

Possible Reforms of the U.S. Immigration Laws

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INTRODUCTION

In 1952, Congress passed the comprehensive federal immigration statute, the Immigration and Nationality Act (INA).¹ The law has been amended almost annually since its original enactment, sometimes in minor ways and other times with major overhauls.

The last decade has seen a series of calls for immigration reform in the United States. Many reform bills have been debated in Congress and among the public at large.² To this point, efforts to pass significant—referred to by many observers as “comprehensive”—immigration reform have failed.³

The politics of immigration are complex, with public debate of the issue often heated. Positions on immigration are not neatly divided along Republican and Democratic party lines. For example, labor unions, generally considered to be liberal politically, at times have supported immigration restrictions in hopes of protecting domestic workers, while *The Wall Street Journal*, known for its conservatism, has championed easy admission of labor.

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¹ Immigration and Nationality Act, ch. 477, 66 Stat. 163 (1952) (codified as amended in scattered sections of Titles 8, 18, and 22 U.S.C.).

² See *infra* Part II.

³ For different perspectives on comprehensive immigration reform, see Steven W. Bender, *Compassionate Immigration Reform*, 38 FORDHAM URB. L.J. 107 (2010); Sheila Jackson Lee, *Why Immigration Reform Requires a Comprehensive Approach that Includes Both Legalization Programs and Provisions to Secure the Border*, 43 HARV. J. ON LEGIS. 267 (2006); Christopher J. Walker, *Border Vigilantism and Comprehensive Immigration Reform*, 10 HARV. LATINO L. REV. 135 (2007); see also John D. Skrentny & Micah Gell-Redman, *Comprehensive Immigration Reform and the Dynamics of Statutory Entrenchment*, 120 YALE L.J. ONLINE 325 (2011) (explaining the failure of Congress to enact comprehensive immigration reform during the Bush and Obama administrations).

One complicating factor for immigration reform is that the events of September 11, 2001 have influenced the immigration debate. Even after more than a decade, any reform proposal that does not focus on border enforcement and enhanced removal efforts continues to risk claims that it poses undue risks to the national security and public safety.⁴

Part I of this Article first outlines the impacts of the contemporary operation of the U.S. immigration laws and some of the problems with the current immigration system. Part II describes various reform proposals floated in Congress in the last few years. Part III generally outlines some more far-reaching possibilities for immigration reform.

I. THE IMMIGRATION STATUS QUO

To appropriately evaluate potential immigration reforms, one must consider the operation of modern U.S. immigration law and policy and its impacts.

A. Undocumented Immigration

As President George W. Bush observed in calling for immigration reform in 2006, “*illegal immigrants live in the shadows of our society. . . . [T]he vast majority . . . are decent people who work hard, support their families, practice their faith, and lead responsible lives. They are part of American life, but they are beyond the reach and protection of American law.*”⁵

Somewhere in the neighborhood of 12 million undocumented immigrants currently live in the United States.⁶ Rather than

⁴ See BILL ONG HING, DEPORTING OUR SOULS: VALUES, MORALITY, AND IMMIGRATION POLICY 140–63 (2006); Jennifer M. Chacón, *Unsecured Borders: Immigration Restrictions, Crime Control and National Security*, 39 CONN. L. REV. 1827 (2007); see also Jonathan Hafetz, *Immigration and National Security Law: Converging Approaches to State Power, Individual Rights, and Judicial Review*, 46 REV. JUR. U.I.P.R. 787 (2012) (discussing the relationship between immigration policy and national security after September 11, 2001); Donald Kerwin & Margaret D. Stock, *The Role of Immigration in a Coordinated National Security Policy*, 21 GEO. IMMIGR. L.J. 383 (2007) (analyzing how immigration law can serve national security ends); Karen C. Tumlin, Comment, *Suspect First: How Terrorism Policy Is Reshaping Immigration Policy*, 92 CALIF. L. REV. 1173 (2004) (evaluating how post-September 11 terrorism concerns reshaped U.S. immigration law and policy).

⁵ George W. Bush, Address to the Nation on Immigration Reform (May 15, 2006), in 1 PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES 928, 928–29 (2010) (emphasis added).

⁶ JEFFREY S. PASSEL, D'VERA COHN & ANA GONZALEZ-BARRERA, PEW RESEARCH CTR., POPULATION DECLINE OF UNAUTHORIZED IMMIGRANTS STALLS, MAY HAVE REVERSED 6 (2013), available at <http://www.pewhispanic.org/files/2013/09/Unauthorized-Sept-2013-FINAL.pdf>, estimates that, as of March 2012, 11.7 million unauthorized immigrants lived in the United States. The U.S. government, whose estimates historically have been somewhat lower than those of non-governmental groups, estimated that, in 2011, 11.5 million undocumented immigrants lived in the United States compared to

engaging in futile efforts to close the border, the United States would benefit if its immigration laws better addressed the modern political, economic, and social realities currently fueling undocumented immigration and attracting the millions of people who live and work in communities across the country in contravention of the U.S. immigration laws.

Generations of migrants from Mexico have made their way to the United States.⁷ In modern times, migrants literally risk life and limb to come to this land of freedom and opportunity. Absent dramatic economic, political, and social changes, immigrants will continue to come lawfully and unlawfully to the United States in pursuit of employment and to reunite with family members.

The limited legal avenues under U.S. law for labor migration encourage migration in violation of the law by noncitizens who seek to work in the country. Many unskilled and medium-skilled workers have no line to wait in to lawfully immigrate to the United States.

Laws and policies promoting more liberal admissions would decrease the incentives for undocumented immigration. However, such policy proposals are often characterized as sacrificing national security by allowing too many immigrants into the United States. In response, commentators claim that flexible immigration admission systems would in fact better ensure national security.⁸ A scheme that better matches the demand for immigration—while minimizing the incentive for undocumented immigration and thus limiting the creation and maintenance of a population of millions of undocumented immigrants—arguably would better ensure public safety.⁹ To begin with, an immigration system that maximizes the likelihood that the U.S. government has the basic identifying information, such as name

11.6 million in 2010. See MICHAEL HOEFER, NANCY RYTINA & BRYAN BAKER, U.S. DEP'T OF HOMELAND SEC., ESTIMATES OF THE UNAUTHORIZED IMMIGRANT POPULATION RESIDING IN THE UNITED STATES: JANUARY 2011, at 1 (2012), https://www.dhs.gov/sites/default/files/publications/ois_ill_pe_2011.pdf.

⁷ See Gerald P. López, *Undocumented Mexican Migration: In Search of a Just Immigration Law and Policy*, 28 UCLA L. REV. 615, 641–72 (1981); JoAnne D. Spotts, *U.S. Immigration Policy on the Southwest Border from Reagan Through Clinton, 1981–2001*, 16 GEO. IMMIGR. L.J. 601 (2002); see also Gerald P. López, *Don't We Like Them Illegal?*, 45 U.C. DAVIS L. REV. 1711 (2012) (analyzing how the operation of the U.S. immigration laws has facilitated the creation of the undocumented immigrant population in the United States).

⁸ See, e.g., Bill Ong Hing, *Misusing Immigration Policies in the Name of Homeland Security*, 6 NEW CENTENNIAL REV. 195, 207–16 (2006); Jan Ting, *Immigration Law Reform After 9/11: What Has Been and What Still Needs to Be Done*, 17 TEMP. INT'L & COMP. L.J. 503, 512–15 (2003).

⁹ See Jeffrey Manns, *Private Monitoring of Gatekeepers: The Case of Immigration Enforcement*, 2006 U. ILL. L. REV. 887, 930–72.

and address, of as many immigrants in the United States as possible would improve criminal and immigration law enforcement and allow the nation to better protect national security.

Recent years have seen increasingly aggressive efforts in the United States to close the southern border with Mexico. However, *increased* border enforcement efforts, to the surprise of many, have been accompanied by an *increase* in the overall size of the undocumented population. One study concluded that “[t]here is *no* evidence that the border enforcement build-up . . . has substantially reduced unauthorized border crossings,” and that “[d]espite large increases in spending and Border Patrol resources . . . the number of unauthorized immigrants . . . increased to levels higher than those” before 1986.¹⁰ The bottom line is that the undocumented population in the United States has doubled since the mid-1990s.¹¹

The fact that so many undocumented immigrants live in the United States confirms what most Americans know—that the immigration laws are routinely violated and, as currently configured, are effectively unenforceable. The magnet of jobs unquestionably attracts many undocumented immigrants to the United States. Undocumented workers understand that if they are able to make the often-arduous journey to the United States, they can obtain work and that the job will pay more than most of them would have been able to earn in their native countries. Employers willingly hire undocumented workers. Day laborer pickup points in many American cities demonstrate both that undocumented immigrants can obtain work and employers are willing to hire them.¹²

Employer sanctions, which bar the employment of undocumented immigrants, added to the immigration laws in 1986 have failed to put an end to the employment of undocumented immigrants.¹³ Computer systems designed to

10 BELINDA I. REYES ET AL., *HOLDING THE LINE? THE EFFECT OF THE RECENT BORDER BUILD-UP ON UNAUTHORIZED IMMIGRATION*, at viii, xii (2002) (emphasis added).

11 See PASSEL, COHN & GONZALEZ-BARRERA, *supra* note 6, at 6.

12 For studies of day laborers, see ABEL VALENZUELA, JR. ET AL., *ON THE CORNER: DAY LABOR IN THE UNITED STATES* (2006); ABEL VALENZUELA, JR. & EDWIN MELÉNDEZ, *DAY LABOR IN NEW YORK: FINDINGS FROM THE NYDL SURVEY* (2003); see also Justin McDevitt, *Compromise Is Complicity: Why There Is No Middle Road in the Struggle to Protect Day Laborers in the United States*, 26 A.B.A. J. LAB. & EMP. L. 101 (2010) (advocating increased protection of the rights of day laborers in the United States); Kim McLane Wardlaw, *The Latino Immigration Experience*, 31 CHICANO-LATINO L. REV. 13, 30–35 (2012) (discussing the impacts of state and local regulation of day laborers on Mexican immigrants).

13 For critical analysis of the failure of employer sanctions to deter the employment of undocumented immigrants, see Cecelia M. Espenosa, *The Illusory Provisions of*

allow employers to easily verify work authorization, such as E-Verify, continue to have high error rates.¹⁴

To this point, the addition of incremental enforcement measures has had a limited impact on undocumented immigration from Mexico.¹⁵ The U.S. government simply has been unable to keep migrants—who are so determined that they are willing to risk their lives—from unlawfully entering, and remaining in, the country.¹⁶ It makes little sense from an immigration or security standpoint to simply continue to throw resources at fortifying the borders, increasing border enforcement, and engaging in the futile attempt to keep all undocumented immigrants out of the country.

The U.S. government has engaged in limited efforts to remove noncitizens who lawfully entered the country on temporary visas, such as students and tourists, but overstayed their terms. Visa overstays likely constitute somewhere between twenty-five and forty percent of the undocumented population.¹⁷ Increased monitoring of nonimmigrant visa holders after September 11 does not appear to have had much of an impact on reducing visa overstays. Raids and increased interior enforcement pursued by the Bush administration also have not reduced the undocumented population in the United States.¹⁸

Sanctions: The Immigration Reform and Control Act of 1986, 8 GEO. IMMIGR. L.J. 343 (1994); Michael J. Wishnie, *Prohibiting the Employment of Unauthorized Immigrants: The Experiment Fails*, 2007 U. CHI. LEGAL F. 193.

¹⁴ See WESTAT, FINDINGS OF THE E-VERIFY PROGRAM EVALUATION 114 (2009), available at http://www.uscis.gov/sites/default/files/USCIS/E-Verify/E-Verify/Final%20E-Verify%20Report%2012-16-09_2.pdf; Emily Patten, Note, *E-Verify During a Period of Economic Recovery and High Unemployment*, 2012 UTAH L. REV. 475, 482–83; see also T. Alexander Aleinikoff, *Administrative Law: Immigration, Amnesty, and the Rule of Law*, 2007 National Lawyers Convention of the Federalist Society, 36 HOFSTRA L. REV. 1313, 1314 (2008) (acknowledging that the United States is years away from creating a computerized system that can reliably identify undocumented workers: “There is no clear way to fix employer sanctions anytime soon. The widely discussed ‘smart cards’ or ‘swipe cards’ will be years in the making. Meanwhile, massive work will need to be done on government databases to clean up misspelled, duplicate, and false names.”) (footnote omitted).

¹⁵ See Belinda I. Reyes, *The Impact of U.S. Immigration Policy on Mexican Unauthorized Immigration*, 2007 U. CHI. LEGAL F. 131.

¹⁶ See generally PETER ANDREAS, BORDER GAMES: POLICING THE U.S.-MEXICO DIVIDE (Peter J. Katzenstein ed., 2000) (analyzing the difficulties of border enforcement in reducing undocumented immigration while offering concrete benefits to politicians in pursuing border enforcement strategies).

¹⁷ See JEFFREY S. PASSEL, PEW HISPANIC CTR., THE SIZE AND CHARACTERISTICS OF THE UNAUTHORIZED MIGRANT POPULATION IN THE U.S. 16 (2006), available at <http://pewhispanic.org/files/reports/61.pdf>.

¹⁸ See Raquel Aldana, *Of Katz and “Aliens”: Privacy Expectations and the Immigration Raids*, 41 U.C. DAVIS L. REV. 1081, 1092–96 (2008) (discussing raids of meatpacking plants); Sandra Guerra Thompson, *Immigration Law and Long-Term Residents: A Missing Chapter in American Criminal Law*, 5 OHIO ST. J. CRIM. L. 645, 655 (2008) (mentioning raids); Anil Kalhan, *The Fourth Amendment and Privacy Implications*

Resistance to interior enforcement from employers, as well as immigrant rights advocates, makes such enforcement politically challenging.¹⁹ However, increased border enforcement without any effort to tighten the availability of jobs to undocumented immigrants will ultimately do little to change the status quo. The availability of jobs unquestionably will continue to fuel migration to this country.

The current American immigration laws in many respects resemble the failed Prohibition-era anti-alcohol laws.²⁰ In both instances, enforcement of the law failed dramatically and, to make matters worse, resulted in widespread negative collateral consequences, including widespread violation of the law, increased criminal activity, and diminished public perception of the legitimacy of the law.

B. Labor Exploitation

The operation of the immigration laws has negative labor market consequences. Indeed, the large undocumented population harkens back to the days following the abolition of slavery in the United States, with a racial caste of workers relegated to a secondary labor market. As Professor Leticia Saucedo has written, the nation has seen the emergence of a “brown collar” workplace, with many Mexican migrants working in low-wage jobs.²¹ The new “Jim Crow” sees undocumented immigrants working for low wages in poor conditions—and virtually unprotected by law—in one labor market and all others in a superior, more law-abiding labor market.²²

of Interior Immigration Enforcement, 41 U.C. DAVIS L. REV. 1137 (2008) (analyzing legal impacts of raids and other forms of interior immigration enforcement); Shoba Sivaprasad Wadhia, *Under Arrest: Immigrants' Rights and the Rule of Law*, 38 U. MEM. L. REV. 853, 862–88 (2008) (same); see also David B. Thronson, *Creating Crisis: Immigration Raids and the Destabilization of Immigrant Families*, 43 WAKE FOREST L. REV. 391 (2008) (identifying negative impacts of immigration raids on families).

¹⁹ See Lori Nessel, *Undocumented Immigrants in the Workplace: The Fallacy of Labor Protection and the Need for Reform*, 36 HARV. C.R.-C.L. L. REV. 345, 359–61 (2001); Michael J. Wishnie, *Emerging Issues for Undocumented Workers*, 6 U. PA. J. LAB. & EMP. L. 497, 516–21 (2004).

²⁰ See Kevin R. Johnson, *Open Borders?*, 51 UCLA L. REV. 193, 245–52 (2003).

²¹ See Leticia M. Saucedo, *Addressing Segregation in the Brown Collar Workplace: Toward a Solution for the Inexorable 100%*, 41 U. MICH. J.L. REFORM 447 (2008); Leticia M. Saucedo, *The Browning of the American Workplace: Protecting Workers in Increasingly Latino-ized Occupations*, 80 NOTRE DAME L. REV. 303 (2004); Leticia M. Saucedo, *The Employer Preference for the Subservient Worker and the Making of the Brown Collar Workplace*, 67 OHIO ST. L.J. 961 (2006); see also Leticia M. Saucedo, *Anglo Views of Mexican Labor: Shaping the Law of Temporary Work Through Masculinities Narratives*, 13 NEV. L.J. 547 (2013) (analyzing narratives of race and masculinity used to justify the exploitation of Mexican immigrant workers).

²² See Karla Mari McKanders, *Sustaining Tiered Personhood: Jim Crow and Anti-immigrant Laws*, 26 HARV. J. ON RACIAL & ETHNIC JUST. 163 (2010).

Other adverse consequences also are associated with the current immigration laws and their enforcement. Reports of involuntary servitude of immigrants in the modern United States have increased in recent years.²³ More commonly, exploited in the workplace,²⁴ undocumented workers have legal rights that go unenforced.²⁵ Because many are people of color, the nation's labor market has a distinctively racial caste quality to it. This labor market operates outside of the confines of law, with undocumented workers enjoying few legal protections and often working for low wages in poor conditions. More realistic immigration law and policy that allows labor migration could help eliminate this secondary labor market and halt the exploitation of undocumented workers (by making them less vulnerable because of their unauthorized immigration status).

C. Human Trafficking and Death on the Border

Demand for evasion of the law by millions of undocumented immigrants has contributed to the emergence of highly organized human trafficking networks.²⁶ In no small part due to tighter

²³ See HUMAN RIGHTS CTR., UNIV. OF CAL., BERKELEY, FREEDOM DENIED: FORCED LABOR IN CALIFORNIA 1 (2005); Free the Slaves, Washington, D.C. & The Human Rights Ctr. of the Univ. of Cal., Berkeley, *Hidden Slaves: Forced Labor in the United States*, 23 BERKELEY J. INT'L L. 47 (2005); Ellen L. Buckwalter, Maria Perinetti, Susan L. Pollet & Meredith S. Salvaggio, *Modern Day Slavery in Our Own Backyard*, 12 WM. & MARY J. WOMEN & L. 403 (2006).

²⁴ See Maria L. Ontiveros, *To Help Those Most in Need: Undocumented Workers' Rights and Remedies Under Title VII*, 20 N.Y.U. REV. L. & SOC. CHANGE 607 (1993-1994); Donna E. Young, *Working Across Borders: Global Restructuring and Women's Work*, 2001 UTAH L. REV. 1.

²⁵ See, e.g., *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002) (holding that undocumented immigrant lacked full legal rights under federal labor law and was not entitled to reinstatement and back pay despite being unlawfully terminated for union-organizing activities). For critiques of the *Hoffman Plastic* decision, see, for example, Christopher David Ruiz Cameron, *Borderline Decisions: Hoffman Plastic Compounds, the New Bracero Program, and the Supreme Court's Role in Making Federal Labor Policy*, 51 UCLA L. REV. 1 (2003); Robert I. Correales, *Did Hoffman Plastic Compounds, Inc., Produce Disposable Workers?*, 14 BERKELEY LA RAZA L.J. 103 (2003); Ruben J. Garcia, *Ghost Workers in an Interconnected World: Going Beyond the Dichotomies of Domestic Immigration and Labor Laws*, 36 U. MICH. J.L. REFORM 737 (2003); María Pabón López, *The Place of the Undocumented Worker in the United States Legal System After Hoffman Plastic Compounds: An Assessment and Comparison with Argentina's Legal System*, 15 IND. INT'L & COMP. L. REV. 301 (2005); *Developments in the Law—Jobs and Borders*, 118 HARV. L. REV. 2171, 2224-47 (2005); James Lin, Note, *A Greedy Institution: Domestic Workers and a Legacy of Legislative Exclusion*, 36 FORDHAM INT'L L.J. 706 (2013).

²⁶ See Morgan Brown, *Targeting Demand: A New Approach to Curbing Human Trafficking in the United States*, 11 RICH. J. GLOBAL L. & BUS. 357 (2012); Jennifer M. Chacón, *Misery and Myopia: Understanding the Failures of U.S. Efforts to Stop Human Trafficking*, 74 FORDHAM L. REV. 2977 (2006); Jayashri Srikantiah, *Perfect Victims and Real Survivors: The Iconic Victim in Domestic Human Trafficking Law*, 87 B.U. L. REV. 157 (2007).

immigration enforcement, the trafficking of human beings today is a booming industry, with the problem extending across the entire United States. Deaths regularly occur as migrants attempt the dangerous crossing of the U.S./Mexico border.²⁷

Besides risking life and limb, some immigrants are forced to work to pay off smuggling debts, with thousands of immigrant women forced into the sex industry and other exploitative work arrangements.²⁸ The trafficking of human beings—with its devastating impacts—flows directly from heightened immigration enforcement. Recognizing the problem, Congress has passed laws in response to human trafficking but has failed to more fundamentally reform the laws that in effect encourage the unlawful labor practice.²⁹

D. A Disrespected Immigration Bureaucracy

The American immigration bureaucracy frequently is accused of being unfair and biased. Many commentators and jurists currently express a lack of respect and confidence in the agencies that enforce the immigration laws.

The Immigration and Naturalization Service (INS), which until the spring of 2003 possessed primary responsibility for enforcing the immigration laws, had long been criticized as

²⁷ For a sampling of extensive literature analyzing the deadly impacts of increased border enforcement measures, see TIMOTHY J. DUNN, *THE MILITARIZATION OF THE U.S.–MEXICAN BORDER, 1978–1992: LOW-INTENSITY CONFLICT DOCTRINE COMES HOME* (Victor J. Guerra et al. eds., 1996); KARL ESCHBACH, JACQUELINE HAGAN & NESTOR RODRIGUEZ, *CAUSES AND TRENDS IN MIGRANT DEATHS ALONG THE U.S./MEXICO BORDER, 1985–1998* (2001); JOSEPH NEVINS, *OPERATION GATEKEEPER* (2002); Wayne A. Cornelius, *Death at the Border: Efficacy and Unintended Consequences of US Immigration Control Policy*, 27 *POPULATION & DEV. REV.* 661 (2001); Karl Eschbach et al., *Death at the Border*, 33 *INT'L MIGRATION REV.* 430 (1999); Bill Ong Hing, *The Dark Side of Operation Gatekeeper*, 7 *U.C. DAVIS J. INT'L L. & POLY* 121, 123 (2001); Guillermo Alonso Meneses, *Human Rights and Undocumented Migration Along the Mexican-U.S. Border*, 51 *UCLA L. REV.* 267 (2003); Jorge A. Vargas, *U.S. Border Patrol Abuses, Undocumented Mexican Workers, and International Human Rights*, 2 *SAN DIEGO INT'L L.J.* 1 (2001). Much popular literature focuses on the travails of immigrants seeking to unlawfully enter the United States from Mexico. See, e.g., SONIA NAZARIO, *ENRIQUE'S JOURNEY* (2013); LUIS ALBERTO URREA, *THE DEVIL'S HIGHWAY: A TRUE STORY* (2004).

²⁸ See Rosy Kandathil, *Global Sex Trafficking and the Trafficking Victims Protection Act of 2000: Legislative Responses to the Problem of Modern Slavery*, 12 *MICH. J. GENDER & L.* 87 (2005); Susan W. Tiefenbrun, *Sex Slavery in the United States and the Law Enacted to Stop It Here and Abroad*, 11 *WM. & MARY J. WOMEN & L.* 317 (2005); Susan W. Tiefenbrun, *The Domestic and International Impact of the U.S. Victims of Trafficking Protection Act of 2000: Does Law Deter Crime?*, 2 *LOY. U. CHI. INT'L L. REV.* 193 (2005); see also *Human Trafficking: Modern Enslavement of Immigrant Women in the United States*, ACLU (May 31, 2007), <https://www.aclu.org/womens-rights/human-trafficking-modern-enslavement-immigrant-women-united-states>.

²⁹ See *Trafficking Victims Protection Act of 2000*, Pub. L. No. 106-386, 114 Stat. 1464, 1466 (codified as amended at 22 U.S.C. §§ 7101–7110 (2012)); *Trafficking Victims Protection Reauthorization Act of 2003*, Pub. L. No. 108-193, 117 Stat. 2875.

excessively focused on enforcement and being inefficient, arbitrary, and incompetent.³⁰ The new Department of Homeland Security (DHS) appears as enforcement-oriented as the old INS. This is not altogether surprising because the agency, as its name connotes, was created with the primary purpose of better protecting “homeland security,” not serving the needs of immigrants. Nor has the dismantling of the INS seen any dramatic improvement in the efficiency of immigration operations.³¹ Unless the DHS is reformed so that it better balances its enforcement and service functions, pouring increasing resources into the agency is unlikely to improve matters. For example, additional increases to funding to increase the number of Border Patrol officers without significantly providing sufficient training for them is likely to make matters worse, not better.³²

In addition, the decisions of the immigration courts and Board of Immigration Appeals (BIA) have been the subject of sustained criticism.³³ The Board has long been challenged for, among other things, a lack of independence and neutrality. Other criticisms run the gamut from poor quality rulings (most charitably attributed to a high volume of matters to review), to

³⁰ See Nancy Morawetz, *Understanding the Impact of the 1996 Deportation Laws and the Limited Scope of Proposed Reforms*, 113 HARV. L. REV. 1936, 1948–50 (2000); Margaret H. Taylor, *Promoting Legal Representation for Detained Aliens: Litigation and Administrative Reform*, 29 CONN. L. REV. 1647, 1698–700 (1997).

³¹ For criticism of the Department of Homeland Security’s handling of immigration matters, see M. Isabel Medina, *Immigrants and the Government’s War on Terrorism*, 6 NEW CENTENNIAL REV. 225, 230–32 (2006); Thomas W. Donovan, *The American Immigration System: A Structural Change with a Different Emphasis*, 17 INT’L. J. REFUGEE L. 574 (2005); Victor Romero, *Race, Immigration, and the Department of Homeland Security*, 19 ST. JOHN’S J. LEGAL COMMENT. 51, 52 (2004); Noël L. Griswold, Note, *Forgetting the Melting Pot: An Analysis of the Department of Homeland Security Takeover of the INS*, 39 SUFFOLK U. L. REV. 207, 227–28 (2005); Jeffrey Manns, *Legislation Comment, Reorganization as a Substitute for Reform: The Abolition of the INS*, 112 YALE L.J. 145 (2002).

³² See Ruchir Patel, *Immigration Legislation Pursuant to Threats to US National Security*, 32 DENV. J. INT’L L. & POLY 83, 97 (2003) (criticizing USA PATRIOT Act for increasing the number of Border Patrol agents but failing to ensure better training); Gabriela A. Gallegos, Comment, *Border Matters: Redefining the National Interest in U.S.-Mexico Immigration and Trade Policy*, 92 CALIF. L. REV. 1729, 1757–58 (2004) (stating that 1996 immigration reforms failed to ensure adequate training in light of “the Border Patrol’s checkered history of abuse in the Southwest”). See generally ALFREDO MIRANDÉ, *GRINGO JUSTICE* (1987) (analyzing how law, including immigration law, has been employed to subordinate persons of Mexican ancestry in the United States).

³³ See, e.g., *Sukwanputra v. Gonzales*, 434 F.3d 627, 637–38 (3d Cir. 2006); *Wang v. Attorney Gen.*, 423 F.3d 260 (3d Cir. 2005); *Nuru v. Gonzales*, 404 F.3d 1207, 1229 (9th Cir. 2005); Pamela A. MacLean, *Immigration Judges Come Under Fire*, NAT’L L.J., Jan. 30, 2006, at 1; see also Stephen H. Legomsky, *Restructuring Immigration Adjudication*, 59 DUKE L.J. 1635 (2010) (proposing the abolition of the Board of Immigration Appeals and appellate review by the court of appeals and replacing such review with appeals to a new Article III Court of Immigration Appeals).

bias against noncitizens, to simple incompetence. Such criticism increased after the BIA changed its procedures in 2002 to expedite its rulings in an attempt to reduce a large backlog of appeals.³⁴

Respected court of appeals judge Richard Posner, a conservative appointed to the federal bench by Republican President Ronald Reagan, is a vocal critic of the decisions of the BIA.³⁵ As Judge Posner succinctly stated in one immigration appeal, “[a]t the risk of sounding like a broken record, we reiterate our oft-expressed concern with the adjudication of asylum claims by the Immigration Court and the Board of Immigration Appeals and with the defense of the BIA’s asylum decisions in this court.”³⁶ In another opinion, he stated, “We understand the Board’s staggering workload. But the Department of Justice cannot be permitted to defeat judicial review by refusing to staff the Immigration Court and the Board of Immigration Appeals with enough judicial officers to provide reasoned decisions.”³⁷ Judge Posner in still another opinion emphasized that

[d]eference is earned; it is not a birthright. Repeated egregious failures of the Immigration Court and the Board to exercise care commensurate with the stakes in an asylum case can be understood, but not excused, as consequences of a crushing workload that the executive and legislative branches of the federal government have refused to alleviate.³⁸

The immigration courts also have been the subject of public criticism. In late 2005, *The New York Times* ran a front page story about how immigration judges, at times in mean-spirited and disrespectful ways, callously treated noncitizens and disposed of their cases.³⁹ In response, then-Attorney General

³⁴ See Stacy Caplow, *After the Flood: The Legacy of the “Surge” of Federal Immigration Appeals*, 7 NW. J.L. & SOC. POLY 1 (2012) (discussing the surge of appeals in the federal courts following the BIA’s streamlining measures); Jill E. Family, *Beyond Decisional Independence: Uncovering Contributors to the Immigration Adjudication Crisis*, 59 U. KAN. L. REV. 541 (2011) (analyzing contemporary immigration adjudication problems, including the dilution of judicial review resulting from streamlining measures); Scott Rempell, *The Board of Immigration Appeals’ Standard of Review: An Argument for Regulatory Reform*, 63 ADMIN. L. REV. 283 (2011) (studying the impacts of the reforms on the Board’s standard of review).

³⁵ See, e.g., *Benslimane v. Gonzales*, 430 F.3d 828, 829–30 (7th Cir. 2005); *Iao v. Gonzales*, 400 F.3d 530, 534–35 (7th Cir. 2005). For analysis of Judge Posner’s immigration jurisprudence, see Adam B. Cox, *Deference, Delegation, and Immigration Law*, 74 U. CHI. L. REV. 1671, 1679–87 (2007).

³⁶ *Pasha v. Gonzales*, 433 F.3d 530, 531 (7th Cir. 2005).

³⁷ *Mekhael v. Mukasey*, 509 F.3d 326, 328 (7th Cir. 2007).

³⁸ *Kadia v. Gonzales*, 501 F.3d 817, 821 (7th Cir. 2007).

³⁹ See Adam Liptak, *Courts Criticize Judges’ Handling of Asylum Cases*, N.Y. TIMES, Dec. 26, 2005, at A1.

Alberto Gonzales formally instructed the immigration judges to improve their conduct.⁴⁰ The Bush administration also was found to have employed political litmus tests in the selection of immigration court judges.⁴¹

Along these lines, an empirical study of asylum decision-making published in 2009 has shown widely disparate results in the asylum decisions of immigration judges.⁴² The evidence suggests a chronic problem in the quality and consistency of the immigration court and BIA decisions, thereby placing their legitimacy in serious question.

Concerns with immigration adjudication persist. In 2013, the president of the National Association of Immigration Judges offered one possible solution:

Immigration courts must be restructured as real courts under Article I of the Constitution, similar to Tax and Bankruptcy Courts, so we can maintain administrative independence and ensure total transparency in our proceedings. This would free them from any control or influence by the Attorney General or Department of Homeland Security. While seemingly technical, this change is essential to achieve the most fundamental expectation we American's [sic] hold about judges: that they are independent and protected from undue influence by any party to their proceedings. It is a reform which is much needed and long overdue.⁴³

⁴⁰ For discussion of the Attorney General's memorandum, see *Cham v. Attorney Gen.*, 445 F.3d 683, 686–89 (3d Cir. 2006).

⁴¹ The Office of the Inspector General concluded that, during the Bush administration, ties to the Republican Party, among other political considerations, were taken into consideration in the selection of immigration judges. See OFFICE OF PROF'L RESP. & OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF JUSTICE, AN INVESTIGATION OF ALLEGATIONS OF POLITICIZED HIRING BY MONICA GOODLING AND OTHER STAFF IN THE OFFICE OF THE ATTORNEY GENERAL 69 (2008), available at <http://www.justice.gov/oig/special/s0807/final.pdf>.

⁴² See JAYA RAMJI-NOGALES, ANDREW I. SCHOENHOLTZ & PHILIP G. SCHRAG, REFUGEE ROULETTE: DISPARITIES IN ASYLUM ADJUDICATION AND PROPOSALS FOR REFORM (2009). For commentary on the study, see Stephen H. Legomsky, *Learning to Live with Unequal Justice: Asylum and the Limits to Consistency*, 60 STAN. L. REV. 413 (2007); Margaret H. Taylor, *Refugee Roulette in an Administrative Law Context: The Déjà vu of Decisional Disparities in Agency Adjudication*, 60 STAN. L. REV. 475 (2007); see also Kate Aschenbrenner, *Ripples Against the Other Shore: The Impact of Trauma Exposure on the Immigration Process Through Adjudicators*, 19 MICH. J. RACE & L. 53 (2013) (analyzing the impact of trauma suffered by immigrants on immigration adjudicators); Elizabeth Keyes, *Beyond Saints and Sinners: Discretion and the Need for New Narratives in the U.S. Immigration System*, 26 GEO. IMMIGR. L.J. 207 (2012) (examining narratives of "good" and "bad" immigrants that affect the exercise of discretion by immigration courts); Fatma E. Marouf, *Implicit Bias and Immigration Courts*, 45 NEW ENG. L. REV. 417 (2011) (analyzing implicit bias that influences the decisions of immigration judges).

⁴³ Dana Leigh Marks, *Let Immigration Judges Be Judges*, HILL (May 09, 2013, 8:03 PM), <http://thehill.com/blogs/congress-blog/judicial/298875-let-immigration-judges-be-judges>.

E. The Need for More Reasonable Immigration Laws

A system that authorizes easier migration of labor to the United States would likely decrease the incentive for circumventing the immigration laws. More liberal admissions grounds that allow workers and migrants who lack family members in the United States to lawfully enter into this nation would be a good first step.

To this end, narrower inadmissibility grounds in the U.S. immigration laws would be more realistic than the current blanket exclusions that, for example, bar the immigration of poor and working people from the developing world.⁴⁴ With relaxation of the inadmissibility grounds, the nation could devote scarce enforcement resources to efforts to bar the entry into the United States of criminals, terrorists, and other serious dangers to society. As seen in other areas of law enforcement, more focused immigration law enforcement has a greater likelihood of rooting out public safety risks than scattershot efforts that infringe on the civil rights of large numbers of people.⁴⁵

Moreover, more carefully crafted immigration enforcement is less likely to frighten immigrant communities—the very communities whose assistance is essential if the United States truly seeks to successfully combat global terrorism and crime generally. Unfortunately, the “war on terror” following September 11, 2001 has almost undoubtedly chilled Arabs and Muslims living in the United States from cooperating with the government in counter-terrorism efforts.⁴⁶

A system in which undocumented migration is reduced would allow for improved tracking of all noncitizens entering and living in the United States. It is difficult to see how the existence of millions of undocumented immigrants living off the grid could

⁴⁴ See, e.g., Immigration & Nationality Act § 212(a)(4), 8 U.S.C. § 1182(a)(4) (2012) (providing that “[a]ny alien . . . likely at any time to become a public charge is inadmissible”). See generally KEVIN R. JOHNSON, THE “HUDDLED MASSES” MYTH: IMMIGRATION AND CIVIL RIGHTS 91–108 (2004) (analyzing history of excluding poor and working noncitizens from the United States). Statistics for fiscal year 2013 show that the public charge exclusion was a substantive ground frequently relied upon in the denial of immigrant visas by the State Department. See OFFICE OF VISA SERVS., U.S. DEP’T OF STATE, REPORT OF THE VISA OFFICE 2013, at tbl.xx (2013), available at <http://travel.state.gov/content/dam/visas/Statistics/AnnualReports/FY2013AnnualReport/FY13AnnualReport-TableXX.pdf>.

⁴⁵ See Kevin R. Johnson, *U.S. Border Enforcement: Drugs, Migrants, and the Rule of Law*, 47 VILL. L. REV. 897, 912–15 (2002) (reviewing experience of U.S. Customs Service and its adoption of a policy limiting searches, resulting in fewer searches and increased rate of searches finding contraband).

⁴⁶ See Susan M. Akram & Kevin R. Johnson, *Race, Civil Rights, and Immigration Law After September 11, 2001: The Targeting of Arabs and Muslims*, 58 N.Y.U. ANN. SURV. AM. L. 295, 327–55 (2002).

in any way be in the national interest. Nor is there sufficient evidence that the U.S. government as a practical matter could end undocumented immigration under the current laws and remove all undocumented immigrants from the country.

Consider the available evidence. Despite record levels of removals in the years since September 11, 2001,⁴⁷ officials at the highest levels of the U.S. government recognize that removal of all undocumented immigrants from the country is simply not possible. In 2006, President George W. Bush himself acknowledged that “[m]assive deportation of the people here is unrealistic. It’s just not going to work.”⁴⁸ President Obama has made similar statements.⁴⁹ A 2005 study estimated that it would cost \$41 billion a year for five years to fund a serious effort to remove all undocumented immigrants from the country.⁵⁰

At the same time, more liberal admissions of immigrants to the United States arguably would benefit the national economy. The Economic Reports of the President in both the Bush (Republican) and Obama (Democratic) administrations have extolled the benefits of immigrants to the U.S. economy.⁵¹ The Obama administration has argued that immigration reform would bring substantial economic benefits.⁵²

Some contend that incremental reform will not work and that bolder initiatives are necessary to cure the ills of modern U.S. immigration law. In that vein, the possibility of much more

47 See JOHN F. SIMANSKI & LESLEY M. SAPP, U.S. DEPT OF HOMELAND SEC., IMMIGRATION ENFORCEMENT ACTIONS: 2012 (2013), available at http://www.dhs.gov/sites/default/files/publications/ois_enforcement_ar_2012_1.pdf. For statistics on the number of unauthorized immigrants removed from the United States since 2001, see OFFICE OF IMMIGRATION STATISTICS, U.S. DEPT OF HOMELAND SEC., 2012 YEARBOOK OF IMMIGRATION STATISTICS 103 (2013), available at http://www.dhs.gov/sites/default/files/publications/ois_yb_2012.pdf.

48 Elisabeth Bumiller, *In Immigration Remarks, Bush Hints He Favors Senate Plan*, N.Y. TIMES, Apr. 25, 2006, at A22 (emphasis added) (quoting President Bush).

49 See *Obama Addresses the National Council of La Raza*, WASH. POST (July 15, 2008, 10:49 AM), http://www.washingtonpost.com/wp-dyn/content/article/2008/07/15/AR2008071501138_pf.html (advocating a path to legalization for undocumented immigrants: “we cannot and should not deport 12 million people”).

50 See RAJEEV GOYLE & DAVID A. JAEGER, CTR. FOR AM. PROGRESS, DEPORTING THE UNDOCUMENTED: A COST ASSESSMENT 1–2 (2005).

51 See COUNCIL OF ECON. ADVISERS, EXEC. OFFICE OF THE PRESIDENT, ECONOMIC REPORT OF THE PRESIDENT 154–56 (2013), available at http://www.whitehouse.gov/sites/default/files/docs/erp2013/full_2013_economic_report_of_the_president.pdf; COUNCIL OF ECON. ADVISERS, EXEC. OFFICE OF THE PRESIDENT, ECONOMIC REPORT OF THE PRESIDENT 93 (2005), available at <http://www.gpo.gov/fdsys/browse/collection.action?collectionCode=ERP>.

52 See EXEC. OFFICE OF THE PRESIDENT, THE ECONOMIC BENEFITS OF FIXING OUR BROKEN IMMIGRATION SYSTEM (2013), available at <http://www.whitehouse.gov/sites/default/files/docs/report.pdf>.

open borders has been advocated.⁵³ In an era of an increasingly integrated world economy, the United States arguably requires a system of immigration admissions that better comports with social, political, and economic factors contributing to immigration than the current system.⁵⁴ At a most fundamental level, the nation needs immigration laws that avoid the creation and re-creation of an undocumented immigrant population numbering in the millions.

II. CONGRESSIONAL PROPOSALS FOR IMMIGRATION REFORM

For roughly a decade, the nation has engaged in a fractious national debate over reform of the immigration laws, with a special focus on undocumented immigration from Mexico. The proposals frequently call for legalization of undocumented immigrants, “guest” (or temporary) worker programs,⁵⁵ and a myriad of enforcement measures. The granting of “amnesty” to undocumented immigrants in some of the proposals became a charged political accusation and contributed to political opposition to any reform proposal including a path to legalization for undocumented immigrants.⁵⁶

In December 2005, the House of Representatives passed what was known as the Sensenbrenner bill,⁵⁷ named after its sponsor, Representative James Sensenbrenner. The tough nature of the bill sparked protests of thousands of immigrants and their

⁵³ See, e.g., KEVIN R. JOHNSON, *OPENING THE FLOODGATES: WHY AMERICA NEEDS TO RETHINK ITS BORDERS AND IMMIGRATION LAWS* (2007); JASON L. RILEY, *LET THEM IN: THE CASE FOR OPEN BORDERS* (2008); SATVINDER SINGH JUSS, *INTERNATIONAL MIGRATION AND GLOBAL JUSTICE* (2006); TERESA HAYTER, *OPEN BORDERS: THE CASE AGAINST IMMIGRATION CONTROLS* (2d ed. 2004).

⁵⁴ See Walter A. Ewing, *From Denial to Acceptance: Effectively Regulating Immigration to the United States*, 16 *STAN. L. & POL'Y REV.* 445, 445 (2005) (“U.S. immigration policy is based on denial. Most lawmakers in the United States have largely embraced the process of economic ‘globalization,’ yet stubbornly refuse to acknowledge that increased migration, especially from developing nations to developed nations, is an integral and inevitable part of this process.”).

⁵⁵ For critical analysis of guest worker programs, see Cristina M. Rodríguez, *Guest Workers and Integration: Toward a Theory of What Immigrants and Americans Owe One Another*, 2007 *U. CHI. LEG. F.* 219; Karla M. Campbell, *Guest Worker Programs and the Convergence of U.S. Immigration and Development Policies: A Two-Factor Economic Model*, 21 *GEO. IMMIGR. L.J.* 663 (2007). Howard F. Chang, *Liberal Ideals and Political Feasibility: Guest-Worker Programs as Second-Best Policies*, 27 *N.C. J. INT'L L. & COM. REG.* 465 (2002), provides a partial defense to guest worker programs.

⁵⁶ See Bryn Siegel, Note, *The Political Discourse of Amnesty in Immigration Policy*, 41 *AKRON L. REV.* 291 (2008). For a defense of amnesty, see Bill Ong Hing, *The Case for Amnesty*, 3 *STAN. J. C.R. & C.L.* 233 (2007).

⁵⁷ Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005, H.R. 4437, 109th Cong. (2005). The Sensenbrenner bill, among other things, would have made the mere status of being an undocumented immigrant a felony subject to imprisonment and would have imposed criminal sanctions on persons who provided humanitarian assistance to undocumented immigrants. See *id.* §§ 203, 205.

supporters across the United States.⁵⁸ Shortly thereafter, the Senate passed a more moderate reform proposal, which included legalization and guest worker programs in addition to more moderate enforcement measures than in the Sensenbrenner bill.⁵⁹ Ultimately, the controversy ended in 2006 with Congress failing to enact immigration reform. It instead agreed only to authorize extension of a fence along the United States' southern border with Mexico.⁶⁰ Congress did so even though there is no evidence that this, or any other border enforcement measure alone, will decrease the flow of undocumented immigrants to the United States.⁶¹

In the 2008 election campaign, President Obama expressed support for immigration reform, with a majority of Latina/o voters supporting him.⁶² His administration renewed calls for comprehensive immigration reform.⁶³ In 2013, the Senate passed the Border Security, Economic Opportunity, and Immigration Modernization Act (S. 744),⁶⁴ which was co-sponsored by a bipartisan group of Senators. The bill generally has four basic objectives:

- (1) creating a path to citizenship for the approximately 11 million undocumented aliens currently living in the United States; (2)

⁵⁸ For analysis of the spring 2006 immigrant rights marches, see Kevin R. Johnson & Bill Ong Hing, *The Immigrant Rights Marches of 2006 and the Prospects for a New Civil Rights Movement*, 42 HARV. C.R.-C.L. L. REV. 99 (2007); Sylvia R. Lazos Vargas, *The Immigrant Rights Marches (Las Marchas): Did the "Gigante" (Giant) Wake Up or Does It Still Sleep Tonight?*, 7 NEV. L.J. 780 (2007).

⁵⁹ Comprehensive Immigration Reform Act of 2006, S. 2611, 109th Cong. (2006).

⁶⁰ See Secure Fence Act of 2006, Pub. L. No. 109-367, 120 Stat. 2638. For analysis of the political symbolism of the U.S./Mexico border fence, see Pratheepan Gulasekaram, *Why a Wall?*, 2 U.C. IRVINE L. REV. 147 (2012).

⁶¹ See JOHNSON, *supra* note 53, at 114–15.

⁶² See MARK HUGO LOPEZ, PEW HISPANIC CTR., *THE HISPANIC VOTE IN THE 2008 ELECTION*, at i–ii (2008), available at www.pewhispanic.org/files/reports/98.pdf (stating that Latina/os voted for the Democratic presidential ticket by a 2:1 margin over the Republican candidates for President and Vice President).

⁶³ See THE WHITE HOUSE, *BUILDING A 21ST CENTURY IMMIGRATION SYSTEM* (2011), available at http://www.whitehouse.gov/sites/default/files/rss_viewer/immigration_blue_print.pdf.

⁶⁴ Border Security, Economic Opportunity, and Immigration Modernization Act, S. 744, 113th Cong. (2013), available at <http://www.gpo.gov/fdsys/pkg/BILLS-113s744pap/pdf/BILLS-113s744pap.pdf>. The Senate passed the bill by a margin of 68 to 32. See *U.S. Senate Roll Call Votes 113th Congress – 1st Session*, U.S. SENATE (June 27, 2013, 4:11 PM), http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=113&session=1&vote=00168. For analysis of S. 744's provisions, see NAT'L IMMIGRATION LAW CTR., *SUMMARY & ANALYSIS: BORDER SECURITY, ECONOMIC OPPORTUNITY, AND IMMIGRATION MODERNIZATION ACT OF 2013* (2013), available at www.nilc.org/document.html?id=895; CONG. BUDGET OFFICE, *THE ECONOMIC IMPACT OF S. 744, THE BORDER SECURITY, ECONOMIC OPPORTUNITY, AND IMMIGRATION MODERNIZATION ACT* (2013), available at <http://www.cbo.gov/sites/default/files/cbofiles/attachments/44346-Immigration.pdf>; Claire Bergeron, *Current Developments, Bipartisan "Gang of Eight" Bill Would Dramatically Alter US Immigration Law*, 27 GEO. IMMIGR. L.J. 431 (2013).

reforming America's immigration system to better recognize characteristics that will help build the economy; (3) implementing an effective employment verification system; and (4) establishing an improved process for admitting future workers.⁶⁵

Despite bipartisan support, as well as a push from the White House, as this Article goes to press, the House of Representatives has not voted on the Senate bill or any alternative comprehensive immigration reform proposal.⁶⁶

A. The DREAM Act

Congress has considered many versions of a bill narrower in scope than the various comprehensive immigration reform proposals that would expressly permit states to allow undocumented students to pay in-state fees to attend public colleges and universities and to regularize their immigration status.⁶⁷ Members of Congress almost annually sponsor legislation known as the Development, Relief and Education for Alien Minors (DREAM) Act.⁶⁸

Versions of the DREAM Act would have defined residency requirements for in-state tuition without regard to immigration

⁶⁵ Brandon E. Davis, *The Border Security, Economic Opportunity, and Immigration Modernization Act: An Overview of the Changes Employers May Expect Following Comprehensive Immigration Reform*, FED. LAW., Jan./Feb. 2014, at 24, 26.

⁶⁶ See Wesley Lowery, *House Democrats Need 27 Signatures to Force Vote on Comprehensive Immigration Reform Bill*, WASH. POST (Apr. 15, 2014), <http://www.washingtonpost.com/blogs/post-politics/wp/2014/04/15/house-democrats-need-27-signatures-to-force-vote-on-comprehensive-immigration-reform-bill/>; David Nakamura, *U.S. Chamber of Commerce Pushes House GOP on Immigration Reform*, WASH. POST (Feb. 25, 2014), <http://www.washingtonpost.com/blogs/post-politics/wp/2014/02/25/u-s-chamber-of-commerce-pushes-house-gop-on-immigration-reform/>.

⁶⁷ See Michael A. Olivas, *IIRIRA, The DREAM Act, and Undocumented College Student Residency*, 30 J.C. & U.L. 435, 452–57 (2004); Thomas R. Ruge & Angela D. Iza, *Higher Education for Undocumented Students: The Case for Open Admissions and In-State Tuition Rates for Students Without Lawful Immigration Status*, 15 IND. INT'L & COMP. L. REV. 257, 266–74 (2005).

⁶⁸ See Kevin R. Johnson, *A Handicapped, Not "Sleeping," Giant: The Devastating Impact of the Initiative Process on Latina/o and Immigrant Communities*, 96 CALIF. L. REV. 1259, 1280–82 (2008). For arguments favoring enactment of the DREAM Act, see Berta Hernández-Truyol & Justin Luna, *Children and Immigration: International, Local, and Social Responsibilities*, 15 B.U. PUB. INT. L.J. 297, 314–16 (2006); Victor C. Romero, *Postsecondary School Education Benefits for Undocumented Immigrants: Promises and Pitfalls*, 27 N.C. J. INT'L L. & COM. REG. 393 (2002); Susana Garcia, Comment, *Dream Come True or True Nightmare? The Effect of Creating Educational Opportunity for Undocumented Youth*, 36 GOLDEN GATE U. L. REV. 247 (2006); Youngro Lee, Note, *To Dream or Not to Dream: A Cost-Benefit Analysis of the Development, Relief, and Education for Alien Minors (DREAM) Act*, 16 CORNELL J.L. & PUB. POLY 231 (2006); Vicky J. Salinas, Comment, *You Can Be Whatever You Want to Be When You Grow Up, Unless Your Parents Brought You to This Country Illegally: The Struggle to Grant In-State Tuition to Undocumented Immigrant Students*, 43 HOUS. L. REV. 847 (2006); see also María Pabón López, *Reflections on Educating Latino and Latina Undocumented Children: Beyond Plyler v. Doe*, 35 SETON HALL L. REV. 1373, 1400–04 (2005) (summarizing status of undocumented student access to higher education).

status, provided a path to legalization for eligible undocumented students, and made undocumented students eligible for federal financial aid (which they currently are not). Immigration restrictionists harshly criticize the many iterations of the DREAM Act, contending, among other things, that they reward unlawful conduct and amount to an “amnesty” for undocumented immigrants.⁶⁹

In 2007, the DREAM Act was part of a comprehensive Senate immigration bill that Congress ultimately failed to enact.⁷⁰ A subsequent version of the Act, which would have permitted a path to legalization for undocumented high school graduates who attend college or serve in the military, failed in the U.S. Senate.⁷¹ To date, Congress has not passed any version of the DREAM Act.

Although lacking authority to provide a path to legalization for undocumented immigrant students, some states, including California, have expanded access for undocumented students to public colleges and universities.⁷² In contrast, Arizona voters passed an initiative that barred public universities from providing undocumented students with any “public benefits,” including in-state fees, state financial aid, or enrollment in adult education classes.⁷³

⁶⁹ See Julia Preston, *In Increments, Senate Revisits Immigration Bill*, N.Y. TIMES, Aug. 3, 2007, at A1 (noting opposition to the DREAM Act in the House of Representatives and quoting Representative Brian P. Bilbray, who referred to the bill as “the Nightmare Act”). Compare Kris W. Kobach, *Immigration Nullification: In-State Tuition and Lawmakers Who Disregard the Law*, 10 N.Y.U. J. LEGIS. & PUB. POLY 473 (2007) (criticizing strongly state and federal DREAM Acts), with Michael A. Olivas, *Lawmakers Gone Wild? College Residency and the Response to Professor Kobach*, 61 SMU L. REV. 99 (2008) (advocating passage of these laws).

⁷⁰ See Preston, *supra* note 69.

⁷¹ See Karin Brulliard, *Bill Aimed at Immigrant Children Fails*, WASH. POST, Oct. 25, 2007, at A12.

⁷² See, e.g., *Martinez v. Regents of the Univ. of Cal.*, 241 P.3d 855 (Cal. 2010), *cert. denied*, 131 S. Ct. 2961 (2011) (rejecting a challenge to a California law that allows certain graduates of California high schools, including undocumented immigrants, to pay the same fees as state residents to attend the University of California, state universities, and community colleges). For analysis of the *Martinez* decision, see Kyle William Colvin, Note, *In-State Tuition and Illegal Immigrants: An Analysis of Martinez v. Regents of the University of California*, 2010 BYU EDUC. & L.J. 391; Beverly N. Rich, Note, *Tracking AB 540's Potential Resilience: An Analysis of In-State Tuition for Undocumented Students in Light of Martinez v. Regents of the University of California*, 19 S. CAL. REV. L. & SOC. JUST. 297 (2010).

⁷³ See *Friendly House v. Napolitano*, 419 F.3d 930 (9th Cir. 2005); *Yes on Prop 200 v. Napolitano*, 160 P.3d 1216 (Ariz. Ct. App. 2007). Arizona Governor Jan Brewer later issued an order that prohibited public colleges and universities from allowing undocumented students granted relief by the U.S. government under the Deferred Action for Childhood Arrivals (DACA) program from eligibility for in-state university fees, or any public benefits. Ariz. Exec. Order No. 2012-06, 18 Ariz. Admin. Reg. 2237 (Sept. 7, 2012), available at <http://www.azsos.gov/aar/2012/36/governor.pdf>. Although the executive order does not specifically refer to in-state tuition eligibility, Governor Brewer stated that

B. Prosecutorial Discretion and Deferred Action for Childhood Arrivals

With Congress failing to pass immigration reform, the Obama administration took a number of steps to fine-tune its immigration enforcement efforts. While focusing its efforts on immigrants with brushes with the criminal law, it administratively employed its discretionary authority to make certain removal cases a low priority.

One important area of deferred action involved a category of noncitizens who would have benefitted from passage of the DREAM Act. In June 2012, the U.S. Department of Homeland Security announced the Deferred Action for Childhood Arrivals program (DACA), an exercise of prosecutorial discretion that provides temporary relief from removal on a case-by-case basis to those who entered the United States as children.⁷⁴ To be eligible for relief, a noncitizen must have entered the United States before the age of sixteen; continuously resided in the United States since June 15, 2007; been physically present in the United States and not over the age of thirty when DACA was announced; have not been convicted of a felony, a significant misdemeanor, or multiple misdemeanors; not pose a threat to national security or public safety; and be currently in school, graduated from high school, obtained a General Educational Development (GED) certification, or be an honorably discharged veteran of the U.S. Coast Guard or Armed Forces.⁷⁵ DACA recognizes its

in-state tuition for DACA recipients would be unlawful under the order. See Daniel González, *Young Migrants May Get Arizona College Tuition Break*, ARIZ. REPUBLIC (Sept. 12, 2012), <http://www.azcentral.com/news/articles/20120912young-migrants-may-get-arizona-college-tuition-break.html> (“The executive order did not address tuition specifically, but Brewer said afterward that allowing illegal immigrants to pay in-state tuition even if they receive deferred action and work permits would violate state law.”).

⁷⁴ Memorandum from Janet Napolitano, Sec’y of Homeland Sec., U.S. Dep’t of Homeland Sec., to David V. Aguilar, Acting Comm’r, U.S. Customs & Border Prot., Alejandro Mayorkas, Dir., U.S. Citizenship & Immigration Servs., and John Morton, Dir., U.S. Immigration & Customs Enforcement (June 15, 2012) [hereinafter DHS Memorandum], available at <http://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf>. For criticism of the DACA program, see Robert J. Delahunty & John C. Yoo, *Dream On: The Obama Administration’s Nonenforcement of Immigration Laws, the DREAM Act, and the Take Care Clause*, 91 TEX. L. REV. 781, 784–85, 856 (2013) (arguing that by authorizing the DACA program, President Obama breached his responsibility to faithfully enforce the immigration laws). *But see* Shoba Sivaprasad Wadhia, Response, *In Defense of DACA, Deferred Action, and the DREAM Act*, 91 TEX. L. REV. 59, 62–68 (2013) (defending program as consistent with the executive exercise of prosecutorial discretion by the Executive Branch in immigration matters), available at <http://www.texaslrev.com/wp-content/uploads/Wadhia.pdf>.

⁷⁵ DHS Memorandum, *supra* note 74, at 1.

beneficiaries to be “low priority cases” for removal from the United States.⁷⁶

By the end of the first quarter of fiscal year 2014, U.S. Citizenship and Immigration Services reported that it had received a total of 638,054 DACA applications, approved 521,815, and denied 15,968.⁷⁷ In 2014, DHS announced a renewal program for DACA recipients.⁷⁸

DACA recipients are able to obtain employment authorization, a Social Security number, and, in many states, a driver’s license.⁷⁹ However, the relatively high \$465 filing fee and the requirement of documentation of continuous presence in the United States since 2007 can serve as impediments to successful applications,⁸⁰ which may help explain why many eligible noncitizens have not applied for DACA relief.

Thus far, DACA has helped more than a half million immigrants “who were brought to this country as children and know only this country as home.”⁸¹ As one commentator has noted, however, “it is not a permanent solution and does not grant [recipients] any long-term immigration status stability.”⁸²

III. ALTERNATIVE VISIONS

Future possibilities for immigration reform run the gamut. Reform could represent incremental changes to the current immigration laws, with “comprehensive” immigration reform similar to S. 744 a possibility.⁸³ As one commentator observed,

⁷⁶ See *id.*

⁷⁷ U.S. CITIZENSHIP & IMMIGRATION SERVS., NUMBER OF I-821D, CONSIDERATION OF DEFERRED ACTION FOR CHILDHOOD ARRIVALS BY FISCAL YEAR, QUARTER, INTAKE, BIOMETRICS AND CASE STATUS: 2012–2014 FIRST QUARTER (2014), available at <http://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/All%20Form%20Types/DACA/DACA-06-02-14.pdf>.

⁷⁸ See *Secretary Johnson Announces Process for DACA Renewal*, U.S. CITIZENSHIP & IMMIGR. SERVICES (June 5, 2014), <http://www.uscis.gov/news/secretary-johnson-announces-process-daca-renewal>.

⁷⁹ See *Frequently Asked Questions: The Obama Administration’s Deferred Action for Childhood Arrivals (DACA)*, NAT’L IMMIGR. L. CENTER (June 13, 2014), <http://www.nilc.org/FAQdeferredactionyouth.html>.

⁸⁰ AUDREY SINGER & NICOLE PRCHAL SVAJLENKA, METRO. POLICY PROGRAM AT BROOKINGS, IMMIGRATION FACTS: DEFERRED ACTION FOR CHILDHOOD ARRIVALS (DACA) 2 (2013), available at http://www.brookings.edu/~media/research/files/reports/2013/08/14%20daca/daca_singer_svajlenka_final.pdf.

⁸¹ DHS Memorandum, *supra* note 74.

⁸² Mariela Olivares, *Renewing the Dream: DREAM Act Redux and Immigration Reform*, 16 HARV. LATINO L. REV. 79, 91 (2013).

⁸³ See, e.g., Kevin R. Johnson, *Ten Guiding Principles for Truly Comprehensive Immigration Reform: A Blueprint*, 55 WAYNE L. REV. 1599 (2009); Doris Meissner, *Keynote Address*, 16 TEMP. POL. & CIV. RTS. L. REV. 309 (2007); Asa Hutchinson, *Keynote Address*, 59 ADMIN. L. REV. 533, 537–38 (2007).

A thoughtful and responsible reform package must accomplish a few things. First, it must address the dilemma of the existing undocumented immigrant population in our country. Second, it must regulate future flows of immigrants consistent with our labor market needs and economic interests in an increasingly inter-dependent world. Third, it must advance the protection of both U.S. and foreign workers. Finally, it must reflect the deeply engrained American value of fairness.⁸⁴

The author of this Article has argued that economic, moral, and policy arguments militate in favor of more liberal admissions of immigrants to the United States than that provided by current law.⁸⁵ A related possibility is the greater economic integration, including the integration of labor markets, of the United States, Canada, and Mexico modeled after the relatively successful European Union.

A. A North American Union? Increased Economic Integration of Canada, Mexico, and the United States

At the tail end of the twentieth century, regional common markets gained popularity. Many nations perceived the economic benefits of more integrated economies. At the same time, there was reluctance to move from a restricted to a more open scheme immediately. In several important instances, including the European Union, labor migration between the member nations evolved out of increased trade of goods and services.

The U.S. government at some point may consider regularizing the flow of labor from Mexico into the United States.⁸⁶ The North American Free Trade Agreement (NAFTA) might be expanded to permit labor migration that mirrors the free trade of goods and services among the member nations. A North American Union modeled on the European Union could

⁸⁴ Muzaffar Chishti, *A Redesigned Immigration Selection System*, 41 CORNELL INT'L L.J. 115, 116 (2008); see Johnson, *supra* note 83.

⁸⁵ See JOHNSON, *supra* note 53.

⁸⁶ Considerable attention has been paid to the growing economic integration of North America. See, e.g., THE FUTURE OF NORTH AMERICAN INTEGRATION: BEYOND NAFTA (Peter Hakim & Robert E. Litan eds., 2002); ERIC HELLEINER, TOWARDS NORTH AMERICAN MONETARY UNION? THE POLITICS AND HISTORY OF CANADA'S EXCHANGE RATE REGIME (2006); Emily Gilbert, *Money, Citizenship, Territoriality and the Proposals for North American Monetary Union*, 26 POL. GEOGRAPHY 141 (2007); Emily Gilbert, *The Inevitability of Integration? Neoliberal Discourse and the Proposals for a New North American Economic Space After September 11*, 95 ANNALS ASS'N AM. GEOGRAPHERS 202 (2005); Axel Huelsemeyer, *Toward Deeper North American Integration: A Customs Union?*, CANADIAN-AM. PUB. POL'Y, Oct. 2004, at 2. Of course, opposition to any such union is strong. See, e.g., JEROME R. CORSI, THE LATE GREAT USA: THE COMING MERGER WITH MEXICO AND CANADA (2007); COLIN D. STANDISH & RUSSELL R. STANDISH, THE EUROPEAN UNION, THE NORTH AMERICAN UNION, THE PAPACY, & GLOBALISM (2007).

permit labor migration among Canada, Mexico, and the United States.⁸⁷

Some preliminary steps might be necessary before the implementation of a North American regional migration arrangement. Noting that the European Union invested billions of dollars in the infrastructure of new member nations, one observer argues that the United States must consider an economic adjustment strategy for Mexico to decrease migration pressures and allow for the possibility of more manageable free labor movement into the United States.⁸⁸

B. Integration of Immigrants into Civil Society

Discussion of immigration reform often neglects the consideration of strategies that might improve the integration of legal, as well as undocumented, immigrants into U.S. society.⁸⁹ Facilitating naturalization of immigrants is one way to provide for the legal integration of immigrants. The U.S. government, however, has been somewhat inconsistent with respect to promoting naturalization as well as other programs, such as ensuring access to federal public benefits programs, which might facilitate immigrant integration.⁹⁰

Although often focusing on strategies to facilitate immigration enforcement, state and local governments can play an important role in the integration of immigrants into civil

⁸⁷ See T. Alexander Aleinikoff, *Legal Immigration Reform: Toward Rationality and Equity*, in BLUEPRINTS FOR AN IDEAL LEGAL IMMIGRATION POLICY 5, 5–6 (Richard D. Lamm & Alan Simpson eds., 2001); Noemi Gal-Or, *Labor Mobility Under NAFTA: Regulatory Policy Spearheading the Social Supplement to the International Trade Regime*, 15 ARIZ. J. INT'L & COMP. L. 365 (1998); Emily Gibbs, Comment, *Free Movement of Labor in North America: Using the European Union as a Model for the Creation of North American Citizenship*, 45 U.S.F. L. REV. 265, 286–88 (2010); see also Ernesto Hernández-López, *Sovereignty Migrates in U.S. and Mexican Law: Transnational Influences in Plenary Power and Non-intervention*, 40 VAND. J. TRANSNAT'L L. 1345 (2007) (noting that the United States and Mexico have been acting in increasingly transnational ways with respect to migration); Katie E. Chachere, Comment, *Keeping America Competitive: A Multilateral Approach to Illegal Immigration Reform*, 49 S. TEX. L. REV. 659 (2008) (contending that United States must work with other nations on immigration). See generally BILL ONG HING, *ETHICAL BORDERS: NAFTA, GLOBALIZATION, AND MEXICAN MIGRATION* (2010) (analyzing immigration in North America after NAFTA); L. RONALD SCHEMAN, *GREATER AMERICA: A NEW PARTNERSHIP FOR THE AMERICAS IN THE TWENTY-FIRST CENTURY* (2003) (advocating generally greater cooperation between nations in the Americas); THE FUTURE OF NORTH AMERICAN INTEGRATION: BEYOND NAFTA, *supra* note 86 (analyzing integration of North America).

⁸⁸ See Timothy A. Canova, *Closing the Border and Opening the Door: Mobility, Adjustment, and the Sequencing of Reform*, 5 GEO. J.L. & PUB. POL'Y 341 (2007).

⁸⁹ See, e.g., SECURING THE FUTURE: U.S. IMMIGRANT INTEGRATION POLICY: A READER (Michael Fix ed., 2007).

⁹⁰ See Judith Bernstein-Baker, *Citizenship in a Restrictionist Era: The Mixed Messages of Federal Policies*, 16 TEMP. POL. & CIV. RTS. L. REV. 367, 381–84 (2007).

society.⁹¹ Issuing driver's licenses to undocumented immigrants or recipients of deferred action, which has proven to be hotly contested in the states,⁹² is one strategy that would facilitate noncitizen integration. A number of states have passed laws allowing undocumented high school graduates to pay in-state fees at public universities.⁹³ Providing additional English-as-a-second-language classes, which are chronically over-enrolled,⁹⁴ and bilingual education⁹⁵ also would facilitate English language acquisition by immigrants and thus immigrant integration.

CONCLUSION

Congress will pass immigration reform. The only questions are when and what form it will take. The answer to both questions is far from clear at this time. This Article outlines some of the possible reforms that Congress might consider in the future.

⁹¹ See Cristina M. Rodríguez, *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. 567, 581–609 (2008).

⁹² See Kevin R. Johnson, *Driver's Licenses and Undocumented Immigrants: The Future of Civil Rights Law?*, 5 NEV. L.J. 213 (2004); Sylvia R. Lazos Vargas, *Missouri, the "War on Terrorism," and Immigrants: Legal Challenges Post 9/11*, 67 MO. L. REV. 775, 798–807 (2002); María Pabón López, *More than a License to Drive: State Restrictions on the Use of Driver's Licenses by Noncitizens*, 29 S. ILL. U. L.J. 91 (2004); Joelle P. Hong, *Current Developments, Illinois Joins Three States in Granting Driving Privileges to Undocumented Immigrants*, 26 GEO. IMMIGR. L.J. 713 (2012); Kari E. D'Ottavio, *Comment, Deferred Action for Childhood Arrivals: Why Granting Driver's Licenses to DACA Beneficiaries Makes Constitutional and Political Sense*, 72 MD. L. REV. 931 (2013); Steven J. Escobar, *Note, Allowing Undocumented Immigrants to Obtain Driver's Licenses in New Mexico: Revising, Not Abandoning, the System*, 43 WASH. U. J.L. & POLY 285 (2013).

⁹³ See, e.g., *Martinez v. Regents of the Univ. of Cal.*, 241 P.3d 855 (Cal. 2010), *cert. denied*, 131 S. Ct. 2961 (2011) (upholding California law permitting California high school graduates including undocumented immigrants to pay in-state fees at public universities); see Rodríguez, *supra* note 91, at 605–09; Olivas, *supra* note 67.

⁹⁴ See James Thomas Tucker, *The ESL Logjam: Waiting Times for ESL Classes and the Impact on English Learners*, 96 NAT'L CIVIC REV., Spring 2007, at 30. Increasingly, the private sector has promoted immigrant assimilation with employers through, among other policies, promoting English language acquisition. See Pamela Constable & N.C. Aizenman, *Companies Take Lead in Assimilation Efforts*, WASH. POST, Aug. 9, 2008, at B1.

⁹⁵ See Kevin R. Johnson & George A. Martínez, *Discrimination by Proxy: The Case of Proposition 227 and the Ban on Bilingual Education*, 33 U.C. DAVIS L. REV. 1227 (2000) (analyzing elimination of bilingual education in California).

Credible Fears, Unaccompanied Minors, and the Causes of the Southwestern Border Surge

*Scott Rempell**

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INTRODUCTION

From 2006 through 2011, apprehensions of unauthorized immigrants by border patrol agents plummeted.¹ While apprehension rates still remain at a historically low level, authorities have documented an uptick since 2012.² Two categories of unauthorized immigrants have significantly contributed to the rising apprehension rates: those subject to expedited removal who claim to fear persecution and unaccompanied alien children (“UACs”).

Expedited removal is a process created in 1996 that permits immigration authorities to summarily deport certain individuals apprehended at or near the border.³ The major exception to summary deportation is for those who demonstrate a credible fear of persecution or torture.⁴ Thus, “[t]he ‘credible fear’ process is in many cases the only mechanism that stands between an arriving asylum seeker and immediate deportation.”⁵ For UACs, immigration law provides certain processes and protections that curtail authorities’ ability to deport particular UACs quickly.⁶ Any child without a parent or legal guardian is considered a UAC.⁷

¹ JOHN F. SIMANSKI & LESLEY M. SAPP, OFFICE OF IMMIGRATION STATISTICS, U.S. DEPT’ OF HOMELAND SEC., IMMIGRATION ENFORCEMENT ACTIONS: 2012, at 3 fig.1 (2013), available at http://www.dhs.gov/sites/default/files/publications/ois_enforcement_ar_2012_1.pdf. Apprehension rates are different than the number of distinct individuals apprehended because the same person could be apprehended multiple times in a given year.

² U.S. BORDER PATROL, U.S. DEPT’ OF HOMELAND SEC., TOTAL ILLEGAL ALIEN APPREHENSIONS BY FISCAL YEAR (2014), available at <http://www.cbp.gov/newsroom/media-resources/stats?title=Border+Patrol> (providing apprehension rates in the southwestern border region from FY 1960 through FY 2013).

³ 8 U.S.C. § 1225(b)(1)(A)(i) (2012); see also 8 C.F.R. § 235.3(b) (2014).

⁴ 8 U.S.C. § 1225(b)(1)(A)(i); 8 C.F.R. § 235.3(b)(4).

⁵ *Asylum Abuse: Is It Overwhelming Our Borders?*, Hearing Before the Comm. on the Judiciary, 113th Cong. 143 (2013) [hereinafter *Asylum Surge Hearing*] (statement of ACLU et al.).

⁶ See, e.g., 8 U.S.C. § 1232(b)(3) (requiring enforcement agencies to transfer UACs to the U.S. Department of Health and Human Services within seventy-two hours of apprehension).

⁷ The Homeland Security Act of 2002 defines an “unaccompanied alien child” as one who:

(A) has no lawful immigration status in the United States;

After a gradual rise in claims for several years, the number of unauthorized immigrants claiming to credibly fear persecution spiked in the middle of 2012.⁸ The number of claims nearly tripled in fiscal year (“FY”) 2013 and the FY 2014 figures depict a comparably high rate.⁹ The increase in UAC border crossings rode the coattails of the surge in credible fear claims. Immigration authorities started to record a steady rise in UAC border crossings in 2012.¹⁰ By 2014, the staggering surge in UAC border crossings at the southwestern border began to gain national attention.¹¹ The situation has been called a “disaster,”¹² a potential “national security threat,”¹³ and a “humanitarian crisis.”¹⁴

Lawmakers have taken notice of the surges as well. The House Judiciary Committee held a series of hearings to assess whether migrants are abusing the credible fear process and ostensibly to identify the causes for the spike in credible fear claims.¹⁵ The UAC surge has also garnered congressional attention and led to hearings in the House.¹⁶

(B) has not attained 18 years of age; and

(C) with respect to whom—

- (i) there is no parent or legal guardian in the United States; or
- (ii) no parent or legal guardian in the United States is available to provide care and physical custody.

