and burdens already heavily indebted migrants. It is normatively problematic to submit migrants to a regime of "double indenture" in which they have to simultaneously repay the loans taken to finance ex-ante fees while also provide for the accumulating ex-post bond. At the same time, migrants' limited resources and low earnings con-

not leave on time but later complied, there would be a deduction of designated gradual sums according to the length of the migrant's illegal stay: a delay of a month or less—5% deduction; a month to two months—25%; two to three months—35%; four to five months—65%; five to six months—80%; and more than six months of delay—100% deduction. See the Israeli Ministerial Procedures specified in *supra* note 150. Interestingly, even migrants who are detected and forced out receive tiered confiscation, though their deportation costs are deducted from their remaining bond funds. This scheme appears to give insufficient incentives for voluntary compliance.

163. This relates to the self-reporting idea. Self-reporting can reduce enforcement costs as well as the harm from continuing violations. It can be encouraged by offering reduced sanctions for those who self-report and especially for those who do it quickly. On the other hand, if the sanction is reduced too far in order to reward self-reporting, there is the danger of too little deterrence for the wrong itself. Louis Kaplow & Steven Shavell, *Optimal Enforcement with Self-Reporting of Behavior*, 102 J. POL. ECON. 583, 583–85, 602–03 (1994). *See also* Polinsky & Shavell, *supra* note 137, at 437.

164. *See* Ben-Shahar & Bradford, *supra* note 123, at 156.

strain the bond's scope. In light of these shortcomings and the chronic deficiencies of current enforcement mechanisms, host countries tend to complement their enforcement schemes with additional "pushing out" and somewhat offensive mechanisms. The 'No Family' policies discussed above[165] and the non-portability rules[166] are prominent examples.

The motivation to further invest in creative institutional design of guest worker programs becomes clear. In the next section I will briefly present two possible alternative mechanisms that go beyond migrants' financial resources while also minimizing punitive effects. The first alternative explores the potential of "monetary carrots" instead of, or in addition to, "monetary sticks," where the host country provides the financial means and directly rewards migrants for compliance. The second alternative draws on migrants' personal assets—their good reputation—rather than on their material resources.

B. Alternative Mechanisms

1. Adding Rewards

Compliance can be encouraged with rewards rather than with sanctions alone. The rewards must be high enough to induce compliance, yet not so high as to outstrip the cost of enforcement and the harm of the violation itself.

Generally, most enforcement systems favor sanctions over rewards.[167] First, sanctions need not be applied to be effective; the threat of sanction can bring about compliance at low cost to a host country.[168] Second, monetary sanctions, such as when bonds are confiscated as a sanction, compensate a host country for migrants'

165. *See supra* Part II.A.1.

166. According to the non-portability rules the worker is tied to the contractually agreed-upon employer in the host country. The problem is that the employer is then in a position to exploit the worker. The worker hesitates to complain about violations because the worker cannot move to another employer. *See* Mundlak, *supra* note 70, at 440–43; Ontiveros, *supra* note 69, at 938. Non-portability is thought necessary to prevent workers from moving to other industries or to the host country's larger labor market and to facilitate the tracking of migrant workers, who might be more tempted to overstay if their whereabouts are unknown. These assumptions are complicated and call for further research and challenge.

167. Omri Ben-Shahar & Anu Bradford, *Efficient Enforcement in International Law*, 12 CHI. J. INT'L. L. 375, 391 (2012).

168. De Geest & Dari-Mattiacci, *supra* note 138, at 354.

noncompliance.[169] In contrast, a reward must be paid—from State coffers rather than by migrants or their employers—to be effective. A worker's noncompliance does not generate income to offset the enforcement costs borne by the host country.[170] Negative sanctions may also be more potent than comparably sized positive incentives because individuals are prone to loss aversion.[171] In addition, the enforcement costs associated with sanctions fall when compliance increases and enforcement levels can ebb. Rewards systems become more costly when compliance increases.[172]

Rewards for compliance are also wastefully over-inclusive—"wasted"—on those who would have complied with the host state's rules anyway and can create perverse incentives by incentivizing migrants who would otherwise be inclined to comply with host state rules, to falsely signal noncompliance in order to be offered rewards.[173] Thus, it is difficult to identify the group of migrants that would be usefully motivated by rewards.

