

The Private Enforcement of Immigration Laws

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INTRODUCTION

In 2002, Greyhound Lines started warning its employees not to sell tickets “to anyone you know or believe to be an illegal alien.” To identify illegal aliens, the bus company instructed employees to look out for large groups of people traveling together, who are led by a guide, and are “moving in single file.” To identify smugglers, employees were told to listen for the Spanish word “pol-lito”—a diminutive of the word for chicken, what smugglers call their clients—and other terms. The employees were instructed not to engage in racial profiling or other illegal discrimination, but they were also told that they could be terminated, arrested, or both for selling tickets to undocumented passengers. Finally, employees were warned: “the Company and/or the government is watching and listening to you!”¹

Greyhound instituted this employee training to avoid prosecution under a federal law that makes it a crime to transport an undocumented person, “knowing or in reckless disregard” of the person’s illegal immigration status.² This

1. Leslie Berestein & Norma de la Vega, *Bus Company Policy Irks Latino Groups: Ticket Sellers Told To Deny Service to Apparent Illegals*, SAN DIEGO UNION-TRIB., Sept. 23, 2005, at A1; see also Michael Marizco, *Greyhound Staffers Face Job Loss if Entrants Ride*, ARIZ. DAILY STAR, Sept. 23, 2005, at A1.

2. Immigration and Nationality Act (INA) § 274(a)(1)(A)(ii), 8 U.S.C. §1324(a)(1)(A)(ii) (2000). In 2001, the now-defunct Golden State Transportation Company, a commercial bus company based in Los Angeles, pled guilty to charges that it transported an estimated 42,100 illegal immigrants within the

law is just one of a growing number of laws, federal and local, that shifts the burden of enforcing immigration laws onto private parties—employers, bus companies and other carriers, and landlords.³ Under these laws, private parties are obligated to insure that they provide their goods and services only to those who are legally present in the United States (or in the case of employers, that employees they hire are legally present *and* authorized to work).⁴ Private parties who fail to meet that responsibility face civil and criminal penalties.⁵

To be sure, the lion's share of immigration enforcement still rests with government authorities.⁶ But there is a growing trend to shift some enforcement responsibilities onto private parties. With the passing of the Immigration Reform and Control Act of 1986 (IRCA),⁷ Congress took the significant step of requiring employers to check the immigration status of all employees in order to verify their work eligibility.⁸ For the first time nationwide, private parties were required to deny a benefit—here, employment—based on immigration status. In effect then, IRCA required employers to enforce the employment provisions of federal immigration laws.

In the twenty-one years since IRCA (late 1986 to late 2007), Congress, state legislatures, and even local city councils have passed laws that have required various private parties to enforce immigration laws. The trend has accelerated post-9/11, as immigration policy has been increasingly tied to national security. Motivated by concerns that illegal immigration is running rampant and that the nation is losing control of its borders, legislative branches at all levels have conscripted private parties to join government authorities in enforcing immigration laws.

The reach of private enforcement laws into such varied sectors is startling. On the employment front, in addition to the sanctions contained in IRCA, employers in a growing number of cities and counties also risk losing their business licenses, government contracts, and other government benefits if they hire undocumented workers.⁹ As mentioned earlier, public carriers like Greyhound face civil and criminal penalties for transporting undocumented persons within the United States. In the most recent manifestation of private enforcement, landlords in cities across the United States face daily fines as high as

nation's interior, using circuitous routes to avoid Border Patrol checkpoints. For more about Golden State and the impact of its prosecution, see *infra* notes 93 to 98 and accompanying text.

Greyhound modified its policy after immigrants' rights groups raised concerns about the racial-profiling implications of the policy. See *infra* notes 95 to 98 and accompanying text.

3. Also, legislatures have or are considering imposing enforcement obligations on medical care providers, educators, and charities. See *infra* section I.B.4.

4. Immigration & Nationality Act (INA) § 274A, 8 U.S.C. § 1324a (2000 & Supp. IV 2004).

5. For detailed information about private enforcement laws, including penalties, see *infra* Part II.

6. Some state and local governments have also started enforcing immigration laws. See *infra* note 20.

7. Pub. L. No. 99-603, 100 Stat. 3359 (codified as amended in scattered sections of 8 U.S.C.).

8. INA § 274A(b)(1), 8 U.S.C. § 1324a(b)(1) (2000 & Supp. IV 2004).

9. See *infra* section II.B.1.

\$1000 if they rent their properties to undocumented tenants.¹⁰ And legislatures across the country have or are considering laws that would impose private enforcement duties on educators, medical care providers, and charities.¹¹

Though they vary in their jurisdiction and the penalties they impose, these laws share a common characteristic: they all impose a legal duty on private individuals or institutions to enforce immigration laws. These private persons are required to check the immigration status of persons seeking a restricted benefit (for example, employment or housing) and to deny that benefit if the person is present in the United States without legal immigration status.

Proponents of private enforcement emphasize its multiplier effect. Instead of limiting immigration law enforcement to the ranks of government officers, proponents argue that private enforcement spreads enforcement duties to private individuals, multiplying the number of immigration law enforcers without adding significant costs. With more enforcement, advocates say, illegal immigration will decrease, as more unauthorized immigrants are deported, voluntarily return home, or are deterred from trying to immigrate in the first place. According to its proponents, private enforcement also has the additional benefits of penalizing private enforcers (like employers) who would otherwise benefit from illegal immigration and of sending a strong symbolic message about the importance of immigration law enforcement.

Private enforcement, particularly its touted multiplier effect, has intuitive appeal. But looking carefully at the twenty-one-year track record of federal employer sanctions, we see that the benefits of the sanctions have been speculative, at best, while the costs extracted through discrimination against those who look or sound foreign are substantive and serious.¹² These results raise important doubts about the efficacy of private enforcement laws generally.

Enacted to reduce the “pull factor” of employment, federal employer sanctions have not deterred illegal immigration. Although some indicators suggested illegal immigration decreased shortly after the sanctions took place (for example, decreased border apprehensions of undocumented immigrants), there have also been important questions raised about the significance of those indicators (for example, how much of the decreased border apprehensions resulted from the concurrent legalization of 2.7 million undocumented immigrants).¹³ Moreover, many of those indicators returned to their pre-IRCA levels within a few years, suggesting that any deterrence effect of employer sanctions was temporary at best. What appears to have happened is that over time, employers and employees found ways to comply with the letter of employer sanctions laws (checking documents), without having to change the substance of their business practices. That explanation is consistent with the burgeoning

10. See *infra* section II.B.2.

11. See *infra* section II.B.4.

12. For more analysis about the benefits of private enforcement, see section III.B.

13. U.S. IMMIGRATION & NATURALIZATION SERV., STATISTICAL YEARBOOK OF THE IMMIGRATION AND NATURALIZATION SERVICE (INS), 1994, at 32 tbl.4 (1996).

availability of counterfeit documents. Together with the lack of enforcement, these factors have made employer sanctions a largely toothless law.¹⁴

On the cost side, federal employer sanctions have been roundly criticized as increasing discrimination against legal immigrants and citizens. In a 1990 congressionally mandated survey, the then-General Accounting Office (GAO) concluded that ten percent of employers engaged in illegal national-origin discrimination as a result of the sanctions (for example, not hiring workers who look or sound foreign), constituting “a widespread pattern of discrimination.”¹⁵ The survey also found that an additional nine percent of employers engaged in illegal citizenship discrimination (for example, hiring only workers born in the United States) as a result of the sanctions.¹⁶ Based on correlations in its data, GAO concluded that at least some of the discrimination could be attributed to employers’ misunderstanding of or confusion about the law’s requirements.¹⁷

The track record of federal employer sanctions provides important lessons for private enforcement laws generally. First, the failure of employer sanctions to deter illegal immigration raises serious doubts about the ability of other private enforcement laws to do so. Employer sanctions were implemented on a national level, with extensive federal resources, and yet have been unable to deter illegal immigration. With jobs still available to draw undocumented immigrants, it seems unlikely that private enforcement laws in other areas like housing will have much deterrent effect. Furthermore, the implementation problems that have plagued employer sanctions (private enforcer confusion, fraudulent documents, and lack of government enforcement) may also undermine the effectiveness of other private enforcement laws as well.

Second, our experience with employer sanctions shows us clearly the discriminatory costs of putting immigration enforcement obligations into private hands. Private parties, not trained in immigration law and not given clear legal guidelines, are likely to make mistakes, resulting in accidental over-enforcement (denying benefits to applicants with legal immigration status) and under-enforcement of the immigration laws (granting benefits to applicants without legal immigration status).

The legal complexities of immigration law also create great potential for intentional discrimination. Those private parties intent on discrimination find the perfect pretext in private enforcement laws. Using the laws as a shield, these private parties could refuse to provide services to all immigrants, certain groups of immigrants, or those who simply “look like” immigrants. Or more subtly, the private parties could demand proof of legal status (or more proof) only from certain groups, making illegal distinctions based on national origin, citizenship status, or race.

14. A detailed analysis of the effect of employer sanctions on illegal immigration can be found in section II.B.1.a.

15. U.S. GEN. ACCOUNTING OFFICE, REPORT TO THE CONGRESS, IMMIGRATION REFORM: EMPLOYER SANCTIONS AND THE QUESTION OF DISCRIMINATION 38–39 (1990) [hereinafter GAO 1990 DISCRIMINATION REPORT].

16. *Id.* at 39.

17. *Id.* at 61–63.

The potential for error and discrimination is rooted in the complexities of immigration law. With the many categories of immigrants and non-immigrants authorized by U.S. immigration law, determining legal presence can be a confusing task. There is no one definitive document that establishes legal presence. For example, consider that while most visitors to the United States have visas, many (like those from countries that participate in the visa waiver program) do not. And then there are those who initially arrive without legal status (like applicants for political asylum) but then, as allowed by U.S. law, take steps to legalize their presence. These groups of individuals are authorized to be in the United States (and authorized to rent housing, travel, and in some cases, work), but to private parties who have no immigration law training, making that determination can be fraught with error. And the consequences for erroneous determinations are severe: for under-enforcement, private parties face criminal and civil penalties while the nation's enforcement goals are not advanced; for over-enforcement, individuals who are legally present are denied housing, transportation, and other necessities.

In Part I of this Article, I define private enforcement and explore the expansion of private enforcement laws into different sectors, studying the circumstances motivating the expansion. Private enforcement occurs when private parties, acting under a requirement of law, check for legal immigration status before granting applicants access to a restricted benefit. Effectively beginning with federal employer sanctions in 1986, private enforcement has spread into the housing and transportation areas, with proposals for expansion into the medical, educational, and charitable areas.

In Part II, I examine the effectiveness of private enforcement laws, drawing from the experience of federal employer sanctions. Finding that federal employer sanctions have not decreased illegal immigration or punished private employers benefiting from illegal immigration, I suggest that the main benefit of sanctions has been to establish that hiring undocumented workers is indeed illegal. But weighed against the increased discrimination that sanctions have created toward job applicants who look or sound foreign (discrimination attributable, in large part, to employers' misunderstanding or confusion about the sanctions' requirements), I conclude that employer sanctions have not been an effective immigration law policy. Because other private enforcement laws depend on a similar enforcement mechanism, I conclude that the benefits of private enforcement laws are mostly symbolic, sending tough messages about the importance of immigration law enforcement, while the costs in increased discrimination are real and serious.

I. THE SCOPE OF PRIVATE ENFORCEMENT

A. DEFINING PRIVATE ENFORCEMENT

What exactly is private enforcement? There are two components to consider: determining who the private enforcers are and determining what the enforce-

ment consists of. The “who” consists of private parties who are not government employees but are nonetheless required to enforce immigration laws. Examples of private enforcers include employers, landlords, and school administrators. The “what” of private enforcement is usually limited to checking and confirming the legal immigration status of others who seek a restricted benefit (employment, housing, and so forth).¹⁸

In defining the “who” of private enforcement, there are several compelling reasons for drawing the line at government employment. First, intuitively, someone enforcing immigration laws as part of her governmental duties cannot be engaging in private enforcement. And though government enforcement of immigration laws does generate controversy,¹⁹ it is really the paradigm of private enforcement that is new and novel.

Second, as a pragmatic matter, government employees are more likely than their private sector counterparts to receive immigration law training, thus potentially alleviating some of the policy concerns of private enforcement.²⁰ At a minimum, it would be possible for governments to mandate that their employees receive immigration law training, something harder to achieve within the decentralized private sector.

Finally, there is legal and political consistency in defining private enforcement as non-government enforcement. Through private enforcement, the government is shifting some of the responsibility of immigration law enforcement to private parties, who are not trained to enforce (or compensated for doing so). This Article focuses on the efficacy of the shifting, but the phenomenon of private enforcement also raises similar legal and political questions: are governments also shifting political accountability for immigration law enforcement? If a private party violates civil rights laws, who should be held responsible for damages—the private party, the government requiring the private enforcement,

18. None of the private enforcement laws require enforcers to directly report undocumented immigrants to federal authorities. However, some of the locally passed employment sanctions and housing laws require employers or landlords who are cited for violations to submit affidavits, identifying the immigrant(s) by name and address, in order to avoid penalties. The affidavits, in some cases, are passed on to federal immigration authorities. For more about private enforcement laws, see *infra* Part II.

19. See, e.g., Press Release, S. Poverty Law Ctr., SPLC Sues Immigration Agency: Lawsuit Challenges Constitutionality of Raids in Georgia (Nov. 1, 2006), http://www.splcenter.org/legal/news/article.jsp?aid=221&site_area=1 (describing federal lawsuit filed against Immigration and Customs Enforcement, alleging that agents harassed Latinos in workplace and home raids, solely based on their appearance).

20. Border Patrol agents, for example, go through a rigorous nineteen-week training program in which they take courses in immigration and nationality law, among other subjects. Frequently Asked Questions About Working for the CBP Border Patrol (Dec. 15, 2004), http://www.cbp.gov/xp/cgov/careers/customs_careers/border_careers/bp_agent/faqs_working_for_the_usbp.xml. Even local government authorities, not normally charged with immigration enforcement responsibilities, may receive immigration training upon accepting those responsibilities. For example, Alabama has entered into a training agreement with Immigration and Customs Enforcement to train its state troopers to enforce immigration laws, and as of 2006, sixty troopers had received this training. Press Release, U.S. Immigration & Customs Enforcement, Alabama Troopers Complete Federal Immigration Training (Sept. 1, 2006), available at <http://www.ice.gov/pi/news/newsreleases/articles/060901dc.htm>.

both or none? Finally, should private parties be compensated in some way for their new enforcement responsibilities?

The “what” of private enforcement focuses on the checking of legal status by private parties before restricted benefits are distributed or sold. The laws at issue here do not require private parties to do anything beyond checking legal status and then denying the restricted benefit if legal status cannot be proven. Do these duties qualify as immigration law enforcement?

The answer is yes, on several different levels. If, as a matter of plain meaning, “to enforce” is to “give force to,”²¹ “cause to take effect,”²² or “compel obedience to,”²³ then private parties are “enforcing” the nation’s immigration laws. By making it more difficult for undocumented immigrants to travel, obtain housing, education or health care, private parties are “compel[ing] obedience to” two basic immigration laws: Immigration and Nationality Act Sections 212(a)(6)(A)(i) (illegal to enter the United States without authorization)²⁴ and 237(a)(1)(B) (illegal to remain in the United States without authorization).²⁵ Private enforcement laws, advocates would argue, enforce our immigration laws by encouraging undocumented immigrants to leave or discouraging their immigration in the first place.

Some might object that this enforcement is indirect, at best, and more akin to execution of government policy, than actual enforcement. And certainly, the private enforcement at issue here falls short of traditional immigration enforcement done by government authorities: investigation and reporting of immigration status; and often for those without lawful status, arrest, removal hearing, and actual removal. But this objection is only relevant if we are focused on the government’s authority to act upon private citizens and any resulting liability.²⁶ In this Article, however, the focus is on the efficacy of private enforcement, so addressing these legal questions is not essential to our inquiry.²⁷

21. THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (4th ed. 2004), available at <http://dictionary.reference.com/browse/enforce> (last visited Oct. 17, 2007).

22. MERRIAM-WEBSTER’S DICTIONARY OF LAW (1996), available at <http://dictionary.reference.com/browse/enforce> (last visited Oct. 17, 2007).

23. DICTIONARY.COM UNABRIDGED, <http://dictionary.reference.com/browse/enforce> (last visited Oct. 17, 2007).

24. 8 U.S.C. § 1182(a)(6)(A)(i) (2000).

25. 8 U.S.C. § 1227(a)(1) (2000 & Supp. IV 2004).

26. For example, could the government require private citizens to report undocumented immigrants to government authorities, similar perhaps to the mandatory reporting system required in the child protection context? And if so, at what point would private citizens become government actors for the purpose of finding government liability? For more on the question of private party liability in the civil rights context, see Myriam Gilles, *Private Parties as Defendants in Civil Rights Litigation*, 26 CARDOZO L. REV. 1 (2004).

27. Enforcement has been defined broadly in other contexts as well. See Barton H. Thompson, Jr., *The Continuing Innovation of Citizen Enforcement*, 2000 U. ILL. L. REV. 185 (2000) (defining citizen monitoring of environmental violations as enforcement of environmental laws); see also Nuno Garoupa & Fernando Gomez-Pomar, *Punish Once or Punish Twice: A Theory of the Use of Criminal Sanctions in Addition to Regulatory Penalties*, 6 AM. L. & ECON. REV. 410 (2004) (using economic analysis to argue for the combined use of criminal sanctions and regulatory penalties to enforce laws).