6 U.S.C. § 279(g)(2) (2012).

⁸ *Asylum Surge Hearing*, *supra* note 5, at 227.

⁹ *Id.* (documenting 36,035 credible fear referrals in FY 2013, up from 13,880 referrals the previous fiscal year); U.S. CITIZENSHIP & IMMIGRATION SERVS., U.S. DEPT OF HOMELAND SEC., CREDIBLE FEAR WORKLOAD SUMMARY FY 2014 (2014), *available at* <http://www.uscis.gov/sites/default/files/USCIS/Outreach/Notes%20from%20Previous%20Engagements/Asy-Credible-Reasonable-FearFY14-Q1.pdf> [hereinafter USCIS 2014 CREDIBLE FEAR STATISTICS] (documenting more than 20,000 referrals in the first half of FY 2014).

¹⁰ *Southwest Border Unaccompanied Alien Children*, U.S. CUSTOMS & BORDER PATROL, <http://www.cbp.gov/newsroom/stats/southwest-border-unaccompanied-children> (last visited Oct. 9, 2014).

¹¹ *Id.*; e.g., Frances Robles, *Wave of Minors on Their Own Rush to Cross Southwest Border*, N.Y. TIMES, June 4, 2014, at A1; Richard Cowan, *Waves of Immigrant Minors Present Crisis for Obama*, CONGRESS, REUTERS, May 28, 2014, *available at* <http://www.reuters.com/article/2014/05/28/us-usa-immigration-children-idUSKBN0E814T20140528>.

¹² *An Administration Made Disaster: The South Texas Border Surge of Unaccompanied Alien Minors: Hearing Before the Comm. on the Judiciary*, 113th Cong. 154 (2014) [hereinafter *UAC Surge Hearing*].

¹³ Lindsey Boerma, *Is the Surge of Illegal Child Immigrants a National Security Threat?*, CBS NEWS (July 7, 2014, 5:42 AM), <http://www.cbsnews.com/news/is-the-surge-of-illegal-child-immigrants-a-national-security-threat/>.

¹⁴ Cowan, *supra* note 11.

¹⁵ See, e.g., *Asylum Surge Hearing*, *supra* note 5.

¹⁶ *UAC Surge Hearing*, *supra* note 12.

Explanations for the causes of these surges vary considerably. Some point to depressed economic opportunities and increased crime rates in the so-called Northern Triangle of El Salvador, Honduras, and Guatemala,¹⁷ which are the countries of origin for most of the migrants.¹⁸ Others fault the enforcement efforts and policy choices of the Obama Administration.¹⁹ Myriad derivations of these potential causes also permeate the discussion,²⁰ adding to the difficulties in discerning the most likely causes of these surges. It is important, however, to identify these causes. The history of immigration is a collection of derivations on cyclical events and arguments presented as if they were entirely unprecedented. Whatever one's beliefs about the optimal level and types of migration, immigration law and policy should be grounded in a greater understanding of the significance of the various push and pull factors that influence migratory patterns.

This Article looks closer at the available data to try to identify the factors that have caused this extraordinary surge in border crossings by credible fear claimants and UACs. Part I provides an overview of expedited removal and the credible fear process before reviewing data on credible fear referral rates. Part II discusses the law that pertains to UACs and provides data to illustrate the extent of the surge in UAC border crossings. Part III will review the main factors that could be contributing to the surges.

In Part IV, this Article will assess holistically the previously discussed causes and identify how several of them have converged to create the current crisis. In short, while individual

¹⁷ See *Asylum Surge Hearing*, *supra* note 5, at 94 (statement of Eleanor Acer, Director, Refugee Protection Program, Human Rights First) (arguing that violence and other “external factors . . . are the drivers of flight”); Tom K. Wong, *Statistical Analysis Shows that Violence, Not Deferred Action, Is Behind the Surge of Unaccompanied Children Crossing the Border*, CENTER FOR AM. PROGRESS (July 8, 2014), <http://www.americanprogress.org/issues/immigration/news/2014/07/08/93370/statistical-analysis-shows-that-violence-not-deferred-action-is-behind-the-surge-of-unaccompanied-children-crossing-the-border/>.

¹⁸ See *Southwest Border Unaccompanied Alien Children*, *supra* note 10; *Asylum Surge Hearing*, *supra* note 5, at 61 (report of Ruth Ellen Wasem, Congressional Research Service).

¹⁹ See *Asylum Surge Hearing*, *supra* note 5, at 2 (statement of Rep. Bob Goodlatte) (opining that “word has gotten out as to the virtual rubberstamping of applications” by the administration); *id.* at 6–7 (statement of Rep. Jason Chaffetz) (blaming the ineffectiveness of immigration enforcement agencies).

²⁰ See Wong, *supra* note 17, at 5–6 (using Mexican UAC migratory rates to negate the significance of the William Wilberforce Trafficking Victims Protection Reauthorization Act to the surge in UAC border crossings); *Asylum Surge Hearing*, *supra* note 5, at 2 (statement of Rep. Bob Goodlatte) (attributing ICE’s “watered down” interpretation of its parole authority to the surge in credible fear claims).

circumstances vary, dire country conditions in the Northern Triangle further deteriorated in certain ways around the time of the surges. The continued deterioration increased the incentive to leave. Concurrently, specific U.S. laws, practices, and immigration policies—along with claims made by nefarious opportunists—led to some accurate and some misinformed perceptions that certain migrants have a greater chance to enter or remain in the United States. When these perceptions spread amidst deteriorating country conditions, it provided the spark that motivated a greater number of credible fear claimants and UACs to make the dangerous journey north.

After reviewing these causes, this Article provides some brief concluding thoughts. Specifically, this Article suggests limited reforms that should not be contentious, and reviews how certain gaps in the available data impugn researchers' ability to more fully discern the causes of migration.

I. THE CREDIBLE FEAR PROCESS

A. Expedited Removal

In 1996, Congress enacted the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA").²¹ Prior to IIRIRA, inadmissible individuals apprehended by the government were placed into formal exclusion or deportation proceedings in an immigration court.²² IIRIRA amended the Immigration and Nationality Act ("INA") to create a process to significantly accelerate the removal of many "arriving aliens."²³ Referred to as "expedited removal," the procedure permits immigration inspectors within the U.S. Department of Homeland Security ("DHS") to order that an individual be removed from the United States without providing that individual with an opportunity to have his or her case further reviewed by an immigration judge.²⁴ Specifically, IIRIRA authorizes immigration inspection officers to

²¹ Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546 (codified in scattered sections of 8 U.S.C.).

²² See *id.*; see also Peter L. Markowitz, *Straddling the Civil-Criminal Divide: A Bifurcated Approach to Understanding the Nature of Immigration Removal Proceedings*, 43 HARV. C.R.-C.L.L. REV. 289, 289 n.2 (2008).

²³ An "arriving alien" is

an applicant for admission coming or attempting to come into the United States at a port-of-entry, or an alien seeking transit through the United States at a port-of-entry, or an alien interdicted in international or United States waters and brought into the United States by any means, whether or not to a designated port-of-entry, and regardless of the means of transport.

8 C.F.R. §§ 1.1(q), 1001.1(q) (2014).

²⁴ 8 U.S.C. § 1225(b)(1)(A)(i) (2012); see also 8 C.F.R. § 235.3(b).

summarily order the removal of arriving aliens who are inadmissible because they do not hold valid travel documents or because they obtained or attempted to obtain travel documents by fraud or misrepresentation.²⁵ IIRIRA also provides DHS (as the successor to the Immigration and Naturalization Service on such matters)²⁶ with authority to expand the classes of individuals who are subject to expedited removal.²⁷ Among other expansions, expedited removal now applies to individuals apprehended within 100 miles of certain sectors of the northern and southern borders as long as authorities apprehend such individuals within fourteen days of their unlawful entry.²⁸

The number of individuals subject to expedited removal is significant. Between thirty and forty percent of all annual deportations in recent years have been through expedited removal.²⁹ Between FYs 2010 and 2012, nearly 400,000 people were deported through the expedited removal process.³⁰ In 2012, migrants from Mexico, Guatemala, Honduras, and El Salvador comprised ninety-seven percent of all expedited removals.³¹

B. Fear of Persecution or Torture

If applied without exception, the expedited removal process would thwart the United States' obligation to not return to their home countries individuals with a legitimate fear of being persecuted or tortured. The United States is a signatory to the 1967 United Nations Protocol Relating to the Status of Refugees.³² Known as the principle of non-refoulement, the Protocol prohibits states from repatriating individuals to countries from which they legitimately fear being persecuted.³³

²⁵ 8 U.S.C. § 1225(b)(1)(A)(i) (referring to the grounds of inadmissibility provided under 8 U.S.C. § 1182(a)(6)(C), (a)(7)). “[C]itizens of Cuba arriving at a United States port-of-entry by aircraft” are not subject to expedited removal. 8 C.F.R. § 235.3(b)(1)(i).

²⁶ See Homeland Security Act of 2002, Pub. L. No. 107-296, §§ 1512(d), 1517, 116 Stat. 2135, 2310–11 (indicating that certain references to the Attorney General in immigration statutes and regulations now pertain to the Secretary of DHS).

²⁷ 8 U.S.C. § 1225(b)(1)(A)(iii) (limiting the agency's expansion authority to aliens who have not been admitted or paroled into the United States and have not been continuously present in the United States for two years).

²⁸ 69 Fed. Reg. 48,876, 48,877–81 (Aug. 11, 2004); 67 Fed. Reg. 68,923, 68,923–26 (Nov. 13, 2002); 8 C.F.R. § 235.3(b).

²⁹ SIMANSKI & SAPP, *supra* note 1, at 5 tbl.6.

³⁰ *Id.*

³¹ *Id.* at 5.

³² United Nations Protocol Relating to the Status of Refugees, *opened for signature* Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 (entered into force Nov. 1, 1968).

³³ *Id.* art. 33.

Congress subsequently enacted the Refugee Act of 1980, which codified this obligation.³⁴

The Refugee Act provides that individuals are eligible for asylum relief if they satisfy the definition of a refugee.³⁵ Applicants can establish they are refugees by demonstrating that they fear they will be persecuted on account of race, religion, nationality, political opinion, or social group.³⁶ The definition also requires that asylum applicants demonstrate that the governments in their home countries are either responsible for the persecution, or unable or unwilling to curtail the actions of non-governmental actors.³⁷

Applicants who apply for asylum are also assumed to be applying for withholding of removal.³⁸ The requirements for establishing eligibility for withholding of removal under the INA are largely comparable to the prerequisites for asylum.³⁹ There are, however, several differences.⁴⁰ Withholding of removal implements the government's non-refoulement obligation by requiring that the government does not deport eligible applicants to the countries from which they fear harm.⁴¹ While withholding of removal prohibits repatriation to the persecuting country, it does not provide the applicant with an opportunity to become a legal permanent resident.⁴² Asylum, by contrast, does provide such adjustment benefits, and for that reason it is discretionary; the Attorney General does not have to provide applicants with asylum relief even if they demonstrate eligibility.⁴³

The United States is also a signatory to the Convention Against Torture ("CAT").⁴⁴ In 1999, the Attorney General

³⁴ Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (codified in scattered sections of 8 U.S.C.).

³⁵ 8 U.S.C. § 1158(b)(1)(A) (2012).

³⁶ *Id.* § 1101(a)(42)(A).

³⁷ *Id.*; see also *Gutierrez-Vidal v. Holder*, 709 F.3d 728, 732–33 (8th Cir. 2013).

³⁸ See 8 U.S.C. § 1231(b)(3)(A).

³⁹ See *id.*; *id.* § 1101(a)(42)(A); 8 C.F.R. §§ 1208.13, 1208.16(a)–(b) (2014).

⁴⁰ For example, applicants are eligible for asylum if they demonstrate a well-founded fear of persecution, while withholding of removal requires that applicants demonstrate a clear probability of persecution. See *INS v. Cardoza-Fonseca*, 480 U.S. 421, 431–32, 450 (1987); *INS v. Stevic*, 467 U.S. 407, 429–30 (1984).

⁴¹ 8 U.S.C. § 1231(b)(3)(A); *Castellano-Chacon v. INS*, 341 F.3d 533, 544–45 (6th Cir. 2003). Several statutory exceptions can preclude a grant of withholding of removal, but the ultimate determination is not a matter of discretion. 8 U.S.C. § 1231(b)(3)(B).

⁴² *Castellano-Chacon*, 341 F.3d at 545.

⁴³ 8 U.S.C. § 1159(b); *INS v. Elias-Zacarias*, 502 U.S. 478, 481 (1992).

⁴⁴ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 46, U.N. GAOR, 39th Sess., Supp. No. 51, U.N. Doc. A/39/51, at 195 (Dec. 10, 1984).

promulgated regulations to implement CAT.⁴⁵ The regulations prohibit the government from returning applicants to their home countries if the applicants demonstrate that perpetrators are more likely than not to torture them.⁴⁶ Unlike asylum and withholding of removal under the INA, the regulations implementing CAT do not require applicants to establish that they will be tortured on account of race, religion, or any of the other protected grounds.⁴⁷

C. The Credible Fear Interview

To ensure compliance with the United States' non-refoulement obligations, the expedited removal provisions of the INA and immigration regulations prohibit the government from summarily deporting a person who demonstrates a credible fear of persecution or torture. Specifically, the INA provides that an "immigration officer" should not order an alien removed "without further hearing or review" when "the alien indicates either an intention to apply for asylum . . . or a fear of persecution."⁴⁸ In many instances, the onus is on the immigration officer to ask the questions necessary to discern whether the alien may, in fact, have such a fear. Many have criticized this aspect of the process, noting that enforcement agents do not always ask the questions needed to ascertain whether a fear of harm exists, and, in some instances, agents proactively convince aliens to agree to removal even after they express a fear of harm.⁴⁹

If an individual otherwise subject to expedited removal asks to apply for asylum or expresses a fear of being persecuted, that individual is then transferred to U.S. Immigration and Customs Enforcement ("ICE")—a component of DHS—which detains the alien until the credible fear interview. The law provides that an alien must be detained pending the credible fear interview.⁵⁰ The interview is conducted by one of the asylum officers in U.S. Citizenship and Immigration Services ("USCIS")—also a

⁴⁵ 8 C.F.R. §§ 1208.16(c), 1208.18 (2014); Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. No. 105-277, div. G, § 2242(b), 112 Stat. 2681-821, 2681-822 (directing the agency to issue regulations to implement CAT).

⁴⁶ 8 C.F.R. § 1208.16(c)(2).

⁴⁷ See *id.*; see also *Lopez de Hincapie v. Gonzales*, 494 F.3d 213, 220 (1st Cir. 2007).

⁴⁸ 8 U.S.C. § 1225(b)(1)(A)(i); see also 8 C.F.R. § 235.3(b)(4) (referring to fears of "persecution or torture").

⁴⁹ See, e.g., U.S. COMM'N ON INT'L RELIGIOUS FREEDOM, 1 REPORT ON ASYLUM SEEKERS IN EXPEDITED REMOVAL: FINDINGS AND RECOMMENDATIONS 50-51 (2005) [hereinafter 1 USCIRF 2005 REPORT] (observing instances in Houston where agents pressured migrants to retract their stated fear).

⁵⁰ 8 U.S.C. § 1225(b)(1)(B)(iii)(IV).

component of DHS.⁵¹ The officers in USCIS's Asylum Office must assess whether the transferred individual has a "credible fear of persecution."⁵² The transferred individual demonstrates the requisite fear if the asylum officer finds "that there is a significant possibility, taking into account the credibility of the statements made by the alien in support of the alien's claim and such other facts as are known to the officer, that the alien could establish eligibility for asylum."⁵³ The "significant possibility" language was meant to serve as a compromise standard. The original House version mandated a "substantial likelihood" that the alien could establish asylum eligibility, while the original Senate version merely required the asylum officer to determine whether the asylum claim was "manifestly unfounded."⁵⁴ Changes to USCIS's credible fear lesson plan in February 2014, however, have led some to question whether the standard will become more stringent.⁵⁵

The time dedicated to these credible fear interviews demonstrates why it could not possibly be a final determination—and why the credible fear threshold is necessarily low.⁵⁶ Government officials report that, on average, asylum officers interview claimants for about twenty minutes before making a credible fear determination.⁵⁷ The viability of many asylum claims takes much longer to tease out. Aside from the substantive information asylum officers must discern, twenty minutes is hardly enough time to truly assess the credibility of the claim itself—a task that is incredibly challenging for adjudicators even when there is a full hearing on the merits.⁵⁸ Accordingly, as often noted, the credible fear interview is merely

51 *Id.* § 1225(b)(1)(A)(ii), (b)(1)(B).

52 *Id.* § 1225(b)(1)(B)(ii).

53 *Id.* § 1225(b)(1)(B)(v).

54 142 CONG. REC. 25,374 (1996) (statement of Sen. Orrin Hatch).

55 Memorandum from John Lafferty, Asylum Div., U.S. Citizenship & Immigration Servs., U.S. Dep't of Homeland Sec., to Asylum Office Dirs., et al. (Feb. 28, 2014), available at [http://www.uscis.gov/sites/default/files/USCIS/Outreach/Notes from Previous Engagements/Memorandum-ReleaseofUpdatedADOTCLessonPlan.pdf](http://www.uscis.gov/sites/default/files/USCIS/Outreach/Notes%20from%20Previous%20Engagements/Memorandum-ReleaseofUpdatedADOTCLessonPlan.pdf); see also SARA CAMPOS & JOAN FRIEDLAND, AM. IMMIGRATION COUNCIL, MEXICAN AND CENTRAL AMERICAN ASYLUM AND CREDIBLE FEAR CLAIMS: BACKGROUND AND CONTEXT 4 (2014).

56 *But see Asylum Surge Hearing*, *supra* note 5, at 166 (statement of Leslie E. Vélez, Senior Protection Officer, U.N. High Commissioner for Refugees) (contending that the credible fear threshold is too harsh).

57 *Id.* at 189 (statement of Lori Scialabba, Deputy Director, U.S. Citizenship and Immigration Services).

58 See generally Scott Rempell, *Credibility Assessments and the REAL ID Act's Amendments to Immigration Law*, 44 TEX. INT'L L.J. 185, 196 (2008).

a screening device, meant to capture all claims that could reasonably be viable.⁵⁹

D. Credible Fear Determinations and Detention

If an asylum officer determines that a claimant does not have a credible fear of persecution, the claimant is immediately subject to removal.⁶⁰ Although the claimant is not entitled to a full hearing before an immigration judge, he or she can request that an immigration judge review the asylum officer's determination that no credible fear of persecution has been established; the law requires the immigration judge to review the denial within seven days.⁶¹ Conversely, if the asylum officer determines that the claimant established a credible fear of persecution or torture, that individual is placed in formal removal proceedings before an immigration judge, where he or she will have an opportunity to apply for asylum, statutory withholding of removal, and protection under the regulations implementing CAT.⁶²

The immigration courts lack the resources to timely adjudicate all the cases on their dockets. There are about 260 immigration judges spread throughout the immigration courts;⁶³ they review nearly 300,000 immigration matters annually.⁶⁴ As a result, individuals found to have a credible fear of persecution may have to wait years before an immigration judge rules on the merits of their claims.⁶⁵

The long waiting period makes the issue of detention particularly consequential. The law is quite clear that DHS must detain apprehended individuals prior to the credible fear interview.⁶⁶ The time lapse between apprehension and the credible fear interview, however, is typically only a matter of

⁵⁹ See, e.g., Thomas J. White Ctr. on Law & Gov't, *The Expedited Removal Study: Report on the First Three Years of Implementation of Expedited Removal*, 15 NOTRE DAME J.L. ETHICS & PUB. POLY 1, 126–27 (2001); *Asylum Surge Hearing*, *supra* note 5, at 27 (statement of Lori Scialabba, Deputy Director, U.S. Citizenship and Immigration Services).

⁶⁰ 8 U.S.C. § 1225(b)(1)(B)(iii)(I) (2012).

⁶¹ *Id.* § 1225(b)(1)(B)(iii)(III); 8 C.F.R. § 1208.30(g) (2014).

⁶² 8 U.S.C. § 1225(b)(1)(B)(ii); 8 C.F.R. § 235.6(a)(1)(ii).

⁶³ *Office of the Chief Immigration Judge*, U.S. DEPARTMENT OF JUSTICE, <http://www.justice.gov/eoir/ocijinfo.htm> (last updated May 2014).

⁶⁴ OFFICE OF PLANNING, ANALYSIS & TECH., EXEC. OFFICE FOR IMMIGRATION REVIEW, FY 2013 STATISTICAL YEARBOOK, at A2 fig.1 (2014); see also *id.* at W1 fig.34 (noting 350,330 pending cases in immigration courts at the end of FY 2013).

⁶⁵ *Immigration Court Backlog Tool: Pending Cases and Length of Wait in Immigration Courts*, TRACIMMIGR., http://trac.syr.edu/phptools/immigration/court_backlog/ (last updated June 2014).

⁶⁶ 8 C.F.R. § 235.3(b)(4)(ii).

days or weeks. If an asylum officer—or an immigration judge if the claimant requests further review—finds that the claimant has established a credible fear of persecution, immigration law prescribes certain circumstances that permit ICE to release the individual from custody pending the formal removal proceedings in immigration court. The mechanisms for releasing such persons are based on whether the individual is classified as an “arriving alien.”

1. Parole for Arriving Aliens

Parole is an administrative measure ICE can use to authorize the temporary release of certain detained aliens. DHS’s parole determinations are not subject to review in immigration court.⁶⁷ Additionally, in the credible fear context, DHS’s parole authority is limited to those considered “arriving aliens” because they were apprehended at a port of entry.⁶⁸

In certain instances, DHS may parole an arriving alien who establishes a credible fear of persecution. Immigration regulations prescribe that parole may be justified for “urgent humanitarian reasons or significant public benefit, provided the aliens present neither a security risk nor a risk of absconding.”⁶⁹ Within this framework, the regulations provide five categories of aliens who may be eligible for parole. These five categories are aliens with serious medical conditions, women who are pregnant, select juveniles, witnesses in certain proceedings, and aliens “whose continued detention is not in the public interest.”⁷⁰

In 2009, ICE Assistant Secretary John Morton issued a policy directive to provide guidance to ICE’s “Detention and Removal Operations (DRO) Field Office personnel for exercising their discretion to consider the parole for arriving aliens processed under the expedited removal provisions” of the INA (“Morton Memo” or “Directive”).⁷¹ The Directive sought to clarify when an alien can be paroled under the fifth category of the regulation—that is, when an alien’s “continued detention is not

⁶⁷ See Designating Aliens for Expedited Removal, 69 Fed. Reg. 48,877-01, 48,879 (Aug. 5, 2004) (noting immigration judges’ limited “review of custody determinations”).

⁶⁸ See U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, U.S. DEPT OF HOMELAND SEC., ICE POLICY DIRECTIVE NO. 11002.1: PAROLE OF ARRIVING ALIENS FOUND TO HAVE A CREDIBLE FEAR OF PERSECUTION OR TORTURE ¶¶ 1–5 (2009) [hereinafter MORTON MEMO].

⁶⁹ 8 C.F.R. § 212.5(b) (internal quotation omitted); see also *id.* § 235.3(c) (authorizing parole for aliens placed in removal proceedings after a positive credible fear finding in accordance with the decisional framework of section 212.5(b)). *But see* 8 C.F.R. § 235.3(b)(4)(ii) (limiting parole eligibility to medical necessity and furthering a “legitimate law enforcement objective”).

⁷⁰ 8 C.F.R. § 212.5(b)(1)–(5).

⁷¹ MORTON MEMO, *supra* note 68, ¶ 1.

in the public interest.”⁷² Regarding this fifth category, the Directive provides that aliens “should be” paroled if “the alien’s identity is sufficiently established, the alien poses neither a flight risk nor a danger to the community, and no additional factors weigh against release of the alien.”⁷³ By interpreting its parole authority broadly, the Morton Memo expanded the circumstances under which parole is available to arriving aliens who establish a credible fear of persecution or torture.⁷⁴

2. Release for Aliens Not Apprehended at a Port of Entry

If authorities apprehend an alien in the interior of the United States but the alien establishes a credible fear of persecution, DHS is authorized to release the individual during the pendency of the removal proceeding.⁷⁵ DHS may, however, choose to detain the alien or premise release on a bond. Unlike detention decisions for arriving aliens, DHS’s detention determinations for aliens who are not considered “arriving” are subject to review by an immigration judge.⁷⁶

E. Credible Fear Statistics

Table 1 provides data for credible fear claims adjudicated by USCIS’s Asylum Office from FY 1997 through FY 2013:

⁷² *Id.* ¶ 4.3.

⁷³ *Id.* ¶ 8.3.

⁷⁴ *Cf.* U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, U.S. DEP’T OF HOMELAND SEC., ICE POLICY DIRECTIVE NO. 7-1.0: PAROLE OF ARRIVING ALIENS FOUND TO HAVE A CREDIBLE FEAR OF PERSECUTION OR TORTURE ¶ 6 (2007).

⁷⁵ *X-K-*, 23 I. & N. Dec. 731, 731 (B.I.A. 2005); *see also* *D-J-*, 23 I. & N. Dec. 572, 575–76 (A.G. 2003).

⁷⁶ *See X-K-*, 23 I. & N. Dec. at 731–36; *see also* 8 C.F.R. § 1003.19(h)(2)(i) (2014) (providing exceptions to immigration judges’ authority to review custody determinations).

Table 1: Percentage of Claims Where USCIS Finds a Credible Fear⁷⁷

Credible Fear ("CF") Cases	Referrals from ICE or CBP	Total Completed Cases	Completed Cases: CF Found	Completed Cases: CF Not Found	Completed Cases: Closed	% of All Referred Cases Where CF Found
FY 97	1438	1206	922	256	28	76.45%
FY 98	3427	3304	2747	125	432	83.14%
FY 99	6690	6463	5762	144	557	89.14%
FY 00	10,315	9971	9285	150	536	93.12%
FY 01	13,140	13,689	12,932	119	638	94.47%
FY 02	10,042	9961	9179	84	698	92.15%
FY 03	6447	6357	5715	45	597	89.90%
FY 04	7917	7754	7282	32	440	93.91%
FY 05	9465	9581	8469	144	968	88.39%
FY 06	5338	5241	3320	584	1337	63.35%
FY 07	5252	5286	3182	1062	1042	60.20%
FY 08	4995	4828	3097	816	915	64.15%
FY 09	5368	5222	3411	1004	807	65.32%
FY 10	8959	8777	6293	1404	1080	71.70%
FY 11	11,217	11,529	9423	1054	1052	81.73%
FY 12	13,880	13,579	10,838	1187	1554	79.81%
FY 13	36,035	36,174	30,393	2587	3194	84.02%

The figures show that between FY 1997 and FY 2012, the number of individuals claiming to fear persecution or torture fluctuated from 1438 to 13,880. In FY 2013, by contrast, claimants spiked significantly; more than 36,000 expressed (or were found to harbor) a fear of persecution or torture.⁷⁸ The data available for FY 2014 indicates a comparably high number. Through the first six months of FY 2014, DHS referred more than 20,000 claimants to the Asylum Office for credible fear interviews.⁷⁹

⁷⁷ This Article obtained the data for Table 1 from *Asylum Surge Hearing*, *supra* note 5, at 227.

⁷⁸ This figure does not include individuals who may have claimed to fear persecution or torture but were not provided an interview by the initial immigration officer. See HUMAN RIGHTS FIRST, HOW TO PROTECT REFUGEES AND PREVENT ABUSE AT THE BORDER 11–12, 30–31 (2014) [hereinafter HRF, HOW TO PROTECT REFUGEES].

⁷⁹ USCIS 2014 CREDIBLE FEAR STATISTICS, *supra* note 9.

Aside from the number of claims themselves, the figures also indicate the percentage of credible fear interviews that led asylum officers to find a credible fear of persecution or torture. The data can roughly be broken into three distinct time periods. From FY 1998 through FY 2005, between 83% and 94% of claimants received favorable credible fear determinations. A noticeable drop occurred in FY 2006, where the percentage dipped to the sixties and stayed in that range for several years. FY 2010 marked the transition into the third time period; since that time, the Asylum Office determined that claimants had a credible fear in 79%–84% of cases. The preliminary data for the first half of FY 2014 indicates an 80% grant rate by the Asylum Office.⁸⁰

The percentage of individuals found to have a credible fear of persecution is even higher when looking solely at those cases adjudicated on the merits. After claiming a credible fear of persecution, some individuals withdraw their requests for asylum before an asylum officer has an opportunity to adjudicate their claims. In FY 2013, for example, while USCIS found that 84% of individuals claiming to fear persecution or torture did meet the credible fear standard, asylum officers found the credible fear standard was met in 92% of cases assessed on the merits.⁸¹ When excluding administratively closed cases in the first half of FY 2014, the grant rate jumps from 80% to 87%.⁸²

The percentage of individuals subject to expedited removal who claim to fear persecution or torture has also increased. According to DHS, from FY 2000 through FY 2009, between 4% and 6% of individuals subject to expedited removal expressed a fear of persecution or torture if returned to their home country.⁸³ By FY 2013, that figure rose to 15%.⁸⁴

II. UNACCOMPANIED MINORS

A. The Law Regarding UACs

Prior to 2003, immigration officials made little distinction between minors and adults when apprehending and detaining those who entered the country without authorization.⁸⁵ While

⁸⁰ *Id.* (indicating a credible fear of persecution was established in 16,467 of the 20,488 decisions made).

⁸¹ *Asylum Surge Hearing*, *supra* note 5, at 20.

⁸² USCIS 2014 CREDIBLE FEAR STATISTICS, *supra* note 9.

⁸³ *Asylum Surge Hearing*, *supra* note 5, at 35.

⁸⁴ *Id.*

⁸⁵ See generally 6 U.S.C. § 279(g)(2) (2012) (defining an “unaccompanied alien child”).

UACs are still placed into removal proceedings, the Homeland Security Act of 2002 transferred the shelter and placement of unaccompanied minors to the Office of Refugee Resettlement (“ORR”), which is a component of DHS.⁸⁶ Further protections for unaccompanied minors were created in 2008 when Congress passed the William Wilberforce Trafficking Victims Protection Reauthorization Act (“TVPRA”).⁸⁷ Absent “exceptional circumstances,” the TVPRA requires agencies holding UACs in custody to transfer them to ORR within seventy-two hours.⁸⁸ For contiguous countries, DHS must determine, within forty-eight hours, whether the minor is a victim of human trafficking or otherwise establishes a credible fear of persecution.⁸⁹ For non-contiguous countries—such as those of the Northern Triangle—TVPRA requires several agencies to coordinate best practices for repatriation.⁹⁰

TVPRA also altered determinations regarding unaccompanied minors’ custody and eligibility for relief from removal. Regarding custody, TVPRA provides that “an unaccompanied alien child in the custody of the Secretary of Health and Human Services shall be promptly placed in the least restrictive setting that is in the best interest of the child.”⁹¹ As a result, while UACs’ immigration proceedings are pending, federal agencies typically try to place them with a relative or other sponsor.⁹² According to the Migration Policy Institute, “[n]inety percent of these children are released by ORR into the care of a parent, relative, or family friend while they await adjudication of their immigration cases, with foster care the placement for the remainder.”⁹³ For relief from removal, TVPRA provides additional opportunities, such as Special Immigrant Juvenile Status for minors who have been abused, abandoned, or neglected.⁹⁴ Like all unauthorized immigrants, unaccompanied

⁸⁶ *Id.* § 279(b)(1); Homeland Security Act of 2002, Pub. L. No. 107-296, § 462, 116 Stat. 2135, 2202–03.

⁸⁷ William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, 122 Stat. 5044.

⁸⁸ 8 U.S.C. § 1232(b)(3) (2012).

⁸⁹ *Id.* § 1232(a)(4).

⁹⁰ *Id.* § 1232(a)(1), (c)(5)–(6).

⁹¹ *Id.* § 1232(c)(2).

⁹² *See id.* (noting the law’s preference for “a suitable family member . . . to provide care”).

⁹³ Muzaffar Chishti & Faye Hipsman, *Dramatic Surge in the Arrival of Unaccompanied Children Has Deep Roots and No Simple Solutions*, MIGRATION POL’Y INST. (June 13, 2014), <http://migrationpolicy.org/article/dramatic-surge-arrival-unaccompanied-children-has-deep-roots-and-no-simple-solutions>.

⁹⁴ 8 U.S.C. § 1232(d); *see id.* § 1101(a)(27)(J) (explaining the requirements of Special Immigrant Juvenile Status); *see also id.* § 1101(a)(15)(J), (U) (discussing eligibility for J and U visas that certain UACs may be able to obtain).

minors who meet the relevant criteria may also be eligible for asylum.⁹⁵

B. UAC Statistical Information

The statistics bear out the extent of the surge in UAC border crossings. Along the southwestern border in FY 2013, border patrol apprehended 31,491 unaccompanied minors.⁹⁶ In the first three quarters of FY 2014, that number spiked to 62,998.⁹⁷ The general surge in border crossings is reflective of the UAC apprehension rate for children migrating from the Northern Triangle:

Table 2: UAC Apprehension Rate for Northern Triangle Countries⁹⁸

Country	FY 2009	FY 2010	FY 2011	FY 2012	FY 2013	FY 2014 (through August 31)
El Salvador	1221	1190	1394	3314	5990	14,591
Guatemala	1115	1517	1565	3835	8068	15,733
Honduras	968	1017	974	2997	6747	17,582
Total	9026	9170	8721	10,146	20,805	47,906

The repatriation rate for minors from the Northern Triangle decreased from 2008 through 2013. Whereas DHS repatriated 2311 minors from the Northern Triangle in 2008, only 469 minors were repatriated in 2013.⁹⁹

III. POTENTIAL CAUSES OF THE SURGE

Most of the causes proffered to explain the surge fall into one of two categories: country conditions in the Northern Triangle and migrants' perception that changes to immigration law and policy favorably impact their chances to remain in the United States permanently or temporarily. Part IV will review both of these potential causes before discussing whether the prospect of immigration reform, border security concerns, and instances of

⁹⁵ See generally *id.* § 1158(a)–(b).

⁹⁶ *Southwest Border Unaccompanied Alien Children*, *supra* note 10 (providing statistics through June 30, 2014).

⁹⁷ *Id.*

⁹⁸ For the source of the data in Table 2, see *id.*

⁹⁹ Chishti & Hipsman, *supra* note 93; see also Robles, *supra* note 11 (noting the decrease in removals of children).

fraud could impact the migratory calculus. The distinct potential causes discussed independently in Part III will be assessed holistically in Part IV.

A. Regional Instability in the Northern Triangle

Looking at the countries of origin of those migrating to the United States during the surges, one finds at the top El Salvador, Honduras, and Guatemala. Many politicians, advocacy groups, and others have proffered that the regional instability in these countries could be a cause of the increased migration flows in the past few years. Advocacy groups have argued that “persecution, violence and war[] are the drivers of flight” and that many reports “have documented the increased violence in Central America.”¹⁰⁰ Others have argued that the “resulting uptick in asylum claims” directly stems from “an increase in violence in Mexico and Central America.”¹⁰¹ Representative Lofgren opined that the surge could be “a brewing refugee crisis in the Western Hemisphere.”¹⁰² Comparable sentiments have been expressed about UACs.¹⁰³

The limited studies that assessed the situation in Central America have indeed found a dire situation in many Central American countries—particularly El Salvador, Honduras, and Guatemala, which comprise the Northern Triangle.¹⁰⁴ In 2006, there were more than 14,000 murders recorded in Central American countries.¹⁰⁵ To put that number in perspective, a World Bank study noted that Spain—with a population comparable to all Central American countries combined—only recorded 336 murders.¹⁰⁶ The countries of the Northern Triangle had some of the highest murder rates. El Salvador led the list in 2006 with 64.4 murders for every 100,000 members of the population.¹⁰⁷

¹⁰⁰ *Asylum Surge Hearing*, *supra* note 5, at 94.

¹⁰¹ *Id.* at 156; *see also* Robles, *supra* note 11 (recounting the administration’s belief that it “seems to be quite clear that what is driving this is what’s happening in their home countries”).

¹⁰² *Asylum Surge Hearing*, *supra* note 5, at 5.

¹⁰³ *See UAC Surge Hearing*, *supra* note 12, at 46 (statement of Mark Seitz, Bishop of the Diocese of El Paso, Texas, U.S. Conference of Catholic Bishops).

¹⁰⁴ *A Shared Responsibility—Citizen Security and Counter-Narcotics Initiatives in the Americas: Hearing Before the Subcomm. on the W. Hemisphere, Peace Corps & Global Narcotics Affairs of the S. Comm. on Foreign Relations*, 112th Cong. 57 (2011) (statement of Cynthia J. Arnson, Director, Woodrow Wilson International Center for Scholars Latin America Program).

¹⁰⁵ WORLD BANK, CRIME AND VIOLENCE IN CENTRAL AMERICA: A DEVELOPMENT CHALLENGE, at ii (2011) [hereinafter WORLD BANK, DEVELOPMENT CHALLENGE].

¹⁰⁶ *Id.*

¹⁰⁷ U.N. Office on Drug & Crime, *Intentional Homicide Count and Rate per 100,000 Population, by Country/Territory (2000-2012)*, UNODC, <http://www.unodc.org/documents/>

There are many causes of these high murder rates as well as the high rates of crime in general. Chief among them are drug trafficking and violence associated with gang activity.¹⁰⁸ While drug trafficking is a central cause of violence in all three countries, a larger percentage of the violence in El Salvador can be attributed to gangs.¹⁰⁹ Many of the gangs in Central America have their roots in the United States. The Central American armed conflicts of the 1980s caused hundreds of thousands of Central Americans to flee to the United States.¹¹⁰ Economic marginalization led a small minority of these migrants to join or form gangs.¹¹¹ When some of these individuals were deported back to their home countries in the 1990s, they continued their criminal activities and recruited others to join.¹¹² As a result, gangs in certain Northern Triangle countries “control large neighborhoods in the most important cities.”¹¹³

Additional—and intertwined—causes of the rise in violence in the Northern Triangle include the availability of arms and weak states that are unable to provide a security apparatus and judicial process to sufficiently remedy perceived injustice.¹¹⁴ The availability of arms is a product of the regional conflicts of the 1980s, which created a culture of violence.¹¹⁵ Central America is “awash in weapons,” with an estimated 4.5 million firearms throughout the region in 2007.¹¹⁶ The weakness of the governments in the Northern Triangle exacerbates the level of

gsh/data/GSH2013_Homicide_count_and_rate.xlsx (last visited Sept. 2, 2014) [hereinafter UNODC, Homicide Stats]. *But cf.* WORLD BANK, DEVELOPMENT CHALLENGE, *supra* note 105, at 1 (noting that the murder rate in El Salvador in 2006 was 58 per 100,000 inhabitants).

¹⁰⁸ WORLD BANK, DEVELOPMENT CHALLENGE, *supra* note 105; *see also* ANDREW SELEE ET AL., WILSON CTR. & MIGRATION POLICY CTR., CRIME AND VIOLENCE IN MEXICO AND CENTRAL AMERICA: AN EVOLVING BUT INCOMPLETE US POLICY RESPONSE 1 (2013) (noting that organized crime gives cover to “unorganized crime”).

¹⁰⁹ Joaquín Villalobos, *Violence in Central America*, in RETHINKING THE “WAR ON DRUGS” THROUGH THE US-MEXICO PRISM 69 (Ernesto Zedillo & Haynie Wheeler eds., 2012); *see also* SELEE ET AL., *supra* note 108, at 4 (reviewing evidence that establishes a connection between transshipment drug routes and homicides). Others have cautioned that ambiguities in data collection and classification make it hard to state definitively the percentage of crime that stems from gang activity. WORLD BANK, DEVELOPMENT CHALLENGE, *supra* note 105, at 15–16.

¹¹⁰ WORLD BANK, DEVELOPMENT CHALLENGE, *supra* note 105, at 15.

¹¹¹ *Id.*

¹¹² *Id.*; *see also* U.N. OFFICE ON DRUGS & CRIME, TRANSNATIONAL ORGANIZED CRIME IN CENTRAL AMERICA AND THE CARIBBEAN 27 (2012) (discussing the origins of Mara Salvatrucha in the 1980s).

¹¹³ Villalobos, *supra* note 109, at 69.

¹¹⁴ WORLD BANK, DEVELOPMENT CHALLENGE, *supra* note 105, at ii–iii; SELEE ET AL., *supra* note 108, at 1.

¹¹⁵ WORLD BANK, DEVELOPMENT CHALLENGE, *supra* note 105, at iii.

¹¹⁶ *Id.*

violence because it permits criminals to act with impunity without significant fear of punishment.¹¹⁷

Quite distinct from the causes of the turmoil in the Northern Triangle, however, is the question of whether these circumstances are a cause of the recent spike in UAC border crossings and claims of persecution and torture among those subject to expedited removal. A potentially useful means to gauge causation is to assess whether a spike in the homicide rate occurred around the time the credible fear claims and UAC border crossings began to increase. As noted above, in 2006, El Salvador's homicide rate was 64.4 for every 100,000 residents. The murder rate in Guatemala was 45.3, and in Honduras it was 44.3. In 2010, the murder rate in Guatemala had fallen slightly to 41.6 homicides per 100,000 inhabitants. In El Salvador, the rate held steady at 64.1, while in Honduras the murder rate spiked to nearly 82, making Honduras's murder rate "the highest in the world."¹¹⁸ In 2012, as the credible fear claims and UAC border crossings began to escalate, the murder rates in Honduras further climbed to 90.4, while the rate in Guatemala held fairly steady at 39.9, and the homicide rate in El Salvador fell significantly to 41.2; the *reported* reduction in the homicide rate in El Salvador correlates with an organized gang truce in early 2012.¹¹⁹

¹¹⁷ See WORLD BANK, CRIME AND VIOLENCE IN CENTRAL AMERICA 90 (2010) [hereinafter WORLD BANK, CRIME AND VIOLENCE] (illustrating stagnant or decreased trust in the justice system and police force in El Salvador, Honduras, and Guatemala from 2004 to 2008); see also Karen Musalo et al., *Crimes Without Punishment: Violence Against Women in Guatemala*, 21 HASTINGS WOMEN'S L.J. 161, 163 (2010) (noting the low rate of prosecution against murderers when the victims are female).

¹¹⁸ Villalobos, *supra* note 109, at 64 (providing a murder rate that differs slightly from UNODC's data); see also UNODC, Homicide Stats, *supra* note 107.

¹¹⁹ U.N. OFFICE ON DRUG & CRIME, GLOBAL STUDY ON HOMICIDE, at 45–46, 126, U.N. Sales No. 14.IV.1 (2013) [hereinafter UNODC, 2013 GLOBAL STUDY], available at http://www.unodc.org/documents/gsh/pdfs/2014_GLOBAL_HOMICIDE_BOOK_web.pdf; COMM. ON MIGRATION OF THE U.S. CONFERENCE OF CATHOLIC BISHOPS, MISSION TO CENTRAL AMERICA: THE FLIGHT OF UNACCOMPANIED CHILDREN TO THE UNITED STATES 3 (2013).

Table 3: Homicide Rates in the Northern Triangle (per 100,000 Inhabitants)¹²⁰

Annual Homicide Rates	2006	2007	2008	2009	2010	2011	2012
Honduras	44.3	50.0	60.8	70.7	81.8	91.4	90.4
Guatemala	45.3	43.4	46.1	46.5	41.6	38.6	39.9
El Salvador	64.4	57.1	51.7	70.9	64.1	69.9	41.2

The increased murder rate in Honduras would seem to support the conclusion that an escalation in homicides could be representative of the general insecurity that provided an impetus for the surges. It would not appear that the same can be said for El Salvador, which actually has the highest number of people subject to expedited removal who claim to fear persecution or torture.¹²¹ Numbers, however, can be misleading, and there are a couple reasons to view the reported murder rate decline with a grain of salt. First, decisions to flee are not made in a macro-statistical bubble. The murder rates in El Salvador were very high in 2011 and prior years, and the decision to flee could be based on the confluence of what residents perceived over the course of the preceding years. Indeed, in surveys administered in 2012 and 2013 in El Salvador, nearly half the respondents did not believe the gang truce reduced crime.¹²² Nevertheless, the available data demonstrates substantially fewer Salvadorian credible fear referrals toward the end of 2010 and throughout 2011, even though the murder rate had been high for many years.¹²³

Second, and more importantly, the drop in recorded murder rates in El Salvador was at best temporary and at worst illusory. Officials in El Salvador have reported a rise in the murder rate

¹²⁰ The data for this table was obtained from UNODC, *Homicide Stats*, *supra* note 107.

¹²¹ See, e.g., USCIS 2014 CREDIBLE FEAR STATISTICS, *supra* note 9.

¹²² See UNODC, 2013 GLOBAL STUDY, *supra* note 119, at 46 (noting that 2012 and 2013 surveys indicate that only half the population believed the gang truce reduced crime).

¹²³ U.S. CITIZENSHIP & IMMIGRATION SERVS., U.S. DEPT OF HOMELAND SEC., CREDIBLE FEAR WORKLOAD SUMMARY FY 2011 (2011) [hereinafter USCIS 2011 CREDIBLE FEAR STATISTICS], available at <http://www.uscis.gov/sites/default/files/USCIS/Outreach/Notes%20from%20Previous%20Engagements/2011/CredibleFearandReasonableFearWorkload.pdf> (reporting that from October 2010 through 2011, between 100 and 200 Salvadorians were usually referred per month).

since May 2013, which accelerated in 2014.¹²⁴ In December 2013, authorities discovered secret mass graves.¹²⁵ These graves, along with rises in disappearances during the time of the purported truce,¹²⁶ bring into question whether the gang truce significantly reduced the murder rate at any point. Based on this data, it appears that the murder rates now comport to the recorded averages in 2011 and the years immediately preceding. In this respect, the murder rate in El Salvador is not trending in a manner that is substantially distinct from Honduras and Guatemala. Moreover, the reported homicides in Guatemala are under-representative of the actual figures.¹²⁷

Homicide victims, however, are not spread evenly throughout the Northern Triangle countries. More refined data compilations on murder rates indicate that certain pockets of the Northern Triangle contain a disproportionate rate of murders per capita;¹²⁸ for example, in Choluteca, Honduras, the murder rate per 100,000 inhabitants in 2010 was 21.8, while the rate in Atlántida, Honduras during the same year was 131.3.¹²⁹ Studies have indeed shown that UACs are more likely to come from regions within their countries where the murder rates are particularly high.¹³⁰

¹²⁴ See Nelson Renteria, *El Salvador Murders Surge as Gang Truce Fades*, REUTERS, Apr. 4, 2014, available at <http://uk.reuters.com/article/2014/04/04/uk-elsalvador-crime-idUKBREA3302S20140404>; Michael Lohmuller, *El Salvador Murders Fall Slightly for 2013, but Rising Again*, INSIGHT CRIME (Jan. 14, 2014), <http://www.insightcrime.org/news-briefs/el-salvador-murders-fall-slightly-in-2013-but-rising-again>; Alexandra Alper et al., *El Salvador Gang Truce Wobbles as Violent Murders Mount*, REUTERS, July 5, 2013, available at <http://www.reuters.com/article/2013/07/06/us-elsalvador-violence-idUSBRE96501D20130706>.

¹²⁵ Miriam Wells, *El Salvador Mass Graves Put Pressure on Gang Truce*, INSIGHT CRIME (Dec. 11, 2013), <http://www.insightcrime.org/news-briefs/el-salvador-mass-graves-put-pressure-on-gang-truce>.

¹²⁶ BUREAU OF DIPLOMATIC SEC., U.S. DEP'T OF STATE, EL SALVADOR 2014 CRIME AND SAFETY REPORT 1–2 (2014), available at <https://www.osac.gov/pages/ContentReportDetails.aspx?cid=15771>; see Hannah Stone, *The Murky Question of Disappearances in El Salvador: An El Faro Investigation*, INSIGHT CRIME (Jan. 25, 2013), <https://www.osac.gov/pages/ContentReportPDF.aspx?cid=15771>.

¹²⁷ See BUREAU OF DIPLOMATIC SEC., U.S. DEP'T OF STATE, GUATEMALA 2013 CRIME AND SAFETY REPORT 1 (2013), available at <https://www.osac.gov/pages/ContentReportPDF.aspx?cid=13878> (“In the case of homicides, the [police do] not count homicides if the victim left the crime scene alive and subsequently died as a result of injuries.”).

¹²⁸ INTERNACIONAL CTR. FOR THE HUMAN RIGHTS OF MIGRANTS, FORCED DISPLACEMENT AND PROTECTION NEEDS PRODUCED BY NEW FORMS OF VIOLENCE AND CRIMINALITY IN CENTRAL AMERICA 19–20, 22–23, 25–26 (2012), available at <http://www.nanseninitiative.org/sites/default/files/UNHCR%20Research%20Paper%20May%202012.pdf>.

¹²⁹ *Id.* at 25.

¹³⁰ See Ana Gonzalez-Barrera et al., *DHS: Violence, Poverty, Is Driving Children to Flee Central America to U.S.*, PEW RES. CENTER (July 1, 2014), <http://www.pewresearch.org/fact-tank/2014/07/01/dhs-violence-poverty-is-driving-children-to-flee-central-america-to-u-s/>; see also INTERNACIONAL CTR. FOR THE HUMAN RIGHTS OF MIGRANTS,

A final potentially relevant issue to assessing the significance of murder rates is whether there are any correlations between short-term changes in the homicide rate and subsequent fluctuations in the rate of claimants. The homicide rate in El Salvador officially began to increase in May 2013.¹³¹ According to reports on the monthly credible fear referral rate of Salvadorians in 2013, there were 749 in March, 947 in April, 1000 in May, 1419 in June, and, in October, the referral rate remained high at 1552.¹³² Since the recorded murder rate continued to increase in June and the credible fear referral rate spiked in June as well, the data does demonstrate a correlation between reported homicides and credible fear referrals. Nevertheless, a confluence of additional factors might have influenced the numbers; further study is needed to ascertain more precisely the significance of the month-to-month credible fear referral trends, as well as the monthly UAC data.¹³³

Insecurity is not simply a product of the murder rate. It could also be based on overall crime rates and a general belief that the state cannot adequately provide protection against criminal elements. Tracking the rates of other violent crimes, however, is hard to accurately accomplish. The available data for violent crimes, such as assault, robbery, and sexual violence, are often incomplete, which makes it difficult to track trends over multiple years.¹³⁴ Additionally, countries and specific localities may diverge in how they classify such crimes.¹³⁵ Further compounding the difficulties, there is extreme underreporting of

supra note 128, at 15–26; Dara Lind, *These Two Maps Show the Violence Driving Central American Children to the US*, VOX (July 1, 2014), <http://www.vox.com/2014/7/1/5861908/child-migrants-are-fleeing-the-most-dangerous-places-on-earth-in-two>.

¹³¹ Lohmuller, *supra* note 124.

¹³² U.S. CITIZENSHIP & IMMIGRATION SERVS., U.S. DEP'T OF HOMELAND SEC., CREDIBLE FEAR WORKLOAD SUMMARY FY 2013 (2013), available at <http://www.uscis.gov/sites/default/files/USCIS/Outreach/Notes%20from%20Previous%20Engagements/2013/July%202013/FY13-CFandRF-stats2013-06-30.pdf> [hereinafter USCIS 2013 CREDIBLE FEAR STATISTICS]; U.S. CITIZENSHIP & IMMIGRATION SERVS., U.S. DEP'T OF HOMELAND SEC., CREDIBLE FEAR WORKLOAD SUMMARY FY 2014 (2014), available at <http://www.uscis.gov/sites/default/files/USCIS/Outreach/Notes%20from%20Previous%20Engagements/Asy-Credible-Reasonable-FearFY14-Q1.pdf>. As of October 2014, USCIS's FY 2013 Credible Fear Workload Summary does not include monthly data from July 2013 to September 2013.

¹³³ For example, the number of credible fear referrals was lower overall in FY 2012, but the month-to-month figures for Salvadorians also show a substantial jump from May 2012 to June 2012. U.S. CITIZENSHIP & IMMIGRATION SERVS., U.S. DEP'T OF HOMELAND SEC., CREDIBLE FEAR WORKLOAD SUMMARY FY 2012 (2012), available at <http://www.uscis.gov/sites/default/files/USCIS/Outreach/Notes%20from%20Previous%20Engagements/2012/December%202012/Credible-Reasonable-workloadsFY12.pdf>.

¹³⁴ See, e.g., U.N. Office on Drug & Crime, Robbery at the National Level, Number of Police-Recorded Offences (2013), http://www.unodc.org/documents/data-and-analysis/statistics/crime/CTS2013_Robbery.xls [hereinafter UNODC, Robbery Statistics] (providing no data on the rate of robbery in Honduras from 2003 through 2010).

¹³⁵ See WORLD BANK, CRIME AND VIOLENCE, *supra* note 117, at 5.

these crimes because, among other reasons, perceived police ineptitude negates the motivation to seek redress.¹³⁶ Consequently—and paradoxically—in some instances, increased crime rates could be the result of heightened efforts by the State to take the reporting seriously (and perception by citizens that reporting will actually lead to a proactive response).¹³⁷ The data that is available does not demonstrate an overall increase or decrease in crime rates that could confidently account for the impetus to flee and seek refuge in the United States.¹³⁸

Aside from the specific incidents of homicide and other crimes, another potentially relevant cause of migration could be how secure individuals feel in their home countries. The premise here is that widespread perceptions of insecurity could fuel migration even for those who have not been personally victimized. Professors Hiskey, Malone, and Orcés have studied the link between migration and perceptions of insecurity in the Northern Triangle.¹³⁹ The results of their surveys demonstrate that even as rates of violence increased over the last decade within the Northern Triangle, respondents' perception of insecurity actually decreased.¹⁴⁰ The one exception was El

¹³⁶ *Id.* at 10 (finding that, in 2008, between 58% and 73% of the victims of a crime in El Salvador, Honduras, and Guatemala did not report the incident); INTERNACIONAL CTR. FOR THE HUMAN RIGHTS OF MIGRANTS, *supra* note 128, at 15 (“[V]ictims interviewed during the development of this study state that they do not denounce their cases before the corresponding bodies for fear of being publicly identified or of being victimized again by [organized crime] . . .”).

¹³⁷ See *UAC Surge Hearing*, *supra* note 12, at 46 (statement of Mark Seitz, Bishop of the Diocese of El Paso, Texas, U.S. Conference of Catholic Bishops) (“With the increased efforts by the Honduran government to stem communications from gang-leaders within prisons, there are reports of increased violence as gangs fragment and mid-level criminal operators compete for control.”).

¹³⁸ For the limited data that is available, there does not appear to be a noticeable increase in assault rates around the time when claims began to spike. In El Salvador, the rate of assaults per 100,000 inhabitants was 76.2 in 2005, and 67.1 in 2012. U.N. Office on Drug & Crime, Assault at the National Level, Number of Police-Recorded Offences (2013), http://www.unodc.org/documents/data-and-analysis/statistics/crime/CTS2013_Assault.xls. The data available for sexual assaults does depict an escalation in incidents in El Salvador and Guatemala (although the data for Guatemala only covers 2011 and 2012). U.N. Office on Drug & Crime, Total Sexual Offences Against Children at the National Level, Number of Police Recorded Offences (2013), https://www.unodc.org/documents/data-and-analysis/statistics/crime/CTS2013_SexualViolence.xls. For robberies, the rates increased until 2009 but subsequently declined. UNODC, Robbery Statistics, *supra* note 134. The robbery rates in Guatemala decreased from 2004 to 2009, but there is no data available subsequent to 2009. *Id.* Despite the lack of data UNODC was able to obtain, the World Bank noted in a 2010 report that “[a]necdotal accounts suggest that armed robbery has become increasingly common in Guatemala, El Salvador, and Honduras.” WORLD BANK, CRIME AND VIOLENCE, *supra* note 117, at 5, 8. If this were the case and the trend continued subsequent to the report, it would buttress the significance of country conditions as a basis for migrants to flee the Northern Triangle.

¹³⁹ See Jonathan Hiskey et al., *Violence and Migration in Central America*, AMERICASBAROMETER INSIGHTS, 2014, at 1.

¹⁴⁰ *Id.* at 2–3.

Salvador, where respondents' fear of crime remained constant.¹⁴¹ The authors proffer that "Central Americans may have become increasingly desensitized to high levels of crime, or made behavioral adjustments in their daily lives to avoid victimization, and thus are now less likely to feel unsafe in their neighborhoods."¹⁴²

Reports appear to corroborate the professors' desensitization suggestion because, in recent years, organized gangs in the Northern Triangle "have established themselves as an alternative, if not primary, authority in parts of the countries."¹⁴³ A study conducted by the Internacional Centre for the Human Rights of Migrants ("ICHRM") also lends support to the professors' suggestion that citizens in the Northern Triangle are not only altering their daily behavior, but rather that the organized crime syndicates in the Northern Triangle have caused significant internal displacement within the countries.¹⁴⁴ The ICHRM found that within the Northern Triangle, organized criminal enterprises are carving out territory to facilitate their illegal trades, leading to hot zones in the countries where murder, extortion, kidnapping, trafficking, and other crimes are particularly high.¹⁴⁵ As organized criminal enterprises accumulate more territory, citizens' options to relocate within the state diminish. The problem is particularly prominent in Honduras, which

offers very few options for internal forced displacement, since organized crime has appropriated a great quantity of territories in the country. *Maras* or organized gangs are mainly present in the capital cities . . . and the country's commercial capital[,] . . . while drug cartels operate in the east of the countries . . . and in some areas of the west and northwest . . .¹⁴⁶

Of course, migrating to the United States might be seen as more desirable than internal relocation. The potential benefits include family reunification and economic opportunity. Unsurprisingly, studies have shown that depressed economic opportunities and family reunification are also factors that drive migration from the Northern Triangle.¹⁴⁷ The economic outlook in

141 *Id.* at 3 (comparing responses from 2004 through 2012).

142 *Id.* at 3–4.

143 *UAC Surge Hearing, supra* note 12, at 47 (statement of Mark Seitz, Bishop of the Diocese of El Paso, Texas, U.S. Conference of Catholic Bishops).

144 INTERNACIONAL CTR. FOR THE HUMAN RIGHTS OF MIGRANTS, *supra* note 128, at 15.

145 *Id.* at 16–26.

146 *Id.* at 24.

147 See U.N. High Comm'r for Refugees, *Children on the Run*, 16–17 (Mar. 12, 2014) [hereinafter UNHCR, *Children on the Run*].

Northern Triangle countries is indeed bleak.¹⁴⁸ While much of the economic turmoil is intertwined with high crime rates, some of the depressed economic conditions that cause individuals to migrate are attributable to general market forces. For example, Guatemalan migrants have been affected by the “demise in the coffee industry in recent years.”¹⁴⁹ Additionally, the global recession spawned by the U.S. financial crisis in 2008 significantly impacted the Salvadorian economy because a substantial percentage of the economy is dependent on remittances from the United States.¹⁵⁰

Surveys on national crime rates and overall perceptions of insecurity do not necessarily account for demographic factors such as age and gender. Violence in the Northern Triangle appears to disproportionately impact younger members of the population.¹⁵¹ The relevance of this disproportionate impact to UACs is intuitive; for credible fear claimants, migrants as a whole tend to be younger than the overall population.¹⁵² Young migrants have conveyed a growing Hobson’s choice because of criminals’ recruitment tactics. Reports indicate that children now face the realization that they have to join gangs or risk victimization because of gangs’ recruitment tactics, which makes the decision to flee their only viable option.¹⁵³ Over the last five years in parts of Honduras, for example, “the number of kids coming through the doors who are victims of violence has

¹⁴⁸ See *Child Poverty: A Priority Challenge*, CHALLENGES (U.N. Int’l Children’s Emergency Fund), May 2010, at 1, 7 (noting the extreme rates of child poverty in Northern Triangle countries); Stephanie Gosk et al., *Desperate Journey: Crime and Poverty Drive Honduran Kids to U.S.*, NBC NEWS (July 7, 2014), <http://www.nbcnews.com/storyline/immigration-border-crisis/desperate-journey-crime-poverty-drive-honduran-kids-u-s-n150011> (reviewing malnourishment and schooling rates among Honduran children).

¹⁴⁹ COMM. ON MIGRATION OF THE U.S. CONFERENCE OF CATHOLIC BISHOPS, *supra* note 119, at 2.

¹⁵⁰ *Id.*; see Villalobos, *supra* note 109, at 69.

¹⁵¹ See Julie Turkewitz, *Fear Is Driving Young Men Across the U.S. Border*, ATLANTIC (June 20, 2014, 4:07 PM), <http://www.theatlantic.com/international/archive/2014/06/credible-fear-whats-driving-central-americans-across-the-us-border/373158/> (“[G]angs . . . feed on the money and manpower that youths provide, and pursue them with an almost-religious persistence.”).

¹⁵² See Alex Arnold et al., *Who Seeks to Exit? Security, Connections, and Happiness as Predictors of Migration Intentions in the Americas*, AMERICASBAROMETER INSIGHTS, 2011, at 1, 3 (noting that aging members of the population are less likely to “leave their homeland to move to another country”).

¹⁵³ See Turkewitz, *supra* note 151; Moni Basu, *Daniel’s Journey: How Thousands of Children Are Creating a Crisis in America*, CNN (June 19, 2014, 5:42 PM), <http://www.cnn.com/2014/06/13/us/immigration-undocumented-children-explainer/> (noting how “[g]ang members [have] infiltrated public schools” in El Salvador).

tripled,” and pediatricians have “had to become . . . expert[s] at repairing the damage bullets do to children.”¹⁵⁴

A study published by the United Nations in 2014 found that children from Northern Triangle countries have noted security concerns as a basis for fleeing with much greater frequency in recent years.¹⁵⁵ The study is based on interviews the U.N. conducted with children who fled Mexico and the Northern Triangle around the time of the surge. In a previous 2006 study, only 13% of children mentioned “international protection concerns” as a basis for migrating.¹⁵⁶ “International protection concerns” include “violence in society predominantly by armed criminal actors, and abuse in the home.”¹⁵⁷ In the interviews conducted between 2011 and 2013 for the 2014 study, 53% of children voiced comparable reasons for migrating.¹⁵⁸ The numbers were not spread evenly between the three Northern Triangle countries. Twenty percent of children from Guatemala mentioned violence as a basis for fleeing, while 43% from Honduras made similar claims and a staggering 69% of children from El Salvador indicated that violence formed a basis for fleeing.¹⁵⁹ A plurality of those interviewed stated that they had already experienced actual harm or the threat of harm from gangs or other criminals.¹⁶⁰ Boys were more likely to report violence generally while girls were more likely to report actual or threatened sexual violence.¹⁶¹ While the study documents rising security concerns, it also makes clear that family reunification and greater opportunities drive many children to migrate to the United States.¹⁶²

As a final point, regardless of whether depressed economic conditions, deteriorating security concerns, or domestic violence is responsible, the rate of asylum requests by individuals from Northern Triangle countries is also worth mentioning. The U.N. has calculated that since 2009, “Mexico, Panama, Nicaragua, Costa Rica and Belize documented a 435% increase in the

¹⁵⁴ Gosk et al., *supra* note 148; *see* Robles, *supra* note 11 (noting that the majority of children live in gang-controlled areas); *see also* James Bargent, *Honduras Extortion Gangs Undergoing Violent Leadership Crisis*, INSIGHT CRIME (June 3, 2014), <http://www.insightcrime.org/news-briefs/honduras-extortion-gangs-undergoing-violent-leadership-crisis> (noting that attempts to crack down on gang leaders in prison has led to the splintering of the organizational structure and increased violence).

¹⁵⁵ UNHCR, *Children on the Run*, *supra* note 147, at 24.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* at 25.

¹⁶⁰ *Id.* at 26.

¹⁶¹ *Id.* at 27.

¹⁶² *Id.* at 7–10.

number of asylum applications lodged by individuals from El Salvador, Honduras and Guatemala.”¹⁶³

On the whole, the numbers indisputably demonstrate a dire situation in the Northern Triangle. Crime rates are high, gangs and other criminal entities run rampant, economic opportunities are limited, and the governments have largely shown themselves incapable of curtailing the violence. Much of the data indicates that the conditions in the Northern Triangle have been grim for many years, while other data suggests that certain circumstances have worsened since the surge commenced.

B. Word of Mouth

A recurring basis asserted to explain the surges has been what can be referred to as the word of mouth effect. Individuals learn about actual or allegedly successful ways to enter the United States and mimic the pattern that has been successful. Recent reports concerning the migrant community from the frontlines of the southwestern border have provided firsthand accounts of how the word of mouth effect is fueling migration from the Northern Triangle.¹⁶⁴ One article reported that “[m]igrants have sent word back home they received a ‘permit’ to remain at least temporarily in the United States, feeding rumors along migrant routes and spurring others to embark on the long journey.”¹⁶⁵ Providing anecdotal support, a migrant explained, “I heard in Guatemala that people were caught by immigration, but then they let them go and gave them a permit.”¹⁶⁶ Representative Henry Cuellar, a Democrat who represents a Texas district that borders Mexico, explained that there is a “perception” among migrants “that if you step on American soil, they will give you a piece of paper, you go to the bus station and you can go anywhere in the United States. You’re free with that permisio.”¹⁶⁷ This

¹⁶³ *Id.* at 4.

¹⁶⁴ See, e.g., *Illegal Immigrant: Reports in Central America Encourage Trek North*, KRGV.COM (June 3, 2014), <http://www.krgv.com/news/illegal-immigrant-reports-in-central-america-encourage-trek-north/> (“[T]he message being disseminated in [Guatemala] is, ‘go to America with your child, you won’t be turned away.’”).

¹⁶⁵ Julia Preston, *Migrants Flow in South Texas, as Do Rumors*, N.Y. TIMES, June 17, 2014, at A1.

¹⁶⁶ *Id.*; see also Basu, *supra* note 153 (“[UACs] make no quarrels about getting caught.”).

¹⁶⁷ Preston, *supra* note 165; see also Lisa Riordan Seville & Hannah Rapple, *Border Children Tell Their Stories: Why We Came to the US*, NBC NEWS (June 12, 2014), <http://www.nbcnews.com/news/investigations/border-children-tell-their-stories-why-we-came-us-n129646> (noting rumors of “lax enforcement”); Kirk Semple, *Surge in Child Migrants Reaches New York, Overwhelming Advocates*, N.Y. TIMES, June 18, 2014, at A19 (listing a cause of minors fleeing their home countries as “a perceived change in American policy that would favor child immigrants”).

perception can be seen by the fact that more and more migrants have stopped trying to evade Border Patrol agents; rather, they “run toward agents.”¹⁶⁸

The question, then, is what is fueling the word of mouth effect that has led people to believe that their chance to remain in the United States has significantly increased. The suggested potential factors diverge between credible fear claimants and UACs.

1. Credible Fear Claims

In the context of the rise in credible fear claims, some of the most commonly cited reasons for the word of mouth effect are credible fear grant rates, U.S. detention policies, misinformation about the benefits of a favorable credible fear determination, and asylum grant rates. Each will be reviewed in turn.

a. Credible Fear Grant Rates

As noted above, some have asserted that a possible cause of the increase in individuals claiming to fear persecution or torture could be the high rate at which the Asylum Office is finding that individuals have established a credible fear of persecution or torture; a positive finding would make it less likely the government would summarily deport a migrant who is otherwise subject to expedited removal.¹⁶⁹ Proponents of this argument point to the fact that positive credible fear determinations have been fairly high in recent years, averaging between 80% and 85%—and even around 90% when excluding cases not assessed on the merits.¹⁷⁰ Historically, however, there have been many years where the credible fear grant rates met or exceeded those accompanying the current surge in claims, but a comparably high request rate did not materialize. For example, the credible fear grant rate hovered around 90% from 1999 to 2005, but the number of referrals to the Asylum Office never increased by more than a few thousand in any given year.¹⁷¹

¹⁶⁸ Preston, *supra* note 165.

¹⁶⁹ *Asylum Surge Hearing*, *supra* note 5, at 2 (statement of Rep. Bob Goodlatte, Chairman, Comm. on the Judiciary) (attributing, in part, the credible fear surge to the “virtual rubberstamping of applications”).

¹⁷⁰ The grant rates reported by ICE may also not be entirely accurate or representative. Advocacy groups have reported instances where U.S. Customs and Border Protection (“CBP”) did not refer to the Asylum Office individuals who asserted a fear of persecution. *See, e.g., Asylum Surge Hearing*, *supra* note 5, at 141 (statement of American Immigration Lawyers Association); HRF, HOW TO PROTECT REFUGEES, *supra* note 78, at 11–12, 30–31. Conversely, others have stated that the high grant rate could be the result of better screenings by CBP.

¹⁷¹ *Asylum Surge Hearing*, *supra* note 5, at 227.

Aside from the grant rate itself, another proffered cause for the surge in claims is the belief that officials have lowered the standard needed to establish a credible fear of persecution.¹⁷² The assertion that the Asylum Office incorrectly applies the credible fear standard, however, is both overly simplistic and irrelevant. The converse argument could also have been made when the grant rate was low because, for many credible fear assessments, the decisions are not based on clear-cut standards that assessors can apply rigidly. Asylum evaluations entail matters of degree, probability assessments, and reasonable disagreements about the merits of claims—in addition to credibility determinations that are difficult to render in a short timeframe. As a result, the credible fear “significant possibility” language often imparts onto decision makers the need to assess the probability of a probability.¹⁷³ For the nexus prong of asylum determinations, the scope of conduct that falls within one of the protected grounds is continuously evolving, and courts even disagree sometimes about the scope of certain protected grounds.¹⁷⁴ Thus, distinctions in grant rates are more likely a product of two possibilities: how much adjudicators choose to err on the side of caution and whether the circumstances in applicants’ home countries altered the viability of the proffered bases for asylum claims.

More relevant than the particular assessment threshold is whether there has been a noticeable shift in the overall grant rate. In a vacuum, the high grant rate in recent years is not itself a significant contributing cause of the surge in claims, but the distinction between the grant rate during the surge and the rate before the surge could play a larger role. From 2006 to 2009, the percentage of claims where the Asylum Office found a credible fear was in the sixties.¹⁷⁵ Subsequently, the grant rate quickly accelerated to the seventies and eighties as the number of credible fear claims began to rise.¹⁷⁶ Thus, the current high grant rates come on the coattails of a period in time in which the grant rates were historically low. It could be argued that it is not so much that the current grant rate is historically anomalous, but

¹⁷² *Id.* at 6 (statement of Rep. Jason Chaffetz) (attributing the grant rate to “the Obama administration’s undermining of the enforcement of our immigration law”).

¹⁷³ 8 U.S.C. § 1225(b)(1)(B)(v) (2012) (providing the credible fear assessment standard); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 431–32 (1987) (discussing the likelihood of harm that applicants must demonstrate to establish a well-founded fear of persecution); *id.* at 450 (Blackmun, J., concurring).

¹⁷⁴ *Compare Gatimi v. Holder*, 578 F.3d 611, 615–16 (7th Cir. 2009) (holding that the Board’s particular social group construction is not entitled to deference), *with* *Henriquez-Rivas v. Holder*, 707 F.3d 1081, 1087–88 (9th Cir. 2013) (disagreeing with aspects of the analysis in *Gatimi*).

¹⁷⁵ *Asylum Surge Hearing*, *supra* note 5, at 227.

