

# Splitting the Difference on Illegal Immigration

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*Peter Skerry*

In the controversy over illegal immigration that has roiled our politics for decades, the image of “living in the shadows” has been invoked by all sides. For immigrant advocates, “the shadows” are where the undocumented are harassed by overzealous law-enforcement officers and exploited by unscrupulous landlords and employers. For many other Americans, “living in the shadows” conjures vaguely sinister intruders using public services to which they are not entitled and preying on law-abiding Americans through illicit activities and crime.

Yet regardless of one’s views on the issue, this imagery is profoundly misleading. It helps to perpetuate the myths and exaggerations that have made our immigration debate so fruitless. Undocumented immigrants are hardly mere victims of economic or political forces beyond their control. But neither are they dangerous criminals or public charges lurking on the fringes of our society. Rather, they are responsible agents who have made difficult choices in a complicated and risky environment — an environment for which all Americans bear some blame.

These choices produce both beneficial and negative consequences for the nation and for the immigrants themselves. And our policies must contend with both sets of effects. If we are to find our way to a solution, we must examine the genuine predicament of the millions of illegal immigrants in our midst without ignoring the legitimate concerns millions of Americans have about their presence.

If we succeeded in removing the hyperbole and stereotypes from the immigration debate, our politics might open itself to a balanced

approach to the problem: legalization for as many undocumented immigrants as possible, but citizenship for none of them. Under this proposal, illegal immigrants who so desired could become “permanent non-citizen residents” with no option of ever naturalizing.

Such a policy would do much to address the predicament faced by the undocumented while at the same time respecting and addressing the concerns of those Americans who have long demanded that illegals be penalized for breaking the law. It would respond to the challenge of illegal immigration in its genuine complexity and ambiguity. And only when we acknowledge that complexity, looking beyond the simple caricatures that too often shape the immigration debate, can we see our way to a plausible policy solution.

### shedding light on “life in the shadows”

The first step in clarifying our debate is to move beyond some familiar distortions about just who illegal immigrants are, how they live, and how and why they got here. Based on a variety of surveys and estimates, we actually have a decent understanding of the illegal-immigrant population in America. The latest figures compiled by the Pew Hispanic Center indicate that there are more than 11 million undocumented immigrants, a number that includes more than one million children under the age of 18. Overall, the undocumented represent approximately 4% of the nation’s population, 5% of its labor force, and 28% of its foreign-born population.

These numbers understate things somewhat, for the simple reason that the undocumented often live with relatives who are here legally. Some illegals have spouses who are either legal immigrants or citizens. Still more numerous are the 4.5 million native-born (and therefore citizen) children under 18 with at least one illegal parent. As a result, the total number of individuals living in households with at least one illegal immigrant exceeds 15 million, representing about 6% of the population.

The classic image of illegal immigrants entering our country is one of silhouetted figures sneaking across the Mexican border. About half of the undocumented arrived this way; less noted, however, is that the remainder initially came legally — typically on work or tourist visas — but then overstayed their allotted residency periods. While there are sizable contingents of illegals from Asia, Europe, Africa, and Canada, almost 60% are from Mexico, and about 20% more are from Central and South

America or the Caribbean. Therefore, about 80% of illegal immigrants are Latinos.

Today's figure of roughly 11 million illegals living in the U.S. is actually lower than the record high of 12 million in 2007. This decline reflects decreased inflows since the Great Recession of 2008, though there does not appear to have been much, if any, increase in the number of illegals voluntarily returning home in recent years. This lower number is also the result of steadily tightening border enforcement, including increased deportations initiated by the Bush administration and now sustained by the Obama administration.

On the other hand, their youth and fertility mean that illegal immigrants are frequently young parents. They are actually much more likely to live in a household with a spouse (or partner) and at least one child than are legal immigrants and native-born adults. Pew estimates that 45% of undocumented immigrants live in such situations, compared with 34% of legal immigrants and 21% of native-born Americans. Consequently, while illegals represent about 4% of the U.S. adult population, their children account for 8% of newborns. These numbers point to the challenges that illegal immigration poses for schools, hospitals, and other service providers. Anxiety about these challenges has translated into charges that the undocumented are here primarily to sponge off the nation.