It is also worth noting that the governments that pass private enforcement laws see their efforts as enforcing immigration laws. In passing federal employer sanctions, Congress made clear its intent that employer sanctions be an essential part of immigration law enforcement.²⁸ At the local governmental level, private enforcement laws are often passed to fill perceived holes in the federal government's enforcement efforts. For example, in passing its own employer sanctions system, Suffolk County, New York explained that

since there has been a lack of enforcement of a twenty (20) year old federal law (Simpson-Mazzoli) that requires businesses to verify that their employees are legally eligible to be employed in the United States, Suffolk County has an opportunity to lead by example in an effort to prod the federal government to undertake such enforcement action.²⁹

B. THE EXPANDING REACH OF PRIVATE ENFORCEMENT

Private enforcement of immigration laws is a recent phenomenon, effectively starting with the federal employer sanctions laws passed in 1986. To be sure, there have been instances of private parties volunteering to enforce immigration laws, but private enforcement mandated by law, for the most part, is of recent vintage.³⁰ This section examines the expansion of private enforcement laws into different fields.

As an initial matter, we should remember that the lion's share of immigration enforcement is still done by government employees, mostly at the federal level but also increasingly at the local levels. At the federal level, Immigration and Customs Enforcement (ICE) and Customs and Border Protection (CBP), both within the Department of Homeland Security, have the primary responsibility for enforcing the nation's immigration laws. CBP is responsible for "protecting

28. See Alan K. Simpson, *U.S. Immigration Reform: Employer Sanctions and Antidiscrimination Provisions*, 9 U. ARK. LITTLE ROCK L. REV. 563, 563-64 (1986-87) ("The maximum effort in Congress to control illegal immigration to the United States has been expended over the last fifteen years [T]here is a common feature to every bill that has been seriously considered: inclusion of 'employer sanctions' as the main enforcement mechanism.").

29. Suffolk County, N.Y., Local Law No. 52-2006 (Aug. 8, 2006).

30. A recent example of voluntary private enforcement is the Minutemen Project, a self-described "citizens' Vigilance Operation monitoring immigration, business, and government." See *Boyles, Gilchrist Cited Dubious Stats on Illegal Immigration*, COLO. MEDIA MATTERS, Aug. 3, 2006, <http://colorado.mediamatters.org/items/200608040001>. This language used to appear on the Minutemen Project's website, but has since been removed. See *Welcome to the Minutemen Project*, <http://www.minutemanproject.com/> (last visited Nov. 12, 2007). Denounced by President Bush as "vigilante" activity, the Minutemen have set up patrols at the southern border to monitor and report the crossing of undocumented immigrants. Amy Argetsinger, *In Ariz., "Minutemen" Start Border Patrols; Volunteers Crusade To Stop Illegal Crossings*, WASH. POST, Apr. 5, 2005, at A03.

An exception to the recent trend is the longstanding obligation that carriers have had to ensure that their passengers are fit for entry to the U.S., with valid visas or other authorization to enter. See Marvin H. Morse & Lucy M. Moran, *Troubling the Waters: Human Cargos*, 33 J. MAR. L. & COM. 1, 11-12 (2002) (describing carrier liability under federal and state laws for immigration ineligibility of passengers as "nothing new").

the sovereign borders of the United States, at and between the official ports of entry.”³¹ Though this mission encompasses more than just immigration enforcement,³² a substantial portion of its resources are spent enforcing immigration laws. In fiscal year 2006, for example, CBP processed 422.9 million people seeking admission to the United States and apprehended over 1.3 million people trying to enter illegally.³³ ICE is responsible for immigration law enforcement in the interior of the country.³⁴ Also in fiscal year 2006, ICE removed 185,431 undocumented immigrants from the country³⁵ and seized more than \$42 million in assets through immigration-related investigations.³⁶

State and local governments are getting involved in immigration law enforcement too, with encouragement from the federal government. In 2002, reversing its previous legal position, the Department of Justice invited local and state police to enforce both civil and criminal immigration laws, opining that state governments have “inherent authority” to do so.³⁷ Taking up that invitation, local law enforcement in Florida, Alabama, and Los Angeles County have entered into training agreements with ICE and currently have immigration law enforcement responsibilities. Other local jurisdictions have pending agreements.³⁸

Proportionally, private enforcement is still a small percentage of total immigration enforcement. And it should be noted that some of the private enforcement laws, particularly those enacted by local governments, have not been implemented because of legal challenges.³⁹ Still, even as specific laws face legal

31. See U.S. CUSTOMS AND BORDER PROT., U.S. CUSTOMS AND BORDER PROTECTION BUDGET IN BRIEF (2007), http://www.cbp.gov/xp/cgov/newsroom/fact_sheets/budget/.

32. CBP is also responsible for preventing the cross border smuggling of contraband such as controlled substances, weapons, and prohibited plants and animals. *Id.*

33. 2006: A Year of Accomplishment, http://www.cbp.gov/xp/cgov/newsroom/full_text_articles/accomp_yr06.xml (last visited Oct. 5, 2007).

34. ICE’s self-described mission is to “protect America and uphold public safety by targeting the people, money and materials that support terrorist and criminal activities.” U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, ICE FISCAL YEAR 2006 ANNUAL REPORT 2 (2007), available at <http://www.ice.gov/doclib/about/ICE-06AR.pdf>. Besides its immigration functions, ICE investigates and prosecutes criminal organizations involved with counterfeit products, investigates and prosecutes pedophiles and other predatory criminals, and provides security services to federal buildings. *Id.* at 2–3.

35. *Id.* at v.

36. *Id.* at 4.

37. Attorney General John Ashcroft, Prepared Remarks on the National Security Entry-Exit Registration System (June 6, 2002), available at <http://www.usdoj.gov/archive/ag/speeches/2002/060502agpreparedremarks.htm>.

38. Susan Ferriss, *When Cops Probe Immigrants*, SACRAMENTO BEE, Feb. 27, 2006, at A1. For more on the debate about local law enforcement of immigration laws, see Kris W. Kobach, *The Quintessential Force Multiplier: The Inherent Authority of Local Police To Make Immigration Arrests*, 69 ALB. L. REV. 179 (2005); Huyen Pham, *The Constitutional Right Not To Cooperate? Local Sovereignty and the Federal Immigration Power*, 74 U. CIN. L. REV. 1373 (2006); Huyen Pham, *The Inherent Flaws in the Inherent Authority Position: Why Inviting Local Enforcement of Immigration Laws Violates the Constitution*, 31 FLA. ST. U. L. REV. 965 (2004).

39. See, e.g., *Villas at Parkside Partners v. City of Farmers Branch*, 496 F. Supp. 2d 757 (N.D. Tex. 2007) (granting a preliminary injunction against the city’s ordinance that would have required landlords

challenge, the concept of private enforcement continues to expand, as described below.

1. Employment

The employment field has seen the most private enforcement activity. The driving rationale of these laws is to make it more difficult for undocumented immigrants to find work in the United States and thus reduce the main “pull factor” that draws them here. By threatening employers with lost contracts and licenses, fines, and even prison sentences, these laws, in effect, require employers to check and vouch for the authorized status of their employees. The laws are designed to encourage all employers to abide by immigration laws and to increase the costs for those inclined to hire unauthorized workers.

There are two broad categories of employment-related private enforcement laws: (1) general employer sanctions that require employers to check the immigration status of all employees or face civil and criminal penalties, and (2) more targeted sanctions that require businesses to verify employees’ immigration status as a condition of obtaining business licenses, government contracts, economic grants, or tax deductions.

In the employment field, local governments and the federal government have both passed private enforcement laws, with states taking the first step. In 1971, fifteen years before IRCA, California passed a law that prohibited employers from knowingly hiring unauthorized workers and threatened them with civil fines of \$200 to \$1000 for violations.⁴⁰ Ten states and one city soon followed suit, passing similar legislation.⁴¹ In at least eight of these states, however, few cases were ever prosecuted under the laws, largely because employer sanctions cases were considered a low law enforcement priority.⁴²

With the passage of IRCA in 1986, the federal government took the lead. IRCA took a three-pronged approach to illegal immigration: legalization for many undocumented immigrants already here (long-term residents and agricultural workers), enhanced border security to prevent future illegal crossings, and employer sanctions to dry up the pull factor of higher-paying jobs. Employer sanctions were the centerpiece of the legislation as Congress believed that

to check tenants’ immigration status because the ordinance was preempted by federal law and was void for vagueness); *Reynolds v. City of Valley Park*, No. 06-CC-3802 (Cir. Ct. St. Louis County Mar. 12, 2007), available at http://www.aclu.org/pdfs/immigrants/valleypark_opinion.pdf (holding that the city’s ordinances penalizing businesses which hire undocumented workers and landlords who rent to undocumented tenants are invalid because they violate state law).

40. Carl E. Schwarz, *Employer Sanctions Laws, Worker Identification Systems, and Undocumented Aliens: The State Experience and Federal Proposals*, 19 STAN. J. INT’L L. 371, 402 (1983). The constitutionality of the California statute was upheld in *DeCanas v. Bica*, 424 U.S. 351, 355, 365 (1976) (holding California’s statute was not unconstitutional as an immigration regulation and was not preempted by the Immigration and Nationality Act).

41. Those local governments were Connecticut, Delaware, Florida, Kansas, Maine, Massachusetts, Montana, New Hampshire, Vermont, Virginia, and the city of Las Vegas, Nevada. Schwarz, *supra* note 40, at 373.

42. *Id.* at 383.

illegal immigration was driven by employment opportunities:

This legislation seeks to close the back door on illegal immigration so that the front door on legal immigration may remain open. The principal means of closing the back door, or curtailing future illegal immigration, is through employer sanctions Employment is the magnet that attracts aliens here illegally Employers will be deterred by the penalties in this legislation from hiring unauthorized aliens, and this, in turn, will deter aliens from entering illegally or violating their status in search of employment.⁴³

The federal employer sanctions are general sanctions, applying to all employers with few exceptions.⁴⁴ The sanctions impose two requirements on employers: one substantive (prohibiting the “knowing” hire of a person unauthorized to work in the United States)⁴⁵ and one administrative (requiring all employers to verify the employment eligibility of all employees by checking for certain documents).⁴⁶

The two requirements interact in a significant way. Compliance with the administrative requirements provides employers with a shield against charges of substantive violations. Section 274A(a)(3) allows an employer who can demonstrate good faith compliance with the administrative requirements to assert an affirmative defense to any substantive violations.⁴⁷ Under that provision, an employer charged with substantive violations can point to its attempts to comply with the document verification requirements to establish a rebuttable affirmative defense.⁴⁸ Critics charge that this affirmative defense makes prosecution of substantive offenses very difficult.⁴⁹

An employer knowingly employs an unauthorized worker in violation of the statute when she has actual knowledge of the employee’s unauthorized status *or* when she has reason to know. Federal regulations define “knowing” as including “not only actual knowledge but also knowledge which may fairly be inferred through notice of certain facts and circumstances which would lead a person, through the exercise of reasonable care, to know about a certain condition.”⁵⁰ Furthermore, according to federal regulations, an employer’s knowl-

43. H. REP. NO. 99-682(I), at 46 (1986).

44. Because of a grandfathering provision, the sanctions do not apply to employees hired, recruited, or referred before November 7, 1986. 8 C.F.R. §§ 274a.7(a) (2007).

45. INA § 274A(a)(1)(A), 8 U.S.C. § 1324A(a)(1)(A) (2000).

46. INA § 274A(a)(1)(B), 8 U.S.C. § 1324A(a)(1)(B) (2000).

47. 8 U.S.C. § 1324A(a)(3) (2007).

48. 8 C.F.R. §§ 274a.4, 1274a.4 (2007). Section 274A(b)(6) does not even require successful compliance, but rather counts a good faith verification attempt as compliance “notwithstanding a technical or procedural failure to meet such requirement if there was a good faith effort to comply.” An example of a technical or procedural failure that has been excused is the failure to include a date on section 2 of the I-9 form (where the employer attests that she has reviewed the required forms and that they appear genuine). WSC Plumbing, Inc., 9 O.C.A.H.O. no. 1061 (Dep’t of Justice, 2000).

49. For more critique of the federal employer sanctions, see section II.B.

50. 8 C.F.R. §§ 274a.1(1)(1), 1274a.1(1)(1) (2007).

edge can be inferred where the employer fails to complete or improperly completes the I-9 form.⁵¹ But this broad definition of knowledge has been questioned.⁵² At least one court has suggested that knowing requires something more akin to willful blindness. In *Collins Foods International, Inc. v. Immigration & Naturalization Service*, the Ninth Circuit held that an employer does not have constructive knowledge of its employee's unauthorized status simply because the employer had not compared the back of the fraudulent Social Security card to the sample card in the INS manual.⁵³

If ICE can prove a substantive violation, the employer is subject to civil fines of \$250 to \$2000 per unauthorized employee hired.⁵⁴ For subsequent substantive offenses, the employer may be fined \$2000 to \$10,000 for each unauthorized hire.⁵⁵ If ICE proves an administrative violation, the employer is subject to fines of \$100 to \$1000 for each employee with inadequate paperwork.⁵⁶ Criminal penalties also may be imposed on an employer who "engages in a pattern or practice" of substantive violations.⁵⁷

The federal employer sanctions expressly preempt all local employer sanctions laws, with a limited exception for licensing and other similar laws.⁵⁸ Thus, all of the general employer sanctions laws that were passed by states before IRCA were preempted. Despite this preemption provision, at least one state, Colorado, passed a general employer sanctions law after IRCA. In 2006, along with other get-tough immigration legislation,⁵⁹ Colorado passed H.B. 1017, which requires Colorado employers to verify the legal work status of all new employees and if requested, to submit documentation of employees' legal status to the state Department of Labor and Employment.⁶⁰ Employers who, with reckless disregard, fail to submit the requested documents or submit false documents are subject to a maximum \$5000 fine for first offenses and \$25,000

51. 8 C.F.R. §§ 274a.1(l)(1)(i), 1274a.1(l)(1)(i) (2007). The I-9 is the immigration form that requires an employer to attest that the employee has produced documents establishing identity and employment authorization and that the documents appear reasonably genuine. 8 C.F.R. §§ 274a.1(g), 1274a.1(g), 274a.2(b)(1)(iv), 1274a.2(b)(1)(iv) (2007).

52. See, e.g., *Walden Station, Inc.*, 8 O.C.A.H.O. 1053 (2000) (incomplete or inaccurate I-9 form is not enough to establish employer's knowledge of employee's unauthorized status).

53. 948 F.2d 549, 554 (9th Cir. 1991).

54. INA § 274A(e)(4)(A)(i), 8 U.S.C. § 1324a(e)(4)(A)(i) (2000).

55. INA § 274A(e)(4)(A)(ii)-(iii), 8 U.S.C. § 1324a(e)(4)(A)(ii)-(iii) (2000).

56. INA § 274A(e)(5), 8 U.S.C. § 1324a(e)(5) (2000).

57. The maximum criminal penalties are \$3000 fines per unauthorized hire, six month imprisonment, or both. INA § 274A(f)(1), 8 U.S.C. § 1324a(f)(1) (2000).

58. "The provisions of this section [employer sanctions] preempt any State or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens." INA § 274A(h)(2), 8 U.S.C. § 1324a(h)(2) (2000).

59. Mark P. Couch & Chris Frates, *Immigration Pact OK'd Strongest Reform in U.S.*, DENVER POST, July 11, 2006, at A01.

60. H.B. 1017, 2006 Leg. Sess., 1st Spec. Sess. (Co. 2006), *codified at* COLO. REV. STAT. § 8-2-122(2)-(3) (2006).

maximum fines for subsequent offenses.⁶¹ Legal status is defined by reference to federal law.⁶²

By contrast, most local private enforcement laws threaten employers with more targeted penalties—the loss of government benefits like a business license, a government contract or grant, or a tax deduction. The approach taken by Hazleton, Pennsylvania is typical. Entitled the Illegal Immigration Relief Act Ordinance (IIRA), Hazleton's law required landlords and employers to verify the legal immigration status of their tenants and employees or risk fines or other city-imposed penalties.⁶³ Though it has been declared unconstitutional⁶⁴ the ordinance is worth studying, because it has become a model for other towns and cities seeking to pass local immigration legislation.⁶⁵

Like many targeted employer sanction laws, Hazleton's ordinance requires businesses applying for a business license to attest that they do not knowingly hire unauthorized workers. Unauthorized-worker status is defined by reference to federal law. If the city receives a valid complaint that a particular business hires unauthorized workers, the city will suspend the business license if the business does not fire the unauthorized workers within three business days of receiving notice from the city.⁶⁶ Perhaps most controversially, in provisions not often copied by other local governments, a Hazleton business seeking to reinstate its license must submit an affidavit that includes the "name, address and other adequate identifying information of the unlawful workers related to the complaint."⁶⁷ For subsequent violations, the city will forward the affidavit, complaint and other related documents to federal authorities.⁶⁸

61. *Id.* at § 8-2-122(4).

62. *Id.* at § 8-2-122(1)(d).

63. HAZLETON, PA., ORDINANCES 2006-18 (2006).

64. In July 2007, a federal judge ruled that Hazleton's IIRA ordinance, as well as its Tenant Registration Ordinance (requiring apartment dwellers to prove legal immigration status to obtain an occupancy permit), were unconstitutional on preemption and due process grounds. *Lozano v. City of Hazleton*, 496 F. Supp. 2d 477 (M.D. Pa. 2007). The city has vowed to appeal the decision. See Darryl Fears, *Judge Blocks City's Ordinances Against Illegal Immigration*, WASH. POST, July 27, 2007, at A2; David G. Savage & Nicole Gaouette, *Hazleton Immigration Law Is Rejected*, L.A. TIMES, July 27, 2007 at A20.

65. According to the Puerto Rican Legal Defense and Education Fund (PRLDEF), at least twenty-nine local governments have passed laws requiring employers to verify the legal immigration status of employees, with twenty-seven local governments considering or tabling similar legislation. PRLDEF Latino Justice Campaign, <http://www.prldef.org/Civil/Latino%20Justice%20Campaign.htm> (last visited Jan. 6, 2008); see also Abby Goodnough, *A Florida Mayor Turns to an Immigration Curb To Fix a Fading City*, N.Y. TIMES, July 10, 2006, at A11 (describing how Avon Park, Florida, modeled its ordinance after Hazleton's).