¹⁷⁶ *Id.*

rather that it jumped significantly in a short period of time—and the migrating public might have taken notice of the grant rate spike. Indeed, the rise in grant rates might have been particularly significant for individuals from the Northern Triangle, as their grant rates in the mid-2000s were particularly low. For example, according to the Congressional Research Service, in FY 2008, the Asylum Office only found that 40% of Salvadorians had a credible fear of persecution or torture—a rate that has since gone up.¹⁷⁷ Noting this potential cause does not necessarily impugn to migrators any nefarious intention. A prospective migrant who learns that grants rates have increased may reasonably factor this information into his or her decision to flee a country with security woes and depressed economic opportunities.

b. The Morton Memo and Detention Rates

The Morton Memo has been cited as a potential cause of the surge in credible fear claims because ICE issued it in December 2009, which is around the time when individuals subject to expedited removal began to assert a fear of persecution or torture with greater frequency.¹⁷⁸ The argument is that claimants are more likely to assert a fear of persecution because the Morton Memo expanded the criteria for parole eligibility. The data does appear to show a rise in the percentage of eligible applicants that ICE releases under its parole authority.¹⁷⁹ ICE provided Human Rights First with statistical data that indicates that the rate of release on parole between FY 2004 and FY 2007 dropped from 41.3% to 4.2%.¹⁸⁰ By FY 2012, the rate of release rose to 80%.¹⁸¹

Despite the increased release rate based on parole, the Morton Memo's limited scope minimizes the potential impact of its change to detention practices. All migrants subject to expedited removal can claim to fear persecution or torture, but only "arriving aliens"—those apprehended at a port of entry—are

¹⁷⁷ *Id.* at 70 (statement of Ruth Ellen Wasem, Congressional Research Service).

¹⁷⁸ *Id.* at 2 (statement of Rep. Bob Goodlatte).

¹⁷⁹ See *infra* Table 4 for a compilation of the available parole data. Even if parole is granted, release from detention may still require the detainee to post bond. See *Asylum Surge Hearing, supra* note 5, at 105–06 (statement of U.S. Commission on International Religious Freedom).

¹⁸⁰ HUMAN RIGHTS FIRST, U.S. DETENTION OF ASYLUM SEEKERS 35 (2009) [hereinafter HRF, ASYLUM DETENTION]; see also U.S. CITIZENSHIP & IMMIGRATION SERVS., U.S. DEP'T OF HOMELAND SEC., REPORT TO CONGRESS: DETAINED ASYLUM SEEKERS FISCAL YEAR 2007, at 6 (2008) [hereinafter ICE 2007 DETENTION STATISTICS] (noting that in FY 2007 "67 percent of all aliens found to have met the 'credible fear' screening standard who were detained had 90 or fewer days in detention").

¹⁸¹ *Asylum Surge Hearing, supra* note 5, at 107 (statement of U.S. Commission on International Religious Freedom) (recounting information that ICE provided to USCIRF).

potentially eligible for parole.¹⁸² Most individuals subject to expedited removal, however, are not considered arriving aliens. The available data indicates that approximately 75% of individuals claiming to fear persecution or torture are not apprehended at a port of entry.¹⁸³ In the first half of FY 2014, for example, 16,428 of the 20,488 credible fear decisions concerned individuals apprehended inland.¹⁸⁴ Consequently, the detention policies described in the Morton Memo only apply to approximately 25% of individuals subject to expedited removal who claim to fear persecution or torture. Thus, while there does appear to be a substantial increase in the number of individuals released on parole, the relatively low number of claimants to whom ICE's parole authority applies cautions against finding that the Morton Memo's detention policy changes are itself significantly responsible for the increase in credible fear claims. To more accurately assess the true impact of the Morton Memo, DHS would need to provide data on the number of Northern Triangle migrants who qualify as arriving aliens.

Regarding ICE's detention practices more generally, a few cautionary words are in order. The data available for measuring detention rates are far from comprehensive. The information that is available is often the product of formal or informal requests made to DHS by advocacy groups for statistical data that cover delineated time periods—or statistical data provided to the U.S. Commission on International Religious Freedom (“USCIRF”), an independent government agency tasked with assessing DHS's detention practices as they pertain to the expedited removal process.¹⁸⁵ Thus, the obtained data does not cover many years since DHS (and the former INS) began compiling statistics on expedited removal and credible fear cases. Moreover, even for the years when DHS publicized its detention data, the information does not always appear to consistently quantify the detention status of asylum seekers subject to expedited removal. DHS has noted that the “proportions in various outcomes classes are not strictly comparable” to the data compiled in previous years.¹⁸⁶

¹⁸² See MORTON MEMO, *supra* note 68, ¶¶ 1–4.

¹⁸³ See, e.g., USCIS 2014 CREDIBLE FEAR STATISTICS, *supra* note 9; USCIS 2013 CREDIBLE FEAR STATISTICS, *supra* note 132.

¹⁸⁴ USCIS 2014 CREDIBLE FEAR STATISTICS, *supra* note 9.

¹⁸⁵ USCIRF was established by the International Religious Freedom Act of 1998. See 1 USCIRF 2005 REPORT, *supra* note 49, at 10.

¹⁸⁶ U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, U.S. DEPT OF HOMELAND SEC., DETAINED ASYLUM SEEKERS: FISCAL YEARS 2009 AND 2010 REPORT TO CONGRESS 3 (2012) [hereinafter ICE 2009 & 2010 DETENTION STATISTICS]; *Asylum Fraud: Abusing America's Compassion?: Hearing Before the Subcomm. on Immigration & Border Sec. of the H. Comm. on the Judiciary*, 113th Cong. 116 (2014) [hereinafter *Asylum Fraud Hearing*] (providing a copy of ICE's FY 2012 report on detained asylum seekers).

Additionally, the methodology DHS uses to classify detention status has changed over the years.¹⁸⁷ Also worth noting, because detention data takes into account the initial detention decision and the ultimate release rates for applicants who might have been detained initially, the detention and custody counts differ from the number of credible fear decisions made in a particular fiscal year. Given the shortcomings in the data, this Article can only use the information obtained to illustrate general detention trends and to assess the proportional use of certain detention and release methods.

Table 4 provides a summary of the available data. The first two columns provide the number of credible fear claimants who were and were not detained. For those who were detained, the remainder of Table 4 lists the reasons why ICE eventually released them.

Table 4: Detention and Release Rate Data for Credible Fear Claimants¹⁸⁸

	NOT DET	DET	REASN FOR RELEASE											
			BOND	DEP	DETN	OR	OS	OTHR	PARO	USM	TR	VD	WD	XFER
FY 2006	4461	257	41	143	28	2	4	N/A	16	0	13	3	0	7
FY 2007	605	4614	1502	2031	81	355	68	N/A	207	5	277	23	22	43
FY 2009	5386	5317	1972	1441	487	403	164	254	284	15	N/A	10	28	259
FY 2010	9291	9041	4272	1721	648	415	200	163	1095	31	N/A	13	6	475
FY 2012	816	14,525	≈4969	≈2393	≈881	≈3841	≈242	≈175	1175	25	N/A	26	1	≈793

*NOT DET=not detained; DET=detained; REASN FOR RELEASE=reason why ICE released a detained migrant; BOND=released on bond; DEP=released for removal from the United States; DETN=detained; OR=released on recognizance; OS=released

¹⁸⁷ Compare U.S. COMM'N ON INT'L RELIGIOUS FREEDOM, 2 REPORT ON ASYLUM SEEKERS IN EXPEDITED REMOVAL: EXPERT REPORTS 333 (2005) [hereinafter 2 USCIRF 2005 REPORT] (defining the categories that comprise "release" and "held" determinations), with ICE 2009 & 2010 DETENTION STATISTICS, *supra* note 186, at 46 (defining the terms used in 2009).

¹⁸⁸ For the data used to compile Table 4, see *Asylum Fraud Hearing*, *supra* note 186, at 117, 138 (providing the credible fear statistics in ICE's FY 2012 report on detained asylum seekers); ICE 2009 & 2010 DETENTION STATISTICS, *supra* note 186, at 4, 46; ICE 2007 DETENTION STATISTICS, *supra* note 180, at 4 (providing summary data only); U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, U.S. DEPT OF HOMELAND SEC., REPORT TO CONGRESS: DETAINED ASYLUM SEEKERS FISCAL YEAR 2006, at 4 (2007) [hereinafter ICE 2006 DETENTION STATISTICS]. Some of the figures for FY 2012 are estimations because the PDF version of the report in the congressional record blurs some of the release rate numbers. See *Asylum Fraud Hearing*, *supra* note 186, at 138. The definitions of the reasons for release come from the reports. Because ICE modified its release categories, Table 4 includes the notation "N/A" when a certain category is not applicable in a given fiscal year.

on an order of supervision; OTHR=includes escaped, lack of funds to detain, lack of space, and all cases deemed unclassified for release details; PARO=paroled into the United States; TR=released, case terminated; USM=released to U.S. Marshals; VD=released for voluntary departure from the United States; WD=released, alien withdraws application; XFER=transferred between facilities; N/A=category not applicable within that fiscal year.

The available data does not establish a definitive trend for general detention rates. To the contrary, it appears quite haphazard. As Table 4 illustrates, ICE detained very few claimants in FY 2006. By contrast, ICE initially detained nearly all credible fear claimants in FY 2007. In FYs 2009 and 2010, however, ICE only detained approximately 50% of claimants. Changing course once again in FY 2012, ICE initially detained almost all credible fear claimants. The basis for the fluctuation in initial detention determinations is unclear. It could be the result of policy changes or inconsistent methodologies employed by ICE to code the data.¹⁸⁹ Moreover, ICE does not provide any additional data on the release of those who were not detained, which would help to obtain a more accurate understanding of its detention practices.

Perhaps more germane than the general detention rates are the release rates and the average length of detention. In 2001, the government released prior to their hearing date in immigration court 86.1% of claimants found to have a credible fear of persecution or torture.¹⁹⁰ By 2003, the release rate had fallen to 62.5%.¹⁹¹ In FY 2006, ICE released nearly all claimants within ninety days.¹⁹² While not publically available, groups that have seen the release rates for FY 2007 estimate that it dropped to 44.7%, which would coincide with ICE's incredibly low use of its parole authority in FY 2007.¹⁹³ In FYs 2009, 2010, and 2012, ICE again released almost all detainees, and the vast majority were released within ninety days.¹⁹⁴ Thus, the data shows that generally low release rates in FY 2007 increased thereafter and remained consistently high through FY 2012. The data also

¹⁸⁹ For instance, since authorities must detain migrants subject to expedited removal prior to a credible fear determination by the Asylum Office, it is possible that ICE has modified how it accounts for detention during this time period. See 8 U.S.C. § 1225(b)(1)(B)(iii)(IV) (2012).

¹⁹⁰ 2 USCIRF 2005 REPORT, *supra* note 187.

¹⁹¹ *Id.*

¹⁹² ICE 2006 DETENTION STATISTICS, *supra* note 188, at 6.

¹⁹³ HRF, ASYLUM DETENTION, *supra* note 180, at 35.

¹⁹⁴ *Asylum Fraud Hearing*, *supra* note 186, at 136; ICE 2009 & 2010 DETENTION STATISTICS, *supra* note 186, at 44.

generally shows that most claimants were not detained for very long.

In sum, based on the available data, it appears that release rates have significantly increased for arriving aliens. More generally, it also appears that release rates have increased since FY 2007, but given the lenient detention practices in FY 2006, the current detention practices are not unprecedented.

c. The Implications of Credible Fear Grants

As reviewed above, the credible fear screening standard is much lower than the ultimate standard adjudicators use to determine if an applicant is entitled to asylum. Nevertheless, media reports and political organizations have incorrectly stated that credible fear grants constitute “temporary asylum” or otherwise imply that a credible fear grant provides an opportunity to obtain benefits greater than what it actually provides.¹⁹⁵ Advocacy groups have noted, however, that “[t]his kind of misinformation can then be circulated through social media and word of mouth, potentially encouraging people to make decisions based on inaccurate information.”¹⁹⁶ Accordingly, reports on the perceived benefits of credible fear grants might contribute to the word of mouth effect in this context.

d. Asylum Grant Rates

A final potential contributor to the word of mouth effect concerns asylum grant rates and whether an increased likelihood of success could incentivize individuals from the Northern Triangle to migrate to the United States and express a fear of persecution. Table 5 provides the grant and denial rates in immigration court for Northern Triangle asylum seekers. There are, however, numerous additional categories not provided here, such as the number of applicants who abandon their claims.

¹⁹⁵ See, e.g., *Immigration: Claims for Asylum Soar in 2013*, UNITED PRESS INT’L (Dec. 13, 2013), http://www.upi.com/Top_News/US/2013/12/13/Immigration-Claims-for-asylum-soar-in-2013/UPI-12891386944160/; Brian Bennett, *Immigration Claims for Asylum Soar*, L.A. TIMES (Dec. 12, 2013), <http://articles.latimes.com/2013/dec/12/news/la-pn-immigration-asylum-claims-soar-20131212>.

¹⁹⁶ HRF, HOW TO PROTECT REFUGEES, *supra* note 78, at 17.

Table 5: Asylum Grant Rate for Northern Triangle Countries¹⁹⁷

Year	El Salvador		Guatemala		Honduras	
	Granted	Denied	Granted	Denied	Granted	Denied
FY 2009	100	1049	123	1034	34	347
FY 2010	123	923	131	894	56	321
FY 2011	137	1141	145	851	58	421
FY 2012	158	971	192	823	77	388
FY 2013	181	1186	153	829	92	575

For all three countries, the data establishes that the grant rates are exceptionally low. Additionally, the figures show little to no escalation in the grant rate immediately preceding or during the surge. Accordingly, it does not appear that asylum grant rates have contributed to the surge.

2. UAC Border Crossings

For UACs, many suggest that the word of mouth effect is the product of several recent legislative and policy changes to immigration law and enforcement, as well as accompanying attempts by criminal organizations to exploit real and perceived changes to the law.¹⁹⁸ TVPRA and the Deferred Action for Childhood Arrivals are the two changes considered most responsible for spreading word that deportation is less likely to occur or not likely to happen at all.

a. Trafficking Victims Protection Reauthorization Act

As noted above, TVPRA provides that “an unaccompanied alien child in the custody of the Secretary of Health and Human Services shall be promptly placed in the least restrictive setting that is in the best interest of the child.”¹⁹⁹ For children from noncontiguous countries such as those of the Northern Triangle, TVPRA—for quite legitimate reasons—diminishes the

¹⁹⁷ To view the source from which Table 5’s data is derived, see OFFICE OF PLANNING, ANALYSIS & TECH., EXEC. OFFICE FOR IMMIGRATION REVIEW, U.S. DEPT’ OF JUSTICE, IMMIGRATION COURTS ASYLUM STATISTICS FY 2009–2013 (2014), available at <http://www.justice.gov/eoir/efoia/FY2009-FY2013AsylumStatisticsbyNationality.pdf>.

¹⁹⁸ See, e.g., Chishti & Hipsman, *supra* note 93; Carle Hulse, *Migrant Surge Traced to Law on Trafficking*, N.Y. TIMES, July 8, 2014, at A1.

¹⁹⁹ 8 U.S.C. § 1232(c)(2)(A) (2012).

government's ability to quickly deport minors. The premise of these repatriation hurdles is to protect victims of human trafficking.²⁰⁰ The surge in UAC border crossings, however, might be "classic unintended consequences" of the desire to protect potential victims of human trafficking.²⁰¹ Interviewed migrants and immigration officials have indicated that the lower rate of deportation of minors over the past few years has indeed created the perception that DHS's deportation policy toward UACs has changed.²⁰²

b. Deferred Action for Childhood Arrivals

The second basis cited as a potential reason for the UAC surge is DACA—the Deferred Action for Childhood Arrivals.²⁰³ DACA is an administrative policy issued by DHS in 2012 that instructs officials to defer the removal of certain minors who may benefit from the previously proposed DREAM Act.²⁰⁴ DACA, however, does not apply to minors crossing the border during the current surge.²⁰⁵ Studies have suggested that the migratory rates of UACs from the Northern Triangle immediately following the creation of DACA actually decreased.²⁰⁶ Nevertheless, there have been reports that smuggling organizations may be employing misinformation about legal remedies, including DACA, to convince young migrants to attempt the often dangerous journey to the United States.²⁰⁷ The evidence regarding the significance of DACA as an incentive to migrate, however, is largely anecdotal.

3. Smuggling Organizations

Politicians, researchers, and news reports often note the possibility that those who facilitate unauthorized border crossings or physically take part in smuggling migrants are

²⁰⁰ *Id.* § 1232(a)(1).

²⁰¹ Hulse, *supra* note 198; *see also* Chishti & Hipsman, *supra* note 93 (noting the potential perception since TVPRA that the United States treats UACs differently).

²⁰² Chishti & Hipsman, *supra* note 93 (providing the reduced deportation rates); Robles, *supra* note 11 (noting the perception).

²⁰³ *UAC Surge Hearing*, *supra* note 12, at 5–6.

²⁰⁴ *See* Memorandum from Janet Napolitano, Sec'y, U.S. Dep't of Homeland Sec., to David V. Aguilar, Acting Comm'r, U.S. Customs & Border Prot., Alejandro Mayorkas, Dir., U.S. Citizenship & Immigration Servs., and John Morton, Dir., U.S. Immigration & Customs Enforcement (June 15, 2012), *available at* <http://www.ice.gov/doclib/about/offices/ero/pdf/s1-certain-young-people.pdf>.

²⁰⁵ *Id.*

²⁰⁶ *See* Wong, *supra* note 17, at 4–5.

²⁰⁷ Chishti & Hipsman, *supra* note 93; *see also* Caitlin Dickson, *How Mexico's Cartels Are Behind the Border Kid Crisis*, DAILY BEAST (July 9, 2014), <http://www.thedailybeast.com/articles/2014/06/23/how-mexico-s-cartels-are-behind-the-border-kid-crisis.html>; Seville & Rappleye, *supra* note 167.

responsible for communicating information that has contributed to both surges.²⁰⁸ Unlike the potential causes previously discussed, such communications are not a root cause of the surge but rather a means to further spread word about the actual and perceived changes to law and policy that were previously discussed.²⁰⁹ It is in smugglers' interest to spread word because heightened interest in migrating contributes to the industry's multi-billion dollar enterprise and can even help facilitate smugglers' narcotics trade.²¹⁰ Smuggling organizations often take advantage of perceived weaknesses in the entry process and help migrants exploit them;²¹¹ right now, the credible fear process and UAC laws could be perceived as potential weaknesses.²¹² As to why the surge took years to materialize, migration experts have suggested that "[i]t took a little time for word to get back to Central America and other countries about those protections, as well as for criminal organizations to develop smuggling infrastructure around them."²¹³ It is likely that smuggling organizations have played some role in facilitating the surge. The extent of that role, however, is not readily discernible.

C. The Prospect of Immigration Reform

For both UACs and those claiming to credibly fear persecution or torture, another basis could potentially be

²⁰⁸ See, e.g., Eyder Peralta, *Central American Presidents Say U.S. Shares Responsibility for Migration Crisis*, NPR (July 24, 2014), <http://www.npr.org/blogs/thetwo-way/2014/07/24/334942174/central-american-presidents-say-u-s-shares-responsibility-for-migration-crisis> (relaying the President of Honduras's belief that one of many contributors to the surge is "human smugglers telling families in Honduras that they could stay in the U.S. if they make it past the border").

²⁰⁹ E. Eduardo Castillo & Christopher Sherman, *Migration Spotlights Mexican 'Coyote' Smugglers*, ASSOCIATED PRESS, July 21, 2014, available at <http://bigstory.ap.org/article/migration-spotlights-mexican-coyote-smugglers> (noting how some have suggested that coyotes help spread word that it is now easier to enter and remain in the United States).

²¹⁰ U.N. OFFICE OF DRUGS & CRIME, *THE GLOBALIZATION OF CRIME: A TRANSNATIONAL ORGANIZED CRIME THREAT ASSESSMENT*, at 59, U.N. Sales No. E.10.IV.6 (2010) (estimating that the annual income for smugglers is \$6.6 billion); Dickson, *supra* note 207 (discussing how traffickers use migrants as diversions).

²¹¹ See Daniel González, *Immigrants from India Surge Across Arizona Border*, REPUBLIC (Sept. 8, 2013), <http://www.azcentral.com/news/politics/articles/20130907immigration-arizona-border-indian.html> (noting a sharp rise in similar credible fear claims that experts believe may be attributable to smuggling organizations).

²¹² See *Asylum Surge Hearing*, *supra* note 5, at 186 (statement of Michael J. Fisher, Chief, U.S. Border Patrol).

²¹³ Suzanne Gamboa, *Too Many, Too Fast: Border Children Swamping Agents*, NBC NEWS (June 9, 2014), <http://www.nbcnews.com/news/latino/too-many-too-fast-border-child-ren-swamping-agents-n126751> (recounting the sentiments of Marc Rosenblum, deputy director of the Migration Policy Institute's U.S. immigration program); see also *Asylum Fraud Hearing*, *supra* note 186, at 71 (statement of Hipolito M. Acosta, former District Director, U.S. Citizenship and Immigration Services) (discussing the link between UACs, smugglers, and drug cartels).

contributing to the surge in claims and border crossings: the possibility of immigration reform in the near future.²¹⁴ Many migrants might well be aware that current U.S. immigration law does not provide them with a legal basis to remain in the United States permanently. They may believe, however, that prospective immigration reform could provide them with a path to legal status. In this respect, they are willing to ride it out and wait to see if immigration reform materializes—even though a path to legal status may be premised on a certain length of continuous residence in the United States that they likely cannot satisfy.²¹⁵

D. Border Security and Fraud

Some appear to partially attribute the surge to perceived lax security at the southwestern border.²¹⁶ The data, however, does not support this claim. Border enforcement spending has increased, as have the number of border patrol agents.²¹⁷ More importantly though, credible fear claimants and UACs do not typically try to evade border patrol agents.²¹⁸ Consequently, while many of the above-discussed potential causes may have impacted the surge, perceived lax border security does not appear to be a relevant factor.

Conversely, and seemingly paradoxically, some have partially attributed the surge to *heightened* enforcement efforts at the border.²¹⁹ The premise is that a larger border patrol presence has caused migrants to seek alternate means to gain entry to the United States. For credible fear claimants, the government's increased use of expedited removal could cause more migrants to allege a fear of persecution or torture, since a credible claim provides one of the only means at migrants' disposal to avoid deportation when they are otherwise subject to expedited removal.²²⁰

²¹⁴ Jim Dwyer, *A 12-Year-Old's Trek of Despair Ends in a Noose at the Border*, N.Y. TIMES, Apr. 20, 2014, at A1 ("The prospect of immigration reform in the United States is also enticing . . . because of the belief that anyone already in the country illegally will be allowed to stay.").

²¹⁵ For example, the proposed 2013 Senate bill would only authorize a path to citizenship for certain unauthorized immigrants who resided in the United States before December 31, 2011.

²¹⁶ See, e.g., *UAC Surge Hearing*, *supra* note 12, at 2; see also DAN RESTREPO & ANN GARCIA, CTR. FOR AM. PROGRESS, THE SURGE OF UNACCOMPANIED CHILDREN FROM CENTRAL AMERICA: ROOT CAUSES AND POLICY SOLUTIONS 3 (2014) (recounting the border security argument proffered by several lawmakers).

²¹⁷ See U.S. BORDER PATROL, U.S. DEPT OF HOMELAND SEC., BORDER PATROL AGENT STAFFING BY FISCAL YEAR (2013), available at <http://www.cbp.gov/sites/default/files/documents/U.S. Border Patrol Fiscal Year Staffing Statistics 1992-2013.pdf>.

²¹⁸ See Preston, *supra* note 165.

²¹⁹ See HRF, HOW TO PROTECT REFUGEES, *supra* note 78, at 1.

²²⁰ See *Asylum Surge Hearing*, *supra* note 5, at 143 (statement of ACLU et al.).

This potential cause raises numerous questions about the meaning and extent of “fraud” in the surge. Critics of the current surge often allege rampant fraud, stating that migrants “abuse”²²¹ and “game the system.”²²² But are these migrants committing fraud? There are several categories that have to be distinguished. First are those who take advantage of U.S. laws and policies that apply to them and plan to pursue their claims in accordance with the law. For example, if a prospective migrant fears, or has experienced, unspeakable harm in his home country and learns of a process that can more readily allow him to stay in the United States on the basis of this harm, he is not engaged in fraud simply because he takes advantage. Second are those who have no viable claim and purposefully choose to game the process. For example, some internal CBP reports allege “Mexican drug cartel members are abusing the credible fear process to bypass regular immigration checks in order [to] get into the country.”²²³ Other reports have noted how gang members are trying to enter the United States as UACs.²²⁴ Migrants falling within the second category are unequivocally committing fraud.

There are many other categories between these two extremes. Some migrants have experienced hardships in their home countries, but their experiences may not unequivocally fit within a legally permissible box, so they alter their stories. Others might have viable claims that could permit them to remain in the United States, but they have no intention to adhere to the requirements the law imposes on them. Indeed, a percentage of migrants released into the country do not show up for their subsequent immigration hearings.²²⁵ There are many derivations of the above-mentioned categories.

To be sure, a certain amount of fraud is typically a byproduct of any government program.²²⁶ Accurate data on the extent of

221 *Id.* at 6 (statement of Rep. Jason Chaffetz).

222 *Id.* at 3 (statement of Rep. Bob Goodlatte).

223 *Id.* at 6 (statement of Rep. Jason Chaffetz); *see id.* at 186 (statement of Rep. Ted Poe); *see also id.* at 3 (statement of Rep. Bob Goodlatte) (recounting reports that claimants are being coached to game the system).

224 James Bargent, *Flood of Child Migrants into US Could Include MS13 Gang Members*, INSIGHT CRIME (July 14, 2014), <http://www.insightcrime.org/news-briefs/flood-of-child-migrants-into-us-could-include-ms13-gang-members>.

225 Chishti & Hipsman, *supra* note 93 (“[A]n estimated 30 percent of unaccompanied minors are ordered removed in absentia because they fail to appear at their initial or later hearings.”).

226 *See Asylum Surge Hearing, supra* note 5, at 191 (statement of Rep. Luis V. Gutierrez) (noting that the government would not end unemployment compensation simply because there are instances of fraud); *see also Asylum Fraud Hearing, supra* note 186, at 11 (statement of Louis D. Crocetti, Jr., Principal, Immigration Integrity Group) (noting that internal DHS studies found conclusive evidence of fraud in about 12% of cases).

actual fraud as a contributor to the surge, however, is not currently available.²²⁷ To illustrate, conservative news outlets have purportedly obtained from immigration agents “cheat sheets” near the border that provide migrants with lists of commonly asked questions and suggested answers to make out a viable claim.²²⁸ Determining the authenticity of such documents, however, is difficult to do. Although it purportedly came from a federal law enforcement official, there appears to be infighting within DHS components that is leading to the dissemination of contradictory information.²²⁹ This infighting, along with DHS’s general reluctance to make public information regarding ongoing investigations or politically sensitive topics, undermines the ability to accurately assess the data. Thus, this Article’s causal conclusions in Part IV are premised on the concession that a greater understanding of the extent of any fraud could alter the calculus.²³⁰

IV. ASSESSMENT OF COLLECTIVE CAUSES

This Article concludes that the word of mouth effect and, to a lesser extent, changes in country conditions in the Northern Triangle, have primarily caused the surge in crossings by credible fear claimants and UACs. Regarding the country conditions in the Northern Triangle, economic and crime data certainly paint a bleak picture,²³¹ but the region-wide data does not itself indicate that the overall circumstances deteriorated significantly around the time of the surge. For instance, the murder rates in Guatemala actually decreased as the United States began to record a spike in credible fear claims.²³² Regarding Salvadorians, credible fear referral rates remained

²²⁷ See *Asylum Surge Hearing*, *supra* note 5, at 5 (statement of Rep. Zoe Lofgren) (noting the inability to decipher at this stage whether fraud is responsible for the surge).

²²⁸ See Sara Carter, *This Is a ‘Cheat Sheet’ Found at the Border to Coach Illegals on How to Stay in the U.S.*, BLAZE (June 26, 2014), <http://www.theblaze.com/stories/2014/06/26/this-is-a-cheat-sheet-found-at-the-border-to-coach-illegals-on-how-to-stay-in-the-u-s/>.

²²⁹ See, e.g., *Asylum Surge Hearing*, *supra* note 5, at 178–79 (statement of Michael J. Fisher, Chief, U.S. Border Patrol) (disputing the National Border Patrol Council’s assessment of agency policy on certain matters).

²³⁰ As a final point on potential causes, it appears that apprehension rates are not a contributing factor. Ruth Ellen Wasem of the Congressional Research Service noted that apprehension rates of migrants from the Northern Triangle were also high in 2005, but there was no accompanying surge in claims. *Asylum Surge Hearing*, *supra* note 5, at 69–70.

²³¹ See WORLD BANK, DEVELOPMENT CHALLENGE, *supra* note 105, at 4–9; see also UNODC, Homicide Stats, *supra* note 107.

²³² UNODC, Homicide Stats, *supra* note 107 (listing the murder rates in the Northern Triangle countries from 2006 through 2012); *Asylum Surge Hearing*, *supra* note 5, at 227; see *supra* Table 1 (providing credible fear referral data); *supra* Table 3 (listing the murder rates in the Northern Triangle countries from 2006 through 2012).

relatively low in 2010 and 2011, even though El Salvador's homicide rate was consistently high during the preceding years.²³³

Nevertheless, despite the countrywide data on countries in the Northern Triangle, there are several signs of deteriorating conditions on the ground around the time of the surges. First, there are indications that the situation has gotten worse for certain segments of the population such as children.²³⁴ Researchers who have studied migratory patterns have found that a younger age significantly correlates to expressed intentions to migrate, which would impact both UACs and credible fear claimants.²³⁵ Second, the hometowns and regions from which many migrants fled have murder rates well above the country averages, which supports the conclusion that inter-country regional crime distinctions can trump national figures or exacerbate their deleterious consequences.²³⁶

Third, there are indications that gangs and other criminal entities are accumulating more territory, which decreases citizens' ability to relocate internally.²³⁷ Fourth, since the beginning of the surge, migrants from Northern Triangle countries have requested asylum from countries other than the United States at a higher rate.²³⁸ If migrants' reasons for departing their home countries were solely attributable to U.S. policy rather than country conditions, then one would not expect a concurrent spike in asylum requests in other countries.²³⁹ Fifth, there is some indication that fluctuations in murder rates correlate with migrants subject to expedited removal expressing a fear of persecution. For example, the credible fear data depicts a noticeable increase in Salvadorian claimants subsequent to the apparent failing of the truce between rival gangs.²⁴⁰ The failure

²³³ USCIS 2011 CREDIBLE FEAR STATISTICS, *supra* note 123.

²³⁴ See UNHCR, *Children on the Run*, *supra* note 147, at 24.

²³⁵ Hiskey et al., *supra* note 139, at 5. The researchers, however, have only found a correlation for children sixteen and older, which shows that other factors account for the rise in border crossings by minors who are younger than sixteen. *Id.*

²³⁶ Gonzalez-Barrera et al., *supra* note 130; see also INTERNACIONAL CTR. FOR THE HUMAN RIGHTS OF MIGRANTS, *supra* note 128, at 15–26; Lind, *supra* note 130.

²³⁷ INTERNACIONAL CTR. FOR THE HUMAN RIGHTS OF MIGRANTS, *supra* note 128, at 24.

²³⁸ UNHCR, *Children on the Run*, *supra* note 147, at 15 (reporting a 432% increase in neighboring countries since 2009); see also *UAC Surge Hearing*, *supra* note 12, at 47 (statement of Mark Seitz, Bishop of the Diocese of El Paso, Texas, U.S. Conference of Catholic Bishops) (noting that since 2008, there has been a 712% increase in asylum claims filed by Northern Triangle citizens in countries that surround the Northern Triangle).

²³⁹ Unless, of course, a change in the pull factors in these countries around the time of the surge also incentivized prospective asylum seekers to attempt to migrate there.

²⁴⁰ USCIS 2014 CREDIBLE FEAR STATISTICS, *supra* note 9; USCIS 2013 CREDIBLE FEAR STATISTICS, *supra* note 132.

of the truce also correlates with the rise in claims by Salvadorian UACs (though not at a level that significantly distinguishes it from other Northern Triangle countries).²⁴¹

Sixth, unlike the official national murder rates in the region, the data on countrywide perceptions of insecurity since the time of the surge appear to correlate with the rate at which migrants claim to fear persecution if returned to their home countries.²⁴² Referring back to the homicide data, unlike in Honduras, the murder rate in El Salvador reportedly decreased from 2011 to 2012.²⁴³ Nevertheless, since the time when credible fear claims began to spike, El Salvador has consistently been the primary country of origin for individuals subject to expedited removal who claim to fear persecution or torture.²⁴⁴ At the same time, El Salvador is the only country in the Northern Triangle where citizens' perceptions of insecurity did *not* decrease when the surge began.²⁴⁵ Thus, the connection between the number of claimants at the border and perceptions of insecurity support the conclusion that a security deterioration may have contributed to the rise in claims. Regarding this sixth point, there are, however, additional factors that may also contribute to the particularly high number of Salvadorian claims. For instance, there is a strong connection between remittance networks and intentions to migrate.²⁴⁶ As noted above, El Salvador is also the country with the highest remittance rate—a staggering one-third of the country.²⁴⁷ Other Northern Triangle countries also have high remittance rates.²⁴⁸

More generally, considering the six aforementioned signs collectively, the data does point to several circumstances that changed around the time of the surge, which demonstrates that country conditions have played a role in the escalation. While security concerns are undoubtedly a contributing factor, family reunification and depressed economic conditions fully or partially

²⁴¹ See *Southwest Border Unaccompanied Alien Children*, *supra* note 10.

²⁴² This correlation, however, does not apply as readily to the surge in UAC claimants. See *id.*

²⁴³ UNODC, *Homicide Stats*, *supra* note 107.

²⁴⁴ See, e.g., USCIS 2014 CREDIBLE FEAR STATISTICS, *supra* note 9 (reporting that in some months Salvadorians had nearly three times as many credible fear referrals as claimants from the next country on the list).

²⁴⁵ Hiskey et al., *supra* note 139, at 3.

²⁴⁶ *Id.* at 5 (reviewing the “friends and family effect”).

²⁴⁷ Villalobos, *supra* note 109, at 69.

²⁴⁸ See Daniel Reichman, *Honduras: The Perils of Remittance Dependence and Clandestine Migration*, MIGRATION POLY INST. (Apr. 11, 2013), <http://www.migrationpolicy.org/article/honduras-perils-remittance-dependence-and-clandestine-migration> (noting that 17% of Honduras's economy is based on remittances).

motivated some migrants to leave the Northern Triangle, particularly those coming from Guatemala.²⁴⁹

While country conditions have likely contributed to the surge, those who claim they are solely responsible for the rise in these particular types of claims are incorrect.²⁵⁰ The conditions in the Northern Triangle are simply not analogous to situations in countries such as Syria, where the destabilization of the government and escalation in violence caused millions to flee the country irrespective of the conditions that awaited them in refugee camps.²⁵¹ Rather, the word of mouth effect appears to have impacted the migratory spike for credible fear claimants and UACs.

Starting with the rise in credible fear claimants, this Article reviewed several potential reasons why word has spread in the Northern Triangle that migrants could more easily obtain permission to enter the United States: increased credible fear grant rates, decreased detention rates, the characterizations of credible fear grant benefits by smugglers and others, and higher asylum grant rates. The high credible fear grant rates since the time of the surge do not, in and of themselves, appear to provide a significant basis to account for the rise in claims. As mentioned above, comparably high grant rates in the past did not result in concurrent spikes in claims.²⁵²

The credible fear grant rates, however, were substantially lower for several years prior to the rise in claims.²⁵³ Thus, the *rise* in the grant rate could be a contributing factor, particularly because the grant rate was notably low for certain Northern Triangle claimants prior to the escalation.²⁵⁴ For the rising grant rate to be impactful, however, claimants must actually obtain asylum (or related relief) or be released during the pendency of

²⁴⁹ For example, a significant percentage of children interviewed by the U.N. listed “family or opportunity” as a reason why they decided to leave. UNHCR, *Children on the Run*, *supra* note 147, at 7–10. The data shows that children from Guatemala, in particular, are much more likely to migrate because of family or greater opportunities than violence in society. *Id.* at 10.

²⁵⁰ See Wong, *supra* note 17, at 1.

²⁵¹ See U.N. High Comm’r for Refugees, Syria Regional Refugee Response, <http://data.unhcr.org/syrianrefugees/regional.php> (last updated Aug. 21, 2014) (stating that approximately 3 million refugees have fled Syria since 2012); see also Miguel Almaguer & Elisha Fieldstadt, *Is Trek of Undocumented Immigrant Children Safer than Staying Home?*, NBC NEWS (July 6, 2014), <http://www.nbcnews.com/storyline/immigration-border-crisis/trek-undocumented-immigrant-children-safer-staying-home-n149151> (“Countries surrounding Syria have welcomed 2.5 million refugees, but ‘we get 90 thousand immigrant children and we start talking about expedited removal.’”).

²⁵² *Asylum Surge Hearing*, *supra* note 5, at 227.

²⁵³ *Id.*

²⁵⁴ *Id.* at 70 (statement of Ruth Ellen Wasem, Congressional Research Service).

their claims; otherwise, a favorable credible fear determination would produce little inherent benefit. Regarding the asylum relief issue, the data produced in Table 5 demonstrates that adjudicators consistently grant very few asylum claims filed by Northern Triangle applicants. Accordingly, the grant rate would not produce any perceived inherent benefit.

As to the detention issue, migrants could be incentivized by the belief that the government would not detain them or would, at the very least, quickly release them into the country. Absent misinformation, migrants would not believe DHS would release them if DHS detained individuals found to have a credible fear of persecution during the pendency of their claims. Thus, it appears that the primary significance of the rise in grant rates may be inexorably linked to the significance of any change in detention policy. (To say that detention rates may be a contributing cause is quite different than advocating for increased detention, and by analyzing the former this Article is by no means advocating the latter.) The link between U.S. detention policies and migration rates has some historical backing. For instance, immigration officials working in South Texas in the 1980s noted how a similar surge in border crossings immediately followed the government's decision to "institute[] a policy of releasing on recognizance aliens from Central America who claimed they were fleeing violence and persecution in their homeland."²⁵⁵ In 2005, DHS implemented a policy of detaining Brazilians crossing the southwest border without authorization and the rate of migration by Brazilian nationals dropped considerably.²⁵⁶

Regarding the current surge, the data does suggest some changes in detention policy. There is undoubtedly a greater chance that DHS will release arriving aliens because of the Morton Memo.²⁵⁷ For detention more generally, in recent years the rates of release have been high and the average length of detention has been relatively short.²⁵⁸ As previously noted, however, the release rates and lengths of detention are not historically anomalous, which cautions against attributing to them freestanding blame for the surge, wholly divorced from other converging factors.²⁵⁹ Nevertheless, the data does appear to

²⁵⁵ *Asylum Fraud Hearing*, *supra* note 186, at 28 (statement of Hipolito M. Acosta, former District Director, U.S. Citizenship and Immigration Services).

²⁵⁶ *Asylum Surge Hearing*, *supra* note 5, at 64 (statement of Rep. Bob Goodlatte) (recounting the sentiments of former DHS Secretary Michael Chertoff).

²⁵⁷ *Id.* at 107 (statement of U.S. Commission on International Religious Freedom) (noting that in FY 2012, 80% of eligible claimants received parole).

²⁵⁸ *See, e.g., Asylum Fraud Hearing*, *supra* note 186, at 136; ICE 2009 & 2010 DETENTION STATISTICS, *supra* note 186, at 44.

²⁵⁹ *See, e.g., ICE 2006 DETENTION STATISTICS*, *supra* note 188, at 34.

show that detention standards were somewhat relaxed after FY 2007, and this relaxation, combined with detention policy changes for arriving aliens and increased credible fear grant rates, could have all converged to impact external perception. Indeed, regarding the current situation, the administration appears to concede that its detention practices have likely contributed to the current surge in migrants from Central America.²⁶⁰

Unclear, however, is the extent of smugglers' role in facilitating migrants' perceptions about the credible fear process. Their role could be limited. Conversely, smugglers could have more regularly spread word that the United States significantly relaxed its detention practices for credible fear claimants based on a misunderstanding of the limited scope of the Morton Memo. Further still, smugglers could have intentionally misinformed migrants about U.S. detention practices to convince them to incur the cost of migrating—deteriorating country conditions would more readily entice prospective migrants to embark northward.²⁶¹ Actual and perceived descriptions of the credible fear process by politicians, news outlets, and others could also be contributing factors.²⁶² In short, a credible fear screening standard that is necessarily low appears to have converged with several factors to produce the word of mouth effect for credible fear claims. These factors include relaxed detention standards generally, detention policy changes for arriving aliens, credible fear grant rates that rose after historically low levels, and groups that facilitate the dissemination of real and perceived changes to the credible fear process.

As to the UAC surge, perceptions about changes to law and policy appear to more concretely account for the word of mouth effect. As noted above, TVRPA has been cited as a reason why UACs have migrated to the United States in greater numbers. TVRPA did change the law in a manner that applies to UACs currently crossing the border,²⁶³ and the repatriation rate has declined since FY 2008.²⁶⁴ Reports indicate that these actual changes, combined with a general administrative policy to defer UAC deportations, have indeed contributed to the word of mouth

²⁶⁰ Preston, *supra* note 165 (quoting Cecilia Muñoz, director of the White House Domestic Policy Council).

²⁶¹ Some smugglers, however, depend on referrals, which may dissuade them to intentionally provide false information.

²⁶² See HRF, HOW TO PROTECT REFUGEES, *supra* note 78, at 17.

²⁶³ See 8 U.S.C. § 1232 (2012).

²⁶⁴ See Chishti & Hipsman, *supra* note 93.

effect.²⁶⁵ In this respect, TVRPA's causal relevance is not that people are necessarily aware of the Act by name, but rather that they are aware of the changes in detention and deportation practices that can partially be attributed to TVRPA.²⁶⁶ Smugglers appear to have contributed to prospective migrants' heightened awareness,²⁶⁷ but, for the reasons already discussed, the precise extent of their role is uncertain. The impact of TVRPA on migration levels is particularly notable because the law favors placing UACs with friends or family.²⁶⁸ Researchers have noted a strong correlation between intentions to migrate and "individuals who have migrant friends or relatives already living abroad."²⁶⁹ Most UACs have family members or family friends in the United States with whom they plan to reside;²⁷⁰ many acknowledged that family reunification was a reason why they decided to migrate.²⁷¹

Unlike TVRPA, DACA does not directly apply to UACs who recently migrated. The DACA program, however, has been an alleged catalyst for UACs to migrate to the United States.²⁷² Assessing the relevance of DACA requires unpacking two distinct issues. The first is whether DACA incentivizes UACs to travel to the United States because these UACs believe DACA applies to them. While not definitive, the decrease in overall apprehension rates in the months following the creation of DACA could support the conclusion that UACs do not believe DACA applies to them.²⁷³ Nevertheless, there could very well have been lag time

²⁶⁵ See Ron Allen, *Fate for Most Kids Who Cross the Border? Staying in the U.S.*, NBC NEWS (July 14, 2014), <http://www.nbcnews.com/storyline/immigration-border-crisis/fate-most-kids-who-cross-border-staying-u-s-n153706> (observing in immigration court that no UACs "appear[] to be ordered out of the country any time soon"); Robles, *supra* note 11 (reporting that TVRPA has led to fewer deportations of minors, and immigration officials in the Northern Triangle took note); Hulse, *supra* note 198 (noting that the administration believes that TVRPA "is partly responsible for tying its hands in dealing with the current influx of children"); see also Brian Bennett, *Deportation Data Won't Dispel Rumors Drawing Migrant Minors to U.S.*, L.A. TIMES (July 5, 2014), <http://www.latimes.com/nation/la-na-deport-children-20140706-story.html#page=1>.

²⁶⁶ *But see* Wong, *supra* note 17, at 5–6 (arguing that TVRPA has not contributed to the surge).

²⁶⁷ See Peralta, *supra* note 208.

²⁶⁸ See 8 U.S.C. § 1232(c)(2).

²⁶⁹ Hiskey et al., *supra* note 139, at 5.

²⁷⁰ See, e.g., Chishti & Hipsman, *supra* note 93 ("Ninety percent of [UACs] are released by ORR into the care of a parent, relative, or family friend . . ."); Hannah Rappleye, *Undocumented and Unaccompanied: Facts, Figures on Children at the Border*, NBC NEWS (July 9, 2014), <http://www.nbcnews.com/storyline/immigration-border-crisis/undocumented-unaccompanied-facts-figures-children-border-n152221> (estimating that eighty-five percent of UACs "are reunified with their immediate or extended families").

²⁷¹ UNHCR, *Children on the Run*, *supra* note 147, at 7–10.

²⁷² *UAC Surge Hearing*, *supra* note 12, at 18–20 (statement of Ronald D. Vitiello, Deputy Chief, U.S. Border Patrol).

²⁷³ See Wong, *supra* note 17, at 4.

between the administration's announcement of the program and UACs' (or their families') decision to act on that information. Additionally, UACs might believe that DACA applies to them because numerous reports indicate that smuggling rings are disseminating inaccurate information.²⁷⁴ Reviews of Central American news coverage of DACA, however, indicate that the coverage has accurately explained the applicability of the program.²⁷⁵ Unsurprisingly then, reports have not indicated that migrants list DACA's applicability to them as a reason why they chose to migrate; rather, migrants are more likely to refer to a general belief that they can obtain a permit—or *permiso*—to stay.²⁷⁶

More germane, perhaps, is the second reason why DACA may be relevant: it fosters greater migration not based on its applicability to recent UACs, but rather because of what it represents. Specifically, DACA provides an indication that U.S. immigration policies might provide to future categories of unauthorized immigrants additional opportunities for reprieve from deportation (or possibly a legal means to stay). In this respect, DACA is part of the general immigration reform uncertainty that could, quite understandably, further incentivize prospective migrants to come to the United States. It is highly unlikely that DACA itself is responsible for the surge, which is why it is necessary to look at all the potential factors collectively. In this respect, the prospect of future reprieve that DACA represents must be considered against the backdrop of dire country conditions in the Northern Triangle and U.S. laws and policies that do actually decrease the chances of expedient deportation.

Considering all the factors likely contributing to the surge, it appears that as a general matter, the climate of violence, insecurity, and depressed economic opportunities in the Northern Triangle is the powder keg and, along with certain indications of worsening conditions, the word of mouth effect has provided the spark.²⁷⁷ The following anecdote aptly illustrates this conclusion:

²⁷⁴ Chishti & Hipsman, *supra* note 93; Dickson, *supra* note 207; Seville & Rappleye, *supra* note 167.

²⁷⁵ Roque Planas, *Don't Blame Central American Newspapers for Influx of Undocumented Children*, HUFFINGTON POST (June 12, 2014), http://www.huffingtonpost.com/2014/06/12/central-america-daca_n_5488329.html.

²⁷⁶ Preston, *supra* note 165; *see also* Seville & Rappleye, *supra* note 167; Semple, *supra* note 167.

²⁷⁷ Against the backdrop of all these factors are the general reasons why people want to migrate to the United States—such as family reunification and greater opportunity—and the established migratory networks in the Northern Triangle that facilitate

At the church, some women said the talk about an entry permit, which has intensified in the last two months, had prompted them to set out on the risk-filled journey across Mexico. But the women said they were moved mainly by desperate worries about their children, with poverty unrelenting in their countries and warring street gangs expanding their control.²⁷⁸

Although the migrants in this illustration indicate that deplorable country conditions were their main reason for leaving the Northern Triangle, the powder keg/spark analogy encapsulates the causes of the surge better than attempts to assign specific percentages to each contributing factor.

To be sure, while the powder keg/spark analogy might represent the general phenomenon that appears to account for the surge, it would be overly simplistic to assume that the factors driving all migrants during the surge are uniform. Delving into individual cases would undoubtedly yield a range of divergent circumstances.²⁷⁹ Certain migrants would have traveled to the United States even if they did not hear about any changes in policy. Others living in less violent regions could be opportunists who want to take advantage of the perceived changes in policy. Some of these opportunists could have nefarious intentions while others simply desire to reunify with family or pursue greater economic and educational opportunities.²⁸⁰ And of course, there are others with legitimate bases for seeking refuge who never make it to the United States because of the dangerous journey and the nefarious actions of smuggling rings who take advantage of migrants when they are most vulnerable. The amalgamation of these divergent circumstances is an inevitable byproduct of the country conditions in the Northern Triangle and U.S. immigration policy.

CONCLUSION

This Article has shown how Northern Triangle country conditions, U.S. immigration policy, and smuggling organizations collectively created the surge in credible fear claimants and UACs. How the United States should respond to the surge is a question beyond the scope of this Article. Nevertheless, one

migration. Hiskey et al., *supra* note 139, at 5 (noting the link between migratory networks and intentions to migrate).

²⁷⁸ Preston, *supra* note 165.

²⁷⁹ See UNHCR, *Children on the Run*, *supra* note 147, at 7–11 (reviewing the results of its interviews with UACs); see also Semple, *supra* note 167 (recounting the multitude of reasons UACs expressed for leaving their home countries).

²⁸⁰ See *Asylum Surge Hearing*, *supra* note 5, at 3, 6, 186 (attributing nefarious intentions to some migrants, including drug cartel members who may attempt to take advantage of the asylum process).

potential response is worth mentioning because it should not be contentious: substantially increasing adjudicatory capacity. There has been a significant increase in resources provided for enforcement efforts.²⁸¹ Conversely, the number of immigration judges tasked with adjudicating immigration cases has remained fairly stagnant.²⁸² The extraordinary imbalance creates a bottleneck in the system and causes cases to languish for significant periods of time.²⁸³ From a humanitarian perspective, greater funding for immigration judges would decrease the length of detention for some migrants. For those who believe that the years migrants often spend in limbo while their cases pend is a security risk, shorter wait times would help alleviate that concern. Even from an economic perspective, shorter detentions and monitoring responsibilities would offset the resources needed to hire additional immigration judges. In short, increased funding for immigration judges and other adjudicators should be a no-brainer.

As noted repeatedly, the conclusions reached in this Article are based on the available data. Unfortunately, however, the available data is incomplete. Generally, DHS does make publically available a considerable amount of immigration-related data. The agency, however, does not consistently provide to the public the panoply of immigration data at its disposal, nor does it always disseminate in a timely manner the data that it does provide. Aside from disseminating that which is at its disposal, DHS is also not taking advantage of the extent of immigration data it could be collecting and analyzing. The agency should significantly increase its database capabilities and coding practices to allow enhanced research into migratory patterns and other immigration-related issues. DHS should also create a central location where all this data is published rather than having it spread throughout the websites of various agency components. Providing researchers with accurate, robust, and easily obtainable data would help inform policy.

The current surge and the rhetoric surrounding it are an apt illustration of the importance of more fully understanding the root causes of migration. Policymakers and other stakeholders would be well-served to observe how recurrent push and pull factors influence migratory patterns. Without a greater

²⁸¹ See, e.g., U.S. BORDER PATROL, *supra* note 217.

²⁸² See Office of the Chief Immigration Judge, *supra* note 63.

²⁸³ OFFICE OF PLANNING, ANALYSIS & TECH., *supra* note 64, at A2, W1.

understanding of the causes of migration, future legislative and policy decisions will inevitably lead to unintended consequences.

Lawfully Present Lawyers

*Wendi Adelson**

When I was nine-years old, I committed an act so sacrilegious, so unspeakable, and so nefarious that I became a threat to national security and a potential terrorist. I confess my offense: I did not resist my parents who snatched [me] from Mexico's poverty to live illegally in the United States of America. In this essay, I outline how a college education became a reality for me despite the tremendous obstacles I encountered and my struggle for immigrant rights.¹

INTRODUCTION

The quotation above is taken from an application to law school written by a dedicated and hard-working law student in my seminar on Immigrant Children Legal Representation in the fall of 2012. Valedictorian of his high school and an Eagle Scout, he was prepared for every class with sophisticated legal questions and thought-provoking analysis, and I knew him for two years as my student before he revealed to me that he was undocumented. He graduated from Florida State University College of Law with honors, and proceeded with the next logical hurdle for any law student of any immigration status: taking our state's bar exam. For Jose Manuel, he faced the additional roadblock of the need to show immigration status to apply to the Bar. He enlisted the assistance of one of his law professors, the inimitable Sandy D'Alemberte, to approach the Florida Bar and find out if they would waive the immigration status question and permit Jose Manuel to take the bar exam. The Bar waived the immigration status requirement. So, my former law student studied for, took, and passed the bar exam. And then the real challenge began: the Florida Bar was unsure about whether it could issue a license to practice law to an undocumented person,

* Clinical Professor, Florida State University College of Law. The author thanks the many members of her village, but most especially Jose Manuel Godinez Samperio, Michael Olivas, Marisa Cianciarulo, Sandy D'Alemberte and Patsy Palmer, Terry Coonan, Donna and Harvey Adelson, and Benjamin and Lincoln Jonah.

¹ This paragraph is an excerpt from Jose Manuel Godinez Samperio's application for a place at Florida State University College of Law. Appendix to Respondent's Brief at 32, Fla. Bd. of Bar Examiners Re: Question as to Whether Undocumented Immigrants Are Eligible for Admission to the Fla. Bar (2014) (No. SC 11-2568), *available at* http://www.floridasupremecourt.org/pub_info/summaries/briefs/11/11-2568/Filed_03-07-2012_Respondent_Brief_Appendix.pdf.

even one who graduated from an accredited American law school and passed the Florida Bar exam. The Florida Bar petitioned the state supreme court in December 2011 for an advisory opinion to answer the following question: “Are undocumented immigrants eligible for admission to the Florida Bar?”

One potential hurdle for admission to the Florida Bar includes a finding as to good moral character.² Jose Manuel Godinez Samperio appeared to have the kind of spotless record that would make a finding as to his good moral character simple. Jose Manuel nevertheless worried: Was his illegal entrance to the United States at the age of nine with his parents enough to make his character too immoral to be a lawyer in Florida? Since Jose Manuel had fulfilled every other aspect of acquisition of a bar license in Florida and was still waiting for a decision from the Florida Bar and then the Florida Supreme Court on his case, why the holdup?

While Jose Manuel waited for a decision from the Florida Supreme Court, life continued around him. On June 15, 2012, then Department of Homeland Security Secretary Janet Napolitano issued a policy memo creating Deferred Action for Early Childhood Arrivals (DACA) for the category of young people illegally present in the United States—which Jose Manuel was a part of—the people who were brought to the United States as children and “know only this country as home.”³ In her memo, Secretary Napolitano delegated to the United States Citizenship and Immigration Service (USCIS) the determination as to whether individuals who qualify for DACA would also receive a work permit.⁴ As DACA beneficiaries, these individuals are “lawfully present” in the United States, even if only on a temporary basis. Given their lawful presence, they became potentially eligible for federal and state benefits like driver’s licenses and in-state tuition to public colleges and universities.

Jose Manuel ended up being one of those DACA-eligible young people who did receive authorization to work. The Florida Supreme Court issued an advisory opinion stating that he was nevertheless ineligible for admission to the Bar because the Florida legislature had not passed legislation authorizing

² FLA. SUP. CT. R. 2-12, available at <http://www.floridabarexam.org/web/web/site.nsf/rule.xsp> (rules relating to admissions to the Bar).

³ Memorandum from Janet Napolitano, Sec’y, U.S. Dep’t of Homeland Sec., to David V. Aguilar, Acting Comm’r, U.S. Customs & Border Prot., et al. (June 15, 2012), available at <http://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf>.

⁴ *Id.* at 3.

undocumented immigrants to work in the state.⁵ Less than two months later, the Florida legislature passed a law allowing immigrants such as Jose Manuel to be admitted to practice law.⁶

As both a participant and an observer in the case of Jose Manuel Godinez Samperio's efforts to obtain a license to practice law in Florida, I am writing this Article to clarify the issues involved in his case, to discuss the larger questions presented as they relate to in-state tuition and occupational licenses for those in liminal statuses, and to anticipate future changes in the law in light of the potential passage of comprehensive immigration reform.

Part I addresses DACA and the unintended consequences and questions regarding its application to a large population of previously undocumented people. I then proceed, in Part II, to examine the interconnected issues of in-state tuition for colleges and universities for the DACA population and occupational licensing. Part III contemplates the role that comprehensive immigration reform could play in the lives of DACA recipients. In sum, this paper will add to the literature and conversation about DACA recipients and lawful presence, the interplay between occupational licenses and in-state tuition, and the rights and remedies accorded to this burgeoning population of young people who are coming of age in America today.

I. PROSECUTORIAL DISCRETION AND DEFERRED ACTION FOR CHILDHOOD ARRIVALS

On June 17, 2011, Immigration and Customs Enforcement (ICE) Director John Morton issued a memo encouraging its agency to use prosecutorial discretion for young people brought to the United States before they came of age.⁷ According to Morton, some appropriate factors to consider when exercising prosecutorial discretion include: the alien's length of presence in the United States; whether the alien came as a young child; the alien's pursuit of education in the United States, with particular consideration to those who have graduated from a U.S. high school or are pursuing a college or advanced degree; and the

⁵ Fla. Bd. of Bar Examiners Re: Question as to Whether Undocumented Immigrants Are Eligible for Admission to the Fla. Bar, 134 So. 3d 432, 434–35 (Fla. 2014).

⁶ H.R. 755, § 454.021, 2014 Leg., Reg. Sess. (Fla. 2014).

⁷ Memorandum from John Morton, Dir., U.S. Immigration & Customs Enforcement, to All Field Office Dirs., All Special Agents in Charge, and All Chief Counsel, Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens (June 17, 2011), available at <http://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf>.

alien's ties and contributions to the community.⁸ On June 15, 2012, President Obama's administration created a deferred action program for childhood arrivals and the USCIS began formally accepting DACA applications on August 15, 2012.

To be eligible for DACA, a person who is otherwise in this country illegally must meet the following requirements: 1) have come to the United States before the age of sixteen; 2) have continuously resided in the United States for at least the five years preceding June 15, 2007 and be present in the United States when the DACA memo was issued; 3) be currently enrolled in school, have graduated from high school, have obtained a general education development (GED) certificate, or be an honorably discharged veteran; 4) have not been convicted of a felony, a significant misdemeanor, multiple misdemeanors, or otherwise pose a threat to national security or public safety; and 5) not be above age thirty.⁹

In short, DACA policy permits those individuals who arrived in the United States before the age of sixteen and who meet the other age, education, continuous presence, and lack of criminal history requirements to remain in the United States for a renewable two-year period of time and to apply for work authorization.¹⁰ As the program began, it was estimated there were approximately 1.8 million immigrants in the United States who might be, or might become, eligible for the Obama Administration's "deferred action" initiative for unauthorized youth brought to this country as children.¹¹ To date, USCIS has approved more than 500,000 applications for DACA, with at least another 100,000 under review, and likely more to come.¹²

Advocates for the DREAM Act¹³ and other legal remedies for undocumented students had never dreamed that a legal option as

⁸ *Id.*

⁹ *Frequently Asked Questions: The Obama Administration's Deferred Action for Childhood Arrivals (DACA)*, NAT'L IMMIGR. L. CENTER (June 13, 2014), <http://www.nilc.org/FAQdeferredactionyouth.html>.

¹⁰ *DACA and Driver's Licenses*, NAT'L IMMIGR. L. CENTER (June 19, 2013), <http://www.nilc.org/dacadriverslicenses.html>.

¹¹ American Immigration Council, *Who and Where the DREAMers Are, Revised Estimates*, IMMIGR. POLY CENTER (Oct. 16, 2012), <http://www.immigrationpolicy.org/just-facts/who-and-where-dreamers-are-revised-estimates>.

¹² U.S. CITIZENSHIP & IMMIGRATION SERVS., NUMBER OF I-821D, CONSIDERATION OF DEFERRED ACTION FOR CHILDHOOD ARRIVALS BY FISCAL YEAR, QUARTER, INTAKE, BIOMETRICS AND CASE STATUS: 2012-2014 FIRST QUARTER (2014), available at <http://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/All%20Form%20Types/DACA/DACA-06-02-14.pdf>. A myriad of reasons prevent individuals from applying for DACA. One reason preventing application, for those otherwise eligible, is that the application is cost prohibitive.

¹³ American Dream Act, H.R. 1751, 111th Cong. (2009).

comprehensive as DACA would exist that would confer these specific benefits to this otherwise ignored population. Although DACA is relatively new, it is only the latest incarnation of deferred action, a practice that has existed in U.S. immigration law for some time, as John Lennon was famously granted it in 1975.¹⁴ Deferred Action as a status is mentioned in several places in the U.S. Code,¹⁵ and various sections of the Code of Federal Regulations recognize that deferred action beneficiaries are deemed lawfully present for most purposes under federal law.¹⁶

The brand of deferred action previously in play stems from two memos issued on June 17, 2011 by ICE Director John Morton related to prosecutorial discretion.¹⁷ These memos call on “ICE attorneys and employees to refrain from pursuing noncitizens with close family, educational, military, or other ties in the U.S.” for deportation and instead to spend the agency’s limited resources on those persons who pose a serious threat to public safety or national security.¹⁸

Prosecutorial discretion of the Morton Memo variety evolved into the DACA-era scheme in play at present. The principal differences between the two are eligibility for employment authorization and conferral of lawful presence. Unlike Morton prosecutorial discretion, DACA beneficiaries are eligible for an employment authorization document, or work permit.¹⁹ Also, DACA confers legal presence for the time period in which an individual receives it. In contrast, prosecutorial discretion was never spelled out prior to DACA as conferring lawful presence.

¹⁴ *Lennon v. INS*, 527 F.2d 187, 190–91 (2d Cir. 1975).

¹⁵ *See, e.g.*, 8 U.S.C. §§ 1151, 1154, 1227 (2012); 49 U.S.C. § 30,301 (2012).

¹⁶ *See, e.g.*, 6 C.F.R. § 37.3 (2014) (defining “approved deferred action status” as “lawful status” for the purpose of federal REAL ID drivers’ licenses); 8 C.F.R. § 1.3(a)(4)(vi) (2014) (defining any “[a]liens currently in deferred action status” as an “alien who is lawfully present in the United States” for the purposes of applying for Social Security benefits); 8 C.F.R. § 274a.12(c)(14) (listing “[a]n alien who has been granted deferred action” as one of the “[c]lasses of aliens authorized to accept employment”); 20 C.F.R. § 416.1618(b)(11) (2014) (listing “[a]liens granted deferred action status” as “permanently residing in the United States under color of law”); 45 C.F.R. § 152.2(4)(vi) (2013) (defining “[a]liens currently in deferred action status” as “lawfully present”).

¹⁷ Prosecutorial discretion refers to ICE’s authority not to enforce immigration laws against certain individuals and groups. Memorandum from John Morton, *supra* note 7; Memorandum from John Morton, Dir., U.S. Immigration & Customs Enforcement, to All Field Office Dir., All Special Agents in Charge, and All Chief Counsel, Prosecutorial Discretion: Certain Victims, Witnesses, and Plaintiffs (June 17, 2011), *available at* <http://www.ice.gov/doclib/secure-communities/pdf/domestic-violence.pdf>.

¹⁸ SHOBA SIVAPRASAD WADHIA, IMMIGRATION POLICY CTR., THE MORTON MEMO AND PROSECUTORIAL DISCRETION: AN OVERVIEW (2011), *available at* http://www.immigrationpolicy.org/sites/default/files/docs/Shoba_-_Prosecutorial_Discretion_072011_0.pdf.

¹⁹ This cost is \$465. *I-765, Application for Employment Authorization*, U.S. CITIZENSHIP & IMMIGR. SERVICES, <http://www.uscis.gov/i-765> (last updated Aug. 14, 2014).

DACA has resulted in significant benefits for those who qualify, but it has also created confusion among state officials as to which state benefits, if any, should be available to DACA recipients. A lawfully present person without a foreign domicile to which he or she can return becomes eligible for driver's licenses, in-state tuition, and many of the occupational licenses.²⁰ However, states disagree as to whether DACA does in fact confer "lawful presence," and what state and federal benefits follow with that status.

II. THE STATES ARE CONFUSED ABOUT HOW TO RESPOND TO DACA-ELIGIBLE PERSONS

Although immigration law itself is a federal question, the enactment of certain laws and policies as they affect immigrant populations is a matter for the states. Driver's licenses, in-state tuition, and professional licensing are those that most significantly impact DACA recipients. Should DACA recipients be eligible for in-state tuition? Once they graduate from college and then pursue post-secondary education, can or should these "lawfully present" individuals be granted access to certain professions through states issuing professional licenses? Should the state issue them driver's licenses so that they may commute to school and work? This section will explore the tensions inherent in those legal decisions.

A. Driver's Licenses

A state, and not the federal government, gets to decide who is eligible to drive within its borders. For the most part, applicants for a state driver's license must provide a Social Security number, evidence of lawful immigration status, a birth certificate to determine age eligibility, and evidence of residence within that state. Because the rules governing eligibility for driver's licenses vary by state, a grant of DACA does not necessarily guarantee access to a license to drive in that state.²¹

²⁰ In its "Frequently Asked Questions," U.S. Citizenship and Immigration Services (USCIS) confirmed that people granted deferred action under DACA are authorized by the Department of Homeland Security (DHS) to be present in the United States and are therefore considered to be lawfully present during the period for which they've been granted deferred action. *Frequently Asked Questions*, U.S. CITIZENSHIP & IMMIGR. SERVICES, <http://www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-process/frequently-asked-questions> (last updated June 5, 2014).

²¹ DACA recipients who are granted deferred action obtain work authorization and Social Security numbers and would fit well within the general rules for driver's license issuance in almost every state. Nevertheless, states such as Arizona and Nebraska have chosen to single them out for discriminatory treatment. *DACA and Driver's Licenses*, *supra* note 10; see also *Fifty-State Survey*, *infra* app. (The author has compiled a fifty-state survey outlining each state's policies on granting DACA recipients driver's

Even though driver's licenses are ostensibly a state issue, since drivers often cross state borders, this movement creates an interstate issue that implicates federal law. The REAL ID Act of 2005 is a federal law that includes guidance for states when issuing driver's licenses to noncitizens.²² As part of that guidance, the REAL ID Act specifically lists "deferred action," of which DACA is a type, as a lawful status that would permit the issuance of a federally recognized driver's license, valid during the period of authorized stay in the United States.²³

In most states, DACA recipients who obtain an employment authorization document²⁴ and a Social Security number are likely to be eligible for a driver's license, provided they produce the rest of the required documentation. But a few state officials have announced that they will ignore or alter their state's rules by denying licenses to DACA youth, and some states already impose restrictive document requirements.²⁵

Navigating life without a driver's license makes everything more challenging for a DACA recipient. Certainly, obtaining a driver's license facilitates a person's ability to work or attend

licenses, in-state tuition, and occupational licenses. In gathering this information, the author referenced the National Immigration Law Center's information on driver's licenses and in-state tuition, as well as each individual state's supreme court precedent on admitting undocumented individuals to the state's bar. Please note that any "N/A" designation was assigned by the author for any state policies that were unable to be located at the time the survey was compiled and thus are "not addressed" by applicable state legislation. All information contained in this document is on file with the author.)

²² *DACA and Driver's Licenses*, *supra* note 10.

²³ Real ID Act of 2005, Pub. L. No. 109-13, § 202(c)(2)(B)(viii), 119 Stat. 311, 313.

²⁴ Most states list EADs specifically in their statutes or motor vehicles department website as proof of lawful presence (e.g., AL, CA, CO, CT, DE, DC, FL, GA, HI, ID, IL, KS, KY, LA, ME, MD, MA, MI, MN, MO, MT, NH, NJ, NY, NC, ND, OR, PA, RI, SC, SD, TN, UT, VT, WI, WY). Arizona and Nebraska also list EADs as meeting an eligibility requirement, but have announced that DACA recipients are not eligible for licenses, even if they have an EAD. *DACA and Driver's Licenses*, *supra* note 10; *see also* Fifty-State Survey, *infra* app.

²⁵ *DACA and Driver's Licenses*, *supra* note 10. Arizona made DACA recipients ineligible for licenses through its Motor Vehicle Division, which revised its list of identity documents to exclude EADs obtained by DACA recipients, while preserving eligibility for all other individuals with EADs.

The exclusion by Arizona and Nebraska has been challenged in litigation, as was an exclusion imposed by Michigan state officials. However, the Michigan secretary of state announced on February 1 that the state would reverse its policy and resume issuing driver's licenses to individuals granted DACA. North Carolina briefly stopped issuing drivers' [sic] licenses to DACA grantees while awaiting an opinion from the state attorney general. The attorney general concluded that, although they do not have a formal immigration status, people granted DACA are lawfully present in the U.S. and are therefore eligible for a state driver's license. Although the state Department of Transportation decided to resume its policy of issuing licenses to this group, the licenses are now marked "LEGAL PRESENCE NO LAWFUL STATUS."

Id.

classes; but from a community perspective, disseminating driver's licenses better serves the public interest in having trained and tested drivers on the road.²⁶ States continue to debate DACA eligibility for driver's licenses and a lack of uniformity on this issue persists, making the benefits associated with a DACA grant different depending on the state where you live. The same inconsistency exists with respect to in-state tuition.

B. In-State Tuition

In a time of shrinking state budgets and fewer job opportunities for college graduates, state colleges and universities are wrestling with the question of what benefits to bestow upon DACA recipients.²⁷ The question of in-state tuition as it applies to DACA recipients has led to different solutions in states across the country.²⁸ Currently, approximately forty of the states have a provision that allows for undocumented students to receive in-state tuition, but two do not, and two states do not permit undocumented students even to enroll at their state's post-secondary institutions.²⁹

Some of these DACA-eligible young people are high school valedictorians, raised in the United States, and eager to contribute to our economy and our society; to choose not to let them enroll in their closest public university is short-sighted, if only from an economic perspective. The same anti-immigrant sentiment that denies college to individuals will also inspire a decision to deny post-college employment.

To date, at least seventeen states have made it possible for students who have attended primary schools in the United States to pay the same in-state tuition as their American-born counterparts at public institutions of higher education.³⁰ In direct contrast, some states have officially opposed in-state tuition for DACA recipients, stating, as Virginia's State Council of Higher Education did, that DACA beneficiaries should be considered

²⁶ *Id.*

²⁷ Allie Bidwell, *Colleges Get More State Funds, but Rely on Tuition*, U.S. NEWS & WORLD REP. (Apr. 21, 2014, 6:45 PM), <http://www.usnews.com/news/articles/2014/04/21/states-increase-higher-education-spending-rely-on-tuition-in-economic-recovery>.

²⁸ *Undocumented Student Tuition: State Action*, NAT'L CONF. ST. LEGISLATURES (June 12, 2014), <http://www.ncsl.org/research/education/undocumented-student-tuition-state-action.aspx>.

²⁹ Gilberto Mendoza, *Tuition Benefits for Immigrants*, NAT'L CONF. ST. LEGISLATURES (July 15, 2014), <http://www.ncsl.org/research/education/undocumented-student-tuition-overview.aspx>.

³⁰ NAT'L IMMIGRATION LAW CTR., BASIC FACTS ABOUT IN-STATE TUITION FOR UNDOCUMENTED IMMIGRANT STUDENTS 1 (2014), available at <http://www.nilc.org/document.html?id=170>.

“non-residents” for purposes of qualifying for in-state tuition for Virginia colleges and universities.³¹ These institutions grant in-state tuition status to Virginia “domiciliaries.” And Virginia law defines “domiciliary intent” as the “present intent to remain [in Virginia] indefinitely.”³² Virginia has granted driver’s licenses to DACA beneficiaries, but not provided for in-state tuition.³³ This decision by Virginia’s State Council of Higher Education is at odds with the structure of the DACA program, which is “presently structured as indefinitely renewable, such that [a] . . . DACA beneficiary can form a reasonable present legal intent to remain indefinitely”³⁴ satisfying the “domiciliary intent” requirement for in-state tuition in Virginia.

The question as to whether a DACA recipient can attend a public post-secondary institution, let alone receive in-state tuition, hinges on the meaning of “lawful presence.”³⁵ A grant of DACA confers a temporary period of lawful presence. The difference between DACA and say F1, J, or other nonimmigrant statuses is that DACA recipients do not maintain a foreign domicile and have no intent to return to a country to which they have no meaningful ties. Provided that a lawfully present DACA recipient meets the durational requirement for tuition in that state, no legal reason exists to deny them this benefit.

In a recent Georgia case, the question turned on an issue apart from lawful presence. A Georgia state trial court granted the University System of Georgia’s Board of Regents’ motion to dismiss against DACA beneficiary Georgia college students seeking in-state tuition, finding that the Board is protected from suit by sovereign immunity. However, in addressing the “lawful presence” question, the court made some interesting observations that work in favor of viewing DACA recipients as lawfully present and therefore eligible for in-state tuition, in theory. First, the court acknowledged that “[t]he fact that Georgia allows DACA recipients to obtain a driver’s license, a public benefit for which lawful presence must be verified, seems to support [the] Plaintiffs’ contention that the State regards them as being

31 Complaint for Declaratory Relief at 2, *Orellana v. State Council of Higher Educ. for Va.*, No. CL13003086-00 (Va. Cir. Ct. Dec. 17, 2013), available at https://www.justice4all.org/wp-content/uploads/2013/12/Orellana_v_SCHEV.pdf.