But while concerns about illegals' reliance on social programs may be warranted (as discussed below), most undocumented immigrants are not here looking for "freebies." Overwhelmingly, they migrate in pursuit of work. This is particularly true for undocumented males: Among all men in the U.S. between the ages of 18 and 64, illegal immigrants are the most likely to be working. In 2009, for example, 93% of undocumented men participated in the labor force, compared to 86% of legal-immigrant men and 81% of native-born men. Yet the opposite pattern is evident among women. In 2009, 58% of undocumented women were in the labor force, compared to 66% of legal-immigrant women and 72% of native-born women. So while a majority of undocumented women do work, more of them remain at home — presumably to care for their children — than do other women in America.

However hard undocumented immigrants work, their professional prospects are limited by their low skill and education levels. Almost half have not completed high school, and nearly a third have less than a ninth-grade education. Pew notes that 22% of U.S. residents between the ages of 25 and 64 with less than a high-school education are undocumented immigrants.

Their incomes are commensurately meager. Even though undocumented-immigrant households contain, on average, more workers than do households composed of native-born Americans, the former's median annual income in 2007 was \$36,000, compared to the latter's \$50,000. And while legal-immigrant households have experienced significant income gains over time, illegal-immigrant households have not. Moreover, the latter's poverty rates are also disproportionately high:





originate: Mexico. The United States has invited illegal immigrants even as it has pushed them away, and a century of policies facilitating the recruitment and hiring of unskilled Mexican laborers—regardless of whether those workers were legal or illegal—set in motion social and economic forces that have proven difficult to control. Only during the last third of the 20th century did we even begin to focus on managing migration from Mexico, and only in the past quarter-century have we gotten remotely serious about securing our southern border or restricting the employment of people who are here illegally.

Toward the end of the 19th century (0416214143)

## National Affairs ·

But the legacy of a “Mexican exception” persists, and continues to subvert the principle of equal treatment of all nations upon which our immigration policy is nominally based. Thus, each year, we welcome many more



Peter Skerry ·

Franklin Abrams pointed to Bracero a decade after its termination and wryly observed that “the program may be said to be continuing on an unofficial basis.”

approve of those who reside here without permission, yet we implicitly invite them to do so and only reluctantly crack down on their employers. Just as the circumstances faced by illegal immigrants in our country are simultaneously threatening and encouraging, so the nation's attitude toward illegals has long been at once hostile and welcoming.

victims or risk-takers?

This ambivalence toward undocumented immigrants is evident even among those responsible for enforcing our immigration laws. In scores of interviews with Border Patrol agents over the years, I have been struck by two contradictory comments they invariably volunteer. The first is the defensive assertion that “we are federal law-enforcement agents, as good as those from any other agency — including the FBI.” The second, which no agent I have ever talked with has failed to voice unprompted, is, “If I were in [the illegals'] shoes, I'd be doing the same thing and crossing that border to better things for me and my family.”

Herein lies the unique challenge of immigration-law enforcement. While insisting on their standing as effective federal agents, Border Patrol personnel point to the one facet of their jobs that distinguishes them from other law enforcement — and that compromises their mission. By contrast, local police are unlikely to be defensive about their status as law-enforcement professionals. Nor are they likely to be heard

Peter Skerry ·

surprise that millions of less affluent Americans perceive immigrants as a threat, while the more comfortable and wealthy tend to regard them as helpful employees—the nannies, gardeners, waiters, maids, and laborers who provide them with valued services.

This uneven distributional impact of immigration has occurred during a period of increasing income inequality. Indeed, wage stagnation over the past few decades has roughly coincided with the steadily increasing numbers of immigrants arriving since the 1965 reform. Incorrectly, but perhaps not surprisingly, many Americans attribute their economic woes to immigrants. As economists Kenneth Scheve and Matthew Slaughter observe: “Less-skilled people prefer more restrictive immigration policy, and more-skilled people prefer less restrictive immigration policy.” Indeed, their simulations lead them to conclude: “If you could put a high school dropout with roughly 11 years of education through both high school and college, ending up with about 16 years of education, then the probability that this individual supports immigration restrictions would fall by some 10 to 14 percentage points.”

reveal, illegals are often “target earners” who come to the U.S. without intending to stay. To maximize income, they work at several jobs; to minimize expenses, they live in spartan, often substandard conditions. This helps explain why the undocumented change residences so frequently — nearly twice as often as legal immigrants or the native born, according to the Pew Hispanic Center.