66. HAZLETON, PA., ORDINANCES 2006-18 (2006). If the employer seeks to verify the employee's status through the Basic Pilot program, then the three days is tolled while that verification is conducted. Hazleton, Pa., Ordinance 2006-40 (2006). IIRA was subsequently amended by Ordinance 2007-6, but none of those minor amendments is relevant here. *Lozano*, 496 F. Supp. 2d at 485. For more on the Basic Pilot program, see note 70 *infra*.

67. HAZLETON, PA., ORDINANCES 2006-18 (2006).

68. Another unique Hazleton provision creates a private cause of action for authorized employees who are fired if, at the time of the firing, the employer hired unauthorized workers and did not participate in the Basic Pilot program. See *id.*

Georgia, in broad sweeping immigration legislation passed in 2006,⁶⁹ goes a few steps further. Besides requiring employers with state contracts to use the federal Basic Pilot program to verify the eligibility of new employees,⁷⁰ Georgia also requires employers to withhold 6% of paid compensation as state income tax for employees who do not provide a taxpayer identification number or who provide a tax identification number issued for nonresident aliens. An employer who does not make the required withholding becomes responsible for the taxes required. Also under Georgia law, employers are prohibited from deducting as a business expense more than \$600 paid in wages to unauthorized employees.⁷¹ While not expressly requiring private enforcement, these Georgia provisions make employing unauthorized workers even more costly.

2. Housing

The housing field has seen a tremendous amount of private enforcement activity, second only to the employment field. Why are housing-related private enforcement laws passed? The relationship between housing and illegal immigration is more nuanced than the relationship between employment and illegal immigration. No one argues that the availability of housing is a pull factor, drawing undocumented immigrants to the United States. Rather, advocates of these laws (especially at the local level) seem to suggest that by making life in the United States more difficult, undocumented immigrants already here have more incentive to leave, and immigrants outside the country are discouraged from entering or staying illegally. In pushing Avon Park, Florida to adopt a housing private enforcement law, Mayor Tom Macklin urged, “If we address the housing issue—make it as difficult as possible for illegals to find safe haven in Avon Park—then they are going to have to find someplace else to go.”⁷²

Federal law has long threatened with criminal penalties anyone who “knowing or in reckless disregard” of an immigrant’s undocumented status “conceals,

69. Aside from employer sanctions, the legislation also requires state and local governments to verify that applicants for government benefits are lawfully in the United States; authorizes state law enforcement officials to enforce immigration laws; creates the offenses of human trafficking and contributing to human trafficking; requires jail personnel to check the immigration status of those charged with DUI or a felony and to contact ICE (Immigration and Customs Enforcement) if the defendant is not legally present; and limits the services that for-profit immigration assistance agencies (not lawyers) can provide. *See* Georgia Security/Immigration Compliance Act, S.B. 529, 148th Gen. Assem., Reg. Sess. (Ga. 2006).

70. Basic Pilot, now known as E-Verify, is the voluntary federal program that enables employers to verify the eligibility of new employees by checking the databases of the Social Security Administration and the Department of Homeland Security. U.S. Citizenship and Immigration Servs., Employment Eligibility Verification, <https://www.vis-dhs.com/EmployerRegistration/StartPage.aspx?JS=YES> (last visited Sept. 21, 2007). The requirement to use Basic Pilot is phased in—with employers with 500 or more employees required to comply by July 1, 2007, employers with 100 to 500 employees by July 1, 2008, and employers with fewer than 100 employees by July 1, 2009. Ga. S.B. 529.

71. Ga. S.B. 529.

72. Goodnough, *supra* note 65. Avon Park eventually rejected the immigration ordinances. Casey Woods, *Immigration Opens Big Split in Small Town*, MIAMI HERALD, Aug. 9, 2006, at 1A.

harbors, or shields [the immigrant] from detection.”⁷³ This prohibition expressly includes harboring in “any building or any means of transportation.”⁷⁴ Penalties include a fine, a prison sentence up to five years, or both.⁷⁵

Would a landlord who merely rents to an undocumented immigrant in a commercial transaction, knowing or in reckless disregard of her illegal status, violate this statute? The answer depends on what it means to “harbor,” and the courts are split on this issue. Most of the circuits define “harbor” broadly to mean simply “afford shelter to,” without requiring that the defendant actually prevented or attempted to prevent detection by law enforcement agents.⁷⁶ But at least one circuit has held that to “harbor” means to “clandestinely shelter, succor, and protect improperly admitted aliens.”⁷⁷ It is also significant to note that even in the cases where the courts defined harboring broadly, the defendants had more connections with the undocumented immigrants than simply providing housing.⁷⁸

By contrast, the local housing-related laws (all passed by cities and counties, rather than by states) unambiguously define harboring to penalize landlords and other owners who allow undocumented immigrants to occupy their dwelling units. For example, the harboring definition passed by Cherokee County, Georgia instructs owners that they may not “let, lease, or rent” or “suffer or permit the occupancy” of a dwelling unit by an undocumented immigrant, “knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of the law.”⁷⁹ Other local laws require a higher mens rea of acting knowingly.⁸⁰

73. INA § 274(a)(1)(A)(iii), 8 U.S.C. § 1324(a)(1)(A)(iii) (2000).

74. INA § 274(a)(1)(A)(iii), 8 U.S.C. § 1324(a)(1)(A)(iii) (2000) provides: “Any person who knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law, conceals, harbors, or shields from detection, or attempts to conceal, harbor, or shield from detection, such alien in any place, including any building or any means of transportation” is subject to criminal punishment.

75. INA § 274(a)(1)(B), 8 U.S.C. § 1324(a)(1)(B) (2000). The prison sentence can be increased up to ten years if “the offense was done for the purpose of commercial advantage or private financial gain;” up to twenty years if the defendant “causes serious bodily injury . . . or places in jeopardy the life of another;” and can include a life sentence or the death penalty if the violation results in the death of another. *Id.*

76. *United States v. Acosta De Evans*, 531 F.2d 428, 429–30 (9th Cir. 1976) (interpreting 8 U.S.C. § 1324(a)(3), the predecessor to 8 U.S.C. § 1324(a)(1)(A)(iii)); *see also* *United States v. Lopez*, 521 F.2d 437, 440–41 (2d Cir. 1975) (holding that harboring includes “conduct tending substantially to facilitate an alien’s remaining illegally in the U.S.” (internal quotations omitted)).

77. *Susnjar v. United States*, 27 F.2d 223, 224 (6th Cir. 1928), *followed by* *United States v. Belevin-Ramales*, 458 F. Supp. 2d 409 (E.D. Ky. 2006) (holding that the government had to prove that the defendant acted with intent to prevent detection of the undocumented immigrant).

78. *See, e.g., Lopez*, 521 F.2d at 439 (undocumented immigrants entered the country knowing the addresses of the defendant’s houses; they traveled directly to his houses; he helped them obtain work and transportation to work, and arranged fraudulent marriages for them to claim legal residence); *Acosta De Evans*, 531 F.2d at 428 (defendant was related to the undocumented immigrant and had previously met her in Mexico, where they talked about the difficulty of obtaining immigration papers).

79. CHEROKEE COUNTY, GA., ORDINANCES no. 2006-003 (2006).

80. *See, e.g.,* WEST HAZLETON, PA., ORDINANCES 2006-3 (2006).

These local laws tend to use a similar system for meting out penalties. Landlords and others who “harbor” undocumented immigrants face fines from \$50⁸¹ to \$1000,⁸² which are levied for every day that the landowner is found to be in violation (and sometimes for every undocumented adult immigrant found living in the unit).⁸³ Many of the laws also suspend the business license for the dwelling unit, preventing the landlord from collecting rent on that unit.⁸⁴

Unlike many of the employer sanctions, the housing laws do not impose on landlords any separate administrative requirement to verify the lawful immigration status of tenants. However, particularly in jurisdictions which impose liability for reckless disregard, as well as for knowledge, the incentive is high for landlords to affirmatively check their tenants’ immigration status. For example, after Valley Park, Missouri passed its housing law, landlord James Zhang sent his apartment manager door-to-door, telling residents that if they were not in the United States legally, they needed to move out. Within a week, twenty of his forty-eight units were empty, with some families leaving so quickly that they did not even take their furniture with them.⁸⁵

How does a landlord or other property owner determine who is lawfully present, so as to avoid harboring violations? This is a central weakness of the housing-related laws. Unlike employers, landlords subject to these ordinances are not given a list of documents to check to determine if tenants or potential tenants are lawfully present. In fact, some of the local laws are painfully silent on this issue, incorporating by reference federal immigration law defining legal presence and leaving it to the landlords to figure out.⁸⁶ Other local laws, like that passed in Hazleton, Pennsylvania, have outlined procedures for verifying a tenant’s immigration status with the federal government, either at the request of the landlord or after the city receives a complaint about a particular landlord and starts an investigation.

3. Transportation

In the transportation context, the private enforcement law of main concern is Section 274(a)(1)(A)(ii) of the INA, which imposes criminal punishment on:

81. See, e.g., NASHVILLE, TN., ORDINANCES no. BL2006-1234 (tabled as of Nov. 21, 2006).

82. See, e.g., WEST HAZLETON, PA., ORDINANCES 2006-3 (Aug. 10, 2006).

83. See, e.g., ESCONDIDO, CA., ORDINANCES no. 2006-38. On December 13, 2006, the City Council of Escondido agreed to a permanent injunction, barring enforcement of the ordinance. *Statement Regarding City of Escondido Actions Stipulation for Final Judgment and Permanent Injunction*, available at <http://www.ci.escondido.ca.us/immigration/Statement.pdf> (Dec. 13, 2006).

84. See, e.g., CHEROKEE COUNTY, GA., ORDINANCES no. 2006-003 (Dec. 5, 2006).

85. Stephen Deere, *Driven by Immigration Law, Families Flee Valley Park*, ST. LOUIS POST-DISPATCH, Aug. 14, 2006, at A1. Zhang noted that the minimum \$500 fine threatened under the housing law was more than the monthly \$450 rent he collected on each unit. *Id.*

86. See, e.g., VALLEY PARK, MO., ORDINANCES 1708 (July 17, 2006); WEST HAZLETON, PA., ORDINANCES 2006-3 (Aug. 10, 2006).

[a]ny person who knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of such law, transports, or moves or attempts to transport or move such alien within the United States by means of transportation or otherwise, in furtherance of such violation of law.⁸⁷

There are federal laws that impose private enforcement duties at the border or upon entrance to the country, but they are not the focus of our analysis.⁸⁸ From a private enforcement perspective, duties imposed at the border are less controversial. By transporting others across the border, the carriers and private persons who are subject to these laws presumably know they have immigration-compliance obligations and, thus, can and should be held responsible for understanding the laws' requirements. With more legal understanding, the potential for discrimination—unintentional or otherwise—is diminished.

By contrast, those transporting in the *interior* of the country are less likely to have the necessary training to make immigration distinctions, thus raising more private enforcement concerns. To face criminal liability under § 274(a)(1)(A)(ii), a defendant does not have to have actual knowledge that the person being transported is unlawfully present; reckless disregard of that status is enough. And unlawful presence includes both people who enter illegally and those who enter legally but violate the terms of their stay (typically by overstaying the length of their permitted visit). The lower mens rea requirement substantially broadens the scope of liability, though that broadening is tempered by the requirement that the transportation be “in furtherance” of the immigration violation.⁸⁹

Criminal penalties for violation include a fine, up to five years' imprisonment, or both. If the offense is committed for commercial advantage or private financial gain, the possible prison sentence increases to ten years. If a defendant causes serious bodily injury or jeopardizes another's life, he could be sentenced up to twenty years; if he causes death, he faces a possible life sentence.⁹⁰

87. 8 U.S.C. § 1324(a)(1)(A)(ii) (2000).

88. For example, civil laws require everyone bringing noncitizens into the United States to make sure that the noncitizens only land at authorized ports of entry. INA § 271(a), 8 U.S.C. § 1321(a) (2000). Carriers, in particular, must ensure that non-citizen passengers have unexpired visas (if a visa is required); carriers also face penalties if they fail to remove stowaways. INA § 273, 8 U.S.C. § 1323 (2000). Carriers and private persons face criminal penalties if, knowing that an individual is a non-citizen, they try to bring her into the country in a manner or place not authorized by the federal government. INA § 274(a)(1)(A)(i); 8 U.S.C. § 1324(a)(1)(A)(i) (2000). For more on the history of carrier liability for the immigration status of their passengers, see Morse & Moran, *supra* note 30.

For present purposes, federal and state human trafficking statutes are also excluded because they require more than the knowing transportation of undocumented immigrants. Georgia, for example, states that a person commits trafficking for labor servitude when he or she “knowingly subjects or maintains another in labor servitude or knowingly recruits, entices, harbors, transports, provides, or obtains by any means another person for the purpose of labor servitude.” GA. CODE ANN. § 16-5-46 (West 2006).

89. “Any person who knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of the law, transports . . . such alien within the United States . . . in furtherance of such violation of law.” 8 U.S.C. § 1324(a)(1)(A)(ii) (2000) (emphasis added).

90. INA §§ 274a(1)(B)(i)-(iv), 8 U.S.C. §§ 1324a(1)(B)(i)-(iv) (2000).

What are the implications for private enforcement? Section 274(a)(1)(A)(ii) does not impose an affirmative requirement on those providing interior transportation to check the immigration status of potential passengers. And many of the cases prosecuted under this provision involve defendants who actually knew the undocumented status of their passengers.⁹¹ Still, the “reckless disregard” language might give a cautious transporter incentive to check immigration status. In the transportation context, reckless disregard is defined as “deliberate indifference to facts which, if considered and weighed in a reasonable manner, indicate the highest probability that the alleged aliens were in fact aliens and were in the United States unlawfully.”⁹²

The prosecution under this provision that has had the most private enforcement effect was the 2001 indictment of Golden State Transportation, a Los Angeles-based bus company. According to the federal indictment, Golden State conspired with smugglers to transport hundreds of undocumented immigrants from the United States-Mexico border to cities in the interior. Golden State allowed smugglers to buy large blocks of tickets in advance; to thwart immigration law enforcement, the company scheduled its arrivals and departures late at night and changed established routes to avoid Border Patrol checkpoints.⁹³ Golden State eventually pled guilty to charges of smuggling under §274(a)(1)(A)(ii), conspiracy to smuggle, and money laundering. The company forfeited a terminal worth \$2.5 million, as well as over \$100,000 in cash seized during the investigation. Its owners and managers also pled guilty to various harboring and transporting charges⁹⁴

The reaction among bus companies to Golden State’s conviction has important private enforcement implications. In 2002, shortly after Golden State was indicted, Greyhound began warning its employees not to sell tickets “to anyone you know or believe to be an illegal alien”; a violation could lead to the employee’s termination, arrest, or both. Asking “How do you recognize groups of illegal aliens?” Greyhound’s guidelines instructed employees to look for large groups traveling together, with little or no luggage, led by one person (likely the smuggler), and moving in single file. The guidelines also advised employees to look out for smugglers, who often use the Spanish word “pollito” (a form of pollo or chicken) to describe their clients. Sistema Internacional de Transporte de Autobuses Inc., a Greyhound subsidiary, also adopted a similar employee-training policy.⁹⁵

91. See, e.g., *United States v. Chavez-Palacios*, 30 F.3d 1290, 1294 (10th Cir. 1994) (defendant admitted that he knew his passengers were in the U.S. illegally); *United States v. Hernandez-Guardado*, 228 F.3d 1017, 1022 (9th Cir. 2000) (defendant admitted that there was “substantial evidence” that he knew his passengers were illegally present).

92. *United States v. Uresti-Hernandez*, 968 F.2d 1042, 1046 (10th Cir. 1992).

93. Press Release, Dep’t of Justice, Regional Bus Company Charged in Historic Migrant Smuggling Case (Dec. 10, 2001), available at http://www.usdoj.gov/opa/pr/2001/December/01_ag_636.htm.

94. Press Release, Dep’t of Justice, Bus Company Owners & Managers Plead Guilty and Are Sentenced in Illegal Alien Smuggling & Employment Case (May 19, 2006), available at [http://www.usdoj.gov/usao/press_releases/2006/2006-078\(GoldenState\).pdf](http://www.usdoj.gov/usao/press_releases/2006/2006-078(GoldenState).pdf).

95. Berestein & de la Vega, *Bus Company Policy Irks Latino Groups*, SAN DIEGO UNION-TRIB., Sept. 23, 2005, at A1.

After receiving complaints from the Mexican American Legal Defense and Educational Fund (MALDEF) and the National Council of La Raza,⁹⁶ Greyhound modified its guidelines. Now called “Implementing Prohibitions on Smuggling of Undocumented Persons and Racial Profiling,” the company removed all references to Spanish words and gave equal space to explaining the company’s prohibition against racial profiling.⁹⁷

The Golden State prosecution and its aftermath identify some of the problems with private enforcement in the transportation sector. Briefly stated here, carriers are understandably nervous about their liability, particularly when reckless disregard is enough to impose criminal penalties. But implementing employee training and other policies to avoid criminal liability is a difficult task, particularly with concerns about discrimination and racial profiling.⁹⁸

4. Future Areas for Private Enforcement

Currently, private enforcement laws exist only in the employment, housing, and transportation fields. But proposed legislation and other signals suggest legislative interest in expanding the reach of private enforcement into education, medical care, and even charity services. This section explores the possible expansion of private enforcement laws.

a. Education. In education, there are laws that deny government educational benefits to undocumented students, but there are currently no laws that require private parties to play the enforcement role.⁹⁹ To date, there are no laws that restrict the ability of private colleges to enroll or give private financial aid to undocumented students; similarly, there are no laws that prohibit undocumented students from attending public colleges, if they can find private sources of funding.¹⁰⁰

96. Said John Trasvina, now MALDEF’s president and general counsel, “There are elements in [the guidelines] which make it very clear they are talking about Latinos. The policy really screams of racial profiling and discrimination from start to end.” *Id.*

97. On racial profiling, the new guidelines state: “In the transportation industry, profiling may involve classifying a passenger or potential passenger as ‘illegal’ based on assumptions about the individual’s race, color, ethnicity, national origin [sic] or other personal characteristics rather than based on the individual’s actual activities or conduct. Company personnel shall not engage in such profiling.” GREYHOUND LINES, INC., IMPLEMENTING PROHIBITIONS ON SMUGGLING OF UNDOCUMENTED PERSONS AND RACIAL PROFILING (revised Jan. 10, 2006) (on file with author).