32 VA. CODE ANN. § 23-7.4(A) (2014).

33 See Fifty-State Survey, *infra* app; see also *DACA and Driver’s Licenses*, *supra* note 10; *Mendoza*, *supra* note 29.

34 Complaint for Declaratory Relief, *supra* note 31, at 11 ¶ 29.

35 See *Undocumented Student Tuition: State Action*, *supra* note 28. “Indiana enacted HB 1402 requiring that students be lawfully present to receive in-state tuition benefits.” *Id.* Also, “[i]n October 2010, Georgia’s State Board of Regents passed new rules regulating the admission of undocumented students. The 35 institutions in the University System of Georgia must verify the ‘lawful presence’ of all students seeking in-state tuition rates.” *Id.*

lawfully present.”³⁶ The court further emphasized the obfuscation of the issue of lawful presence, terming it “bureaucratic doublespeak” that the Board allows “driver’s licenses to constitute verification of lawful presence, but the very individuals that [the] Defendants contend are not lawfully present may obtain a Georgia driver’s license as a result of DACA.”³⁷ Although the court declared that the “ambiguity of the policies at issue and how ‘lawful presence’ is being construed cry out for judicial clarification,” that clarification is precluded by sovereign immunity in that case. The court, however, closed by noting the reality that DACA recipients can live, work, and drive legally in Georgia, which arguably precludes a determination that they are “unlawfully” present. Whether granting or denying access to a public college or university, it does raise the question of what comes next for DACA-eligible young people.

C. Occupational Licensing

In the case of my former law student, Jose Manuel, the Florida Supreme Court certified that the question of whether an undocumented person who graduates from an accredited U.S. law school and passes the bar in Florida should be issued a license to practice created a conundrum for the Florida Board of Bar Examiners and the Florida Supreme Court. For the purposes of this paper, we will limit the discussion of immigration status and occupational licensing to the practice of law, but recognize that it has broader application to the fields of medicine, dentistry, and beyond.³⁸

Expanding or ensuring access to certain occupational licensing for undocumented persons, to some, is a logical “extension of other measures enacted in recent years that provide such immigrants with driver’s licenses, lower college tuition and access to public financial aid and private funds held by the state

³⁶ DACA Beneficiary Ga. Coll. Students v. Univ. Sys. of Ga.’s Bd. of Regents, No. 2014cv243077, at 13 (Ga. Sup. Ct. Fulton Co. 2014), *appeal docketed*, No. A14A2352 (Ga. Ct. App. Aug. 15, 2014).

³⁷ *Id.* at 14–15 (stating that an EAD operates similarly to a driver’s license in that various Georgia departments and agencies permit an individual to present an EAD to establish lawful presence in the state of Georgia).

³⁸ 8 U.S.C. § 1621(d) (2012); *Bill Would Allow Undocumented Immigrants to Practice Health Care*, CAL. HEALTHLINE (May 12, 2014), <http://www.californiahealthline.org/articles/2014/5/12/bill-would-allow-undocumented-immigrants-to-practice-health-care>; Steve Bousquet, *Senate Supports Landmark Bid for Law License by Non-Citizen*, TAMPA BAY TIMES (Apr. 24, 2014), <http://www.tampabay.com/blogs/the-buzz-florida-politics/senate-supports-landmark-bid-for-law-license-by-non-citizen/2176704> (“D’Alemberte has noted that Florida routinely licenses doctors and many other professionals who are not U.S. citizens.”).

universities.”³⁹ To others, the question of who qualifies for occupational licenses issued by a state turns on proper interpretation of section 1621 of title 8 of the U.S. Code (“1621”), referring to aliens who are not qualified aliens or nonimmigrants ineligible for State and local public benefits, one of which is a professional license.⁴⁰ 1621 basically states that noncitizens are ineligible for state or local benefits, but also contains a subsection expressly authorizing a state to render a noncitizen eligible to obtain a professional license through the enactment of a state law meeting specified requirements.⁴¹ California and Florida have recently dealt with the application of 1621 to bar admission for lawyers who are undocumented or lawfully present as DACA recipients.

1. California

In the beginning of January 2014, the California Supreme Court ruled that undocumented immigrant Sergio Garcia could be licensed to practice law in that state. The court rejected the claim that undocumented immigration status makes a bar applicant *per se* ineligible for a bar license. A product of the California public elementary and secondary schools, Garcia put himself through college, and then attended an unaccredited law school in California. Garcia passed the California bar exam on the first try and then passed the moral character portion of the Bar.⁴² In the spring of 2012, the California Supreme Court issued an order to show cause why Garcia should be admitted to practice law and invited briefing on a number of immigration law and policy issues. In its briefing on the issue, the Obama administration opposed Garcia’s admission, claiming that federal law required an affirmative legislative enactment in order to license an undocumented immigrant to practice law.⁴³ In September 2013, the court held oral arguments and many questions centered on whether a state legislative enactment was necessary. To address the issue, the California legislature with bipartisan support quickly passed a law, signed by Governor

³⁹ Patrick McGreevy, *California Bill Would Ease Professional Licensing Rules for Immigrants*, L.A. TIMES, May 12, 2014, at A1, available at <http://www.latimes.com/local/la-me-immigrants-doctors-20140512-story.html>.

⁴⁰ *In re Garcia*, 315 P.3d 117, 132 (Cal. 2014).

⁴¹ *Id.*; 8 U.S.C. § 1621(d) (2012).

⁴² *In re Garcia*, 315 P.3d at 448. Garcia had fully disclosed on his bar application that he was undocumented. He was brought to the United States by his undocumented immigrant parents from Mexico when he was a toddler. His parents have since regularized their immigration status, and Garcia, who has filed all of the necessary paperwork, is awaiting a visa to be issued to him. *Id.*

⁴³ Application and Proposed Brief for Amicus Curiae the United States of America at 5–12, *In re Garcia*, 315 P.3d 117 (Cal. 2014) (No. S202512), 2012 WL 3822246, at *5–12.

Jerry Brown, rendering undocumented immigrants eligible to practice law.⁴⁴ The California Supreme Court invited further briefing on the question of the effect of the California legislature's action. After briefing was completed, the court issued its opinion, one day after the legislative enactment went into effect.⁴⁵

The California Supreme Court in the Garcia case had certified the question: Does 8 U.S.C. section 1621(c) apply and preclude this court's admission of an undocumented immigrant to the State Bar of California? Does any other statute, regulation, or authority preclude the admission? They then found that in light of the recent enactment of legislation permitting Garcia to practice law,⁴⁶ the court did not need to determine the validity of the parties' contentions with regard to the proper interpretation of section 1621(c)(1)(A). In those states where lawyers who are undocumented or lawfully present due to DACA have yet to apply for bar admission, what should a court do in the absence of legislative action? For those cases of first impression yet to come, some analysis is warranted.

I join the contention that once an individual is lawfully present, 1621 and 1623 no longer apply.⁴⁷ "No federal statute precludes a state from issuing a law license to an undocumented immigrant."⁴⁸ Yes, California passed a prophylactic statute for Sergio Garcia, but for DACA recipients like Jose Manuel Godinez Samperio, once they have their EAD (or authorization to work through their immigration status), they should be considered the same as those individuals granted Temporary Protected Status (TPS),⁴⁹ or Advanced Parole,⁵⁰ or permanently residing under color of law (PRUCOL),⁵¹ who are all eligible for professional licenses given their lawfully present status.

⁴⁴ S. 1024, 2014 Leg., Reg. Sess. (Cal. 2014).

⁴⁵ Kevin R. Johnson, *Breaking News: California Supreme Court Approves Bar License for Sergio Garcia*, IMMIGRATIONPROF BLOG (Jan. 2, 2014), <http://lawprofessors.typepad.com/immigration/2014/01/california-supreme-court-approves-bar-license-for-sergio-garcia.html>.

⁴⁶ CAL. BUS. & PROF. CODE § 6064 (West 2003 & Supp. 2014).

⁴⁷ See Katherine Tianyue Qu, *Passing the Legal Bar: State Courts and the Licensure of Undocumented Immigrants*, 26 GEO. J. LEGAL ETHICS 959, 977 (2013) ("Whether they receive work authorization through DACA, future laws, or some other avenue, the applicants will be able to lawfully obtain employment. In addition, any alterations to the current immigration system will likely lead to the repeal of existing statutes—including possibly 8 U.S.C. § 1621.")

⁴⁸ *In re Garcia*, 315 P.3d 117, 132 (Cal. 2014).

⁴⁹ See generally 8 U.S.C. § 1254a (2012).

⁵⁰ See generally *id.* § 1182(d)(5).

⁵¹ See generally 20 C.F.R. § 416.1618 (2014).

2. Florida

In March 2014 the Florida Supreme Court considered the question of whether a DACA recipient with work authorization⁵² who passed the bar exam could be granted a law license. The question turned largely on the court's interpretation of section 1621 of Title 8 of the U.S. Code. The applicant for admission, Jose Manuel Godinez Samperio, argued that 1621 did not prevent the state of Florida from issuing him a license to practice law because Florida's constitutional provision authorizing Florida to license attorneys overcomes 1621(d)'s requirement that states have a specific law granting particular benefits to undocumented immigrants.⁵³ The Supreme Court of Florida disagreed, finding that 1621 requires a state wishing to confer a benefit such as a public license on an undocumented immigrant to pass legislation specifically authorizing such a benefit.⁵⁴ In response, the Florida legislature on May 2, 2014 passed HB 755, a bipartisan bill⁵⁵ which specifically authorized the Florida Bar to license undocumented immigrants who were brought to the United States as minors, have lived in the United States for at least ten years, are eligible for DACA, and are qualified for admission to the Bar to be admitted.⁵⁶ Upon passing the law, the Florida House of Representatives gave Jose Manuel a standing ovation.⁵⁷

III. THE FUTURE OF DACA WITH RESPECT TO COMPREHENSIVE IMMIGRATION REFORM

Almost twenty years have passed since the last big immigration overhaul in 1996. Since that legislative effort, the country has seen an enforcement-led policy, and a system that

⁵² *In re Garcia*, 315 P.3d at 130 ("We conclude the fact that an undocumented immigrant is present in the United States without lawful authorization does not itself involve moral turpitude or demonstrate moral unfitness so as to justify exclusion from the State Bar, or prevent the individual from taking an oath promising faithfully to discharge the duty to support the Constitution and laws of the United States and California.")

⁵³ Applicant/Respondent's Response to Questions from the Court, at 9–10, Fla. Bd. of Bar Examiners Re: Question as to Whether Undocumented Immigrants Are Eligible for Admission to the Fla. Bar, 134 So.3d 432 (Fla. May 17, 2013).

⁵⁴ Fla. Bd. of Bar Examiners Re: Question as to Whether Undocumented Immigrants Are Eligible for Admission to the Fla. Bar, 134 So.3d 432, 434–35 (Fla. 2014).

⁵⁵ Senators Darren Soto, D-Orlando, and David Simmons, R-Altamonte, sponsored the Senate amendment that would support Jose Manuel's acquisition of a Florida Bar license. Steve Bousquet, *Florida Senate Supports Landmark Bid for Law License by Non-citizen*, MIAMI HERALD (Apr. 25, 2014, 4:05 PM), <http://www.miamiherald.com/news/state/article1963385.html>.

⁵⁶ H.R. 755, § 454.021, 2014 Leg., Reg. Sess. (Fla. 2014).

⁵⁷ Steve Bousquet, *Historic Vote in House Clears Way for Noncitizen to Practice Law*, TAMPA BAY TIMES (May 1, 2014), <http://www.tampabay.com/blogs/the-buzz-florida-politics/historic-vote-in-house-clears-way-for-noncitizen-to-practice-law/2177833>.

does not respond well to the changing economic needs of our nation. Nevertheless, comprehensive immigration reform remains elusive.

If comprehensive immigration reform does come to pass, there are several possibilities for DACA's continued viability. One possibility is that comprehensive immigration reform legislation will adopt and expand DACA as part of an earned legalization program. Some experts postulate that comprehensive immigration reform legislation might contain a provision placing DACA recipients at the front of the line for adjusting their statuses to that of permanent residents.⁵⁸ If that happens, then DACA grantees could petition for their parents when they turn twenty-one.

Some argue that the continuation of DACA is uncertain, as it is contingent on who gets voted into office in 2016. Whoever the next president is, the likelihood of rescinding DACA for more than 700,000 kids is negligible. Unless they leave the country or commit crimes, DACA beneficiaries will likely retain that status for life. If comprehensive immigration reform comes to pass, DACA-eligible individuals will likely have more legal remedies available to them, not fewer. Nevertheless, it is important to acknowledge that DACA is not a panacea or an enduring substitute for comprehensive immigration reform.

CONCLUSION

Jose Manuel Godinez Samperio can now legally work, drive, and practice law. He is eager to be the attorney, instead of the client, in his future cases. Jose Manuel Godinez Samperio in Florida and Sergio Garcia in California will not be the last two individuals, or states, to confront these questions of lawfully present lawyers in the United States in a post-DACA world. States can choose to deny this population access to driver's licenses or in-state tuition, but they can also choose to comply with state and federal law and policy and ensure streamlined access to education, licensure, work, transportation, and mobility to harvest the talent that we have already planted in this generation of U.S. educated students and young professionals.

⁵⁸ Telephone Interview with Michael Olivas, Dir., Inst. of Higher Educ. Law & Governance, Univ. of Hous. Law Ctr. (May 3, 2014).

Appendix

Fifty-State Survey: DACA Recipient Status

Wendi Adelson

The following is a fifty-state survey outlining each state's policies on granting Deferred Action for Childhood Arrivals (DACA) recipients driver's licenses, in-state tuition, and occupational licenses. In gathering this information, the author referenced the National Immigration Law Center's information on driver's licenses and in-state tuition, as well as each individual state's supreme court precedent on admitting undocumented individuals to the state's bar. Please note that any "N/A" designation was assigned by the author for any state policies that were unable to be located at the time the survey was compiled and thus are "not addressed" by applicable state legislation. All information contained in this document is on file with the author.

STATE	DRIVER'S LICENSES	IN-STATE TUITION	OCCUPATIONAL LICENSES – SPECIFICALLY BAR LICENSES
AL	Eligible Confirmed Through Statements or Granting of Licenses Specifically Lists Employment Authorization Document (EAD) as Meeting Lawful Presence Lists I-797 Notice of Action (or Generally Accepts Any Verifiable Immigration Document) as Meeting Lawful Presence Requirement	N/A (Prohibits Undocumented Students from Enrolling in Any Public Postsecondary Institution, but May Enroll DACA Recipients at In-State Tuition Rates at Some Universities & Community Colleges)	N/A Application Requires: - Citizenship & Immigration Status

AK	Appear to Be Eligible, but Not Specifically Addressed	N/A (Out-of-State)	N/A Application Requires: - "Citizenship" Information
AZ	Not Eligible Officials Have Announced Intent to Deny Licenses to DACA Recipients	N/A (DACA Grantees Eligible for In-State Tuition at Some Institutions) (+Maricopa County Judge Granted Attorney General & Governor to Sue Maricopa Colleges on This Issue; Decided 4/30/14)	N/A Application Requires: - Documentation Proving Citizenship or Immigration Status
AR	Eligible Confirmed Through Statements or Granting of Licenses *Recognizes DACA as Meeting Lawful Presence Requirement	N/A (Out-of-State)	N/A
CA	Eligible Confirmed Through Statements or Granting of Licenses *Recognizes DACA as Meeting Lawful Presence Requirement Specifically Lists Employment Authorization Document (EAD) as Meeting Lawful Presence Lists I-797 Notice of Action (or Generally Accepts Any Verifiable Immigration Document) as Meeting Lawful Presence Requirement	Eligible 2001 Cal. Stat. 6652 (A.B. 540) Signed 10/12/01	Eligible 2012 Cal. Stat. 4658 (A.B. 1024) Signed 10/5/13

+ Denotes ongoing litigation.

* Denotes ongoing litigation.

CO	Eligible	Eligible 2013 Colo. Sess. Laws 504 (S.B. 33) Signed 4/29/13	N/A Application Requires: - Citizenship and/or Lawful Presence Documentation
	Confirmed Through Statements or Granting of Licenses		
	Specifically Lists Employment Authorization Document (EAD) as Meeting Lawful Presence		
CT	Eligible	Eligible CONN. GEN. STAT. § 10a-29 (2011) (H.B. 6390) Signed 6/13/11	N/A Application Requires: - Citizenship & Immigration Status
	Confirmed Through Statements or Granting of Licenses		
	Specifically Lists Employment Authorization Document (EAD) as Meeting Lawful Presence		
	Lists I-797 Notice of Action (or Generally Accepts Any Verifiable Immigration Document) as Meeting Lawful Presence Requirement		
DE	Eligible	N/A (Pay Out-of-State) *S.B. 183 – Senate Education Committee 4/3/14	N/A Application Requires: - Citizenship & Immigration Status
	Confirmed Through Statements or Granting of Licenses		
	Specifically Lists Employment Authorization Document (EAD) as Meeting Lawful Presence		

* Denotes ongoing litigation.

DC	Eligible	N/A	N/A
	Confirmed Through Statements or Granting of Licenses		
	Specifically Lists Employment Authorization Document (EAD) as Meeting Lawful Presence		
	Lists I-797 Notice of Action (or Generally Accepts Any Verifiable Immigration Document) as Meeting Lawful Presence Requirement		
FL	Eligible	Eligible	Not Eligible
	Confirmed Through Statements or Granting of Licenses		
	*Recognizes DACA as Meeting Lawful Presence Requirement		
	Specifically Lists Employment Authorization Document (EAD) as Meeting Lawful Presence		
		FLA. STAT. §§ 1009.21–1009.24, 1009.26, 1009.98 (2014) (H.B. 851) Signed 6/9/14	Florida Board of Bar Examiners Re: Question as to Whether Undocumented Immigrants Are Eligible for Admission to the Florida Bar (2014) (No. SC 11-2568)

* Denotes ongoing litigation.

GA	Eligible	Prohibited (Bans Undocumented Students from Some Colleges) +DACA Beneficiary Ga. College Students v. Univ. Sys. of Georgia's Bd. of Regents, No. 2014cv243077, (Ga. Sup. Ct. Fulton Co. 2014), <i>appeal docketed</i> , No. A14A2352 (Ga. Ct. App. Aug. 15, 2014)	N/A Application Requires: - Citizenship & Immigration Status - Applicants Who Are not U.S. Citizens or Do not Have Permanent Resident Status in U.S. Must Submit Non-Immigrant Affidavit & Other Documentation with Fitness Application
	Confirmed Through Statements or Granting of Licenses		
	*Recognizes DACA as Meeting Lawful Presence Requirement		
	Specifically Lists Employment Authorization Document (EAD) as Meeting Lawful Presence		
HI	Eligible	N/A (Out-of-State at Some Institutions; In-State at Some Institutions)	N/A
	Confirmed Through Statements or Granting of Licenses		
	Specifically Lists Employment Authorization Document (EAD) as Meeting Lawful Presence		
	Lists I-797 Notice of Action (or Generally Accepts Any Verifiable Immigration Document) as Meeting Lawful Presence Requirement		

+ Denotes ongoing litigation.

* Denotes ongoing litigation.

ID	Eligible	N/A (Out-of-State)	N/A Applicant Qualifications Include: - "Be lawfully admitted to this country."
	Confirmed Through Statements or Granting of Licenses		
	Specifically Lists Employment Authorization Document (EAD) as Meeting Lawful Presence		
IL	Eligible	Eligible 2003 Ill. Stat. 50 (H.B. 60) Effective 5/20/03	N/A Application Requires: - Citizenship Status
	Confirmed Through Statements or Granting of Licenses		
	Specifically Lists Employment Authorization Document (EAD) as Meeting Lawful Presence		
IN	Eligible	Prohibited 2011 Ind. Acts 2790 (H.B. 1402) (Required Lawful Presence for In-State Tuition) Effective 7/1/11 2013 Ind. Acts 1801 (S.B. 207) (Protects Those Undocumented Enrolled Before 7/1/11 Who Were Already Receiving In-State Tuition) Signed 5/13/13 *S.B. 279	N/A
	Confirmed Through Statements or Granting of Licenses		
	*Recognizes DACA as Meeting Lawful Presence Requirement		
	Lists I-797 Notice of Action (or Generally Accepts Any Verifiable Immigration Document) as Meeting Lawful Presence Requirement		

* Denotes ongoing litigation.

IA	Eligible	N/A (Out-of-State) *H.F. 309 – House Education Committee	N/A Application Requires: - Citizenship Status
	Confirmed Through Statements or Granting of Licenses		
KS	Eligible	Eligible KAN. STAT. ANN. § 76- 731a (2004) (H.B. 2145) Effective 7/1/04	N/A Application Requires: - Citizenship Status - Immigration Status - Lawful Presence Information
	Confirmed Through Statements or Granting of Licenses		
	*Recognizes DACA as Meeting Lawful Presence Requirement		
	Specifically Lists Employment Authorization Document (EAD) as Meeting Lawful Presence		

* Denotes ongoing litigation.

KY	Eligible	N/A Kentucky Council on Postsecondary Education Enabled Institutions to Do So Without Explicit Bill ¹	N/A Application Requires: - Citizenship & Immigration Status Documentation
	Confirmed Through Statements or Granting of Licenses		
	Specifically Lists Employment Authorization Document (EAD) as Meeting Lawful Presence		
LA	Eligible	N/A (Out-of-State)	N/A Requires: - U.S. Citizenship; - Alien Lawfully Admitted for Permanent Residence; or - Alien Otherwise Authorized to Work Lawfully in the United States
	Confirmed Through Statements or Granting of Licenses		
	Specifically Lists Employment Authorization Document (EAD) as Meeting Lawful Presence		
ME	Eligible	N/A (Out-of-State)	N/A Application Requires: - Citizenship & Immigration Status
	Confirmed Through Statements or Granting of Licenses		
	*Recognizes DACA as Meeting Lawful Presence Requirement		
	Specifically Lists Employment Authorization Document (EAD) as Meeting Lawful Presence		

¹ See *Kentucky Policy*, ULEADNET.ORG, <http://uleadnet.org/map/kentucky-policy> (last visited Oct. 30, 2014).

* Denotes ongoing litigation.

MD	Eligible	Eligible 2011 Md. Laws 870 (S. 167) (H. 470) Signed 5/10/11	N/A
	Confirmed Through Statements or Granting of Licenses		
	Specifically Lists Employment Authorization Document (EAD) as Meeting Lawful Presence		
MA	Eligible	N/A (In-State at Some Institutions) *H. 1078 & *S. 577	N/A
	Confirmed Through Statements or Granting of Licenses		
	Specifically Lists Employment Authorization Document (EAD) as Meeting Lawful Presence		
MI	Eligible	N/A (In-State Tuition at Some Institutions)	N/A - Do Not Need U.S. Citizenship or Residence
	Confirmed Through Statements or Granting of Licenses		
	Specifically Lists Employment Authorization Document (EAD) as Meeting Lawful Presence		

* Denotes ongoing litigation.

MN	Eligible	Eligible 2013 Minn. Laws 752 (S. 1236) Effective 7/1/13	N/A
	Confirmed Through Statements or Granting of Licenses		
	Specifically Lists Employment Authorization Document (EAD) as Meeting Lawful Presence		
MS	Eligible	N/A (Out-of-State)	N/A
	Confirmed Through Statements or Granting of Licenses		
	Lists I-797 Notice of Action (or Generally Accepts Any Verifiable Immigration Document) as Meeting Lawful Presence Requirement		
MO	Eligible	N/A (In-State Tuition at Some Institutions)	N/A Application Requires: - Citizenship Status; or - Immigrant Lawfully Admitted for Permanent Residence; or - Alien Otherwise Authorized to Work Lawfully in the United States
	Confirmed Through Statements or Granting of Licenses		
	*Recognizes DACA as Meeting Lawful Presence Requirement		
	Specifically Lists Employment Authorization Document (EAD) as Meeting Lawful Presence		
		*S.B. 722 – Education *H.B. 1870 – Higher Education *H.B. 1704 – Higher Education *H.B. 1784 – Higher Education *H.B. 1637 (Bill Restricting Access) – Higher Education Public Hearing 2/11/14	

* Denotes ongoing litigation.

MT	Eligible	Prohibited (Bans Enrollment of Undocumented Students; However, Public University System Has Announced Plans to Admit Students Regardless of Status)	N/A
	Confirmed Through Statements or Granting of Licenses *Requires Proof of Authorized Presence; MONT. CODE ANN. § 61-5-105(10) (2013)		
	Specifically Lists Employment Authorization Document (EAD) as Meeting Lawful Presence		
NE	Not Eligible	Eligible NEB. REV. STAT. § 85-502 (2006) L.B. 239 (Passed over Governor's Veto 4/13/06)	N/A
	Officials Have Announced Intent to Deny Licenses to DACA Recipients		
NV	Eligible	N/A (Out-of-State)	N/A
	Confirmed Through Statements or Granting of Licenses		
NH	Eligible	N/A (Out-of-State; University of New Hampshire Enrolls DACA Recipients at In-State Rates) *H.B. 474 – House Passed 1/22/14; Senate Health, Education & Human Services Referred to Study	N/A Application Requires: - Citizenship & Immigration Status
	Confirmed Through Statements or Granting of Licenses		
	Specifically Lists Employment Authorization Document (EAD) as Meeting Lawful Presence		

* Denotes ongoing litigation.

NJ	Eligible	Eligible	N/A
	Confirmed Through Statements or Granting of Licenses		
	Specifically Lists Employment Authorization Document (EAD) as Meeting Lawful Presence	2013 N.J. Sess. Law Serv. 712 (West) (S. 2479) 12/20/13 *S. 442 – Senate Higher Education *A. 3013 – Assembly Higher Education	Application Requires: - Citizenship & Immigration Status
NM	Eligible	Eligible	N/A
	Confirmed Through Statements or Granting of Licenses		
		21-1-4.6, N.M. STAT. ANN. (2005) (S.B. 582)	Application Requires: - Citizenship & Naturalization Information
NY	Eligible	Eligible	Pending (+May Be Reviewed by State's Highest Court – i.e., Cesar Vargas, New York Law School Graduate Seeking Bar License)
	Confirmed Through Statements or Granting of Licenses		
	Specifically Lists Employment Authorization Document (EAD) as Meeting Lawful Presence	N.Y. EDUC. LAW § 355(2)(h)(8) (2002) (S.B. 7784) *S. 01747 – Higher Education *A. 02463 (Restricting Access) – Assembly Higher Education, Held for Consideration	
NC	Eligible	N/A	N/A
	Confirmed Through Statements or Granting of Licenses		
	Lists I-797 Notice of Action (or Generally Accepts Any Verifiable Immigration Document) as Meeting Lawful Presence Requirement		
		(Out-of-State)	

* Denotes ongoing litigation.

+ Denotes ongoing litigation.

ND	Eligible	N/A (Out-of-State)	N/A
	Specifically Lists Employment Authorization Document (EAD) as Meeting Lawful Presence Requirement		
OH	Eligible	N/A (In-State Tuition at Some Institutions)	N/A
	Confirmed Through Statements or Granting of Licenses		
	Lists I-797 Notice of Action (or Generally Accepts Any Verifiable Immigration Document) as Meeting Lawful Presence Requirement		
OK	Eligible	N/A (Out-of-State) H.B. 1804 Signed 5/8/07 (Rescinded S.B. 596, 2003, Which Allowed In-State Tuition)	N/A
	Confirmed Through Statements or Granting of Licenses		
	*Recognizes DACA as Meeting Lawful Presence Requirement		

* Denotes ongoing litigation.

OR	Eligible	Eligible 2013 Or. Laws 91 (2013) (H. 2787) Effective 7/1/13	N/A
	Confirmed Through Statements or Granting of Licenses		
	Specifically Lists Employment Authorization Document (EAD) as Meeting Lawful Presence		
PA	Eligible	N/A (Out-of-State) *S.B. 713 – Senate Education	N/A Application Requires: - Citizenship; or - Immigration Status with Documentation Showing You Are in the United States Legally
	Confirmed Through Statements or Granting of Licenses		
	Specifically Lists Employment Authorization Document (EAD) as Meeting Lawful Presence		
	*Recognizes DACA as Meeting Lawful Presence Requirement		
RI	Eligible	N/A (In-State at Some Institutions) *H.B. 7437 – House Finance, Recommended Hold for Further Study *SB 2345 – Senate Financing Hearing 5/13	N/A Application Requires: - Citizenship; or - Proof of Legal Residency or Naturalization
	Confirmed Through Statements or Granting of Licenses		
	Specifically Lists Employment Authorization Document (EAD) as Meeting Lawful Presence		

* Denotes ongoing litigation.

SC	Eligible	N/A (Prohibits Undocumented Students from Enrolling in Any Public Postsecondary Institution; However Some Enroll DACA Recipients) (Out-of-State) *H. 4735 – Ways and Means	N/A Application Requires: - Citizenship; or - Naturalization Documentation; or - If Not Naturalized, Information Whether You Have Bona Fide Declared Your Intention to Become a Citizen
	Confirmed Through Statements or Granting of Licenses		
	Specifically Lists Employment Authorization Document (EAD) as Meeting Lawful Presence		
SD	Eligible	N/A (Out-of-State)	N/A
	Specifically Lists Employment Authorization Document (EAD) as Meeting Lawful Presence Requirement		
TN	Eligible	N/A (Out-of-State) *S.B. 1951 – Education Subcommittee, on Calendar 3/24 *H.B. 1992 – Education Subcommittee, Taken off Notice for Calendar *S.B. 2067 – Senate Education Committee Calendar 3/26 *H.B. 2328 – House Education Subcommittee, Taken off Notice for Calendar	N/A
	Confirmed Through Statements or Granting of Licenses		
	Specifically Lists Employment Authorization Document (EAD) as Meeting Lawful Presence		

* Denotes ongoing litigation.

TX	Eligible	Eligible	N/A
	Confirmed Through Statements or Granting of Licenses		
	*Recognizes DACA as Meeting Lawful Presence Requirement		
UT	Eligible	Eligible	N/A
	*Offers Licenses to Those Who Can Prove Citizenship or Lawful Status/Offers Driver's Certificate for Those Who Cannot		
	Confirmed Through Statements or Granting of Licenses		
	*Recognizes DACA as Meeting Lawful Presence Requirement		
	Specifically Lists Employment Authorization Document (EAD) as Meeting Lawful Presence		

* Denotes ongoing litigation.

VT	Eligible	N/A (Out-of-State)	N/A Application Requires: - Citizenship; or - Alien Lawfully Present in United States
	Confirmed Through Statements or Granting of Licenses		
	*Recognizes DACA as Meeting Lawful Presence Requirement		
	Specifically Lists Employment Authorization Document (EAD) as Meeting Lawful Presence		
VA	Eligible	N/A (DACA Recipients May Be Eligible for In-State Tuition at Some Institutions) *H.B. 747 – Education Committee Passed 1/29, Left in Appropriations	N/A Application Requires: - U.S. Birth Certificate or Naturalization Papers; or - Affidavit of Immigration Status with Applicable Documentation
	Confirmed Through Statements or Granting of Licenses		
	*Recognizes DACA as Meeting Lawful Presence Requirement		
	Lists I-797 Notice of Action (or Generally Accepts Any Verifiable Immigration Document) as Meeting Lawful Presence Requirement		
WA	Eligible	Eligible WASH. REV. CODE § 28B.15.012 (2003) (H.B. 1079) Signed 5/7/03	N/A
	Confirmed Through Statements or Granting of Licenses		

* Denotes ongoing litigation.

WV	Eligible	N/A	N/A
	Lists I-797 Notice of Action (or Generally Accepts Any Verifiable Immigration Document) as Meeting Lawful Presence Requirement	(Out-of-State)	
WI	Eligible	N/A	N/A
	Confirmed Through Statements or Granting of Licenses	WIS. STAT. § 36.27 (A75-2009) 2011	Application Requires: - Citizenship; or - Description of Immigration Status
	*Recognizes DACA as Meeting Lawful Presence Requirement	(Revoked Eligibility for Instate Tuition for Unauthorized Immigrants that Was Added Through the Budget Law in 2009)	
	Specifically Lists Employment Authorization Document (EAD) as Meeting Lawful Presence		
WY	Eligible	N/A	N/A
	Confirmed Through Statements or Granting of Licenses	(Out-of-State)	U.S. Citizenship Required WYO. STAT. ANN. § 33-5-105 (2014)
	Specifically Lists Employment Authorization Document (EAD) as Meeting Lawful Presence		

* Denotes ongoing litigation.

current effects of contemporary immigration law and proposed legislation, the law has deterred the migration of women, the naturalization of women, the authorization of women to work lawfully within U.S. borders, and women's freedom to escape domestic and state-sponsored violence and abuse within their countries of origin and within the United States.

As Congress and the American public seek to reform the broken immigration system, calls for gender equality in the next round of amendments to the Immigration and Nationality Act (INA) have been faint at best. As this Article argues, however, rather than create another generation of discriminatory legislation, policymakers must enact comprehensive immigration reform that embodies equality and that embraces policy correcting the legacy of oppression against women.

This Article advocates for comprehensive immigration reform that encompasses gender equality by including legislative provisions that benefit women. In this way, immigration law and policy can ameliorate the discriminatory effects of the explicit and implicit oppression against women that has characterized immigration law from its beginning. Part I provides a basis to understand this legacy of oppression by exploring the subordination of women in immigration law. Since its inception as formalized federal law, immigration law has restricted the manner in which immigrant women could come to the United States and the type of immigration status benefits for which they could be eligible. Building on this historical foundation, Part II discusses the current state of immigration reform and comments on the continued oppressive measures that have infiltrated these proposals. Even though comprehensive legislative immigration reform remains elusive, this Part discusses a piece of proposed legislation that passed the Senate, the Border Security, Economic Opportunity, and Immigration Modernization Act of 2013² ("2013 Border Security Bill"). While the political process has likely stalled the chance of law reform passing in the current congressional session, the 2013 Border Security Bill serves as an illustrative case study in understanding current legislative trends and how they continue to disadvantage women. This Article concludes by discussing the feasibility and efficacy of a continued push for gender equality in immigration law and policy, given the environment of heightened anti-immigrant animus. Though change may be difficult to obtain, the history of immigration law teaches that the law has evolved to encompass

² Border Security, Economic Opportunity, and Immigration Act, S. 744, 113th Cong. (2013).

more gender-neutral norms. Thus, equality will be achieved only through vigilant, unceasing efforts.

I. THE HISTORICAL SUBORDINATION OF WOMEN IN IMMIGRATION LAW

From its earliest iterations, immigration law has contained explicitly discriminatory provisions against women. This should not be surprising, as early immigration law followed the mores of other areas of law regarding the rights of women. In the early part of the nineteenth century, the law formally embraced the legal doctrine of coverture.³ Under coverture, women were considered little more than property of their husbands, unable to act independently in the eyes of the law.⁴ As Janet Calvo explains:

Coverture is the legal notion that a husband and wife are one, and the one is the husband. Under the doctrine of coverture, the husband had ownership rights over his wife and was legally entitled to control his wife's income, property and residence The wife's legal identity merged with that of her husband to such an extent that she was unable to file suit for damages or to enforce contracts. Moreover, under coverture, the children of the marriage were considered marital property and, therefore, were under the father's control. A mother was entitled to no power over her children. The law sanctioned the power and control of the husband over the wife. The legal notion of coverture thus established a legal regime that enforced the subordination of one adult human being to another.⁵

The subordination of women to men in the formal law softened in the late nineteenth century, when women were afforded the right to own property as individuals and not through their husbands or fathers. Beginning in the mid-1800s, states passed versions of the Married Women Property Act,⁶ creating a critical fissure in

³ See Janet Calvo, *A Decade of Spouse-Based Immigration Laws: Coverture's Diminishment, but Not Its Demise*, 24 N. ILL. U. L. REV. 153, 161 (2004) [hereinafter Calvo, *Coverture's Diminishment*].

⁴ See 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 441 (15th ed. 1809) ("By marriage, the husband and wife are one person in the law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband: under whose wing, protection, and cover, she performs everything; and is therefore called . . . a *feme-covert*, . . . is said to be *covert-baron*, or under the protection and influence of her husband, her *baron*, or lord; and her condition during her marriage is called her *coverture*."); see also Marisa S. Cianciarulo, *U.S. Immigration Law: Where Antiquated Views on Gender and Sexual Orientation Go to Die*, 55 WAYNE L. REV. 1897, 1899 (2009); Janet M. Calvo, *Spouse-Based Immigration Laws: The Legacies of Coverture*, 28 SAN DIEGO L. REV. 593, 596 (1991) [hereinafter Calvo, *Spouse-Based Immigration Laws*].

⁵ Calvo, *Coverture's Diminishment*, *supra* note 3, at 160–61.

⁶ Mississippi was one of the first states to enact the law, in an effort to protect women's rights to own slaves. See 1839 Miss. Laws 72. New York passed its own

the hard confines of coverture. Yet despite these explicit gains, the implicit effects of the legacy of coverture continued to infiltrate law and policy, including the rights of women to control their own property and labor.⁷

Although domestic and property law is generally well-ensconced in the purview of the state's regulatory and legislative powers—while immigration law is inherently federal law—the federal law of immigration as it pertains to family dynamics, ordering, and marriage borrows much from state conceptions of domestic rights and privileges. So although coverture was losing favor as an explicit premise in state law,⁸ it flourished in immigration law. The oppression of women in the immigration law system took various forms, including immigrant women's entrance and formal admission to the United States, their ability to sponsor family members for admission, and the laws surrounding naturalization of women. The effect of marital status—that is, being married—was of critical import. Thus, being married (or unmarried) impacted a woman's ability to lawfully immigrate and remain in the United States, to eventually naturalize, or even to retain her American citizenship. In short, coverture remained alive and well in immigration law and policy.

In fact, since its earliest iterations, immigration law has contained provisions that operate to discriminate against women. Within the Immigration Act of 1917 and the Immigration Act of 1924 (and their later amendments), certain American citizen women married to foreign national men were unable to petition for their husbands' lawful immigration status, while no such restrictions operated against American citizen men petitioning for their wives.⁹ Similarly, the Immigration Act of 1917 provided what was essentially a waiver of the literacy requirement for otherwise admissible aliens if the petitioner was a man seeking to bring in his father, grandfather, wife, mother, grandmother, or

progressive version, which awarded women the right to sue and keep their earnings. See 1848 N.Y. Laws 307.

⁷ See, e.g., Reva B. Siegel, *The Modernization of Marital Status Law: Adjudicating Wives' Rights to Earnings, 1860-1930*, 82 GEO. L.J. 2127 (1994) (exploring the shift of coverture from contract law to status, whereby husbands could justifiably continue to claim their wives' earnings even though the formal doctrine of coverture was being written out of domestic and property law).

⁸ Reva B. Siegel discusses, however, that although coverture lost explicit favor in the law, its effects were felt in myriad ways. See Reva B. Siegel, *The Rule of Love: Wife Beating as Prerogative*, 105 YALE L.J. 2117, 2172 (1996), discussed and cited in Calvo, *Coverture's Diminishment*, *supra* note 3, at 161.

⁹ See S. REP. NO. 81-1515, at 414-15 (1951).

unmarried or widowed daughter.¹⁰ No such waiver existed for a woman petitioning for those same family members.¹¹ Other explicitly discriminatory provisions lurked throughout these early immigration laws.¹²

Immigration law also historically discriminated against women in the naturalization context. Due to racist restrictions on who could naturalize,¹³ only immigrant women who were eligible to be citizens—i.e., only white women—could naturalize through their U.S. citizen husbands.¹⁴ Moreover U.S. citizen women lost their citizenship if they married immigrants who themselves were ineligible for citizenship.¹⁵ The law targeted U.S. citizen white women seeking to marry immigrants of color, who could not themselves naturalize due to the law's formalized racial discrimination.¹⁶

In a 1915 case deciding the validity of the law requiring that an American woman lose her U.S. citizenship (through involuntary expatriation) by marrying a foreign national, the United States Supreme Court summarized the intersection of domestic policy—i.e., marriage—and immigration law as it pertained to the rights and limitations of women:

The identity of husband and wife is an ancient principle of our jurisprudence. It was neither accidental nor arbitrary and worked in

10 *Id.* at 415; see also Calvo, *Spouse-Based Immigration Laws*, *supra* note 4, at 600–06 (discussing the history of gender discrimination in early immigration law).

11 S. REP. NO. 81-1515, at 414.

12 See *id.* at 415–17 (describing discrimination against women treaty traders, women seeking to bring in family members affected with certain contagious diseases, and women ministers and professors, among other categories experiencing blatant discrimination).

13 The author discusses this historical discrimination through a gender-critical framework as applied to the recent reauthorization process of the Violence Against Women Act. See Mariela Olivares, *Battered by Law: The Political Subordination of Immigrant Women*, 64 AM. U. L. REV. 231, 271–76 (2014) (discussing the discriminatory history of immigration law and policy).

14 See López, *supra* note 1, at 33 (discussing how a woman's citizenship would depend on both her marriage to a U.S. citizen and on her own eligibility for naturalization by being white).

15 See *id.* at 34–47 (citing Act of Mar. 2, 1907, ch. 2534, § 3, 34 Stat. 1228, 1228) (“[A]ny American woman who marries a foreigner shall take the nationality of her husband.”).

16 López, *supra* note 1 at 34 (explaining that although the law was partially repealed in 1922, it “continued to require the expatriation of any woman who married a foreigner racially barred from citizenship” until 1931); see Act of Sept. 22, 1922, ch. 411, § 3, 42 Stat. 1021, 1022; see also Cianciarulo, *supra* note 4, at 1898; see also Kelly v. Owen, 74 U.S. (7 Wall.) 496, 498 (1868) (holding that only “free white women” could become citizens through marriage to a U.S. citizen), cited in Kevin R. Johnson, *Racial Restrictions on Naturalization: The Recurring Intersection of Race and Gender in Immigration and Citizenship Law*, 11 BERKELEY WOMEN'S L.J. 142, 161 & n.142 (1996); see also Leti Volpp, *Divesting Citizenship: On Asian American History and the Loss of Citizenship Through Marriage*, 53 UCLA L. REV. 405, 443–49 (2005) (discussing how the repeal of the 1922 law did not apply to those women and their spouses who were of Chinese nationality or descent).

many instances for her protection. There has been, it is true, much relaxation of it but in its retention as in its origin it is determined by their intimate relation and unity of interests, and this relation and unity may make it of public concern in many instances to merge their identity, and give dominance to the husband. It has purpose, if not necessity, in purely domestic policy; it has greater purpose and, it may be, necessity, in international policy. And this was the dictate of the act in controversy. Having this purpose, has it not the sanction of power?¹⁷

The Court in *Mackenzie* was drawing on the common practice of law and policy at the time: absent her own political and legal independence due to the effects of coverture, a woman could not be extricated from the personality of her husband. Involuntary expatriation by statutory mandate was thus seemingly inevitable because the male domination over female spouses held this “sanction of power.”¹⁸ This long-standing history perpetuated and reflected the common law norms of coverture, and as Kerry Abrams writes, “[i]t took enfranchisement through the Nineteenth Amendment, extensive feminist activism, and the specter of illiterate, potentially disloyal, and now *voting* foreign wives to finally persuade Congress that derivative national citizenship was a bad idea.”¹⁹

Indeed, in 1950, to ameliorate the long-standing effects of coverture in immigration law, Congress worked towards a comprehensive immigration legislative reform. These efforts ultimately resulted in the Immigration and Nationality Act of 1952.²⁰ As part of the preparation and drafting of the 1952 Act, Congress undertook an extensive investigation into the state of the law.²¹ One small portion of this investigation discussed the oppressive effects of immigration law against women, noting:

The so-called discrimination against women features of the acts of 1917 and 1924 probably are in those laws as a legislative enactment of the common-law theory that the husband is the head of the household and the woman's nationality and residence follows [sic] that of her husband.²²

The Congressional Report goes on to address how this “so-called” discrimination against women affected various portions of the law, including the spousal citizenship and admission waiver

¹⁷ *Mackenzie v. Hare*, 239 U.S. 299, 311 (1915).

¹⁸ See Kerry Abrams, *Citizen Spouse*, 101 CALIF. L. REV. 407, 416–17 (2013) (discussing the legal history prior to *Mackenzie* and the effects of the decision).

¹⁹ *Id.* at 417.

²⁰ Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163.

²¹ S. REP. NO. 81-1515, at 414 (1951).

²² *Id.*

provisions, discussed above.²³ The Congressional Report concludes: “The subcommittee believes that there is no justification for according different treatment to the sexes under the immigration laws and recommends, therefore, that the laws be amended to remove all such inequalities.”²⁴ In an accompanying footnote, the reporting subcommittee offers the solution to the inequities: “The recommendation will require the substitution of the word ‘spouse’ for the word ‘wife’ where it appears in the following provisions of the laws” and then lists the affected sections of the 1917 and 1924 Acts.²⁵ When the 1952 Immigration and Nationality Act (INA) was passed—the law that still forms the basis for the current version of the INA—this word change had been effectuated.

Yet as scholars have researched and explored, gender inequality was not so easily fixed.²⁶ Although the word choice in the 1952 INA provided facial neutrality in the law (i.e., changing “wife” to “spouse”), the long-time effects of coverture and oppression against women were still operational in the law’s implementation. As one example, the family-based immigration visa petitioning process—whereby the Lawful Permanent Resident (LPR) or U.S. citizen spouse is required to petition for his/her foreign national spouse’s immigration status²⁷—became an easy vehicle for abusive spouses with lawful or citizen status to manipulate and keep their spouses in the abusive marriages.²⁸ And as studies consistently show, the vast majority of domestic abuse occurs at the hands of men against women.²⁹ Thus, the effect was to keep many immigrant women locked within the confines of an abusive marriage to fulfill the requirements for her own LPR status. Despite these realities, legislators were instead concerned that this petitioning process was fraught with fraudulent marriages—i.e., marriages that occurred simply for

²³ *Id.* at 414–17.

²⁴ *Id.* at 417.

²⁵ *Id.* at 417 n.8.

²⁶ See, e.g., Calvo, *Spouse-Based Immigration Laws*, *supra* note 4, at 604–12; Cianciarulo, *supra* note 4.

²⁷ Calvo, *Spouse-Based Immigration Laws*, *supra* note 4, at 600–02.

²⁸ Julie E. Dinnerstein, *Options for Immigrant Victims of Domestic Violence*, in IMMIGRATION AND NATIONALITY LAW HANDBOOK 482 (2007–2008 ed. 2007), reprinted in 190 PRACTISING L. INST. N.Y. 161, 164 (2009) (detailing how a U.S. citizen or LPR spouse effectively holds the reins and controls the success or failure of his or her spouse’s immigration stability).

²⁹ *Intimate Partner Violence: Consequences*, CENTERS FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/violenceprevention/intimatepartnerviolence/consequences.html> (last updated Dec. 24, 2013) (citing studies that show nearly fifteen percent of women have been injured as a result of intimate partner violence (domestic violence) during their lifetime, compared with four percent of men—nearly four times the rate of men).

immigration benefits and not for bona fide “marriage purposes.” As a result, Congress passed the 1986 Immigration Marriage Fraud Amendments (IMFA)³⁰ at about the same time as the comprehensive Immigration Reform and Control Act (IRCA).³¹

The IMFA sought to stop immigrants from receiving immigration relief through sham marriages. To do so, the IMFA created a petitioning process in which the foreign spouse was dependent on the continued support of her petitioning spouse for at least two years.³² During those two years, the petitioning spouse could simply revoke his support of his spouse’s immigration petition.³³ The result was that immigrant domestic violence victims had to endure continued domestic abuse or risk losing lawful immigration status.³⁴ In this way, the law continued to prefer men petitioning for their wives and to uphold a long-standing barrier for women to gain independence from abusive or coercive husbands.³⁵ Although the effects of the law were softened in the 1990 Immigration Act through provisions for battered immigrant spouses,³⁶ it was not until the 1994 Violence Against Women Act (VAWA) that certain battered immigrants could self-petition for immigration benefits and not rely on an abusive spouse for immigration relief.³⁷

Similarly, Congress passed the 1986 IRCA law, seeking to deter the influx of undocumented immigrants—largely from Central American countries—who were fleeing violence and

³⁰ Immigration Marriage Fraud Amendments of 1986, Pub. L. No. 99-639, 100 Stat. 3537.

³¹ Immigration Reform and Control (Simpson-Mazzoli) Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359.

³² See Immigration Marriage Fraud Amendments, 100 Stat. at 3537.

³³ See WILLIAM A. KANDEL, CONG. RESEARCH SERV., R42477, IMMIGRATION PROVISIONS IN THE VIOLENCE AGAINST WOMEN ACT (VAWA) 19 (2012) (quoting a House Judiciary Committee report on the purposes for the battered spouse waiver provision of the Violence Against Women Act: “The purpose of this provision is to ensure that when the U.S. citizen or permanent resident spouse or parent engages in battering or cruelty against a spouse or child, neither the spouse nor child should be entrapped in the abusive relationship by the threat of losing their legal resident status.”) (citing H.R. REP. NO. 101-723(I), at 78 (1990)).

³⁴ See Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1247 (1991); Calvo, *Spouse-Based Immigration Laws*, *supra* note 4, at 607–11; Kevin R. Johnson, *Public Benefits and Immigration: The Intersection of Immigration Status, Ethnicity, Gender, and Class*, 42 UCLA L. REV. 1509, 1551 (1995).

³⁵ The author has written on the spousal petitioning process and its deleterious effects on immigrant victims of domestic violence. See Mariela Olivares, *A Final Obstacle: Barriers to Divorce for Immigrant Victims of Domestic Violence*, 34 HAMLIN L. REV. 149 (2011); Olivares, *supra* note 13; see also Calvo, *Spouse-Based Immigration Laws*, *supra* note 4, at 604–12; Cianciarulo, *supra* note 4.

³⁶ See 8 U.S.C. § 1186a(c)(4)(C) (2012).

³⁷ Violent Crime Control and Law Enforcement Act of 1994, H.R. 3355, 103d Cong. §§ 40,001–703 (1994).

political turmoil and seeking employment in the low-skilled service and agricultural industries in the United States.³⁸ The IRCA created strict prohibitions against employers hiring undocumented people and increased enforcement measures at the U.S. border.³⁹ But recognizing the large number of undocumented workers already in the country, the IRCA also provided legalization programs, including one for undocumented agricultural workers.⁴⁰ Among other provisions, these “special agricultural workers” had to prove that they resided in the United States for at least ninety days in “seasonal agricultural services” during the time between May 1985 and May 1986.⁴¹ This legalization provision did not require that the seasonal agricultural workers remain in this particular labor pool, but as Hiroshi Motomura writes, “the proponents of the program anticipated that many would do so,”⁴² thereby guaranteeing a cheap labor force. Moreover, the IRCA contained a more general legalization provision, which stipulated that certain undocumented immigrants who had been residing in the United States since January 1, 1982 could petition for an eighteen-month-long lawful “temporary resident status.” This temporary status could then lead to “permanent resident status”⁴³ upon meeting certain eligibility requirements, including lack of a felony conviction and demonstration of a minimal understanding of the English language.⁴⁴

These IRCA legalization provisions, though seemingly beneficial to the undocumented population, were implicitly skewed to benefit male immigrants and disfavor undocumented women. The IRCA special agricultural worker legalization provision disproportionately benefited men, who were more often employed in the agricultural industries.⁴⁵ Undocumented women

38 See H.R. REP. NO. 99-682, pt. 1, at 56 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5649, 5660 (“[T]he [Judiciary] Committee is convinced that as long as job opportunities are available to undocumented aliens, the intense pressure to surreptitiously enter this country or to violate status once admitted as a nonimmigrant in order to obtain employment will continue.”), *cited in* Dennise A. Calderon-Barrera, Hoffman v. NLRB: *Leaving Undocumented Workers Unprotected Under United States Labor Laws?*, 6 HARV. LATINO L. REV. 119, 120 (2003).

39 8 U.S.C. § 1324a(a)(2), (b)(1).

40 Immigration and Nationality Act § 210, 8 U.S.C. § 1160 (2012).

41 Immigration and Nationality Act § 210(a)(1)(B); *see also* Hiroshi Motomura, *What is “Comprehensive Immigration Reform”? Taking the Long View*, 63 ARK. L. REV. 225, 226 (2010) (discussing the IRCA provisions).

42 Motomura, *supra* note 41.

43 *See* Immigration and Nationality Act § 245A(b); *see also* Motomura, *supra* note 41.

44 Immigration and Nationality Act § 245A(b)(1)(C), (D); *see also* Motomura, *supra* note 41.

45 *See* Margot Mendelson, *The Legal Production of Identities: A Narrative Analysis of Conversations with Battered Undocumented Women*, 19 BERKELEY WOMEN’S L.J. 138, 205–06 (2004).

who worked outside of the home, on the other hand, often held jobs in domestic industries and thus were ineligible for this IRCA legalization program.⁴⁶ As Margot Mendelson notes: "No equivalent provision was available, for example, to nannies and housecleaners, or even to hotel workers and hospital aides, which are predominantly female positions."⁴⁷ Mendelson writes further about how the implementation of even the general IRCA "temporary resident status" legalization provision also contained gendered bias:

The law's documentary requirements placed the burden on immigrants to prove they had resided in the United States continuously for the necessary time period [since January 1, 1982]. Many immigrants fulfilled that requirement by collecting letters from their employers in the fields. Access to that kind of documentary proof was far less accessible to women, who may not have worked continuously due to childrearing, or who worked irregular jobs under individual employers. In fact, the very access to information about the IRCA process was gendered, as immigrants who work in isolation or spend more time in the home have less access to information, advice, and assistance from other immigrants undergoing the process. The legal provisions themselves, as well as the information and institutional access to utilize them, were less available to immigrant women than their male counterparts. The result was a law that disproportionately granted amnesty to men.⁴⁸

The gendered effects of the IRCA continued through its implementation and ended up affecting millions of immigrants in the United States. In fact, the IRCA legalization provisions afforded status to roughly 3 million undocumented immigrants.⁴⁹ Of these immigrants, 1,763,434 obtained lawful status under the general legalization provision, and 1,277,041 obtained status as seasonal agricultural workers.⁵⁰ Motomura observes that this

⁴⁶ See *id.*

⁴⁷ *Id.* at 205.

⁴⁸ *Id.* at 205–06; see also Laura E. Enriquez, *Gendered Laws: VAWA, IRCA and the Future of Immigration Reform*, HUFFINGTON POST (Mar. 7, 2013, 3:56 PM), http://www.huffingtonpost.com/laura-e-enriquez/domestic-violence-immigration_b_2793828.html?utm_hp_ref=latino-voices ("In the case of IRCA, a lack of attention to gendered differences in the private and public lives of undocumented men and women meant that undocumented women were less able to legalize. Specifically, IRCA required undocumented immigrants to prove their work status and length of time in the U.S. This was a lot harder for undocumented women to do because they tended to work in private homes as housekeepers and nannies—where their employers did not want to confirm their employment—and did not have bills or accounts in their names—because this was their husband's responsibility.").

⁴⁹ See NANCY RYTINA, OFFICE OF POLICY & PLANNING STATISTICS DIV., U.S. IMMIGRATION & NATURALIZATION SERV., *IRCA LEGALIZATION EFFECTS: LAWFUL PERMANENT RESIDENCE AND NATURALIZATION THROUGH 2001*, at 3, exhibit 1 (2002), available at <http://www.dhs.gov/xlibrary/assets/statistics/publications/irca0114int.pdf>.

⁵⁰ *Id.*

represented legalization for “over sixty percent of the pre-IRCA undocumented population.”⁵¹ Importantly, however, there were no provisions in the IRCA legalization programs that extended this lawful status to family members of the beneficiaries, who themselves might have been otherwise individually ineligible.⁵² Instead, the primarily male beneficiaries were “followed by a huge wave of wives, girlfriends, and families migrating to the United States for family reunification.”⁵³ Thus, immigrant women’s dependence on their male spouses and family members continued.

This summary historical review of immigration law—from its early days of explicit and formal enshrinement of the doctrine and practice of coverture through much more recent reform measures—shows that it embraces discriminatory provisions against women. Seen as ancillary to her male spouse or family member, the woman immigrant is the dependent beneficiary or the expatriated citizen, following and beholden to the status of the man. Despite measures of gender equality in more contemporary times, current immigration reform proposals do little to quash the disparity, as discussed in Part II.

II. CURRENT PROPOSED IMMIGRATION REFORMS PERPETUATE THE SUBORDINATION OF WOMEN

Despite years of discussion and political promises, there has been no large-scale, comprehensive immigration reform since the 1990 Immigration Act.⁵⁴ This legislative inertia changed after the 2012 elections. The 113th Congress (2013–2014) heralded in unprecedented movement towards reforming the current immigration law system. Bolstered by President Obama’s landslide victory in the 2012 presidential election, in which he won the overwhelming support of Latino/a voters,⁵⁵ both Republicans and Democrats endorsed Obama’s commitment to immigration reform.⁵⁶ Campaigning in his re-election bid to make immigration reform his “top priority,”⁵⁷ Obama thus set the stage for Congressional action. In late 2012 through 2013, the

51 Motomura, *supra* note 41.

52 *See, e.g., id.*

53 Mendelson, *supra* note 45, at 205.

54 *See* Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978.

55 *See* Elise Foley & Sam Stein, *Immigration Reform Effort to Begin in Senate Post Inauguration*, HUFFINGTON POST (Nov. 8, 2012, 12:44 PM), http://www.huffingtonpost.com/2012/11/08/immigration-reform-senate_n_2093178.html.

56 *See id.*

57 Alexandra Jaffe, *Obama Promises Immigration Reform in Second Term*, NAT’L J. (Apr. 15, 2012), <http://www.nationaljournal.com/2012-presidential-campaign/obama-promises-immigration-reform-in-second-term-20120415>.

commitment to reform on all sides seemed strong, as Republican Speaker of the House John Boehner noted in November 2012: “This issue [immigration reform] has been around far too long. . . . A comprehensive approach is long overdue, and I’m confident that the president, myself, [and] others can find the common ground to take care of this issue once and for all.”⁵⁸

The discussions resulted in action, as lawmakers busily drafted and ultimately introduced numerous immigration law reform bills in the House and Senate through 2014.⁵⁹ After much negotiation and anticipation on both sides of the political aisle, the Senate passed the Border Security, Economic Opportunity and Immigration Modernization Act of 2013⁶⁰ (“2013 Border Security Bill”) in June 2013 and sent it to the House of Representatives, where it has since languished. In the House of Representatives, numerous comprehensive immigration reform bills were introduced in the 2013–2014 session.⁶¹ None of those bills reached a debate on the House floor.⁶² On October 2, 2013, Representative Joe Garcia (D-FL) introduced H.R. 15, the Border Security, Economic Opportunity and Immigration Modernization Act, which mirrors the language of the Senate 2013 Border

⁵⁸ John Parkinson, *Boehner: Raising Tax Rates 'Unacceptable'*, ABC NEWS (Nov. 8, 2012), <http://abcnews.go.com/Politics/boehner-exclusive-raising-tax-rates-unacceptable-revenue-table/story?id=17672947&page=2>.

⁵⁹ See *Proposed Federal Legislation*, AM. IMMIGR. LAW. ASS'N, <http://www.aila.org/content/default.aspx?docid=11536> (last visited Aug. 14, 2014) (summarizing current federal immigration legislative proposals pending in the U.S. House of Representatives and U.S. Senate in 2013–2014 period).

⁶⁰ Border Security, Economic Opportunity, and Immigration Modernization Act, S. 744, 113th Cong. (2013).

⁶¹ See Immigration Policy Ctr., *What's on the Menu? Immigration Bills Pending in the House of Representatives in 2014*, AM. IMMIGR. COUNCIL (Mar. 26, 2014), www.immigrationpolicy.org/just-facts/what-s-menu-immigration-bills-pending-house-representatives-2014 (summarizing the thirteen bills' key features and noting each one's congressional progress). This discussion does not include bills introduced in the summer of 2014, which focused on appropriations of federal money to respond to the humanitarian crisis on the U.S.-Mexico border regarding the arrival of large numbers of immigrant children from certain Central American countries. In response to the wave of child migrants, the Obama administration sought a congressional appropriation of \$3.7 billion to bolster border security, assistance, and shelter for the immigrants. See David Nakamura & Paul Kane, *House GOP Proposes to Make It Easier to Deport Central American Minors*, WASH. POST (July 29, 2014), <http://www.washingtonpost.com/blogs/post-politics/wp/2014/07/29/house-gop-strips-border-bill-to-659-million-as-deadline-approaches/>. The House of Representatives and Senate responded by introducing their respective competing bills, providing a lower amount of funds and proposing other changes to the INA. See, e.g., *id.* (“Even if the House acts to pass a bill, there’s little sense on Capitol Hill that its plan would pass the Senate. Democrats in the upper chamber have proposed a \$2.7 billion plan that has also been met with bipartisan skepticism. Further complicating matters is that the GOP is calling for amendments to a 2008 anti-trafficking law that currently provides greater legal protections to unaccompanied children who enter the United States illegally from countries other than Mexico or Canada.”); see also discussion *infra* Conclusion.

⁶² See Immigration Policy Ctr., *supra* note 61.

Security Bill, with some changes to the border security provisions.⁶³ Although H.R. 15 had 199 co-sponsors, including Republicans, it has yet to reach the House floor for debate.⁶⁴ Thus, by many accounts, the prospect of a comprehensive immigration reform law emerging from the 113th Congress is dim.⁶⁵ Yet as politicians and advocates push for progress—a move supported, too, by the majority of Americans⁶⁶—it is imperative to continue the debate about what reform should include—and whom reform should protect. In this regard, now is an ideal time to advocate for gender equality in immigration law.

A. Provisions of the 2013 Border Security Bill Typify How Contemporary Comprehensive Immigration Reform Efforts Continue to Disadvantage Women

As discussed, bipartisan support and sponsorship pushed the 2013 Border Security Bill through the Senate in June 2013. With a 68-32 vote in favor of its passage,⁶⁷ the 2013 Border Security Bill swept in a wave of optimism that comprehensive immigration reform could finally be possible. Although the bill has yet to get to a vote on the House of Representatives floor, the

⁶³ See H.R. 15, 113th Cong. (2013).

⁶⁴ See *Bill & Summary Status, 113th Congress (2013–2014), H.R. 15*, LIBR. CONGRESS, <http://thomas.loc.gov/cgi-bin/bdquery/z?d113:HR00015>: (last visited Aug. 30, 2014) (detailing bill summary, co-sponsorship, and lack of committee movement).

⁶⁵ See, e.g., Dan Roberts, *Boehner Suggests Immigration Reform Will Not Pass This Year*, GUARDIAN (Feb. 6, 2014), <http://www.theguardian.com/world/2014/feb/06/boehner-immigration-reform-will-not-pass>. In response to the House stalemate, Obama indicated that his administration would carry out reform measures through executive order:

And in this situation, the failure of House Republicans to pass a darn bill is bad for our security, it's bad for our economy, and it's bad for our future. So while I will continue to push House Republicans to drop the excuses and act—and I hope their constituents will too—America cannot wait forever for them to act.

The White House Office of the Press Sec'y, *Remarks by the President on Border Security and Immigration Reform*, WHITE HOUSE (June 30, 2014), <http://www.whitehouse.gov/the-press-office/2014/06/30/remarks-president-border-security-and-immigration-reform>.

⁶⁶ Pam Constable & Michelle Boorstein, *Americans Still Favor Immigration Reform, Despite Political Friction, Study Finds*, WASH. POST (June 10, 2014), http://www.washingtonpost.com/national/americans-still-favor-immigration-reform-despite-political-friction-study-finds/2014/06/09/764f327a-eff9-11e3-9ebc-2ee6f81ed217_story.html; PEW RESEARCH CTR., PUBLIC DIVIDED OVER INCREASED DEPORTATION OF UNAUTHORIZED IMMIGRANTS 2 (2014), available at <http://www.people-press.org/files/legacy-pdf/02-27-14%20Immigration%20Release.pdf> (“There also has been little overall change in opinions about the importance of passing new immigration legislation [discussing February 2014 findings compared to May 2013 findings]. About half [of polled American adults] (49%) say the passage of new immigration legislation is extremely or very important, while 26% view this as somewhat important and 21% say it is not too important or not at all important.”).

⁶⁷ See *U.S. Senate Roll Call Votes on Passage of S. 744 as Amended*, U.S. SENATE, http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?&congress=113&session=1&vote=00168 (last visited Oct. 6, 2014).

long and arduous process to Senate passage, which included many negotiations and concessions by both parties,⁶⁸ underscores the importance of its ultimate language. As the best current example of proposed legislation that enjoys strong bipartisan support, the 2013 Border Security Bill illustrates, too, the ways in which immigration law protects and disadvantages women immigrants.

To be sure, the 2013 Border Security Bill proposes to provide important protections for immigrants, including provisions that would help women specifically. In response to calls for equality, the Senate Judiciary Committee convened a hearing on the importance of reform that would help women in March 2013—two months before the bill passed the Senate.⁶⁹ Advocates applauded portions of the final bill that improved access to the U visa, which assists certain immigrant victims of crime, including victims of domestic violence, who are often women.⁷⁰ Others endorsed portions of the bill that improved parts of the INA concerning family-based immigration petitions, which would have positive effects on women and girls, who receive immigration status relief more commonly through family-based immigration visa provisions than through other avenues.⁷¹ In

68 See William Finnegan, *The Gang of Eight's Immigration Fight*, NEW YORKER (May 9, 2013), <http://www.newyorker.com/news/news-desk/the-gang-of-eights-immigration-fight> (detailing the more than three hundred proposed amendments to the Gang of Eight's immigration reform bill in the final days before the U.S. Senate passed S. 744). *But see* Sean Sullivan, *Three Signs of Trouble for Immigration Reform in the House*, WASH. POST (June 21, 2013), <http://www.washingtonpost.com/blogs/the-fix/wp/2013/06/21/three-signs-of-trouble-for-immigration-reform-in-the-house/> (summarizing the significant obstacles to securing House Republican support for comprehensive immigration reform).

69 *How Comprehensive Immigration Reform Should Address the Needs of Women and Families: Hearing Before the S. Comm. on the Judiciary*, 113th Cong. (2013).

70 See, e.g., NAT'L COMM. OF LEADING EXPERTS, HOW COMPREHENSIVE IMMIGRATION REFORM AFFECTS IMMIGRANT SURVIVORS OF VIOLENCE: TALKING POINTS ON THE FINAL SENATE BILL AND THE ROAD AHEAD IN THE HOUSE (2013), available at http://www.asista.help.org/documents/news/Final_updated_onepager_71_5749DB9995CDB.pdf (highlighting the key parts in S. 744 that protect women victims of domestic violence, including the expansion of the U visa eligibility provision and increasing the number of U visas each fiscal year); WE BELONG TOGETHER: WOMEN FOR COMMON-SENSE IMMIGRATION REFORM, ANALYSIS OF THE SENATE IMMIGRATION BILL (S. 744) AND WOMEN'S PRIORITIES FOR IMMIGRATION REFORM, available at http://www.welongogether.org/sites/default/files/WBT_S744_Analysis_en_0.pdf.

71 See, e.g., WE BELONG TOGETHER: WOMEN FOR COMMON-SENSE IMMIGRATION REFORM, *supra* note 70 ("Minor children and spouses of LPRs (both within the current backlog as well as for future applications) would be re-classified as 'immediate relatives.' This would allow for immediate access to an immigrant visa and exemption from caps on number of available visas. That means that spouses, minor children and parents of LPRs would no longer have to wait years to be together The modified V visa would allow family members to work and live in the U.S. once they have been petitioned for, instead of having to wait decades for their LPR status in their countries of origin."). DHS statistics from 2013 show that, of all of the ways in which females obtain LPR status, 68.5% acquire status through the family-based petitioning process. See *Yearbook of Immigration Statistics: 2013 Lawful Permanent Residents*, DEP'T HOMELAND SECURITY (June 16, 2014),

another example, the 2013 Border Security Bill improved due process protections for immigrants and noted the importance of family unity by expanding immigration judges' discretionary powers to terminate the removal proceedings against parents whose removal from the United States would constitute extreme hardship to their U.S. citizen or LPR child(ren).⁷² Such a provision would benefit families and mothers especially, who are more frequently primary caregivers of children.⁷³

But perhaps the most groundbreaking portions of the 2013 Border Security Bill focused on providing lawful status to categories of currently undocumented immigrants and on revising the immigrant visa system. In these particular provisions, however, the 2013 Border Security Bill failed to fully address the economic, employment, and educational disparities between men and women immigrants. Indeed, at its passage, advocates for women immigrants voiced concerns over the drafting process of the bill, which was led by eight senators—all of whom were men⁷⁴—and over some parts of the bill that would ultimately disadvantage immigrant women.⁷⁵ As is explored more fully below, even certain provisions of the Bill that expand benefits for immigrants do not fully include women in their breadth.

B. The 2013 Border Security Bill Leaves out Low-Skilled and Undocumented Women

In one of the 2013 Border Security Bill's key provisions, certain undocumented immigrants already in the United States could petition for Registered Provision Immigrant (RPI) status,⁷⁶ a type of lawful temporary status that includes a path towards eventual LPR status and then naturalization.⁷⁷ To qualify for RPI status, among other requirements, the person must pay a \$1000 fine (and an additional \$1000 fine upon extension of RPI

<http://www.dhs.gov/yearbook-immigration-statistics-2013-lawful-permanent-residents> [hereinafter *Yearbook of Immigration Statistics: 2013*] (Table 9).

⁷² See S. 744, 113th Cong. § 2314(a)(D) (as passed by Senate, June 27, 2013).

⁷³ See, e.g., WE BELONG TOGETHER: WOMEN FOR COMMON-SENSE IMMIGRATION REFORM, *supra* note 70.

⁷⁴ See Ruth Tam, *Can Women Give Immigration Reform the Boost It Needs?*, WASH. POST (Nov. 20, 2013, 1:48 PM), <http://www.washingtonpost.com/blogs/she-the-people/wp/2013/11/20/can-women-give-immigration-reform-the-boost-it-needs/> (observing that the so-called "Gang of Eight" tasked with drafting comprehensive immigration reform in the U.S. Congress in 2013 was comprised of all men).

⁷⁵ See *id.* (reporting remarks by U.S. Senator Mazie Hirono (D-HI): "One of the outcomes of all the guys [in the immigration reform 'Gang of Eight'] was that this new system really disadvantaged women. They put so much emphasis on education experience and high-skilled work experience that women in these countries don't have.").

⁷⁶ See S. 744, § 2101.

⁷⁷ See *id.* § 2102.

status), pay prescribed filing fees, and pay any federal tax liability, as assessed by the IRS.⁷⁸ RPI status is valid for six years and is renewable for an additional six-year period. To be eligible for RPI renewal, a person must prove that s/he has been regularly employed during their RPI status (except for periods not to exceed sixty days) and that s/he will not become a public charge.⁷⁹ As part of this proof, the RPI-status holder must show that s/he has earned an average income or is otherwise financially secure at a level that is no less than 100% of the federal poverty level.⁸⁰ Moreover, an RPI-status immigrant is ineligible for many types of federal means-tested government aid, including Medicaid, food stamps, and benefits under the Affordable Care Act.⁸¹ In other words, to be eligible for RPI renewal, the person must have maintained and be able to prove steady employment throughout the initial six-year RPI time and have enough financial resources to not be considered impoverished, all without access to traditional safety-net resources for the poor.

When the RPI provision in the 2013 Border Security Bill was announced, advocates for immigrants praised the efforts to address the tenuous status of the roughly 11 million undocumented immigrants already in the United States⁸² by providing them an opportunity to regularize their immigration status.⁸³ Yet the proposed provision of RPI status is fraught with difficult hurdles for immigrants to surpass and is especially problematic for immigrant women. Not surprisingly, a large majority of undocumented immigrants live in poverty, as they are unable to secure stable employment, frequently suffer workplace abuses, and are underpaid and/or exploited by employers.⁸⁴ Moreover, an even higher percentage of

⁷⁸ *Id.*; see also *Summary and Analysis: Border, Security, Economic Opportunity, and Immigration Modernization Act of 2013*, NAT'L IMMIGR. L. CENTER. (Aug. 15, 2013), <http://www.nilc.org/s744summary1.html> [hereinafter NAT'L IMMIG. L. CENTER].

