

Outsourcing Criminal Deportees

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The cat is chasing its tail. They deport criminals to us and we inevitably export criminals right back to them.

Senator K.D. Knight¹

INTRODUCTION

Source-labor countries—states that “export” migrants—are virtually invisible in immigration law scholarship. Notwithstanding the growing recognition that ever more people live transnational lives,² the dominant conceptualization of immigration law and policy in the United States remains uni-nationally oriented. Under this approach, most immigration questions hinge on reforming and enacting federal laws.

“Crimmigration” scholarship—located at the intersection of criminal and immigration law—embodies this uni-national paradigm.³ Recent contributions by Professors Mariano-Florentino Cuéllar and David Sklansky epitomize this focus on the *domestic*

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¹ Interview with Senator the Honorable K.D. Knight, Former Minister of National Security and Justice in Jamaica and Former Chairman of the Caribbean Community Committee on National Security (July 4, 2012) (on file with author).

² The transnationality of the alien population is a major theme in the sociological literature, yet largely unincorporated into legal scholarship. For a summary of the transnationalism research, see Peggy Levitt, *Salsa and Ketchup: Transnational Migrants Straddle Two Worlds*, in Jeff Goodwin and James M. Jasper, eds, *The Contexts Reader* 445, 450–51 (Norton 2008).

³ The term was first used formally in the literature by Professor Juliet Stumpf to describe the increasing overlap of criminal and immigration law. See Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 Am U L Rev 367, 381 (2006).

political economies of immigration law enforcement.⁴ According to Professors Cuéllar⁵ and Sklansky, prosecutorial choices have been warped by transaction costs in policy making that implicate coordination between entities with overlapping and sometimes conflicting mandates.⁶ Absurdly, this results in immigration disproportionately consuming federal law enforcement resources. Indeed, immigration cases—most involving relatively minor infractions—now constitute the majority of federal criminal prosecutions.⁷

Compounding these absurd enforcement choices, the United States spends significant resources on incarcerating deportees-in-waiting,⁸ aliens with final convictions who are already subject to deportation orders.⁹ While Professors Cuéllar and Sklansky solely consider domestic decision makers, Professor Peter Schuck believes that this domestic focus exacerbates resource

⁴ Mariano-Florentino Cuéllar, *The Political Economies of Immigration Law*, 2 UC Irvine L Rev 1, 31–32 (2012); David Alan Sklansky, *Crime, Immigration, and Ad Hoc Instrumentalism*, 15 New Crim L Rev 157, 160–61 (2012).

⁵ Professor Cuéllar's "macro" view emphasizes that bizarre enforcement choices inevitably result from the messy compromises in the Immigration and Nationality Act of 1952 (INA), Pub L No 82-414, ch 477, 66 Stat 163, codified as amended at 8 USC § 1101 et seq. See Cuéllar, 2 UC Irvine L Rev at 3 (cited in note 4). This point is also well made in the chapters addressing inadmissibility, deportability, and relief from removal in two leading immigration law texts. See Thomas Alexander Aleinikoff, et al, *Immigration and Citizenship: Process and Policy* 582–84 (West 7th ed 2012); Stephen H. Legomsky and Cristina M. Rodríguez, *Immigration and Refugee Law and Policy* 514–92 (Foundation 5th ed 2009).

⁶ For a further discussion of this issue, see Ingrid V. Eagly, *Prosecuting Immigration*, 104 Nw U L Rev 1281, 1352–53 (2010); Jennifer M. Chacón, *Managing Migration through Crime*, 109 Colum L Rev Sidebar 135, 139 (Dec 12, 2009), online at http://www.columbialawreview.org/wp-content/uploads/2009/12/135_Chacón.pdf (visited Mar 3, 2013); Stephen H. Legomsky, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 Wash & Lee L Rev 469, 476–80 (2007); Teresa A. Miller, *Citizenship & Severity: Recent Immigration Reforms and the New Penology*, 17 Georgetown Immig L J 611, 639 (2003).

⁷ See Sklansky, 15 New Crim L Rev at 166–67 (cited in note 4). Moreover, more than 90 percent of criminal immigration prosecutions are for illegal entry and reentry, both nonviolent crimes. See *id.* at 167–69.

⁸ The term is a play on Professor Hiroshi Motomura's "Americans in waiting." Hiroshi Motomura, *Americans in Waiting: The Lost Story of Immigration and Citizenship in the United States* 8–9 (Oxford 2006).

⁹ Professor Peter H. Schuck's *Deportation before Incarceration* focuses on this population. Peter H. Schuck, *Deportation before Incarceration*, 171 Pol Rev 73, 78 (2012); Peter H. Schuck, *Immigrant Criminals in Overcrowded Prisons: Rethinking an Anachronistic Policy* *53–54 (Yale Law School Public Law Working Paper No 266, Mar 12, 2012), online at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1805931 (visited Mar 3, 2013).

constraints.¹⁰ His contribution is groundbreaking: unlike traditional scholarship, Professor Schuck considers how the United States allocates its enforcement resources more broadly in the context of international decision makers.¹¹

Given the voluminous enforcement obligations imposed by multiple immigration statutes,¹² US law enforcement cannot merely identify and remove the myriad people subject to removal, even if they narrow their focus to aliens who commit (presumably more serious) nonimmigration crimes.¹³ Simply put, the system is overwhelmed. Where better to look for help than to countries from which these aliens came? As Professor Schuck notes, “Simply stated, the federal government should deport

¹⁰ The resource constraints are so extreme as to have necessitated Supreme Court intervention in at least one state, with all the accompanying policy pressures. See *Brown v Plata*, 131 S Ct 1910, 1923 (2011) (affirming a lower court’s mandate that California reduce its prison population to halt violations of the Eighth Amendment). See also Schuck, 171 Pol Rev at 78 (cited in note 9).

¹¹ Other than Professor Schuck, the only other significant piece of scholarship that takes this approach is an article by Professors Tomer Broude and Doron Teichman. See Tomer Broude and Doron Teichman, *Outsourcing and Insourcing Crime: The Political Economy of Globalized Criminal Activity*, 62 Vand L Rev 795, 810–14 (2009). Professor Schuck is particularly focused on the prisoner transfer treaty (PTT) regime, an international legal arrangement whereby foreign-national prisoners may serve their sentences in their countries of nationality. See Schuck, 171 Pol Rev at 79–80 (cited in note 9).

¹² See, for example, INA, 66 Stat 163; Immigration and Nationality Act of 1965, Pub L No 89-236, 79 Stat 911, codified as amended at 8 USC § 1151 et seq; Immigration Reform and Control Act of 1986 (IRCA), Pub L No 99-603, 100 Stat 3359, codified as amended in various sections of Title 8; Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub L No 104-208, 110 Stat 3009-546, codified in various sections of Title 8. The broad statutory framework of US immigration law is contained within the INA, IRCA, and IIRIRA. The INA laid the foundation of the modern immigration system. Various amendments, particularly those made by the 1965 and 1990 Immigration Acts, emphasized the family unit by offering many family-based visas, developed a focus on highly skilled, employment-based immigration, and eliminated the existing national origin quotas. The 1986 IRCA introduced employer sanctions in order to reduce employment of unauthorized aliens (and simultaneously provided a path to legalization for some undocumented immigrants). The 1996 IIRIRA increased enforcement capacity to both prosecute undocumented immigration and remove criminal immigrants (these measures were extended following September 11, 2001). See Legomsky and Rodríguez, *Immigration and Refugee Law and Policy* at 1–11 (cited in note 5); Aleinikoff, et al, *Immigration and Citizenship: Process and Policy* at 1–36 (cited in note 5).

¹³ The United States has recently articulated such a policy shift in its focus on prosecutorial discretion, whereby it will only focus on persons who commit nonimmigration crimes. See Julia Preston, *In Test of Deportation Policy, 1 in 6 Get a Fresh Look and a Reprieve*, NY Times A13 (Jan 20, 2012); John Morton, Director, Immigration and Customs Enforcement (ICE), Memorandum for all Field Directors, Special Agents in Charge, Chief Counsel, *Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens* 5 (June 17, 2011), online at <http://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf> (visited Mar 3, 2013).

some immigrant criminals *before* they enter prison, not *after*.”¹⁴ Professor Schuck appears impatient with US officials whom he considers too “soft” with countries—like Mexico—that repeatedly resist entreaties to expeditiously receive their deported nationals.¹⁵ Professor Schuck advocates a tougher approach¹⁶ wherein the United States strategically utilizes its regional heft to pressure the reluctant Latin American and Caribbean countries—from which most migrant criminals originate.¹⁷

What explains Professor Schuck’s frustration? Efforts to clarify what incentives drive decision makers in developing countries are necessarily multidisciplinary. Consider the public choice literature’s discussion of the political economy of decentralized governance and its implications for institutional design. According to public choice theorists, states, seeking to maximize their own welfare, compete to ward off criminal behavior, even if this shifts criminal behavior elsewhere.¹⁸ Negative externalities inevitably result for neighboring states. Indeed, two scholars have described the evolution of a global race wherein states compete to “outsource” crime.¹⁹

Herein lies Professor Schuck’s frustration. It is unsurprising that developing countries resist what they rightly consider to be US efforts to outsource “bad types.”²⁰ Yet Professor Schuck’s impatience belies a more fundamental question: How do we structure a system that provides appropriate incentives for source-labor countries to share the burdens when their nationals break US laws? This Article contends that proper incentives will beget

¹⁴ Schuck, 171 *Pol Rev* at 78 (cited in note 9) (emphasis added).