98. For more analysis of the private enforcement concerns, see *infra* Part II.

99. For example, federal student aid programs (including Pell Grants and federally subsidized loans) are only available to citizens and legal permanent residents. To apply for this aid, students complete a federal application (FAFSA—Free Application for Federal Student Aid), in which they verify their eligible immigration status by providing a Social Security number and, if applicable, an alien registration number. Schools use the FAFSA information to prepare a financial aid package which may include federal aid, but the initial eligibility determination is made by the federal government. See generally FED. STUDENT AID, U.S. DEP’T. OF EDUC., COMPLETING THE 2007–08 FAFSA 4 & 6, available at <http://studentaid.ed.gov/students/attachments/siteresources/CompletingtheFAFSA07-08.pdf>.

100. In 2006, the Missouri legislature considered House Bill 1864, which would have prohibited undocumented students from attending any public Missouri college or university, even if they had

Why no private enforcement laws in the education field? There are two explanations, one legal and one pragmatic. On the legal side, in the 1982 *Plyler v. Doe* case, the Supreme Court struck down a Texas law that denied undocumented children the opportunity to receive a free public education.¹⁰¹ Holding that undocumented immigrants are entitled to equal protection of the law, the Court found that Texas—and states generally—have no substantial interest in denying a basic education to undocumented children.¹⁰² *Plyler v. Doe* ties local governments' hands on the issue of public secondary education and, by analogy, on private secondary education as well.

On the pragmatic side, the high costs of college tuition, combined with current restrictions on government financial aid, may make private enforcement laws unnecessary. As explained above, federal financial aid is restricted to citizens or legal permanent residents;¹⁰³ additionally, some states expressly prohibit undocumented students from receiving in-state tuition rates.¹⁰⁴ With no access to government grants, loans, or in many cases, to in-state tuition rates, the cost of a college education may simply be unattainable for most undocumented students. Thus, under the current system, there may already be enough public restrictions that suppress undocumented enrollment such that private enforcement laws may be perceived by legislatures as unnecessary.

The statistics support this explanation. According to Michael A. Olivas, Director of the Institute for Higher Education Law and Governance at the University of Houston and Professor of Law, approximately 25,000 undocumented students are enrolled in American public universities and colleges, and only 200 are enrolled in private institutions.¹⁰⁵ Professor Olivas estimates that there are an additional 50,000 to 75,000 more qualified students who want to attend college but are discouraged for financial

private funding. See H.B. 1864, 93d Gen. Assemb., 2d Reg. Sess. (Mo. 2006). The bill passed the House but died in the Senate. Mo. H.R. Activity History for HB1864, available at <http://www.house.mo.gov/bills061/action/aHB1864.htm> (last visited Jan. 14, 2008). And in 2002, the then-Attorney General of Virginia, Jerry Kilgore, issued a memo advising Virginia's public colleges and universities to deny admission to undocumented students and to report them to federal immigration authorities. OFFICE OF THE ATT'Y GEN., COMMONWEALTH OF VA., IMMIGRATION LAW COMPLIANCE UPDATE 1 (Sept. 5, 2002), available at <http://schev.virginia.gov/AdminFaculty/ImmigrationMemo9-5-02APL.pdf>. The constitutional authority of Virginia's public universities and colleges to deny admission to undocumented students has been upheld. See *Equal Access Educ. v. Merten*, 305 F. Supp. 2d 585, 614 (E.D. Va. 2004).

101. 457 U.S. 202, 230 (1982).

102. *Id.* at 215, 230.

103. See *supra* note 99.

104. Arizona, Mississippi, and Virginia have passed laws prohibiting undocumented students from receiving in-state tuition at public colleges and university. Ten states (California, Illinois, Kansas, Nebraska, New Mexico, New York, Oklahoma, Texas, Utah, and Washington) extend in-state tuition rates to undocumented students. Elizabeth Redden, *An In-State Tuition Debate*, INSIDE HIGHER EDUC., Feb. 28, 2007, available at <http://insidehighered.com/news/2007/02/28/immigration>. For more on the in-state tuition debate, see Michael A. Olivas, *IIRIRA, the Dream Act, and Undocumented College Student Residency*, 30 J.C. & U.L. 435 (2004).

105. Catherine Hausman & Victoria Goldman, *Great Expectations*, N.Y. TIMES, Apr. 8, 2001, at 4A.

and immigration-related reasons from doing so.¹⁰⁶

There have been efforts, past and pending, to challenge *Plyler* and prohibit undocumented students from attending elementary and secondary schools. In 1994, California voters passed Proposition 187, which, among other things, barred public elementary and secondary schools from enrolling undocumented children.¹⁰⁷ Proposition 187 also required school officials to report to federal immigration authorities all students and parents suspected of illegal status. Citing *Plyler*, the district court invalidated the bar on education; the court also struck down the reporting provisions on preemption grounds.¹⁰⁸ The case was finally settled by special mediation, with both sides accepting the district court's decision.¹⁰⁹ And in Texas, proposed legislation would have prohibited children born in Texas to undocumented parents from attending public secondary schools and colleges, even though their birth in Texas makes them U.S. citizens.¹¹⁰ Most recently, county supervisors and school board members in Prince William County, Virginia, have discussed denying public education to undocumented students, as part of an approved county measure that denies county services to undocumented immigrants generally.¹¹¹

These laws would not have required private enforcement per se (because only public schools would be affected), but they may indicate the tenor of future private enforcement laws.¹¹²

b. Medical Care. In the medical care field, hospital administrators and doctors have been successful in defeating proposed private enforcement laws. They have argued convincingly that doctors, nurses, and workers should not be turned into border agents. Says Terri McCabe Retana, marketing representative for Brownsville Medical Center in Texas, "Nurses and doctors working in our nation's hospitals are in the business of saving people's lives. We're caregivers, not police."¹¹³

One noteworthy defeat in the U.S. Congress was of House Resolution 3722, introduced by Rep. Dana Rohrabacher in 2004.¹¹⁴ This bill would have required hospitals seeking federal reimbursement for care provided to undocumented

106. *Id.*

107. Cal. Prop. 187 (1994) (codified at CAL. PENAL CODE §§ 113–14).

108. League of United Latin Am. Citizens v. Wilson, 908 F. Supp. 755, 786–87 (C.D. Cal. 1995).

109. Patrick J. McDonnell, *Davis Won't Appeal Prop. 187 Ruling, Ending Court Battles*, L.A. TIMES, July 29, 1999, at A1.

110. H.B. 28, 80th Leg., Reg. Sess. (Tex. 2007). On January 29, 2007, the bill was referred to the State Affairs Committee, where it died. Tex. Leg. Online, History: H.B. 28, <http://www.capitol.state.tx.us/BillLookup/History.aspx?LegSess=80R&Bill=HB28> (last visited Oct. 1, 2007).

111. Ian Shapira, *Immigrants' Access to Schools Is Discussed; Supervisors' Say Would Be Limited*, WASH. POST, July 15, 2007, at PW01.

112. If enacted, these laws would be very vulnerable to legal challenge based on equal protection, due process, and federal preemption grounds.

113. Angeles Negrete Lares, *Proposal Would Require Hospitals To Report Immigrants' Status to Government*, BROWNSVILLE HERALD, May 14, 2004.

114. H.R. Res. 3722, 108th Cong. (2004).

patients to ask whether patients are U.S. citizens before providing care.¹¹⁵ Non-citizens unable to provide a Green Card or other proof of legal status would have to be fingerprinted or photographed by the hospital, and this information would be made available to ICE officials, who could initiate deportations. Undocumented patients would also be required to disclose their employers, who then would be required to pay for their employees' care. The bill also prohibited hospitals from providing most types of medical treatment, unless the care was needed to "protect the health and safety" of U.S. citizens.¹¹⁶ The American Hospital Association and other medical industry groups lobbied fiercely against this bill, with the result that the bill was soundly defeated, 331 to 88.¹¹⁷

In 2004, these same groups, along with advocates for immigrants, were also successful in persuading the Bush Administration to drop rules that would have required hospitals applying for federal reimbursement to ask patients about their immigration status.¹¹⁸ Unlike H.R. 3722, these proposed rules did not compel hospitals to report data about specific patients to federal authorities, but they did require hospitals to ask about citizenship status and method of entry to the United States to ensure that the federal reimbursements were being used for their intended purpose (that is, to reimburse hospitals for care provided to undocumented patients).¹¹⁹

The National Association of Public Hospitals and Health Systems, which represents more than 100 safety-net hospitals that provide care to the uninsured, criticized these proposed rules as creating "peril for [undocumented immigrants], a public health threat to the entire community, and higher costs for treating patients at later disease stages."¹²⁰ In response to these protests, the Administration agreed to allow hospitals instead to collect documentation like Social Security numbers and foreign driver's licenses that would indirectly indicate immigration status.¹²¹

When hospitals do deny care based on immigration status, they are doing so voluntarily for financial reasons, rather than being compelled by private enforcement laws to do so. For example, JPS Health Network, a public hospital in Fort Worth, Texas, requires foreign-born patients to demonstrate legal immigration status before providing financial assistance for non-emergency care, like elec-

115. The reimbursement is part of a federal program that started in 2005 to distribute \$1 billion over four years to hospitals that provide medical care to undocumented patients. Ricardo Alonso-Zaldivar, *Hospitals To Get Funds for ER Care; Southland Facilities Are Expected To Receive \$35 Million To Help Cover the Cost of Treating Uninsured Illegal Immigrants*, L.A. TIMES, May 10, 2005, at 1.

116. Zachary Coile, *Hospitals Won't Be Required To Report Illegals*, S.F. CHRON., May 19, 2004, at A3.

117. *Id.*

118. Mark Sherman, *Patient Status Kept out of ERs; The Government Had Wanted To Use the Immigration Question To Assess Funding Eligibility*, HOUSTON CHRON., Oct. 10, 2004, at A21.

119. *Id.*

120. *Id.*

121. *Id.*; see also Alonso-Zaldivar, *supra* note 115.

tive surgery and treatment for chronic or routine illnesses.¹²² In January 2004, the hospital's board of managers voted to extend its financial assistance program to all county residents, regardless of immigration status, but reversed course eight months later, as undocumented patients started to fill the hospital.¹²³

c. Charity and Other Services. There also seems to be some legislative interest in expanding private enforcement laws into charitable work. Federal law has long prohibited legal service agencies which receive Legal Services Corporation funding from providing legal services to undocumented clients.¹²⁴ More recently, the Virginia House passed House Bill 2937, which prohibited charities receiving state or local government funding from using those funds to provide services to undocumented immigrants.¹²⁵ Charities that violated H.B. 2937 would have been ineligible for all future public funding.¹²⁶ Charities could still provide services to undocumented immigrants from private funds, but as Major James Allison, General Secretary of the Virginia Division of the Salvation Army acknowledged, many charities would have no choice but to turn people away if the bill is approved: "Our main desire is to get service to people who need it, without discrimination, but we have to comply by state, federal and local guidelines as it relates to funding, so we would have to tighten up."¹²⁷ To the extent that undocumented immigrants are perceived as dependent on charitable services, legislatures may become more interested in expanding private enforcement laws in this area.

II. AN EFFECTIVE IMMIGRATION LAW POLICY?

A. DEFINING CRITERIA FOR EVALUATION

In order to determine whether private enforcement laws have been or will be effective immigration law policy, it is important to define the criteria by which to measure their success. The criteria used here are largely drawn from the goals articulated by the governments themselves in passing the laws. And those

122. Julia Preston, *Texas Hospitals Reflect the Debate on Immigration*, N.Y. TIMES, July 18, 2006, at A1.

123. *Id.*

124. 45 C.F.R. § 1626.3 (2007). There are limited exceptions, for example, for clients who are victims of domestic violence. 45 C.F.R. § 1626.4(a)(1) (2007). Though this federal law has other disturbing public policy implications, it doesn't raise the same private enforcement concerns because legal services agencies have the legal training to be able to make correct determinations about immigration status and, because of the nature of their work, are unlikely to engage in alienage or citizenship discrimination.

125. H.B. 2937, 2007 Gen. Assemb., Reg. Sess. (Va. 2007).

126. *Id.*

127. Tim Craig, *Va. House Approves Bill on Illegal Immigration*, WASH. POST, Jan. 31, 2007, at A01; see also H.B. 2937, 2007 Gen. Assemb., Reg. Sess. (Va. 2007). The bill was referred to the Senate Committee on Rehabilitation and Social Services, where it was passed by indefinitely. Va. Gen. Assemb. Legislative Information System, H.B. 2937, available at <http://leg1.state.va.us/cgi-bin/legp504.exe?ses=071&typ=bil&val=hb2937> (last visited Oct. 18, 2007).

criteria are whether the laws can effectively decrease illegal immigration, punish private parties perceived to be benefiting from illegal immigration, and convey a strong message about the importance of immigration law enforcement.

By far, the most important criterion is to decrease illegal immigration. Every government passing private enforcement legislation has articulated as an important goal the desire to stem the flow of undocumented immigrants into the country. For some governments, this goal is more localized—to force undocumented immigrants from their jurisdictions, even if that means that the immigrants move into neighboring jurisdictions. Louis Barletta, mayor of Hazleton, Pennsylvania, says that he wants to make the city “the toughest place on illegal immigrants in America.” “And I will get rid of the illegal people,” he emphasizes. “It’s this simple: *They must leave.*”¹²⁸

Another criterion to consider is the extent to which private parties perceived to be benefiting from illegal immigration are punished under these private enforcement laws. In addition to penalizing undocumented immigrants (by denying them access to employment, housing, and transportation), some legislatures have expressed a desire to punish those whom they believe to be unfairly profiting from illegal immigration. Consider that even before IRCA became law, undocumented immigrants could not work legally; employers, however, faced no penalty for hiring them.¹²⁹ Some commentators have suggested that addressing this anomaly—making employers, as well as employees, subject to penalties for engaging in the employment relationship—motivated the passage of the employer sanctions.¹³⁰

In the context of employment-related laws, the punitive motive seems fueled by concerns that employers who hire undocumented workers are gaining an unfair advantage over other employers, presumably by paying lower wages with worse working conditions. That motive seems to be true of Suffolk County, New York, which passed a law requiring all entities with county contracts to verify their employees’ legal status.¹³¹ In explaining passage of the law, Suffolk County Executive Steve Levy echoed this punitive sentiment: “While we in Suffolk County cannot do the federal government’s job in enforcing this for every business throughout our county, we can and should make sure that companies doing business with the county are abiding by the law and are not getting a competitive advantage through the illegal underground economy.”¹³²

Separate from the actual effect of the private enforcement laws, the third criterion is to consider the laws’ *symbolic* effect. Laws that do not achieve their functional purposes (for example, deterring illegal immigration) may still have

128. Michael Powell & Michelle Garcia, *Pa. City Puts Illegal Immigrants on Notice*, WASH. POST, Aug. 22, 2006, at A03 (emphasis in the original).

129. See Maria Isabel Medina, *The Criminalization of Immigration Law: Employer Sanctions and Marriage Fraud*, 5 GEO. MASON L. REV. 669, 681 (1997).

130. See, e.g., *id.*

131. Suffolk County, N.Y., Local Law No. 52-2006 (Aug. 8, 2006).

132. Bart Jones, *Immigrant Job Bill Called Redundant*, NEWSDAY, Sept. 1, 2006.

an important symbolic role.¹³³ Symbolism appears to have played an important role in the passage of many private enforcement laws. A theme running through many of the private enforcement laws is a get-tough immigration enforcement message, directed at various audiences: constituents, Congress and federal immigration authorities, those who profit from illegal immigration, and/or the immigrants themselves.¹³⁴

For some legislatures, the symbolic effect of the laws may even be more important than their practical impact. For example, when interviewing members of Congress involved in drafting key IRCA provisions, researchers found that the drafters were most concerned with establishing the legal principle that employers could not hire undocumented workers, “regardless of whether it was financially, technically, or politically possible to enforce it rigorously in the short run.”¹³⁵

Finally, the benefits of private enforcement laws must be weighed against their costs. A private enforcement law may be able to meet some or all of the criteria articulated above, but its success, ultimately, is measured by weighing its benefits against its costs. Chief among these potential costs are discrimination based on national origin, citizenship, or other protected category. The concern here is that private enforcers, acting from discriminatory animus, risk aversion, or confusion, will deny benefits to lawfully present persons because they are foreign-born or simply appear to be so. Other possible costs include the administrative costs incurred by private enforcers as they learn and then apply the laws and the diversion of societal resources away from other, perhaps more effective enforcement strategies.

B. EVALUATING PRIVATE ENFORCEMENT

Are private enforcement laws an effective immigration law policy? Though many of these laws are of recent vintage, we can draw upon lessons learned from federal employer sanctions. These sanctions provide a good case study because they have been implemented nationally, with substantial federal resources, and their impact over twenty-one years has been widely studied.¹³⁶ What the studies show is that the sanctions have not decreased illegal immigra-

133. See generally David Garland, *Punishment and Culture: The Symbolic Dimension of Criminal Justice*, 11 *STUD. L. POL. & SOC.* 191 (1991) (arguing that punishment plays an active role in the generative process that produces culture). But see Margaret Taylor, *Symbolic Detention*, in *XX IN DEFENSE OF THE ALIEN* 153 (1997) (arguing that immigration detention implemented for symbolic reasons—to restore credibility to the immigration system—is unfair and ineffective and results in harsh detention conditions).