To meet their earnings targets, illegals endure long hours in unpleasant, sometimes dangerous conditions. Over time, their goals of returning home often get pushed off into the future and, as we know, many illegal immigrants end up remaining in the U.S., with family members joining them. Yet the notion of someday enjoying wealth earned in the U.S. back in their home countries typically persists, while transience and impermanence often continue to characterize their lives here — with important implications for them and for the rest of us.

Employers understand these dynamics. They avoid investing time and money training workers who might leave or get deported. Yet employers also regard illegals as ideal for occasional or undesirable jobs where high turnover is the norm. If they work “under the table,” illegals don’t get any benefits, but they avoid payroll taxes — which saves money and trouble for them as well as their employers. But as Hanson points out, even on the books, undocumented workers are valuable to employers precisely because they are more flexible and responsive to market forces than are other workers.

Labor organizers have learned this the hard way. Activist lawyer Jennifer Gordon has chronicled her (ultimately unsuccessful) efforts to organize undocumented day laborers in suburban Long Island. She succinctly identifies one obstacle she could not overcome: The workers were “settlers in fact but sojourners in attitude.” A veteran union organizer whom Gordon called in to assess the situation bluntly concluded: “There are just too many workers, most of whom are incredibly transient, and too few jobs, and the whole scene is so fluid and uncontrollable. The employers are too small and too varied to make organizing them practical.”

Not surprisingly, such transience is not confined to the workplace. Young people detached from the constraints as well as the supports of families back home exhibit what one sociologist refers to as “instrumental sociability,” characterized by transitory friendships, casual sexual encounters, and excessive drinking to a degree uncommon back home.

Such atomism helps explain why immigrant communities often lack strong leadership and organizations. In their study of four Chicago neighborhoods, Richard Taub and William Julius Wilson quote a parochial-school principal: “Mexicans don’t think they’re going to be living here a long time. That makes them not invest much in their neighborhood.” For similar reasons, when community policing was initiated in Chicago in the mid-1990s, participation among Hispanics was markedly lower than among other groups. So the instability that characterizes life among the undocumented does not result simply from their legal status, but reflects their own priorities and goals.



who are accorded the initiative not in pursuit of any expert or objective findings, but on behalf of the interests of their clients. Legal decisions are typically open to subsequent challenges and ongoing disputation. As legal scholar Robert Kagan has noted, in America, “[l]egal conflict and uncertainty vitiate legal authority.”

Because our judges are not narrow specialists insulated from societal and political forces, they resolve legal disputes in light of precedent, historical context, and the concerns of the wider community. In America, federal judges—including, of course, Supreme Court justices—not only read the newspapers but also appear on television. They understand that their decisions are not commands from on high, but part of a conversation—a colloquy, as legal scholar Alexander Bickel put it decades ago—with the other branches of our government and with the American people. As Bickel argued:

For the basis of all law . . . is consensual. We are willing, and ought to be willing, to pay only a limited price in coercing minorities. Whenever a minority is sufficiently large or determined or . . . strategically placed, we do not quite have law. We must then generate a greater measure of consent, or reconsider our stance on the minority’s position. We must, in such circumstances, resort to methods other than coercive law; methods of persuasion and inducement, appeal to reason and shared values, appeal to interest, and not only material but political interest. We act on the realization that the law needs to be established before it can be effectively enforced, that it is, in a quite real sense, still provisional.

Law, then, is not the exclusive purview of the courts or the legislatures. As social theorist Philip Selznick has put it:

A responsive legal order is not set over society. . . . [L]egislatures and courts are only two among the diverse forms of legal order that regulate people’s lives. The vitality of a social order comes from below, that is, from the necessities of cooperation in everyday life.