¹⁵ The PTT is the typical prisoner transfer mechanism. A PTT is an international agreement allowing one country to transfer its foreign-national prisoner to that prisoner’s home country to serve his sentence. For a good summary of the PTT regime, see *id.* at 80.

Professor Schuck would ask countries of origin not only to accept criminal aliens as soon as an order of deportation is entered but also to assume responsibility for incarcerating them. His bottom line: it would be significantly cheaper for the United States to deport first and incarcerate later. See *id.* at 82.

¹⁶ I do not address the broader legal issues that necessarily attend such a controversial proposal. I am concerned with the narrow strategic question of whether this is a wise move.

¹⁷ See Schuck, *Immigrant Criminals in Overcrowded Prisons* at Appendix 1 (cited in note 9).

¹⁸ See, for example, Broude and Teichman, 62 *Vand L Rev* at 830–31 (cited in note 11). See also Peter Andreas and Ethan Nadelmann, *Policing the Globe: Criminalization and Crime Control in International Relations* 7–13 (Oxford 2006).

¹⁹ Broude and Teichman, 62 *Vand L Rev* at 814 (cited in note 11).

²⁰ The term “bad type” is from Adam B. Cox and Eric A. Posner, *The Second-Order Structure of Immigration Law*, 59 *Stan L Rev* 809, 855 (2007).

cooperation. Indeed, there are likely many axes of interest convergence between the United States and source-labor countries.

In a fascinating permutation of the globalization narrative, consider the cash flows resulting from US immigration policy. Migrants are prolific sources of greenbacks back home.²¹ Many developing countries' governments now depend on US visa allocations for hard currency flows.²² Moreover, the interests of business elites in developing countries are well aligned with the United States—migrants have become big business. Consider Haiti: Although it is the poorest country in the Western hemisphere, there has been substantial investment in its telecommunications sector in recent years.²³ Haitian economic growth is inextricably intertwined with migration. A utility bill in Port au Prince is often paid by a New York relative.²⁴ It is no accident that several newly minted *Forbes* Latin American billionaires benefited from the explosion of sectors that migrants utilize heavily—telecommunications, banking, and transportation.²⁵

²¹ This is primarily through remittances—money sent from the United States to a migrant's home country. The World Bank has argued in a recent annual migration report that worldwide labor mobility trends will continue to lead migrant workers to remain significant economic drivers for their home countries. See *Global Economic Prospects: Economic Implications of Remittances and Migration* 25–31 (World Bank 2006).

²² The term hard currency is typically utilized to refer to benchmark currencies such as the Euro and the dollar. See *id* at 99; *Towards Human Resilience: Sustaining MDG Progress in an Age of Economic Uncertainty* 124 (United Nations Development Programme 2011).

²³ Digicel, an Irish telecommunications conglomerate, signed up two million Haitian customers in three years. *Digicel Haiti Reaches 2.1 Million Customers*, TeleGeography (May 5, 2009), online at <http://www.telegeography.com/products/commsupdate/articles/2009/05/05/digicel-haiti-reaches-2-1-million-customers> (visited Mar 3, 2013); Sarah Stack, *Digicel Boss O'Brien Named as Haiti Goodwill Ambassador*, Irish Examiner (Feb 20, 2010), online at <http://www.irishexaminer.com/ireland/kfkfcwgbkfauf/rss2/#ixzz0upXcofS4> (visited Mar 3, 2013).

²⁴ See Manuel Orozco, *Understanding the Remittance Economy in Haiti*, Inter-American Dialogue 16 (Mar 15, 2006), online at <http://www.thedialogue.org/publicationfiles/understanding%20the%20remittance%20economy%20in%20haiti.pdf> (visited Mar 3, 2013).

For a summary of the transnationalism research, see Levitt, *Salsa and Ketchup* at 450–51 (cited in note 2). I acknowledge that my utilization of the transnationalism concept is unconventional. The sociology literature generally refers to transnational migrants as citizens or permanent residents of two societies. However, similar issues are clearly raised in this context. Professors Cristina Rodríguez and Kim Barry have made similar points in the context of citizenship theory. See Cristina M. Rodríguez, Book Review, *The Citizenship Paradox in a Transnational Age*, 106 Mich L Rev 1111, 1122–26 (2008); Kim Barry, *Home and Away: The Construction of Citizenship in an Emigration Context*, 81 NYU L Rev 11, 14–15 (2006).

²⁵ I am grateful to the journalist Andrés Martínez for emphasizing this point. Manuel Orozco's work is particularly helpful in illustrating the extent to which migrants

Citizens receiving remittances are also less likely to impose welfare costs on the state. Moreover, in part due to increased remittance flows, credit markets opened up in the developing world, underwritten by Western bond investors.²⁶ Although remittances are still considered unconventional inflows (constituting neither aid nor investments), they easily outpace foreign aid and direct investment as the largest source of overseas inflows to the developing world.

Indeed, visa allocations are arguably *de facto* foreign aid. Professor Charles Reich's observation that federal licenses—although theoretically temporary and revocable—provide many states and localities with significant support²⁷ seems particularly relevant in an international framework. To utilize his famous “new property” concept: the federal government, by issuing visas, is a primary facilitator of financial support both for migrants' families and for governments in the developing world.

In another permutation of the globalization narrative, the United States asks virtually nothing *formally* of these governments for these benefits,²⁸ though they are clearly well incentivized to meet certain critical immigration law goals.²⁹ Moreover, a comparative approach indicates that this *laissez-faire* US attitude contrasts with that of the European Union, where member

fueled the growth of telecommunications, banking, and transportation businesses. Manuel Orozco, *Remittances to Latin America and the Caribbean: Issues and Perspectives on Development* 13–14 (Organization of American States Sept 2004), online at <http://www.frbatlanta.org/news/CoNFEREN/payments04/orozco.pdf> (visited Mar 3, 2013). Carlos Slim Helú, who is ranked number one on the *Forbes* list, built his wealth partly through his ownership of Mexico's primary telecommunications company, which has benefited heavily from transnational telecommunications traffic. Emilio Azcárraga, another Mexican billionaire, also has significant telecommunications holdings. Luis Carlos Sarmiento, the Colombian billionaire, Gustavo Julio Vollmer, the Venezuelan billionaire, and Pedro Moreira Salles, the Brazilian billionaire, have significant banking interests, all of which own subsidiaries specializing in remittance transfers. See Kerry A. Dolan, *Secret Meeting of Latin American Billionaires*, *Forbes* (May 23, 2003), online at http://www.forbes.com/2003/05/23/cz_kd_0523mexico.html (visited Mar 3, 2013). See also *The World's Billionaires*, *Forbes* (March 2012), online at <http://www.forbes.com/billionaires/list> (visited Mar 3, 2013).

²⁶ Indeed, prior to the global financial crisis, “remittance securitization” was a hot, new field on Wall Street. See *Global Economic Prospects* at 101–04 (cited in note 21).

²⁷ Charles A. Reich, *The New Property*, 73 *Yale L J* 733, 734–35 (1964).

²⁸ See Antje Ellermann, *Negotiating Unilateralism: Deportation and Interstate Cooperation in Germany and the United States* *7–8 (Conference Paper, Mar 2003), online at <http://aei.pitt.edu/7060/1/000427.PDF> (visited Mar 3, 2013).

²⁹ The United States' inclination to tie foreign aid to its policy goals is emphasized in Jeanne A.K. Hey, *Introducing Small State Foreign Policy*, in Jeanne A.K. Hey, ed., *Small States in World Politics: Explaining Foreign Policy Behavior* 1, 1 (Lynne Rienner 2003).

states increasingly impose immigration-related obligations on source-labor countries as a condition of granting visas.³⁰ The question becomes: How might the United States leverage relations with source-labor governments to further US immigration goals?