Notwithstanding these drawbacks, in the context of guest worker programs, it still makes sense to combine rewards with sanctions to encourage timely exit.[174] Given that compliance with host-state rules is the predominant practice,[175] rewards given throughout a migrant's stay in the host country can be costly. However, at the exit point of guest worker programs, compliance is not necessarily the default. It would therefore be worthwhile to offer a reward at that point to encourage self-compliance, providing that the cost of the reward is lower than the cost of securing detection and forced-compliance—deportation. Timely exit, which is relatively easy to identify and verify, is a strong candidate for rewardable conduct. A migrant who has departed has no further risk of noncompliance with the terms of the guest-worker program and can thus be rewarded.

169. *See* Shavell, *supra* note 124, at 584–85.

170. Giuseppe Dari-Mattiacci & Gerrit De Geest, *Carrots, Sticks, and the Multiplication Effect*, 26 J.L. ECON. & ORG. 365, 365–66 (2010).

171. Amos Tversky & Daniel Kahneman, *Loss Aversion in Riskless Choice: A Reference-Dependent Model*, 106 Q.J. ECON. 1039, 1039 (1991).

172. De Geest & Dari-Mattiacci, *supra* note 138, at 371.

173. Ben-Shahar & Bradford, *supra* note 167, at 392–93.

174. The bond-reward hybrid must be designed with political reaction and public opinion in mind. Many citizens of a host country will dislike the idea of rewarding guests for timely departure, and enough opposition of this kind might lead to a decision against guest-worker programs altogether. To address this, the revenue needed to fund rewards can, for instance, be raised from confiscated bonds. In that case, no outright and politically unpopular expenditure by a host country would be required.

175. See De Geest & Dari-Mattiacci, *supra* note 138, at 362.

Host countries might consider alternative rewarding strategies that create incentives in source countries. Alternatives might focus on helping workers integrate themselves into their old communities. As an example, workers who have returned could be rewarded with credits in their source country's retirement systems.[176] It is in the interest of host countries to broaden their support to include rewards that have or take effect outside of their territory. These rewards would "pull" migrants back to their source countries rather than "pushing" them out of host countries.[177]

2. Reputation

Rewards bear an inherent tension—they will be offered as long as their cost remains lower than the enforcement costs to the host state. However the value of the reward, determined this way, will not necessarily suffice to prompt migrants to comply, if the potential benefits from noncompliance are higher. Offering fewer rewards, each of a higher value, will not circumvent this tension, because if the pool of migrants and the budget for rewards both stay the same, the expectancy of migrants from the rewards will also stay the same and therefore the level of incentives will not be higher. This inherent tension calls for thinking about other types of rewards that would be effective while not being constrained by limited budgets.

In the immigration context, the host country holds an asset that entails high value for the migrant and low cost for the State, at least while its distribution remains limited: the option of a longer stay. The State can channel the high value associated with the longer-term opportunity to serve its own enforcement interests. It can transform time from having a threatening capacity (i.e. impending deportation) to having a rewarding capacity (e.g. repeat play). A mechanism that moves beyond monetary mechanisms circumvents the challenge of enforcing against insolvent participants. Obviously,

176. This precise incentive was proposed by the Bush administration. The proposal suggested that the United States would support the creation of tax-preferred savings accounts that migrants would be able to collect upon their return to their source countries. *See Fact Sheet: Fair and Secure Immigration Reform*, THE WHITE HOUSE (January 7, 2004) https://www.hsdl.org/?abstract&did=475485 [https://perma.cc/QF97-85VY].

177. *See* Motomura, *supra* note 16, at 286–87. Motomura suggests this strategy should be perceived as not only an alternative to the "pushing-out" approach—thus creating positive incentives as opposed to negative incentives, while the real goal is to maintain temporariness—but as an alternative that coexists with his "path to citizenship" idea. In his vision migrants would face two better choices: either go back and reintegrate in the sending country but in an organized and well-thought manner, or stay and eventually become a member in the hosting American society.

as with other sanctions, the existence of a credible and effective enforcement system is still required, otherwise staying longer or permanently would be an available illegal reward for all.