⁷⁹ See S. 744, § 2101; see also NAT'L IMMIGR. L. CENTER, *supra* note 78.

⁸⁰ See S. 744, § 2101; see also NAT'L IMMIGR. L. CENTER, *supra* note 78.

⁸¹ See S. 744, § 2101; see also AM. IMMIGRATION COUNCIL, IMMIGRATION POLICY CTR., *A GUIDE TO S. 744: UNDERSTANDING THE 2013 SENATE IMMIGRATION BILL* (2013), available at http://www.immigrationpolicy.org/sites/default/files/docs/guide_to_s744_corker_hoeven_final_12-02-13.pdf.

⁸² See JEFFREY S. PASSEL & D'VERA COHN, PEW HISPANIC CTR., *UNAUTHORIZED IMMIGRANT POPULATION: NATIONAL AND STATE TRENDS, 2010* (2011), available at <http://www.pewhispanic.org/files/reports/133.pdf> (noting that there were 11.2 million estimated undocumented immigrants living in the United States in 2010).

⁸³ See, e.g., NAT'L IMMIGRATION LAW CTR., *ANALYSIS OF SENATE IMMIGRATION REFORM BILL: TITLE II: IMMIGRANT VISAS* (2013), available at www.nilc.org/document.html?id=898 (praising congressional efforts to create a path to U.S. citizenship for undocumented immigrants).

⁸⁴ See, e.g., WORLD BANK, *GENDER AT WORK: A COMPANION TO THE WORLD DEVELOPMENT REPORT ON JOBS 19* (2013), available at <http://www.worldbank.org/content/>

“blue-card” status if they, in addition to other requirements, have worked at least 575 hours or 100 work days of agricultural employment during the two-year period before the bill’s enactment, pay a fine, and pay any federal tax liabilities.⁹⁰ The temporary blue-card status can last up to eight years, at which time, and if eligible, the blue-card holder can apply for LPR status, which could eventually lead to naturalization.⁹¹ Like immigrants in RPI status, blue-card holders are ineligible for federal means-tested public benefits and must remain employed to qualify to adjust to LPR status.⁹²

Despite containing many of the same financial hurdles as the RPI process, the blue-card status program provides a necessary pathway towards lawful status and citizenship for critical agricultural workers. Yet just like the 1986 IRCA provision that legalized undocumented agricultural workers,⁹³ the Agricultural Worker Program would have a disparate gendered effect. Although women make up nearly half of the overall undocumented population,⁹⁴ they comprise only about thirty-nine percent of the undocumented “farm worker” population, as reported by 2001–2002 data from the Department of Labor National Agricultural Workers Survey,⁹⁵ the most recent compilation of this information. Albeit not a large disparity, there is enough of a difference to create an unequal effect as to the program’s reach.

It is not clear, though, if the blue-card regulations would also apply to workers in meat, poultry, and seafood processing plants. Although the blue-card provisions are silent as to coverage of processing plant workers,⁹⁶ if these workers were included, the

⁹⁰ See S. 744, 113th Cong. § 2211 (2013).

⁹¹ See *id.*

⁹² See *id.*

⁹³ See *supra* notes 41–52 and accompanying text.

⁹⁴ See HOEFER ET AL., *supra* note 86.

⁹⁵ U.S. DEP’T OF LABOR, FINDINGS FROM THE NATIONAL AGRICULTURAL WORKERS SURVEY (NAWS) 2001-2002: A DEMOGRAPHIC AND EMPLOYMENT PROFILE OF UNITED STATES FARM WORKERS 9 (2005), available at http://www.doleta.gov/agworker/report9/naws_rpt9.pdf.

⁹⁶ In the Agricultural Worker Program provisions, the 2013 Border Security Bill cites the Migrant and Seasonal Agricultural Worker Protection Act to define agricultural employment as “employment in any service or activity included within the provisions of section 3(f) of the Fair Labor Standards Act of 1938 and the handling, planting, drying, packing, packaging, processing . . . prior to delivery for storage of any agricultural or horticultural commodity in its unmanufactured state.” 29 U.S.C. § 1802(3) (2012). Furthermore, the Fair Labor Standards Act (as cited in S. 744) defines agriculture as the “farming in all its branches . . . performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market.” 29 U.S.C. § 203(f) (citation omitted). While neither of these definitions provides a clear reference to meat, poultry, or seafood processing plants, a few cases have applied the Migrant and Seasonal

undocumented women immigrants live in the most extreme levels of poverty, as compared to men.⁸⁵ The Department of Homeland Security reports that, in 2011, almost half (forty-seven percent) of the overall population of undocumented immigrants were women,⁸⁶ emphasizing the expansive effects of such a punitive proposal.⁸⁷ Thus, it is a bleak prospect that a large percentage of the undocumented population would be able to pay the hefty fines, fees, and tax liabilities necessary to apply for RPI status.⁸⁸ Such an outcome would ultimately disproportionately affect undocumented immigrant women, who are more likely to live in poverty and be unable to pay excessive fines and fees.⁸⁹

A similar critique can be levied against the 2013 Border Security Bill provision that creates a new type of status for certain agricultural workers. The Agricultural Worker Program specifies that certain undocumented immigrants (including some prior nonimmigrant H-2A visa holders) are eligible for

dam/Worldbank/document/Gender/GenderAtWork_web.pdf (summarizing key challenges to women in the work force around the world, including pay disparities, undervalued work, workplace harassment, etc.); MARY BAUER & MÓNICA RAMÍREZ, S. POVERTY LAW CTR., INJUSTICE ON OUR PLATES: IMMIGRANT WOMEN IN THE U.S. FOOD INDUSTRY (2010), available at http://www.splcenter.org/sites/default/files/downloads/publication/Injustice_on_Our_Plates.pdf (discussing the extreme difficulties faced by women in the agricultural industries).

⁸⁵ See BAUER & RAMÍREZ, *supra* note 84; see also ALEXANDRA CAWTHORNE, CTR. FOR AM. PROGRESS, THE STRAIGHT FACTS ON WOMEN IN POVERTY (2008), available at <http://www.americanprogress.org/issues/women/report/2008/10/08/5103/the-straight-facts-on-women-in-poverty/> (noting the disparities in poverty rates between men and women in the United States and, as compared to women in other countries, “the gap in poverty rates between men and women is wider in America than anywhere else in the Western world”).

⁸⁶ See MICHAEL HOEFER ET AL., OFFICE OF IMMIGRATION STATISTICS, DEP’T OF HOMELAND SEC., ESTIMATES OF THE UNAUTHORIZED IMMIGRANT POPULATION RESIDING IN THE UNITED STATES: JANUARY 2011, at 6 tbl.5 (2012), available at http://www.dhs.gov/xlibrary/assets/statistics/publications/ois_ill_pe_2011.pdf.

⁸⁷ Recent reports suggest that a high percentage of the undocumented immigrant population is women: “There were 3.9 million undocumented women in the United States in March 2005; by March 2008 that number had increased to 4.1 million.” BAUER & RAMÍREZ, *supra* note 84, at 12 (citing and comparing JEFFREY S. PASSELL, PEW HISPANIC CTR., THE SIZE AND CHARACTERISTICS OF THE UNAUTHORIZED MIGRANT POPULATION IN THE U.S. (2006), with JEFFREY S. PASSELL & D’VERA COHN, PEW HISPANIC CTR., A PORTRAIT OF UNAUTHORIZED IMMIGRANTS IN THE UNITED STATES (2009)).

⁸⁸ See, e.g., WE BELONG TOGETHER: WOMEN FOR COMMON-SENSE IMMIGRATION REFORM, *supra* note 70, at 1 (noting that single women and single mothers would have difficulty in meeting the income thresholds for RPI renewal (110% of the federal poverty guidelines) and for eventual LPR adjustment (125% of the federal poverty guidelines)).

⁸⁹ See BAUER & RAMÍREZ, *supra* note 84, at 24 (citing RANDY CAPPS ET AL., URBAN INST., A PROFILE OF THE LOW-WAGE IMMIGRANT WORKFORCE (2003), available at http://www.urban.org/UploadedPDF/310880_lowwage_immig_wkfc.pdf) (“While undocumented workers often earn less than U.S. citizens in the same jobs, the women typically earn even less than their male counterparts. That may be why, five years after Congress granted legal status to 1.7 million immigrants in 1986, wages for the previously undocumented women had risen by an average of 20.5 percent, compared to 13.2 percent for men.”); SHIRLEY J. SMITH ET AL., U.S. DEP’T OF LABOR, CHARACTERISTICS OF LABOR MARKET BEHAVIOR OF THE LEGALIZED POPULATION FIVE YEARS FOLLOWING LEGALIZATION (1996).

number of women eligible for the visa would be higher, as some surveys estimate that more than half of workers at some processing industries are women.⁹⁷ Even so, important gender disparities still exist that would dilute the effect of these increased numbers of women working in the agricultural and processing industries. As one stark example, one study notes that many women agricultural workers do not get direct payment from their employers, but rather their pay is incorporated into the paychecks of their husbands or other male family members as a way for employers to escape paying unemployment compensation, Social Security taxes, and disability benefits.⁹⁸ As the report notes, such a practice

has the immediate impact of depriving women of the minimum wages to which they are entitled and the longer-term impact of denying them any chance of qualifying for Social Security or other benefits. It also subjects these women to control by their husbands, partners or male family members, because they do not have the same financial freedom they would have if they were afforded their own pay check. And, if immigration reform is enacted [like the blue-card status program], it will make proving their eligibility for legalization more difficult.⁹⁹

Agricultural Worker Protection Act to processing plant work, defining it as agricultural employment. *See, e.g.,* *Castillo v. Case Farms of Ohio, Inc.*, 96 F. Supp. 2d 578 (W.D. Tex. 1999) (holding a chicken processing plant as agricultural employment and liable to standards set with the Migrant and Seasonal Agricultural Worker Protection Act); *Almendarez v. Barret-Fisher Co.*, 762 F.2d 1275 (5th Cir. 1985) (holding work performed in vegetable packing plants as agricultural labor and subject to regulations established in the Migrant and Seasonal Agricultural Worker Protection Act). Thus, if S. 744 contemplates processing plants to be agricultural employment in line with this case law interpretation, processing plant workers would potentially be blue-card eligible under S. 744. If, however, the blue-card program was intended for traditional H-2A visa agricultural workers, meat, poultry, and seafood processing plant workers may not be included in its provisions, as processing plant workers typically now receive H-2B visas when they work lawfully (and not H-2A visas). *See, e.g.,* AM. UNIV. WASH. COLL. OF LAW & CENTRO DE LOS DERECHOS DEL MIGRANTE, INC., *PICKED APART: THE HIDDEN STRUGGLES OF MIGRANT WOMEN IN THE MARYLAND CRAB INDUSTRY 5* (2010), available at http://www.wcl.americana.edu/clinical/documents/20100714_auwcl_jhrlc_picked_apart.pdf (“The H-2B visa program is a guestworker program that allows U.S. employers to recruit and employ foreign workers for temporary non-agricultural work.”). For example, the report notes that up to fifty-six percent of the crab processing industry relies on H-2B visa workers. *Id.* at 1.

⁹⁷ *See* BAUER & RAMÍREZ, *supra* note 84, at 36 n.3 (citing UNITED FOOD & COMMERCIAL WORKERS INT’L UNION, *INJURY AND INJUSTICE—AMERICA’S POULTRY INDUSTRY* (2010), available at http://staging.uusc.org/files/programs/econjustice/pdf/injury_and_injustice.pdf) (discussing one worker’s story: “Rosa’s labor, and that of 250,000 other workers who toil in 174 major chicken factories, have helped make chicken America’s cheapest and most popular meat protein. At least half of these workers are Latino and more than half are women.”).

⁹⁸ *See* BAUER & RAMÍREZ, *supra* note 84, at 29.

⁹⁹ *Id.* Fortunately, S. 744 contains provisions that are helpful to women and other workers who may have various employers or otherwise have difficulty obtaining traditional proof of employment, like Social Security, IRS, or other governmental agency proof. Petitioners may submit:

Thus, despite efforts at increasing protections for agricultural workers, the effects of gender-oppressive practices would still disadvantage women in these industries.

Supporters of the 2013 Border Security Bill, however, counter that another provision, the newly-created W nonimmigrant visa for certain workers in fields with labor shortages,¹⁰⁰ is geared towards occupations in which women comprise larger numbers of the workforce, like nannies, housekeepers, or domestic workers.¹⁰¹ Although an important concession that ultimately may lead to regularized immigration status for some women, as a nonimmigrant visa, the W visa contains no established path towards permanency within its proposed language,¹⁰² unlike the RPI system and the Agricultural Worker Program. While a nonimmigrant W-visa holder may utilize the time in W status towards eventual adjustment to LPR status in the Tier 1 of the merit-based system¹⁰³ (discussed more thoroughly below), or in a petition to adjust to immigrant status if her/his employer decided to petition for the person in the employment-based immigrant visa process,¹⁰⁴ the program does

at least 2 types of reliable documents . . . that provide evidence of employment or education, including—

- (I) bank records;
- (II) business records;
- (III) employer records;
- (IV) records of a labor union, day labor center, or organization that assists workers in employment;
- (V) sworn affidavits from nonrelatives who have direct knowledge of the alien's work or education, that contain—
 - (aa) the name, address, and telephone number of the affiant;
 - (bb) the nature and duration of the relationship between the affiant and the alien; and
 - (cc) other verification or information;
- (VI) remittance records; and
- (VII) school records from institutions described in subparagraph (D).

S. 744, 113th Cong. § 2102 (2013) (amended by § 245C(b)(3)(B)(ii)). Moreover, there are provisions that recognize the important work of primary caregivers and the need to account for medical and maternity leave. *See id.* (amended by § 245C(b)(3)(E)(iii)) (“The employment and education requirements under this paragraph shall not apply during any period during which the alien—(I) was on medical leave, maternity leave, or other employment leave authorized by Federal law, State law, or the policy of the employer; (II) is or was the primary caretaker of a child or another person who requires supervision or is unable to care for himself or herself; or (III) was unable to work due to circumstances outside the control of the alien.”).

¹⁰⁰ *See* S. 744, § 4703(a).

¹⁰¹ *See, e.g.,* WE BELONG TOGETHER: WOMEN FOR COMMON-SENSE IMMIGRATION REFORM, *supra* note 70, at 2 (“A new W visa category would be established to fill high need occupations, likely including domestic workers.”).

¹⁰² *See* S. 744, § 4703(a).

¹⁰³ *See id.* § 2301.

¹⁰⁴ *See id.* § 4703(e)(5)(B)(i).

not lead to LPR status on its own. As a result, and again harkening to the effects of the IRCA legalization program in which fields dominated by men workers were preferred over women-dominated fields,¹⁰⁵ the paths to permanency remain more open and available for more men, while leaving out women.

C. By Focusing on Highly Skilled Immigrants, the 2013 Border Security Bill Leaves Out Women

The 2013 Border Security Bill contains additional provisions that lead to disparately negative results for women immigrants. Embracing familiar calls to make immigration law more focused on rewarding and recruiting the “best and brightest” of the immigrant population,¹⁰⁶ the proposed legislation highlights a merit-based point system that “allows foreign nationals to obtain Lawful Permanent Residence in the United States by accumulating points mainly based on their skills, employment history, and educational credentials.”¹⁰⁷ This point system is “Track One” of the two-track merit-based structure in the 2013 Border Security Bill.¹⁰⁸ Track One is then divided up into Tier 1 and Tier 2, each of which provides a pathway for immigrants to receive points towards ultimately obtaining LPR status.¹⁰⁹ Although there is no threshold point amount that a petitioner must accumulate to receive LPR status, successful applicants will be those who obtain the highest score in the point system.¹¹⁰ For example, immigrants vying for LPR status in Tier 1 receive 15 points if they have a doctorate degree, 10 points if they have a master’s degree,¹¹¹ and 5 points for a bachelor’s degree.¹¹² Petitioners can receive up to 20 points for a successful employment history and for engaging in certain types of work,¹¹³ and up to 10 points for owning a business in particular fields.¹¹⁴ Although Tier 2 is ostensibly geared towards less skilled and less formally educated immigrants, just like in Tier 1, the Tier 2

¹⁰⁵ See *supra* notes 41–52 and accompanying text.

¹⁰⁶ See, e.g., Mariela Olivares, *Renewing the Dream: DREAM Act Redux and Immigration Reform*, 16 HARV. LATINO L. REV. 79, 116 (2013) (describing efforts to keep the “best and brightest” young immigrants in the United States through the DREAM Act); Elizabeth Keyes, *Beyond Saints and Sinners: Discretion and the Need for New Narratives in the U.S. Immigration System*, 26 GEO. IMMIGR. L.J. 207 (2012) (critiquing the narratives used in immigration law to categorize the “good” versus “bad” immigrants, resulting in disparate effects).

¹⁰⁷ AM. IMMIGRATION COUNCIL, IMMIGRATION POLICY CTR., *supra* note 81, at 9.

¹⁰⁸ See S. 744, § 2301.

¹⁰⁹ See *id.*

¹¹⁰ See *id.* § 2301(c)(2)(A)–(B).

¹¹¹ See *id.* § 2301(c)(4)(A)(i)(I)–(II).

¹¹² See *id.* § 2301(c)(4)(A)(ii).

¹¹³ See *id.* § 2301(c)(4)(B).

¹¹⁴ See *id.* § 2301(c)(4)(D).

system awards petitioning immigrants merit-based points for education, performance of an “in demand” occupation, and entrepreneurship.¹¹⁵

Although the merit-based system is facially gender neutral, in its operation, it would provide greater benefits to men over women seeking to obtain LPR status. A 2005 Department of Homeland Security (DHS) report highlights that only 27.7% of principal employment-based visa holders were women.¹¹⁶ Unlike family-based immigration visas, which rely simply on the requisite familial relationship, the employment-based immigration visa provisions are rooted in rewarding those immigrants with the education and skills sought by American businesses.¹¹⁷ Thus, just like the vast majority of principal beneficiaries from the employment-based visa provisions are men, the 2013 Border Security Bill merit-based program, which places high value on education and skill, would also disproportionately benefit men.

This merit-based point system (i.e., the first track of a two-track system) would account for half of the total number of

¹¹⁵ See *id.* § 2301(c)(5).

¹¹⁶ See KELLY JEFFERYS, OFFICE OF IMMIGR. STATISTICS, DEP'T OF HOMELAND SEC., CHARACTERISTICS OF EMPLOYMENT-BASED LEGAL PERMANENT RESIDENTS: 2004, at 2 tbl.1 (2005), available at <https://www.dhs.gov/xlibrary/assets/statistics/publications/FSEmployBasedLPR2004.pdf>. DHS has not made more recent gender-specific data on employment-based immigration visas publicly available, prompting some to assert that DHS no longer wishes to publicize the gendered gap present in the employment-based visa system. See, e.g., *More Men than Women Get Visas for Highly Skilled Immigrants*, SEATTLE TIMES (Mar. 18, 2013, 9:35 PM), http://seattletimes.com/html/nationworld/2020590764_visasgenderxml.html [hereinafter *More Men than Women*] (detailing the March 2013 congressional hearing, in which the “Obama administration came under fire . . . for not revealing how many men and women hold H-1B visas, the nation’s centerpiece program for highly skilled workers”). Seeking this information, organizations filed a Freedom of Information Act request. See *id.* (quoting *How Comprehensive Immigration Reform Should Address the Needs of Women and Families: Hearing Before the S. Comm. on the Judiciary*, 113th Cong. 179 (2013) (statement of Doctor Karen Panetta) (“[Our organization] has been trying for months to get the actual data on this from DHS. They have been stonewalling us. It’s a simple question: how many women get H-1B visas? We are still waiting on our Freedom of Information Request. But it’s a scandal that we even had to file one. When you think about it—why doesn’t DHS already know exactly how many women get H-1B visas? If a major immigration program effectively discriminated based on race or national origin, would that be okay?”). As reported by sources, the Bay Area News Group requested the information from DHS and, upon receipt of the statistics, thereby determined: “The U.S. Office of Immigration Statistics recorded 347,087 male H-1B visa holders entered the country during the 2011 fiscal year compared to 137,522 women. The data is imperfect because it includes many H-1B immigrants traveling to the United States after visits to their home countries, not just first-time arrivals.” Matt O’Brien, *High-Skilled Immigration Debate Grows Over Stark Gender Imbalance, Favoring Men for H-1B Visas*, SAN JOSE MERCURY NEWS (Mar. 19, 2013, 6:28 AM), http://www.mercurynews.com/ci_22819054/high-skilled-immigration-debate-grows-over-stark-gender; see *More Men than Women*, *supra* (reporting same).

¹¹⁷ See, e.g., Olivares, *supra* note 106, at 98–104 (describing the hierarchical nature of the employment-based visa preference systems).

merit-based visas each year.¹¹⁸ Proponents of the 2013 Border Security Bill assert that “Track Two” is reserved for lesser-skilled immigrants in that, rather than focusing on educational or skill credentials, Track Two is devised to eliminate the long backlog for available visas for people whose family or employment-based visa applications have been pending for five years or more.¹¹⁹ Thus, anyone—regardless of skill or education—could qualify for LPR status under Track Two (if otherwise eligible). In this regard, then, more women—who, globally, lag behind men in their ability to obtain higher levels of formal education,¹²⁰ continued employability and employment in certain fields,¹²¹ and success as entrepreneurs of any sort¹²²—would qualify for visas under Track Two. Yet the two-track system does not require that

¹¹⁸ See S. 744, § 2301(c).

¹¹⁹ See *id.* § 2302(a), (c)(1)–(2); see also AM. IMMIGRATION COUNCIL, IMMIGRATION POLICY CTR., *supra* note 81, at 10.

¹²⁰ See, e.g., UNESCO, WORLD ATLAS OF GENDER EQUALITY IN EDUCATION 8–9 (2012), available at <http://unesdoc.unesco.org/images/0021/002155/215522E.pdf> (discussing the important advancements made by women and girls in obtaining education in the last forty years, while highlighting the continued educational disparities between men and women, including the low numbers of women in the fields of the hard sciences (e.g., computing and engineering) and in research positions at the post-PhD levels).

¹²¹ See, e.g., *id.* at 62–64; *id.* at 84 (“It must also be noted that over-representation of women in higher education has yet to translate into proportional representation in the labour market, especially in leadership and decision-making positions. Even though many women have started to benefit from their countries’ improved education systems, they face barriers to the same work opportunities available to men. Women continue to confront discrimination in jobs, disparities in power, voice and political representation and the laws that are prejudicial on the basis of their gender. As a result, well-educated women often end up in jobs where they do not use their full potential and skills.”). More generally, though, the disparities between women and men in the work force are heightened outside of the highly educated population. See, e.g., KATRINA ELBORGH-WOYTEK ET AL., INT’L MONETARY FUND, WOMEN, WORK, AND THE ECONOMY: MACROECONOMIC GAINS FROM GENDER EQUITY 4 (2013), available at <https://www.imf.org/external/pubs/ft/sdn/2013/sdn1310.pdf> (“Women make up a little over half the world’s population, but their contribution to measured economic activity, growth, and well-being is far below its potential, with serious macroeconomic consequences. Despite significant progress in recent decades, labor markets across the world remain divided along gender lines, and progress toward gender equality seems to have stalled. Female labor force participation (FLFP) has remained lower than male participation, women account for most unpaid work, and when women are employed in paid work, they are overrepresented in the informal sector and among the poor. They also face significant wage differentials vis-à-vis their male colleagues. In many countries, distortions and discrimination in the labor market restrict women’s options for paid work, and female representation in senior positions and entrepreneurship remains low.”).

¹²² See, e.g., ELBORGH-WOYTEK ET AL., *supra* note 121, at 10 (internal citations omitted) (“In many countries, the lack of basic necessities and rights inhibits women’s potential to join the formal labor market or become entrepreneurs. In some emerging and developing economies, restrictions on women’s independent mobility and participation in market work curtail their economic potential. Women dominate the informal sector, characterized by vulnerability in employment status, a low degree of protection, mostly unskilled work, and unstable earnings. They often have limited property and inheritance rights and limited access to credit. In agriculture, particularly in Africa, women operate smaller plots of land and farm less remunerative crops than men, and they have more limited access to agricultural inputs.”).

the higher skilled immigrants be directed into Track One, meaning that these immigrants could arguably benefit from both Track One and Track Two. As a result, men—who would more likely score high point totals in Track One, while just as easily qualifying for visas under Track Two—would outnumber women as the winners in this system.

The prioritization on rewarding immigrants with job skills, formal education, and entrepreneurial success continues in the 2013 Border Security Bill. For example, unlike other professions that are subject to the annual cap on the number of available employment-based visas, the legislation exempts “certain highly-skilled and exceptionally talented immigrants . . . such as those who have extraordinary ability or advanced degrees in STEM [science, technology, engineering, and math] fields from U.S. universities.”¹²³ But because men, who regularly achieve higher levels of education than women in countries around the world,¹²⁴ are more likely to qualify for this STEM-profession exemption,¹²⁵ the result is yet again to disadvantage women.¹²⁶

Finally, among these provisions, the 2013 Border Security Bill puts further emphasis on recruiting and retaining immigrants who are able to invest in American business. Not surprisingly, these new “investor” visas would benefit men—who, globally, have more access to the large amounts of money and

¹²³ AM. IMMIGRATION COUNCIL, IMMIGRATION POLICY CTR., *supra* note 81, at 11 (referring to S. 744, § 2307(c)(3), Allocation of Immigrant Visas, outlining the conforming amendments to the current INA employment-based preferences).

¹²⁴ See, e.g., UNESCO, *supra* note 120, at 9, 62–64; Ruth Tam, *Can Women Give Immigration Reform the Boost It Needs?*, WASH. POST (Nov. 20, 2013, 1:48 PM), <http://www.washingtonpost.com/blogs/she-the-people/wp/2013/11/20/can-women-give-immigration-reform-the-boost-it-needs/> (observing the gender disparities in preferring highly educated immigrants).

¹²⁵ See, e.g., *More Men than Women*, *supra* note 116; O'Brien, *supra* note 116; UNESCO, *supra* note 120, at 62–64 (discussing the low numbers of women in the fields of the hard sciences (e.g., computing and engineering) and in research positions at the post-PhD levels).

¹²⁶ As one improvement, S. 744 includes a provision to allow derivative visa holders of the principle employment-based visa—that is, the spouses of the employee who obtained the visa—to lawfully work. See S. 744, § 4102, 113th Cong. (2013). In fact, United States Citizenship and Immigration Services (USCIS) advocated this same change to the regulation and has issued a proposed rulemaking allowing certain spouses of H-1B workers to lawfully work in the United States. See Press Release, Dep't of Homeland Sec., DHS Announces Proposals to Attract and Retain Highly Skilled Immigrants (May 6, 2014), available at <http://www.dhs.gov/news/2014/05/06/dhs-announces-proposals-attract-and-retain-highly-skilled-immigrants>. Although this provision, if approved, would be welcome news to these spouses who could not previously work lawfully, the proposal highlights the emphasis on beneficial reform for highly skilled workers, rather than reform provisions targeting the greater population of women immigrants. See generally Sabrina Balamwalla, *Bride and Prejudice: How U.S. Immigration Law Discriminates Against Spousal Visa Holders*, 29 BERKELEY WOMEN'S L.J. 25 (2014).

resources needed to qualify.¹²⁷ For example, the new proposed nonimmigrant X visa provides temporary status to “qualified entrepreneurs” who attract investments of at least \$100,000 in a U.S. business or have created at least three jobs in the United States during the three-year period before the initial X visa petition was filed, and, during the two-year period before the visa petition was filed, the immigrant’s business generated at least \$250,000 in annual revenue in the United States.¹²⁸ Moreover, the 2013 Border Security Bill proposes a new employment-based visa category, leading to LPR status—the EB-6 investor visa.¹²⁹ The EB-6 immigrant visa would be for “qualified immigrant” entrepreneurs who have: (1) “significant ownership interest in a United States business entity”¹³⁰ that has created at least five qualified jobs¹³¹ and (2) either reaped venture capital or investments of not less than \$500,000 or have generated at least \$750,000 in annual revenue within the United States in the two years prior to the filing of the immigrant visa petition.¹³²

These programs unabashedly target wealthy foreigners, who are willing to expend large sums of money for a chance at U.S. citizenship. Yet the concept of a wealthy businesswoman or entrepreneur is still a rarity across the world. Not surprisingly, the effects of gender discrimination and oppressive systems have

¹²⁷ See generally Priya Alagiri, *Why Aren't There More Foreign Female Entrepreneurs?*, REUTERS (Oct. 10, 2011), <http://blogs.reuters.com/great-debate/2011/10/10/why-arent-there-more-foreign-female-entrepreneurs/> (describing the author’s own surveying of professional immigrant women and noting that many felt they were at a disadvantage compared to American women entrepreneurs and immigrant males, who benefitted greatly from more established professional networks). Expanding on this problem, immigrant women felt they were unable to obtain funding from private investors because many investors hold a bias against funding women, including immigrant women. *Id.* “One investor, for example, has said that ‘a ton of us decide not to invest, support, promote or work with women because of this whole “marriage/pregnancy” hurdle that most women will face in their career.’” *Id.* See generally Del Jones, *Women Business Founders Rising, but Slowly*, USA TODAY (Apr. 23, 2008), http://usatoday30.usatoday.com/money/companies/management/2008-04-22-women-founders-success_N.htm (describing interviews with some of the few women executives or company founders: “Women who have built big companies don’t know why they remain so rare, but explanations fall largely into two camps: discrimination and nature. They say men have easier access to money from bankers and venture capitalists, the lifeblood of growth. Women also are often more devoted to family, and even those who out-earn their husbands often remain responsible for children and households.”).

¹²⁸ See S. 744, § 4801(i)–(ii).

¹²⁹ See *id.* § 4802.

¹³⁰ See *id.* § 4802(C).

¹³¹ *Id.*

¹³² See *id.* § 4802(C)(i)(III)(aa)(BB)–(bb)(BB); see also AM. IMMIGRATION COUNCIL, IMMIGRATION POLICY CTR., *supra* note 81, at 17, for a thorough summary of these provisions.

operated to keep women out of the workforce generally and out of its highest reaches specifically.¹³³

As an effect, few women are in the position to be able to benefit from immigrant visas aimed at high-earning investors and entrepreneurs. DHS declines to publicly report on the gender breakdown of the EB-5 investor immigrant visas, but there are visible trends regarding the dearth of women in these positions.¹³⁴ Albeit fiscally logical on its face and perhaps otherwise meritorious in reach, one deleterious effect of such programs is to provide immigration status and benefits to men, while leaving out women.

Thus, first, as demonstrated by the point allocation system detailed above,¹³⁵ the two-tiered merit-based system “prioritizes immigrants who are young, educated, experienced, skilled, and fluent in English,”¹³⁶ characteristics at least some of which globally tend to favor men.¹³⁷ Second, priority is further placed on highly educated immigrants pursuing or employed in STEM fields or otherwise able to invest large sums of money in American-based businesses. Thus, although family ties¹³⁸ and caregiver status also earn points in the 2013 Border Security Bill’s merit-based system¹³⁹—characteristics that globally favor women¹⁴⁰—the discrepancy between prioritization of formal education, business acumen, and wealth on one side and familial

¹³³ See *supra* notes 120–121 (describing global labor market effects and the dearth of women in the highest level of post-doctorate positions).

¹³⁴ See *supra* note 127.

¹³⁵ See *supra* notes 111–115 and accompanying text.

¹³⁶ AM. IMMIGRATION COUNCIL, IMMIGRATION POLICY CTR., *supra* note 81, at 9.

¹³⁷ See, e.g., UNESCO, *supra* note 120, at 82–84 (discussing the higher rates of men who attain the highest levels of education, including those fields in the hard sciences and which encompass research jobs); ELBORGH-WOYTEK ET AL., *supra* note 121, at 4, 8–10.

¹³⁸ See S. 744, 113th Cong. § 2301(c)(5)(G) (2013).

¹³⁹ See *id.* § 2301(c)(5)(C).

¹⁴⁰ Research shows, for example, that though the last century has seen great strides in women working outside the home in formal or informal work settings around the world, women still face barriers to engage in paid work and/or are consistently paid less than men. See, e.g., WORLD BANK, *supra* note 84, at 2 (“Social norms are a key factor underlying deprivations and constraints . . . Norms affect women’s work by dictating the way they spend their time and undervaluing their potential. Housework, child-rearing, and elderly care are often considered primarily women’s responsibility. Further, nearly four in 10 people globally (close to one-half in developing countries) agree that, when jobs are scarce, men should have more right to jobs than women. Research shows that women are frequently disadvantaged by gender biases in performance and hiring evaluations.”). Just like women are underrepresented as principals in the employment-based visa system, they are overrepresented as the beneficiaries in the family-based visa system, indicating that they are more often than not beneficiaries of immigration relief due to their status as caregiver (e.g., mother, spouse, daughter) and/or because of their familial ties. See *supra* note 116 and accompanying text; see also *Yearbook of Immigration Statistics: 2013*, *supra* note 71.

or caregiver status on the other side is too large to equalize the concomitant effects on men versus women.¹⁴¹

Thus, though many of these proposals negatively affect poor immigrant men too, the result of historic and continued discriminatory practices against women—immigrants and otherwise—produces a disproportionately harmful effect on women. With high levels of anti-immigrant animus in the current political and public climate,¹⁴² it is not surprising that the most comprehensive compromise to come from the Senate would incorporate arduous steps that embody the “good” and “remorseful” immigrant narrative.¹⁴³ Creating barriers that very few could surpass for eventual RPI or blue-card status provides easy political soundbites against illegal immigration. But by ignoring the economic and gendered realities of the current immigrant population and their inability to overcome these barriers, proposals like the 2013 Border Security Bill do little to solve the ongoing problems in immigration law and policy. Moreover, the harshness of the 2013 Border Security Bill continues to perpetuate policies that discriminate against women, rather than work towards equality.

¹⁴¹ As one immigrant advocacy organization has noted:

Proponents of a point system [i.e., the merit-based point system in the 2013 Border Security Bill] have argued that we must move away from family-based immigration to a system that is tied to economic necessity. The merit-based point system is designed to balance a range of factors in assessing who should be admitted to the United States, but it remains an experiment. Supporters argue that similar systems have been used in other major industrialized nations. Critics have pointed out that it puts some applicants at a disadvantage, such as women, people who work in the informal economy or do unpaid work, relatives of U.S. citizens with insufficient formal education and employment history, older adults, and applicants from less-developed countries.

AM. IMMIGRATION COUNCIL, IMMIGRATION POLICY CTR., *supra* note 81, at 10.

¹⁴² See, e.g., Lauren Fox, *Anti-immigrant Hate Coming from Everyday Americans*, U.S. NEWS & WORLD REP. (July 24, 2014, 12:01 AM), <http://www.usnews.com/news/articles/2014/07/24/anti-immigrant-hate-coming-from-everyday-americans> (noting that anti-immigrant protests and sentiments are no longer for extremist groups, but from “everyday Americans”); Justine Hofherr, *Protesters Swarm Beacon Hill, ‘Livid’ Over Illegal Immigration*, BOSTON.COM (July 26, 2014, 1:19 PM), <http://www.boston.com/news/local/massachusetts/2014/07/26/hundreds-attend-anti-illegal-immigration-rally-beacon-hill/> (describing protest against Massachusetts Governor’s decision that the state would house unaccompanied minors). Protesters held signs reading, for example, “Deport Illegals” and “Americans before Illegals.” *Id.*

¹⁴³ The concept of the “good” immigrant as being the preferred immigrant is a topic of much debate and research by the author and other scholars. See, e.g., generally Olivares, *supra* note 106; Elizabeth Keyes, *Defining American: The DREAM Act, Immigration Reform and Citizenship*, 14 NEV. L.J. 101 (2014); Hiroshi Motomura, *Who Belongs? Immigration Outside the Law and the Idea of Americans in Waiting*, 2 U.C. IRVINE L. REV. 359 (2012); Kevin R. Johnson, *Race, the Immigration Laws, and Domestic Race Relations: A “Magic Mirror” into the Heart of Darkness*, 73 IND. L.J. 1111 (1998).

CONCLUSION: REFORM FOR THE FUTURE

“The thing this administration needs to do is immediately deport these families, these children.” Representative Raul Labrador (R-ID), July 6, 2014.¹⁴⁴

Passing comprehensive immigration law reform may be the legislative Sisyphean feat of contemporary times. With solid movement of the 2013 Border Security Bill through the Senate, change seemed afoot. Progress stalled in the House of Representatives, only to be confronted with the next boulder in 2014—the influx of large numbers of undocumented child migrants, sometimes unaccompanied and sometimes traveling with guardians or parents, often their mothers.¹⁴⁵ Reports widely estimated that DHS apprehended more than 50,000 undocumented children in the first nine months of 2014, a huge increase from the year prior.¹⁴⁶ The public and governmental

¹⁴⁴ Interview by David Gregory with Raul Labrador, Congressman, Idaho (July 6, 2014), available at <http://www.nbcnews.com/watch/meet-the-press/full-raul-labrador-inter-view-on-meet-the-press-297785923834>.

¹⁴⁵ See, e.g., Hannah Rappleye & Lisa Riordan Seville, *Flood of Immigration Families at Border Revives Dormant Detention Program*, NBC NEWS (July 25, 2014, 5:39 AM), <http://www.nbcnews.com/storyline/immigration-border-crisis/flood-immigrant-families-border-revives-dormant-detention-program-n164461> (describing the increase in women and children immigrants) (“Figures released last week by Customs and Border Protection show more than 55,000 ‘family units’—at least one adult relative traveling with one or more children—were apprehended crossing the border in fiscal 2014. That figure is an increase of nearly 500 percent from the previous year and dwarfs the 106 percent spike in unaccompanied children—to more than 57,000—that has received so much attention in recent months. Now the Obama administration is rushing to open up detention centers to hold the families—mostly women with children from El Salvador, Guatemala and Honduras—and is working out streamlined procedures to quickly send them back to their homelands, a turnabout in policy that is being widely panned by immigrant advocates.”); Rebecca Kaplan, *Surge in Unaccompanied Child Immigrants Spurs White House Reaction*, CBS NEWS (June 2, 2014, 8:26 PM), <http://www.cbsnews.com/news/surge-in-unaccompanied-child-immigrants-spurs-white-house-reaction/> (“Cecelia Munoz, the White House Director of Domestic Policy, said the impetus for the emergency measures by the administration was an increase in the number of the arrivals that was ‘much larger than anticipated’—more than 90 percent compared to last year. There are also rising numbers of girls and children under the age of 13, she said.”); Jana Winter, *Endless Wave of Illegal Immigrants Floods Rio Grande Valley*, FOX NEWS (July 14, 2014), <http://www.foxnews.com/us/2014/07/14/night-time-on-border-endless-wave-illegal-immigrants-floods-rio-grande-valley/> (discussing recent efforts at the Mexico-Texas border to capture migrants) (“The Border Patrol agents loaded and unloaded their vehicles packed with the newly-arrived illegal immigrants—including women pregnant or nursing infants, and small, unaccompanied children—throughout the evening and early morning hours. At first, they were mostly teenagers, ages 14 to 17, arriving with their mother or brothers or no one at all. Then came the pregnant women. A mother nursing her infant. A small girl with wide eyes clutching a doll.”).

¹⁴⁶ See, e.g., DAN RESTREPO & ANN GARCIA, CTR. FOR AM. PROGRESS, *THE SURGE OF UNACCOMPANIED CHILDREN FROM CENTRAL AMERICA 1* (2014), available at <http://cdn.americanprogress.org/wp-content/uploads/2014/07/CentAmerChildren3.pdf> (“Already in fiscal year 2014, more than 57,000 children have arrived in the United States, double the number who made it to the U.S. southern border in FY 2013. The number of families arriving at the border, consisting mostly of mothers with infants and toddlers, has

response to the humanitarian crisis of tens of thousands of children arriving at our borders has been, at times, vitriolic.¹⁴⁷ But perhaps more disturbing is the reaction from United States Citizenship and Immigration Services (USCIS) and other administrative authorities, who have focused their responses on the expedient removal of the immigrants, apparently whether or not they have valid claims for lawful status, including asylum.¹⁴⁸ Though accounts from the U.S. border and from the “family detention centers,” where the immigrants are detained pending their release or removal, paint a bleak picture that can only be deemed a humanitarian crisis involving the most vulnerable of populations,¹⁴⁹ calls for legislative answers focus on quick removal absent due process protections.¹⁵⁰

Advocates for immigration law reform that encompasses gender equality thus face an increasingly hostile political and public climate. While the voices speaking up for these women and children immigrants are also strong, even proponents of humanitarian immigration reform are grappling with the effects

increased in similar proportions. In fiscal year 2013, the U.S. Department of Homeland Security, or DHS, apprehended fewer than 10,000 families per year; yet, more than 55,000 families were apprehended in the first nine months of fiscal year 2014 alone.”)

¹⁴⁷ See, e.g., Andrew Kaczynski, *GOP Congressman: Kids at Border ‘Gang Members’ From Culture of Rape*, BUZZFEED POL. (July 15, 2014), <http://www.buzzfeed.com/andrew-kaczynski/gop-congressman-kids-at-border-gang-members-from-culture-of> (quoting radio interview with Representative Rich Nugent (R-FL)) (“These kids have been brought up in a culture of thievery. A culture of murder, of rape. And now we are going to infuse them into the American culture. It’s just ludicrous.”); Halimah Abdullah, *Not in My Backyard: Communities Protest Surge of Immigrant Kids*, CNN POL. (July 16, 2014, 9:46 AM), <http://www.cnn.com/2014/07/15/politics/immigration-not-in-my-backyard/> (detailing protests in cities against the influx of children immigrants, including in Murrieta, California where anti-immigrant protesters held up signs reading “Return to Sender” when vehicles transporting the children arrived).

¹⁴⁸ See, e.g., Julia Preston, *As U.S. Speeds the Path to Deportation, Distress Fills New Family Detention Centers*, N.Y. TIMES, Aug. 6, 2014 at A10, available at http://www.nytimes.com/2014/08/06/us/seeking-to-stop-migrants-from-risking-trip-us-speeds-the-path-to-deportation-for-families.html?_r=0 (discussing how the Obama administration works to deter more arrivals by placing those caught on a fast track to deportation, many times without providing opportunities for asylum cases or bonds to those that qualify); *Obama Official Says at Border: ‘We’ll Send You Back’*, CNN (July 11, 2014, 10:58 PM), <http://www.cnn.com/2014/07/11/politics/immigration-border/> (quoting DHS Secretary Jeh Johnson’s message to incoming immigrants: “Our message to those who are coming here illegally, to those who are contemplating coming here illegally: ‘We will send you back.’”).

¹⁴⁹ See, e.g., Dara Lind, *14 Facts that Help Explain America’s Child-Migrant Crisis*, VOX (July 29, 2014, 11:43 AM), <http://www.vox.com/2014/6/16/5813406/explain-child-migrant-crisis-central-america-unaccompanied-children-immigrants-daca> (detailing the reason migrant children and families are crossing the U.S. border and the government’s response to this humanitarian crisis); Susan Carroll, *Feds Will House Immigrant Families at Detention Center Near San Antonio*, HOUS. CHRON. (July 26, 2014, 10:00 PM), <http://www.chron.com/news/article/Feds-will-house-immigrant-families-at-detention-5630925.php> (deportation process at Karnes County, Texas family detention center is performed many times without the presence of an attorney to help the detained women and children).

¹⁵⁰ See *supra* note 148.

of the latest wave of migrant children.¹⁵¹ The fact that the targets of the debate are, indeed, children—infants traveling with their mothers,¹⁵² and children as young as five traveling alone¹⁵³—is telling. In some respects, there could be no more vulnerable of a population deserving of empathy, compassion, and humanitarian immigration relief. Instead, they are met with derision and calls for their swift removal and harsh treatment while in detention. In fact, by *virtue* of their identity as women and children—mothers with their children, to be precise—the migrants are placed in a specialized detention center and, until volunteer lawyers sued for access to the center so as to provide legal assistance, were denied basic due process while enduring poor living conditions.¹⁵⁴

151 See, e.g., Rebecca Kaplan, *For Unaccompanied Immigrant Children, a Shortage of Lawyers*, CBS NEWS (Aug. 7, 2014, 6:00 AM), <http://www.cbsnews.com/news/for-unaccompanied-immigrant-children-a-shortage-of-lawyers/> (noting that with the increase of deportation procedures for unaccompanied minors by the Obama administration, organizations have begun to scramble in their search for pro bono attorneys for these individuals); Fox, *supra* note 142 (“Even politicians who have voiced sympathy for the kids have tried to keep migrant children out of their own backyards. Maryland Gov. Martin O’Malley, a Democrat, said sending kids back to their home countries meant they could face ‘certain death.’ Then, he turned around and asked the Obama administration not to send any kids to a Westminster, Maryland, facility because he feared they would not be welcomed. The facility in question had been vandalized with a message that read, ‘NO ILLEGALS [sic] HERE. NO UNDOCUMENTED DEMOCRATS.’”).

152 See, e.g., Catherine E. Shoichet, *Getting There*, CNN (July 2014), <http://www.cnn.com/interactive/2014/07/us/beyond-the-border-getting-there/> (chronicling the journey of a Guatemalan mother and son from a bus station in Arizona to her husband’s house in Mississippi and speaking to the conditions that brought her to America, the trials and tribulations they encountered in the detention center, and the increase of mothers traveling to the United States with their children); Cindy Carcamo, *U.S. Sends Planeload of Moms, Children Back to Honduras*, L.A. TIMES (July 14, 2014, 9:40 PM), <http://www.latimes.com/world/mexico-americas/la-fg-honduras-deportees-20140714-story.html#page=1> (describing the scene when a flight carrying only mothers and children deported from the United States arrived in Honduras).

153 See Molly Hennessy-Fiske, *Report: 117% Increase in Children 12 and Younger Crossing Border Alone*, L.A. TIMES (July 25, 2014, 7:00 AM) <http://www.latimes.com/nation/nationnow/la-na-illegal-immigration-unaccompanied-minors-20140724-story.html#page=1> (“Although the increase among migrants ages 6 to 12 was significant, they made up only 14% of total youths apprehended at the border, according to the Pew report, which provides the first detailed portrait of the age and nationality of child migrants detained . . . Fewer than 1% of children caught this year were younger than 1 year old, and only about 2% were 5 or younger.”).

154 See Cindy Carcamo, *Nearly 300 Women, Children Deported from Immigration Detention Centers*, L.A. TIMES (Aug. 21, 2014, 7:30 AM), <http://www.latimes.com/nation/nationnow/la-na-nn-ff-new-mexico-immigration-deportation-20140821-story.html> (“[T]he Department of Homeland Security’s inspector general report has cited various other problems—inadequate amounts of food, inconsistent temperatures and unsanitary conditions—at various immigration holding facilities for children. Also, immigration officials have been accused of not allowing the mothers and children due process as the U.S. speeds up the processing of the thousands of single parents with children who have fled Central America and entered the U.S.”); Julia Preston, *In Remote Detention Center, a Battle on Fast Deportations*, N.Y. TIMES, Sept. 6, 2014, at A1 (“Women and their children from El Salvador, Guatemala and Honduras are housed in dark bunk rooms with eight people each. There are balls and toys for the children and stacks of diapers for babies. But

In such an environment, the 2013 Border Security Bill—despite its flaws that would result in disparate negative effects on women—could have potentially provided much better protections to women and other vulnerable populations than whatever is likely to be borne from this recent immigration debacle. Moreover, as one of the most subordinated populations, women¹⁵⁵—and especially poor women of color, which characterize part of the immigrant population¹⁵⁶—suffer some of the harshest effects of the historical degradation of their rights. As a result, when women seek gains through legislation aimed specifically at improving their status and increasing measures of gender equality, the legislative process seemingly stalls. Indeed, even previously noncontroversial legislation may fall victim to the politics of subordination.¹⁵⁷

Moreover, as detailed above,¹⁵⁸ history teaches that immigration law and policy have long positioned women at a disadvantage in procuring and retaining immigration benefits. From the formalized doctrine of coverture to the stripping of women's citizenship due to marriage to a foreign national, immigration law has explicitly treated women as second-class citizens. And beyond the formalized discrimination, policies that resulted in disparate negative effects for women—like the IMFA provisions and the IRCA legalization provisions—continued in more contemporary reform efforts, including the 2013 Border Security Bill. Thus, given the current environment of angry sentiment against children and women migrants fleeing violence, coupled with the history of gender oppression in early and contemporary times, advocates may wonder if the struggle for equality is still a worthwhile endeavor.

I argue that the push for equality remains vital and meaningful. True gender equality remains elusive in immigration law in effect and implementation, but positive strides have certainly improved the lives of immigrant women since the earliest days of legislation. As gender equality permeated other areas of law, and women won the rights that once belonged to only men, the effects have reached immigration law and policy. Thus, a similar wave can create positive ripples of improvement in more far-reaching and nuanced ways in future

in a report this week, the inspector general of the Department of Homeland Security found 'unsanitary conditions' in some dormitories because many detainees were ill.").

¹⁵⁵ See Olivares, *supra* note 13 at 34–39 (describing and analyzing the legacy of subordination of women in immigration law).

¹⁵⁶ See *id.* at 29–31 (describing and analyzing the subordination of racial minority immigrants in immigration law).

¹⁵⁷ See *id.*

¹⁵⁸ See *supra* Part I.

reform efforts. While it may seem benign to write about—and even fight for—such change, the alternative of doing nothing is an even more toxic answer.

Seventeen Years Since the Sunset: The Expiration of 245(i) and Its Effect on U.S. Citizens Married to Undocumented Immigrants

*Marisa S. Cianciarulo**

INTRODUCTION

One of the most pervasive myths of U.S. immigration law is that marriage to a U.S. citizen confers citizenship, or at least some form of legal status, upon a foreign national. It is an intuitive notion: that a U.S. citizen enjoys, as part of his or her package of privileges and protections, the right to live anywhere in the United States with a spouse of his or her choosing, and to confer automatically some form of legal status upon that spouse. It comes as a surprise and an affront to many U.S. citizens that their immigration laws do not always comport with this notion.

The fact is that no marriage-based adjustment of a foreign national's immigration status occurs automatically. A U.S. citizen who wishes to confer permanent immigration status upon his or her spouse must sponsor that spouse for lawful permanent residency.¹ If and when the petition is approved, the foreign national spouse must then apply for adjustment of status to lawful permanent residency (if in the United States)² or an immigrant visa (if outside the United States).³ Only after a period of three years as a lawful permanent resident may the foreign national spouse then apply for naturalization.⁴ While this process is contrary to the intuitive notion of automatic conferral of citizenship via marriage, it is nevertheless a relatively painless and straightforward process for many families.

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1 8 U.S.C. § 1154(a) (2012).

2 8 U.S.C. § 1255(a).

3 8 U.S.C. § 1181(a).

4 8 U.S.C. § 1430.

Significant problems arise, however, for families in which the foreign national spouse entered the United States without inspection. Under current immigration law, foreign nationals who entered the United States without inspection⁵ are ineligible to apply for lawful permanent residency in the United States, irrespective of the existence of an approved petition submitted by a U.S. citizen spouse.⁶ Such individuals must instead depart the United States and apply for an immigrant visa abroad. This is much more than an inconvenience involving travel and temporary separation from loved ones. Another immigration provision bars any foreign national who has been unlawfully present in the United States for one year or longer from reentering the United States for ten years upon his or her departure from the United States.⁷ Only a waiver granted on account of "extreme hardship" to the U.S. citizen spouse can overcome the bar.⁸

The reentry bars were enacted in 1996 as part of the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA"),⁹ a sweeping immigration bill that sought to curtail illegal immigration to the United States and to facilitate the removal of noncitizens who commit crimes and administrative violations. In addition to creating the reentry bars, IIRIRA authorized increased personnel, fencing, and surveillance equipment for the Border Patrol;¹⁰ amended the definition of an "aggravated felony" to include more offenses that would subject a noncitizen to permanent deportation;¹¹ enhanced the process of "expedited removal" by which an immigration officer may order a person deemed inadmissible deported without a hearing or supervisory review;¹² restricted judicial review of several types of

⁵ See 8 U.S.C. § 1182(a)(6) (designating as ineligible for visas or admission to the United States "[a]n alien present in the United States without being admitted or paroled, or who arrives in the United States at any time or place other than as designated by the Attorney General").

⁶ See 8 U.S.C. § 1255(a) (limiting eligibility for adjustment of status to aliens who were "inspected and admitted or paroled into the United States").

⁷ 8 U.S.C. § 1182(a)(9)(B)(i)(II).

⁸ 8 U.S.C. § 1182(a)(9)(B)(v).

⁹ Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546 (codified as amended in scattered sections of 8 U.S.C. and 18 U.S.C.).

¹⁰ *Id.* §§ 101-103, 110 Stat. at 3009-553 to -555.

¹¹ *Id.* § 321, 110 Stat. at 3009-627.

¹² *Id.* § 302, 110 Stat. at 3009-579. The Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214, enacted earlier the same year, created the expedited removal process.

immigration court decisions;¹³ and facilitated the increased detention of certain noncitizens.¹⁴

Within two years of IIRIRA's enactment, a temporary but crucial provision found at section 245(i) of the Immigration and Nationality Act expired.¹⁵ Section 245(i) allowed undocumented immigrants who married U.S. citizens to adjust their status in the United States rather than have to depart the United States and apply for an immigrant visa abroad. When 245(i) expired on January 14, 1998, undocumented spouses of U.S. citizens for whom spousal petitions were filed after that date not only became ineligible to adjust their status in the United States, but also triggered a three- or ten-year bar on reentering the United States as soon as they departed the country in order to apply for an immigrant visa. Except for a brief reinstatement of 245(i) from December 21, 2000 to April 30, 2001,¹⁶ undocumented immigrant spouses of U.S. citizens have had to seek a waiver of the three- and ten-year bars in order to receive an immigrant visa.

This Article examines the rationale behind and effects of IIRIRA with respect to the inadmissibility of undocumented spouses of U.S. citizens. Part I explains the current framework for spousal petitions and family-based immigration to the United States. Part II reviews the political and immigration landscape that gave rise to IIRIRA and the reentry bars. Part III details the combined effects of the reentry bars and the unavailability of 245(i) upon the current generation of U.S. citizens seeking to sponsor undocumented immigrant spouses. Part IV evaluates the effects of the unavailability of 245(i), taking into account the intended goals and the actual effects of the reentry bars, and concludes that the unavailability of 245(i) for persons subject to the reentry bars does not contribute to the objectives advanced in support of IIRIRA. The Article concludes that truly comprehensive immigration reform legislation must include a permanent reinstatement of 245(i) for immediate relatives of U.S. citizens.

I. THE ROCKY ROAD TO LAWFUL PERMANENT RESIDENT STATUS

Another popular myth about U.S. immigration law is that in order to obtain lawful permanent resident status, one must

¹³ Illegal Immigration Reform and Immigrant Responsibility Act § 306, 110 Stat. at 3009-607.

¹⁴ *Id.* §§ 303, 305, 110 Stat. at 3009-585, -597.

¹⁵ 8 U.S.C. § 1255(i) (2012).

¹⁶ Legal Immigration Family Equity Act, Pub. L. No. 106-553, 114 Stat. 2762A-142 (2000).

simply apply and wait in line for one's turn to legalize. In reality, immigration law strictly limits the ability to apply for lawful permanent resident status to certain categories of individuals.¹⁷ Only certain family members sponsored by U.S. citizens and lawful permanent residents,¹⁸ certain employment-based immigrants,¹⁹ or other narrow categories of intending immigrants²⁰ are eligible to apply for lawful permanent resident status. Most of those aspiring immigrants must wait for years in quota-related backlogs to be able to apply for lawful permanent resident status.²¹

One of the few categories of intending immigrants who qualify as "immediate relatives" not subject to a quota is the category of spouses of U.S. citizens.²² Nevertheless, as noted above, a U.S. citizen's conferral of permanent lawful immigration status upon a foreign spouse is neither automatic nor guaranteed.²³ The citizen must sponsor the foreign spouse and the foreign spouse must subsequently apply for lawful permanent resident status. For foreign spouses who entered the United States legally, the process is expensive and can be cumbersome, but it is fairly straightforward. For foreign spouses who entered the United States without inspection, however, the process involves significantly more stress, time, and cost, and affects

¹⁷ See 8 U.S.C. § 1255(a) (stating that only applicants with approved and immediately available immigrant visas are eligible to apply for adjustment of status).

¹⁸ 8 U.S.C. § 1153(a).

¹⁹ 8 U.S.C. § 1153(b).

²⁰ See, e.g., 8 U.S.C. § 1153(c) (permitting the issuance of immigrant visas to diversity immigrants, beneficiaries of a program popularly known as the "visa lottery"); 8 U.S.C. § 1255(l) (authorizing the adjustment of status for victims of trafficking who were granted a visa under 8 U.S.C. § 1101(a)(15)(T)); 8 U.S.C. § 1159 (authorizing the adjustment of status of refugees and asylees).

²¹ See 8 U.S.C. § 1151(c)-(e) (specifying the number of individuals who may become lawful permanent residents each year pursuant to a relative petition, employment, and the diversity visa program). The statutory quotas have resulted in long wait times for some categories of immigrants. See *Immigrant Numbers for June 2014*, VISA BULL. (U.S. Dep't of State, Washington, D.C.), June 2014, at 2, available at <http://travel.state.gov/content/visas/english/law-and-policy/bulletin/2014/visa-bulletin-for-june-2014.html> (reporting that immigrant visas are currently available for adult unmarried sons and daughters of U.S. citizens whose petitions were filed on or before March 22, 2007 (seven-year delay); adult unmarried children of permanent residents whose petitions were filed on or before April 1, 2007 (seven-year delay); married sons and daughters whose petitions were filed on or before October 1, 2003 (eleven-year delay); and siblings of U.S. citizens whose petitions were filed on or before December 15, 2001 (thirteen-year delay)). The delays are significantly longer for nationals of Mexico and the Philippines. For example, immigrant visas are not available for Filipino siblings of U.S. citizens whose petitions were filed after November 15, 1990, a twenty-four-year delay. *Id.*

²² See 8 U.S.C. § 1151(b)(2)(A)(i) (classifying children, spouses, and parents of U.S. citizens as immediate relatives not subject to statutory numerical limitations).

²³ It is also not free. See 8 C.F.R. § 103.7(b)(1)(i)(L) (2014) (stating that the filing fee for a spousal petition is \$420); 8 C.F.R. § 103.7(b)(1)(i)(U)(1) (stating that the filing fee for an application to adjust status is \$985 for applicants age fourteen or older).

careers and fundamental family matters such as having and raising children.

A. On the Same Path: Petitioning for the Alien Spouse

Regardless of the immigration status of the foreign spouse, conferring lawful immigration status upon that spouse begins with the U.S. citizen filing a “Petition for Alien Relative.”²⁴ The petition must include evidence of the petitioner’s U.S. citizenship, a marriage certificate, passport-style photos of the petitioner and beneficiary, proof of termination of any previous marriages,²⁵ and a \$420 fee.²⁶ Unless the foreign spouse is in removal proceedings or has past immigration violations or criminal convictions,²⁷ this is a fairly simple process in which the U.S. citizen in effect requests that the U.S. government recognize his or her marriage to a foreign national and allow the foreign spouse to apply for lawful permanent resident status.²⁸ An approved petition provides the basis for applying for adjustment of status if the foreign spouse is eligible for adjustment.²⁹

It is at this point that the road divides. Foreign spouses who entered legally may apply for adjustment of status, regardless of their current immigration status.³⁰ Foreign spouses who entered without inspection are ineligible for adjustment of status and must seek an immigrant visa through the consular processing system.

²⁴ 8 C.F.R. § 204.1(a)(1).

²⁵ 8 C.F.R. § 204.2(a)(2).

²⁶ 8 C.F.R. § 103.7(b)(1)(i)(L).

²⁷ See 8 U.S.C. § 1154(g) (prohibiting the approval of a marriage entered into while the foreign spouse was in removal proceedings, unless the foreign spouse resides outside the United States for two years after the date of marriage or proves that the marriage is bona fide); see also 8 U.S.C. § 1255(e)(3) (requiring that the foreign spouse who married while in removal proceedings prove that the marriage was entered into in good faith and not “for the purpose of procuring the alien’s admission as an immigrant”).

²⁸ See 8 U.S.C. § 1151(b)(2)(A)(i) (classifying spouses of U.S. citizens as immediate relatives who are eligible to apply for adjustment of status upon approval of the spousal petition). The regulations governing the process state that “a petitioner . . . [or] a beneficiary . . . residing in the United States at the time of filing an [application or petition] may be required to appear for . . . an interview.” 8 C.F.R. § 103.2(b)(9).

²⁹ A petition will only be denied if the eligibility requirements are not proven or the marriage is deemed fraudulent. See 8 C.F.R. § 103.2(b)(1) (requiring that the petitioner establish eligibility at the time of filing the petition); 8 U.S.C. § 1154(c) (prohibiting the approval of spousal petitions in cases in which the foreign spouse “has attempted or conspired to enter into a marriage for the purpose of evading the immigration laws”). Sponsors and beneficiaries may also be required to attend an interview. 8 C.F.R. § 103.2(b)(9). A beneficiary married to his or her spouse for less than two years at the time that adjustment is granted is subject to conditional residency, and must seek to have the conditions removed before being granted unconditional lawful permanent residency. 8 U.S.C. § 1186a.

³⁰ 8 U.S.C. § 1255(a).

B. The Paths Diverge: Consular Processing and Bars to Admissibility

Immigration law requires that an adjustment applicant have entered the United States legally, but does not require that the applicant have maintained his or her lawful status. An applicant who has been sponsored by a U.S. citizen spouse is exempt from the provision that prohibits individuals who are in unlawful immigration status or who have worked without authorization from adjusting their status.³¹ Moreover, although a foreign spouse outside the United States can be barred from reentry if he or she was ever unlawfully present in the United States, a foreign spouse who entered legally is eligible to adjust his or her status without ever leaving the United States.³²

This is the point at which the situation becomes drastically different for a foreign spouse who entered the United States without inspection. Adjustment of status is only available to applicants who have been “inspected and admitted or paroled into the United States.”³³ Thus, the only way for a foreign spouse who entered without inspection to obtain lawful permanent resident status pursuant to an approved petition by a U.S. citizen is to depart the United States and apply for an immigrant visa abroad through the consular processing system.

Consular processing involves more than the inconvenience and expense of traveling abroad to obtain an immigrant visa. When a noncitizen leaves the United States, she or he must apply for admission in order to reenter the United States, irrespective of family ties to U.S. citizens. A noncitizen who departs the United States thus becomes subject to various grounds of inadmissibility that can prevent her or him from returning to the United States. An undocumented immigrant who entered without inspection and lived in the United States as an adult for six months or longer is inadmissible for a period of three years;³⁴ an undocumented immigrant who entered without

³¹ See 8 U.S.C. § 1255(c) (rendering ineligible for adjustment of status an applicant who “continues in or accepts unauthorized employment prior to filing an application for adjustment of status or who is in unlawful immigration status on the date of filing the application for adjustment of status or who has failed . . . to maintain continuously a lawful status since entry into the United States,” unless the applicant qualifies for adjustment as the spouse of a U.S. citizen or other specified category).

³² 8 U.S.C. § 1255(a).

³³ *Id.*

³⁴ Immigration and Nationality Act of 1952 § 212(a)(9)(B)(i)(I), 8 U.S.C. § 1182(a)(9)(B)(i)(I).

inspection and lived in the United States for one year or longer is inadmissible for a period of ten years.³⁵

In order for the undocumented immigrant to overcome the three- or ten-year bar on reentry, he or she must apply for a waiver.³⁶ Discussed more fully below, the waiver process is fraught with anxiety and uncertainty. A family that has already spent considerable time and money to complete the petitioning process with United States Citizenship and Immigration Services (“USCIS”) must now pay an additional fee and contend with an additional branch of the U.S. government: the State Department. Failure to obtain a waiver could result in indefinite undocumented status at best, and prolonged separation at worst.

C. A Treacherous Route: The Waiver Process

Applicants seeking a waiver of the three- or ten-year bar must prove that the reentry bar will result in extreme hardship to the U.S. citizen spouse who sponsored him or her.³⁷ USCIS officers adjudicating waiver applications must consider the U.S. citizen’s family ties or absence thereof in the country to which she or he would have to relocate, the conditions in the country of relocation, the financial impact of having to depart the United States, and the U.S. citizen’s health and ability to receive adequate medical care in the country of relocation.³⁸ The statute does not permit consideration of extreme hardship to U.S. citizen children.³⁹

Until March of 2013, the waiver could not be filed until the undocumented spouse departed the United States.⁴⁰ Thus, since the expiration of 245(i) in 1998, U.S. citizens whose spouses are seeking a waiver of the reentry bar have had to wait for the decision while their undocumented spouses reside outside the United States. Often, this results in a separation of many months and even years.⁴¹ Only upon approval of the waiver is the previously undocumented spouse permitted to enter the United States as a lawful permanent resident. Moreover, there is no guarantee that the waiver will be granted; approval rates vary

³⁵ Immigration and Nationality Act § 212(a)(9)(B)(i)(II), 8 U.S.C. § 1182(a)(9)(B)(i)(II).

³⁶ Immigration and Nationality Act § 212(a)(9)(B)(v), 8 U.S.C. § 1182(a)(9)(B)(v).

³⁷ Immigration and Nationality Act § 212(a)(9)(B)(v), 8 U.S.C. § 1182(a)(9)(B)(v).

³⁸ *Cervantes-Gonzales*, 22 I. & N. Dec. 560 (B.I.A. 1999).

³⁹ 8 U.S.C. § 1182(a)(9)(B)(v).

⁴⁰ *Provisional Unlawful Presence Waivers of Inadmissibility for Certain Immediate Relatives*, 78 Fed. Reg. 536, 536 (Jan. 3, 2013) (to be codified at 8 C.F.R. pt. 103 and 212).

⁴¹ *See id.*

dramatically among the various U.S. consulates.⁴² The effect that this situation has had on numerous families is well documented.⁴³

On March 4, 2013, USCIS implemented a new process called a “provisional waiver” for spouses and other immediate relatives of U.S. citizens whose only ground of inadmissibility is unlawful presence.⁴⁴ This process allows the relative to seek a waiver before leaving the United States to apply for his or her immigrant visa. If the waiver is granted, the undocumented spouse may then depart the United States and apply for admission as a lawful permanent resident.⁴⁵

Although this process is a welcome change that considerably shortens the length of separation for families, it is not an adequate substitute for the permanent reinstatement of 245(i). If the undocumented spouse cannot prove extreme hardship, or if there are any other possible grounds of inadmissibility that apply to the undocumented spouse, the family has no recourse but to endure a lengthy separation or residence outside the United States while the undocumented spouse pursues a waiver through the regular process. Even if the waiver is granted provisionally, it is not a guarantee that the undocumented spouse will not be delayed abroad. Applying for an immigrant visa entails a number of complex and expensive steps, including obtaining a medical exam from a U.S. government-approved physician, which prolong the process and increase the chances of a lengthy separation.⁴⁶ Moreover, the applicant might have other grounds of

⁴² See *I-601 Waivers of Inadmissibility: Does the Current Process Work? When Is Hardship Extreme? Do Alternative Models Exist?*, U.S. DEPARTMENT HOMELAND SECURITY (June 29, 2012), <http://www.dhs.gov/i-601-waivers-inadmissibility-does-current-process-work-when-hardship-extreme-do-alternative-models> (“I-601 approval rates for FY 2011 international offices were 54% in the Bangkok District, 50% in the Rome District, and 84% in the Mexico District.”).

⁴³ See Cain W. Oulahan, *The American Dream Deferred: Family Separation and Immigrant Visa Adjudications at U.S. Consulates Abroad*, 94 MARQ. L. REV. 1351, 1354–55, 1370–71 (2011) (describing the impact that the reentry bars have had on mixed-status families); IMMIGRATION POLICY CTR., *SO CLOSE AND YET SO FAR: HOW THE THREE- AND TEN-YEAR BARS KEEP FAMILIES APART 3* (2011), available at http://www.immigrationpolicy.org/sites/default/files/docs/3_and_10_year_bars_072511.pdf (noting that the vast majority of applicants seeking waivers do so at the U.S. consulate in Ciudad Juarez, Mexico, where violent crime is so rampant that the U.S. Department of State has issued a travel advisory warning against travel there).

⁴⁴ Provisional Unlawful Presence Waivers of Inadmissibility, 78 Fed. Reg. at 536.

⁴⁵ See *id.*

⁴⁶ See IMMIGRATION POLICY CTR., *supra* note 43 (“An applicant must first meet with a consular officer from the Department of State (DOS), be told that a waiver is required, wait for the case to be referred, obtain and wait for the appointment with USCIS, wait for the adjudication, and then get a new appointment with DOS if the adjudication is granted. Current wait times for the initial appointment with USCIS are 2 to 3 months, meaning that even under the best of circumstances, an applicant will have to be outside the U.S. for at least 3 months.”).

inadmissibility of which she or he was not previously aware, and which trigger the reentry bars, effectively negating the provisional waiver.⁴⁷

From a purely philosophical perspective, it would seem that the law should give more weight and respect to the fundamental life choices of the U.S. citizen than to the manner of entry of the foreign spouse. And yet, the opposite is true: the law places enormous stress and burdens on U.S. citizens married to undocumented immigrants and on the U.S. citizen children of those unions. The next section explains why the law became focused on the foreign spouse's manner of entry at the expense of respect for U.S. citizens, family unity, and fundamental life choices.

II. ILLEGAL IMMIGRATION REFORM AND IMMIGRANT RESPONSIBILITY ACT OF 1996

The 1970s and 1980s saw a significant increase in unauthorized immigration to the United States. Approximately 540,000 undocumented immigrants arrived in the 1960s,⁴⁸ presumably to fill labor shortages that persisted after a guest-worker program known as the Bracero Program ended in 1964.⁴⁹ That number increased to 941,000 illegal entries between 1975 and 1980.⁵⁰ By 1980, the undocumented population exceeded 2 million.⁵¹

Throughout this period of increasing unauthorized immigration, Congress passed laws attempting to address and control it.⁵² Nevertheless, the 1990s saw a significant and rapid increase in unauthorized immigration. By 1992, the United

⁴⁷ See 8 U.S.C. § 1182 (2012) (enumerating the various grounds of inadmissibility).

⁴⁸ Robert Warren & Jeffrey S. Passel, *A Count of the Uncountable: Estimates of Undocumented Aliens Counted in the 1980 United States Census*, 24 *DEMOGRAPHY* 375, 380 tbl.2 (1987).

⁴⁹ The Bracero Program was a temporary guest-worker program in place from 1942 to 1964 intended to fill agricultural labor shortages resulting from World War II. For a thorough description of the program and its effects on future Mexican immigration to the United States, see generally RONALD L. MIZE & ALICIA C.S. SWORDS, *CONSUMING MEXICAN LABOR: FROM THE BRACERO PROGRAM TO NAFTA* (2011).

⁵⁰ Warren & Passel, *supra* note 48.

⁵¹ *Id.*

⁵² See, e.g., Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (codified as amended in scattered sections of 8 U.S.C.) (increasing the number of border patrol personnel, imposing sanctions on employers hiring immigrants unauthorized to work in the United States, and creating legalization programs for undocumented immigrants who meet certain requirements); Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (codified as amended in scattered sections of 8 U.S.C. and 28 U.S.C.) (increasing legal admissions, particularly for employment-based immigrants and temporary workers; expanding the definition of "aggravated felony"; and eliminating judicial sentencing recommendations against deportation).

States was home to an estimated 3.4 million undocumented immigrants; the undocumented population reached 5 million by 1996.⁵³ In response to what were perceived as failed laws and policies, and increasing hostility towards undocumented immigrants at the state level, Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act of 1996.