In contrast to Professor Schuck's formulation, this Article advocates a soft approach—a modified auction system wherein the United States allocates visas to high-value source-labor countries.³¹ A high-value source-labor country is one well placed to help the United States meet its own immigration goals. In such a system, developing countries bid for labor-market access for their nationals by demonstrating that they are well placed to help find visa recipients who meet US policy goals.³²

One potential policy goal is for source-labor countries to help identify, prior to admission, the most law-abiding prospective

³⁰ I am grateful to officials of the Ministry of the Interior of Spain for making this point and to Professor Patrick Weil for guiding me to the supporting literature. For a good summary of immigration agreements and obligations that European Union member states impose on source-labor countries, see Patrick Weil, *All or Nothing? What the United States Can Learn from Europe as It Contemplates Circular Migration and Legalization for Undocumented Immigrants* 6–9, 12–13 (German Marshall Fund Immigration Paper Series, Apr 2010), online at http://oppenheimer.mcgill.ca/IMG/pdf/GMF7610_IM_Weil_final.pdf (visited Mar 3, 2013). See also Philip L. Martin, Susan F. Martin, and Patrick Weil, *Managing Migration: The Promise of Cooperation* 123 (Lexington 2006). It bears emphasis: Some of these immigration agreements between European Union member states and source-labor countries have been controversial. Indeed, Italy's tolerance for human rights abuses by the former Gaddafi regime in Libya has been attributed to its reliance on Libya for immigration policing. See *Italy's Immigration Deal with Libya Sparks Uproar* (EurActiv June 11, 2009), online at <http://www.euractiv.com/justice/italys-immigration-deal-libya-sp-news-221943> (visited Mar 3, 2013).

³¹ The primary proposals are put forth by Professors Gary S. Becker, Julian L. Simon, and Barry R. Chiswick. See Gary S. Becker, *An Open Door for Immigrants—The Auction*, Wall St J A14 (Oct 14, 1992); Julian L. Simon, *The Economic Consequences of Immigration* 329–35 (Basil Blackwell 1989); Barry R. Chiswick, *The Impact of Immigration on the Level and Distribution of Economic Well-Being*, in Barry R. Chiswick, ed, *The Gateway: U.S. Immigration Issues and Policies* 289, 308–10 (American Enterprise Institute 1982). Professors Becker and Simon are discussed favorably but briefly in Peter H. Schuck, *The Morality of Immigration Policy*, 45 San Diego L Rev 865, 892–93 (2008), and Professors Becker, Simon, and Chiswick in Howard F. Chang, *Liberalized Immigration as Free Trade: Economic Welfare and the Optimal Immigration Policy*, 145 U Pa L Rev 1147, 1160–61 (1997). It bears emphasizing that in most such proposals, visas are not conventional property. For example, the government would sell the visa to the recipient. However, the recipient would not be authorized to then sell the visa. Other proposals would allow recipients to sell visas, but only into a limited prescreened pool of persons for national security reasons.

³² Notably, however, the proposal does not involve actually selling visas, as has been advocated in other controversial auction proposals.

migrants.³³ In the event of breaches, high-value source-labor countries would commit to expeditiously accepting and incarcerating criminal deportees. They would also commit to reintegration initiatives to enable a rough tracking program; when a criminal deportee drops off the radar, a source-labor country would alert the United States that the deportee may seek to reenter the United States illegally.

Given the important communal values that incarceration serves, the United States must insist on a reasonable period of incarceration in source-labor countries (as opposed to early release).³⁴ Simultaneously, those migrant criminals who are eligible for early transfer to their country of origin should be low-level offenders. Resource-constrained source-labor countries with weak institutional frameworks are rightly concerned about the early return of high-level offenders, given their potential involvement in transnational narcotics gangs.³⁵ Moreover, hard

³³ I acknowledge a significant corruption concern in this proposal, as in any visa-allocation program, where typically the number of qualified applicants exceeds the number of visa slots. The risk is particularly significant in developing countries with lax anti-corruption protocols.

³⁴ Indeed, some might contend that the important communal values incarceration serves are actually undermined when persons who commit crime in the United States serve their sentences overseas. For a widely cited piece discussing the important communal values that are served by incarceration, see Dan M. Kahan, *Social Influence, Social Meaning, and Deterrence*, 83 Va L Rev 349, 383–85 (1997). See also Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U Chi L Rev 591, 594–605 (1996); Paul H. Robinson and John M. Darley, *The Utility of Desert*, 91 Nw U L Rev 453, 471–88 (1997); Alvin K. Klevorick, *On the Economic Theory of Crime*, in J. Roland Pennock and John W. Chapman, eds, *Criminal Justice* 289, 292–95, 301–04 (New York 1985). But see Bernard E. Harcourt, *Reflecting on the Subject: A Critique of the Social Influence Conception of Deterrence, the Broken Windows Theory, and Order-Maintenance Policing New York Style*, 97 Mich L Rev 291, 294–97 (1998).

³⁵ See Jonah M. Temple, Note, *The Merry-Go-Round of Youth Gangs: The Failure of the U.S. Immigration Removal Policy and the False Outsourcing of Crime*, 31 BC Third World L J 193, 196–97 (2011); Salvador A. Cicero-Domínguez, *Assessing the U.S.-Mexico Fight against Human Trafficking and Smuggling: Unintended Results of U.S. Immigration Policy*, 4 Nw U J Intl Hum Rts 303, 320 (2005); Hal Brands, *Crime, Violence, and the Crisis in Guatemala: A Case Study in the Erosion of the State* *25–26 (Strategic Studies Institute May 2010), online at <http://www.strategicstudiesinstitute.army.mil/pdffiles/PUB986.pdf> (visited Mar 3, 2013); Garfield O. Blake, *America's Deadly Export: Evidence from Cross-Country Panel Data of Deportation and Homicide Rates* *11–13 (Sir Arthur Lewis Institute of Social & Economic Studies 11th Annual Conference, Mar 2010), online at <http://sta.uwi.edu/conferences/09/salises/documents/G%20Blake.pdf> (visited Mar 3, 2013); *Deportees in Latin America and the Caribbean, Hearing and Briefing before the Subcommittee on the Western Hemisphere of the House Committee on Foreign Affairs*, 110th Cong, 1st Sess 50–53 (2007) (statement of Nestor Rodriguez, PhD, Chairman of the Department of Sociology, University of Houston); Freddy Funes, Note, *Removal of Central American Gang Members: How Immigration Laws Fail to Reflect Global Reality*, 63 U Miami L Rev 301, 306–13 (2008).

empirical questions remain about the financial implications of this new approach for both federal and state budgets, and for cost sharing between the United States and source-labor countries, perhaps through foreign-aid budgets.

While I agree with Professor Schuck's instinct that countries of origin currently do too little risk sharing, this proposal differs in critical ways from his approach. Herein lies the difficulty with Professor Schuck's proposal: In recommending that the United States persuade developing countries to expeditiously accept and incarcerate their nationals, Professor Schuck would essentially ask developing countries to bear some risk on the "back end" (at the time of an alien's incarceration), despite minimal input on the "front end" (when the alien entered the United States).³⁶ Implicit in his proposal is a recognition that developing countries are better incentivized to share costs on the back end if they have some say on the front end. Moreover, through this proposal, the United States can maintain many of the features that make an auction attractive while eliminating the controversial features of an auction, such as the sale of visas.

In Part I, I contend that Professor Schuck is more correct than is apparent on first glance. Analogizing from Anglo-American contract law, I conceptualize a visa as a contract between the United States and the migrant, and reflect on who bears the risk when the migrant breaches by committing a crime.³⁷ Migrant criminals have essentially been able to defer the consequences of their contract violation for years.³⁸ Preliminary qualitative field work among deportees-in-waiting in Canada indicates that many migrant criminals prefer incarceration in Canada to *freedom* in a developing country.³⁹ Under the current model, should a migrant

³⁶ Schuck, 171 Pol Rev at 81–82 (cited in note 9).

³⁷ Professor Motomura offers a vigorous critique of contract analysis in the immigration context. Motomura, *Americans in Waiting* at 9–10 (cited in note 8) (distinguishing the view of "immigration as contract" with actual contract law due to the lack of bargaining, formal legal documents outlining the contract, and the unequal bargaining position of those who seek admission).

³⁸ Jamaican criminologist Annmarie Barnes conducted qualitative fieldwork among incarcerated Jamaicans in Canada regarding their deportation preferences. Annmarie Barnes, *Transnational Dislocations: The Use of Deportation as Crime Control* *152–55 (unpublished PhD dissertation, University of Toronto, 2007) (on file at University of Toronto) (conjecturing that the slight majority of criminal deportees who said they preferred deportation to extra prison time knew they had no right to be in the country and noting that half of the deportees were not charged with serious criminality or claimed to be innocent).

