

# It Takes Two

## Immigration and the rule of law.

BY PETER SKERRY

With an immigration bill finally on the table, Republicans would do well to stop and ponder how they have arrived at this juncture. Since the November election they have been preoccupied with how to approach Hispanics on this critical issue. Because almost 80 percent of illegal immigrants are Hispanic, conservative elites have—appropriately—been wrestling with terminology and have just about persuaded themselves that “illegals” are more prudently referred to as “the undocumented.”

But the soul-searching seems to have stopped there. Whatever they call them, Republicans continue to insist that the undocumented must be treated as law-breakers, even as criminals, who must be penalized and not allowed to benefit from their transgressions. For a party struggling to renew itself, this isn't much progress. What Republicans now need to consider is that the undocumented are hardly the only law-breakers here. More precisely, Republicans must assess how much responsibility for illegal immigration can be fairly attributed to employers.

This won't be easy. Especially at this juncture in the process, no one wants to point fingers—certainly not at employers who are complicit in illegal immigration. To be sure, back in 2009 the Obama administration prioritized the criminal prosecution of employers who hire the undocumented and brought some large firms to heel. But right now, Democrats want to mobilize their troops and focus attention on the travails of worthy newcomers who just happen to be here without documents.

Republicans, as I have suggested, have their own problems. For them,

immigration enforcement has meant securing our border with Mexico, for which public support has been readily mobilized with images of imposing physical barriers, sophisticated surveillance technology, and thousands of Border Patrol agents. By contrast, interior enforcement has been a much tougher sell. After all, it arouses images of busy Americans being hassled at highway checkpoints or hard-working businessmen wasting their time filling out government forms and answering the questions of intrusive bureaucrats. And since employers tend to be well organized and vocal when it comes to immigration, Republicans have sought to avoid offending what looks to be a natural constituency. But then so have many Democrats.

As for the rest of us, Americans tend to identify with employers, who are like “us.” In many cases the employers *are* us, insofar as they are homeowners relying on laborers, gardeners, painters, carpenters, cleaning ladies, and nannies, who are typically undocumented.

In fact, casual reliance on illegal immigrant workers is unlikely to run afoul of the law. Individuals who hire fewer than 10 illegal workers during any 12-month period are effectively exempt from prosecution. To be sure, candidates for high government appointments and politicians are subject to embarrassing exposure on this point, and they might be legally vulnerable for failing to pay Social Security taxes for undocumented workers. But the average American can still drive down to the Home Depot parking lot and hire a day laborer without fear of violating the law.

And so it has been for most of our history. It was not until 1986, when Congress enacted the Immigration Reform and Control Act (IRCA), that employers were prohibited from

hiring noncitizens lacking work authorization. Up to that time, to be sure, it had been a felony to harbor illegal aliens. But at the insistence of agricultural interests, the so-called Texas Proviso stipulated that *employing* illegals was not to be construed as harboring them. So those who insist on upholding “the rule of law” would do well to consider how immigration law has evolved and changed.

In any event, IRCA changed all that, and for the first time, employers—excepting the homeowners described above—became subject to fines and prosecution for hiring undocumented immigrants. Yet an unholy alliance of immigrant advocates, business interests, and civil libertarians raised alarms about the creation of a “national identity card” and stymied efforts to create a secure means of identification that would allow employers to reliably determine the legal status of job applicants. At the same time, Congress enacted anti-discrimination provisions to discourage employers from avoiding the risk of hiring illegal immigrants simply by not hiring foreign-looking applicants. The result is that employers have been required to ascertain the legal status of their employees but discouraged from doing so aggressively.

It gets worse. To establish their eligibility for employment, applicants may rely on driver's licenses, Social Security cards, and birth certificates—all of which can be counterfeited. Yet employers are not required to verify the authenticity of such documents, merely to confirm that they “reasonably appear on their face to be genuine.” Documenting all this on the now-infamous I-9 form completes the ritual and allows employers to satisfy the letter of the law by affirming that they did not *knowingly* hire undocumented workers.