All of this suggests that the challenge posed by illegal immigration is social and political as much as it is legal in nature. Illegal immigrants



Peter Skerry ·

break the informal rules of neighborhood and civic life as much as the formal rules of legislatures and courts. But because the resulting strains are not felt evenly across society, and indeed because many Americans see themselves benefiting from illegal immigration, responses to these strains vary greatly. The ~~10 9570~~

The specific details of any such status would obviously need to be determined through the back and forth of the legislative process. But several points are worth considering now. The conditions for eligibility should be minimal — for example, excluding only those undocumented immigrants with serious criminal records. This new legal status should be granted on a one-time basis to as many of the undocumented as possible, as quickly as possible. Of course, to be eligible, illegals now in the U.S. would have to prove that they had begun residing here before some set date. But this date should be as recent as possible in order to maximize the number of individuals legalized.



There have at times been controversies about the legal and constitutional statuses of each of these entities. Nevertheless, these anomalies have proved stable and acceptable over time—both for the individuals involved and for the nation at large. We are clearly able to handle complex legal arrangements that arise from complicated historical circumstances.

A second objection to this proposal concerns the benefits and obligations attached to permanent non-citizen resident status. These of course would depend on the specifics of the policy, which Congress would have considerable (though hardly unlimited) latitude to formulate. To a lesser degree, so would the states. At this point, then, any discussion of these details is necessarily hypothetical. But the distinctions drawn between citizens and legal permanent residents (green-card holders) in current law and policy offer some informative examples.

In some cases, legal permanent residents are treated substantially the same as citizens. For example, the wage and overtime protections of the Fair Labor Standards Act apply to both. So do the free-speech protections of the First Amendment. Permanent residents are similarly eligible for various social-welfare programs, including the Earned Income Tax Credit and Social Security benefits (subject to a few con

time their coverage is at the discretion of individual states. Similarly, legal permanent residents who have contributed to Social Security and are otherwise entitled to benefits may have them suspended if they remain outside the United States for more than six consecutive months.

In fact, travel outside the U.S. is a major issue for these immigrants. Especially when they leave for extended periods, perhaps visiting relatives back in their countries of origin, green-card holders risk not being allowed to re-enter. As Motomura concludes, under current rulings, “the Constitution protects a returning lawful immigrant no more than a first-time entrant.” More generally, permanent residents have no absolute assurance that they will be allowed to remain here. Failing to keep documents current or committing various crimes — including tax evasion and shoplifting — could result in their deportation. The status of such immigrants is therefore highly contingent, both on their own behavior and on global politics.



we must ask whose interests are at issue — those of the undocumented or those of their advocates?

Others have ignored evidence of ambivalence or indifference toward citizenship among illegals because it does not sit easily with our fondest immigration myths. Americans find it difficult, perhaps even offensive, to believe that immigrants might cling to the notion of eventually returning home or spurn the opportunity to become Americans. Now, however, these very preferences may point the way out of the ethical and political dilemma that confronts us.

Even though the overwhelming majority of illegal immigrants would

immigrant advocates or the machinations of greedy businessmen. While these and other interests have often exerted disproportionate influence on immigration policy, what this debate has long lacked is a willingness on everyone's part to acknowledge ownership of the outcomes, however imperfect, of a political process that is fundamentally fair and just. Without that acknowledgment, our policy failures will always just be the other guy's fault, and will never be remedied.

This insight brings us back to Alexander Bickel's wise warnings about the limits of abstract, formal understandings of citizenship and his corresponding emphasis on its informal social and political underpinnings. In the ongoing debate over illegal immigrants, we Americans have fixated on legal formalisms in what has often seemed like an effort to escape the social complexity of the problem. The circumstances of the 11 million undocumented immigrants in America pose a set of social challenges—to our nation and to the immigrants themselves—that are at least as important as the legal issues involved. The proposal presented here, culminating in permanent non-citizen resident status, is intended to address both dimensions of this seemingly intractable dilemma. We cannot hope for a lasting solution if we ignore either one.