³⁹ *Id.*

breach the visa contract through criminal behavior, the state will inevitably bear many of the costs. My proposal seeks to change this calculus by adding a third party—the source-labor country. If the source-labor state and the United States change the default rule to one wherein certain categories of nonviolent criminals serve their sentences in their countries of origin, a migrant will no longer be able to defer the consequences of his contract breach.

Part II presents a more detailed case that significant numbers of developing countries depend on US largesse through either the de jure extension of visas or the de facto extension of visa-like privileges through lax federal immigration enforcement. I also consider the implications of Professor Reich's "new property" concept for how the United States might persuade developing countries to share burdens.⁴⁰

In Part III, I argue that Professor Schuck's proposal is a "shot across the bow" in an outsourcing race, which recent history indicates is unlikely to benefit the United States. As rational welfare-maximizing entities themselves, source-labor countries may seek to re-outsource their criminal deportees—potentially back to the United States. Utilizing basic game-theoretic analyses, I lay out the incentives for source-labor countries to enter this outsourcing race. In Part IV, I consider how these incentives might be changed for the source-labor countries and criminal deportees. Finally, in Part V, I put forth an alternative proposal in which visas are allocated to high-value source-labor countries, which help the United States meet its own law enforcement policy goals. Under the alternative proposal discussed here, source-labor countries will ultimately transform into good insourcing states. Moreover, criminal deportees will choose to remain in their countries of origin because there will be incentives for them to do so.

⁴⁰ I discuss this concept elsewhere. Eleanor Marie Lawrence Brown, *Visa as Property, Visa as Collateral*, 64 *Vand L Rev* 1047, 1084–86 (2011).

I. EXPLORING THE PROBLEM WITH THE CURRENT SYSTEM: CONCEPTUALIZING VISAS AS CONTRACTS

A. Background

Section 242(h) of the INA codifies the US policy of imprisonment before deportation.⁴¹ In pertinent part, this provision requires alien criminals to serve their sentences in the United States. Congress appears generally disinclined to revisit this rule,⁴² rejecting most efforts at amendment, even when exceptions to the rule would have been restricted to limited categories of nonviolent offenders.⁴³ Concurrently, Congress has significantly expanded the category of crimes triggering deportation in the past few decades.⁴⁴ It has also removed most legal defenses to deportation and reduced the availability of equitable, discretionary relief from deportation,⁴⁵ leaving virtually no release valve. Thus, in recent years, many more persons have been incarcerated and subject to deportation,⁴⁶ but it remains extraordinarily difficult to transfer prisoners to their countries of origin before incarceration.

Traditionally, there was no mechanism to execute such transfers.⁴⁷ The default rule of the United States and many other countries has been that one country should not implement the criminal laws of another state.⁴⁸ However, in the last few decades an international legal regime of prisoner transfer treaties (PTTs) has evolved. PTTs allow countries to remove alien prisoners to their countries of origin to serve out the remainder of their sentences.⁴⁹ However, these treaties impose such onerous conditions that transfers are rarely practicable.⁵⁰ For instance,

⁴¹ See INA § 242(h), 8 USC § 1252(h).

⁴² The rule was enacted in 1917. See Schuck, 171 Pol Rev at 78 (cited in note 9).

⁴³ See id at 79.

⁴⁴ See Sklansky, 15 New Crim L Rev at 159–60 (cited in note 4).

⁴⁵ See id; Stumpf, 56 Am U L Rev at 370–71 (cited in note 3); Chacón, 109 Colum L Rev Sidebar at 137–39 (cited in note 6); Legomsky, 64 Wash & Lee L Rev at 481 (cited in note 6); Miller, 17 Georgetown Immig L J at 614 (cited in note 6); Eagly, 104 Nw U L Rev at 1334–36 (cited in note 6).

⁴⁶ See Schuck, 171 Pol Rev at 78 (cited in note 9).

⁴⁷ See Michael Abbell, *International Prisoner Transfer* § 1-1 (Martinus Nijhoff 3d ed 2007).

⁴⁸ See Michal Plachta, *Transfer of Prisoners under International Instruments and Domestic Legislation* 304–10 (Freiburg im Breisgau 1993).

⁴⁹ See Schuck, 171 Pol Rev at 79–80 (cited in note 9).

⁵⁰ See id at 80.

the prisoner must typically initiate and consent to the transfer, and the receiving state must consent to receipt.⁵¹

As Professor Schuck demonstrates, these agreements appear to serve the United States poorly. First, few prisoners initiate transfer requests.⁵² Second, even when the Department of Justice approves such requests, it often experiences difficulty securing cooperation from receiving states.⁵³ The miniscule number of persons transferred—typically under two-hundred prisoners annually—testifies to the ineffectiveness of the international legal arrangements.⁵⁴

B. The Contract Analysis

Although not typically conceptualized in this way, let us import familiar reasoning from Anglo-American contract law. If we conceptualize a US visa as a contract between an alien and the United States, the alien agrees to particular terms of good behavior as a condition of his visa contract. These terms include an implicit agreement to obey US law. The question becomes: Who should bear the risk if the alien violates the term of this contract? On first glance, it would seem uncontroversial that the alien usually bears the risk. Violating the contract through criminal behavior should typically lead to conviction, revocation of one's visa, and deportation. However, one might argue that the United States is currently bearing too much of the risk because it is difficult to identify and apprehend noncompliant aliens. It is precisely this sentiment that animates supporters of the controversial state-level efforts to control undocumented migration,⁵⁵

⁵¹ The Department of Justice (DOJ) typically weighs a number of considerations, most importantly the severity of the crime involved and the likelihood of illegal reentry. The DOJ also considers the prisoner's likelihood of social rehabilitation and other law enforcement concerns in determining whether to approve the transfer. *Guidelines for Evaluating Prisoner Transfer Applications* (DOJ), online at <http://www.justice.gov/criminal/oeofiptu/guidelines.html> (visited Mar 3, 2013).

⁵² See Schuck, *Immigrant Criminals in Overcrowded Prisons* at *50–51 (cited in note 9).

⁵³ See *id.* at *51.

⁵⁴ See *id.* (noting there were 177 prisoners transferred in 2009).

⁵⁵ See, for example, Support Our Law Enforcement and Safe Neighborhoods Act (SB 1070), 2010 Ariz Sess Laws 113, as amended by HB 2162, 2010 Ariz Sess Laws 211; Beason-Hammon Alabama Taxpayer and Citizen Protection Act (HB 56), 2011 Ala Acts 535 (2011), codified at Ala Code § 31-13-19. The Alabama immigration statute was partially enjoined in *United States v Alabama*, 813 F Supp 2d 1282, 1351 (ND Ala 2011), *rev'd* in part 691 F3d 1269 (11th Cir 2012). The Arizona statute was recently partially struck down by the US Supreme Court in *Arizona v United States*, 132 S Ct 2492, 2510 (2012). For a good summary of the opinion in *Arizona*, see generally David A. Martin, *Reading Arizona*, 98 Va

which in part seek to raise the likelihood that aliens who violate the terms of their visa contract will actually bear the risk.⁵⁶

This is one potential reading of Professor Schuck's analysis. His point is that an absurdity currently obtains: Even if an alien is technically immediately deportable once his conviction is final, in actuality the United States cannot deport him prior to incarceration without his consent and the consent of his original country.⁵⁷ Essentially, the noncompliant alien is able to defer bearing the risk of his visa contract violation for several years. Perversely, when an alien commits a crime and breaks his visa contract, he may impose significant costs (such as incarceration costs⁵⁸) on the United States—the alien simultaneously defers his risk and consumes scarce tax dollars.⁵⁹

This view is also supported by preliminary ethnographic work that explored the decision-making matrices of Jamaican deportees-in-waiting in Canada, which also regularly confronts the problem of migrant criminals.⁶⁰ When given a choice between incarceration in Canada and incarceration in their country of origin, the interviewees overwhelmingly chose Canada. Significantly, close to half of interviewees indicated that they would prefer to remain in a Canadian prison even if offered immediate *freedom* in Jamaica.⁶¹

L Rev In Brief 41 (2012), online at http://www.virginialawreview.org/inbrief/2012/04/14/Martin_Web.pdf (visited Mar 3, 2013).

⁵⁶ See Randal C. Archibold and Megan Thee-Brenan, *Poll Finds Serious Concern among Americans about Immigration*, NY Times A15 (May 4, 2010) (indicating a majority of US citizens believed that the Arizona law would reduce crime); *Broad Approval for New Arizona Immigration Law* (Pew Research Center May 12, 2010), online at <http://pewresearch.org/pubs/1591/public-support-arizona-immigration-law-poll> (visited Mar 3, 2013) (reporting general poll results on SB 1070).