A. Immigration Landscape in 1996

As unauthorized immigration to the United States increased in the 1990s, hostility towards undocumented immigrants rose proportionally. Although discrimination against and fear of immigrants had long been a reality in the United States, the phenomenon of illegal immigration endowed anti-immigrant sentiment with a new purpose and sense of righteousness. According to immigration restrictionists, anti-immigrant sentiment was not race- or national origin-based discrimination; it was a logical response to unlawful actions that were having a significant economic impact on states and localities.⁵⁴

California's Proposition 187 is emblematic of the state and local response to unprecedented levels of unauthorized immigration to the United States. Proposition 187, a 1994 ballot initiative nicknamed "Save Our State," received the support of fifty-nine percent of California voters.⁵⁵ Its major provisions included denying public education to undocumented children from kindergarten through university, requiring public schools to verify the legal status of students and their parents, denying publicly funded non-emergency medical care to undocumented immigrants (including prenatal care and long-term nursing care, which were among the first services that then Governor Pete

⁵³ OFFICE OF POLICY & STRATEGY, U.S. CITIZENSHIP & IMMIGRATION SERV., THE TRIENNIAL COMPREHENSIVE REPORT ON IMMIGRATION 39 (1997), available at <http://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/tri3fullreport.pdf>.

⁵⁴ See *Quotes from Contemporary Public Officials*, FED'N FOR AM. IMMIGR. REFORM, <http://www.fairus.org/facts/contemporary-public-officials> (last visited Sept. 26, 2014) (February 1994 statement of Los Angeles County Supervisor Michael D. Antonovich) ("The question taxpayers keep asking is 'why should we pay for services for those who have broken the law to get here?' They should not, nor should they be forced to be the Health Maintenance Organization (HMO) and School District of the world. This is evidenced in every poll I have seen indicating that every ethnic group is opposed to illegal immigration and supports enforcement of the law."); *id.* (May 6, 1995 statement of President Bill Clinton in weekly radio address) ("[Illegal immigration] costs the taxpayers of the United States a lot of money. And it's unfair to Americans who are working every day to pay their own bills. It's also unfair to a lot of people who have waited in line for years and years in other countries to be legal immigrants.").

⁵⁵ *Prop. 187 Approved in California*, MIGRATION NEWS (Univ. Cal. Davis, Davis, Cal.), Dec. 1994, available at https://migration.ucdavis.edu/mn/more.php?id=492_0_2_0.

Wilson ordered denied to undocumented immigrants),⁵⁶ and requiring state service providers to report suspected undocumented immigrants to the police and federal immigration authorities.⁵⁷ Referring to the initiative as “the first giant stride in ultimately ending the ILLEGAL ALIEN invasion,” proponents saw the measure as a means to counteract the alleged “magnets” for unauthorized immigration: “[w]elfare, medical and educational benefits.”⁵⁸

In California and around the country, proponents of restrictive state measures targeting undocumented immigrants cited fiscal concerns, federal inaction, and sovereignty. Proposition 187 supporters, Pat Buchanan, and others decried the “alien invasion” of undocumented immigrants.⁵⁹ Pete Wilson, Newt Gingrich, and other federal and state lawmakers criticized the federal government for creating the situation that led to high rates of unauthorized immigration, failing to rectify it, and refusing to compensate states for the cost of dealing with it.⁶⁰

The Clinton Administration responded with a flurry of actions designed to show that it was “tough on illegal immigration.” Attorney General Janet Reno oversaw the implementation of Operation Gatekeeper, which increased border security and overhauled border enforcement strategies,⁶¹ and ultimately had the effect of increasing unauthorized immigration

⁵⁶ *Id.*

⁵⁷ California Proposition 187: Illegal Aliens. Ineligibility for Public Services. Verification and Reporting 51, 92 (1994), available at http://repository.uchastings.edu/ca_ballot_props/1104.

⁵⁸ *Id.* at 54; see also *id.* (“The federal government and the state government have been derelict in their duty to control our borders. It is the role of our government to end the benefits that draw people from around the world who ILLEGALLY enter our country. Our government actually entices them.”).

⁵⁹ See, e.g., Arthur Brice, *Immigration: One Candidate Grabs Issue: Buchanan Fears Dark Tide to Sink U.S.*, ATLANTA J. & CONST., Mar. 6, 1992, at B1 (quoting Pat Buchanan) (“Does this First World nation wish to become a Third World country? Because that is our destiny, if we do not build a sea wall against the waves of immigration rolling over our shores.”).

⁶⁰ See, e.g., 104 CONG. REC. 24,817 (1996) (statement of Rep. Newt Gingrich) (“[H]ow can any Member [of Congress] walk on this floor, deny the citizens of California the right to implement proposition 187, without expecting California to come right back here and ask for \$3 billion from the Federal Government annually to pay California for the cost of a Federal failure?”); Greg Krikorian & Dave Leshner, *Huffington Declares Support for Prop. 187*, L.A. TIMES, Oct. 21, 1994, at A1 (quoting Republican Senate candidate Mike Huffington) (“It’s time to send a message to those illegal immigrants who disregard our laws and take advantage of our government’s misplaced generosity. Equally important, it is high time we send a message to Washington. The taxpayers of California are sick and tired of paying for Washington’s federally imposed mandates while Washington ignores their federal responsibility at the border.”).

⁶¹ U.S. DEPT OF JUSTICE & OFFICE OF THE INSPECTOR GEN., OPERATION GATEKEEPER: AN INVESTIGATION INTO ALLEGATIONS OF FRAUD AND MISCONDUCT (1998), available at http://www.justice.gov/oig/special/9807/gkp01.htm#P203_31548.

as well as increasing its attendant deaths and injuries.⁶² Attorney General Reno also created the position of “border czar,” appointing U.S. Attorney Alan Bersin to the post in October 1995.⁶³ Finally, President Clinton signed into law the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, which contained a number of restrictive immigration provisions, including the three- and ten-year reentry bars currently in place.⁶⁴ The legislation came into effect just as section 245(i) was about to expire.

B. The Rise of the Reentry Bars and the Sunsetting of 245(i)

Congress had passed 245(i) as a temporary measure in 1994.⁶⁵ According to the Senate Appropriations Committee, requiring undocumented immigrants to go abroad in order to obtain an immigrant visa “was originally designed to dissuade aliens from circumventing normal visa requirements, [but] has not provided the intended deterrent effect and merely creates consular workload overseas.”⁶⁶ Persons seeking to adjust under 245(i) had to pay the “normal fee for adjustment of status, plus an additional fee”⁶⁷ that was originally \$650 and was later increased to \$1000 under IIRIRA.⁶⁸ Section 245(i) was set to expire in October 1997, but in November 1997 Congress extended

⁶² See Bill Ong Hing, *NAFTA, Globalization, and Mexican Migrants*, 5 J.L. ECON. & POL'Y 87, 131–32 (2009) (“Operation Gatekeeper has not stopped the flow of border crossers, but it has made crossing more dangerous. Gatekeeper and the increased militarizing of the border have ironically curtailed one thing: circularity. Mexican seasonal workers commonly traveled back and forth across the border because their families often remained in Mexico. But now the number of undocumented migrants who actually want to return to Mexico has been reduced. Given the difficulty in crossing into the United States, once many undocumented persons arrive, they remain to work and may even look for family members to join them. This has contributed to the increase in the undocumented population in the United States.”); see also MARIA JIMENEZ, ACLU OF SAN DIEGO & IMPERIAL CNTYS. & MEXICO'S NAT'L COMM'N OF HUMAN RIGHTS, HUMANITARIAN CRISIS: MIGRANT DEATHS AT THE U.S.-MEXICO BORDER 17 (2009) (reporting a low incidence of border-crossing deaths in 1994 (estimates vary from 0 to 23) and a steady increase after the implementation of Operation Gatekeeper (estimates vary from 329 to 827 in specific fiscal years)); U.S. BORDER PATROL, SOUTHWEST BORDER DEATHS BY FISCAL YEAR, available at <http://www.cbp.gov/sites/default/files/documents/U.S.%20Border%20Patrol%20Fiscal%20Year%20Statistics%20SWB%20Sector%20Deaths%20FY1998%20-%20FY2013.pdf> (demonstrating an increase in border deaths from 263 in 1998 to 445 in 2013—down only slightly from 477 in 2012).

⁶³ Sebastian Rotella, *Reno Names Prosecutor as “Border Czar”*, L.A. TIMES, Oct. 14, 1995, at A1.

⁶⁴ Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546 (codified as amended in scattered sections of 8 U.S.C. and 18 U.S.C.).

⁶⁵ ANDORRA BRUNO, CONG. RESEARCH SERV., RL31373, IMMIGRATION: ADJUSTMENT TO PERMANENT RESIDENT STATUS UNDER SECTION 245(i), at 1 (2002).

⁶⁶ S. REP. NO. 103-309, at 134 (1994).

⁶⁷ *Id.*

⁶⁸ BRUNO, *supra* note 65, at 3–4.

the deadline to January 14, 1998.⁶⁹ Notably, the Senate version of the legislation that extended the deadline included a permanent reinstatement of 245(i).⁷⁰

The enactment of 245(i) and, likely, its temporary duration, led to a significant increase in applications for adjustment of status. Prior to 1995, the government typically had approximately 120,000 pending applications for adjustment of status.⁷¹ By 1995, that number had jumped to 321,000.⁷² By the end of 1997, when 245(i) was close to expiring, the government had 699,000 pending applications for adjustment of status.⁷³ Although the government does not report how many of those applications were the result of approved spousal petitions by U.S. citizens for undocumented spouses, the government attributes the increase to 245(i).⁷⁴

The enactment of the three- and ten-year reentry bars in 1996 brought a new level of significance to the imminent expiration of 245(i). Prior to the enactment of 245(i), undocumented immigrant spouses of U.S. citizens merely faced the inconvenience of consular processing; now they would face a three- or ten-year bar to reentry as well. The expiration of 245(i) meant that undocumented immigrants whose U.S. citizen spouses submitted petitions for them after January 14, 1998 would be ineligible for adjustment of status and would need to apply for an immigrant visa abroad and petition for a waiver of the three- or ten-year bar. Not surprisingly, 1998 and 1999 saw a decrease in the number of applications for lawful permanent residence.⁷⁵

The numbers of applications filed increased again in 2001 when 245(i) was briefly reinstated as part of the Legal Immigration Family Equity Act of 2000.⁷⁶ The number of applications approved in 2001 was 653,259,⁷⁷ up from 442,405 in

⁶⁹ Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1998, Pub. L. No. 105-119, sec. 111 (a)-(b), §§ 245(i)(1), 506(c), 11 Stat. 2440, 2458 (1997) (codified as amended at 8 U.S.C. §§ 1255, 1182 (2012)).

⁷⁰ BRUNO, *supra* note 65, at 4.

⁷¹ IMMIGRATION & NATURALIZATION SERV., U.S. DEP'T OF JUSTICE, 1997 STATISTICAL YEARBOOK OF THE IMMIGRATION AND NATURALIZATION SERVICE 17 (1999).

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ IMMIGRATION & NATURALIZATION SERV., U.S. DEP'T OF JUSTICE, 1999 STATISTICAL YEARBOOK OF THE IMMIGRATION AND NATURALIZATION SERVICE 15 (2002).

⁷⁶ Legal Immigration Family Equity Act, Pub. L. No. 106-553, 114 Stat. 2762A-142 (2000); LIFE Act Amendments of 2000, Pub. L. No. 106-554, 114 Stat. 2763A-324.

⁷⁷ IMMIGRATION AND NATURALIZATION SERV., U.S. DEP'T OF JUSTICE, 2001 STATISTICAL YEARBOOK OF THE IMMIGRATION AND NATURALIZATION SERVICE 13 (2003).

2000.⁷⁸ Although, as noted above, the government does not report the underlying bases for the adjustment applications, a 2004 memo from the Associate Director of USCIS Operations provides USCIS personnel with guidance on dealing with “the significant increase in [petition] filings at Service Centers immediately preceding the April 30, 2001 sunset date contained in Section 245(i).”⁷⁹

One might safely assume, given the increase in petitions and applications for adjustment of status during periods when 245(i) was in effect, that many families co-headed by an undocumented immigrant spouse declined to pursue the legalization of the undocumented spouse when doing so would place the spouse in danger of being denied entry to the United States for many years. In fact, the number of families seeking provisional waivers since that option became available in March of 2013 gives some indication of how many U.S. families have been affected by the absence of 245(i): in the first seven months of the program, USCIS received nearly 24,000 applications for provisional waivers.⁸⁰

The next section will discuss whether IIRIRA’s reentry bars have served their intended purpose.

III. NINETEEN YEARS AFTER IIRIRA: TODAY’S IMMIGRATION LANDSCAPE

A number of facts indicate that IIRIRA has failed to achieve its primary goal of reducing unauthorized immigration to the United States and that the reentry bars serve only to make legalization more onerous for arguably some of the most deserving of undocumented immigrants: those married to U.S. citizens. First, the number of undocumented immigrants present in the United States has increased significantly since 1996, a response to economic factors that exist completely independently of any domestic immigration legislation. Second, states and localities are so dissatisfied with immigration law and enforcement that the United States has seen a resurgence of state attempts to punish or protect undocumented immigrants, depending on the culture and politics of the particular state. Finally, the United States is now home to an estimated

⁷⁸ IMMIGRATION & NATURALIZATION SERV., U.S. DEP’T OF JUSTICE, 2000 STATISTICAL YEARBOOK OF THE IMMIGRATION AND NATURALIZATION SERVICE 14 (2002).

⁷⁹ Interoffice Memorandum from Michael R. Yates, Assoc. Dir., USCIS Operations, to USCIS Reg’l Dirs. et al. (Apr. 22, 2004) (on file with the *Chapman Law Review*), available at <http://www.avlawoffice.com/YatesMemoPending1130.htm>.

⁸⁰ U.S. CITIZENSHIP & IMMIGRATION SERVS., QUESTIONS AND ANSWERS: USCIS MEETING WITH THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION (AILA) 3 (2013).

1.7 million undocumented immigrant children and young adults who did not enter the United States of their own volition but because their parents brought them;⁸¹ it would seem that the deterrent effect of IIRIRA's reentry bars have been particularly ineffective with respect to that group of undocumented immigrants.

A. The Fluctuating Rate of Illegal Immigration to the United States

IIRIRA was predicated on the theory that undocumented immigrants respond to deterrence and punitive measures, and that generous immigration provisions serve only to encourage unauthorized immigration. What was true in 1996, however, remains true today: economics is the principle driving force behind migration. Consequently, the rate of illegal immigration to the United States has continued to respond to economic factors rather than laws. As economist Gordon Hanson has stated:

Inflows of illegal immigrants tend to be highly sensitive to economic conditions, with inflows rising during periods when the U.S. economy is expanding and Mexico's is contracting. Examining month-to-month changes in apprehensions of illegal immigrants attempting to cross the U.S.-Mexico border reveals that when Mexican wages fall by 10 percent relative to U.S. wages, attempts at illegal entry increase by 6 percent. The responsiveness of illegal immigration to economic conditions is to be expected. These individuals come to the United States seeking work and their incentive to do so is strongest when the difference in job prospects on the two sides of the border is greatest. The illegal immigrant population is also quite mobile geographically within the United States. During the 1990s, U.S. job growth was strongest in mountain states and the southeast. These states also registered the largest percentage increases in the number of illegal immigrants.⁸²

Other prominent law and economics scholars concur that economics, more than any other factor, drives immigration. The research of Dean Kevin Johnson, Professor Bill Ong Hing, and others⁸³ conclusively demonstrates that "immigrants, generally

⁸¹ JEFFREY S. PASSEL & MARK HUGO LOPEZ, PEW HISPANIC CTR., UP TO 1.7 MILLION UNAUTHORIZED IMMIGRANT YOUTH MAY BENEFIT FROM NEW DEPORTATION RULES 3 (2012).

⁸² GORDON H. HANSON, THE ECONOMIC LOGIC OF ILLEGAL IMMIGRATION 12 (Council on Foreign Relations, Council Special Report No. 26, 2007).

⁸³ See generally Donald J. Boudreaux, *Some Basic Economics of Immigration*, 5 J.L. ECON. & POL'Y 199, 199-200 (2009); Hing, *supra* note 62 (examining the laws and economic factors on both sides of the Mexico/U.S. border that influence migration); Kevin R. Johnson, *It's the Economy, Stupid: The Hijacking of the Debate Over Immigration Reform by Monsters, Ghosts, and Goblins (or the War on Drugs, War on Terror, Narcoterrorists, Etc.)*, 13 CHAP. L. REV. 583, 587 (2010) ("[M]ost immigration is connected,

speaking, historically have been attracted by the economic opportunities that exist in this country.”⁸⁴ More than that, however, economics on both sides of the border—often created by economic policies that benefit the United States and harm its neighbors⁸⁵—are tremendous push and pull factors that create high demand for unauthorized migration.⁸⁶

Perhaps it is not surprising, then, that an immigration law regime focused on individual migrants rather than the economic conditions that drive migration has proven ineffective. The dissatisfaction with current immigration law is at its most intense in states and localities critical of federal efforts. The next section discusses state attempts to correct perceived flaws with federal immigration law and enforcement.

B. States’ Frustration with the Lack of Effective Immigration Laws

States and localities quickly became aware that IIRIRA, despite its sweeping provisions, was not living up to its potential. Some believe that the legislation itself is sufficient, but that the government is not effectively enforcing it; those states have

directly or indirectly, to labor migration of individuals and families and the relative economic opportunity in the United States.”); Douglas S. Massey et al., *An Evaluation of International Migration Theory: The North American Case*, 20 *POPULATION & DEV. REV.* 699, 710 (1994) (reviewing numerous migration studies and concluding that “the accumulated empirical evidence generally supports neoclassical theory’s fundamental proposition that immigration is tied to international differences in wage rates”).

⁸⁴ Johnson, *supra* note 83, at 601.

⁸⁵ See Hing, *supra* note 62, at 98–99 (explaining how the failure of NAFTA and the proliferation of U.S. farm subsidies have increased poverty rates in Mexico); *id.* (“For years, Mexico provided support to rural areas through systems of price supports for producers and reduced prices of agricultural products for consumers, but after NAFTA, Mexico withdrew this support. The United States, however, continued to produce subsidized corn in huge quantities at low prices, undercutting Mexico’s corn prices; this subsidized system displaced Mexican workers because corn was a major source of rural income. At best, the effects of NAFTA in Mexico have been uneven, especially in rural areas and among low-skilled groups that tend to migrate to the United States. The wages for low-wage workers have declined, and the rural poverty rate has increased. The idea of NAFTA-created jobs that would reduce pressure to migrate simply has not become a reality.”).

⁸⁶ See Douglas S. Massey, *Five Myths About Immigration: Common Misconceptions Underlying U.S. Border-Enforcement Policy*, *IMMIGR. POL’Y FOCUS*, Aug. 2005, at 1, 5–7 (“[H]ouseholds use international migration as a tool to overcome failed or missing markets at home. Mexico, in particular, lacks well-developed markets for insurance, capital, and credit . . . Mexico has virtually no mortgage banking industry.”); see also *Hearing Before the Subcomm. on Immigration and Claims of the H. Comm. on the Judiciary*, 104th Cong. 2 (1995) (statement of Barbara Jordan, Chair, U.S. Comm. on Immigration Reform) (“[W]e must face the fact that unilateral action on the part of the United States will never be enough to curb illegal immigration. Immigrants come here illegally from source countries where conditions prevail that encourage or even compel them to leave. Attacking the root causes of illegal migration is essential and will require international cooperation.”).

enacted laws that attempt to augment or effectuate the enforcement provisions of IIRIRA. Others find the current laws to be unreasonably and counterproductively harsh towards undocumented immigrants and seek to assure undocumented immigrants that they will enjoy some protections and benefits in those states. The National Conference of State Legislatures reports that since 2007, an average of 1300 state immigration-related bills are introduced per year and an average of 200 are enacted.⁸⁷ Both types of state laws send a similar message to the federal government: current immigration laws are not working.

1. The Restrictive Model

States seeking to fill a perceived federal inability to reduce unauthorized immigration to the United States have passed laws similar to California's Proposition 187 and other measures popular in the 1990s. Provisions include barring undocumented immigrants from eligibility for in-state tuition at public colleges and universities;⁸⁸ enforcing federal restrictions on the employment of undocumented immigrants;⁸⁹ requiring law

⁸⁷ ANN MORSE ET AL., NAT'L CONFERENCE OF STATE LEGISLATURES, 2013 IMMIGRATION REPORT 2 (2013).

⁸⁸ See, e.g., S. Con. Res. 1031, 47th Leg., 2d Reg. Sess., 2007 Ariz. Sess. Laws 1567, 1569 (prohibiting in-state tuition for undocumented students); S.B. 492, 149th Gen. Assemb., Reg. Sess., 2008 Ga. Laws 759, 761 (same); H.B. 1402, 117th Gen. Assemb., 1st Reg. Sess., 2011 Ind. Acts 2790, 2790 (same); H.B. 153, 129th Gen. Assemb., Reg. Sess., 2011 Ohio Laws 1436, 1438 (same); H.B. 4400, 117th Gen. Assemb., Reg. Sess., 2008 S.C. Acts 2325, 2354 (prohibiting undocumented students from attending public institutions of higher learning and from receiving in-state tuition).

⁸⁹ See, e.g., H.B. 56, 2011 Leg., Reg. Sess., 2011 Ala. Acts 888, 910–11 (requiring employers to comply with E-Verify, a federal system for ascertaining employment authorization); H.B. 2779, 48th Leg., 1st Reg. Sess., 2007 Ariz. Sess. Laws 1312, 1313 (prohibiting employers from employing immigrants unauthorized to work in the United States); H.B. 1343, 65th Gen. Assemb., 2d Reg. Sess., 2006 Colo. Sess. Laws 1694, 1695 (prohibiting state agencies from entering into contract agreements with contractors who knowingly employ unauthorized immigrants); Fla. Exec. Order No. 11-116 (May 27, 2011) (requiring state agencies as well as contractors and subcontractors who have contracts "for the provision of goods or services to the state in excess of nominal value" to use E-Verify); H.B. 2, 150th Gen. Assemb., Reg. Sess., 2009 Ga. Laws 970, 971 (requiring public employers to use E-Verify); H.B. 87, 151st Gen. Assemb., Reg. Sess., 2011 Ga. Laws 794, 808 (requiring certain private employers to use E-Verify); Idaho Exec. Order No. 2009-10 (May 29, 2009) (requiring companies with state contracts to verify the employment authorization of their workers); S.B. 590, 117th Gen. Assemb., 1st Reg. Sess., 2011 Ind. Acts 1926, 1959–62 (requiring state agencies, political subdivisions, contractors with public contracts, and certain business entities to use E-Verify); H.B. 646, 2011 Leg., Reg. Sess., 2011 La. Acts 2046, 2046–47 (requiring all private businesses to use E-Verify or maintain records of proof of eligibility to work in the United States); H.B. 5365, 96th Leg., Reg. Sess. (Mich. 2012) (requiring contractors and subcontractors working on certain state transportation projects to use E-Verify); S.B. 2988, 2008 Leg., Reg. Sess., 2008 Miss. Laws 386, 387 (requiring public and private employers to use E-Verify); H.B. 1549, 94th Gen. Assemb., 2d Reg. Sess., 2008 Mo. Laws 291, 296–97 (requiring public agencies, contractors, and subcontractors to use E-Verify); L.B. 403, 101st Leg., 1st Sess., 2009 Neb.

enforcement officers to attempt to ascertain the immigration status of individuals involved in a lawful stop;⁹⁰ penalizing the harboring and transporting of undocumented immigrants, without exceptions for mixed-status family members who live and travel together;⁹¹ and imposing penalties on employers who hire undocumented immigrants and property owners who rent to them.⁹²

The National Conference of State Legislatures reports that, presumably in response to the negative reception punitive

Laws 788, 789 (requiring all public employers and contractors to use E-Verify); H.B. 36, 2011 Gen. Assemb., Reg. Sess., 2011 N.C. Sess. Laws 975, 976–78 (requiring private employers to use E-Verify and requiring public employers to comply with federal employment authorization verification requirements); H.B. 1804, 51st Leg., 1st Reg. Sess., 2007 Okla. Sess. Laws 545, 549 (requiring public employers, contractors, and subcontractors to use E-Verify); S.B. 637, 2012 Gen. Assemb., Reg. Sess., 2012 Pa. Laws 1086, 1086 (requiring public contractors and subcontractors to use E-Verify); H.B. 4400, 117th Gen. Assemb., Reg. Sess., 2008 S.C. Acts 2325, 2331–34 (requiring public and certain private employers to use E-Verify); H.B. 1378, 107th Gen. Assemb., Reg. Sess. (Tenn. 2011) (requiring employers to use E-Verify); S.B. 81, 57th Leg., Gen. Sess., 2008 Utah Laws 746, 750–51 (requiring public employers to use E-Verify); S.B. 251, 58th Leg., Gen. Sess., 2010 Utah Laws 2733, 2733–34 (requiring private employers to use E-Verify); H.B. 737, 2010 Gen. Assemb., Reg. Sess., 2010 Va. Acts 1144, 1144 (requiring state agencies to use E-Verify); S.B. 659, 80th Leg., Reg. Sess. (W. Va. 2012) (requiring use of E-Verify for new employees working on the premises of the Capitol Complex).

⁹⁰ See, e.g., ARIZ. REV. STAT. ANN. § 11-1051(B) (2014) (West) (requiring law enforcement officers making a lawful stop, detention, or arrest to make a reasonable attempt to determine the immigration status of the person if reasonable suspicion exists that the person is unlawfully present in the United States); GA. CODE ANN. § 17-5-100(b) (2014) (requiring law enforcement officers investigating a criminal suspect to seek to verify the suspect's immigration status if the suspect is unable to provide proof of lawful status); S.C. CODE ANN. § 17-13-170(A) (2013) (requiring law enforcement officers making a lawful stop, detention, or arrest to make a reasonable attempt to determine the immigration status of the person if reasonable suspicion exists that the person is unlawfully present in the United States).

⁹¹ See, e.g., OKLA. STAT. tit. 21, § 446(A)–(B) (2014) (making it a criminal offense “for any person to transport, move, or attempt to transport in the State of Oklahoma any alien knowing or in reckless disregard of the fact that the alien has come to, entered, or remained in the United States in violation of law,” or to “conceal, harbor, or shelter from detection any alien in any place within the State of Oklahoma, including any building or means of transportation, knowing or in reckless disregard of the fact that the alien has come to, entered, or remained in the United States in violation of law”); GA. CODE ANN. §§ 16-11-200, -201 (2014) (subjecting to criminal penalties a person who “knowingly and intentionally transports or moves an illegal alien in a motor vehicle for the purpose of furthering the illegal presence of the alien,” or who “knowingly conceals, harbors, or shields an illegal alien from detection in any place in [Georgia], including any building or means of transportation, when such person knows that the person being concealed, harbored, or shielded is an illegal alien”).

⁹² See, e.g., Act of June 9, 2011, No. 535, § 13(a)(4), 2011 Ala. Acts 888, 907 (repealed 2012) (criminalizing the renting of dwelling units to unlawfully present immigrants); Hazleton, Pa., Ordinance 2006–10 § 5(A) (July 13, 2006) (criminalizing entering into rental agreements with unlawfully present immigrants), *invalidated by Lozano v. City of Hazleton*, 724 F.3d 297 (3d. Cir. 2013); Farmers Branch, Tex., Ordinance 2903 § 3(B)(f) (Jan. 22, 2007) (criminalizing entering into rental agreements with unlawfully present immigrants), *invalidated by Villas at Parkside v. City of Farmers Branch*, 701 F. Supp. 2d 835 (N.D. Tex. 2010), *aff'd*, 726 F.3d 524 (5th Cir. 2013) (en banc).

legislation has had in the federal courts,⁹³ coupled with the implementation of the executive program known as Deferred Action for Childhood Arrivals,⁹⁴ state immigration legislation since 2012 has shifted its focus away from enforcement and towards protections and benefits for undocumented immigrants.⁹⁵

2. The Humanitarian Model

In direct contrast to the states that have passed the measures discussed above, other states have passed laws extending benefits to undocumented immigrants and protecting them from certain forms of immigration enforcement. Provisions include authorizing in-state tuition for undocumented immigrants;⁹⁶ extending eligibility for driver's licenses to undocumented immigrants;⁹⁷ allowing undocumented immigrants to practice law;⁹⁸ and prohibiting state law enforcement officers from engaging in certain enforcement

⁹³ See, e.g., *Arizona v. United States*, 132 S. Ct. 2492, 2503–07 (2012) (upholding the invalidation of key provisions of S.B. 1040, including section 5(C), which criminalized unlawful presence, and section 6, which authorized the warrantless arrest of lawfully present noncitizens where probable cause existed that they had committed a deportable offense).

⁹⁴ See Memorandum from Janet Napolitano, Sec'y, U.S. Dep't of Homeland Sec., to David V. Aguilar, Acting Comm'r, U.S. Customs & Border Prot., Alejandro Mayorkas, Dir., U.S. Citizenship & Immigration Servs., and John Morton, Dir., U.S. Immigration & Customs Enforcement (June 15, 2012) [hereinafter Janet Napolitano Memo], available at <http://www.ice.gov/doclib/about/offices/ero/pdf/s1-certain-young-people.pdf> (instituting Deferred Action for Childhood Arrivals).

⁹⁵ MORSE ET AL., *supra* note 87, at 1.

⁹⁶ See *Table One: State Laws Allowing Undocumented College Students to Establish Residency, 2014*, U. HOUS. L. CENTER, <http://www.law.uh.edu/ihelg/documents/Statute-TableOne.html> (last visited Sept. 24, 2014) (reporting that the following states currently allow undocumented immigrants to pay in-state tuition: Texas, California, Utah, New York, Washington, Illinois, Kansas, New Mexico, Nebraska, Maryland, Connecticut, Rhode Island, Oregon, Colorado, Hawaii, Minnesota, New Jersey, and Florida).

⁹⁷ See TANYA BRODER ET AL., NAT'L IMMIGRATION LAW CTR., INCLUSIVE POLICIES ADVANCE DRAMATICALLY IN THE STATES: IMMIGRANTS' ACCESS TO DRIVER'S LICENSES, HIGHER EDUCATION, WORKERS' RIGHTS, AND COMMUNITY POLICING 4 map (2013), available at <http://www.nilc.org/document.html?id=963> (reporting that Washington, Oregon, California, Nevada, Utah, Colorado, New Mexico, Illinois, Vermont, Connecticut, Maryland, the District of Columbia, and Puerto Rico provide access to driver's licenses regardless of immigration status, and that Kansas, Minnesota, Iowa, Indiana, Wisconsin, Kentucky, Florida, Pennsylvania, New York, Massachusetts, New Jersey, and Rhode Island are considering doing so).

⁹⁸ See CAL. BUS. & PROF. CODE § 6064 (West 2014) (authorizing bar admission for unlawfully present immigrants in California); FLA. STAT. § 454.021 (2014) (authorizing bar admission for undocumented immigrants in Florida who meet certain requirements); S.B. 7879, 237th Leg., Reg. Sess. (N.Y. 2014) (proposing that undocumented immigrants be admitted to law practice in New York); see also Wendi Adelson, *Lawfully Present Lawyers*, 18 CHAP. L. REV. 387 (2015) (explaining the federal prohibition on issuing professional licenses to undocumented immigrants absent specific authorization by state law, and discussing the effect of Deferred Action for Childhood Arrivals on undocumented DACA-eligible law school graduates).

activities, such as detaining immigrants arrested for minor crimes beyond the time at which they become eligible for release in order to turn them over to federal immigration authorities.⁹⁹

States that have adopted the humanitarian model recognize that punitive measures targeting undocumented immigrants will have little, if any, effect on the rate of unauthorized immigration. In fact, nearly two million of today's undocumented immigrants are children and young adults who never had a choice about coming to the United States.¹⁰⁰ They arrived with their families as children, grew up here, attended school here, and know no other life.¹⁰¹ The reentry bars and absence of 245(i) are particularly punitive and ineffective with respect to that group of undocumented immigrants.

C. A Generation of DREAMers

One important difference between the undocumented population in 1996 and the undocumented population of today is the presence of a generation of children and young adults who have grown up in the United States but have had no opportunity to legalize. For the estimated 1.8 million "unauthorized Americans" in the United States, there is no legalization eligibility as there was for earlier unauthorized entrants under previous immigrant statutes.¹⁰² They are thus in the unenviable

⁹⁹ See, e.g., CAL. GOV'T CODE §§ 7282, 7282.5 (West 2014) (prohibiting California law enforcement officials from detaining an individual on the basis of an Immigration and Customs Enforcement ("ICE") hold after that individual becomes eligible for release from custody, unless, at the time that the individual becomes eligible for release from custody, certain conditions are met, including, among other things, that the individual has been convicted of specified crimes); CONN. GEN. STAT. § 54-192h (2014) (prohibiting Connecticut law enforcement officials from: holding an individual beyond the time when such individual would otherwise be released from custody; notifying federal immigration authorities of such individual's release; or facilitating the individual's transfer to ICE, unless certain conditions apply; and prohibiting an ICE hold of more than twenty-four hours under any circumstances); see also, Carrie L. Rosenbaum, *The Role of Equality Principles in Preemption Analysis of Sub-federal Immigration Laws: The California TRUST Act*, 18 CHAP. L. REV. 481 (2015) (providing an in-depth analysis of California's and Connecticut's TRUST Acts, cited above).

¹⁰⁰ See IMMIGRATION POLICY CTR., WHO AND WHERE THE DREAMERS ARE, REVISED ESTIMATES: A DEMOGRAPHIC PROFILE OF IMMIGRANTS WHO MIGHT BENEFIT FROM THE OBAMA ADMINISTRATION'S DEFERRED ACTION INITIATIVE 1 (2012), available at http://www.immigrationpolicy.org/sites/default/files/docs/who_and_where_the_dreamers_a_re_two.pdf (estimating that 1.8 million undocumented immigrants meet the requirements for Deferred Action for Childhood Arrivals, which mirrors the requirements of the DREAM Act: that the immigrant be under the age of thirty-one, have entered the United States before age sixteen, have lived continuously in the country for at least five years, have not been convicted of certain crimes, and be currently in school, have graduated from high school, have earned a GED, or have served in the military).

¹⁰¹ Janet Napolitano Memorandum, *supra* note 94, at 1.

¹⁰² See, e.g., Immigration and Nationality Act § 249, 8 U.S.C. § 1259 (2012) (permitting qualified persons who have resided continuously in the United States since 1972 to apply for lawful permanent residency); Immigration Reform and Control Act,

position of having grown up socially as Americans but being rejected legally as Americans.

These young undocumented immigrants are known as “DREAMers,” a moniker reflecting their aspiration to qualify for relief under the as yet unenacted Development, Relief and Education for Alien Minors Act.¹⁰³ They have grown up and been educated in the United States, and thus absorbed U.S. culture to the same degree as their legally present and U.S.-born peers.¹⁰⁴ Despite their loyalty to the United States, dedication to the democratic process, and courageous efforts to effect legislative change, legalization remains elusive.¹⁰⁵

Many DREAMers are members of “mixed-status” families, in which at least one member is undocumented and one member is a U.S. citizen or lawfully present immigrant.¹⁰⁶ Their relationship to a U.S. citizen or legally present immigrant, however, does not afford them the ability to apply for adjustment of status in the United States. Even though they did not, as minor children, have the mens rea to effect an illegal entry into

8 U.S.C. § 1182 (permitting qualified persons who had resided continuously in the United States since prior to January 1, 1982 to apply for lawful permanent residency); Nicaraguan Adjustment and Central American Relief Act, Pub. L. No. 105-100, 111 Stat. 2193 (1997) (permitting qualified Central Americans and citizens of former Soviet States to apply for adjustment of status, suspension of deportation, or cancellation of removal).

¹⁰³ S. 3992, 111th Cong. § 1 (2010); see Michael A. Olivas, *Dreams Deferred: Deferred Action, Prosecutorial Discretion, and the Vexing Case(s) of DREAM Act Students*, 21 WM. & MARY BILL RTS. J. 463, 463 (2012) (chronicling the most recent failed attempts to pass the DREAM Act, which has been introduced in Congress almost annually since 2001).

¹⁰⁴ See Michael A. Olivas, *The Political Efficacy of Plyler v. Doe*, 45 U.C. DAVIS L. REV. 1, 13 (2011) (“[T]he undocumented have every incentive to remain in the United States, to adjust their status through formal or discretionary means, and to contribute to the U.S. economy and polity. My own experiences over the years with these students have shown them to be extremely loyal to the United States. Despite their undocumented status, most are more Americanized than are many native born students. They believe in the immigrant success story, having lived it in most instances . . .”).

¹⁰⁵ See Nataly Tavidian, *Students Rally for DREAM Act Passage*, 89.3 KPCC (Sept. 21, 2010), <http://www.scpr.org/news/2010/09/21/19419/students-rally-dream-act-passage/> (reporting that dozens of undocumented students spoke at a September 2010 rally in Los Angeles, urging federal lawmakers to pass the DREAM Act); Jason Linkins, *DREAM Act Rally in Tucson: Four Detained*, HUFFINGTON POST (May 25, 2011, 4:30 PM), http://www.huffingtonpost.com/2010/05/18/dream-act-rally-in-tucson_n_580733.html (reporting that in May 2010, a group of Arizona undocumented students led a sit-in at the offices of Senator John McCain to urge him to support the DREAM Act); *Young Illegal Immigrants Rally in Downtown L.A. to Support Dream Act*, L.A. NOW (June 15, 2012, 11:10 AM), <http://latimesblogs.latimes.com/lanow/2012/06/young-illegal-immigrants-rally-in-downtown-la-to-support-dream-act.html> (reporting that in June 2012, DREAMers rallied in Los Angeles to support the DREAM Act and President Barack Obama’s decision to halt removal proceedings and deportations of DREAM Act-eligible immigrants).

¹⁰⁶ See PAUL TAYLOR ET AL., PEW HISPANIC CTR., UNAUTHORIZED IMMIGRANTS: LENGTHS OF RESIDENCY, PATTERNS OF PARENTHOOD 6 (2011) (estimating that 9 million people are members of mixed status families, and that 400,000 undocumented immigrant children have U.S. citizen siblings).

the United States, the law does not provide an exception for minors; they are thus ineligible to apply for adjustment of status in the United States. Moreover, they began accumulating unlawful presence the day after they turned eighteen¹⁰⁷ and are consequently subject to the three- and ten-year bars once they depart the United States.

Considering the significant increase in unauthorized immigration since the enactment of IIRIRA, the states' disapproval of current immigration law and enforcement, and the growing number of fully acculturated but nevertheless undocumented children and young adults, it seems reasonable to conclude that IIRIRA has not achieved its goals and is particularly ineffective with respect to today's generation of undocumented immigrants. This realization should encourage a sea change in immigration law and policy, but that does not seem to be forthcoming. At the very least, however, the law should be amended to respect the fundamental life choices of U.S. citizens.

IV. 245(i) SHOULD BE PERMANENTLY REINSTATED

Despite the obvious failure of current immigration law, comprehensive immigration reform is not on the horizon. It is possible for reform to occur piecemeal, which might be the preferable way to proceed given the vast ignorance surrounding immigration and the resulting "emotionalization" of what is, in the end, primarily an economic issue. If true comprehensive immigration reform remains elusive, and legislators and policymakers single out discrete areas of immigration law for reform, permanently reinstating 245(i) should be the priority. Other niche areas of immigration law are also in dire need of reform, such as asylum (especially the one-year deadline)¹⁰⁸ and detention (particularly of children, families, and asylum seekers).¹⁰⁹ The reentry bars, however, stand out as provisions that disproportionately impact the United States' closest neighbors and interfere with the fundamental life choices of U.S. citizens, and in the end are not an effective deterrent for

¹⁰⁷ Immigration and Nationality Act § 212, 8 U.S.C. § 1182(a)(9)(B)(iii)-(iv).

¹⁰⁸ See 8 U.S.C. § 1158(a)(2)(B) (requiring applicants for asylum to file within one year of entering the United States); see also Philip G. Schrag & Michelle R. Pistone, *The New Asylum Rule: Not Yet a Model of Fair Procedure*, 11 GEO. IMMIGR. L.J. 267, 268 (1997) (criticizing the one-year deadline, among other changes that IIRIRA made to the asylum process).

¹⁰⁹ See 8 U.S.C. § 1225(b)(1)(B)(iii)(IV) (mandating the detention of asylum applicants apprehended at a port of entry); 8 U.S.C. § 1226(c) (mandating the detention of certain noncitizens convicted of deportable crimes); see also LEADERSHIP CONFERENCE ON CIVIL RIGHTS EDUC. FUND & AM. BAR ASS'N COMM'N ON IMMIGRATION, AMERICAN JUSTICE THROUGH IMMIGRANTS' EYES 59 (2004) (criticizing mandatory detention laws).

marriage fraud or unauthorized immigration. Reinstating 245(i) is a simple solution to a problem of significant proportions for many U.S. citizens and their families.¹¹⁰

A. The Reentry Bars Target Undocumented Immigrants but Ignore Visa Violators, Disproportionately Affecting U.S. Citizen Family Members of Mexican and Central American Immigrants

There are two ways in which an immigrant may fall into the status of “undocumented”: by entering the United States without inspection, or by overstaying a visa. Approximately fifty-five percent of undocumented immigrants entered the United States without inspection; the remaining forty-five percent have overstayed a visa.¹¹¹ Despite the fact that undocumented immigrants who entered without inspection do not form an overwhelming percentage of the undocumented population, they are overwhelmingly prejudiced by the reentry bars and the unavailability of 245(i).

As discussed at length above, the reentry bars only apply to those noncitizens who do not apply for adjustment of status in the United States but rather seek an immigrant visa through consular processing abroad.¹¹² The prohibition on adjusting status in the United States only applies to applicants who did not effect a legal entry into the United States. If an undocumented immigrant entered legally, overstayed her or his visa by any length of time, and even worked and continues to work without authorization, she or he is nevertheless eligible to adjust her or his status in the United States as the beneficiary of a spousal petition filed by a U.S. citizen.¹¹³

The law’s targeting of noncitizens who entered the United States without inspection has a disparate negative impact on Latinos and persons of lower socioeconomic status. First, most entries without inspection are occurring at the U.S. border with Mexico, predominantly by Mexicans and Central Americans.¹¹⁴

¹¹⁰ See U.S. CITIZENSHIP & IMMIGRATION SERVS., *supra* note 80, at 3 and accompanying text (indicating that at least 24,000 families are currently affected by the unavailability of 245(i)).

¹¹¹ PEW HISPANIC CTR., *MODES OF ENTRY FOR THE UNAUTHORIZED MIGRANT POPULATION 1* (2006); *see also id.* at 2 (“[T]he annual flow of new unauthorized migrants is almost evenly divided between those who enter legally and those who do not.”).

¹¹² See 8 U.S.C. § 1255(a) (rendering aliens who entered without inspection ineligible for adjustment of status); 8 U.S.C. § 1182(a)(6)(A) (rendering aliens who entered without inspection inadmissible).

¹¹³ See 8 U.S.C. § 1255(a) (authorizing aliens who were inspected and admitted into the United States to apply for adjustment of status); 8 U.S.C. § 1255(c) (exempting immediate relatives of U.S. citizens from ineligibility for adjustment based on unlawful presence or unauthorized employment).

¹¹⁴ See PEW HISPANIC CTR., *supra* note 111, at 4.

Second, in order to obtain a nonimmigrant visa to the United States, the applicant must provide a travel itinerary, demonstrate financial ability to make the trip, and provide assurance (such as proof of employment) that she or he intends to return to the home country.¹¹⁵ Thus, a foreign national who is employed and can afford a trip for pleasure to the United States can secure a visa, overstay for decades, and never be subject to the reentry bars; but a working-class Mexican or Central American who arrived without inspection will be ineligible for adjustment of status and subject to the reentry bars, despite the fact that her or his U.S. citizen spouse is responsible for ensuring that she or he does not become a public charge.¹¹⁶

This seems particularly unjust with respect to the DREAMer population, many of whom did not choose to come to the United States and others of whom were compelled by desire to be with parents and siblings.¹¹⁷ While many visa overstays conceivably had the intent to remain in the United States at the time they applied for their visas, many DREAMers never had or acted upon an intent to deceive U.S. immigration or consular officials; and yet it is the DREAMer, not the visa overstay, who is subject to the reentry bars.

Above all, the reentry bars and unavailability of 245(i) have a harsh impact on U.S. citizens. The undocumented immigrant who faces the possibility of a three- or ten-year bar to reentry is an illegally present alien in the eyes of the law, but is a husband or wife to a U.S. citizen and a mother or father to U.S. citizen children. Thus, for every one undocumented immigrant who is ineligible for adjustment of status, there is an entire family of U.S. citizens who must live with the stress, expense, upheaval, and uncertainty that the reentry bars create. There is a strong argument that such interference with fundamental life choices violates the Constitution.

¹¹⁵ *Visitor Visa*, U.S. VISAS, <http://travel.state.gov/content/visas/english/visit/visitor.html#documentation> (last visited Sept. 25, 2014).

¹¹⁶ See 8 U.S.C. § 1183a(a)(1), (3) (contractually obligating sponsors of aliens "to provide support to maintain the sponsored alien at an annual income that is not less than 125 percent of the Federal poverty line" for forty quarters).

¹¹⁷ See WILLIAM PEREZ, *WE ARE AMERICANS: UNDOCUMENTED STUDENTS PURSUING THE AMERICAN DREAM*, at xviii (2009) (noting that most DREAMers were brought to the United States as infants).

B. The Reentry Bars and Unavailability of 245(i) Are Inconsistent with the Due Process Clause Right to Marry, Establish a Home, and Raise Children

The three- and ten-year bars, combined with the unavailability of 245(i), constitute a significant imposition on a U.S. citizen's right to marry. The laws in effect dictate to a U.S. citizen who chooses to marry an undocumented immigrant that the U.S. citizen must be prepared to live outside the United States or endure a painful separation if a waiver of the reentry bars is not available. The only alternative to expatriation or separation is living in a mixed-status situation, with the U.S. citizen spouse and children enduring the precariousness, stress, and financial consequences attendant to undocumented status. Although a full discourse on the right to marry is beyond the scope of this Article, a brief discussion illuminates the questionable nature of the reentry bars with respect to that issue.¹¹⁸

Challenges to laws and regulatory schemes involving marriage arise in many contexts and take various forms. Generally, they range from cases in which marital status dictates an individual's or family's rights to some form of public benefit,¹¹⁹ to those in which an individual's or couple's right to marry is at issue.¹²⁰ If the law, regulation, or policy does not directly and substantially interfere with the right to marry, courts apply rational basis review, evaluating whether it is rationally related to a legitimate governmental interest.¹²¹

Cases typically evaluated under rational basis review involve the termination of benefits or employment because of

¹¹⁸ For an in-depth discussion of the erosion of the right to marriage and family as a result of Congress's plenary power over immigration, see Linda Kelly, *Preserving the Fundamental Right to Family Unity: Championing Notions of Social Contract and Community Ties in the Battle of Plenary Power Versus Aliens' Rights*, 41 VILL. L. REV. 725 (1996).

¹¹⁹ See, e.g., *Califano v. Jobst*, 434 U.S. 47 (1977) (addressing the question of whether Congress has the power to require that a dependent child's social security benefits terminate upon marriage even though he is permanently disabled).

¹²⁰ See, e.g., *Loving v. Virginia*, 388 U.S. 1 (1967) (addressing the constitutionality of anti-miscegenation laws).

¹²¹ See, e.g., *Califano*, 434 U.S. 47 (applying rational basis review to the question of whether Congress has the power to require that a dependent child's social security benefits terminate upon marriage even though he is permanently disabled); *Smith v. Shalala*, 5 F.3d 235 (7th Cir. 1993) (applying rational basis review to the question of whether a statute conferring marriage onto unmarried cohabitants for purposes of determining whether they are eligible for disability benefits violates their freedom to choose to marry); *Bautista v. Cnty. of L.A.*, 118 Cal. Rptr. 3d 714 (Cal. Ct. App. 2010) (applying rational basis review to the issue of whether termination pursuant to a policy prohibiting police officers from personally associating with suspects or known criminals violated the plaintiffs' right to intimate association).

marriage: the legislature or employer has not prohibited marriage, but the law or policy substantially impacts the decision to marry by disadvantaging certain married couples. Examples include anti-nepotism policies, which place restrictions on spouses working for the same employer,¹²² and the denial of certain public benefits upon marriage.¹²³ Courts have routinely found that such laws and policies are rationally related to legitimate interests and thus reside within constitutional bounds.¹²⁴

The Supreme Court took a very different approach when it examined a statute that impacted a family's ability to reside together. In *Moore v. City of East Cleveland*,¹²⁵ the Supreme Court struck down a municipal code that prohibited certain family members from living together in a single dwelling. The Court cautioned that "when the government intrudes on choices concerning family living arrangements, this Court must examine carefully the importance of the governmental interests advanced and the extent to which they are served by the challenged regulation."¹²⁶ The Court found that the ordinance served "marginally, at best," the concededly legitimate governmental interests of "preventing overcrowding, minimizing traffic and

¹²² See, e.g., *Parks v. City of Warner Robins, Ga.*, 43 F.3d 609 (11th Cir. 1995) (applying rational basis review in evaluating the constitutionality of a policy prohibiting relatives of city employees in a supervisory position from working in the same department); *Waters v. Gaston Cnty., N.C.*, 57 F.3d 422 (4th Cir. 1995) (applying rational basis review in evaluating the constitutionality of a policy prohibiting spouses from working in the same department); *Montgomery v. Carr*, 101 F.3d 1117 (6th Cir. 1996) (applying rational basis review in evaluating the constitutionality of a policy prohibiting married teachers from working at the same school).

¹²³ See, e.g., *Califano*, 434 U.S. 47 (applying rational basis review to the question of whether Congress has the power to require that a dependent child's social security benefits terminate upon marriage even though he is permanently disabled); *Shalala*, 5 F.3d 235 (applying rational basis review to the question of whether a statute conferring marriage onto unmarried cohabitants for purposes of determining whether they are eligible for disability benefits violates their freedom to choose to marry).

¹²⁴ See, e.g., *Califano*, 434 U.S. at 58 (upholding the termination of a dependent child's social security benefits upon marriage even though he was permanently disabled); *Shalala*, 5 F.3d at 240 (upholding a statute conferring marriage onto unmarried cohabitants for purposes of determining whether they are eligible for disability benefits); *Bautista*, 118 Cal. Rptr. 3d at 720-21 (upholding the termination of a police officer after his marriage to a prostitute, finding that a policy prohibiting police officers from personally associating with suspects or known criminals did not interfere with the right to marry); *Parks*, 43 F.3d at 618 (upholding a policy prohibiting relatives of city employees in a supervisory position from working in the same department); *Waters*, 57 F.3d at 427 (upholding a policy prohibiting spouses from working in the same department); *Montgomery*, 101 F.3d at 1118 (upholding a policy prohibiting married teachers from working at the same school).

¹²⁵ *Moore v. City of E. Cleveland, Ohio*, 431 U.S. 494 (1977).

¹²⁶ *Id.* at 499.

parking congestion, and avoiding an undue financial burden on East Cleveland's school system."¹²⁷

The situation created by ineligibility for adjustment of status and subjection to the reentry bars is more analogous to the *Moore* case than to those dealing with employment and benefits. The laws intrude on choices concerning family living arrangements by forcing U.S. citizens either to live apart from their undocumented family members or to leave their rightful country and live abroad. As discussed in other parts of this Article,¹²⁸ the laws serve marginally, at best, the government interests of deterring and punishing unauthorized immigration. Thus, although the laws do not specifically prohibit certain family relationships or living arrangements, the impact the laws have on mixed-status families is severe and unmitigated by furtherance of government interests.

C. The Reentry Bars Do Not Deter Illegal Immigration, nor Would the Reinstatement of 245(i) Encourage Illegality

A final reason for reinstating 245(i) is that its absence has proven not to be an effective deterrent against illegal immigration. As discussed at length above, migration patterns rarely respond to laws but almost always respond to economics. In the case of the United States and the countries from which the majority of undocumented immigrants hail, there is the additional factor of family unification immigrants, or those who entered not in response to economic factors but because they were brought or sent for by their families as infants and young children.

Immigration statistics since the 1996 promulgation of the reentry bars demonstrate their inefficacy. In 1996, the Immigration and Naturalization Service estimated that 5 million undocumented immigrants resided in the United States.¹²⁹ Today, that number has grown to over 11 million.¹³⁰ Fluctuations within that time period track economic conditions on both sides of the Mexico/U.S. border.¹³¹

¹²⁷ *Id.* at 499–500.

¹²⁸ See *supra* Parts IV.A, IV.C, and *infra* Part V.C.

¹²⁹ IMMIGRATION & NATURALIZATION SERV., *supra* note 71, at 199.

¹³⁰ MICHAEL HOEFER ET AL., OFFICE OF IMMIGRATION STATISTICS, U.S. DEP'T OF HOMELAND SEC., ESTIMATES OF THE UNAUTHORIZED POPULATION RESIDING IN THE UNITED STATES: JANUARY 2011, at 1 (2012).

¹³¹ See HANS JOHNSON & LAURA HILL, PUB. POLICY INST. OF CAL., ILLEGAL IMMIGRATION fig.2 (2011), available at http://www.ppic.org/content/pubs/atissue/AI_711HJAI.pdf (providing graphical illustration of the correlation between U.S. economic conditions and unauthorized immigration).

Despite the proven inefficacy of the reentry bars as a deterrent against illegal immigration, opponents of reinstating 245(i) argue that it rewards lawbreakers and encourages illegal immigration.¹³² This argument contains several flaws. First, the vast majority of undocumented immigrants did not enter the United States with the intention of marrying U.S. citizens; in fact, many are married to non-U.S. citizens. Rather, they entered the United States to work. It is therefore unlikely that the United States' policy regarding the adjustment of status of undocumented immigrants married to U.S. citizens has much, if any, impact on migration patterns.

Second, the argument disregards the fact that the punishment—if punishment were even a legitimate concern in the area of immigration—is inflicted on U.S. citizen family members at least to the same degree as the undocumented immigrant.¹³³ It is the U.S. citizen who is denied the ability to live with the spouse of her or his choice in her or his rightful country. If such a denial of basic rights were at least effective, the flaw in this argument might be overlooked. Viewed in the context of the law's indisputable inefficacy, however, the disregard for U.S. citizens' fundamental life choices is insupportable.¹³⁴

Finally, as intimated above, immigration laws intended to punish economic migrants are inherently flawed. They represent an emotional response to a situation that, albeit emotional in many respects, was born of and is powered by economics.¹³⁵ In essence, laws such as the reentry bars attempt to send a message to persons who entered or are considering entering the United States illegally: if you break the law to come to the United States, there will be consequences. But economics are sending much louder and more powerful messages to those same immigrants or intending immigrants: the United States desperately needs your labor; your home country cannot pay you a living wage for your labor; you will be better able to feed, clothe, and educate your children if you come to the United States. Technical laws such as

¹³² See, e.g., 147 CONG. REC. 16,715 (2001) (“[W]e are, for hundreds of thousands of people, going to be basically granting them the right to amnesty without going to their home country to legalize their status. This does nothing but encourage the millions, and we are talking about tens of millions, of people who are standing in line throughout the world waiting to come into this country legally so they can become citizens; but we have done nothing but encourage them to come here illegally, to reward the law-breakers, and to punish those people who are following the law.”).

¹³³ See *supra* Parts I.C, IV.B (discussing the impact of the reentry bars on U.S. citizens).

¹³⁴ See *supra* Part III.A (discussing the inefficacy of the reentry bars with respect to decreasing illegal immigration).

¹³⁵ See *supra* Part III.A (discussing the economics of immigration).

the reentry bars, even if intending immigrants knew of them and understood their effects, are irrelevant in the face of such messages. To impose them as a punishment serves only to assuage those unable or unwilling to understand what actually compels indigent foreign nationals to migrate.

CONCLUSION

Sufficient time has passed since the sunset of 245(i) for lawmakers to accept the fact that the reentry bars and inability of certain undocumented immigrants to apply for adjustment of status in the United States have not curtailed illegal immigration. During that time, the burden that the reentry bars place on U.S. citizen family members of undocumented immigrants has become apparent. As violence has escalated in northern Mexico, the financial burden has been eclipsed by the danger that U.S. citizens and their family members must face in order to complete the lengthy ordeal of consular processing. Many of the undocumented immigrants potentially and actually affected by the reentry bars are Americanized DREAMers with significant ties and loyalty to the United States. Above all, the rate of illegal immigration has continued to reflect economic trends, increasing and decreasing according to economic conditions on both sides of the border. In light of the significant hardship that the reentry bars and unavailability of 245(i) impose on U.S. citizens, and their ineffectiveness in decreasing illegal immigration, it is time for 245(i) to be permanently reinstated.

The Role of Equality Principles in Preemption Analysis of Sub-federal Immigration Laws: The California TRUST Act

Carrie L. Rosenbaum*

INTRODUCTION

In December 2014 the Obama Administration acknowledged the serious critiques of Secure Communities and replaced it with the Priority Enforcement Program (PEP). The United States Department of Homeland Security's Secure Communities program had been subject to extensive and prolonged critique, and quantitative data suggested that it did not deter crime in spite of identifying deportable individuals, nor did it primarily result in deportation of dangerous or serious criminals.¹ Tangible resistance to Secure Communities manifested in the form of "sanctuary city" policies and, more recently, sheriffs' refusal to detain individuals otherwise subject to Immigration and Customs Enforcement (ICE) detainers.² California is one of two states that

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¹ Thomas J. Miles & Adam B. Cox, *Does Immigration Enforcement Reduce Crime? Evidence From "Secure Communities"*, 57 J.L. & ECON. (forthcoming 2015) (manuscript at 4) (on file with author); Charis E. Kubrin, *Secure or Insecure Communities? Seven Reasons to Abandon the Secure Communities Program*, 13 CRIMINOLOGY & PUB. POL'Y 323, 324 (2014) (noting that the seven reasons are: "(1) The assumptions upon which Secure Communities was founded are flawed; (2) Secure Communities is unnecessary; (3) Secure Communities does not target the right offenders; (4) Local law enforcement officials have not embraced Secure Communities; (5) Secure Communities creates insecure communities; (6) Secure Communities may increase instances of racial profiling and pretextual arrests; and (7) Secure Communities is associated with significant human costs"); Mark Noferi, *New Study Shows Deportations Don't Reduce Crime*, AM. IMMIGR. COUNCIL IMMIGR. IMPACT (Sept. 9, 2014), <http://immigrationimpact.com/2014/09/09/new-study-shows-deportations-dont-reduce-crime/>.

² However, this has not stopped rogue sheriffs, such as Sacramento, California Sheriff Scott Jones, now being sued in federal district court as of January 23, 2015 for wrongful detention on an ICE hold in clear contravention of the TRUST Act. See *Lawsuit Challenges Immigration Holds on Undocumented Californians* (KPFA 94.1-FM Berkeley radio broadcast Jan. 23, 2015), available at <http://pacificaeveningnews.blogspot.com/2015/01/lawsuit-challenges-immigration-holds-on.html>; Complaint at 14–15, *Del Agua v. Jones* (E.D. Cal. 2015) (No. 2:15-cv-00185) (on file with author).

has gone a step further and codified the objection to Secure Communities by legislating instances where sub-federal law enforcement cannot comply with ICE detainer requests. Even though PEP eliminated one of the most controversial aspects of Secure Communities, in practice PEP will be similar to Secure Communities.³

Secure Communities significantly increased the involvement of state and local authorities in enforcement of federal immigration law. The discretion wielded by sub-federal agents has raised numerous concerns, including racial profiling and the threat of individual rights violations. Secure Communities has also been criticized for failing to effectively target non-citizens whom the Department of Homeland Security designated as priorities for enforcement action.

Racial profiling, or the threat of racial profiling, resulting from sub-federal agents' involvement in policing immigration is not adequately deterred or remedied through existing legal means, including for example, equal protection causes of action, Fourth Amendment motions to suppress, or acts of prosecutorial discretion in the immigration system.⁴ In the absence of adequate measures to counteract the problems with Secure Communities, and absent comprehensive federal immigration reform that would provide a path to legalization, sub-federal entities have increasingly begun to take formal measures to counteract Secure Communities and its adverse impacts on communities. California's TRUST Act is one such response to these deficiencies.

In addition to a plethora of city and county ordinances and policies, as of the time of writing, two states, California and Connecticut, have passed "TRUST" Acts—sub-federal integrative

³ Even though PEP eliminates the general policy of requesting sub-federal law enforcement cooperation in prolonging detention of a suspected unauthorized migrant for forty-eight hours and claims to prioritize specific individuals with convictions for crimes that indicate dangerousness, PEP replaces the request by ICE for continued detention with a request for immediate notification of an individual's impending release. It does not eliminate the fingerprints. Thus, for all intents and purposes, PEP, even after the TRUST Act in California, will be no different and will not disincentivize local law enforcement from using stops, arrests, and potential citations as a way to potentially identify those they perceive to be unauthorized migrants.

⁴ See *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1056 (1984) (White, J., dissenting) (showing that, similar to equal protection causes of action, proving a Fourth Amendment violation in immigration court sufficient to merit suppression requires "egregious violations"); see also *United States v. Brignoni-Ponce*, 422 U.S. 873, 885 (1975) (explaining that ethnicity is one of many factors used by immigration enforcement agents in identifying unauthorized migrants and is therefore tolerated and not viewed as discriminatory in immigration enforcement).

immigration measures⁵ restricting sub-federal agents' ability to prolong detention of suspected immigration violators. These acts do not prevent information sharing between local authorities and federal immigration enforcement agents as prior immigrant integrative, or sanctuary, laws attempted to do.⁶ The TRUST Acts are limited to preventing detention of some categories of suspected unauthorized migrants or non-citizens by sub-federal agents beyond the original sentence of criminal incarceration.

Are TRUST Acts vulnerable to preemption as state immigration laws? The immigrant integration function of states and the role of the federal government in protecting immigrants from discrimination suggest that perhaps they would not be preempted. This Article will discuss why the California TRUST Act, an integrative immigration law, would not be preempted regardless of whether it is considered under traditional methodologies, and particularly not if its integrative qualities are considered. Particularly because Secure Communities may be responsible for incentivizing racial profiling and ethnically driven policing, absent appropriate remedies or protections, the principles of the 1870 Civil Rights Act and "equality principles" should be a part of the preemption analysis of measures like California's TRUST Act.

This Article will begin in Section I by describing the California TRUST Act. Section II considers sub-federal enforcement of immigration law focusing on Secure Communities and immigration detainers. Section III addresses the factors that led to passage of the TRUST Act, such as the threat of racial profiling where sub-federal agents have the opportunity to engage in pretextual immigration enforcement. Section IV considers the shortcomings of existing remedies to profiling in sub-federal, pretextual immigration enforcement, Section V assesses whether the TRUST Act would be preempted, and Section VI defines and assesses equality principles and considers the ultimate question of why the TRUST Act would not be

⁵ "Integrative" measures or laws refer to those that encourage integration or otherwise treat non-citizen unauthorized migrants as intending immigrants and "Americans in Waiting," or those that otherwise attempt to minimize the adverse consequences of the discrimination that happens as a result of the legal category that includes citizens and residents and excludes others. HIROSHI MOTOMURA, *AMERICANS IN WAITING: THE LOST STORY OF IMMIGRATION AND CITIZENSHIP IN THE UNITED STATES* 89–91 (2007). Anti-detainer laws, like the TRUST Act, are integrative measures because they attempt to minimize the harms caused by policies like Secure Communities that emphasize the difference between those who are lawfully present, and those who are not.

⁶ Tyche Hendricks, *Immigrant Sanctuary Laws Seen as Practical*, SFGATE (July 6, 2008, 4:00 AM), <http://www.sfgate.com/news/article/Immigrant-sanctuary-laws-seen-as-practical-3206563.php>

preempted if such principles were employed in a preemption analysis.

I. THE CALIFORNIA TRUST ACT

In 2013 two states, California⁷ and Connecticut,⁸ passed statewide legislation known as the TRUST Act. In both states the TRUST Act prohibits local law enforcement from detaining individuals pursuant to an ICE hold request, except under limited circumstances.⁹ The TRUST Acts are responsive, grassroots legislative efforts arising out of a combination of a lack of federal immigration reform providing avenues to lawful permanent resident status and an increase in internal enforcement,¹⁰ including Secure Communities. However, TRUST Acts are also a means of bringing equality principles to the forefront of immigration enforcement concerns, rather than allowing the threat or reality of racial profiling to continue to evade detection and appropriate, effective response.¹¹

The California TRUST Act was the result of a multi-year effort by advocates to address the many perceived harms caused by Secure Communities and recently confirmed allegations that data does not support the conclusion that Secure Communities has had any impact on crime.¹² Since implementation, the TRUST Act has impacted the number of immigration arrests resulting in deportations. The number of Secure Communities related deportations has declined since implementation of the TRUST Act. Following implementation, in February and March 2014 there were 2288 arrests resulting in deportation, as compared to 2875 in a similar period shortly before implementation of the TRUST Act.¹³

The TRUST Act prohibits immigration holds except in limited circumstances, including specific categories of convictions, a probable cause determination for specific kinds of charges (described in paragraph (5) of California Government

7 CAL. GOV'T CODE §§ 7282–7282.5 (West 2014). Information for advocates, attorneys, and community members about the California TRUST Act can be found at <http://www.catrustact.org>.

8 CONN. GEN. STAT. § 54-192h (2014).

9 CAL. GOV'T CODE § 7282.5(a); CONN. GEN. STAT. § 54-192h(b).

10 Jennifer M. Chacón, *Overcriminalizing Immigration*, 102 J. CRIM. L. & CRIMINOLOGY 613, 615–16 (2012); STEPHEN H. LEGOMSKY & CRISTINA M. RODRÍGUEZ, IMMIGRATION AND REFUGEE LAW AND POLICY 1148–52 (5th ed. 2009) (describing increased resources for interior enforcement).

11 This Article will focus primarily on California's TRUST Act.

12 Miles & Cox, *supra* note 1.

13 See U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, SECURE COMMUNITIES: MONTHLY STATISTICS THROUGH AUGUST 31, 2014 (2014), available at http://www.ice.gov/doclib/foia/sc-stats/nationwide_interop_stats-fy2014-to-date.pdf.

Code section 7282.5a), where the arrestee is a current registrant on the California Sex and Arson Registry, or where specific categories of federal criminal arrest warrants are in place.¹⁴ In California, certain categories of criminal detainees must be released from custody when charges have been dropped, dismissed, left unfiled, or when the detainee posts bond, is acquitted of all charges, has completed an existing sentence, or is otherwise eligible for release from custody.¹⁵ In other words, in order for a sub-federal agent to have the authority to exercise discretion to comply with an ICE detainer request, two conditions must now be met in California. First, one of the conditions in California Government Code section 7282.5(a)(1)–(6) must be present, *and*, second, compliance with the request may not violate federal, state, or local law.¹⁶

The California law identifies specific offenses wherein sheriffs may comply with an ICE hold request, including: specific serious or violent felonies (some requiring a judge to have made a probable cause determination pursuant to Penal Code section 872); higher level misdemeanors or “wobbler” crimes that can be classified as either a misdemeanor or felony; inclusion on the state sex offender registry; or when the individual has an outstanding federal criminal arrest warrant.¹⁷ If the detainee has committed one of the above crimes, local authorities can detain him or her pursuant to an ICE request.¹⁸

Some of the circumstances in California where sheriffs may still have authority to exercise discretion to comply with an ICE hold request after implementation of the TRUST Act include: felony charges absent a conviction with a determination of probable cause pursuant to Penal Code section 872(a) (as opposed to a determination of probable cause for arrest purposes); domestic violence convictions; felonious driving under the influence; and felonious drug convictions.¹⁹ If the detainee has

¹⁴ CAL. GOV'T CODE § 7282.5(a); Letter from Spencer Amdur, Lawyers' Comm. for Civil Rights of the S.F. Bay Area, et al., to Cal. Cnty. Counsel 5 (Dec. 19, 2013), *available at* http://www.catrustact.org/uploads/2/5/4/6/25464410/trust_act_memorandum_-_12_19_13.pdf. (on file with author)

¹⁵ CAL. GOV'T CODE § 7282(b)(1)–(5).

¹⁶ CAL. GOV'T CODE § 7282.5(a).

¹⁷ *Id.*

¹⁸ In Connecticut, the exceptions under which law enforcement may detain someone include: if the individual has been convicted of a felony, has not posted bond, has an outstanding arrest warrant in Connecticut, has been identified as a gang member or possible terrorist, is subject to a deportation order, or if the local law enforcement officer deems the person a risk to public safety. CONN. GEN. STAT. § 54-192h(b) (2014).

¹⁹ See Letter from Spencer Amdur, Lawyers' Comm. for Civil Rights of the S.F. Bay Area, et al., to Cal. Cnty. Counsel, *supra* note 14, at 6–11. However, the circumstances under which local authorities may detain a juvenile are even more limited, since juveniles may only be detained if they have been convicted of a crime pursuant to California Penal

committed one of the above crimes, local authorities may have authority to choose to detain him or her pursuant to an ICE request.

Because the TRUST Act prevents immigration holds, except for the limited exceptions outlined in the Act, it will impact those who came to ICE's attention through Secure Communities or any other program where federal officials make immigration hold requests following identification of a suspected immigration violator.²⁰ ICE will still become aware of the individual and may still pursue removal proceedings. However, the TRUST Act prevents a sheriff from maintaining custody for an additional forty-eight hours to facilitate transfer to immigration detention once the arrestee is eligible for release from criminal custody.

The purpose of the TRUST Act is to set a minimum standard for elective compliance with ICE detainer requests to protect detainees from being held after they are eligible for release from criminal custody. However, the TRUST Act does not preclude local officials from enacting further protections for detainees against ICE holds. If a county wishes to further limit its own law enforcement's ability to comply with ICE hold requests, such as San Francisco and Santa Clara Counties—and increasingly others around the country—they may do so.²¹

Approximately forty cities and counties in California have adopted even stronger ICE hold reform policies, restricting detainers even more than the California TRUST Act.²² Cities and counties continue to enact more restrictive policies in part to avoid litigation and potential liability related to Fourth and Tenth Amendment concerns caused by compliance with ICE detainer requests.²³

When a sub-federal entity legislates in an area that may be considered traditionally reserved to the federal government, such as immigration law, the issue of preemption may arise. The

Code section 667(d)(3). See *id.* at 11. The letter to the County Counsel also indicates that because detainers may be unconstitutional, compliance with the TRUST Act only shields counties from state-law litigation. In other words, if a sheriff complies with an ICE detainer request under circumstances authorized by TRUST, they may not be subject to liability under TRUST, but still may be subject to liability pursuant to section 1983. See *id.* at 12.

²⁰ See 8 C.F.R. § 287.7 (2014); see also CAL. GOV'T CODE § 7282(c).

²¹ See CAL. TRUST ACT, <http://www.catrustact.org/text-of-trust-acts.html> (last visited Sept. 19, 2014), for a list of states and several counties across the country that have adopted TRUST Acts.

²² See *id.* for a list of California county policies implementing the TRUST Act.

²³ See Jennifer Medina, *Fearing Lawsuits, Sheriffs Balk at U.S. Request to Hold Noncitizens for Extra Time*, N.Y. TIMES (July 5, 2014), http://www.nytimes.com/2014/07/06/us/politics/fearing-lawsuits-sheriffs-balk-at-us-request-to-detain-non-citizens-for-extra-time.html?_r=0.

continued lack of comprehensive immigration reform has seen hundreds of sub-federal immigration measures throughout the country,²⁴ and accordingly, increased preemption litigation. The increase in preemption cases²⁵ has spurred consideration of what role preemption should play in invalidating pro-enforcement or integrative sub-federal immigration measures in the current political context.

Would the California TRUST Act survive a preemption challenge? Should the underlying reasons for passing the TRUST Act, such as concerns about racial profiling, matter in the preemption determination? Before addressing whether the TRUST Act would be preempted, I will outline Secure Communities, immigration detainers, and relevant critiques of both. In the context of addressing this background pertaining to the impetus for the TRUST Act, I will address the notion of “equality principles,” and then finally, the role equality principles may play in a preemption assessment of the TRUST Act.