134. See *infra* section II.B.3.

135. MICHAEL FIX & PAUL T. HILL, *ENFORCING EMPLOYER SANCTIONS: CHALLENGES AND STRATEGIES* 39 (1990).

136. When Congress passed the employer sanctions, it also required that their effects be studied in three annual reports, beginning one year after enactment. Specifically, Congress asked the then-General Accounting Office (GAO) to determine whether (1) sanctions have been implemented satisfactorily, (2) a pattern of discrimination has resulted against eligible workers seeking employment, and (3) the sanctions created an unnecessary regulatory burden for employers. INA § 274A(j)(1), 8 U.S.C. §1324a(j)(1) (repealed 1996).

tion, have not resulted in any significant punishment of law-breaking employers, and have caused substantial discrimination against employees.¹³⁷ The sanctions' sole success appears to be a symbolic one: establishing the legal principle that employment of unauthorized workers is itself a legal violation (one that penalizes both employers and employees) and underlining the nation's commitment to border control.¹³⁸ But as employer sanctions continue to be plagued by numerous enforcement problems, the viability of even that symbolism is at risk.

The dismal experience of federal employer sanctions offers some sobering insights into the potential effectiveness of private enforcement laws generally. Because they rely on private parties to screen for immigration status, private enforcement laws are vulnerable to the same enforcement problems—enforcer confusion and fraudulent documents—that have undermined federal employer sanctions. These enforcement problems strongly suggest that, like federal employer sanctions, private enforcement laws will not substantially decrease illegal immigration.¹³⁹

These other private enforcement laws may have some advantage in that there appears to be more political will to enforce the laws, particularly those enacted at the local level.¹⁴⁰ Though the possible result for some laws may be higher enforcement rates and more significant penalties assessed, the main impact of private enforcement is likely to be symbolic: sending tough immigration messages to the federal government, undocumented immigrants, and fellow community members.¹⁴¹ And when weighed against the administrative and discriminatory costs of private enforcement (which are exacerbated by the decentralized nature of other private enforcement laws), these nominal benefits strongly suggest that private enforcement laws are not an effective immigration policy.

1. Impact on Illegal Immigration

a. Federal Employer Sanctions. After twenty-one years, the almost unanimous conclusion is that federal employer sanctions have not significantly reduced or deterred illegal immigration. The Migration Policy Institute describes employer sanctions as “notoriously ineffective,” noting that “employers view the threat of actual punishment under the current system as an acceptable business expense.”¹⁴² And the Government Accountability Office, which concluded in 1990 that sanctions had slowed illegal immigration,¹⁴³ warned in 2006 that “ongoing weaknesses [in the employment verification process] have

137. See *infra* sections II.B.1, II.B.2, II.B.4.

138. See *infra* section II.B.3.

139. See *infra* section II.B.

140. See *infra* section II.B.1.b.ii.

141. See *infra* section II.B.3.

142. MARC R. ROSENBLUM, MIGRATION POLICY INST., IMMIGRATION ENFORCEMENT AT THE WORKSITE: MAKING IT WORK 1 (2005), available at <http://www.migrationpolicy.org/ITFIAF/PolicyBrief-6-Rosenblum.pdf>.

143. GAO 1990 DISCRIMINATION REPORT, *supra* note 15, at 3.

undermined its effectiveness” and that employers who circumvent the sanctions face little chance of prosecution.¹⁴⁴ Finally, Professors Aleinikoff, Martin, and Motomura conclude: “Whatever the goals (and hopes) of the Congress that put the employer sanctions regime in place in 1986, the statutory provisions have plainly failed of their purpose.”¹⁴⁵

Obviously, this was not the result Congress intended. The Select Committee on Immigration and Refugee Policy, appointed by President Jimmy Carter in 1978 to study immigration reform, endorsed employer sanctions as one of the only effective enforcement tools.¹⁴⁶ When immigration reform was debated pre-IRCA, employer sanctions were touted by their congressional supporters as being “an integral part of effective immigration reform.”¹⁴⁷

According to their advocates, employer sanctions would have two distinct advantages, as compared with other immigration enforcement tools. First, by making jobs in the United States more difficult to obtain, the sanctions would lessen the “pull” factor of higher-wage employment and thus decrease illegal immigration.¹⁴⁸ Second, the sanctions would benefit from the multiplied enforcement efforts of the nation’s employers, without requiring direct government expenditure. In effect, we could get more and more effective immigration enforcement “on the cheap.”¹⁴⁹

Despite these advantages, however, employer sanctions have not significantly reduced or deterred illegal immigration. Employer sanctions are rarely enforced, difficult to prosecute, and often circumvented with fraudulent documents. And as explained below, some of these enforcement problems are intertwined with the touted advantages of employer sanctions. While employer sanctions have been plagued with enforcement problems, the undocumented population in the

144. U.S. GOV’T ACCOUNTABILITY OFFICE, IMMIGRATION ENFORCEMENT: WEAKNESSES HINDER EMPLOYMENT VERIFICATION AND WORKSITE ENFORCEMENT EFFORTS 21 (2006), available at <http://www.gao.gov/new.items/d0685t.pdf> [hereinafter GAO, WEAKNESSES HINDER].

145. THOMAS ALEXANDER ALEINIKOFF, DAVID A. MARTIN & HIROSHI MOTOMURA, IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY 1140 (5th ed. 2003); see also Michael J. Wishnie, *Prohibiting the Employment of Unauthorized Immigrants: The Experiment Fails*, 2007 U. CHI. LEGAL F. 193 (arguing that employer sanctions have not deterred illegal immigration and have not protected U.S. workers).

146. SELECT COMM’N ON IMMIGRATION & REFUGEE POLICY, U.S. IMMIGRATION POLICY AND THE NATIONAL INTEREST xvii (Mar. 1, 1981).

147. Daniel E. Lungren & Hamilton Fish Jr., *Employer Sanctions Are Key to Immigration Reform*, N.Y. TIMES, Feb. 11, 1986, at A30. The writers were members of the House Judiciary Committee.

148. STAFF OF SUBCOMM. ON IMMIGRATION AND REFUGEE AFFAIRS OF THE COMM. ON THE SENATE JUDICIARY, 102d CONG., OPTIONS FOR AN IMPROVED EMPLOYMENT VERIFICATION SYSTEM (Comm. Print 1992), cited in Cecelia M. Espenosa, *The Illusory Provisions of Sanctions: The Immigration Reform and Control Act of 1986*, 8 GEO. IMMIGR. L.J. 343, 360 & n.151 (1994).

149. In congressional hearings during the confirmation of Attorney General candidate Zoë Baird, Senator James Heflin summarized the purposes of IRCA: “[T]his concept of employer sanctions was determined by the supporters of the bill to be the primary method of enforcement as opposed to employing a great number of immigration agents who would be seeking out illegal aliens . . . which would in effect, bring about a much less expensive method of enforcement.” *Nomination of Zoë E. Baird, of Connecticut, To Be Attorney General of the United States: Hearings Before the S. Comm. on the Judiciary*, 103d Cong. 111-12 (1993) (statement of Sen. Howell Heflin, Member, S. Comm. on the Judiciary).

United States continues to grow by approximately 400,000 people every year.¹⁵⁰ Combined, these trends strongly suggest that employer sanctions have not effectively deterred or reduced illegal immigration.

The biggest enforcement problem for employer sanctions is simply that they are rarely enforced. For example, in 1999, the INS dedicated only nine percent of its total enforcement efforts to worksite enforcement; by 2003, that percentage dropped to a dismal four percent of total enforcement.¹⁵¹ In concrete terms, this means that in 1999, INS issued 417 notices of intent to fine (NIF)¹⁵² to employers and arrested 2849 unauthorized workers at worksites. In 2003, ICE (the successor agency to the INS for interior enforcement) issued just 162 NIFs and arrested 445 unauthorized workers.¹⁵³

There are several explanations for these low enforcement rates. The first explanation (and perhaps the most obvious) is that workplace enforcement is simply not a priority. Immigration law enforcement has always focused on securing the borders, with interior enforcement a distant second priority. Even within the realm of interior enforcement, federal immigration authorities have focused more on catching criminal immigrants than those who work illegally (and employers who hire them).¹⁵⁴ The security focus of interior enforcement intensified after 9/11, with workplace enforcement concentrated on airports, power plants, and other workplaces deemed to have national security implications, but which traditionally have not attracted many undocumented workers.¹⁵⁵

The second explanation for low workplace enforcement rates is found within

150. MICHAEL HOEFER, NANCY RYTINA & CHRISTOPHER CAMPBELL, U.S. DEP'T OF HOMELAND SEC., ESTIMATES OF THE UNAUTHORIZED IMMIGRANT POPULATION RESIDING IN THE UNITED STATES: JANUARY 2005, at 1 (Aug. 2006), available at http://www.dhs.gov/xlibrary/asset5/statistics/publications/ILL_PE_2005.pdf [hereinafter DHS JAN. 2005 ESTIMATES].

151. GAO, WEAKNESSES HINDER, *supra* note 144, at 14.

152. A notice of intent to fine is issued if, after an investigation, ICE finds that the employer has violated provisions in the employer sanctions laws. The notice contains the basis for the notice, the charges against the employer, the statutory provisions that the employer has violated, and the fine imposed. 8 C.F.R. §§ 274a.9(d)(1), 1274a.9(d)(1) (2007). The employer can request a hearing before an administrative law judge to contest the charges and the fine. 8 C.F.R. §§ 274a.9(e), 1274a.9(e) (2007).

153. GAO, WEAKNESSES HINDER, *supra* note 144, at 16–17. It should also be noted that in 2004, ICE issued just *three* NIFs. *Id.* at 16. In August 2007, the Bush Administration announced new rules, requiring employers who receive notice that their employees' Social Security information does not match the Social Security Administration's records ("no-match letters") to fire those employees within ninety days if the employees cannot show valid Social Security identification. Previously, employers were not obligated to take action against employees cited in these letters, but under the proposed rules, employers who fail to fire cited employees face civil and criminal penalties. This attempt to step up employer sanction enforcement has been mired in legal challenges, however. In August 2007, a federal judge temporarily barred the Social Security Administration from sending the no-match letters out because of concerns that the SSA and the Department of Homeland Security had overstepped their authority in issuing the rule. Julia Preston, *Rules on Hiring Illegal Workers Are Delayed*, N.Y. TIMES, Sept. 1, 2007, at A10; Julia Preston, *Social Security Warns of Logjam from Immigration Ruling*, N.Y. TIMES, Sept. 7, 2007, at A20.

154. By the late 1990s, ICE was dedicating more resources to criminal alien cases than any other enforcement activity. GAO, WEAKNESSES HINDER, *supra* note 144, at 17.

155. *See id.* at 18.

the employer sanction laws themselves. As explained previously, compliance with the administrative requirements provides employers with an affirmative defense against substantive violations, making prosecutions more difficult.¹⁵⁶ For all practical purposes then, as long as an employer does a cursory check of an employee's documents and files an I-9 form,¹⁵⁷ she is protected from charges of substantive violations, even if the documents turn out to be fraudulent.

These low enforcement rates seem to reflect national ambivalence about employer sanctions and our commitment to eliminating employment as a pull factor for illegal immigration. Employer sanctions have been debated since the 1950s (with the first serious proposal advanced in 1971), but the lack of a natural constituency stalled passage for almost forty years.¹⁵⁸ Few interest groups, outside of labor unions and immigration restrictionist organizations, saw themselves as directly benefiting from the enforcement of employer sanctions.¹⁵⁹ Moreover, many Americans viewed the hiring of unauthorized workers as a morally neutral activity.¹⁶⁰ So while popular pressure existed to reduce illegal immigration and to "regain control of our borders,"¹⁶¹ there was no broad political consensus that employer sanctions were the appropriate tool to use.

On the other side, legislators faced strong opposition from businesses. Employers' objections were three-fold: the sanctions would impose onerous administrative responsibilities on employers; employers could be held civilly and criminally liable for innocent hiring decisions; and most importantly, the sanctions would cut employers off from much-needed immigrant labor.¹⁶² Among the most vocal business opponents were the Chamber of Commerce and the Western Growers' Association.¹⁶³

To minimize employer opposition, Congress included provisions in the legislation—the affirmative defense clause and the knowing hire clause—that mini-

156. See *supra* notes 47–49 and accompanying text.

157. When an employer completes and signs an I-9 form, she certifies to the following: "I attest, under penalty of perjury, that I have examined the document(s) presented by the above-named employee, that the above-listed documents *appear to be genuine* and to relate to the employee named, that the employee began employment on [date] and that to the best of my knowledge the employee is eligible to work in the United States." U.S. CITIZENSHIP AND IMMIGRATION SERVICE, DEPT. OF HOMELAND SEC., FORM I-9 EMPLOYMENT ELIGIBILITY VERIFICATION (2005) (emphasis added).

158. FIX & HILL, *supra* note 135, at 50; see also Kitty Calavita, *Employer Sanctions Violations: Toward a Dialectical Model of White Collar Crime*, 24 LAW & SOC'Y REV. 1041, 1057 (1990) (discussing the hearings held by Rep. Peter Rodino on illegal immigration).

159. FIX & HILL, *supra* note 135, at 50.

160. *Id.*

161. In signing IRCA into law, President Ronald Reagan praised the legislation: "Future generations of Americans will be thankful for our efforts to humanely regain control of our borders and thereby preserve the value of one of the most sacred possessions of our people, American citizenship." Robert Pear, *President Signs Landmark Bill on Immigration*, N.Y. TIMES, Nov. 7, 1986, at A12.

162. See FIX & HILL, *supra* note 135, at 27–29; see also Calavita, *supra* note 158, at 1057–59 (discussing employers' concerns about their potential liability when employees show false documents).

163. Calavita, *supra* note 158, at 1057.

mized employer liability.¹⁶⁴ The purpose, according to Gerald Riso (then INS deputy commissioner), was to encourage voluntary compliance: “We have made some assumptions that most employers will voluntarily comply if we make compliance pragmatically easy for them.”¹⁶⁵ But by including these provisions, as Professor Kitty Calavita suggests, Congress guaranteed that compliance *and* violations would occur. “The point here is not simply that Congress passed a toothless law by making compliance easy through the incorporation of loopholes. Rather, the law in effect made *violations* pragmatically easy.”¹⁶⁶

Besides these provisions, effective enforcement of employer sanctions has also been undermined by the proliferation of counterfeit documents. The centerpiece of the sanctions system is the employer’s verification of an employee’s proffered document (or documents) to prove identity and work eligibility.¹⁶⁷ Counterfeit documents circumvent the verification system in two important ways: (1) good faith employers are deceived by the documents into hiring unauthorized workers, and (2) bad faith employers knowingly hire unauthorized workers and use the documents as a shield against prosecution for substantive violations.¹⁶⁸ Employer confusion and fraud are the predictable downsides of the multiplier effect when employers who receive no immigration training are responsible for determining the genuineness of immigration and other government documents. Further complicating the problem is that twenty-seven different documents can be used to prove identity and work eligibility, providing more opportunities for confusion and fraud.¹⁶⁹

Just a sampling of enforcement actions shows how widespread counterfeit documents are. In a roughly two-year period, between October 1, 1996 and May 29, 1998, INS conducted 3500 investigations in which it found 78,000 fraudulent documents used to obtain employment for 50,000 unauthorized employees.¹⁷⁰ In about 60% of these cases, INS found that the employer had complied with the verification process and had not knowingly hired unauthorized workers.¹⁷¹ Of the 78,000 fraudulent documents, 60% were INS documents like permanent resident cards, 36% were Social Security cards, and the remaining 4% were other documents like drivers’ licenses.¹⁷² And in thirty fraud cases investigated during a five-year period (1990–1995), INS confiscated nearly

164. *Id.* at 1059.

165. *Id.* (emphasis omitted) (internal citation omitted).

166. *Id.* at 1060 (emphasis in the original) (internal quotations omitted).

167. An employer is required to attest that the employee’s document (or documents) “reasonably appears on its face to be genuine.” INA § 274A(b)(1)(A), 8 U.S.C. § 1324a(b)(1)(A) (2000).

168. For more information about the shield effect, see *supra* notes 47–48 and accompanying text.

169. See 8 C.F.R. § 1274a.2 (2007). The General Accountability Office, among other entities, has recommended that the number of documents accepted for employment verification be reduced to minimize fraud. See GAO, WEAKNESSES HINDER, *supra* note 144, at 8–9.

170. U.S. GEN. ACCOUNTING OFFICE, ILLEGAL ALIENS: SIGNIFICANT OBSTACLES TO REDUCING UNAUTHORIZED ALIEN EMPLOYMENT EXIST 10 (1999) [hereinafter GAO, SIGNIFICANT OBSTACLES EXIST].

171. *Id.*

172. *Id.*

300,000 counterfeit documents, almost all of which were confiscated in Los Angeles.¹⁷³ Finally, in November 1998, INS seized two million counterfeit documents; the seizure took place in Los Angeles but the documents were headed to different distribution points across the country.¹⁷⁴

When viewed against this background of enforcement problems, the continued growth in the undocumented population strongly suggests that the sanctions have not reduced or deterred illegal immigration.¹⁷⁵ Consider that the number of undocumented immigrants in the United States has more than doubled since the employer sanctions went into effect. According to Urban Institute estimates, there were between three million and five million undocumented immigrants in the United States in 1986, when employer sanctions were passed.¹⁷⁶ By 2006, estimates of the undocumented population ranged from eleven million¹⁷⁷ to twelve million.¹⁷⁸

There is some evidence that employer sanctions slowed the flow of undocumented immigrants into this country, but that effect seems to have been temporary. In a 1990 report to Congress, the General Accounting Office concluded that employer sanctions have “apparently reduced illegal immigration.”¹⁷⁹ GAO based its conclusion in large part on a July 1989 study by the Urban Institute that found employer sanctions had slowed the rate of undocumented migration across the southern border into the United States.¹⁸⁰ In analyzing a monthly time series of Border Patrol apprehensions,¹⁸¹ the Urban Institute determined

173. *Id.* at 10 & n.10.