⁵⁷ See Schuck, 171 Pol Rev at 80 (cited in note 9).

⁵⁸ On average, one year's incarceration of an inmate in a US prison costs \$45,000. See id at 78 (using the figure in the context of his proposal to reduce prison populations by deporting some criminal noncitizens sooner).

⁵⁹ Professor Schuck offers a robust political economy analysis for this absurdity: interests with a stake in expanding prison populations, such as construction companies and unions representing prison guards, have employed very effective lobbyists to represent their political interests in a peculiar instance of interest convergence between criminal aliens who avoid deportation and prison guard unions. See id at 80.

⁶⁰ See *Canada Detention Profile* (Global Detention Project July 2012), online at <http://www.globaldetentionproject.org/countries/americas/canada/introduction.html> (visited Mar 3, 2013).

⁶¹ Barnes asked Jamaican prisoners whether they would rather spend "a longer period of imprisonment" in Canada or be deported immediately. Just under 50 percent responded that they would prefer to remain in prison. Barnes, *Transnational Dislocations* at *153 (cited in note 38). Among former prisoners who had already been deported

This ethnographic work buttresses Professor Schuck's analysis. Consider also the more general implications of the aforementioned study. The typical alien convicted of a crime is from a resource-constrained developing country. Facing a choice between prison in the United States and prison in that developing country, prison in the United States is likely preferable.⁶²

Given that it is impractical to ask a noncompliant alien to contribute to the incarceration costs that he imposes on the United States, Professor Schuck would deprive certain categories of nonviolent offenders of the choice to serve their prison terms in the United States.⁶³ In the next Part, I explore the incentives for sending states to comply as a background to evaluating their potential decision-making matrices.

II. VISAS AS THE NEW "NEW PROPERTY"

New property has long been hot. In a seminal article published more than forty years ago, Professor Reich argued that increasingly Americans derived their wealth from their relationships with the government; he coined these relationships "new property."⁶⁴ Specifically, Professor Reich noted that public law

to Jamaica, 45 percent stated that they would have preferred more prison time over deportation. *Id.* at *153–54.

⁶² See Joanne Csete and Dirk van Zyl Smit, *Pretrial Detention and Health: Unintended Consequences, Deadly Results* 33–54, 64 (Open Society Foundations 2011), online at <http://www.opensocietyfoundations.org/sites/default/files/ptd-health-20111103.pdf> (visited Mar 3, 2013) (noting the high population of pretrial detainees in North America, but concentrating primarily on the health issues from overcrowding in prisons outside North America); Ralf Jürgens, Manfred Nowak, and Marcus Day, *HIV and Incarceration: Prisons and Detention*, 14 *J Intl AIDS Socy* 1, 2–3 (2011), online at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3123257/pdf/1758-2652-14-26.pdf> (visited Mar 3, 2013) (recounting high rates of AIDS in prisons all over the globe). In February 2012, Honduras experienced one of the worst prison fires in a century when a lit cigarette allegedly started a fire that killed more than 350 inmates. Mayra Navarro, "All Hondurans in Mourning"; *Prison Fire Kills 359, Desperate Relatives Plead with Officials for Information about Loved Ones*, *The Gazette (Montreal)* A17 (Feb 16, 2012).

⁶³ Schuck, 171 *Pol Rev* at 81 (cited in note 9).

⁶⁴ Reich, 73 *Yale L J* at 734–37 (cited in 27). Like Professor Reich, I utilize the term "property" not in the traditional Blackstonian sense that generations of lawyers now associate with alienability and despotic ownership, among other things, but rather as the word "property" is utilized in a modern sense to refer to a more abstract and complicated network of legal entitlements and obligations that serve both private and public goals. *Id.* at 738. For a similar utilization of the new property concept, albeit in the entirely different arena of cyberspace, see generally Anupam Chander, *The New, New Property*, 81 *Tex L Rev* 715 (2003).

entitlements were a primary source of income for millions of Americans.⁶⁵

Critically, the aforementioned entitlements are entirely derivative of government actions. In this way, government is supplanting a role historically fulfilled by a market economy and private law. While the importance of new property in providing support to citizens and permanent residents has long been recognized, far less recognized is the role that government plays in providing support to aliens with less longstanding ties, including those explicitly considered temporary residents. Moreover, the home countries that export these aliens are also beneficiaries. Under Professor Reich's typology, new property beneficiaries include those who receive licenses or franchises from the government that provide them with their primary source of income.⁶⁶ By this definition, migrant workers are a distinct category of recipients of government largesse. Migrant workers benefit largely as the recipients of work visas, which provide at least temporary access to a predictable income stream.⁶⁷

Visa recipients differ from the prototypical recipients of government largesse because they are typically ineligible for social welfare payments.⁶⁸ Rather, they are discrete recipients of government largesse, largely as the beneficiaries of work visas. Without the express permission of the US government, migrants theoretically lack access to the world's most lucrative labor market. A similar point applies to undocumented migrants. The

⁶⁵ See Reich, 73 Yale L J at 734–37 (cited in note 27). What has been far less recognized is that this radical shift in our traditional conception of property has led not only to more nontraditional property for more categories of people but also to more unconventional ways of accessing traditional property through nontraditional property. For example, in the recent subprime mortgage crisis, it emerged that significant numbers of low-income Americans had been able to get mortgages. See Alex F. Schwartz, *Housing Policy in the United States* 297–302 (Routledge 2d ed 2010). Many of these mortgages were underwritten on the basis of social welfare payments being considered as traditional “income.” See *id.* See also Equal Credit Opportunity Act, Pub L No 93-495, 88 Stat 1521 (1974), codified at 15 USC § 1691(a). Thus, ironically, payments that were being made precisely on the basis that recipients could not support themselves independently in the market economy then became the foothold for asset building in the formal economy.

⁶⁶ Reich, 73 Yale L J at 734–35 (cited in note 27).

⁶⁷ See Brown, 64 Vand L Rev at 1084–87 (cited in note 40).

⁶⁸ See Howard F. Chang, *Public Benefits and Federal Authorization for Alienage Discrimination by the States*, 58 NYU Ann Surv Am L 357, 357–58 (2002). It bears emphasizing that despite the contentions of some public commentators, most visa recipients are typically ineligible for public welfare benefits. Indeed, following successive iterations of social welfare benefit reforms, efforts to restrict benefits even from permanent residents have generally withstood judicial scrutiny. See *Mathews v Diaz*, 426 US 67, 81–84 (1976). But see *Graham v Richardson*, 403 US 365, 371–72 (1971).

United States might be said to grant implicit permission for these persons to join the labor market through lax enforcement.⁶⁹ Whether de jure or de facto, visas provide the conduit to significant income streams.

Though undoubtedly visas make possible otherwise impossible financial windfalls for recipients, evidence indicates that new property has proven particularly beneficial to the governments of countries from which migrants originate. “Domestic collectives” such as US states and localities are now disproportionately dependent on federal government largesse due to both direct subsidies from the federal government and their role as indirect beneficiaries of the benefits their citizens receive.⁷⁰ It is less understood that analogous logic applies to “collectives overseas”—the national, state or provincial, and local governments in the source-labor countries. Migrants in the United States are easily the most prolific remittance senders in the world.⁷¹ Migrants in the United States remit more money and do so more reliably than do migrants elsewhere. As the finance minister of

⁶⁹ This point is also implicit in Cox and Posner, 59 *Stan L Rev* at 844–45, 849 (cited in note 20). They do not, however, express a critique of the federal government’s apparent policy of underenforcement. This point is also made by Professor George Borjas. He goes further, arguing that lax enforcement facilitates undocumented work and puts downward competitive pressures on the wages of low-wage persons, including documented migrants. George J. Borjas, *Friends or Strangers: The Impact of Immigrants on the U.S. Economy* 57–58, 90 (Basic Books 1990). For a discussion of the impact of low-skilled alien workers on wages of low-wage workers, see *id.* at 86–92. A counterargument is that lax federal immigration enforcement leads visa holders to compete with a large number of undocumented migrants, undermining their wages and the value of their visas. See *id.* at 90. Nevertheless, the evidence is that visa holders command higher wages in the United States than nonvisa recipients and nonvisa recipients command significantly higher wages than they would in their country of origin. See Michael Clemens, Claudio E. Montenegro, and Lant Pritchett, *The Place Premium: Wage Differences for Identical Workers across the U.S. Border* *55 (Center for Global Development Working Paper No 148, Dec 2008), online at http://www.cgdev.org/files/16352_file_CMP_place_premium_148.pdf (visited Mar 3, 2013) (discussing the “place premium,” namely the wage gain accruing to foreign workers who arrive in the United States, and finding that migration has a much more immediate impact on poverty alleviation than any other policy since the wage differentials between the United States and most developing countries are so great).