II. WHY TRUST?: SECURE COMMUNITIES, IMMIGRATION DETAINERS, AND SUB-FEDERAL ENFORCEMENT OF IMMIGRATION LAW

While enforcement of immigration law has historically been considered a plenary power of the federal government, particularly after Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) in 1996, there has been a marked shift towards increased interior enforcement of immigration law—some authorized by federal law and some unauthorized.²⁶ With this shift towards interior enforcement has come significant participation of sub-federal law enforcement agents in the process of enforcing immigration law. Low-level offenses, like traffic offenses and misdemeanors, have

²⁴ The National Conference of State Legislatures reports that “[s]ince 2007, on average, 1,300 [state immigration-related] bills are introduced each year and 200 laws are enacted.” ANN MORSE ET AL., NAT’L CONFERENCE OF STATE LEGISLATURES, IMMIGRANT POLICY PROJECT: 2013 IMMIGRATION REPORT 2 (2013), available at http://www.ncsl.org/Portals/1/Documents/immig/2013ImmigrationReport_Jan21.pdf.

²⁵ One scholar notes that preemption cases are increasingly a priority for the Roberts Court and cites *Arizona v. United States* and *Chamber of Commerce v. Whiting* to suggest that “preemption will be an important part of its doctrinal legacy.” Ernest A. Young, “*The Ordinary Diet of the Law*: The Presumption Against Preemption in the Roberts Court,” 2011 SUP. CT. REV. 253, 341. In addition to the above immigration cases, “[t]he court has decided at least 10 preemption cases since early 2008, including ones on such products as prescription drugs, medical devices, and car seat belts.” James Vicini, *Analysis: Supreme Court Immigration Case a Federal-State Test*, TERRA NEWS (Sept. 20, 2014, 2:45 PM), http://en.terra.com/news/news/analysis_supreme_court_immigration_case_a_federal_state_test/act439622.

²⁶ See, e.g., Jennifer M. Chacón, *Border Exceptionalism in the Era of Moving Borders*, 38 FORDHAM URB. L.J. 129, 148–51 (2010).

disproportionately been the underlying offenses resulting in ICE detainees.²⁷ For reasons that will be explored more fully in the next sections, the role of sub-federal law enforcement agents and the use of low-level offenses to identify potential unauthorized migrants trigger concerns about discriminatory policing. Problems with discriminatory policing suggest the appropriateness of consideration of equality principles in the preemption analysis of the TRUST Act.

Secure Communities, immigration detainers, state laws, and municipal regulations have all contributed to an environment of expanding sub-federal involvement in the enforcement of immigration law with troubling implications. After enactment of IIRIRA, the former INS created ICE Agreements of Cooperation in Communities to Enhance Safety and Security (ICE ACCESS) measures, which were intended to enhance cooperation between federal and sub-federal agents. Initially, and until recently, ICE used agreements establishing formal enforcement collaboration with sub-federal authorities, authorized under section 287(g),²⁸ to explicitly delegate power to states and localities to deputize their law enforcement agents to enforce federal immigration laws.²⁹ Memorandums of Agreement (MOA) established a scope of authority delegated to sub-federal agents, and established training protocols. However, the Department of Homeland Security (DHS) moved away from use of 287(g) agreements in favor of Secure Communities, likely because of the lesser federal resources required by Secure Communities, which does not require training or the same degree of oversight.³⁰

As a part of the Obama Administration's emphasis on enforcement, in 2008 DHS implemented Secure Communities to identify, detain, and remove "criminal aliens" with a stated priority of targeting non-citizens who are a danger to national security or public safety, "repeat violators," and those deemed "fugitives" due to outstanding removal orders.³¹ Secure Communities was allegedly intended to target "convicted

²⁷ *Secure Communities and ICE Deportation: A Failed Program?*, TRACIMMIGR. (Apr. 8, 2014), <http://trac.syr.edu/immigration/reports/349/>.

²⁸ 8 U.S.C. § 1357(g) (2012) (providing statutory authority for 287(g) agreements).

²⁹ See Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 133, 110 Stat. 3009, 3009-563 (codified at 8 U.S.C. § 1357(g)); see also Velasquez, 19 I. & N. Dec. 377 (B.I.A. 1986), available at <http://www.justice.gov/eoir/vll/intdec/vol19/3011.pdf>.

³⁰ DHS has stated that Secure Communities is more "efficient." Michele Waslin, *ICE Scaling Back 287(g) Program*, AM. IMMIGR. COUNCIL IMMIGR. IMPACT (Oct. 19, 2012), <http://www.immigrationimpact.com/2012/10/19/ice-scaling-back-287g-program/>.

³¹ *Secure Communities*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT, http://www.ice.gov/secure_communities/ (last visited Oct. 4, 2014).

criminals,” specifically those characterized as “aggravated felons.”³² As of the end of 2013, all jurisdictions in the United States had activated the Secure Communities program. From implementation in 2008 to August 2014, Secure Communities resulted in 118,439 deportations in California alone.³³ One scholar has notably referred to Secure Communities as “one of the most ubiquitous examples of immigrant-exclusionary immigration federalism.”³⁴

Secure Communities established a mandatory sharing of information between local jail officials and Immigration and Customs Enforcement agents anytime an individual is arrested and booked.³⁵ Information sharing happens regardless of whether or not criminal charges are even ever filed. Historically, anytime sub-federal law enforcement agents book an individual in connection with an alleged crime, their fingerprints are transmitted to the Federal Bureau of Investigation (FBI). Secure Communities created the connection between the sub-federal law enforcement arrest and the immigration authorities by then transmitting those same fingerprints to DHS. DHS then checks the biometric information against its own database—the Automated Biometric Identification System or “IDENT.”³⁶

Where the arrestee is suspected to be a non-citizen based on the IDENT database results, under Secure Communities DHS could issue an immigration detainer or place an immigration hold requesting that the local law enforcement agents hold the individual in detention for up to forty-eight hours following completion of the criminal sentence and before issuance of a Notice to Appear (NTA).³⁷ IDENT, however, does not necessarily

³² *Id.*

³³ U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, *supra* note 13, at 6; U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, FY 2013 ICE IMMIGRATION REMOVALS 1 (2013) [hereinafter FY 2013 REMOVALS], available at <https://www.ice.gov/doclib/about/offices/ero/pdf/2013-ice-immigration-removals.pdf> (368,644 in 2013).

³⁴ Stella Burch Elias, *The New Immigration Federalism*, 74 OHIO ST. L.J. 703, 724 (2013).

³⁵ States and municipalities have also increasingly been passing laws to permit their local law enforcement agents to have a role in checking immigration status when an individual is booked into a jail; however, state laws encouraging or authorizing sub-federal agents a role in policing immigration law will not be the focus of this Article. *Secure Communities*, *supra* note 31.

³⁶ *Id.*

³⁷ *Fact Sheet: Delegation of Immigration Authority Section 287(g) Immigration and Nationality Act*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT, <http://www.ice.gov/news/library/factsheets/287g.htm> (last visited Oct. 4, 2014). Before ICE makes a detainer request, the arrestee’s fingerprints are submitted electronically to the Integrated Automated Fingerprint Identification System (IAFIS). The fingerprint data is automatically transmitted to the FBI Criminal Justice Information Services Division (CJIS), and the prints are then compared with the United States Visitor and Immigrant Status Indicator Technology (USVISIT) and IDENT. This is the stage at which the sub-federal agent and

give a black or white answer concerning a non-citizen's status because determination of status requires a sophisticated application and understanding of immigration law to an individual's unique factual situation.³⁸ The database merely categorizes individuals as either: (1) non-citizens present in the United States in violation of immigration laws, perhaps as a result of a prior deportation or overstaying a visa, (2) noncitizens who are lawfully present but could be deportable if convicted of specific crimes, or (3) naturalized citizens who are in the system only because they were, at some prior time, not U.S. citizens.

The TRUST Act relates to Secure Communities through its restrictions on immigration detainers. A detainer, or "ICE hold," is a request that the state or local law enforcement agent hold the arrestee for up to forty-eight hours after completion of the criminal sentence so that ICE may take the individual into immigration custody and initiate immigration removal proceedings.³⁹ Initially, prior to 1987, detainers served as notification to jail or prison officials that the former INS wanted to be notified before the prisoner was released.⁴⁰ Subsequently, the Executive Branch enacted federal regulations requiring that agencies receiving a detainer request hold the arrestee for forty-eight hours. With the implementation of Secure Communities, the use of detainers became significantly more common and has had a dramatic effect on the number of immigration arrests, detentions, deportation orders, and removals.⁴¹

ICE obtain some information about the arrestee's immigration status. If the fingerprints register a match in the IDENT immigration database, CJIS automatically sends data to the ICE Law Enforcement Support Center (LESC). Within hours of the initial arrest, ICE determines whether or not to issue a detainer request so that ICE may obtain custody and initiate removal proceedings. *Secure Communities*, *supra* note 31. Note that under PEP the prolonged detention would not be authorized, but the information will still be shared with DHS who may still mobilize officers to make an immigration arrest once the individual is released from criminal custody.

³⁸ See, e.g., *Arizona v. United States*, 132 S. Ct. 2492, 2499 (2012) (illustrating the complexities involved in the federal governance of immigration and alien status). Just as the Supreme Court refused to recognize the state of Arizona's delegation of sub-federal agents to enforce immigration law and determine whether an individual was removable because such determinations require complex legal analyses, the same problem is implicated here. However, this issue will not be addressed in this Article.

³⁹ 8 C.F.R. § 287.7 (2014).

⁴⁰ Christopher N. Lasch, *Preempting Immigration Detainer Enforcement Under Arizona v. United States*, 3 WAKE FOREST J.L. & POLY 281, 283 n.16 (2013) (citing U.S. DEPT OF JUSTICE, IMMIGRATION & NATURALIZATION SERV., FORM I-247 (1983)); *Illegal Immigration Reform and Immigrant Responsibility Act of 1996*, Pub. L. No. 104-208, § 133, 110 Stat. 3009, 3009-563 (codified at 8 U.S.C. § 1357(g)). Under PEP, this or a similar notification practice will likely be in place.

⁴¹ AARTI KOHLI, PETER L. MARKOWITZ & LISA CHAVEZ, *THE CHIEF JUSTICE EARL WARREN INST. ON LAW & SOC. POLICY, SECURE COMMUNITIES BY THE NUMBERS: AN ANALYSIS OF DEMOGRAPHICS AND DUE PROCESS 1* (2011) (noting a significant increase in

Section 287.7(a) of Title 8 of the Code of Federal Regulations provides the authority for immigration detainers. The regulations define detainers as “requests” that “advise another law enforcement agency” that ICE would like to take custody of the person in question.⁴² The only language creating a mandatory duty on behalf of the detaining agent concerns possible constitutional violations and specifies that a hold must not exceed forty-eight hours.⁴³ The sections of the U.S. Code referenced in the detainer regulations indicate that ICE may collaborate with localities that “choose” to participate in immigration enforcement.⁴⁴

Immigration detainers have been challenged from policy and legal doctrinal perspectives. Before TRUST Acts were in place, states and localities began demonstrating increasing resistance to ICE immigration detainer requests.⁴⁵ While local authorities could hypothetically refuse to fingerprint arrestees, resistance to Secure Communities and detainers has typically taken other forms. Fourth and Tenth Amendment challenges have caused numerous local sheriffs throughout the country to announce that they would no longer honor detainer requests.⁴⁶ Since January 2013, detainer requests have dropped by nearly twenty percent.⁴⁷ During a fifty-month period beginning in FY 2008 through the beginning of FY 2012, ICE issued close to one million detainers.⁴⁸

prosecutions and deportations since the Obama Administration’s implementation of Secure Communities); AM. IMMIGRATION COUNCIL, IMMIGRATION POLICY CTR., THE GROWTH OF THE U.S. DEPORTATION MACHINE 5 (2014), available at <http://www.immigrationpolicy.org/printpdf/3283> (citing the U.S. Government Accountability Office, which stated that “from October 2008 through March 2012, Secure Communities led to the removal of about 183,000 aliens”).

⁴² 8 C.F.R. § 287.7.

⁴³ *Id.*; see Letter from Spencer Amdur, Lawyers’ Comm. for Civil Rights of the S.F. Bay Area, et al., to Cal. Cnty. Counsel, *supra* note 14.

⁴⁴ See 8 U.S.C. § 1103(a)(11), (c) (2012); 8 U.S.C. § 1357(d).

⁴⁵ While there has been much consideration of whether or not ICE detainers are mandatory, this Article will examine the issue only to the extent necessary to consider whether the California TRUST Act could be deemed preempted. There has been much controversy over whether ICE holds are mandatory directives or mere requests, and the outcome may pertain to the ultimate federalism question considered here.

⁴⁶ See *Some Colorado Sheriffs Ending Immigrant Detainers*, N.Y. TIMES (Apr. 29, 2014, 7:44 PM), <http://www.nytimes.com/aponline/2014/04/29/us/ap-us-immigration-detainers.html>; Letter to ACLU of San Diego (July 31, 2014) (on file with author) (explaining that San Diego, California Sheriffs will no longer use the I-200 Administrative Warrants as a basis for detaining individuals longer than their time of release and will treat these administrative arrests just like detainers); Medina, *supra* note 23.

⁴⁷ The total number of detainers in 2012 was 273,982. *Number of ICE Detainers Drops by 19 Percent*, TRACIMMIGR., <http://trac.syr.edu/immigration/reports/325/> (last updated January 2013).

⁴⁸ *Who Are the Targets of ICE Detainers?*, TRACIMMIGR. (Feb. 20, 2013), <http://trac.syr.edu/immigration/reports/310/>.

The next section will explore the perceived need for the TRUST Act and measures that lessen the role of sub-federal law enforcement agents in immigration policing.

III. SUB-FEDERAL LAW ENFORCEMENT OFFICERS' DISCRETION TO ARREST AND SHADOW IMMIGRATION ENFORCEMENT⁴⁹

Secure Communities empowers sub-federal agents to participate in identifying potentially unauthorized migrants. Because an arrest under Secure Communities automatically exposes any arrestee to the possibility of identification by federal immigration authorities,⁵⁰ it could incentivize state and local law enforcement agents to use criminal law violations as a pretext to enforce immigration law.⁵¹ Sub-federal agents have significant power because of their discretion to make arrests.⁵² Such "shadow immigration enforcement" may involve pretextual, though still legal, enforcement of criminal or traffic laws based on perceived ethnic or racial characteristics.⁵³

As state and local law enforcement officers have become increasingly involved in enforcement of federal immigration law, their power to make or not make an initial arrest can be the act that creates a cascading effect for the individual arrestee, as well as his or her family and community. Sub-federal agents can, for example, use minor traffic violations as a pretext for determining immigration status.⁵⁴ There is little to prevent a local law enforcement agent from stopping individuals solely to check their immigration status, instead of checking their immigration status incidental to a legitimate arrest that they intend to pursue for substantive, criminal reasons.⁵⁵ Concern about the lack of

⁴⁹ See Maureen A. Sweeney, *Shadow Immigration Enforcement and Its Constitutional Dangers*, 104 J. CRIM. L. & CRIMINOLOGY 227, 230 (2014) (explaining "shadow immigration enforcement" as state or local police lacking immigration enforcement authority who use their police powers for the unsanctioned purposes of federal immigration enforcement and discussing the problem of the unavailability of usual constitutional law safeguards in the immigration context).

⁵⁰ HIROSHI MOTOMURA, IMMIGRATION POLICY CTR., PROSECUTORIAL DISCRETION IN CONTEXT: HOW DISCRETION IS EXERCISED THROUGHOUT OUR IMMIGRATION SYSTEM 4, 7 (2012), available at http://www.immigrationpolicy.org/sites/default/files/docs/motomura_-_discretion_in_context_04112.pdf.

⁵¹ Angela M. Banks, *The Curious Relationship Between "Self-Deportation" Policies and Naturalization Rates*, 16 LEWIS & CLARK L. REV. 1149, 1186–87 (2012).

⁵² HIROSHI MOTOMURA, IMMIGRATION OUTSIDE THE LAW 128–31 (2014) (discussing discretion, which includes "micro-macro" discretion, in enforcement and the role of arresting agents).

⁵³ Sweeney, *supra* note 49, at 240.

⁵⁴ Banks, *supra* note 51.

⁵⁵ ACLU LEGAL ACTION CTR., COMMENTS ON U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT DRAFT DETAINER POLICY 15 (2010), available at <http://www.legalactioncenter.org/sites/default/files/docs/lac/NGO-DetainerCommentsFinal-10-1-2010.pdf> (noting that racial profiling has been a persistent concern where sub-federal agents are

adequate prevention of unconstitutional policing by sub-federal agents is not a new problem, and it has typically been presumed that federal agents may be less likely to engage in such conduct.⁵⁶

A. Discretion to Arrest and the Problem of Profiling in Sub-federal Enforcement of Immigration Law

Discretion by law enforcement officers is generally exercised on micro and macro levels.⁵⁷ “Micro” level discretion may take the form of decisions by local, state, or federal law enforcement agents to arrest or prosecute, or not arrest or prosecute, an individual. Micro level discretion may be exercised at the time of the initial criminal arrest, or later, when either criminal prosecutors or immigration trial attorneys decide what charge(s), if any, to allege, or after a trial has begun.⁵⁸

Patrol officers have a significant amount of discretion to decide whom to stop, arrest, and detain.⁵⁹ An officer exercises micro level discretion when deciding to stop an individual for a traffic violation or minor criminal offense, or make an arrest, rather than just issue a citation.⁶⁰ Secure Communities likely was, and PEP may remain a powerful and effective tool for a patrol officer motivated to decrease the presence of migrants she or he perceives as unauthorized.⁶¹

“Macro” level discretion functions at a systemic level such as when agencies and officials make policy decisions establishing enforcement priorities and commit resources accordingly.⁶² Sub-federal agents’ roles in policing immigration law are

empowered to enforce immigration law); Lasch, *supra* note 40, at 292 (citing ACLU LEGAL ACTION CTR., *supra*); see Violeta R. Chapin, *¡Silencio! Undocumented Immigrant Witnesses and the Right to Silence*, 17 MICH. J. RACE & L. 119, 152–54 (2011) (discussing racial profiling concerns resulting from state and local immigration enforcement).

⁵⁶ Stella Burch Elias, “Good Reason to Believe”: *Widespread Constitutional Violations in the Course of Immigration Enforcement and the Case for Revisiting Lopez-Mendoza*, 2008 WIS. L. REV. 1109, 1119 (referencing the *Lopez-Mendoza* decision, where “Chief Justice Burger believed that INS was ‘better than most police departments’ at preventing constitutional violations from occurring”) (quoting Justice Harry Blackmun, Harry Blackmun’s Conference Notes (Apr. 20, 1984), in HARRY A. BLACKMUN PAPERS, 407/83/491 (Manuscript Division, Library of Cong., Washington D.C.)).

⁵⁷ MOTOMURA, *supra* note 50, at 3–5.

⁵⁸ *Id.*

⁵⁹ *Id.* at 4; see Hiroshi Motomura, *The Discretion That Matters: Federal Immigration Enforcement, State and Local Arrests, and the Civil-Criminal Line*, 58 UCLA L. REV. 1819, 1842–49 (2011).

⁶⁰ Banks, *supra* note 51, at 1184. See generally Motomura, *supra* note 59, at 1819 (showing how the discretion to arrest at state and local levels can in some ways assume a kind of “abdication of federal authority”).

⁶¹ Banks, *supra* note 51, at 1179–80.

⁶² *Id.* at 1183–84; MOTOMURA, *supra* note 50, at 2.

influenced by macro level exercises of discretion, which may in turn be evidenced by their micro level exercises of discretion. As an example, in some regions, such as Maricopa County, Arizona, local authorities create de facto macro level policies that encourage pretextual enforcement of immigration law.⁶³

A local sheriff encouraging patrol officers to arrest, rather than just cite a driver without a valid license, or to apply rigorous standards for what constitutes a valid license, are examples of macro level discretion. Similarly, when government and law enforcement officials make public statements implicitly or directly blaming the undocumented population for crime, or suggest that *any* crime should subject non-citizens to deportation,⁶⁴ they convey macro-level policy directives. When an ICE supervisor states, contrary to federal law, that traffic violations represent “a public safety threat significant enough to warrant removal,” the supervisor influences discretion on macro and micro levels.⁶⁵

Secure Communities can create a context for discretion at both of these micro and macro levels. DHS has expressed intentions regarding whom individual officers should pursue, emphasizing a focus on serious criminals,⁶⁶ but local criminal justice officers may function outside of these directives. Moreover, ICE supervisors may or may not proactively address discrepancies between the federal policy objectives and how officers are exercising discretion in carrying out their authority.⁶⁷ The absence of means to ensure compliance with federal immigration arrest priorities suggests the appropriateness of preventative measures like the TRUST Act, which may decrease the prevalence of undetected and undeterred rights violations.

Secure Communities does not provide an express delegation of authority to sub-federal agents, but nonetheless, discretion exercised on micro and macro levels may play a role in whether and how an officer or agency exercises discretion in policing, including identifying individuals for an initial stop.⁶⁸ Laws, for

⁶³ See *Melendres v. Arpaio*, 989 F. Supp. 2d 822, 825–26 (D. Ariz. 2013).

⁶⁴ See, e.g., Brian Fraga, *Sheriff Hodgson on ‘Secure Communities’ and Undocumented Immigrants*, SOUTHCOASTTODAY.COM (June 9, 2011), <http://blogs.southcoasttoday.com/new-bedford-crime/2011/06/09/sheriff-hodgson-on-secure-communities-and-undocumented-immigrants/>.

⁶⁵ Banks, *supra* note 51, at 1183 (quoting RANDY CAPPS ET AL., *MIGRATION POLICY INST., DELEGATION AND DIVERGENCE: A STUDY OF 287(g) STATE AND LOCAL IMMIGRATION ENFORCEMENT 6* (2011), available at <http://www.migrationpolicy.org/pubs/287g-divergence.pdf>).

⁶⁶ *Secure Communities*, *supra* note 31.

⁶⁷ See Banks, *supra* note 51, at 1182–84.

⁶⁸ MOTOMURA, *supra* note 50, at 2, 4.

example, that authorize officers to use their discretion to arrest a driver without a license at the time of the stop, combined with Secure Communities or PEP, give sub-federal agents significant power to determine which drivers' immigration status will be checked.⁶⁹ Micro and macro exercises of discretion thus contribute significantly to the possibility of improper pretextual enforcement of immigration law as a result of Secure Communities, and now the PEP program.

B. Pretextual Arrests and Racial Profiling by Sub-federal Agents

Allegations of increased racial profiling immediately followed implementation of Secure Communities, as was the case following implementation of 287(g) agreements, and as will likely continue under PEP.⁷⁰ Race has historically been, and still serves as, a proxy for belonging and citizenship,⁷¹ even though use of race as the *only* factor in making a civil immigration stop is illegal.⁷² Resistance to Secure Communities and ICE detainers prompted substantiated civil rights and racial profiling concerns.⁷³

Indeed, local law enforcement agents may use pretextual arrests to identify people they believe are unauthorized migrants to bring them to the attention of federal immigration authorities.⁷⁴ From the inception of Secure Communities to approximately 2011, 93% of those identified as removable

⁶⁹ Banks, *supra* note 51, at 1186.

⁷⁰ *Fact Sheet: Delegation of Immigration Authority Section 287(g) Immigration and Nationality Act*, *supra* note 37; Chacón, *supra* note 26, at 149; Suzanne Ito, *No Security in "Secure Communities"*, ACLU (Aug. 19, 2010, 5:54 PM), <https://www.aclu.org/blog/immigrants-rights-racial-justice/no-security-secure-communities>; *Immigration Bait and Switch*, N.Y. TIMES, Aug. 18, 2010, at A22, available at http://www.nytimes.com/2010/08/18/opinion/18wed3.html?_r=0.

⁷¹ For examples of select scholarly works addressing race as a proxy for citizenship, see Gabriel J. Chin, *Segregation's Last Stronghold: Race Discrimination and the Constitutional Law of Immigration*, 46 UCLA L. REV. 1 (1998); Devon W. Carbado & Cheryl I. Harris, *Undocumented Criminal Procedure*, 58 UCLA L. REV. 1543 (2011); Huyen Pham, *When Immigration Borders Move*, 61 FLA. L. REV. 1115 (2009); Rose Cuison Villazor, *The Other Loving: Uncovering the Federal Government's Racial Regulation of Marriage*, 86 N.Y.U. L. REV. 1361, 1390–402 (2011) (considering the federal government's policing of interracial marriages and citizenship law). See also KOHLI, MARKOWITZ & CHAVEZ, *supra* note 41, at 2, 6 (finding 93% of people arrested under Secure Communities pursuant to one study were from Latin American countries).

⁷² Mexican appearance may be one of many factors relied on in making a civil immigration stop. See, e.g., *United States v. Brignoni-Ponce*, 422 U.S. 873, 885–87 (1975) (noting ethnicity as one of many factors used by immigration enforcement agents in identifying unauthorized migrants).

⁷³ See generally *supra* note 71 and accompanying text.

⁷⁴ TREVOR GARDNER II & AARTI KOHLI, THE CHIEF JUSTICE EARL WARREN INST. ON LAW & SOC. POLICY, THE C.A.P. EFFECT: RACIAL PROFILING IN THE ICE CRIMINAL ALIEN PROGRAM (2009).

through Secure Communities were Latinos, while only 77% of the undocumented population was Latino.⁷⁵

Not only did the majority of those subject to detainers in 2008 to 2012 lack a criminal record (at the time of the detainer issuing or after),⁷⁶ but over 80% of ICE detainers were issued in cases involving men from Mexico, Guatemala, El Salvador, Honduras, or Cuba.⁷⁷ Put differently, 95% of detainers were issued against males with a median age of thirty, and 80% of detainers were issued against Latinos. Specifically, 72.7% were Mexican citizens, approximately 15% were Guatemalans, Hondurans, El Salvadorans, or Cubans, and only about 22,000 were Canadian citizens.⁷⁸ Thus, the majority of ICE detainers have been issued against Latino males without criminal histories, or those whose criminal arrest leading to issuance of the detainer was not related to a serious offense.⁷⁹

Sheriff Joe Arpaio of Maricopa County, Arizona is one particularly well-known example of a powerful law enforcement agent's sanctioning of the improper use of sub-federal immigration policing powers. His discriminatory policing was so egregious and his intentions so clearly discriminatory and anti-immigrant that the Department of Justice pursued litigation.⁸⁰ However, discriminatory policing may be less blatant, evading detection, sanction, or deterrence.

⁷⁵ KOHLI, MARKOWITZ & CHAVEZ, *supra* note 41, at 2.

⁷⁶ *Who Are the Targets of ICE Detainers?*, *supra* note 48 ("In more than two out of three (77.4%) of the detainers issued by ICE, the record shows that the individual who had been identified had no criminal record — either at the time the detainer was issued or subsequently. For the remaining 22.6 percent that had a criminal record, only 8.6 percent of the charges were classified as a Level 1 offense."); *see also id.* fig.1.

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ "In FY 2014, DHS conducted a total of 577,295 removals and returns, including 414,481 removals and 162,814 returns. ICE had a total of 315,943 removals or returns, and CBP made 486,651 apprehensions." Press Release, Dep't of Homeland Sec., DHS Releases End of Year Statistics (Dec. 19, 2014), *available at* <http://www.dhs.gov/news/2014/12/19/dhs-releases-end-year-statistics> (on file with author); *see also* FY 2013 REMOVALS, *supra* note 33. ICE's FY 2013 removal statistics indicate that 82% of those removed from the interior had criminal convictions, as opposed to 60% the prior year. *Id.* Even though more deportees may have had a criminal conviction than in the prior fiscal year, the data does not demonstrate that the crimes were overwhelmingly serious or violent, nor that pretextual enforcement is no longer a problem. Moreover, the author of the study contends that even if this alleged problem does not impact the majority of deportees, the problem of pretextual enforcement or racial profiling still merits significant consideration. *Id.*

⁸⁰ The Department of Justice sued the Maricopa County Sheriff's Office for civil rights violations, beginning with an investigation in June 2008, and filed a lawsuit in May 2012, culminating in a ruling by Judge Snow that Arpaio had systematically profiled Latinos. Arpaio has since been found to have defied the court's order. Fernanda Santo, *Angry Judge Says Sheriff Defied Order on Latinos*, N.Y. TIMES, Mar. 25, 2014, at A18.

In the case of Sheriff Arpaio, the Department of Justice concluded that the Maricopa County Sheriff's Office was responsible for "egregious, pervasive and systemic" racial profiling.⁸¹ Latino drivers in Maricopa County were significantly more likely to be subject to a traffic stop than similarly situated non-Latinos, and patrol officers conducted stops without constitutionally required reasonable suspicion or probable cause.⁸²

Following the Department of Justice litigation against Sheriff Arpaio, DHS Secretary Janet Napolitano announced the decision to rescind part of the 287(g) agreement in Arizona, stating, "Discrimination undermines law enforcement and erodes the public trust. DHS will not be a party to such practices."⁸³ DHS instructed Arizona DHS not to respond to local police requests to enforce immigration law following a traffic stop or other law enforcement action unless the person targeted actually met the DHS criteria for Secure Communities, including those with criminal convictions and prior removals with unlawful reentries.⁸⁴ DHS's termination of a 287(g) agreement was virtually unprecedented.⁸⁵

Even before Secure Communities, local police officers had been complicit in racially motivated immigration law enforcement. One infamous example was what became known as the "Chandler Roundup," where local police officers in Chandler, Arizona targeted individuals based on appearance and inability to speak fluent English and, with Border Patrol officers, spent a week arresting 432 people of Hispanic/Latino descent who were

⁸¹ Letter from Thomas E. Perez, Assistant Attorney Gen. of the U.S., to Bill Montgomery, Cnty. Attorney for Maricopa Cnty., Ariz. 6 (Dec. 15, 2011), available at http://www.justice.gov/crt/about/spl/documents/mcso_findletter_12-15-11.pdf.

⁸² U.S. DEP'T. OF HOMELAND SEC., SECURE COMMUNITIES: STATISTICAL MONITORING (2011), available at <http://www.ice.gov/doclib/secure-communities/pdf/sc-statistical-monitoring.pdf>.

⁸³ Press Release, Dep't of Homeland Sec., Statement by Secretary Napolitano on DOJ's Findings of Discriminatory Policing in Maricopa County (Dec. 15, 2011), available at <https://www.dhs.gov/news/2011/12/15/secretary-napolitano-doj-s-findings-discriminatory-policing-maricopa-county>.

⁸⁴ Michele Waslin, *DHS Rescinds Part of Controversial 287(g) Program in Arizona*, AM. IMMIG. COUNCIL IMMIGR. IMPACT (June 27, 2012), <http://immigrationimpact.com/2012/06/27/dhs-rescinds-part-of-controversial-287g-program-in-arizona/#sthash.7IAG6GA9.dpuf>; see also Jorge Rivas, *Department of Homeland Security and ICE End Sheriff Arpaio's 287(g) Contract*, COLORLINES (Dec. 15, 2011, 5:00 PM), http://colorlines.com/archives/2011/12/department_of_homeland_security_and_ice_end_sheriff_arpaio_s_287g_contract.html.

⁸⁵ DHS did not renew the 287(g) agreements in 2009 and 2011 and stopped its access to DHS databases pursuant to Secure Communities in 2011. See Waslin, *supra* note 84; Randal C. Archibold, *Immigration Hard-Liner Has His Wings Clipped*, N.Y. TIMES, Oct. 7, 2009, at A14; Press Release, Dep't of Homeland Sec., *supra* note 83; Editorial, *The Case Against Sheriff Arpaio*, N.Y. TIMES, Dec. 16, 2011, at A24.

eventually deported.⁸⁶ Following a successful equal protection and Fourth Amendment lawsuit against the city of Chandler, it became a sanctuary city.⁸⁷

Immigration scholar Christopher Lasch has compared immigration rendition, or deportation, to “a legal system resembling slave and criminal rendition” such that it “raises questions as to whether immigration rendition is similarly driven by race . . . rather than by criminality, as the federal government claimed it would be when it launched Secure Communities.”⁸⁸ The possibility that the drive to arrest is not crime, but in fact is the arrestee’s perceived ethnicity, race, or alienage, implies that the equality principles inherent in immigration law should play a more significant role. There may be a threat of racial profiling in conjunction with pretextual enforcement of immigration law when sub-federal agents exercise criminal arresting discretion. This was clearly illustrated in Arizona, yet at the same time, Arizona highlights the limitations of the law in deterring the racial profiling that can result from programs like Secure Communities.⁸⁹

Based on the history of discriminatory policing in immigration law, consideration of equality principles is relevant to any assessment of whether a sub-federal immigration law should be preempted. The TRUST Act grew, in part, out of a concern for discriminatory practices and may decrease the likelihood of discriminatory policing. In the absence of measures like the TRUST Act, the law falls woefully short with respect to deterring or preventing discriminatory immigration practices, particularly when sub-federal agents participate in the process.

⁸⁶ Corrie Bilke, Note, *Divided We Stand, United We Fall: A Public Policy Analysis of Sanctuary Cities’ Role in the “Illegal Immigration” Debate*, 42 IND. L. REV. 165, 185 (2009). One scholar’s review of the “Blackmun files”—notes prepared by Justice Blackmun in connection with the *Lopez-Mendoza* decision—indicated that “Chief Justice Burger believed that INS was ‘better than most police departments’ at preventing constitutional violations from occurring.” Elias, *supra* note 56, at 1122 (emphasis added). Justice Burger’s inclination that local police may be more likely to engage in constitutional violations has been echoed by immigrant rights organizations and in the media. *ACLU Puts Arizona Law Enforcement Agencies on Notice*, AM. CIV. LIBERTIES UNION (Nov. 12, 2013), <https://www.aclu.org/immigrants-rights/aclu-puts-arizona-law-enforcement-agencies-notice>.

⁸⁷ Bilke, *supra* note 86, at 186.

⁸⁸ Christopher N. Lasch, *Rendition Resistance*, 92 N.C. L. REV. 149, 225 (2013).

⁸⁹ MOTOMURA, *supra* note 52, at 115 (“As a corollary, preventing discrimination before it takes place allows courts to avoid the nearly impossible task that a discrimination lawsuit forces judges to undertake—ascertaining what particular state or local officials were thinking.”).

IV. SHORTCOMINGS OF EXISTING MEANS OF DETERRING OR RESPONDING TO RACIALLY OR ETHNICALLY BIASED PRETEXTUAL IMMIGRATION POLICING

One of the legal vehicles to address discriminatory policing is a motion to suppress resulting from a successful Fourth Amendment or equal protection claim. Prosecutorial discretion could be used as a tool as well, but there is no evidence that it is being employed in this manner. However, in the context of sub-federal enforcement of immigration law, these remedies are no replacement for an affirmative measure like California's TRUST Act that limits the incentive to sub-federal agents to engage in racially motivated policing.

A. Fourth Amendment and Suppression

In criminal policing, a law enforcement agent's violation of an individual's Fourth Amendment rights may give rise to a cause of action resulting in suppression of illegally obtained evidence.⁹⁰ In immigration court, particularly in the context of Secure Communities, existing means of addressing racial profiling by sub-federal agents in immigration enforcement fall short even in the rare instances where suppression is available.

In the context of Fourth Amendment jurisprudence, the Supreme Court has permitted law enforcement agents to use ethnicity as one of multiple factors in establishing reasonable suspicion that an individual is unlawfully present in the United States.⁹¹ Thus, not all pretextual stops contested in underlying criminal proceedings necessarily constitute Fourth Amendment violations.⁹² While sub-federal agents enforcing criminal laws are *not* permitted to consider ethnicity as a factor in establishing reasonable suspicion of a crime, a Fourth Amendment violation addressed in immigration courts may not result in exclusion. The more restricted approach to the Fourth Amendment is one of several reasons that sub-federal agents may not be sufficiently

⁹⁰ See *Wong Sun v. United States*, 371 U.S. 471, 484–85 (1963) (holding that evidence obtained illegally is inadmissible as fruit of the poisonous tree); *Mapp v. Ohio*, 367 U.S. 643, 648 (1961) (holding that evidence obtained in violation of an individual's Fourth Amendment right against unreasonable searches and seizures may not be used against him or her in state criminal prosecutions); *Weeks v. United States*, 232 U.S. 383, 393 (1914) (ruling that illegal evidence gathered by state officers cannot be used against defendants in federal court).

⁹¹ See *United States v. Brignoni-Ponce*, 422 U.S. 873, 885 (1975) (stating use of ethnicity as one of many factors by immigration enforcement agents in identifying unauthorized migrants); Elias, *supra* note 56, at 1151.

⁹² See *Whren v. United States*, 517 U.S. 806, 811–13 (1996) (holding that evidence may not be suppressed in criminal proceedings where criminal law enforcement agents engage in pretextual stops and race may seep into the calculus).

deterred from engaging in pretextual enforcement of immigration law, or racial profiling.

Though Fourth Amendment suppression of evidence is not generally available in immigration court, in 1984 the Supreme Court ruled in *INS v. Lopez-Mendoza* that the exclusionary rule could apply in immigration court, but only to address “egregious violations” of the Fourth Amendment.⁹³ The Circuit Courts have since evaluated what constitutes such a violation.⁹⁴ The *Lopez-Mendoza* Court implied that if violations were widespread, the doctrine could be viewed more expansively, and some immigration courts have slowly responded accordingly.⁹⁵ Justice O’Connor’s reasoning regarding the need to recognize the exclusionary rule in deportation proceedings relied on “subconstitutional reasoning” to extend, albeit in limited circumstances, constitutional protections that otherwise previously only applied to citizens.⁹⁶

⁹³ See MOTOMURA, *supra* note 52, at 161–62 (discussing *Lopez-Mendoza* and the role of the “egregious violation” principle in allowing judges to protect individuals and communities from racially and ethnically discriminatory policing and the notion of “comparative culpability,” analogizing workplace raids to discriminatory immigration policing where the employer’s wrongdoing against unauthorized migrants may outweigh certain characterizations of the alleged noncitizen’s unlawful presence). “Just as employment law recognizes the integration of unauthorized migrants into workplace communities, the same approach makes sense when unauthorized migrants seek the protections of the Fourth Amendment.” *Id.*

⁹⁴ See *Oliva-Ramos v. Attorney Gen. of the U.S.*, 694 F.3d 259, 271 (3d Cir. 2012) (finding suppression where violation is egregious or widespread); *Ghysels-Reals v. U.S. Attorney Gen.*, 418 F. App’x 894, 895–96 (11th Cir. 2011) (finding there is no basis to apply the exclusionary rule absent an egregious constitutional violation); *Gutierrez-Berdin v. Holder*, 618 F.3d 647, 653 (7th Cir. 2010) (“[H]andcuffing an alien who resisted arrest is certainly not the ‘egregious’ behavior contemplated by *Lopez-Mendoza*.”); *Escobar v. Holder*, 398 F. App’x 50, 53–54 (5th Cir. 2010) (declining to consider the question in the absence of a Fourth Amendment violation altogether); *United States v. Oscar-Torres*, 507 F.3d 224, 229–30 (4th Cir. 2007) (ruling it need not consider whether egregious violations of the Fourth Amendment warrant a suppression remedy); *Almeida-Amaral v. Gonzales*, 461 F.3d 231, 235 (2d Cir. 2006) (holding that any arrest predicated on race is an arrest for “no reason at all” and is per se egregious); *United States v. Olivares-Rangel*, 458 F.3d 1104, 1106 (10th Cir. 2006) (“*Lopez-Mendoza* does not prevent the suppression of all identity-related evidence . . . [it] merely reiterates the long-standing rule that a defendant may not challenge a court’s *jurisdiction* over him or her based on an illegal arrest.”); *United States v. Navarro-Diaz*, 420 F.3d 581, 587 (6th Cir. 2005) (finding no egregious violation of the Fourth Amendment when police asked the defendant to identify himself); *Mendoza-Solis v. INS*, 36 F.3d 12, 14 (5th Cir. 1994) (stating that the exclusionary rule does not apply in removal proceedings); *Gonzalez-Rivera v. INS*, 22 F.3d 1441, 1449 (9th Cir. 1994) (stating that “bad faith” violations are egregious and occur when “evidence is obtained by deliberate violations of the fourth amendment, or by conduct a reasonable officer should have known is in violation of the [U.S.] Constitution”).

⁹⁵ *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1050 (1984); see also Sweeney, *supra* note 49, at 274–79 (providing a thoughtful analysis of the reasons to fully apply the exclusionary rule in immigration proceedings).

⁹⁶ Hiroshi Motomura, *The Rights of Others: Legal Claims and Immigration Outside the Law*, 59 DUKE L.J. 1723, 1763 (2010).

However, the limitations of the egregious violation requirement are only one of the deficiencies of the practical application of the Fourth Amendment exclusionary rule in immigration court. Suppression is not the best deterrent to racial profiling in large part because there is likely an alternate means of presenting the evidence sought to be suppressed. In immigration removal proceedings, one of the most valuable pieces of evidence is proof of the country of origin because removability cannot be determined or effectuated absent that information. Even if this evidence were suppressed, likely with the assistance of counsel (not presently appointed to all indigent respondents), it would be otherwise admissible because it is also available to law enforcement officers as a result of information sharing resulting from Secure Communities and PEP. Thus, PEP, and previously Secure Communities, undermine the Fourth Amendment's suppression remedy.⁹⁷

B. Equal Protection

Equal protection claims alleging discriminatory intent require one to prove the intention of the law enforcement agent responsible for the alleged violation, which is notoriously hard to do. Intent is difficult to decipher because of implicit racial bias⁹⁸ and logistical challenges of gathering such data.⁹⁹ The difficulty of proving what was in an officer's mind when effectuating an arrest may deter many legitimate rights violations claims.¹⁰⁰ For those that pursue such claims, justice may be unattainable and the offending party evades consequences and will not be deterred from continued profiling. As will be addressed below, this is in part why preemption can and has played a role in indirectly addressing the harms of racial profiling.¹⁰¹

At a macro discretionary level, policy makers and politicians have demonstrated awareness of the possibility of perceived or

⁹⁷ See generally Carrie Rosenbaum, *Sub-federal Enforcement of Immigration Law: An Introduction to the Problem of Pretextual Enforcement and Inadequate Remedies*, 3 LAWS 61 (2014), available at <http://www.mdpi.com/2075-471X/3/1/61>, for a more complete discussion on the shortcomings of suppression in removal proceedings.

⁹⁸ See generally Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489 (2005), for a discussion on the implications of implicit biases in social interactions and the law.

⁹⁹ Brandon Garrett, *Remediating Racial Profiling*, 33 COLUM. HUM. RTS. L. REV. 41, 61–81 (2001) (explaining that racial profiling equal protection claims are particularly hard to prove).

¹⁰⁰ See MOTOMURA, *supra* note 52, at 115 (referencing the difficulty of discrimination lawsuits which require a judge to “ascertain[] what particular state or local officials were thinking” when making an arrest).

¹⁰¹ *Id.* at 135 (“When equal protection violations based on discriminatory intent are a serious concern but hard to define and prove, a preemption challenge can shift who bears the practical risk that the truth is hard to ascertain.”).

real discriminatory effects of measures like S.B. 1070 by going to great lengths to draft measures that have the appearance of racial neutrality.¹⁰² This decreases the likelihood of a successful equal protection challenge because of the difficulty of proving discriminatory intent within the law itself,¹⁰³ which again, highlights the importance of equality concerns within the preemption context. And as will be discussed below, the Court has allowed concerns about discrimination into their preemption analysis.¹⁰⁴ What has been labeled “plenary power preemption” may act as a gap-filler for the inadequate equal protection remedy.¹⁰⁵

C. Prosecutorial Discretion

While not historically viewed as a deterrent to improper police practices, an early exercise of prosecutorial discretion could provide a check on pretextual enforcement or racial profiling.¹⁰⁶ As a counter to the potential harm caused by sub-federal agents’ discretion to arrest, ICE could, even more proactively, utilize discretion not to prosecute pursuant to the June 2010 and 2011 Morton Memos,¹⁰⁷ wherein then-ICE

¹⁰² Pratheepan Gulasekaram & S. Karthick Ramakrishnan, *Immigration Federalism: A Reappraisal*, 88 N.Y.U. L. REV. 2074, 2133 (2013). In spite of the courts’ avoidance of equality concerns, “political actors have been, and are, aware of the underlying connection between immigration law, state and local law, and race.” *Id.* Governor Brewer’s amendment of S.B. 1070 explicitly addresses concerns about racial profiling, which is seen as incentivized by drafts of the bill. *Id.*

¹⁰³ Motomura, *supra* note 96, at 1743 (“An equal protection challenge would require proof of discriminatory intent, but a preemption challenge can persuade some judges based on reasonable possibility of discriminatory intent.”).

¹⁰⁴ Gulasekaram & Ramakrishnan, *supra* note 102, at 2135 & n.289 (“As Professor Hiroshi Motomura argues, some courts may already be aware of this latent racial dynamic, implicitly folding equality considerations into their preemption analysis when striking down state and local laws.”).

¹⁰⁵ Kerry Abrams, Essay, *Plenary Power Preemption*, 99 VA. L. REV. 601, 639 (2013) (noting that plenary power preemption may allow redress to discrimination or racial profiling where claims otherwise may fail or not be brought by unauthorized migrants).

¹⁰⁶ In June 2010 and June 2011, former ICE Director John Morton issued memos instructing ICE Chief Counsel to exercise discretion in removal proceedings with a focus on prosecuting dangerous criminals, repeat immigration violators, and suspected terrorists. See Memorandum from John Morton, Assistant Sec’y, U.S. Immigration & Customs Enforcement, to U.S. Immigration & Customs Enforcement Emps., Civil Immigration Enforcement: Priorities for the Apprehension, Detention, and Removal of Aliens (June 30, 2010) [hereinafter Morton, 2010 Memorandum], available at http://www.ice.gov/doclib/detention-reform/pdf/civil_enforcement_priorities.pdf; Memorandum from John Morton, Dir., U.S. Immigration & Customs Enforcement, to All Field Office Dirs., All Special Agents in Charge, and All Chief Counsel, Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens (June 17, 2011) [hereinafter Morton, 2011 Memorandum], available at <http://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf>.

¹⁰⁷ See Morton, 2010 Memorandum, *supra* note 106; Morton, 2011 Memorandum, *supra* note 106.

Director John Morton instructed the ICE Chief Counsel to exercise discretion in removal proceedings with a focus on prosecuting dangerous criminals, repeat immigration violators, and suspected terrorists.¹⁰⁸

While a district attorney might be likely to drop charges against a non-citizen stopped for a minor criminal violation, DHS has not historically exercised equivalent discretion in the immigration context, even where DHS lacks the actual capacity to carry out removal. Discretion not to prosecute may be an appropriate tool where sub-federal agents engage in behavior that falls short of an egregious violation for Fourth Amendment purposes, and the individual is not a designated enforcement target.

While the 2011 Morton Memo also suggests that discretion be exercised where the respondents are litigating civil rights violations,¹⁰⁹ discretion could be exercised more expansively in the context of pretextual arrests where suppression of evidence under the exclusionary rule may not be an appropriate or available remedy, or where an equal protection¹¹⁰ claim is inadequate to provide protection of individual rights.

Following the letter and spirit of the Morton Memos on prosecutorial discretion, ICE trial attorneys could more actively exercise prosecutorial discretion where there are indicators that the initial criminal arrest was pretextual or marred by racial profiling.¹¹¹ An exercise of discretion would serve the policy goals outlined in the 2011 Morton Memo because the agency could focus resources on seeking removal of those who pose a public safety or national security threat, rather than individuals who entered without inspection, and/or overstayed a visa. An exercise of discretion in this context could help demonstrate the integrity of the immigration enforcement system and discourage pretextual enforcement practices.¹¹²

In the absence of adequate means of deterring discriminatory immigration policing, communities have expressed their resistance to Secure Communities and detainer practices by advocating for non-compliance, or by advocating for

¹⁰⁸ See Morton, 2011 Memorandum, *supra* note 106.

¹⁰⁹ See *id.*; see also Rachel R. Ray, *Insecure Communities: Examining Local Government Participation in U.S. Immigration and Customs Enforcement's "Secure Communities" Program*, 10 SEATTLE J. SOC. JUST. 327, 339 (2011).

¹¹⁰ *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1055 (1984) (White, J., dissenting); see Elias, *supra* note 56, at 1150.

¹¹¹ See generally Jason A. Cade, *Policing the Immigration Police: ICE Prosecutorial Discretion and the Fourth Amendment*, 113 COLUM. L. REV. SIDEBAR 180 (2013).

¹¹² See Morton, 2011 Memorandum, *supra* note 106.

immigrant integrative ordinances and state laws. Additionally, following successful detainer litigation by rights advocates resulting in validation of Fourth Amendment claims, sheriffs have declared their intent to cease compliance with detainers.¹¹³ As of the spring of 2014, the following cities or counties had implemented measures rejecting detainers and/or Secure Communities: Philadelphia, Pennsylvania; Skagit County, Mount Vernon, Walla Walla, and Kitsap, Washington; Orange County, California; New York, New York; Newark, New Jersey; Cook County, Illinois; San Miguel and Boulder, Colorado;¹¹⁴ and the states of California and Connecticut.¹¹⁵ By the time of publication there may be more cities and counties on this list.

The California TRUST Act may begin to address the discriminatory effects of Secure Communities and PEP.¹¹⁶ Because the TRUST Act is intended to, and may result in minimizing the potential for racial and ethnic profiling in policing resulting from Secure Communities, it is in line with equality principles and would not be preempted by federal law.

V. PREEMPTION OF THE TRUST ACT

Pursuant to traditional preemption principles, the TRUST Act should survive a preemption challenge, and by incorporating equality principles, it is even clearer that the TRUST Act would not be preempted. This section will address traditional express, conflict, and implied preemption doctrines and two other forms of preemption that I will refer to as “constitutional preemption” and “statutory preemption,” versions of which have been applied to sub-federal immigration measures. The section will conclude with consideration of the role of equality principles in the preemption analysis.

¹¹³ Courts in Oregon and Pennsylvania determined that ICE detainer requests are not mandatory and are merely requests, and that sheriffs could be liable for constitutional violations for holding people pursuant to ICE detainers. See *Galarza v. Szalczyk*, 745 F.3d 634 (3d Cir. 2014); see also *Miranda-Olivares v. Clackamas Cnty.*, No. 3:12-cv-02317-ST, 2014 U.S. Dist. LEXIS 50340 (D. Or. Apr. 11, 2014).

¹¹⁴ Fear of potentially detaining U.S. citizens as a result of complying with an ICE detainer request may be part of the drive towards policies rejecting ICE holds. Colleen Slevin, *Some Colorado Sheriffs Ending Immigrant Detainers*, N.Y. TIMES (Apr. 29, 2014, 7:44 PM), http://www.nytimes.com/aponline/2014/04/29/us/ap-us-immigration-detainers.html?_r=0.

¹¹⁵ CAL. GOV'T CODE §§ 7282–7282.5 (West 2014); CONN. GEN. STAT. § 54-192h (2014).

¹¹⁶ Local policies developed in the above cities and counties “reflect a broader kind of ideological conflict expressed across the federal-state-local axis: sanctuary laws represent instances of local officials staking out political positions in some tension with federal intentions . . . in the case of noncooperation laws, the laws reflect a general desire to make government institutions accessible to all people.” Cristina M. Rodríguez, *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. 567, 604 (2008).

A. Traditional “Express” Preemption

At the outset, the TRUST Act is not expressly preempted because Congress has not indicated through an expression of federal legislation that it intends to supersede the TRUST Act as a related law. No federal statute contains an “express preemption” provision preempting the TRUST Act.¹¹⁷

The non-cooperation or sanctuary policies of the 1980s and 1990s provide an example of sub-federal non-cooperation laws that were expressly preempted. While substantively different from the California TRUST Act, the sanctuary policies of the 1980s provide a context in which to consider sub-federal legislation.

Following the civil wars in El Salvador and Guatemala, communities throughout the United States provided refuge to people who came to the United States but had not received, or had been denied, refugee status.¹¹⁸ What came to be known as “sanctuary cities” represented a form of resistance to federal immigration law, or semi-organized non-cooperation.¹¹⁹ Cities and counties had informal policies, and some passed ordinances.¹²⁰ In response, in 1996, Congress prohibited local government officials or employees from refusing to provide information about an individual’s immigration status.¹²¹ Congress’s action preempted existing sanctuary ordinances, though there was no litigation of them by the federal government.¹²² If the TRUST Act had attempted to codify sanctuary city policies like those preempted by Congress in 1996, it could have been subject to express preemption. Instead, the TRUST Act was drafted narrowly to only address immigration detainees.

To date, Congress has not expressly prohibited states or localities from regulating sub-federal authorities’ prolonged detention of non-citizens pursuant to ICE detainees. While

¹¹⁷ See, e.g., 8 U.S.C. § 1229a(a)(3) (2012); see also Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 226–28 (2000) (providing a concise summary of express, field, and conflict preemption).

¹¹⁸ See Huyen Pham, *The Constitutional Right Not to Cooperate? Local Sovereignty and the Federal Immigration Power*, 74 U. CIN. L. REV. 1373, 1382–83 (2006); Christopher Carlberg, *Cooperative Noncooperation: A Proposal for an Effective Uniform Noncooperation Immigration Policy for Local Governments*, 77 GEO. WASH. L. REV. 740, 744–45 (2009); Ignatius Bau, *Cities of Refuge: No Federal Preemption of Ordinances Restricting Local Government Cooperation with the INS*, 7 LA RAZA L.J. 50, 50–51 (1994).

¹¹⁹ See Pham, *supra* note 118.

¹²⁰ See *id.* at 1383.

¹²¹ See *id.* at 1376 (citing 8 U.S.C. §§ 1373, 1644 (2000)); Rodriguez, *supra* note 116, at 601.

¹²² See Pham, *supra* note 118, at 1384.

Congress in 1996 expressly preempted the “non-cooperation” sanctuary policies of the 1980s and 1990s, the preempted sanctuary laws were markedly different from the TRUST Act.

Unlike the sanctuary policies, the TRUST Act does not directly prevent or interfere with information sharing between sub-federal criminal entities and federal immigration authorities. Instead, the TRUST Act prevents sub-federal agents from detaining certain suspected non-citizens past the time that detention might otherwise be authorized in connection with the underlying criminal matter.¹²³ The TRUST Act does not prevent discovery of a criminal detainee’s immigration status.¹²⁴ While the sanctuary laws prohibited communication regarding immigration status, the TRUST Act merely prevents actual prolonged detention.

B. Conflict Preemption

The TRUST Act would also not be conflict preempted because it does not create “an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”¹²⁵ It does not present an actual conflict with federal law, and it is not impossible or difficult for an actor to comply with both the state and federal laws at the same time.¹²⁶ No federal law mandates sub-federal agents’ detention of suspected non-citizens. Such a mandate would violate the Tenth Amendment prohibition on commandeering.¹²⁷

C. Implied Preemption

While implied preemption is less clearly defined and broader than express preemption, the TRUST Act would likely also survive an implied, field, or obstacle preemption challenge.¹²⁸ The

¹²³ CAL. GOV’T CODE § 7282.5 (West 2014).

¹²⁴ See Lucas Guttentag, *The Forgotten Equality Norm in Immigration Preemption: Discrimination, Harassment, and the Civil Rights Act of 1870*, 8 DUKE J. CONST. L. & PUB. POLY 1 (2013) (cataloguing and discussing these laws); Rodríguez, *supra* note 116, at 600–05.

¹²⁵ *Arizona v. United States*, 132 S. Ct. 2492, 2501 (2012) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67, 61 (1940)).

¹²⁶ See *Hines*, 312 U.S. at 67; see also Nelson, *supra* note 117, at 226–31.

¹²⁷ Lasch, *supra* note 40, at 290. Section 287.7(a) of Title 8 of the Code of Federal Regulations defines detainees as “requests,” and indicates that detainees “advise another law enforcement agency” that ICE would like to take custody. 8 C.F.R. § 287.7(a) (2014). The sections of the U.S. Code referenced in the detainer regulations indicate that ICE may collaborate with localities that “choose” to participate in immigration enforcement. See 8 U.S.C. §§ 1103(a)(11), (c), 1357(d) (2012); see also Letter from Spencer Amdur, Lawyers’ Comm. for Civil Rights of the S.F. Bay Area, et al., to Cal. Cnty. Counsel, *supra* note 14.

¹²⁸ Field preemption requires Congress to have legislated in a way that was so comprehensive as to occupy the field of an issue, where the framework of their legislation

TRUST Act is not generally incompatible with immigration enforcement regulations and would not be impliedly field preempted because it does not prevent DHS from enforcing immigration law, nor does it supplement immigration law. Instead, it addresses otherwise potentially unlawful extended detention of criminal arrestees for immigration purposes.

Even if the number of detainees or detainer requests has declined as a result of the TRUST Act, there is no indication that the decrease in detainees has interfered with ICE's enforcement of immigration law. The number of Notices to Appear (NTA) being issued annually is still at record high levels.¹²⁹ The TRUST Act would not slow actual rates of deportation, in part because so many deportations happen at the border in expedited proceedings, and because of immigration court backlogs.¹³⁰ Moreover, regardless of the number of apprehensions or orders of removal, DHS only has the capacity to deport about 300,000 to 400,000 people annually.

Instead of interfering with enforcement, the TRUST Act may result in a decrease in superfluous immigration detention of non-priority non-citizens, a cost borne by local law enforcement agencies, and subsequently ICE once the non-citizen is transferred to ICE custody. The TRUST Act may also increase the proportion of removals of higher priority offenders as identified by DHS.¹³¹ Thus instead of interfering with enforcement, it may increase efficiency and cost effectiveness.

Additionally, even if the TRUST Act decreased the use of immigration detainees, it would not interfere with the information-sharing component of Secure Communities. Even after implementation of the TRUST Act, if a local law enforcement agent does not comply with the detainer request, the data-sharing component of Secure Communities, and now PEP,

is "so pervasive . . . that Congress left no room for states to supplement it," or where the federal system of laws would "preclude enforcement of state laws on the same subject." *Arizona*, 132 S.Ct. at 2501 (quoting *Hines*, 312 U.S. at 70). The Supremacy Clause disallows state laws that "stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Id.* (citations omitted).

¹²⁹ See *At Nearly 100,000, Immigration Prosecutions Reach All-Time High in FY 2013*, TRACIMMIGR. (Nov. 25, 2013), <http://trac.syr.edu/immigration/reports/336/>.

¹³⁰ *Immigration Court Backlog Tool: Pending Cases and Length of Wait in Immigration Courts*, TRACIMMIGR., http://trac.syr.edu/phptools/immigration/court_backlog/ (last visited Dec. 15, 2014); FY 2013 REMOVALS, *supra* note 33 (reporting that in FY 2013, of 368,644 removals, 235,093 were apprehended and removed at the border and 133,551 were apprehended within the United States).

¹³¹ *Enforcement Without Focus: Non-violent Offenders Caught in the US Immigration Enforcement System*, AM. IMMIGR. COUNCIL IMMIGR. POL'Y CTR. (Apr. 2, 2013), <http://www.immigrationpolicy.org/printpdf/2925>; KOHLI, MARKOWITZ & CHAVEZ, *supra* note 41.

remains in place because the biometric data will still be transmitted to DHS.¹³²

Preemption in the immigration context is somewhat doctrinally muddled¹³³ and therefore necessitates additional consideration. The rest of this section will attempt to set forth two additional, more nuanced preemption methodologies relevant to the immigration context to offer additional insight into whether an integrative measure like the TRUST Act would be preempted. One model emphasizes the federal government's exclusive power and control over immigration pursuant to the plenary power doctrine,¹³⁴ which I will refer to as "constitutional preemption," and the other, "statutory preemption," favors a power-sharing approach enabling more of a role for sub-federal entities in legislating. These frameworks are merely two general approaches and do not create a dichotomy, but instead define a spectrum of views on the preemption doctrine. This next section will outline these two methodologies within discussions of immigration preemption before finally moving to consideration of civil rights preemption and "equality principles," and the role they may play within either framework for assessing the constitutionality of the TRUST Act.

D. Constitutional Preemption

Federal exclusivity preemption, or what I refer to as "constitutional preemption," is based on the federal government's unique power over certain matters. Federal exclusivity in immigration law is not established explicitly as a matter of constitutional doctrine, but is instead based on implied powers. Only Article I, Section 8, Clause 4 gives Congress the power to "establish a uniform Rule of Naturalization."¹³⁵ Otherwise, the federal government's power over immigration has been

¹³² Once the FBI checks the fingerprints of an arrestee, the FBI automatically sends them to DHS, and ICE determines if the person is subject to removal. Secure Communities however, does not authorize local agents to issue Notices to Appear, as the 287(g) regulations did. *Secure Communities*, *supra* note 31.

¹³³ Abrams, *supra* note 105, at 626.

¹³⁴ *Id.* at 601, 615 (discussing preemption following the Supreme Court's decision in the *Arizona v. United States* case and helping to make sense of contemporary immigration preemption doctrine by suggesting that the Court will apply field or structural preemption to consider or invalidate a state statute that regulates core immigration functions (admissions and removals) and what Abrams terms "plenary power preemption," used to invalidate alienage laws, and describing plenary power preemption in part as a manifestation of immigration exceptionalism as linked to structural immigration preemption concerns regarding the unique nature of foreign affairs).

¹³⁵ U.S. CONST. art. I, § 8, cl. 4.

interpreted as implied.¹³⁶ The power of Congress to admit or deport non-citizens is considered “plenary,” or absolute.

The federal government’s plenary power is what gives rise to federal exclusivity in the context of preemption of sub-federal immigration laws.¹³⁷ The plenary power doctrine has evolved since its establishment pursuant to the Chinese exclusion cases in 1889 and 1893, where the Court held in *Fong Yue Ting v. United States* and *Chae Chan Ping v. United States* that the federal government has exclusive power over admissions and removals.¹³⁸

Perhaps most recently and relevantly, the Supreme Court’s 2012 decision in *Arizona v. United States* reaffirmed the exclusivity of the federal government in immigration law.¹³⁹ In spite of the critiques of federal exclusivity, some contend that it remains relevant as a tool to stem “the discriminatory powers of the states on immigrants,”¹⁴⁰ particularly in the absence of civil rights preemption or application of equality principles within the preemption analysis.

Unlike S.B. 1070, the TRUST Act does not regulate in an area that is a core immigration matter (admissions or removals), compared to the main thrust of S.B. 1070, which was clearly revealed in Section 1 as Arizona’s immigration policy.¹⁴¹ Instead it only indirectly concerns enforcement, and relies on a typical exercise of state police power by identifying non-citizens and limiting their continued incarceration. The impact of the TRUST Act can be characterized as ancillary to immigration. While a court could use the national sovereignty rationale from structural preemption and plenary power preemption and characterize the TRUST Act as an immigration regulation in disguise, even

¹³⁶ LEGOMSKY & RODRÍGUEZ, *supra* note 10, at 113–30.

¹³⁷ *Id.* at 113–14.

¹³⁸ *Fong Yue Ting v. United States*, 149 U.S. 698 (1893); *Chae Chan Ping v. United States*, 130 U.S. 581 (1889); LEGOMSKY & RODRÍGUEZ, *supra* note 10, at 195 (explaining the evolution of the plenary power doctrine).

¹³⁹ Lucas Guttentag, *Immigration Preemption and the Limits of State Power: Reflections on Arizona v. United States*, 9 STAN. J. C.R. & C.L. 1, 2–3 (2013) (noting the Court’s support for federal primacy in the context of immigration enforcement); Jennifer M. Chacón, *The Transformation of Immigration Federalism*, 21 WM. & MARY BILL RTS. J. 577, 580–81 (2012).

¹⁴⁰ Rodríguez, *supra* note 116, at 613; Michael J. Wishnie, *State and Local Police Enforcement of Immigration Laws*, 6 U. PA. J. CONST. L. 1084, 1102–15 (2004) (discussing the threat of racial profiling by state and local law enforcement).

¹⁴¹ See Abrams, *supra* note 105 (discussing the Court’s application of plenary power or structural preemption based in part on distinguishing alienage and immigration laws).

though it is otherwise an exercise of state police power, this seems unlikely.¹⁴²

Constitutional preemption does not necessarily indicate that any sub-federal law, whether immigrant integrative or anti-immigrant, would be preempted. While S.B. 1070 was preempted based largely on a federal exclusivity-oriented preemption analysis,¹⁴³ as will be discussed in the next section, where civil rights and equality principles are incorporated into the preemption analysis, an immigrant integrative sub-federal measure should survive a preemption challenge.

Scholars have questioned the rationale behind federal exclusivity in preemption analyses of state laws concerning immigration.¹⁴⁴ Some suggest that the foreign policy rationale justifying federal exclusivity is no longer relevant,¹⁴⁵ or that federal exclusivity is no longer appropriate as a result of the shift towards increased power sharing between the federal government and sub-federal entities, and the immigrant-integration role of localities.¹⁴⁶ Additionally, prior to 1840 the states played a direct role in regulating immigration.¹⁴⁷

E. Statutory Preemption

Statutory preemption may allow more room for state and local governments to legislate in the field of immigration law¹⁴⁸ because it recognizes some degree of shared authority between

¹⁴² *Id.* at 637 (explaining that in preemption cases with state alienage statute challenges, the Court has taken the national sovereignty issues from structural and plenary power preemption to suggest that the state statute is an immigration regulation in disguise even though it otherwise appeared to be an exercise of a traditional police power). The author suggests (and agrees) that based on Abrams's rationale, the Court would, however, be more likely to invalidate a sub-federal law using this rationale if the law were discriminatory, because in alienage cases the Supreme Court "deviates from the usual preemption doctrine and applies plenary power preemption," in part as a substitute for an inadequate equal protection doctrine. *Id.*

¹⁴³ The author acknowledges that this is an oversimplification and extensive scholarly work has addressed the Court's preemption analysis.

¹⁴⁴ See, e.g., Peter H. Schuck, *Taking Immigration Federalism Seriously*, 2007 U. CHI. LEGAL F. 57; Peter J. Spiro, *Learning to Live with Immigration Federalism*, 29 CONN. L. REV. 1627 (1997); Clare Huntington, *The Constitutional Dimension of Immigration Federalism*, 61 VAND. L. REV. 787, 789 (2008).

¹⁴⁵ Peter J. Spiro, *The States and Immigration in an Era of Demi-sovereignties*, 35 VA. J. INT'L L. 121, 161-74 (1994).

¹⁴⁶ Rodriguez, *supra* note 116, at 600-05.

¹⁴⁷ States had used their constitutionally derived police power to regulate immigration until about 1840 when the courts started placing limits on their regulation of immigration. See STEPHEN H. LEGOMSKY, *IMMIGRATION AND THE JUDICIARY: LAW AND POLITICS IN BRITAIN AND AMERICA* 180-83, 189-90 (1987); GERALD L. NEUMAN, *STRANGERS TO THE CONSTITUTION: IMMIGRANTS, BORDERS AND FUNDAMENTAL LAW* 21-23, 31-37 (1996).

¹⁴⁸ Huntington, *supra* note 144, at 792-93.

national and sub-national levels of government.¹⁴⁹ The Immigration and Nationality Act can statutorily preempt sub-federal laws governing admission and removal of non-citizens.¹⁵⁰ Statutory preemption is neither express nor implied preemption, but a separate and distinct view of the preemption doctrine.¹⁵¹

New configurations of the term “immigration federalism” may be parallel to statutory preemption in that they recognize simultaneous engagement of federal and sub-federal actors in immigration regulation regardless of whether the rulemaking is integrative or anti-immigrant.¹⁵²

Statutory preemption recognizes sub-national authority arising in part pursuant to the police power to regulate health and safety.¹⁵³ Because the federal government has traditionally dominated the field of immigration law, if a sub-federal law were preempted, it will most likely be field preempted.¹⁵⁴

Statutory preemption recognizes that the foreign affairs justification for federal exclusivity may be less relevant because foreign powers interact directly with sub-federal actors,¹⁵⁵ and nations understand that the actions of one state or locality may not reflect the will of the federal government.¹⁵⁶ It is also less possible now than in the past to exclude states and localities from activities with foreign affairs impact.¹⁵⁷ At the same time, leaders of other countries recognize that sub-federal entities within the United States have the power to act in ways that may be at odds

¹⁴⁹ *Id.* at 810 n.90 (citing Ernest A. Young, *The Rehnquist Court's Two Federalisms*, 83 TEX. L. REV. 1, 131 (2004)); *id.* at 826.

¹⁵⁰ *Id.* at 825.

¹⁵¹ *Id.* at 842.

¹⁵² Elias, *supra* note 34, at 708.

¹⁵³ Huntington, *supra* note 144, at 825.

¹⁵⁴ Within the context of statutory preemption is the question of whether federal rules expressly or impliedly preempt sub-federal rules. *Id.* at 850 (citing *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 203–04 (1983)). Implied field preemption is a type of statutory preemption. For more on statutory and implied field preemption, see *id.* at 850–52.

¹⁵⁵ See Rodríguez, *supra* note 116, at 615–16 (citing Judith Resnik, *Law's Migration: American Exceptionalism, Silent Dialogues, and Federalism's Multiple Ports of Entry*, 115 YALE L.J. 1564, 1639–43 (2006)); Spiro, *supra* note 145, at 162–63 (showing how states and localities interact with international entities).

¹⁵⁶ See Amanda Mangaser, *State and Local Regulation of Immigration and Immigrants: A Connecticut Case Study* 12 (Dec. 17, 2013) (Student Legal History Paper, Yale Law School), available at http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=1027&context=student_legal_history_papers (citing Rodríguez, *supra* note 116, at 571).

¹⁵⁷ Rodríguez, *supra* note 116, at 615 (“[I]t is no longer clear that it is possible or even desirable to exclude states and localities from activities that implicate foreign affairs.”).

with federal policies.¹⁵⁸ Under this preemption model, the TRUST Act should not be preempted because it should not have an adverse impact on foreign affairs, as it is immigrant integrative, and regardless, it is reasonable to presume that other nations will not attribute the TRUST Act to the federal government.

Historically, prior to the era of the plenary power doctrine, states played a role in immigration.¹⁵⁹ Today, sub-federal entities play a significant role in integrating immigrants through public services such as hospitals, schools, and the workplace.¹⁶⁰ There is a “de facto” power sharing occurring between these levels of government and the federal government.¹⁶¹ At the same time, even if federal exclusivity were removed from the analysis of state immigration laws, civil rights preemption or active incorporation of equality principles would facilitate sub-federal integrative measures while casting more of a shadow on disintegrative ones. In other words, it could be possible to move away from federal exclusivity in preemption considerations while still protecting civil and individual rights.

Within this context, the federal government should not require states and localities to participate in immigration enforcement where those bodies are attempting to integrate.¹⁶² However, failure to recognize immigrant equality principles as an essential part of preemption analyses would still result in creation of anti-immigrant zones where states and localities choose to create discriminatory or enforcement-oriented measures. Some scholars suggest that permitting states to enact anti-immigrant measures may help facilitate the eventuality of

¹⁵⁸ Instead of suggesting the elimination of federal exclusivity or “immigration federalism,” others, such as Peter Schuck, have suggested that federalism need not mean “constitutional state sovereignty,” where “state authority inheres in the constitutional settlement among the states and the people, whereby only limited powers . . . were delegated to the national government while all other powers were reserved to the states and the people.” Schuck, *supra* note 144, at 66. He explains that instead, “state participation can take many different forms: administration and/or enforcement of federally-established rules and policies; policy development and implementation within parameters (more or less constraining) set by federal policymakers; federal funding of states to develop their own policies; and many other collaborative (though inevitably conflicting) arrangements,” and immigration federalism occurs when “states operate under, and are obliged to respect, federal immigration policies and supervision.” *Id.* at 66–67. He also notes that this is what Peter Spiro calls “cooperative federalism.” *Id.* at 67 (citing Peter J. Spiro, *Federalism and Immigration: Models and Trends*, 167 INT’L SOC. SCI. J. 67, 67–68 (2001)).

¹⁵⁹ See LEGOMSKY & RODRÍGUEZ, *supra* note 10, at 110–30.

¹⁶⁰ See Rodríguez, *supra* note 116, at 571–72, 609–17.

¹⁶¹ *Id.* at 610.

¹⁶² *Id.* at 631.

their independent decision to cease such practices.¹⁶³ However, even if this were true, because the preemption analysis can and should address issues of civil and individual rights, we need not permit such potentially harmful and optimistic experimentation.