174. *Id.* at 10.

175. Of course, the increased growth of undocumented immigrants does not, by itself, prove whether employer sanctions have successfully deterred illegal immigration because we do not know with certainty what the size of the undocumented population would have been in the absence of sanctions. However, the magnitude of the increase, (doubling or tripling, depending on the estimates used), taken together with the numerous enforcement problems that employer sanctions have experienced, strongly suggests that sanctions have not had the intended deterrent effect. *See* Wishnie, *supra* note 145, at 206 (growth in the undocumented population suggests that employer sanctions have not deterred illegal immigration).

176. B. LINDSAY LOWELL & ROBERTO SURO, PEW HISPANIC CTR., HOW MANY UNDOCUMENTED: THE NUMBERS BEHIND THE U.S.-MEXICO MIGRATION TALKS 4 (Mar. 4, 2002). Social scientists use mathematical techniques to estimate the undocumented population. The most common method is the residual method, in which the known legal population of foreign-born residents is subtracted from the total foreign-born population living in the United States. Population figures are taken from several sources, including Census data and administrative data gathered by INS and now the Department of Homeland Security. *See* DHS JAN. 2005 ESTIMATES, *supra* note 150, at 1.

177. DHS JAN. 2005 ESTIMATES, *supra* note 150, at 1.

178. JEFFREY S. PASSEL, PEW HISPANIC CTR., THE SIZE AND CHARACTERISTICS OF THE UNAUTHORIZED MIGRANT POPULATION IN THE U.S. (Mar. 7, 2006), available at <http://pewhispanic.org/reports/report.php?ReportID=61> (estimating that in March 2006, the undocumented population was between 11.5 and 12 million people).

179. GAO 1990 DISCRIMINATION REPORT, *supra* note 15, at 3.

180. MICHAEL J. WHITE, FRANK D. BEAN, & THOMAS J. ESPENSHADE, THE URBAN INST., THE U.S. IMMIGRATION REFORM AND CONTROL ACT AND UNDOCUMENTED MIGRATION TO THE UNITED STATES 23 (1989).

181. The data examined in this study consisted of the apprehensions made by the Border Patrol of undocumented immigrants who cross the U.S.-Mexico border without inspection. *Id.* at 4. Though

that apprehensions in the two-year period after sanctions took effect declined by “nearly 700,000 or about 35% below the level that would be anticipated in the absence of IRCA.”¹⁸² Using mathematical models, the Urban Institute concluded that 71% of the decline was attributable to the deterrent effect of employer sanctions.¹⁸³

Other studies also found clear declines in border crossings (as measured by apprehensions data) in the post-IRCA period that they could attribute to IRCA. These different studies attributed anywhere from 21% to 47% of the declines to IRCA’s impact.¹⁸⁴ And in a joint study conducted by the Rand Corporation and the Urban Institute, researchers looking at various indicators (apprehensions statistics, applications for business and tourist visas, and a labor market study) suggested that the deterrent effect of employer sanctions may have been temporary at best.¹⁸⁵

The bottom line seems to be that the sanctions deterred illegal immigration when first passed but that the deterrent effect was only temporary, as enforcement problems developed. The caution urged by the authors of the 1989 Urban Institute study cited by GAO seems particularly prescient: “[I]f the enforcement of the employer sanctions provisions proves ineffective as a result of insufficient INS resources and INS personnel and as a result of a continuing high demand for undocumented labor, the deterrent efficacy of IRCA might be expected to deteriorate over time.”¹⁸⁶

apprehensions do not measure the number of undocumented immigrants in the U.S., they are frequently cited as evidence of the flow of illegal immigration. In essence, apprehensions reflect the portion of the migratory flow that is captured by the Border Patrol and thus provide some rough estimate of the number of successful crossers. Jeffrey S. Passel, Frank D. Bean & Barry Edmonston, *Assessing the Impact of Employer Sanctions on Undocumented Immigration to the United States*, in THE PAPER CURTAIN: EMPLOYER SANCTIONS: IMPLEMENTATION, IMPACT, AND REFORM 193, 200 (Michael Fix ed., 1991).

182. WHITE ET AL., *supra* note 180, at 20.

183. Twelve percent of the decline was attributable to increased INS enforcement efforts and 17% attributable to the SAWs (seasonal agricultural workers) program (1.3 million undocumented agricultural workers received legal status under this program and thus no longer needed to cross illegally). *Id.*; see also LOWELL & SURO, *supra* note 176, at 4 (discussing the legalization provisions of IRCA).

184. Passel, Bean & Edmonston, *supra* note 181, at 202.

185. For example, these researchers found mixed apprehensions data, with a resurgence in apprehensions in 1988 and a decline again in 1989. They suggested that the legalization programs, by legalizing the status of those who would otherwise have to cross illegally, may explain the decline in apprehensions in 1989. KEITH CRANE ET AL., RAND CORP. & URBAN INST., THE EFFECT OF EMPLOYER SANCTIONS ON THE FLOW OF UNDOCUMENTED IMMIGRANTS TO THE UNITED STATES 71–73 (1990).

186. WHITE ET AL., *supra* note 180, at 21. In reaching its conclusion in 1990 that employer sanctions have deterred illegal immigration, GAO also relied on surveys of employers, unauthorized workers arrested at worksites, and Mexicans living in Mexico that suggested the sanctions had made it harder for unauthorized workers to find employment in the U.S. GAO 1990 DISCRIMINATION REPORT, *supra* note 15, at 103. But a 2004–2005 survey conducted by the Pew Hispanic Center found that Mexican immigrants have little trouble finding work. The Center surveyed 4836 individuals who were applying for matricula consular cards (identity cards issued by Mexican consulates) across the U.S. and found that 95% of those who had been in the United States for more than six months were employed. Family and social networks were keys to helping new immigrants find work. RAKESH KOCHHAR, PEW HISPANIC CTR., SURVEY OF MEXICAN MIGRANTS: THE ECONOMIC TRANSITION TO AMERICA ii (2005). For more on employers’ assessments of the sanctions, see *infra* note 215 and accompanying text.

b. Private Enforcement Laws

i. Pull of Market Forces. Extrapolating from our experience with federal employer sanctions, it is clear that market forces are a formidable hurdle for private enforcement laws. Experts agree that employment is the most important factor drawing undocumented immigrants to the United States; yet federal employer sanctions have been unable to slow the flow of illegal immigration into the country. It seems improbable then to expect that private enforcement laws denying less important benefits—housing, for example—can have the deterrent effect that federal employer sanctions have been unable to achieve.

The deterrent rationale of private enforcement laws is that by denying certain benefits to undocumented immigrants, immigrants already here will be encouraged to go home and would-be immigrants will be discouraged from leaving in the first place. But as our experience with federal employer sanctions has demonstrated, this rationale collapses in the face of market forces. Employers continue to need access to cheap labor (authorized or not), and undocumented workers continue to need work. So the political result is a weakened employer sanctions system that is difficult to enforce, and the economic result is continued employment of large numbers of undocumented workers.

Legal access to housing, transportation, and even medical care certainly makes living in the United States more comfortable for undocumented immigrants, but access to these benefits is not a pull factor of the same magnitude that employment is. Denying legal access to these benefits—as private enforcement laws seek to do—may deter illegal immigration around the margins. But our experience with federal employer sanctions suggests that most undocumented immigrants will, perhaps after a temporary period of adjustment, find substitutes for the legal access (for example, using fraudulent documents or going underground to find landlords who do not require documents) or do without these restricted benefits altogether, as long as jobs are still available. The likely result of private enforcement, then, is little or no immigration deterrence and a large undocumented population living without legal access to essential benefits.¹⁸⁷

ii. Enforcement Challenges. Even if denying benefits could theoretically deter or reduce illegal immigration, the laws are likely to face significant enforcement problems that could undermine their effectiveness. Again drawing from the experience of federal employer sanctions, the enforcement problems that can be anticipated are (1) private enforcers who are confused about the immigration status determinations they are obligated to make and (2) the prevalence of

187. In striking down the Texas law that prohibited undocumented children from attending public schools, the Supreme Court expressed great concern about creating a “permanent caste” of undocumented immigrants, exploited for their labor but denied access to essential benefits like education. “The existence of such an underclass presents most difficult problems for a Nation that prides itself on adherence to principles of equality under law.” *Plyler v. Doe*, 457 U.S. 202, 218–19 (1982).

fraudulent documents, which can undermine even good faith enforcement efforts. The effect of these enforcement problems is likely to be both under-enforcement (that is, some unauthorized immigrants are granted benefits) and over-enforcement (that is, citizens and authorized immigrants are denied benefits).

Because most of these private enforcement laws provide no guidance to the private parties charged with enforcement duties, enforcer confusion is certain to be high. In the GAO survey of employers, 15.1% of employers thought that the I-9 verification form was generally unclear or very unclear.¹⁸⁸ Similarly, 12% of employers were generally unclear or very unclear about the types of documents that could be presented as evidence of work authorization.¹⁸⁹ As confusing as the I-9 may be, it at least provides some guidance to employers. When private enforcement laws extend beyond employment, enforcer confusion is bound to be higher because there is not even a form analogous to the I-9 to help enforcers determine whether persons applying for benefits are legally present.

Moreover, the group of people who are legally present and eligible for these other benefits is larger than the group eligible for employment, further exacerbating enforcer confusion. For example, a student in the United States on an F-1 student visa is not permitted to work off-campus unless she can demonstrate severe economic hardship and obtains an employment authorization document from CIS (Customs and Immigration Services).¹⁹⁰ But based on her student status alone (as demonstrated by an unexpired student visa), she is legally present and is eligible to rent a home, travel within the United States, and engage in other economic activity here. Would a private enforcer without any legal guidance or training in immigration status be able to make that distinction? Would a private enforcer even recognize a student visa?

Or what about a temporary visitor from a visa-waiver country? U.S. immigration laws allow residents from certain countries (mostly in western Europe) to visit for business or pleasure for up to ninety days without having to obtain a visa.¹⁹¹ Would a private enforcer know that these visitors are legally present (and entitled to travel, receive medical care at their own expense, and even rent short-term housing) by simply looking at their passports? Would a private enforcer know that Portugal participates in the program but Argentina does not?¹⁹²

Enforcer confusion is the predictable downside of the multiplier effect. As enforcement responsibilities are spread to numerous private parties, these private parties will likely experience confusion about the immigration law determinations they are obligated to make. Compounding the problem is that few, if any, private enforcers have received training in immigration law's complexi-

188. GAO 1990 DISCRIMINATION REPORT, *supra* note 15, at 119.

189. *Id.*

190. 8 C.F.R. § 214.2(f)(9) (2007).

191. INA § 217, 8 U.S.C. § 1187 (2000).

192. For a current list of participating countries, see U.S. Dep't of State, Visa Waiver Program, http://travel.state.gov/visa/temp/without/without_1990.html#countries (last visited Sept. 30, 2007).

ties.¹⁹³ Without training or legal guidance, private parties are bound to make wrong enforcement decisions, either in good faith or with discriminatory intent to try to minimize legal liability (for example, not renting to those who “look” foreign to try to avoid legal penalties altogether).

In response, an advocate of private enforcement might object that the scenarios presented above have limited practical application. In most cases, they would argue, private enforcers will not face complicated immigration situations; rather, the likely scenario is that a private enforcer will ask an applicant for proof of legal status and will deny the benefit if the applicant is unable to provide any proof. Advocates would argue that applicants without proof of legal status in all likelihood entered without inspection and are, along with those who overstay their authorized visits, the very people who should be denied benefits.

There are several problems with this argument. First, as an empirical matter, many authorized visitors come to the United States and fall into many different visa categories, so the possibility that a private enforcer would encounter, for example, a student-visa or visa-waiver applicant is real.¹⁹⁴

Second, the argument assumes that private enforcers will be satisfied with the production of any immigration documents, and that they therefore do not need to have any real understanding of immigration law in order to carry out their enforcement obligations. But that argument begs the question: how will enforcers know what immigration documents are permissible, if they have no immigration law training? Moreover, our experience with employer sanctions shows that even when presented with valid documentation of legal status, a significant number of enforcers are likely to raise questions about the adequacy of the documents, particularly if applicants look or sound foreign.¹⁹⁵ How then can enforcers determine the validity of documents without immigration training?

Finally, even if we accept the premise that applicants will only be denied benefits if they are unable to produce any documentation of legal status, it is not clear that all those who lack documents (or have expired documents) are necessarily here illegally. For example, someone whose tourist visa has expired but is married to a U.S. citizen is permitted by Section 245 of the Immigration and Nationality Act to apply to legalize her status without having to leave the country.¹⁹⁶ As a technical matter, she is illegally present, but under these

193. And Greyhound’s experience with training—trying to avoid criminal liability for smuggling but also to avoid racial profiling practices—shows that training can be problematic too. *See supra* notes 95–98 and accompanying text.

194. Consider, for example, that in 2005, the U.S. admitted over 620,000 students on F-1 visas and over 15.8 million visitors through the visa waiver program. U.S. DEP’T OF HOMELAND SEC., 2005 YEARBOOK OF IMMIGRATION STATISTICS 66 (2005).

195. In fact, Congress was concerned enough about this issue that it amended § 274B to add a provision prohibiting employers from asking for more documents than are required by law or of refusing to honor presented documents that appear reasonably genuine. INA § 274B(a)(6), 8 U.S.C. § 1324b(a)(6) (2000).

196. *See* INA § 245, 8 U.S.C. § 1255 (2000).

circumstances, ICE would not initiate removal proceedings.¹⁹⁷ Would she be eligible for benefits under private enforcement laws? And perhaps more importantly, how would a private enforcer make that determination?

The other major enforcement problem that private enforcement laws face is the prevalence of fraudulent documents. The scope and effect of fraudulent documents on federal employer sanctions has already been described.¹⁹⁸ If most undocumented immigrants are here to work (and have the fraudulent documents necessary to obtain employment), then they could use those same fraudulent documents to obtain other benefits too. Arguably, the potential for fraud in the non-employment context is higher than what we have seen with employer sanctions. In the non-employment context, there are more documents that could be counterfeited to show legal presence (for example, tourist visas), making verification more difficult. Furthermore, none of the other private enforcement laws have provisions to train private enforcers about the types of documents that prove legal presence and what these documents look like.

The one enforcement advantage that local private enforcement laws have is that there appears to be more political will to enforce these laws, as compared with federal employer sanctions. These towns, counties, and states are motivated on immigration issues, often passing private enforcement laws with other anti-illegal-immigrant measures. And though opinion about the laws is far from unanimous in these communities, it appears that the laws have broad political support.¹⁹⁹

Is this political will translating into dedicated resources? Colorado allocated up to \$110,000 and two full-time employees to implement its employment law and authorized its labor department to conduct random audits of employers to ensure compliance.²⁰⁰ Most of the local governments, however, do not have a plan for systematic enforcement of the laws, relying instead on public com-

197. See, e.g., *Bull v. Immigration and Naturalization Service*, 790 F.2d 869, 871 (11th Cir. 1986) (holding that the Board of Immigration Appeals abused its discretion in denying a continuance so that an immigrant married to a U.S. citizen could apply to adjust to permanent resident status).

198. See *supra* notes 167–74 and accompanying text.

199. In Farmers Branch, Texas, for example, voters overwhelmingly approved a private enforcement housing ordinance, by a more than 2-to-1 margin. Stephanie Sandoval, *FB Immigration Law Wins Easily*, DALLAS MORNING NEWS, May 13, 2007, at 1A. In the runup to the vote, groups supporting and opposing the ordinance formed, and fighting between these groups became emotionally charged. The Farmers Branch chapter of the League of United Latin American Citizens (LULAC) (an anti-ordinance group) obtained a restraining order against members of Support Farmers Branch (a pro-ordinance group), accusing the latter of “intimidation, harassment, threats, false accusations and the filing of false police reports” to try to stop members of the Farmers Branch chapter of LULAC from campaigning against the ordinance. City Council member Tim O’Hare, the driving force behind the ordinance, called the restraining order “another example of bullying tactics” by opponents of the ordinance. Stephanie Sandoval, *Backers of Rental Ban Hit with Order*, DALLAS MORNING NEWS, March 29, 2007, at 1B. In a lawsuit filed by apartment owners and residents in Farmers Branch, a federal judge granted a preliminary injunction, on the grounds that the ordinance was likely preempted by federal law and was void for vagueness. *Villas at Parkside Partners v. City of Farmers Branch*, 496 F. Supp. 2d 757, 777 (N.D. Tex. 2007).

200. H.B. 1017, 2006 Leg., 1st Spec. Sess. (Colo. 2006) (codified at COLO. REV. STAT. § 8-2-122 (2006)).

plaints to ferret out non-compliance.²⁰¹ Without financial and human support dedicated to enforcement, it is questionable how much enforcement these local governments will net, political support notwithstanding.

iii. Local Effect, No National Impact. Another reason why private enforcement laws are unlikely to reduce or deter illegal immigration is because most of them are passed and enforced at the local level. The relevant borders to consider for immigration law purposes are, of course, national borders, and the enforcement of local laws within local jurisdictions does not significantly influence national patterns of immigration.