⁷⁰ Paul Krugman makes this point in his discussion of California’s current economic woes. He argues that the primary distinction between California and Greece is the fact that California’s creditors understand (at least implicitly) that the federal government stands behind California. See Paul Krugman, *A Money Too Far*, *NY Times* A27 (May 7, 2010).

⁷¹ See Dilip Ratha, Sanket Mohapatra, and Ani Silwal, *Migration and Remittances: Factbook 2011* 15 (World Bank 2d ed 2011) (listing the remittances sent from the United States as nearly double that of the next-highest country in terms of remittance outflows).

a developing country, your preference is that your migrants emigrate to and remit from the United States.

III. A RACE-TO-THE-TOP FOR SOURCE-LABOR COUNTRIES?

A. The Challenge: Getting Sending States to Bear Their Portion of the Burden

It is critical that the United States screens more effectively for persons who are less likely to commit crime (“good types”) and expeditiously excludes those who do (“bad types”). As such, policy makers would be expected to prioritize *ex ante* screening mechanisms for good types and *ex post* expulsion of bad types. How then do we identify source-labor countries that are helpful in meeting these goals?

1. The outsourcing race.

Professors Tomer Broude and Doron Teichman provide an original and compelling account of the political economy of transnational crime control.⁷² Modeling states as rational, self-interested, welfare-maximizing agents, they argue that countries formulate crime control policies to advance their own interests, seeking to contain crime in their own jurisdictions even if it means shifting crime elsewhere.⁷³ Applying game-theoretic analyses, Professors Broude and Teichman demonstrate how states come to engage in crime control races, contingent on different national attitudes toward criminal activity.⁷⁴ A case in question concerns the outsourcing races that evolve as some states adopt stricter policies—leading crime to shift to other states which then adopt stricter policies to repel the new inflow of crime.⁷⁵ Developing countries that spend far less on law enforcement than the United States will inevitably find criminals being outsourced to them.

⁷² Broude and Teichman, 62 *Vand L Rev* at 796–99 (cited in note 11).

⁷³ As public choice theorists tell the story, local jurisdictions aiming to maximize their own welfare compete among themselves to attract activities that improve their welfare and deter activities that undermine their welfare. See *id.* at 802. See also Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 *J Polit Econ* 416, 423 (1956). Thus, states attempt to contain criminal behavior in their own state. The realism and neoliberalism schools of international relations theory, which model states as rational, self-interested, welfare-maximizing agents, relay a similar narrative. See Broude and Teichman, 62 *Vand L Rev* at 832–34 (cited in note 11).

⁷⁴ See Broude and Teichman, 62 *Vand L Rev* at 835–45 (cited in note 11).

⁷⁵ *Id.* at 815–26.

Professors Broude and Teichman also discuss how insourcing races may evolve,⁷⁶ as some states are more inclined to be lenient given the spin-off benefits of crime.⁷⁷ In sum, we can expect inefficient levels of enforcement in what is essentially a global collective action problem.

2. Professor Schuck's shot across the bow in the outsourcing race.

How does Professor Schuck's policy proposal fit into this larger narrative? Presumably Professors Broude and Teichman would characterize Professor Schuck's advocacy for using US global heft to negotiate effective PTTs as a quintessential example of a shot across the bow in an outsourcing race.⁷⁸ Indeed, arguably this race is already in full flight. The comment from a former Jamaican Minister of National Security that began this Article epitomizes this view.

Indeed, rather than attempt to renegotiate PTTs (as Professor Schuck proposes), other countries have acted unilaterally. For example, despite the concerns of source-labor governments, the United Kingdom recently sidestepped the PTT process by passing legislation authorizing the early release from prison of certain categories of convicted foreign nationals.⁷⁹ Shortly thereafter, the British government released and deported several overseas nationals.⁸⁰ The Canadian government has been accused of similar behavior.⁸¹

⁷⁶ Id at 840–45 (noting that insourcing crime can be complex since generally governments want the economic benefits of producing crime without the detriments of its consumption).

⁷⁷ For example, excess cash from laundered money provides social benefits in inner-city communities. See id at 823–24 (noting that money laundering is often an ideal insourcing crime because the benefits and detriments can take place in different areas).

⁷⁸ See Broude and Teichman, 62 Vand L Rev at 835 (cited in note 11).

⁷⁹ See Barnes, *Transnational Dislocations* at *4–5 (cited in note 38). The Jamaican government argued that prisoners who had not completed their sentences could only be transferred under a PTT, which typically requires the consent of both the prisoner and Jamaica. See *Nelson: Deportees Can't Complete Sentences in Jamaica!*, Jamaica Observer (Nov 9, 2010), online at http://www.jamaicaobserver.com/Nelson-Deportees-can-t-complete-sentences-in-Jamaica_8134367 (visited Mar 3, 2013).

⁸⁰ See Barnes, *Transnational Dislocations* at *4–5 (cited in note 39). The Caribbean has been disproportionately affected by this policy, especially Jamaica. See United Nations Office on Drugs and Crime and the Latin America and the Caribbean Region of the World Bank, *Crime, Violence, and Development: Trends, Costs, and Policy Options in the Caribbean* *81–92 (United Nations/World Bank Mar 2007), online at http://www-wds.worldbank.org/external/default/WDSContentServer/WDS/IB/2007/05/11/000020953_20070511114448/Rendered/PDF/378200LAC0Crim1white0cover01PUBLIC1.pdf (visit-

If we conceptualize the state's array of enforcement options as a continuum consisting of arrest, conviction, imprisonment, and deportation, states typically begin the outsourcing process following imprisonment. The United Kingdom, in an effort to short-circuit the process, is terminating imprisonment early. Professor Schuck would like to begin outsourcing even earlier, following conviction.⁸²

3. How have these races evolved historically?

Professors Broude and Teichman's theoretical framework also provides a compelling account of the last two decades of US policy toward criminal deportees, which has inadvertently fueled such races to its own detriment. Consider El Salvador, which is among the top four recipients of deportees.⁸³ When the United States first passed the Illegal Immigration Reform and Immigrant Responsibility Act of 1996⁸⁴ (IIRIRA), which significantly increased the crime-related removal grounds for noncitizens, El Salvador was unprepared for the influx of criminal deportees.⁸⁵ At the time, it was a crime-insourcing state wherein criminal enterprise was not heavily sanctioned.⁸⁶

Indeed, according to a Congressional Research Service study,⁸⁷ this appears to have been a broader problem in the Latin American countries where most criminal deportees were sent.⁸⁸ Moreover, while some criminal deportees might have been relatively low-level criminals in the United States, many assumed kingpin status when they returned home, running significant

ed Mar 3, 2013); Blake, *America's Deadly Export* at *35 (cited in note 35). See also Ministry of Justice Prison Service Instruction 52/2011, *Immigration, Repatriation and Removal Services* (Nov 4, 2011), online at <http://www.justice.gov.uk/downloads/offenders/psipso/psi-2011/psi-52-2011.doc> (visited Mar 3, 2013).

⁸¹ See Barnes, *Transnational Dislocations* at *1–2 (cited in note 38).

⁸² See Schuck, 171 Pol Rev at 78 (cited in note 9).

⁸³ *Removals by Country for FY 2011* *17 (ICE 2012), online at <http://www.ice.gov/doclib/foia/reports/ero-facts-and-statistics.pdf> (visited Mar 3, 2013).

⁸⁴ Pub L No 104-208, 110 Stat 3009-546, codified in various sections of Title 8.

⁸⁵ Temple, Note, 31 BC Third World L J at 209 (cited in note 35).

⁸⁶ See id at 208.

⁸⁷ Clare Ribando Seelke, *Gangs in Central America* 4–5 (Congressional Research Service Jan 3, 2011), online at <http://www.fas.org/sgp/crs/row/RL34112.pdf> (visited Mar 3, 2013) (describing the effects of the United States exporting criminal deportees on gang development in Central America).

⁸⁸ See Blake, *America's Deadly Export* at *2 (cited in note 35) (discussing the increase in crime in Latin America as a product of criminal deportation, especially gang-affiliated criminals, to Latin American countries that lacked the resources to combat such criminals).

criminal enterprises.⁸⁹ Ironically, they utilized contacts cultivated in the United States to traffic drugs and people back into the United States.⁹⁰

The result is that Mara Salvatrucha (MS-13), the major transnational narcotic enterprise now operating in El Salvador, was born in the United States.⁹¹ Indeed, some contagion models of crime argue that criminal deportees not only leverage US contacts to build transnational criminal enterprises, they are also effective recruiters.⁹² They thereby increase the likelihood that their fellow nationals will try to enter the United States illegally, primarily as traffickers of people and drugs; today's criminal deportee spawns many future criminal deportees.