In principle, there is a wide spectrum of criteria that host countries could use in deciding whether and how to grant extended longer-term visas to migrants employed on temporary work permits. These criteria may vary over time and across countries.[178] A mechanism of reputation should play a central role in that decision making process. Reputation reflects the past behavior of an individual or a group. It provides others with information and indications about the individual or the group in order to predict future performance.[179] In the immigration setting, reputation has efficient qualities for both screening and enforcement processes. If designed well, reputation could be a cost-effective mechanism for both host states and individuals. It does not require an investment of significant resources by the host state and at the same time it provides valuable information and produces positive incentives to comply.

Current guest worker programs already, though to a limited extent, channel the power of reputation in repeat-play settings, as established through bilateral agreements or in circular migration programs.[180] The problem with current repeat-play settings is that they do not sufficiently rely or maximize the institutional power of reputation. Instead, repeat visits require migrants to pay the accompanied fees for each new entry and return to recruiters and they do not build upon the experience and reputation of the workers.[181]

In consecutive work, I propose a reputation mechanism that simultaneously addresses the information and compliance problems faced by host countries.[182] This mechanism would aggregate the experience-based information of host countries and employers and assign a reputation to each guest worker based on that worker's performance in each host country. It would reflect compliance with local law and timely exit under the terms of the visa, as well as information about the worker's job performance and skills. A positive reputation in one country could then be used to gain admission to another participating host country in a global network.

178. Martin Ruhs, *The Potential of Temporary Migration Programs in Future International Migration Policy*, 145 INT'L LABOR REV. 9 (2006).

179. Nuno Garoupa & Tom Ginsburg, *Reputation, Information and the Organization of the Judiciary*, 4 J. COMP. L. 229 (2010).

180. Brown, *supra* note 75, at 2480–81.

181. WICKRAMASEKARA, *supra* note 45, at 34–36.

182. *See* Sadeh, *supra* note 130.

This sort of multilateral, long-term system would work on the global level without compromising the interest of any host country in ensuring the transience of guest workers. Such a global reputation mechanism would also significantly improve migrant welfare by reducing reliance on recruiters and thus reducing exploitation by employers. In addition, by creating incentives for compliance, the reputation mechanism reduces the need for legal enforcement through more punitive and restraining mechanisms and sanctions.

CONCLUSION

This Article highlighted the fundamental information problem associated with the migration of temporary, low-skilled workers. Host countries find it costly to identify reliable guests. This leads host countries, including the United States, to rely on recruiters for screening. Recruiters' unregulated fees smooth the transaction between a host country and a foreign labor force, mitigating the informational asymmetry between them. They help ensure more capable and reliable workers by shifting the risk of admitting undesirable migrants from the host country to the migrants themselves. Workers who expect future earnings to exceed the required fees are more likely to incur those fees because they face a lower risk of dismissal and deportation. This institutional benefit likely explains the pervasiveness of the fee system. Reformers aiming to eliminate fees must grapple with their institutional role.

The discussion here has emphasized not only the hurdles and abuse that fees create for migrants but also the costs borne by host countries. Fees encourage relatively useful self-selection prior to admission, but they eventually encourage default, rather than compliance, as a worker approaches the end of the legal term of employment. Indeed, the sanction of deportation is weakest just when the need for it from the host state point of view is greatest. The fee system weakens the already feeble grip of the enforcement structure.

In order to offset the negative human and institutional effects of fees, host countries should develop new screening and enforcement mechanisms that reduce the current institutional reliance on fees. In some ways, a gradually-accumulating post-entry bond is a practical device for the task. It doesn't rely on pre-admission resources and thus prevents the engagement with informal lending. At the same time, it can be designed so that it reaches a critical size just when the guest worker is least influenced by the prospect of deportation. And yet even the ex-post bond mechanism suffers from other significant normative and institutional limitations, as explained in

this Article.

Those limitations call for further creative regulatory thinking. Rewards strategies, particularly those that turn on reputation, should be considered as additional or alternative tools to achieve more efficient and less exploitative programs.