There is some anecdotal evidence that immigrant populations have declined in jurisdictions that have passed private enforcement laws. After Riverside, New Jersey, passed the Illegal Immigration Relief Act in July 2006 (a private enforcement law affecting housing and employment), the town's population dropped within months from about 8000 to 7000 people.²⁰² Local residents said that departing Brazilian immigrants accounted for the drop, leaving for nearby Philadelphia, Delaware, and Maryland.²⁰³ In Hazleton, Pennsylvania, even though its housing and employment laws have not been enforced because of litigation, its mayor guesses that as many as 5000 Latinos have left town.²⁰⁴

And in Colorado, state officials have started a pilot program to send prisoners into fields to harvest crops.²⁰⁵ This work is normally done by migrant workers, but after the state passed some of the nation's strictest immigration restrictions, farmers expected that about half of their workers would not return to Colorado.²⁰⁶ "There's a feeling, a perception that these laborers won't be back because it's safer for them to find work in other states," said Frank Sobolik, director of a Colorado State University program that works with farmers.²⁰⁷ Other Colorado businesses like construction companies and carwashes have also complained of a labor shortage.²⁰⁸

201. See, e.g., HAZLETON, PA., ORDINANCES 2006-18 (2006) ("An enforcement action shall be initiated by means of a written signed complaint to the Hazleton Code Enforcement Office submitted by any City official, business entity, or City resident.").

202. Geoff Mulvihill, *Since Strict Immigration Law Was Passed, This Town Has Been Quiet*, BURLINGTON COUNTY TIMES, Sept. 27, 2006, available at <http://www.njmda.org/press-archive/sincestrict.php>.

203. *Id.* Faced with an economic downturn and legal challenges, Riverside eventually rescinded its law. Ken Belson & Jill P. Capuzzo, *Towns Rethink Laws Against Illegal Immigrants*, N.Y. TIMES, Sept. 26, 2007, at A1.

204. Ellen Barry, *City's Immigration Law Turns Back Clock; Latinos Leave Hazleton, Pa., in Drove in the Old Coal Town's Crackdown*, L.A. TIMES, Nov. 9, 2006, at 10.

205. Dan Frosch, *Inmates Will Replace Wary Migrants in Colorado Fields*, N.Y. TIMES, Mar. 4, 2007, at 25.

206. *Id.*

207. *Id.*

208. Nicholas Riccardi, *Going Behind Bars for Laborers; After Colorado Passed Laws Targeting Illegal Immigrants, Field Hands Fled and Crops Rotted. Who Is Left To Work?*, L.A. TIMES, Mar. 1, 2007, at A1.

What is significant about these reports is that they seem to reflect a *shift* of immigrants, rather than a reduction of the total population. Even if we assume that all or most of the immigrants leaving communities like Riverside, New Jersey, are undocumented, they appear to be leaving for other jurisdictions within the United States, rather than leaving the country altogether. For some communities, reducing or eliminating the undocumented population within their jurisdictions is a sign of the laws' success.²⁰⁹ Even if we are willing to accept local governments creating, in effect, their own immigration jurisdictions, the impact on immigration patterns would still be local, not national.

2. Punitive Effect

a. Federal Employer Sanctions. Have the sanctions been effective in punishing employers who hire unauthorized workers (and presumably receive a competitive advantage from doing so)? At one level, this question is intertwined with the earlier inquiry about the ability of sanctions to deter illegal immigration. After all, if (as this Article has concluded), employer sanctions have not been an effective deterrent because of numerous enforcement problems, then we could reasonably deduce that the sanctions have not had their intended punitive effect. Simply put, sanctions that are rarely enforced cannot be effective in punishing the targeted wrongdoers.

But the ineffectiveness of the employer sanctions to punish goes beyond just non-enforcement. Even when the sanctions are enforced against lawbreaking employers, the penalties imposed tend to be small (\$250 to \$2000 per unauthorized worker for first-time offenders)²¹⁰ and difficult to collect. The administrative fine structure provided for in Section 274A of the Immigration and Nationality Act allows an employer who has received a Notice of Intent to Fine to request a hearing before an administrative law judge.²¹¹ Because of the costs required to defend the fines in administrative proceedings, INS (and now ICE) often negotiate with employers to substantially lower the amounts of these fines. Between October 1, 1996, and February 1, 1998, INS issued NIFs against 833 employers, seeking \$6.1 million in administrative penalties. But as a result of negotiations with employers, Final Orders were issued against 794 employers for only \$4.9 million, and of that amount, only \$2.5 million was actually collected.²¹² The substantially lower amount of fines ordered and collected led some ICE officials to complain that the fines do not provide any meaningful deterrent.²¹³

209. See Powell & Garcia, *supra* note 128 and accompanying text.

210. For more details on the administrative fine structure, see 8 U.S.C. § 1324(a)(e)(4)(A)(i)–(iii); § 1324(a)(e)(5); § 1324(a)(f)(1).

211. INA § 274A(e)(3), 8 U.S.C. § 1324a(e)(3) (2000).

212. INS offered several explanations for the low collection amount: (1) employers went out of business; (2) employers filed for bankruptcy; (3) employers died; or (4) employers moved and could not be tracked down. GAO, SIGNIFICANT OBSTACLES EXIST, *supra* note 170, at 25.

213. GAO, WEAKNESSES HINDER, *supra* note 144, at 19. In recent years, ICE started using more civil settlements and criminal charges, instead of administrative fines. In 2005, Wal-Mart agreed to pay \$11

Employers themselves do not seem to view sanctions as having a punitive effect. In a survey of employers working in immigrant-dependent industries in southern California, researchers found that 48% of the employers “thought” they employed unauthorized workers; furthermore, 11% volunteered that they knowingly hired these workers after the sanctions took effect.²¹⁴ More revealing than their actual violations is their attitudes toward those violations: employers believed that their chances of being caught were slim and that given the small potential fines, the risk was an acceptable business expense. Commented one personnel director:

[It’s] like saying if you go 56 on the freeway and the speed limit’s 55, you’re in violation of the law. No foolin’. But, everyday I go 70 until I get caught and when I get caught I say, “Well, I’ve been doing this for two years, and I got nailed for a \$100 fine. That’s not too bad. That’s ten cents a day. I’ll continue to go 70.”²¹⁵

b. Private Enforcement Laws. Outside of the context of federal employer sanctions, determining whether private enforcement laws have had the desired punitive effect is more difficult to address because, as noted previously, many of these laws are new or have not been extensively studied. But by drawing comparisons with federal employer sanctions, some observations are possible.

First, because the punitive effect of private enforcement laws is inextricably linked with their enforcement, that punitive effect is likely to be undercut by the enforcement problems that have plagued federal employer sanctions. Those problems include enforcer confusion about enforcement obligations, fraudulent documents and their ability to undermine a verification system, and political ambivalence about committing the financial resources needed for effective enforcement.

Second, the laws may nonetheless have a strong punitive effect because many of them impose more substantial penalties than federal employer sanctions. For example, housing laws impose fines between \$50 to \$1000 *for each day* of a landlord’s violation,²¹⁶ and the federal transportation law threatens violators

million in a civil settlement to resolve allegations that independent contractors it had hired to clean its stores had employed illegal aliens. Twelve of these contractors pled guilty to criminal immigration charges and agreed to forfeit \$4 million in assets. The settlement came about after “immigration enforcement actions” on October 23, 2003, at more than sixty Wal-Mart stores in twenty-one states, in which ICE arrested 245 illegal aliens. Press Release, U.S. Immigrations and Customs Enforcement, Wal-Mart Stores, Inc. Agrees To Pay a Record \$11 Million To ICE to Settle a Nationwide Worksite Enforcement Investigation (March 18, 2005), <http://www.ice.gov/pi/news/newsreleases/articles/walmart031805.htm>. Because this practice of civil settlements and criminal charges is new, its effectiveness in limiting employment of unauthorized workers is not yet known. GAO, *WEAKNESSES HINDER*, *supra* note 144, at 19.

214. Calavita, *supra* note 158, at 1050–51. The survey was of 103 employers working in the garment, electronics, hotels, construction, restaurants, food processing, and building and landscape maintenance industries, conducted in 1987 and 1988. *Id.* at 1046–47.

215. *Id.* at 1054.

216. For more information about housing penalties, see *supra* notes 81–84 and accompanying text.

who transport undocumented immigrants for financial gain with a fine and up to ten years in jail.²¹⁷ The federal government's prosecution of the Golden State bus company for smuggling made news headlines in large part because of the size of the penalty extracted: forfeiture of a \$2.5 million terminal and \$100,000 in cash, as well as guilty pleas from its owners and managers.²¹⁸

3. Symbolic Impact

a. Federal Employer Sanctions. Measured over time, the real impact of employer sanctions may be a symbolic one. Before employer sanctions were passed, unauthorized workers could be penalized by deportation (either for being illegally present or being legally present but without authorization to work), but the employers who hired them faced no legal repercussions whatsoever. In fact, an exemption known as the Texas Proviso explicitly excluded the hiring of undocumented workers from the federal harboring statute.²¹⁹

The sanctions' drafters were eager to correct this legal anomaly. As mentioned previously, they hoped to reduce the substantive problems of unauthorized employment and illegal immigration.²²⁰ But they were also concerned about the symbolic impact of the anomaly. Foremost, the drafters of IRCA wanted to establish the legal principle that employers could not hire undocumented workers.²²¹ They also wanted to send a clear message that the United States was serious about asserting its sovereign authority to control its borders. In introducing IRCA to the Senate in 1985, Senator Alan Simpson stated, "The most basic function of a sovereign nation . . . is to control the entry of aliens across its borders and to enforce whatever conditions are imposed on the aliens who we so allow to enter."²²²

By many indicators, the sanctions have been successful in establishing the illegality of hiring unauthorized workers. In its 1990 survey of employers, the GAO found that 83% of employers were aware of the law and that 65% reported being in full compliance with the verification requirements.²²³ Similarly, a Rand/Urban Institute study of employers in 1988–89 found that 90% of the employers were aware of IRCA's requirements and a "comparably large percentage" said they had instituted verification procedures in hiring.²²⁴ Even if self-reported compliance rates may be

217. For more information about transportation penalties, see *supra* note 90 and accompanying text.

218. The Golden State prosecution is described *supra* in notes 93–94 and accompanying text.

219. Any person who "willfully or knowingly conceals, harbors, or shields from detection . . . in any place . . . any alien . . . not duly admitted by an immigration officer or not lawfully entitled to enter or reside within the United States . . . shall be guilty of a felony . . . [p]rovided, however, that for purposes of this section, employment (including the usual and moral practices incident to employment) shall not be deemed to constitute harboring." 8 U.S.C. § 1324(a)(3) (1982) (repealed 1986).

220. See *supra* section II.A.

221. See *supra* note 135.

222. FIX & HILL, *supra* note 135, at 39–40.

223. GAO 1990 DISCRIMINATION REPORT, *supra* note 15, at 5. GAO received usable responses from 4362 employers, which it projected to reflect a universe of 4.6 million employers. *Id.* at 28.

224. This study surveyed 184 employers in traditionally immigrant-dependent industries. FIX & HILL, *supra* note 135, at 125, 127, 129.

treated with some skepticism, it is clear from these surveys that employers and employees at least recognize the *principle* that unauthorized employment is illegal.

But have employer sanctions been successful in conveying a serious message about border control? The answer appears to be more mixed. Though employers and employees recognize the illegality of unauthorized employment, the evidence suggests that the sanctions are circumvented with frequent regularity (that is, employers, knowingly or unknowingly, continue to hire large numbers of unauthorized workers).²²⁵ Given that sanctions are rarely enforced, result in only small fines when they are enforced, and are structured in ways designed to undermine aggressive enforcement,²²⁶ it is hard to believe that the sanctions send any serious border control message.

Indeed, lukewarm enforcement of employer sanctions seems to send the opposite message: though the United States claims to be serious about controlling illegal immigration, it is not serious enough to dedicate the political and financial resources necessary to make employer sanctions effective. In its 1994 report to Congress, the U.S. Commission on Immigration Reform (created by Congress to assess the nation's immigration policies) warned about this credibility gap. While affirming the importance of reducing the "employment magnet," the Commission warned sternly that "[t]he ineffectiveness of employer sanctions, prevalence of fraudulent documents, and continued high numbers of unauthorized workers . . . have challenged the credibility of current worksite enforcement efforts."²²⁷ The nation may sincerely want to control the flow of people across its borders, but presently, it does not seem seriously committed to using employer sanctions as a tool to achieve that control.

b. Private Enforcement Laws. Like federal employer sanctions, other private enforcement laws may find the most success in their symbolic impact. A clear majority of these laws have been passed at the local level, often with other anti-illegal-immigration measures (for example, authorizing local police to enforce federal immigration laws).²²⁸ By passing the laws, these communities are sending several messages: frustration at the federal government's immigration policies, opposition to illegal immigration, and respect for immigration laws and the rule of law. The intended audiences are the federal government and the nation as a whole, undocumented immigrants, and community members.

By several measures, private enforcement laws appear to be having at least

225. See, e.g., section II.B.1.a. for information about border crossings after IRCA as a reflection of the sanctions' effect.

226. For a description of enforcement problems, see section II.B.1.b.ii.

227. U.S. COMM'N ON IMMIGRATION REFORM, 1994 EXECUTIVE SUMMARY xii (1994), available at <http://www.utexas.edu/lbj/uscir/exesum94.pdf>.

228. Interest in immigration issues is surging among local governments. The National Conference of State Legislatures reports that in 2006, state legislatures introduced 570 bills related to immigration and passed 90 of them. Governors in 32 different states signed 84 of these bills into laws. NAT'L CONFERENCE OF STATE LEGISLATURES, 2006 STATE LEGISLATION RELATED TO IMMIGRATION: ENACTED AND VETOED (Oct. 31, 2006), available at <http://www.ncsl.org/programs/immig/6ImmigEnactedLegis3.htm>.

some of their intended symbolic effect. The laws have received a lot of media attention and have been described variously as “tough,”²²⁹ intended to “stifle illegal immigration within their borders,”²³⁰ and a “local [immigration] crack-down.”²³¹ To the extent that undocumented immigrants are leaving jurisdictions with these laws,²³² then arguably the laws have successfully communicated their message to the immigrants as well. Given the political climate, the federal government has understandably stayed out of the debate on private enforcement laws, but individual members of Congress have expressed empathy for the local communities.²³³

But besides a tough enforcement message, the laws are also sending messages of racism, anti-immigrant sentiment, and specifically, animus against Latinos. Civil rights groups and immigrant rights groups charge that these laws create a hostile environment, where Latinos, Asians, and others who sound or look foreign, face discrimination, regardless of their immigration status.²³⁴ Though proponents of private enforcement laws deny that their laws are race- or ethnicity-based in any way, some of their comments suggest otherwise. In explaining his rationale for pushing for Valley Park, Missouri’s housing law, Mayor Jeffrey Whitteaker explained, “My main issue is overcrowding. You got one guy and his wife that settle down here, have a couple of kids, and before long you have Cousin Puerto Rico and Taco Whatever moving in.”²³⁵ These discriminatory messages, whether intended or not, dilute the laws’ symbolic impact.

4. The Costs

In assessing the effectiveness of federal employer sanctions and other private enforcement laws, we need to consider the costs, as well as the benefits. As with any enforcement scheme, private enforcement laws impose administrative costs on those charged with enforcement responsibilities—employers, landlords, and

229. Frosch, *supra* note 205 (describing Colorado’s laws).

230. Stephen Deere, *Law Puts Valley Park Landlords in a Bind*, ST. LOUIS POST-DISPATCH, Aug. 14, 2006, at A1.

231. Barry, *supra* note 204 (describing Hazleton, Pennsylvania’s laws).

232. See *supra* notes 202–206 and accompanying text.

233. For example, Rep. Todd Akin (R–MO), whose district includes Valley Park, said of its laws: “It seems to me that they have the jurisdiction to do that. I can see some logic to why they did it.” Deere, *supra* note 85. In response to a request from Congressman Paul E. Kanjorski (D–PA), the Congressional Research Service analyzed the legality of Hazleton, Pennsylvania’s ordinances and concluded that the ordinances are likely preempted by federal immigration law and may violate federal anti-discrimination laws. JODY FEDER & MICHAEL GARCIA, CONG. RESEARCH SERV., LEGAL ANALYSIS OF PROPOSED CITY OF HAZLETON ILLEGAL IMMIGRATION RELIEF ACT ORDINANCE 4, 7 (June 29, 2006).

234. See Press Release, Am. Civil Liberties Union, Hazleton Residents Sue To Halt Harsh Anti-Immigrant Law (Aug. 15, 2006), available at <http://www.aclu.org/immigrants/discrim/26465prs20060815.html> (predicting that Hazleton, Pennsylvania’s laws will “foster rampant discrimination”).

235. Kristen Hinman, *Valley Park to Mexican Immigrants: “Adios, Illegals!”*, ST. LOUIS RIVERFRONT TIMES, Feb. 28, 2007, available at <http://www.riverfronttimes.com/2007-02-28/news/valley-park-to-mexican-immigrants-adios-illegals/full#comments>.

so on—who must familiarize themselves with the laws’ requirements and then implement them. But as our experience with federal employer sanctions demonstrates, private enforcement laws also impose unique costs on those seeking the restricted benefits. Surveys conducted after the sanctions were passed show that employers engaged in national-origin and citizenship discrimination in hiring—for example, not hiring employees who “looked” foreign or had a foreign accent, for fear that they might be undocumented immigrants.²³⁶ These findings of widespread discrimination in the employer sanction context strongly suggest that discrimination would also occur with private enforcement generally.

a. Federal Employer Sanctions

i. Administrative Costs. Under employer sanctions laws, employers incur administrative costs in several ways. First, they have to familiarize themselves with the I-9 verification form, fill out a form for each employee hired, and set up recordkeeping systems to demonstrate compliance. Second, they may spend time interviewing applicants who are not authorized to work or waiting for applicants to obtain the required documents.