El Salvador is a microcosm of the Latin American–Caribbean region. US deportation policies have accelerated the spread of transnational narcotics gangs not only in El Salvador, but also in Honduras, Guatemala, and several Caribbean countries, and ultimately back into the United States.⁹³ Indeed, the appropriately named Christopher Coke—one of the larger drug kingpins of recent note—was originally deported from the United States to Jamaica.⁹⁴ Coke appears to have taken advantage of the weak institutional framework in Jamaica to build a sophisticated criminal enterprise and ultimately became a major narcotics exporter.⁹⁵ In summary, a deportation policy which was partly aimed at breaking up US narcotics gangs has backfired.

⁸⁹ See Temple, Note, 31 BC Third World L J at 198–99 (cited in note 35).

⁹⁰ This position is now broadly held. See, for example, Richard J. Lopez, Rich Connell, and Chris Kraul, *MS-13: An International Franchise*, LA Times A1 (Oct 30, 2005).

⁹¹ This gang is also the largest operating in Central America more generally. Its counterpart, which has major footprints in other Central American countries, is the 18th Street gang (M-18), which originated in Los Angeles, and, like MS-13, took root in Central America through criminal deportees. See Temple, Note, 31 BC Third World L J at 195 (cited in note 35); Seelke, *Gangs in Central America* at 4 (cited in note 87).

⁹² See Blake, *America's Deadly Export* at *3 (cited in note 35).

⁹³ Contagion theories draw heavily on studies of how mafias spread in Italy. Professor Federico Varese's study of the effects of deliberate government policies shows that encouraging the migration of serial mafia criminal offenders from high-crime to low-crime areas of Italy leads the mafia to take root in previously low-crime areas. While Professor Varese's study is internal to Italy, his analysis is nevertheless useful in considering how transnational deportation policies might have inadvertently fueled the growth of transnational drug networks. See Federico Varese, *Mafias on the Move: How Organized Crime Conquers New Territories* 197–98 (Princeton 2011).

⁹⁴ See Benjamin Wesier, *A Case Built in New York against a Jamaican Kingpin*, NY Times A12 (May 27, 2010).

⁹⁵ See *id.* See also Mattathias Schwartz, *A Massacre in Jamaica: After the United States Demanded the Extradition of a Drug Lord, a Bloodletting Ensued*, New Yorker 62 (Dec 12, 2011).

What has El Salvador done in response to the proliferation of criminal deportees? Though previously an insourcing nation, it recently enacted a highly controversial policy known as *mano dura* (firm hand).⁹⁶ Tough enforcement tactics and diminishing economic opportunities incentivize gang members to flee, with many reentering the United States.⁹⁷ Indeed, one might argue that El Salvador is now in an outsourcing race with the United States.⁹⁸

B. The Implications of the Outsourcing Race for Professor Schuck's Proposal

What are the implications of this outsourcing race for Professor Schuck's analysis? Professor Schuck expresses two primary concerns. First, will source-labor countries meet their commitments to incarcerate their nationals for the duration of the sentence that they would have served had they been in the United States? Second, will deportees having served their sentences simply seek to reenter the United States illegally?⁹⁹

Given the outsourcing race described above, there are good reasons for Professor Schuck to be concerned. Rather than prioritizing US policy goals, a rational, self-interested source-labor country prioritizes its own goal of ensuring that the individual does not commit crime within its own country. Indeed, it might actually be in the short-term interest of a source-labor country to re-export its deportees. If not *de jure* then *de facto*, a country might re-export its criminals by encouraging them to migrate again.

IV. AN ALTERNATIVE COURSE

However, it need not be this way. However controversial its strong-hand policing policies may be, El Salvador has only been able to apply *mano dura* because it can *find* gang members. That is, despite major resource constraints, the Salvadoran government clearly tracks gang members.¹⁰⁰

⁹⁶ The policy is often criticized as repressive and insufficiently respectful of civil rights. See, for example, Temple, Note, 31 BC Third World L J at 199–200 (cited in note 35).

⁹⁷ The relative contribution of these causal factors to the flight of gang members outside of El Salvador is not as of yet properly addressed in the legal scholarship.

⁹⁸ See Temple, Note, 31 BC Third World L J at 208–09 (cited in note 35).

⁹⁹ Schuck, 171 Pol Rev at 79 (cited in note 9).

¹⁰⁰ See Melissa Siskind, Note, *Guilt by Association: Transnational Gangs and the Merits of a New Mano Dura*, 40 Geo Wash Intl L Rev 289, 304–05 (2008).

This speaks to a larger point: unlike the United States, the typical source-labor country is relatively small, comprised disproportionately of dense urban communities and closely knit rural communities wherein anonymity is hard to maintain.¹⁰¹ Source-labor countries have far better access to the hyper-local information that enables tracking. While admittedly true that most source-labor countries are constrained by institutional deficiencies, the typical source-labor country is nevertheless well placed to track its nationals.

Once criminal deportees are returned to the source-labor country, there is typically asymmetrical access to information about them between the United States and the source-labor country. The proximity to its nationals that results from a country's small size and dense population is crucial. This proximity enables source-labor countries to detect when deportees have fallen off the radar screen—a potential indication that they are seeking to illegally return to the United States. Considering that the return rates of criminal deportees to the United States have traditionally been worrisomely high,¹⁰² this information should be valuable to the United States. In summary, once criminal deportees are released from incarceration, one would expect that a source-labor country might leverage its proximity to its nationals to help ensure they do not reenter the United States if properly incentivized.

A. The Players

In this Section, I show how immigration laws can bolster compliance incentives for source-labor countries. Given the inevitable asymmetry in access to information about criminal deportees between the source-labor country and the United States, the following analysis is premised on the notion that the United States will outsource two functions—tracking and incarceration of certain criminal deportees.

We are specifically concerned with four actors. First, there is the outsourcing country—the United States. Second, there is

¹⁰¹ This is likely to be particularly true of criminal deportees because they are in some sense newcomers and, as such, attract attention from closely knit communities.

¹⁰² See Schuck, 171 *Pol Rev* at 79 (cited in note 9). These rates, however, have fallen off in recent years. See *id.* (noting that illegal immigration rates have been reduced recently due to the lack of US job opportunities, stiffer border protection, and more effective law enforcement programs, which may lessen the concern of criminals reentering illegally).

the criminal deportee. I posit that criminal deportees may be incentivized to avoid criminal activity and remain in the source-labor country through a reintegration program offering access to employment and social welfare benefits for participation in a mandatory tracking program administered by the source-labor country.

The third actor is the source-labor country, which would be obligated to incarcerate a criminal deportee for the remainder of his sentence. Additionally, the source-labor country would administer a reintegration program to provide the aforementioned employment and social welfare benefits. Typically, this program would be administered through the fourth actor—community leaders who receive benefits from the source-labor country depending on the extent to which they meet their commitments to reintegrate criminal deportees and reduce remigration.

Notably, there is also potentially a role for a private sector player here. That is, the United States may forgo a relationship with a source-labor country, choosing instead to delegate the incarceration and tracking functions in the source-labor countries to a private entity (such an entity might be, for example, an international equivalent of the largest private corrections company in the United States, namely, the Corrections Corporation of America¹⁰³). One would have to carefully consider the incentives for a private actor not only to incarcerate but to develop and utilize a screening technology that allows them to track former deportees in the source-labor country.

B. Creating Incentives for the Players

This Article is predicated on a proposed bilateral arrangement between Jamaica and the United Kingdom.¹⁰⁴ Under the proposed program, in exchange for Jamaica's speedy acceptance of criminal deportees, the United Kingdom will provide financial incentives that Jamaica will be obligated to spend on reintegrating criminal deportees into Jamaican communities. Community leaders will design and administer these employment and reintegration programs in exchange for a range of governmental

¹⁰³ See Pam Belluck, *As More Prisons Go Private, States Seek Tighter Controls*, NY Times A1 (Apr 15, 1999).

¹⁰⁴ The program has only recently been conceptualized and has not yet been implemented. See Diane Abbott, *The Thorny Issue of Foreign Prisoners*, Jamaica Observer (Sept 9, 2012), online at http://www.jamaicaobserver.com/columns/The-thorny-issue-of-foreign-prisoners_12465724 (visited Mar 3, 2013).

benefits. A community leader's status in relation to the Jamaican government will be predicated partly on his or her competence in administering these programs, as demonstrated by certain reintegration metrics.¹⁰⁵

Ultimately, under this proposal the source-labor countries will transform into good insourcing states. It bears emphasis: the good insourcing state I consider differs from the traditional conception. In my model, criminal deportees will choose to remain in their countries of origin, not because of lax criminal enforcement but because reintegration programs provide incentives to do so. In the next Part, I address precisely such a mechanism of incentivization for source-labor states.