Despite such ease of compliance, employers—no one knows how many—still evade or violate the law outright. Many hire undocumented workers indirectly by relying on subcontractors who assume the risk of skirting the law. Perhaps most notorious for this tactic is Walmart, which has used subcontractors who secured undocumented workers to clean its stores. Much less

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notoriously, homeowners routinely hire, for example, landscaping contractors who employ illegals. Technically, such homeowners are not in violation of the law, but this was small consolation to Mitt Romney a few years back. More blatant is the hiring of undocumented workers off-the-books and paying them substandard wages “under the table” with no benefits.

Such common practices highlight why American employers have grown so dependent on illegal immigrant workers. The usual explanation is lower wages, which are undeniably part of the story. Yet not to be overlooked is the willingness of undocumented workers to work long hours on short notice. As economist Gordon Hanson has pointed out, illegals are valuable to employers precisely because they are more flexible and responsive to market forces than other workers. This is particularly true in agriculture but also in construction and the service industry.

This insight also sheds light on the motives of the undocumented

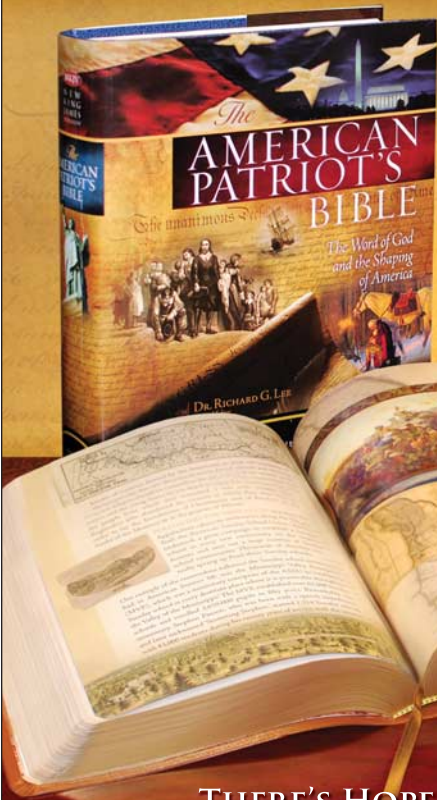
themselves. Invariably overlooked is that illegals do not typically plan to spend the rest of their lives here. In fact, they usually arrive as “target earners,” working several jobs to maximize income and enduring spartan, often substandard conditions to minimize expenses. With a long-range goal of returning home with their accumulated savings, the undocumented are often content with informal arrangements that allow them to avoid paying taxes and put up with long hours in unpleasant, sometimes dangerous conditions.

To be sure, their plans change over time, and many of the undocumented obviously end up remaining here and starting families. Yet the more fundamental point is that illegal immigrants are hardly mere victims of forces beyond their control. Indeed, one of the clearest and most consistent findings by economists is that the big winners in the immigration sweepstakes are immigrants themselves—illegal as well as legal. Yet such economic gains invariably involve considerable risk,

particularly on the part of illegals.

The irony here that Republicans fail to grasp is that undocumented workers tend to be entrepreneurial, not unlike many of their employers. And as with other entrepreneurs, the gains from the risks illegals incur redound primarily to them, while the costs tend to be more widely dispersed. Republicans are certainly sensitive to these costs, but remain oblivious to how undocumented workers are likely to be seen in this more favorable light. For example, when illegals cut corners to achieve their goals, many Americans regard them as ambitious, admirable, even heroic. But when employers cut corners, they get criticized as cheap and mean-spirited.

Months of difficult legislative negotiations now lie ahead. If a bargain is to be struck from which their party will genuinely benefit, Republicans will need to reflect more not only on what they think about illegal immigrants, but also about those who employ them. ♦



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