In its 1990 survey, GAO found that it took employers an average of 7.5 minutes to complete an I-9 form. If an employer’s labor costs were \$10 per hour, each form would cost \$1.25 to prepare; if all 4.6 million projected employers in the study population had fully complied, the cost would have been \$69 million in 1998 values.²³⁷ Adjusted for 2007 values, the costs would be approximately \$1.85 per I-9 form, with total costs of \$102 million.²³⁸ In their study, the Rand Corporation and the Urban Institute found that only 15% of employers actually ascribed costs to administrative compliance.²³⁹

As for costs incurred in interviews and delay, GAO found that approximately 7% of employers who responded to the survey were unable to hire a desired employee because the employee failed to present the necessary work authorization documents.²⁴⁰ The Rand/Urban Institute study found a higher percentage—over a third of employers—were unable to hire promising applicants because of documentation problems.²⁴¹

Charged by Congress to determine whether these administrative costs pre-

236. GAO 1990 DISCRIMINATION REPORT, *supra* note 15, at 6.

237. *Id.* at 110.

238. These adjustments assume the same number of employees and 48% cumulative rate of inflation between 1990 and 2007. See Fed. Reserve Bank of Minneapolis, Consumer Price Index, 1913–, <http://www.minneapolisfed.org/research/data/us/calc/hist1913.cfm> (last visited March 25, 2007) (listing the annual rate of inflation between 1913 and 2007).

239. This low percentage may have been due to the difficulty of calculating the additional costs of compliance. FIX & HILL, *supra* note 135, at 133.

240. GAO 1990 DISCRIMINATION REPORT, *supra* note 15, at 111.

241. FIX & HILL, *supra* note 135, at 134. This higher percentage can be explained by the study’s focus on employers in immigrant-dependent industries. *Id.* at 125.

sented an “unnecessary” regulatory burden for employers, the GAO concluded that they did not. But the GAO based this conclusion on its earlier determination that the sanctions had been effective in significantly decreasing the flow and employment of unauthorized workers:

[T]he principal burden resulting from the sanctions provision (i.e., preparation of an I-9) would be unnecessary if it could be proven that the law was ineffective Nearly all the evidence suggests that the IRCA has reduced illegal immigration and employment. Thus, by our definition, the burden from the sanctions provision is not unnecessary.²⁴²

However, because the evidence shows that employer sanctions only resulted in a temporary decrease of unauthorized immigration and employment, then by the GAO’s own definition, the continuing administrative costs they impose are unnecessary.

ii. Discrimination Costs. When proposals for employer sanctions were first seriously debated, civil rights groups and other advocates for minority rights were among the staunchest opponents. Organizations like MALDEF (Mexican American Legal Defense and Education Fund) and the Union of Democratic Filipinos warned that requiring employers to make determinations about the validity of immigration documents would cause discrimination—intentional and accidental—against lawfully present foreign workers and U.S. residents and citizens who look or sound foreign.²⁴³ These warnings turned out to be well-founded, as several studies found substantial IRCA-linked discrimination.

The most comprehensive study was GAO’s 1989 survey of employers.²⁴⁴ Asking employers about their hiring practices taken “as a result of the 1986 immigration law,”²⁴⁵ GAO concluded that employers engaged in a “serious pattern of discrimination” as a result of the sanctions.²⁴⁶ Specifically, GAO

242. GAO 1990 DISCRIMINATION REPORT, *supra* note 15, at 102.

243. Linda S. Bosniak, *Exclusion and Membership: The Dual Identity of the Undocumented Worker Under United States Law*, 1988 WIS. L. REV. 955, 958 n.7. The NAACP (National Association for the Advancement of Colored People) initially supported employer sanctions, on the theory that immigrants adversely affected job prospects for citizens. But in 1990, seeing the discrimination that sanctions caused, the organization called for repeal. Raul Yzaguirre, *Repeal the Law That Fosters Bias in Hiring*, L.A. TIMES, Aug. 20, 1990, at B5.

244. The GAO sent its questionnaire to 9491 employers drawn from a private firm’s list of 5.5 million employers. It then adjusted its sample to 6317 employers because some of those originally contacted went out of business, could not be located, had no employees, or did its hiring elsewhere. In the end, 4362 employers returned usable responses, which GAO projected to represent 4.6 million employers. GAO 1990 DISCRIMINATION REPORT, *supra* note 15, at 27–28.

245. To capture only discriminatory practices linked to IRCA, the survey phrased its questions as “Which of the following actions, if any, was taken at this location as a result of your firm’s understanding of the 1986 immigration law?” Also, set out in a box at the beginning of the question was this instruction: “IMPORTANT: CHECK ‘YES’ ONLY IF ACTION TAKEN WAS A RESULT OF THE 1986 IMMIGRATION LAW.” *Id.* at 120 (emphasis in the original).

246. See GAO 1990 DISCRIMINATION REPORT, *supra* note 15, at 5.

found that 461,000 employers (or 10%) engaged in illegal national-origin discrimination based on a person's foreign appearance or accent.²⁴⁷ GAO also found that an additional 430,000 employers (9%) engaged in illegal citizenship discrimination as a result of the sanctions.²⁴⁸

Regarding national-origin discrimination, GAO found that 6.6% of the employers stopped hiring applicants who looked or sounded foreign; 8.6% only examined documents of current employees who looked or sounded foreign; 9.8% required applicants with foreign appearances or accents to produce documents *before* making a job offer.²⁴⁹ These practices were implemented because employers suspected that the applicants or employees might be unauthorized. GAO did not have data on how many authorized workers were affected by these discriminatory practices, but because these employers hired an estimated 2.9 million workers in 1998, GAO assumed that many authorized workers were, in fact, affected.²⁵⁰ And as to citizenship discrimination, GAO found equally troubling patterns: as a result of the sanctions, 14.7% of employers started hiring only employees born in the United States and 13% stopped hiring employees with temporary work eligibility (for example, temporary resident aliens).²⁵¹

Why are employers discriminating? This is a question that the GAO survey could not address directly, but based on correlations in its data, GAO concluded that at least some of the discrimination could be attributed to employers' misunderstanding of or confusion about the law's requirements. Employers whose answers showed that they discriminated were more likely than employers who did not discriminate to want a better verification system. Likewise, employers who discriminated were more likely to report that they did not understand the law, as compared with employers who did not engage in discrimination.²⁵²

This survey has been criticized because it depended solely on employers' statements to show a rise in IRCA-related discrimination. In an internal GAO memo, the validity of the survey was questioned because there was no baseline data to compare discrimination before and after IRCA, and thus no basis (besides employers' statements) to demonstrate that the discrimination was caused by IRCA.²⁵³

However, other evidence exists to support a finding of IRCA-related discrimination. Using pre- and post-IRCA data, economists found that Latino workers in non-agricultural sectors received lower wages after IRCA, a finding consistent with discrimination (on the theory that employers may demand that workers

247. *Id.* at 38.

248. *Id.*

249. *Id.* at 117, 120.

250. *Id.* at 6.

251. *Id.* at 120.

252. *Id.* at 62–63.

253. Michael Fix, *IRCA-Related Discrimination: What Do We Know and What Should We Do?*, in *THE PAPER CURTAIN*, *supra* note 181, at 267–68 (citing Memorandum from Eleanor Chelimsky, Assistant Comptroller for Program Evaluation and Methodology (1990)).

suspected of being unauthorized work for lower wages to compensate for the employers' risk in hiring them).²⁵⁴ And in 1989 hiring audits, the Urban Institute found that foreign-looking or -sounding Hispanics received worse treatment than their Anglo counterparts, treatment that the researchers attributed to discrimination. Two-person Hispanic/Anglo teams of young males whose job characteristics (education, work experience, age, and so forth) were carefully matched were sent in to apply for the same low-skilled, entry-level jobs.²⁵⁵ Based on the results of 360 hiring audits, the Urban Institute found that:

- Hispanic testers received unfavorable treatment from three of every ten employers;
- Hispanic testers were three times more likely to encounter unfavorable treatment when applying for jobs than similarly qualified Anglos;
- Anglos received 33% more interviews than Hispanics; and
- Anglos received 52% more job offers than Hispanics.²⁵⁶

Though this evidence of employment discrimination post-IRCA does not prove that the discrimination was *caused by* IRCA, it tells a story that is consistent with the findings in GAO's 1989 survey: that employers discriminated against job applicants on the basis of national origin, possibly to avoid employer sanctions liability.²⁵⁷

Finally, other studies have also found patterns of employer discrimination similar to that found in GAO's 1989 survey. In a 1988 survey of 400 employers in the New York City metropolitan area, the New York State Inter-Agency Task Force on Immigration Affairs found that 7% of the employers required only employees who look foreign or "risky" to provide work authorization documents.²⁵⁸ In a 1989 survey of San Francisco employers, researchers found that 12% of the employers had different work authorization procedures for foreign-born workers than for workers born in the United States.²⁵⁹

254. Cynthia Bansak & Steven Raphael, *Immigration Reform and the Earnings of Latino Workers: Do Employer Sanctions Cause Discrimination?*, 54 *INDUS. & LAB. REL. REV.* 275, 275-76 (2001). The authors compared the wages of non-agricultural Latino workers, who were immediately subject to employer sanctions, with wages earned by agricultural Latino workers, who were exempt from employer sanctions for two years, and found substantial declines in the non-agricultural Latino wages. No similar decline in wages was observed for non-Latino white workers. *Id.*

255. HARRY CROSS ET AL., *URBAN INST., EMPLOYER HIRING PRACTICES DIFFERENTIAL TREATMENT OF HISPANIC AND ANGLO JOB SEEKERS* 2-3 (1990).

256. *Id.* at 61-62.

257. The testers were trained to state during their first contact with potential employers that they were U.S. citizens, to minimize the possibility of citizenship discrimination. *Id.*

258. Martha Davis et al., *Report of the Committee on Immigration and Nationality Law of the Association of the Bar of the City of New York: An Analysis of Discrimination Resulting from Employer Sanctions and a Call for Repeal*, 26 *SAN DIEGO L. REV.* 711, 719 (1989) (citing *NEW YORK STATE INTER-AGENCY TASK FORCE ON IMMIGRATION WORKPLACE DISCRIMINATION UNDER THE IMMIGRATION REFORM AND CONTROL ACT OF 1986: A STUDY OF IMPACTS ON NEW YORKERS* 9 (1988)).

259. GAO 1990 DISCRIMINATION REPORT, *supra* note 15, at 83 (citing *EMPLOYMENT AND HIRING PRACTICES UNDER THE IMMIGRATION REFORM AND CONTROL ACT OF 1986: A SURVEY OF SAN FRANCISCO BUSINESSES* (1989)).

The discrimination occurred despite provisions in IRCA to fight this very kind of discrimination. Section 274B makes it an “unfair immigration-related employment practice” to discriminate against someone in hiring or firing on the basis of national origin or citizenship status.²⁶⁰ These anti-discrimination provisions were part of a necessary political compromise between supporters and opponents of employer sanctions to insure the sanctions’ passage.²⁶¹

If, after an administrative hearing, an employer is found by a preponderance of the evidence to have violated the statute, it may be subject to a cease and desist order, be required to keep more extensive employment records, pay fines between \$250 and \$2000 for each individual discriminated against (for first-time offenders), be required to hire individuals “directly and adversely affected,” or take other remedial action.²⁶²

But there are important restrictions in Section 274B which may make it more difficult for plaintiffs to use. First, only a “protected individual” may bring a claim of citizenship discrimination. Protected individuals are defined as U.S. citizens, lawful permanent residents, and those admitted as refugees or granted asylum; however, the non-citizens have to apply for naturalization within six months of eligibility or be granted citizenship within two years after applying for naturalization.²⁶³ In other words, only citizens and those actively pursuing citizenship can bring citizenship discrimination claims, with the result that those who may more likely experience citizenship discrimination (like long-term permanent residents) will be unable to seek redress.

Another restriction on citizenship discrimination claims is the exception that allows employers to hire an “equally qualified” citizen over a non-citizen without violating the law.²⁶⁴ So even if a non-citizen fits into a “protected individual” category as described above, her ability to bring a citizenship discrimination claim is limited. Finally, and perhaps most significantly, administrative decisions have interpreted Section 274B as requiring proof of intentional discrimination by employers, thus effectively rejecting all disparate impact claims. These interpretations in turn relied on controversial statements made by President Ronald Reagan when he signed IRCA into law.²⁶⁵

It is important to note that studies documenting IRCA discrimination were done in the three- to four-year period after IRCA became law. Without follow-up studies, it is difficult to know what current discrimination issues and patterns are. But that such substantial evidence of discrimination exists should give us pause as we consider the effectiveness and advisability of other private enforcement laws.²⁶⁶

260. INA § 274B(a)(1), 8 U.S.C. § 1324b(a)(1) (2000).

261. Simpson, *supra* note 28, at 590.

262. INA § 274B(g)(2), 8 U.S.C. § 1324b(g)(2) (2000).

263. INA § 274B(a)(3), 8 U.S.C. § 1324b(a)(3) (2000).

264. INA § 274B(a)(4), 8 U.S.C. § 1324b(a)(4) (2000).

265. See STEPHEN H. LEGOMSKY, IMMIGRATION AND REFUGEE LAW AND POLICY 1227–29 (4th ed. 2005).

266. The implications of past IRCA discrimination patterns for private enforcement laws generally are explored *supra* section II.B.4.b.

b. Private Enforcement Laws

i. Administrative Costs. With so many different types of private enforcement laws and so many different private parties subject to enforcement obligations, we would expect high administrative costs for implementation. Each private enforcer has to spend time and money to understand the laws' requirements, train employees to implement the requirements, develop a system for maintaining immigration records, and respond to inquiries and complaints from government entities.

Outside the context of federal employer sanctions, there is no centralized source of information or training to assist the private enforcers. Thus administrative costs are likely higher than those incurred to enforce federal employer sanctions. In fact, none of the other private enforcement laws makes any provision for training enforcers about their obligations. Even if there was political will to provide training, there would be no way to make the training uniform, to make sure that all enforcers are receiving the same accurate immigration training to avoid enforcement mistakes. This decentralization is the predictable downside of private enforcement's multiplier effect.

ii. Discrimination Costs. Discrimination, based on national origin, citizenship, and even race, is the heaviest cost of private enforcement and the most compelling reason to avoid their use. GAO attributed at least some of the discrimination it found to employer confusion about their obligations under federal employer sanctions.²⁶⁷ For other private enforcement laws, we should expect even more private enforcer confusion because there is no government guidance or training on how to enforce these laws. Thus, extrapolating from our experience with federal employer sanctions, we should expect even higher levels of enforcer discrimination for other private enforcement laws.

And to the extent that enforcers discriminate for fear of legal liability, we should also expect higher enforcer discrimination in this current anti-immigrant climate. In a 2006 review of major public opinion polls, the Pew Hispanic Center found that a significant majority of Americans believe that illegal immigration is a very serious problem (57% to 68%, depending on the poll);²⁶⁸ furthermore, a sizeable minority believes that undocumented immigrants should be deported.²⁶⁹ Taken together, these numbers suggest a national atmosphere

267. See *supra* notes 249–52 and accompanying text.

268. PEW HISPANIC SURVEY, THE STATE OF AMERICAN PUBLIC OPINION ON IMMIGRATION IN SPRING 2006, at 4–5 (May 17, 2006).

269. *Id.* at 7–10. The Pew Hispanic Center reported that

[a] majority of Americans appears to favor measures that would allow illegal immigrants currently in the U.S. to remain in the country either as permanent residents and eventual citizens or as temporary workers who will have to go home eventually. When those options are presented, only a minority favors deporting all illegal immigrants or otherwise forcing them to go home.

Id. at 1. It should be noted, however, that the minorities who favor deportation still represent a sizeable

where immigration concerns run high. Particularly in local communities that have taken the initiative to pass private enforcement laws, private parties should therefore expect vigorous enforcement of these laws by motivated local governments.²⁷⁰

Finally, in an anti-immigrant climate, we could also expect to see more discrimination caused by plain, old-fashioned animus. Private enforcement laws can certainly not be blamed for creating this animus, but they do provide the perfect cover: enforcers already biased against a certain group can use the laws as an excuse to refuse to provide benefits to people from that group. And because none of the laws, except for federal employer sanctions, provides a remedy against discrimination,²⁷¹ enforcers can be fairly confident that they will not face repercussions for the discrimination.

CONCLUSION

At first glance, private enforcement of immigration laws has a lot of intuitive appeal—additional enforcement by thousands of private parties, “on the cheap,” to deter illegal immigration and help us regain control of our borders. This appeal helps to explain the expansion of private enforcement laws into employment, housing, transportation, and other areas.

But the reality of our twenty-one-year experience with federal employer sanctions provides sobering lessons about the potential effectiveness of these laws. Implemented nationally with substantial federal resources, these sanctions have not resulted in any permanent decrease in illegal immigration. Rather, the effectiveness of federal employer sanctions has been undermined by numerous enforcement problems: enforcer confusion about enforcement obligations, the pervasiveness of fraudulent documents, and lack of political will to enforce the sanctions. As documented by GAO studies, perhaps most damning has been the national-origin and citizenship discrimination that employers engaged in as a result of the sanctions.

Drawing from these lessons, we can conclude that the benefits of private enforcement laws are mostly symbolic (sending tough enforcement messages), rather than substantive (actually deterring illegal immigration). Diffusing enforcement responsibilities among many private parties, without providing adequate training or resources, leads to predictable enforcement problems. At the same time, the laws extract real costs in terms of discrimination against those who look or appear foreign. Governments, particularly local governments, may find private enforcement laws politically appealing, but a realistic weighing of the true costs and benefits of private enforcement laws counsels against their use.

portion of the population, 18% (USA Today/Gallup) to 47% (Time Magazine Poll). *Id.* at 8.

270. If these other private enforcement laws encounter enforcement problems similar to those experienced by federal employer sanctions, we might expect that enforcer fears about liability—and discrimination linked to those fears—would decrease. Even if that is the case, we would still expect to see liability-linked discrimination in the early period of the laws’ enforcement.

271. For more on the anti-discrimination provisions of federal employer sanctions, see *supra* notes 261–65 and accompanying text.