V. THE POTENTIAL SOLUTION

The United States currently demands virtually nothing of overseas governments, despite the benefits those governments receive from migration.¹⁰⁶ A consensus is emerging that sending states must do more.

Before considering the potential contribution of source-labor countries, I will consider auction systems. Several scholars have advocated allocating visas to the highest-value users through an auction system wherein visas are sold as property.¹⁰⁷ They argue that this mechanism will attract the most productive migrants. Under classic property theory, property holders value property

¹⁰⁵ The background to this Article is Eleanor Marie Lawrence Brown, *Outsourcing Immigration Compliance*, 77 *Fordham L Rev* 2475 (2009). On the basis of a study of visa compliance amongst guest workers under a bilateral arrangement between Jamaica and Canada, this article posited that the United States should enter into bilateral legal agreements as a mechanism for mitigating the asymmetrical access to information about potential guest workers that inevitably exists between source-labor and labor-importing countries. *Id.* at 2493. Under this approach, the source-labor country would leverage its proximity to its nationals to aid in screening for guest workers likely to comply with their visas. *Id.* at 2491–92. Simultaneously, to improve the deterrence function, the article proposed that the United States enlist the support of the source-labor country in imposing sanctions on overstaying guest workers. *Id.* at 2494–95. Under the Jamaica-Canada program, it appears that such a model had been effective in improving visa-compliance norms in source-labor communities and among potential guest workers. *Id.* at 2501–05.

¹⁰⁶ Indeed, the same point has often been made with respect to domestic businesses that depend on cheap labor (particularly in the agricultural, construction, and service sectors). The Obama administration's recent emphasis on sanctioning US employers who do not verify employee documentation reflects the widespread view that such businesses must do more to help the United States meet policy goals, particularly given the financial windfalls that they secure through a low-cost migrant workforce. See INA § 274A, 8 USC § 1324a.

¹⁰⁷ See note 31.

as the repository of value that they have created; every law student learns the Lockean conception of persons jealously guarding land that they have mixed with their labor.

For this reason some scholars believe that an auction-like allocation system would render visa holders more law-abiding overall, thereby mitigating visa overstay and national security concerns. The assumption is that those with quasi-property rights in visas are likely to treat their visas similarly to other valuable property and thus not abuse the terms of their stay (especially given the great sacrifices many prospective migrants make to secure the funds to pay visa-related costs).¹⁰⁸

However, while auction systems are now regularly utilized elsewhere in the developed world, they remain unpopular in the United States, perhaps because of ongoing discomfort with utilizing market-based criteria for determining access to the United States.¹⁰⁹ Yet we can maintain some of the benefits of a proposed auction system without actually selling the visas in the way that sales are classically understood. After all, the sale is primarily a mechanism of identifying the highest-value users. We may also utilize an auction to identify high-value intermediaries to act as proxies in identifying high-value recipients. Using the priorities Professor Schuck articulates, a high-value end user (or good type) is one who does not break US law and a high-value intermediary is one who helps identify such end users and facilitates the speedy return of bad end users that breach US law.¹¹⁰

One way for the United States to utilize its leverage would be a modified auction system wherein the United States allocates visas to high-value labor-exporting countries without selling them in a free-market sense. Why do countries of origin matter? One need only consider the current nexus between countries of origin and potential visa recipients. Even now, most people who travel to the United States, either with or without documentation,

¹⁰⁸ Unless of course, their countries of origin are subsidizing the purchases of the visas (a rational course of action for many countries), which would enable some persons to make a purchase without much sacrifice. See *Not Coming to America: Why the US is Falling Behind in the Global Race for Talent* 28–30 (Partnership for a New Economy and Partnership for New York City May 2012), online at <http://www.renewoureconomy.org/sites/all/themes/pnae/not-coming-to-america.pdf> (visited Mar, 2013). One might argue that this is precisely what countries like Singapore do when they subsidize the costs of their highly skilled nationals traveling to the United States for study (including covering visa costs, for example), although I should emphasize that these visas are not being sold.

¹⁰⁹ The discomfort that attends auction systems in the United States is discussed in Brown, 64 Vand L Rev at 1101–02 (cited in note 40).

¹¹⁰ Schuck, 171 Pol Rev at 81–82 (cited in note 9).

are unable to leave their countries of origin without government help—if only to cross borders or to access the passports that they need to travel legally.

For undocumented migrants, their government identity cards are similarly important. These identification documents facilitate access to consulates overseas or ease identification during the precarious journey north.¹¹¹ The larger point is that these governments already have a significant nexus with their citizens that makes them well placed to help meet US immigration policy goals—hence the absurdity of the United States's *laissez-faire* approach.

A high-value source-labor country is one that is well placed to help the United States maximize these functions. Perhaps the country has a screening technology that makes it particularly adept at identifying persons who are likely to remain law-abiding. In such a system, developing countries would bid for labor market access for their nationals by demonstrating that they are well placed to help the United States find high-value visa recipients who meet US policy goals.

Thus, while developing countries would not technically pay for their citizens' access to the United States, they would be required to distinguish themselves as high-compliance participants by meeting certain minimal obligations for such access. These obligations would include the duty to prescreen their nationals and provide assurances to the United States of their trustworthiness (as a proxy for law abidance). They would risk losing visas to other countries if their citizens are not ultimately law abiding or if they do not cooperate in facilitating the expeditious expulsion of bad types from the United States.

The competition between countries to meet policy goals that the United States deems important would stimulate a race to the top.¹¹² In other words, source-labor countries would help defray the costs the United States would have previously had to assume *ex post* to deal with visa violators, particularly those who commit non-immigration-related crimes. The program would force source-labor countries to internalize negative externalities

¹¹¹ See Graham Gori, *A Card Allows U.S. Banks to Aid Mexican Immigrants*, NY Times C3 (July 6, 2002).

¹¹² See Broude and Teichman, 62 Vand L Rev at 800–02 (cited in note 11) (discussing the effects of competition between countries in the realm of international crime control in the context of public choice “race to the bottom” literature).

previously shouldered by the United States.¹¹³ The basic features that make a market attractive would exist in this system without the notion of a sale that offends many Americans.

Before ending this Part, a note on the utilization of the metaphor of an auction is in order. While the utilization of the term “auction” here is metaphorical, it highlights the insight that entities that bid for visas are more likely to value them. Ultimately, when developing countries are properly incentivized they can perform important roles in the ex ante prescreening process and the ex post expulsion process.

CONCLUSION

Given that labor-importing countries like the United States are rightly preoccupied with whether migrants will obey US law, source-labor countries seek to convince the labor-importing country’s government that their citizens are law abiding. To do so, source-labor country governments must incur a cost to ensure that they choose those citizens who will actually comply with visa terms. Some source-labor country governments can more easily access predictive information about their citizens or take greater measures than others to ensure that their citizens abide by the visa’s terms of admission—that is, that the defection rate is minimized. Consequently, one can dichotomize source-labor countries into high performing (that is, their nationals have minimal defection rates from visa terms) and low performing (relatively high defection rates).

Ideally, through a competitive auction process for visas the high performing countries will pressure the low performers as everyone races to the top. Notwithstanding Professor Schuck’s call for a tougher approach to pressure Latin American and Caribbean countries to expeditiously accept their nationals, similar

¹¹³ See Schuck, 171 Pol Rev at 82 (cited in note 9) (discussing how the similar strategy of PTT reform would be “immensely cost-effective” for the United States because the receiving country would take on some of the burdens created by detainees). It bears emphasis that when Guyana objected to the United States’s deportation policy at least partly on this basis, the United States threatened to cease issuing visitors’ visas to Guyanese nationals, leading Guyana to quickly fall in line. Guyana was “forced” to assume costs for which it had not budgeted. See *Guyana: Information on the Treatment of Criminal Deportees* (Citizenship and Immigration Services Feb 12, 2004), online at <http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66ff614176543f6d1a/?vgnextoid=6226361cfb98d010VgnVCM10000048f3d6a1RCRD&vgnnextchannel=d2d1e89390b5d010VgnVCM10000048f3d6a1RCRD> (visited Mar 3, 2013); Randall Richard, *The Deportation of Crime—U.S. Policy Causing Problems Elsewhere*, Seattle Times A3 (Nov 17, 2003).

goals can be achieved through softer strategic institutional design tweaks.