The statutory preemption model would still permit analysis of individual rights because the Constitution's concern with structural issues includes not only the relationship among the branches of sub-national and national government, but also individual rights.¹⁶⁴ The allocation of authority can be informed by questions of individual rights and both can be considered in the preemption analysis, even if federalism and individual rights are fundamentally different questions.¹⁶⁵ However, I would suggest that federalism and individual rights are not fundamentally different questions, as was suggested by the Court's interpretation of the role of the Civil Rights Act in preemption in *Takahashi v. California Fish and Game Commission*,¹⁶⁶ *Hines v. Davidowitz*,¹⁶⁷ and *Graham v. Richardson*.¹⁶⁸

VI. EQUALITY PRINCIPLES AND CIVIL RIGHTS PREEMPTION

For the purposes of this Article, the "equality principle" refers to the constitutional ideal of equality derived from the rationales of the *Plyler v. Doe* and *Brown v. Board of Education* Courts,¹⁶⁹ combined with the notion that everyone in the United States should be treated equally whether their presence in the United States is authorized or not. Immigration scholar Hiroshi Motomura has written extensively about the notion of "Americans in Waiting," or "future members of American society." "Americans in Waiting" may be unauthorized migrants who are already members of and participants in American

¹⁶³ *Id.* at 639 ("[T]his transition from fear to acceptance is more likely to occur not only if the local debate over immigration is permitted to run its course (subject to generally applicable laws), but also if the localities that adopt these [anti-immigrant] ordinances come to feel the consequences of excluding immigrants from their communities—namely, the economic consequences of pushing immigrants out of places they helped revitalize."). Rodríguez responds by questioning whether once immigrant labor has helped revitalize a locale, might the immigrant contribution be dismissed and the population be just as unwelcome as they were initially, as if they had made no measurable or perceivable contribution. *Id.* at 639–40.

¹⁶⁴ Huntington, *supra* note 144, at 793–94, 828, 834–37.

¹⁶⁵ *Id.* at 794.

¹⁶⁶ See *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410 (1948).

¹⁶⁷ See *Hines v. Davidowitz*, 312 U.S. 52 (1941).

¹⁶⁸ See *Graham v. Richardson*, 403 U.S. 365 (1971).

¹⁶⁹ See MOTOMURA, *supra* note 52, at 88 (discussing the *Plyler* decision which treated Texas schoolchildren as future members of U.S. society because of a concern about their integration ability and consequences for them, and the United States as a whole, absent such consideration).

society based on their presence and participation as consumers, workers, and beyond.¹⁷⁰ Thus it is reasonable to propose that future Americans should be entitled to certain rights and protections. Accordingly, by incorporating this kind of equality principle into the preemption analysis, an integrative sub-federal law pertaining to immigration or alienage¹⁷¹ should not be preempted.

Similarly, immigration scholar Lucas Guttentag discusses and defines an “equality principle” by focusing on civil rights preemption as derived from the Civil Rights Act of 1870, which prohibits discrimination based on “alienage.”¹⁷² Guttentag examines the role of this equality principle in the context of assessing sub-federal immigration laws. Application of this equality principle also suggests that an immigrant integrative sub-federal law that furthers the immigrant equality principle derived from the Civil Rights Act would not be preempted.

The next section will employ a combined equality principle based on the notion of applying principles of non-discrimination to all present in the United States irrespective of immigration status, and application of the civil rights equality principle derived from the Civil Rights Act to establish a relevant framework to assess the TRUST Act.

A. The Equality Principle Derived from the Civil Rights Act of 1870

While the Constitution creates what is known as the federalist structure, the role of individual rights expands beyond equal protection, into preemption analyses.¹⁷³ The 1866 and 1870

¹⁷⁰ *Id.* at 86–112.

¹⁷¹ Unless otherwise noted, I do not distinguish between immigration and alienage laws for the purposes of my discussion.

¹⁷² Guttentag, *supra* note 124.

¹⁷³ Huntington, *supra* note 144, at 837 (explaining that “the Constitution also is concerned centrally with the rights of individuals” at the same time that it creates the federalist structure). The author notes that there is an interesting interplay between the appropriateness of preemption as opposed to equal protection in addressing discrimination and federalism. Though there are reasonable arguments for why the Equal Protection Clause should apply uniformly, with the same level of review at the state and federal level, consideration of individual rights has figured into preemption analyses and may rightfully belong there as well. Scholars have suggested that equality principles might be better recognized and the equal protection doctrine might be more effective if federal exclusivity were eliminated in the context of equal protection claims which result in differing levels of scrutiny depending on whether the action arises in state or federal contexts. Elimination of federal exclusivity would mean that alienage classifications would be subject to a higher level of scrutiny than they are now at the federal level. However, equal protection is still an after-the-fact remedy, as opposed to recognizing integrative state immigration measures as not subject to preemption by taking into

Civil Rights Acts included “alien” or non-citizen anti-discrimination principles which were codified in the United States Code and Immigration and Nationality Act, though they eventually found their way into a different section.¹⁷⁴ Congress’s intent to acknowledge and potentially prevent discrimination against non-citizens is evidenced by the express provisions of the Civil Rights Act, codified at Title 42 of the U.S. Code section 1981, and first set forth in section 16 of the 1870 Act. The provisions state in relevant part, “all persons’ shall have the same right as ‘white citizens’ in ‘every State and Territory’ to certain enumerated rights.”¹⁷⁵ From approximately 1886 to 1971, the Supreme Court referenced this provision in preempting discriminatory sub-federal legislation.¹⁷⁶

B. The Supreme Court’s Use of Civil Rights Preemption and Equality Principles to Protect Non-citizens

In prior decades, up until approximately 1971, the Supreme Court actively recognized the anti-immigrant discrimination components of federal law when preempting state statutes.¹⁷⁷ In this respect, immigration scholar Lucas Guttentag and others have focused on the Court’s decisions in the 1866, 1941, 1948, and 1971 cases of *Yick Wo v. Hopkins*,¹⁷⁸ *Hines v. Davidowitz*,¹⁷⁹ *Takahashi v. California Fish and Game Commission*,¹⁸⁰ and *Graham v. Richardson*,¹⁸¹ respectively. I will briefly reference some of the instances where the Court considered individual rights pursuant to the Civil Rights Act, addressing their

consideration equality principles, and considering the possible preemption of anti-immigrant enforcement measures that run contrary to equality principles.

¹⁷⁴ Guttentag, *supra* note 124, at 20–26 (examining the role “equality principles” were intended to play in preemption of sub-federal measures affecting non-citizens, as well as the reason the Court has not emphasized civil rights preemption for the past several decades—primarily because of the codification of the Civil Rights Act in disparate parts of the U.S. Code and elsewhere, and partially because of the relationship between the Equal Protection Clause and preemption). The “alien non-discrimination” provision, section 1977 (originally section 16 of the 1870 Act), became codified at 8 U.S.C. section 41, in what was the “Civil Rights” chapter of the Aliens and Citizenship Act as was first published in 1926. The current version is located at 42 U.S.C. sections 1981–1983. *Id.* at 23; *see* 8 U.S.C. §§ 41–43 (1926). After enactment of the first comprehensive set of immigration laws into the Immigration and Nationality Act (INA) in 1952, the two civil rights provisions from the 1866 and 1870 Acts ended up in the Health and Welfare title, and were no longer contained in Title 8, the Immigration title.

¹⁷⁵ Guttentag, *supra* note 124, at 10 (citing the Civil Rights Act of 1870, ch. 114, § 16, 16 Stat. 140, 144 (codified in part at 42 U.S.C. § 1981 (2012))).

¹⁷⁶ *Id.*

¹⁷⁷ Preemption was generally of “alienage” laws rather than “immigration” ones, but an in-depth discussion is not necessary for the purposes of the following discussion.

¹⁷⁸ *See Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

¹⁷⁹ *See Hines v. Davidowitz*, 312 U.S. 52 (1941).

¹⁸⁰ *See Takahashi v. Fish & Game Comm’n*, 334 U.S. 410 (1948).

¹⁸¹ *See Graham v. Richardson*, 403 U.S. 365 (1971).

characterization of the relationship between equal protection and preemption where relevant. These cases demonstrate the instances where the Court recognized equality principles of the Civil Rights Act to preempt a sub-federal law. The same rationales apply in assessing the TRUST Act.

In 1886, the Supreme Court considered the constitutionality of a San Francisco ordinance barring laundries of wooden construction because the ordinance was applied in a racially discriminatory manner.¹⁸² While the Court's holding in *Yick Wo v. Hopkins*¹⁸³ relied on equal protection grounds, the Court referenced the 1870 Act explicitly.¹⁸⁴ *Yick Wo* was subsequently cited by other courts in striking down state law as discriminatory on preemption grounds.¹⁸⁵

In *Hines v. Davidowitz* the Supreme Court invalidated a Pennsylvania statute creating a state crime for a non-citizen's failure to comply with federal registration requirements, and criminalizing unauthorized employment.¹⁸⁶ In preempting the measure, the Court validated the plaintiff's claims that the state law conflicted with constitutional rights and the 1870 Civil Rights Act.¹⁸⁷ The *Hines* Court specifically acknowledged the 1870 Civil Rights Act's "non-discrimination mandate" tied to federal immigration laws for the purposes of preemption analysis.¹⁸⁸

In *Takahashi v. California Fish and Game Commission*,¹⁸⁹ the Court invalidated a California state law prohibiting issuance of a commercial fishing license to an "alien Japanese" on civil rights preemption grounds.¹⁹⁰ The Court preempted the law, finding the 1870 Civil Rights Act anti-discrimination protections inextricable from Congress's comprehensive immigration plan even though it did not rule that the law violated equal protection.¹⁹¹ The *Takahashi* ruling demonstrated that the Civil Rights Act could serve as the basis for invalidating a state law to further equality principles, even where the state law is not invalid pursuant to Fourteenth Amendment equal protection standards.¹⁹²

182 *Yick Wo*, 118 U.S. at 356-59, 374.

183 *Id.* at 369.

184 Guttentag, *supra* note 124, at 28 (citing *Yick Wo*, 118 U.S. at 374).

185 *Id.* at 28-29 & n.106.

186 *Hines v. Davidowitz*, 312 U.S. 52, 60-74 (1941).

187 Guttentag, *supra* note 124, at 30 (citing *Hines*, 312 U.S. at 69).

188 *Id.*

189 *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410 (1948).

190 *Id.* at 410-20.

191 *Id.* at 419; Guttentag, *supra* note 124, at 34.

192 Guttentag, *supra* note 124, at 34.

In 1971 the Court invalidated state welfare statutes restricting eligibility of immigrants for state benefits programs on equal protection grounds,¹⁹³ and simultaneously on civil rights preemption grounds.¹⁹⁴ In *Graham v. Richardson*, the Court found that the state laws were preempted under the Supremacy Clause¹⁹⁵ based on immigrant protections of section 16 of the Civil Rights Act,¹⁹⁶ as well as an overarching implied conflict with federal immigration law.¹⁹⁷ Thus the *Graham v. Richardson* decision signified the Court's acknowledgement that preemption could stem from the Civil Rights Act itself in the immigration context and not just the 1952 Immigration and Nationality Act.¹⁹⁸

When considering the validity of a state immigration-related law, the Court has recognized the importance of the relationship between the state law and equality principles of federal law.¹⁹⁹ Yet in the decades following *Graham*, where the Court has invalidated a sub-federal law, it has done so based on foreign affairs related preemption or equal protection considerations.

Several recent preemption cases provide examples of instances where the Court relied on non-civil rights preemption grounds or equal protection.²⁰⁰ A brief consideration of how the courts have strayed from civil rights preemption helps frame the discussion regarding why the Court could and should consider individual rights in the preemption analysis of both immigrant integrative or discriminatory state or sub-federal measures.

In *Plyler v. Doe*, the Supreme Court invalidated what was found to be a state attempt at enforcing immigration law by denying a public education to unauthorized migrant children.²⁰¹ The Court ruled on equal protection grounds rather than finding that the federal law preempted the Texas statute.²⁰² Justice Brennan noted that the Constitution required protecting undocumented children from discriminatory laws, and that

193 *Id.* at 29 n.106 (citing *Graham v. Richardson*, 403 U.S. 365, 371–72 (1971)).

194 *Id.* at 35 (citing *Graham*, 403 U.S. at 366–68).

195 *Id.* at 36 n.151 (citing *Graham*, 403 U.S. at 376–77).

196 *Id.* at 36 (citing *Graham*, 403 U.S. at 377).

197 *Id.* (citing *Graham*, 403 U.S. at 378).

198 *Id.* at 37–38.

199 *Id.* at 36–37 (citing *Graham*, 403 U.S. at 377).

200 See *Villas at Parkside Partners v. City of Farmers Branch*, 726 F.3d 524 (5th Cir. 2013), *cert. denied*, 134 S. Ct. 1491 (2014); *Lozano v. City of Hazleton*, 724 F.3d 297 (3d Cir. 2013), *cert. denied*, 134 S. Ct. 1491 (2014); *Arizona v. United States*, 132 S. Ct. 2492 (2012); *Plyler v. Doe*, 457 U.S. 202 (1982) (holding that discrimination against undocumented children is subject to heightened scrutiny in the equal protection analysis); *De Canas v. Bica*, 424 U.S. 351 (1976).

201 *Plyler*, 457 U.S. at 230.

202 *Id.* at 210 n.8.

preemption decisions may be influenced by a concern about “negative externalities.”²⁰³ However, the furthest the Court went in addressing the possibility of civil rights preemption was the suggestion, within their equal protection analysis, that states and localities have less authority than the federal government to discriminate based on immigration status.²⁰⁴

Similarly, in *Farmers Branch*, the Supreme Court also found a state law conflicted with federal immigration law where it restricted lawfully present non-citizens’ ability to rent housing.²⁰⁵ The Supreme Court found the state law preempted by federal immigration law, but did not address civil rights preemption.²⁰⁶ While the Court cited a case where it had struck down a state law which interfered with the ability of an inhabitant to earn a living based on race or nationality,²⁰⁷ it did not rely on the individual rights protections of the 1870 Civil Rights Act in its preemption analysis.

The plaintiffs in *Lozano v. City of Hazleton* brought preemption and equal protection claims alleging that two Hazleton, Pennsylvania ordinances were discriminatory and preempted by federal immigration law.²⁰⁸ The ordinances required proof of U.S. citizenship or lawful immigration status in order to work or rent housing.²⁰⁹ On remand following the Supreme Court’s decisions in *Chamber of Commerce v. Whiting* and *Arizona v. United States*, the Third Circuit determined that the broad employment and housing provisions of the ordinance were impliedly preempted.²¹⁰

The *Hazleton* court’s preemption of the employment provisions was based in significant part on the Hazleton ordinance’s omission of protections against discrimination.²¹¹ In passing the 1996 Act expanding workplace enforcement,

²⁰³ Peter Margulies, *Taking Care of Immigration Law: Presidential Stewardship, Prosecutorial Discretion, and the Separation of Powers*, 94 B.U. L. REV. 105, 165 n.348 (2014) (citing *Plyler*, 457 U.S. at 218–19) (“[There is a] concern over the development of ‘a permanent caste of undocumented resident aliens, encouraged by some to remain here as a source of cheap labor, but nevertheless denied the benefits that our society makes available to citizens and lawful residents’ (citation omitted) ‘We cannot ignore the significant social costs borne by our Nation when select groups are denied the means to absorb the values and skills upon which our social order rests.’”).

²⁰⁴ MOTOMURA, *supra* note 52, at 117, 137.

²⁰⁵ *Farmers Branch*, 726 F.3d 524.

²⁰⁶ *Id.*

²⁰⁷ *Id.* at 559 (citing *Truax v. Raich*, 239 U.S. 33, 42 (1915)).

²⁰⁸ *Lozano v. City of Hazleton*, 724 F.3d 297, 301–02 (3d Cir. 2013), *cert. denied*, 134 S. Ct. 1491 (2014).

²⁰⁹ *Id.* at 301.

²¹⁰ *Id.* at 300.

²¹¹ See MOTOMURA, *supra* note 52, at 108–11, 125–29.

Congress had been careful to include anti-discrimination measures. In finding the employment provisions preempted, the *Hazleton* court specifically cited the lack of similar protections in the Hazleton legislation.²¹²

Underlying the court's conflict preemption analysis was the notion that the ordinances were impliedly conflict preempted by federal immigration law because they interfered with the way in which federal immigration authorities exercise discretion in immigration enforcement.²¹³ Even though the plaintiffs provided ample evidence that the ordinances resulted in potential racial and ethnic discrimination against unauthorized migrants and Latino U.S. citizens, the court did not apply civil rights preemption.²¹⁴

In 2012, the Court relied on foreign-affairs preemption to address underlying concerns about discrimination in *United States v. Arizona*. This kind of disingenuous reliance on foreign-affairs preemption²¹⁵ has caused critics to argue for the end of federal exclusivity in preemption analyses and to suggest more direct consideration of the role of individual rights and recognition of the rights of non-citizens.²¹⁶ The *Arizona* Court referenced *Hines v. Davidowitz* regarding the possibility of "unnecessary harassment of aliens" (whom the government may not seek to deport) as a threat to federal, presumably civil rights, interests.²¹⁷ The Court's reference to the possibility of mistreatment of non-citizens based on race by sub-federal agents was, however, couched in a reference to foreign affairs concerns. Instead, the Court could have addressed the issue of discrimination by employing civil rights preemption.²¹⁸

²¹² See Motomura, *supra* note 96, at 1734. The *Lozano* court might not have found the ordinance preempted had the plaintiffs not brought forth evidence of racial and ethnic bias. *Id.* at 1743.

²¹³ MOTOMURA, *supra* note 52, at 121, 123.

²¹⁴ *Id.* at 133; *Lozano v. City of Hazleton*, 620 F.3d 170, 176, 195 & n.19 (3d Cir. 2010), *vacated*, 131 S. Ct. 2958 (2011); *Lozano v. City of Hazleton*, 496 F. Supp. 2d 477, 484–85, 508–10, 538–42, 556–62 (M.D. Pa. 2007), *aff'd in part, rev'd in part*, 724 F.3d 297 (3d Cir. 2013), *cert denied*, 134 S. Ct. 1491 (2014).

²¹⁵ A more complete discussion of foreign-affairs preemption is beyond the scope of this Article, with the exception of references made here pertaining to the relationship between foreign-affairs preemption and constitutional preemption or preemption influenced by the plenary power doctrine.

²¹⁶ Geoffrey Heeren, *Persons Who Are Not the People: The Changing Rights of Immigrants in the United States*, 44 COLUM. HUM. RTS. L. REV. 367, 421 (2013).

²¹⁷ *Arizona v. United States*, 132 S. Ct. 2492, 2498–99 (2012) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 64 (1941)).

²¹⁸ Guttentag, *supra* note 124, at 9 (citing *Arizona*, 132 S. Ct. at 2506) (noting that the *Arizona* Court did not address the discrimination concerns based on the prohibition on alienage discrimination creating an avenue for civil rights preemption, based on the 1870 Civil Rights Act); *id.* at 30 (discussing *Hines v. Davidowitz*, which the *Arizona* Court also cited in relying on the foreign affairs power as a source of immigration authority to

Many scholars have criticized the Court's failure to address S.B. 1070's potential for harassment of immigrants as a civil rights matter. Professor Guttentag critiqued the Court's analysis as "significant but incomplete" for failing to address this issue in the preemption analysis, and for only considering the harm of discrimination to foreign relations, as opposed to those suffering the discrimination themselves.²¹⁹ Other scholars have noted that the Court has demonstrated a "'disregard [of] the antidiscrimination goals of federal immigration policy' and a 'deemphasiz[ing of] antidiscrimination norms'" within federal immigration enforcement policy and practice.²²⁰ Indeed, the *Arizona* Court was "unwilling or unprepared to embrace civil rights issues in its preemption analysis."²²¹ Yet, at least one scholar has optimistically proposed that even without addressing equality principles or civil rights preemption, the *Arizona* ruling is indicative of a "new immigration federalism" that will allow states and localities to engage in integrative, or "inclusionary rulemaking," while limiting measures that would exclude immigrants.²²² Irrespective of the Court's failure to address equality principles or civil rights, the *Arizona* decision may stand for the principle that states cannot engage in anti-unauthorized migrant "immigration" (as opposed to "alienage") legislating if the measure interferes with the federal government's plenary power over immigration.²²³

While equality principles played a role, civil rights preemption did not prevail in the determination of whether Arizona labor regulations were preempted in *Chamber of Commerce v. Whiting*.²²⁴ In 2011 the Supreme Court held in *Whiting* that the 1986 Immigration Reform and Control Act (IRCA) did not expressly preempt the Legal Arizona Workers Act provision allowing suspension and/or revocation of business licenses for employers who knowingly or intentionally employ undocumented workers lacking work authorization, or for

consider invalidation of state discriminatory laws); *id.* at 31 (citing *Hines*, 312 U.S. at 70) (emphasizing that Justice Black's discussion of preemption in *Hines* "recognized the equality rights and liberty interests of the immigrants themselves that underscores the immigrant equality element of federal law").

²¹⁹ Guttentag, *supra* note 124, at 9–10.

²²⁰ Lasch, *supra* note 40, at 292.

²²¹ *Id.*

²²² Elias, *supra* note 34, at 743–47.

²²³ *Id.* at 719 (explaining that the *Arizona* decision prohibits sub-federal anti-immigrant "immigration" legislation while permitting sub-federal integrative "alienage" measures because the decision contemplated "immigration" laws and not "alienage" measures); see also Kit Johnson & Peter Spiro, Debate, *Immigration Preemption After United States v. Arizona*, 161 U. PA. L. REV. ONLINE 100, 105 (2012), available at <http://www.pennlawreview.com/online/161-U-Pa-L-Rev-Online-100.pdf>.

²²⁴ See *Chamber of Commerce v. Whiting*, 131 S. Ct. 1968 (2011).

adopting a provision that mirrored federal law mandating use of the federal E-Verify database.

Plaintiffs had alleged in part that the law condoned discrimination against those perceived as appearing “foreign looking.”²²⁵ Justice Roberts stated that there was no reason to suspect that the law would cause discrimination against Hispanics “lawfully” in the United States.²²⁶ Roberts’s concluding remarks on preemption indicated that implied preemption does not permit a “freewheeling judicial inquiry into whether a state statute is in tension with federal objectives,” and that civil rights or discrimination concerns could not establish the requisite high threshold for finding preemption in that case.²²⁷ Justice Breyer elicited civil rights preemption by countering that the law disrupts a careful balance between competing Congressional goals and “seriously threatens the federal Act’s antidiscriminatory objectives” by not including anti-discrimination protections present in the federal immigration law while increasing penalties for hiring unauthorized workers, thus increasing the chances of discrimination.²²⁸

Hiroshi Motomura has aptly recognized that the relationship between equal protection and preemption is, in part, that preemption steps in where equal protection fails.²²⁹ These cases, even those where the equal protection claim was validated, present instances where the Court could have employed civil rights preemption. Rather than relying on ill-suited or ineffective tools to address rights issues, the courts should resurrect civil rights preemption whether they take a view of preemption that favors federal exclusivity, or statutory preemption.

After the passage of the 1866 and 1870 Civil Rights Act, up until about 1971, the Supreme Court explicitly considered civil

²²⁵ For an insightful discussion of *Whiting*, see Hiroshi Motomura’s 2014 book: *Immigration Outside the Law*. MOTOMURA, *supra* note 52, at 119–20, 124–25. Motomura discusses preemption in *Whiting* and *Hazleton* and the courts’ omission of consideration of the way in which states indirectly enforce immigration law by making living and working in a state exceptionally difficult. *Id.* He contrasts these decisions to the *Arizona* decision, which acknowledged this issue in the context of their preemption decision. *Id.* at 124–25.

²²⁶ *Whiting*, 131 S. Ct. at 1970.

²²⁷ *Id.* (“Implied preemption analysis does not justify a ‘freewheeling judicial inquiry into whether a state statute is in tension with federal objectives’; such an endeavor ‘would undercut the principle that it is Congress rather than the courts that preempts state law.’ Our precedents ‘establish that a high threshold must be met if a state law is to be preempted for conflicting with the purposes of a federal Act.’ That threshold is not met here.”) (citations omitted).

²²⁸ *Id.* at 1990 (Breyer, J., dissenting).

²²⁹ MOTOMURA, *supra* note 52, at 136.

rights and discrimination concerns in the context of their preemption analysis. Immigrant equality is a part of Supremacy Clause analysis, and as a part of the preemption analysis, “equality adds a ground for preempting laws that cause discrimination and for validating measures that promote immigrant integration and protection.”²³⁰ Equality concerns can play a role in addressing whether a sub-federal measure should be deemed preempted.

Because statutory preemption permits power sharing between the federal government and sub-federal authorities, the TRUST Act would likely not be preempted pursuant to a statutory preemption analysis.²³¹ When considering whether the TRUST Act would be statutorily preempted, the analysis would depend on whether the Act was field preempted. As discussed above, Congress’s legislation in the field of immigration law may be comprehensive; however, the TRUST Act regulates within a state’s police power, concerning incarceration in a state prison or jail, using state resources. Thus, even though federal immigration law occupies a comprehensive field, it does not preempt the TRUST Act.

If equality principles were incorporated into a statutory preemption analysis, the Court could also look to the field of civil rights law. When considering the TRUST Act in the context of field preemption incorporating federal civil rights law, the TRUST Act is even less likely to be preempted. The integrative components of the Act have the potential to protect individual rights by counteracting the potential discriminatory threats of Secure Communities, which suggest its harmony with the field of federal civil rights law.

In the context of shared authority between federal and sub-federal law enforcement agents, the historic prevalence of racial discrimination in law enforcement necessitates incorporation of equality principles into the preemption analysis. Even if shared authority between the federal government and the sub-federal entities suggests the need to move away from preemption of sub-federal immigration-related measures, application of equality principles would result in preemption of discriminatory enforcement measures, but survival of inclusive state or sub-federal laws like the TRUST Act. Regardless of

²³⁰ Guttentag, *supra* note 124, at 4–5.

²³¹ Huntington, *supra* note 144, at 832. Statutory preemption does not eliminate the applicability of express or implied preemption. *Id.* at 824–25. Field preemption is a type of statutory preemption, and considers the extent to which the federal government has regulated the entire field and as a result, prohibited sub-federal entities from playing a role. *Id.* at 851.

whether a statutory preemption or federal exclusivity model is used, as long as essential equality principles are incorporated into the analysis, the TRUST Act would not be preempted.

Federal exclusivity generally suggests that a sub-federal measure may be more likely to be preempted than under statutory preemption. However, if equality principles were incorporated under a federal exclusivity preemption analysis, the TRUST Act and similar immigrant integration measures should survive a federal exclusivity preemption challenge. Because Secure Communities has the potential to incentivize or present a threat of discrimination,²³² and because it undermines the few existing and already inadequate remedies to discrimination, such as Fourth Amendment suppression,²³³ equality principles should be considered when evaluating the possible preemption of measures like the TRUST Act.

One of the reasons for maintaining federal exclusivity in immigration law may not be the foreign affairs rationale, but instead may be to ensure that sub-federal law enforcement agents do not have the power to discriminate based on race or national origin, including in determining who is an American.²³⁴ Federal exclusivity has the potential to prevent the erosion of anti-discrimination principles resulting from increasing involvement of sub-federal agents in immigration enforcement.²³⁵

A broad view of preemption may also be important because the federal government's power to exercise discretion in enforcement is an important part of federal immigration doctrine.²³⁶ The Court has struck down sub-federal measures as

²³² As noted by Lucas Guttentag, it is the threat of potential discrimination and harassment that the Civil Rights Act was designed to curtail, which is why equality principles should play a role in preventing harassment through application in preemption analyses. A law could be deemed "inconsistent with federal purposes" if it threatens the risk of harassment or abuse. Guttentag, *supra* note 124, at 49–50. Thus, correspondingly, where a state law *decreases* or counteracts the possibility of such a threat or risk of harm, equality principles founded in federal civil rights law may result in finding the sub-federal measure not preempted.

²³³ See discussion *supra* Section IV.A.

²³⁴ MOTOMURA, *supra* note 52, at 137 ("[O]ne of the most essential functions of the federal government has been to make sure that regions, states, or localities are not allowed to decide who is an American in ways that rely improperly on race or ethnicity.") (suggesting that this federal role trumps the federal government's role in conducting foreign affairs in supporting immigration federal exclusivity or exceptionalism).

²³⁵ Michael J. Wishnie, *Laboratories of Bigotry? Devolution of the Immigration Power, Equal Protection, and Federalism*, 76 N.Y.U. L. REV. 493 (2001).

²³⁶ MOTOMURA, *supra* note 52, at 115. There may be a higher likelihood of racial and ethnic discrimination by sub-federal law enforcement officers on the street exercising micro level discretion, resulting indirectly in inappropriately biased decisions about immigration enforcement, and that bias escapes remedy. Thus, "limiting the state and local role in immigration law is a way of preventing discrimination in state and local enforcement before it might happen." *Id.*

preempted by federal immigration law precisely because immigration law includes the discretion *not* to arrest, and not to deport individuals who may in fact be deportable.²³⁷ In addition to being able to exercise discretion not to arrest a suspected unauthorized migrant, or not to pursue removal proceedings, immigration law creates discretionary forms of relief from removal. Where sub-federal laws interfere with the federal government's intended broad exercises of authority in immigration enforcement, some state immigration laws may properly be found preempted. In part because of federal exclusivity principles, and because the TRUST Act does not constrict the federal government's ability to exercise discretion in the enforcement of immigration law, it should not be found preempted.

Preemption analysis should take into consideration not only the source of the law, but also the substance,²³⁸ and whether the execution of the law will have discriminatory effects.²³⁹ Similarly, courts should heed inherent equality concerns in federal immigration law when considering whether federal immigration law preempts state integrative measures.

CONCLUSION

Millions of non-citizens in the United States either live with the threat of racial profiling by law enforcement agents or have experienced it. They know that such profiling can impact their life's trajectory and that of their families. Sub-federal involvement in immigration enforcement resulting from Secure Communities—and now PEP—and immigration detainer practices have played a direct role in creating both this perceived and actual threat. There is substantive support for allegations of ethnic or racial bias in immigration policing, particularly in conjunction with Secure Communities.

Legal avenues to prevent such profiling, or reverse the harms stemming from it, are insufficient. In the continued absence of immigration reform permitting millions to go to work, attend school, and care for their families without the fear of detection and deportation, TRUST Acts and similar measures have arisen.

²³⁷ *Id.* at 121.

²³⁸ MOTOMURA, *supra* note 52, at 136–37 (“In defining the constitutional division of power between the federal government and states and localities, the *content* of state and local decisions also matters.”).

²³⁹ Gulasekaram & Ramakrishnan, *supra* note 102, at 2131 (“[T]o the extent federal courts insist on treating laws like S.B. 1070 as alienage laws, they must pay heed to the equality concerns inherent in the creation—and not just the execution—of such laws.”).

If state laws that support immigrant equality or integration are considered in the context of the anti-discrimination aspects of federal immigration law and the Civil Rights Act, they may be understood as consistent with federal law and not preempted. By incorporating equality principles and employing civil rights preemption, a court could find a discriminatory state law preempted under either a federal exclusivity or statutory preemption model. Similarly, a state law that *prevents* discrimination or furthers inclusiveness should be viewed as in line with federal law and not preempted.

This Article has examined why immigrant integrative measures like the TRUST Act should be able to survive a preemption challenge. Eventually, federal immigration reform may decrease sub-federal legislating relating to immigration law. However, the essential equality principles derived from the Civil Rights Act and incorporated into immigration law may eventually return to the forefront in preemption litigation.

Splitting the EB-5 Program: A Proposal for Employment-Based Immigration Reform to Better Target Immigrant Entrepreneurs and Investors

Annie Anjung Lin*

INTRODUCTION

In 1997, Kyung Kim, a former executive with a Korean insurance company, immigrated to the United States with his wife and children through an immigration program designed for foreign entrepreneurs known as the EB-5 program.¹ The program allows foreign-born entrepreneurs or investors with no family connection in the United States to immigrate to the United States, provided they make substantial human and capital investments.² In order to immigrate under the EB-5 visa, Kim invested in a company called AIS, which was formed by former Immigration and Naturalization Service (“INS”) officials to help troubled textile mills.³ AIS attracted investors because it creatively structured its EB-5 deals, allowing foreign investors to put up only \$125,000 in cash and \$375,000 in the form of a promissory note, which would routinely be forgiven once the immigrant’s permanent residency application was approved.⁴ This was an arrangement the INS had signed off on many times before, but shortly after Kim invested, an internal probe concluded that the promissory notes were an impermissible guarantee.⁵ As a result, the INS abruptly changed its mind and

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¹ James Kelleher et al., *Special Report: Overselling the American Dream Overseas*, REUTERS, Dec. 22, 2010, available at <http://www.reuters.com/article/2010/12/22/us-usa-immigration-business-idUSTRE6BL2KJ20101222>.

² S. REP. NO. 101-55, at 10 (1989).

³ Kelleher et al., *supra* note 1.

⁴ *Id.*

⁵ *Id.*

retroactively rejected hundreds of applications it had previously approved, including Kim's.⁶ This retroactive decision left hundreds of immigrant investors and their families in legal limbo.⁷ In 2003, Kim attempted to immigrate again to the United States under the EB-5 program; this time, however, he bought a specialty grocery store and went into business for himself.⁸ He employed eighteen workers in total.⁹ Kim's experience illustrates some of the difficulties the EB-5 program has faced, such as uncertainties with the adjudication process and the rigorous nature of the EB-5 application process.¹⁰ The primary problem this Comment will address is that the EB-5 program has evolved into an immigration program that is contrary to its legislative intent and in need of reform, because rather than attracting true entrepreneurs like Kim, the program is attracting passive immigrant investors.¹¹

Congress created the employment-based visa known as the EB-5 program in 1990.¹² The new visa program was intended to create jobs for U.S. workers and to infuse new capital into the U.S. economy.¹³ The program required that an alien entrepreneur invest \$1 million or \$500,000 in a new commercial enterprise, "engage" in the management of the new enterprise through the exercise of day-to-day managerial control, and create ten full-time jobs for U.S. citizens or lawful permanent residents.¹⁴ This part of the EB-5 program will be referred to as the direct-employment¹⁵ creation program, or the entrepreneur's visa.

The 1993 Appropriations Act made an amendment to the EB-5 program to create the "Pilot Immigration Program," now referred to as the Immigrant Investor Pilot Program ("IIPP"), essentially to make the program more investor-friendly and to

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-05-256, IMMIGRANT INVESTORS: SMALL NUMBER OF PARTICIPANTS ATTRIBUTED TO PENDING REGULATIONS AND OTHER FACTORS 8-9 (2005), available at <http://www.gao.gov/products/GAO-05-256>.

¹¹ See *infra* Part III.B.

¹² See *infra* Part II.A.

¹³ S. REP. NO. 101-55, at 21 (1989).

¹⁴ See *infra* Part II.A.

¹⁵ U.S. CITIZENSHIP & IMMIGRATION SERVS., U.S. DEP'T OF HOMELAND SEC., EB-5 IMMIGRANT INVESTOR PILOT PROGRAM 8 (2011), available at http://www.uscis.gov/sites/default/files/USCIS/Resources/Resources%20for%20Congress/Congressional%20Reports/2011%20National%20Immigration%20%26%20Consular%20Conference%20Presentations/EB-5_Immigrant_Investor_Pilot_Program.pdf ("Direct jobs are actual identifiable jobs for qualified employees located within the commercial enterprise into which the EB-5 investor has directly invested his or her capital.").

stimulate investment of physical capital from foreign investors.¹⁶ Out of the 10,000 visas available annually to EB-5 immigrants, Congress mandated allotment of only 3000 visas for IIPP immigrants.¹⁷ Under the IIPP, an alien investor can currently immigrate to the United States by investing the same requisite amount, \$1 million or \$500,000, into an “economic unit, public or private, which is involved with the promotion of economic growth, including increased export sales, improved regional productivity, job creation, and increased domestic capital investment.”¹⁸ The regulations refer to such economic units as “regional centers.”¹⁹ The ability to invest in regional centers to satisfy the new commercial enterprise requirement affords the alien investors more flexibility in meeting the program’s stringent requirements, because now the alien investors can passively invest and indirectly create jobs through regional centers.²⁰

The EB-5 program has been relatively underutilized since its inception nearly twenty-five years ago.²¹ In 2012, only 3677 of the 10,000 EB-5 visas available annually were approved.²² Overall, only about 0.6% of the total number of U.S. immigrants granted permanent resident status that year were granted status under the EB-5 category.²³ Practitioners and adjudicators have been grappling with the EB-5 program for decades, and finally the program is starting to gain momentum; alien investors admitted under the EB-5 program have nearly doubled from 2011 to 2012.²⁴ However, data released regarding the EB-5 program does not widely publicize which part of the program is actually being

¹⁶ See *infra* Part II.B.

¹⁷ 8 U.S.C. § 1153 (2012).

¹⁸ 8 C.F.R. § 204.6 (2014).

¹⁹ *Id.*

²⁰ See *infra* Part II.B.

²¹ See U.S. CITIZENSHIP & IMMIGRATION SERVS., U.S. DEPT OF HOMELAND SEC., FORM I-526, IMMIGRANT PETITION BY ALIEN ENTREPRENEUR AND FORM I-829, PETITION BY ENTREPRENEUR TO REMOVE CONDITIONS AGENCY-WIDE RECEIPTS, APPROVALS, DENIALS FISCAL YEAR(S): 1991–2013 (THROUGH THIRD QUARTER) (2013), available at http://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/Employment-based/I526-I829_performancecdata_fy1991-2013_qtr3.pdf.

²² *Id.*

²³ Randall Monger & James Yankay, *U.S. Legal Permanent Residents: 2012, 2013 OFF. IMMIGR. STAT. ANN. FLOW REP.* 3 tbl.2, available at https://www.dhs.gov/sites/default/files/publications/ois_lpr_fr_2012_2.pdf.

²⁴ See U.S. CITIZENSHIP & IMMIGRATION SERVS., *supra* note 21. In fact, countries such as China will face retrogression as visas issued to applicants from China will be maxed out at the seven-percent-per-country limit under the EB-5 program. See Mona Shah & Yi Song, *EB-5 Retrogression for China in Mid-2014—Not Really a Reason to Be Alarmed?*, LEXISNEXIS VENTURE CAP. BLOG (Jan. 22, 2014, 4:45 PM), <http://www.lexisnexis.com/legalnewsroom/banking/b/venture-capital/archive/2014/01/22/eb-5-retrogression-for-china-in-mid-2014-not-really-a-reason-to-be-alarmed.aspx>.

utilized; statistics about job creation and total capital investments are typically released about the EB-5 program as a whole.²⁵ The sudden influx of immigrant investors proves the IIPP is successful in attracting foreign capital investments,²⁶ but there is no evidence that the program is at all successful in attracting immigrant entrepreneurs²⁷ as originally intended by Congress.²⁸ This is problematic because immigrant entrepreneurs are valuable labor assets that the United States cannot afford to ignore.

This Comment identifies two main problems with the EB-5 program. First, the program cannot effectively target both immigrant entrepreneurs and investors under one framework. Second, using the program primarily as an investor's visa rather than as an entrepreneur's visa is contrary to legislative intent. Congress created the EB-5 program to stimulate the U.S. economy and create jobs through entrepreneurship and capital investment.²⁹ While immigrant investors are important for injecting foreign capital investments into the United States, immigrant entrepreneurs make both human and physical capital investments into an economy.³⁰

In this Comment, Part I will discuss why immigrant entrepreneurs are important for the United States' economic growth and job creation. Part II will discuss current U.S. policies regarding immigrant entrepreneurs and investors, as well as the history and intent of the EB-5 program. Part III will discuss the success of, as well as the problems with, the EB-5 program. Part IV will discuss proposed legislation and provide recommendations for amending the EB-5 program to enable the United States to attract more entrepreneurs to make intellectual investments and physical capital investments in the United States. This Comment concludes that the U.S. EB-5 program should have separate program requirements for immigrant entrepreneurs and investors in order to properly incentivize and target each group.

²⁵ See, e.g., U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 10; U.S. CITIZENSHIP & IMMIGRATION SERVS., *supra* note 21; ICF INT'L, STUDY OF THE UNITED STATES IMMIGRANT INVESTOR PILOT PROGRAM (EB-5), at 6 (2010), available at <http://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/EB-5/EB5-Report-2010.pdf>.

²⁶ See *infra* Part III.A.1.

²⁷ See U.S. CITIZENSHIP & IMMIGRATION SERVS., *supra* note 15.

²⁸ See *infra* Part II.A.

²⁹ See *infra* Part II.A.

³⁰ See *infra* Part I.

I. IMMIGRANT ENTREPRENEURS AND ECONOMIC GROWTH

There is a fundamental difference between investors and entrepreneurs, which is why other countries, such as the United Kingdom, Canada, and Australia, have separate immigration programs with distinct requirements for immigrant investors and immigrant entrepreneurs.³¹ Generally, the investor programs in those countries require a higher investment or net worth amount than do the entrepreneur or business owner programs, and unlike entrepreneurs, investors do not have job creation requirements.³² The U.S. EB-5 program, however, does not clearly separate alien entrepreneurs from alien investors. The EB-5 program appears to work more as an umbrella program with uniform requirements, such as investment amount, job creation, and management of a new enterprise. This section discusses how investors differ from entrepreneurs in how they stimulate the economy, and why immigrants in particular are important for stimulating the economy.

A. Investors vs. Entrepreneurs

Whether a person is an investor or an entrepreneur can be determined based on how a person intends to generate financial gain from his or her investments. An investor is defined as a person who commits capital for financial return or future benefit or advantage,³³ and an entrepreneur is a person who manages and assumes the risk of a business in order to make money.³⁴ For example, Australia named its immigrant entrepreneur visa the “Business Innovation and Investment visa,” and required that entrepreneur applicants “have a genuine and realistic

³¹ See ICF INT'L, *supra* note 25, at 55–56, 63.

³² See *id.* at 71 tbl.14. In the United Kingdom, investors are required to deposit a minimum of £1 million (approximately US\$1.6 million) into a Financial Services Authority-regulated financial institution, or possess £2 million (approximately US\$3.2 million) with access to an additional £1 million in financing. *Id.* at 55. However, entrepreneurs are only required to demonstrate possession of at least £200,000 (approximately US\$325,000) during the initial application process. *Id.* at 56. In Canada, investors must have a minimum net worth of C\$1.6 million (approximately US\$1.4 million) and invest C\$800,000 (approximately US\$705,000) for five years into Provincial Government Funds. See *Investors*, GOV'T CAN., <http://www.cic.gc.ca/english/immigrate/business/investors/index.asp> (last modified July 11, 2014). However, entrepreneurs only need a net worth of C\$300,000 (approximately US\$277,000) and do not have an investment amount requirement. See ICF INT'L, *supra* note 25, at 62. In Australia, investors must commit to invest and maintain A\$1.5 million (approximately US\$1.3 million) and have a net worth of A\$2.25 million (approximately US\$2 million). However, entrepreneurs only need a net worth of business and personal assets of A\$800,000 (approximately US\$695,000). See DEP'T OF IMMIGRATION & CITIZENSHIP, AUSTRALIAN GOV'T, BOOKLET NO. 10, BUSINESS INNOVATION AND INVESTMENT 17 (2013), available at http://www.austarstudy.com/austar_download/adly-syymisc.pdf.

³³ THE MERRIAM-WEBSTER DICTIONARY 384 (11th ed. 2004).

³⁴ *Id.* at 240.

commitment to be involved as an owner of a new or existing business in Australia,” whereas its “Investor visa” primarily required investor applicants to have sufficient assets and net worth.³⁵

In general, economists believe long-term investments of physical and human capital stimulate the economy and sustain growth.³⁶ Investors stimulate the economy by investing physical capital, thereby creating a trickle-down effect on the economy. Business entities are able to use the capital investments to hire more workers and buy equipment to generate more business. Their workers can then spend money they have earned to buy goods and services to further stimulate the local economy and help to expand local businesses.³⁷

However, entrepreneurs make even greater contributions to a country’s economic growth because they not only make physical capital investments, but they also make human capital investments. Studies have shown a “knowledge-based capital” approach³⁸ has more potential to stimulate the economy in the long run. Moreover, entrepreneurs contribute because: (1) they invest physical capital investments into their business; (2) they directly create jobs by hiring local workers to work in their business; (3) they create diverse products and services in various industries to meet the needs of their target market;³⁹ (4) they contribute to the global economy by selling their goods internationally; and (5) they continuously contribute to a country’s gross national product by operating their business.⁴⁰

³⁵ DEPT OF IMMIGRATION & CITIZENSHIP, *supra* note 32, at 16.

³⁶ *See, e.g.*, Jeffrey Sachs, *Sow the Seeds of Long-Term Growth*, FIN. TIMES (July 21, 2010, 3:18 PM), <http://www.ft.com/cms/s/0/01d88b16-94cd-11df-b90e-00144feab49a.html#axzz2uwRPb0fR>.

³⁷ IMMIGRATION POLICY CTR., VALUE ADDED: IMMIGRANTS CREATE JOBS AND BUSINESSES, BOOST WAGES OF NATIVE-BORN WORKERS 1-2 (2012), *available at* http://www.immigrationpolicy.org/sites/default/files/docs/Value_Added_updated_011212.pdf.

³⁸ A knowledge-based capital approach is a growth policy that recognizes business innovation is more than good ideas; it is about an organization’s ability to execute and translate these ideas into new products, processes, and markets. *See* Charles Hulten, *Stimulating Economic Growth Through Knowledge-Based Investment* 3 (OECD Directorate for Sci., Tech. & Indus., Working Paper No. 2, 2013), *available at* <http://dx.doi.org/10.1787/5k46dbzqjh9v-en>.

³⁹ ROBERT W. FAIRLIE, SBA OFFICE OF ADVOCACY, NO. 334, ESTIMATING THE CONTRIBUTION OF IMMIGRANT BUSINESS OWNERS TO THE U.S. ECONOMY (2008), *available at* <http://archive.sba.gov/advo/research/rs334tot.pdf> (“Immigrants’ contributions differ across sectors of the economy. They own a large share—more than one-fifth—of businesses in the arts, entertainment, and recreation industry. They also contribute significantly to other services, transportation, and wholesale and retail trade.”).

⁴⁰ Amitabh Shukla, *5 Ways an Entrepreneur Stimulates the Economy*, PAGGU.COM (Sept. 7, 2009), <http://www.paggu.com/entrepreneurship/5-ways-an-entrepreneur-stimulates-the-economy/>.

These are reasons why “[s]mall businesses are the engine of job growth in our economy.”⁴¹ Statistics have shown that almost half of U.S. jobs are created by small businesses having fewer than fifty employees.⁴² Thus, entrepreneurs who create small businesses are vital to U.S. job creation, essential to stimulating the U.S. economy, and imperative to keeping the United States competitive in today’s global economy.⁴³

B. Why Immigrants Stimulate the Economy

1. Immigrants Are Innovative

Immigrants, particularly highly skilled immigrants, stimulate the economy because they are innovative.⁴⁴ Highly skilled immigrants are often highly educated in science, technology, engineering, and mathematics (“STEM”) fields with advanced degrees from U.S. universities,⁴⁵ and they are three times more likely to file patents than U.S.-born citizens.⁴⁶ Patents are often used by researchers to gauge inventions that ultimately contribute to an economy’s total factor productivity.⁴⁷ Therefore, immigrants’ patent activities may be used to indicate innovation and how much such innovation contributes to an economy.

⁴¹ *Supporting Small Businesses and Creating Jobs*, WHITE HOUSE, <http://www.whitehouse.gov/omb/factsheet/supporting-small-businesses-and-creating-jobs> (last visited Nov. 1, 2014).

⁴² Press Release, ADP, ADP National Employment Report: Private Sector Employment Increased by 188,000 Jobs in June (July 3, 2013), available at <http://www.adpemploymentreport.com/2013/June/NER/docs/ADP-NATIONAL-EMPLOYMENT-REPORT-June2013-Final-Press-Release.pdf>.

⁴³ See generally VIVEK WADHWA ET AL., *THE GRASS IS INDEED GREENER IN INDIA AND CHINA FOR RETURNEE ENTREPRENEURS* (Kauffman Found., America’s New Immigrant Entrepreneurs Ser. Pt. VI, 2011), available at <http://www.kauffman.org/what-we-do/research/immigration-and-the-american-economy/the-grass-is-indeed-greener-in-india-and-china-for-returnee-entrepreneurs>.

⁴⁴ See VIVEK WADHWA ET AL., *AMERICA’S NEW IMMIGRANT ENTREPRENEURS 4* (Kauffman Found., America’s New Immigrant Entrepreneurs Ser. Pt. I, 2007), available at <http://www.kauffman.org/what-we-do/research/immigration-and-the-american-economy/americas-new-immigrant-entrepreneurs>; MICHAEL GREENSTONE & ADAM LOONEY, *THE HAMILTON PROJECT, TEN ECONOMIC FACTS ABOUT IMMIGRATION 11* (2010), available at http://www.brookings.edu/~media/research/files/reports/2010/9/immigration%20greenstone%20looney/09_immigration.pdf.

⁴⁵ MADELINE ZAVODNY, AM. ENTER. INST. & P’SHP FOR A NEW AM. ECON., *IMMIGRATION AND AMERICAN JOBS 4* (2011), available at http://www.aei.org/wp-content/uploads/2011/12/immigration-and-american-jobs_144002688962.pdf.

⁴⁶ GREENSTONE & LOONEY, *supra* note 44, at 11.

⁴⁷ Robert Shackleton, *Total Factor Productivity Growth in Historical Perspective 3* (Cong. Budget Office, Working Paper No. 1, 2013), available at http://www.cbo.gov/sites/default/files/cbofiles/attachments/44002_TFP_Growth_03-18-2013.pdf.

Innovation stimulates economies because companies are able to take these new ideas and commercialize them.⁴⁸ Studies of regions in the United States with the most vibrant economies attribute the regions' rapid job growth and economic expansion to the development of high-tech industries.⁴⁹ Countries such as China and India are making significant investments into their technology related industries, and they are attracting highly educated and skilled workers from the United States to fuel innovation and growth in research and development.⁵⁰ Statistical analysis reveals that skilled immigrants encourage investments and promote specialization in high-tech industries.⁵¹ U.S. businesses, particularly in the technology sector, are able to take advantage of skilled immigrants to assist in research and development and to produce innovative ideas to help their businesses create new products and services.⁵²

2. Immigrants Are Entrepreneurial

Immigrants are an important source of human capital and a major contributing source of the entrepreneurial base in many countries,⁵³ which is why many developed countries have created special visas and incentive programs to attract immigrant entrepreneurs.⁵⁴ "Entrepreneurs are engaged with the economy on a daily basis in a visceral, immediate way . . ." ⁵⁵ In today's knowledge-based economy, intellectual capital and

⁴⁸ Jennifer Hunt, *Which Immigrants Are Most Innovative and Entrepreneurial?: Distinctions by Entry Visa* 1–2 (Nat'l Bureau of Econ. Research, Working Paper No. 14920, 2009), available at <http://www.nber.org/papers/w14920>.

⁴⁹ Joshua Wright, *For Metros with Flourishing Economies, Tech Sector at Center of Job Growth*, FORBES (Sept. 13, 2013, 3:44 PM), <http://www.forbes.com/sites/emsj/2013/09/13/for-metros-with-flourishing-economies-tech-sector-at-center-of-job-growth/>.

⁵⁰ Vivek Wadhwa, *America's Other Immigration Crisis*, AMERICAN (July 11, 2008), <http://www.aei.org/publication/americas-other-immigration-crisis/>.

⁵¹ Giovanni Peri, *The Effect of Immigrants on U.S. Employment and Productivity*, FRBSF ECON. LETTER (Fed. Reserve Bank of S.F., San Francisco, Cal.), Aug. 30, 2010, at 1, available at <http://www.frbsf.org/economic-research/publications/economic-letter/2010/august/effect-immigrants-us-employment-productivity/el2010-26.pdf>.

⁵² Giovanni Peri, *Immigration, Labor Markets, and Productivity*, 32 CATO J. 35, 38 (2012), available at <http://object.cato.org/sites/cato.org/files/serials/files/cato-journal/2012/1/cj32n1-4.pdf>.

⁵³ Herbert J. Schuetze & Heather Antecol, *Immigration, Entrepreneurship and the Venture Start-Up Process*, in THE LIFE CYCLE OF ENTREPRENEURIAL VENTURES 107, 107 (Simon Parker ed., International Handbook Ser. on Entrepreneurship Vol. 3, 2007), available at <http://link.springer.com/book/10.1007%2F978-0-387-32313-8>.

⁵⁴ *Id.*; ICF INT'L, *supra* note 25.

⁵⁵ KAUFFMAN FOUND. & LEGALZOOM, WHO STARTED NEW BUSINESSES IN 2013?, at 8 (2014), available at <http://www.kauffman.org/what-we-do/research/2014/01/who-started-new-businesses-in-2013>.

knowledge-based assets greatly contribute to the United States' competitive edge in the global economy.⁵⁶

Immigrants, particularly highly skilled immigrants, stimulate the economy because they are entrepreneurial in nature⁵⁷ and are more likely to start businesses than native workers.⁵⁸ Studies have indicated a strong correlation between advanced education in a STEM-related field, entrepreneurship, and innovation,⁵⁹ which means these immigrants are more likely to start businesses based on their advanced technical knowledge⁶⁰ and create jobs.⁶¹ Studies have found “[a]most 80% of immigrant-founded companies in the U.S. [are] within just two industry fields: software and innovation/manufacturing-related services.”⁶² Immigrants have co-founded companies such as Google, Intel, eBay, and Yahoo.⁶³ Given these statistics, the United States should shape its immigration policies to attract highly skilled immigrants and entrepreneurs, and encourage them to make physical, intellectual, and human capital investments in the United States rather than abroad.

II. THE HISTORY OF EB-5

In 1990, Congress passed the Immigration Act of 1990 to expand employment-based immigration because it recognized the increased demand for skilled workers and the contributions these workers make to the U.S. economy.⁶⁴ Although there are other immigration programs that allow for foreign-born entrepreneurs and highly skilled immigrants to immigrate to the United

⁵⁶ VIVEK WADHWA ET AL., INTELLECTUAL PROPERTY, THE IMMIGRATION BACKLOG, AND A REVERSE BRAIN-DRAIN 2 (Kauffman Found., America's New Immigrant Entrepreneurs Ser. Pt. III, 2007), available at <http://www.kauffman.org/what-we-do/research/immigration-and-the-american-economy/intellectual-property-the-immigration-backlog-and-a-reverse-braindrain>.

⁵⁷ Schuetze & Antecol, *supra* note 53, at 107–08. “Immigrants are nearly 30 percent more likely to start a business than are nonimmigrants, and they represent 16.7 percent of all new business owners in the United States.” FAIRLIE, *supra* note 39.

⁵⁸ GREENSTONE & LOONEY, *supra* note 44; FAIRLIE, *supra* note 39.

⁵⁹ VIVEK WADHWA ET AL., EDUCATION, ENTREPRENEURSHIP, AND IMMIGRATION 14 (Kauffman Found., America's New Immigrant Entrepreneurs Ser. Pt. II, 2007), available at <http://www.kauffman.org/what-we-do/research/immigration-and-the-american-economy/education-entrepreneurship-and-immigration-americas-new-immigrant-entrepreneurs-p-art-ii>.

⁶⁰ Hunt, *supra* note 48, at 26.

⁶¹ ZAVODNY, *supra* note 45, at 4; WADHWA ET AL., *supra* note 44, at 4.

⁶² WADHWA ET AL., *supra* note 44, at 4.

⁶³ VIVEK WADHWA ET AL., AMERICA'S LOSS IS THE WORLD'S GAIN 1 (Kauffman Found., America's New Immigrant Entrepreneurs Ser. Pt. IV, 2009), available at <http://www.kauffman.org/what-we-do/research/immigration-and-the-american-economy/america-s-loss-is-the-worlds-gain-americas-new-immigrant-entrepreneurs-part-iv>.

⁶⁴ H.R. REP. NO. 101-723, pt. 1, at 37 (1990).

States,⁶⁵ this Comment will focus primarily on the employment-based fifth preference category (EB-5 program). The EB-5 program gives preference to qualified immigrants to obtain legal permanent residency status without the requirement of special skill, labor certification, the existence of a treaty, or employment by a multinational company.⁶⁶

A. Immigration Act of 1990

The Immigration Act of 1990 created the EB-5 program to allow alien entrepreneurs⁶⁷ who satisfy the statutory requirements to be on a fast track to U.S. residency and citizenship.⁶⁸ The program allotted 10,000 visas annually for immigrants in the EB-5 category for the purpose of engaging in new⁶⁹ commercial enterprises.⁷⁰ The requirements are as follows: (1) the alien must have established the enterprise; (2) the alien must have invested,⁷¹ or be in the process of investing, new capital in the amount of \$1 million or \$500,000 in targeted employment areas;⁷² and (3) the enterprise must benefit the U.S. economy and create ten full-time qualifying jobs.⁷³ Furthermore, the Code of Federal Regulations interprets “engaging in” and “has established” to mean the qualified immigrant is to engage in the new commercial enterprise “through the exercise of day-to-day managerial control or through policy formulation, as

⁶⁵ There are other visa programs that allow immigrants to remain and conduct business in the United States, such as the E-1 Treaty Trader and E-2 Treaty Investor visa, L visas for inter-company transferees of multinational corporations, the H-1B Specialty Occupation visa, and other employment-based visas (EB-1 Priority Worker's visa and EB-2 Advance Degree or Exceptional Abilities visa). See Margaret C. Makar, *Foreign Entrepreneurship in the United States*, COLO. LAW., Jan. 1994, at 35, 35–37.

⁶⁶ *Id.* at 36–37.

⁶⁷ *Id.* at 35. The Senate refers to aliens who receive benefits of the employment-generating investor visa as “alien entrepreneur[s].” Immigration Act of 1990, Pub. L. No. 101-649, sec. 121, § 216A(f)(1), 104 Stat. 4978, 4993–94.

⁶⁸ Spouses and children of lawful permanent resident aliens may also immigrate under the EB-5 visa. Immigration Act, sec. 102, § 202(a)(4), 104 Stat. at 4983.

⁶⁹ “New means established after November 29, 1990.” 8 C.F.R. § 204.6(e) (2014).

⁷⁰ Immigration Act, sec. 121, § 203(b)(5), 104 Stat. at 4989. Establishment of a new commercial enterprise may consist of creation of an original business; purchase and restructuring of an existing business to create a new business; or a minimum of forty percent expansion of an existing business either in net worth or in the number of full-time employees. 8 C.F.R. § 204.6(h).

⁷¹ “Invest means to contribute capital.” 8 C.F.R. § 204.6(e).

⁷² Targeted employment area is defined as: “at the time of the investment, a rural area or an area which has experienced high unemployment (of at least 150 percent of the national average rate).” Immigration Act, sec. 121, § 203(b)(5)(B)(ii), 104 Stat. at 4990.

⁷³ “Qualifying employee means a United States citizen, a lawfully admitted permanent resident, or other immigrant lawfully authorized to be employed in the United States This definition does not include the alien entrepreneur, [or] the alien entrepreneur's spouse [or children]” 8 C.F.R. § 204.6(e).

opposed to maintaining a purely passive role in regard to the investment.”⁷⁴

Once the alien entrepreneur has made the requisite capital investment in a U.S. commercial enterprise, the person may begin the EB-5 application process.⁷⁵ The alien entrepreneur may receive conditional resident status, which allows the immigrant to reside in the United States for two years.⁷⁶ At the end of the two years, so long as the statutory requirements are still met, the immigrant entrepreneur can apply to have the condition removed to become a lawful permanent resident of the United States.⁷⁷

Congress’s intention to attract immigrant entrepreneurs through the EB-5 visa is evinced by the language used in the statute and the requirements of the EB-5 program. First, Congress used the words “alien entrepreneur” in the Immigration Act of 1990.⁷⁸ Second, Congress eliminated the labor certificate requirement that is required for other employment-based programs for EB-5 immigrants, because the immigrants are supposed to be entrepreneurs “engaging in” and “establish[ing]” their own businesses,⁷⁹ not employees of an existing business. Third, the EB-5 visa has “entrepreneur-like” requirements, such as the investment of at least \$1 million in new capital, direct establishment of a new commercial enterprise, and the continuous creation of at least ten full-time jobs for Americans or lawful permanent residents.⁸⁰ The requirement of active

⁷⁴ *Id.* § 204.6(j)(5).

⁷⁵ The alien investor would submit an application, Form I-526, along with supporting documents as evidence that the applicant’s investment plan satisfies the EB-5 program requirements. Supporting documents should demonstrate that: (1) the capital investment meets the requisite amount; (2) the investment funds were legally obtained; (3) the requisite number of jobs have been created; and (4) the applicant’s active managerial role in the new enterprise—for example, corporate officer or board member—has been outlined. See ICF INT’L, *supra* note 25, at 79.

⁷⁶ *Id.* at 54.

⁷⁷ Once the applicant’s I-526 is approved, (1) if the applicant is already residing in the United States, the applicant may submit an Adjustment of Status request by submitting Form I-485; or (2) if the applicant is outside of the United States, the applicant may apply for a visa through the U.S. Department of State. After a conditional visa is granted, the applicant has a two-year period to meet the conditions set forth in Form I-526. Within ninety days of the expiration of conditional residence, the immigrant investor may submit Form I-829 and supporting documentation to the United States Citizenship and Immigration Services to remove conditions placed on status if the EB-5 requirements have been satisfied. Once the condition is removed, the individual will become a lawful permanent resident. *Id.* at 80.

⁷⁸ Immigration Act of 1990, Pub. L. No. 101-649, sec. 121, § 216A(f)(1), 104 Stat. 4978, 4993-94 (defining “alien entrepreneur[s]” as aliens who obtain legal permanent residence status under EB-5 program); see also S. REP. NO. 101-55, at 21 (1989). The word “entrepreneur” is also used throughout the language in the proposed amendment to the Immigration and Nationality Act. *Id.* at 47-51.

⁷⁹ S. REP. NO. 101-55, at 41.

⁸⁰ *Id.* at 5.

engagement in the new enterprise is aimed at targeting an entrepreneur's human capital investment contribution; this demonstrates Congress's intent to attract entrepreneurs and not merely investors. The Senate Report also reveals specifically that the purpose of the EB-5 program was to create jobs for U.S. workers and to infuse new capital into the U.S. economy, "not to provide immigrant visas to wealthy individuals."⁸¹

B. 1993 Appropriations Act

In 1992, the Appropriations Act tweaked the EB-5 program, ostensibly to make it more investor-friendly and allow U.S. companies to directly solicit money from foreign investors.⁸² Section 610 of the 1993 Appropriations Act created the "Pilot Immigration Program" (also known as the Immigrant Investor Pilot Program, or "IIPP"), which involves putting capital investment into "a regional center in the United States for the promotion of economic growth, including increased export sales, improved regional productivity, job creation, and increased domestic capital investment."⁸³ In the case of the IIPP, the ten full-time jobs can be created indirectly⁸⁴ through investment in the new commercial enterprise, which is called a "regional center."⁸⁵ The United States Citizenship and Immigration Services ("USCIS") allows for "reasonable methodologies" to determine the number of jobs indirectly created by the capital investment.⁸⁶ The capital investment amount remains the same: \$1 million or \$500,000 for regional centers in a targeted employment area.⁸⁷

Regional centers wishing to participate in the IIPP may submit proposals to USCIS which: (1) clearly describe how the regional center will promote economic growth in the specific geographical region; (2) provide in verifiable detail how jobs will

⁸¹ *Id.* at 21.

⁸² Kelleher et al., *supra* note 1.

⁸³ Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1993, Pub. L. No. 102-395, § 610(a), 106 Stat. 1828, 1874 (1992). At least 3000 visas are reserved per year for investors who invest in commercial enterprises affiliated with regional centers. 8 U.S.C. § 1153(b)(5)(B)(i) (2012).

⁸⁴ U.S. CITIZENSHIP & IMMIGRATION SERVS., *supra* note 15, at 11. Indirect jobs are jobs "created collaterally or as a result of capital invested in a commercial enterprise affiliated with a regional center by an EB-5 investor." *Id.* at 8.

⁸⁵ 8 C.F.R. § 204.6(e) (2014).

⁸⁶ Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act § 610(c), 106 Stat. at 1874. "[Reasonable] methodologies may include multiplier tables, feasibility studies, analyses of foreign and domestic markets for the goods or services to be exported, and other economically or statistically valid forecasting devices which indicate the likelihood that the business will result in increased employment." 8 C.F.R. § 204.6(m)(7)(ii).

⁸⁷ 8 C.F.R. § 204.6(f)(1)-(2).

be created indirectly through increased exports; (3) provide the amount and source of capital committed to the regional center; (4) contain a detailed prediction regarding the manner in which the regional center will have a positive impact on the economy; and (5) are supported by economically or statistically valid forecasting tools.⁸⁸

The 1992 amendment to the EB-5 program implicitly created an investor's visa, but Congress did not intend for the EB-5 program to become primarily an investor's visa. Congress's intent to limit the use of an investor's visa within the EB-5 program is evidenced by the following: (1) the 1992 amendment as well as the Immigration Act of 1990 do not mention the word "investor," instead only the phrase "alien entrepreneur" is used;⁸⁹ (2) the name "Pilot Immigration Program" implies the program was meant to be a test program that was temporary in nature;⁹⁰ (3) the IIPP on its face maintains the same requirements as the direct-employment creation program of the EB-5 in terms of the investment amount, the engagement in a new commercial enterprise, and the job creation requirement;⁹¹ and (4) Congress did not create a new employment-based category like it did for alien entrepreneurs; instead, it allotted a portion of the EB-5 visas intended for entrepreneurs to allow immigrant investors to participate in the program.⁹² This umbrella structure and the fact that Congress did not change any of the EB-5 requirements on its face indicates Congress's objective was to remain focused on alien entrepreneurs, but at the same time to attract some immigrant investors.

Congress's slight tweak to the original EB-5 requirements made significant differences in its ability to attract immigrant entrepreneurs versus investors. The IIPP allows immigrants to invest in regional centers rather than establishing a new enterprise themselves and create jobs indirectly rather than

⁸⁸ *Id.* § 204.6(m)(3). Investors may find a list of approved regional centers on USCIS's website as part of conducting business and financial due diligence prior to making an investment. See *Immigrant Investor Regional Centers*, U.S. CITIZENSHIP & IMMIGR. SERVICES, <http://www.uscis.gov/working-united-states/permanent-workers/employment-based-immigration-fifth-preference-eb-5/immigrant-investor-regional-centers> (last updated Oct. 22, 2014); Mark Ivener & Gary S. Wolfe, *EB-5 Investor Visa and U.S. Tax Issues*, PRAC. TAX LAW., Fall 2013, at 13, 14–15.

⁸⁹ Immigration Act of 1990, Pub. L. No. 101-649, sec. 121, § 216A, 104 Stat. 4978, 4990–94; Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act § 610, 106 Stat. at 1874; 8 U.S.C. § 1153 (2012).

⁹⁰ THE MERRIAM-WEBSTER DICTIONARY, *supra* note 33, at 403.

⁹¹ Immigration Act, sec. 121, § 203(b)(5), 104 Stat. at 4989; Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act § 610, 106 Stat. at 1874; 8 U.S.C. § 1153(b)(5).

⁹² Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act § 610, 106 Stat. at 1874; 8 U.S.C. § 1153(b)(5)(B)(i).

directly.⁹³ This means the EB-5 immigrant is no longer required to be physically present in the new enterprise's location, because the immigrant is no longer required to "actively" manage day-to-day operations.⁹⁴ Therefore, an EB-5 immigrant can now immigrate to California by passively investing in a regional center located in a targeted employment area in, say, Kansas for the amount of \$500,000. Since the requirements for the IIPP are more easily met, the IIPP has transformed the EB-5 visa—intended for immigrant entrepreneurs—into an investor's visa, which is contrary to Congress's intent in creating the program.

III. SUCCESS OF, AND PROBLEMS WITH, THE EB-5 PROGRAM

In recent years, the EB-5 program has started to gain popularity,⁹⁵ but only as an investor's visa and not as an entrepreneur's visa.⁹⁶ According to USCIS, the EB-5 application rate grew by fifty-eight percent from 2011 to 2012, and nearly all of the applicants were admitted through the IIPP.⁹⁷ However, the EB-5 program is not actually attracting many immigrant entrepreneurs.⁹⁸ Amending the program to address the lack of entrepreneurs participating as immigrant entrepreneurs may potentially provide long-term human and physical capital investments in the United States and create more jobs in the long run.

Problems associated with the EB-5 program include: (1) lack of expertise in the adjudication process; (2) lack of clear guidance regarding the adjudication process; (3) uncertainty in the outcome of adjudication; (4) lack of timeliness in processing and adjudication; (5) restrictive requirements and high burden of proof; and (6) the rigorous nature of the EB-5 application process versus other employment-based visa applications.⁹⁹ First, this section will discuss the success of the EB-5 program in terms of attracting foreign capital investments and the benefits such investments have on the U.S. economy. Second, this section will address problems with the EB-5 program, particularly how the IIPP has rendered the EB-5 requirements superfluous, and how the program has transformed into an investor's visa, which is inconsistent with the legislative intent.

⁹³ 8 U.S.C. § 1153(b)(5)(B)(i).

⁹⁴ Ivener & Wolfe, *supra* note 88, at 13–14.

⁹⁵ See U.S. CITIZENSHIP & IMMIGRATION SERVS., *supra* note 21.

⁹⁶ See U.S. CITIZENSHIP & IMMIGRATION SERVS., *supra* note 15, at 15.

⁹⁷ See U.S. CITIZENSHIP & IMMIGRATION SERVS., *supra* note 21; U.S. CITIZENSHIP & IMMIGRATION SERVS., *supra* note 15, at 15.

⁹⁸ See U.S. CITIZENSHIP & IMMIGRATION SERVS., *supra* note 15, at 15.

⁹⁹ U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 10, at 8–11.

A. Success of the EB-5 Program

1. The IIPP Is Successful in Attracting Foreign Capital Investment

The Immigrant Investor Pilot Program has been successful in attracting foreign capital investments, which create jobs, increase tax revenue, and stimulate the overall U.S. economy. The program's ability to allow passive investment into regional centers has made the EB-5 program more attractive to immigrant investors. The number of applicants has grown from the low hundreds annually to over 6000 in 2012.¹⁰⁰ The number of USCIS-approved regional centers has also grown rapidly.¹⁰¹ According to USCIS, 174 regional centers were approved in 2011,¹⁰² and as of April 1, 2014, approximately 480 regional centers have been approved.¹⁰³ Since the program's inception, a total of 16,157 conditional visas have been approved,¹⁰⁴ which means based on the minimum investment amount of \$500,000, approximately \$2.65 billion in capital may have been injected into the U.S. economy.¹⁰⁵ The rapid growth in the overall application rate indicates the program is working, which means investors are willing to invest a substantial amount of capital to immigrate to the United States.

2. EB-5 Investors' Foreign Capital Investments Create U.S. Jobs

The Association to Invest in the USA ("IIUSA"), a national nonprofit industry trade association for the EB-5 Regional Center Program, teamed up with Minnesota IMPLAN Group, Inc. ("MiG") to conduct research on the economic impact of the EB-5 program.¹⁰⁶ The research study found that from 2010 to 2011, the EB-5 program generated over 33,000 jobs.¹⁰⁷ Regional centers

¹⁰⁰ U.S. CITIZENSHIP & IMMIGRATION SERVS., *supra* note 21. The number of applications grew from 3805 in 2011 to 6041 in 2012—an increase of fifty-eight percent. *Id.*

¹⁰¹ U.S. CITIZENSHIP & IMMIGRATION SERVS., U.S. DEP'T OF HOMELAND SEC., NUMBER OF APPROVED EB5 REGIONAL CENTERS FISCAL YEAR(S): 2007–2012 (2012), *available at* http://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/Employment-based/I526_I924_I829_performancedata_qtr43.pdf.

¹⁰² *Id.*

¹⁰³ Based on results published on USCIS's website as of April 13, 2014. *See Immigrant Investor Regional Centers, supra* note 88.

¹⁰⁴ *See* U.S. CITIZENSHIP & IMMIGRATION SERVS., *supra* note 21.

¹⁰⁵ Press Release, IIUSA, IIUSA Announces Results of Economic Study, Confirms EB-5 Regional Center Program Leads to U.S. Job Creation, GDP Growth and Tax Revenue (Sept. 27, 2013), *available at* <http://www.prweb.com/pdfdownload/11168367.pdf>.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

create jobs because they are able to match up foreign investors with local commercial projects primarily located in targeted employment areas.¹⁰⁸ Many of the regional centers are commercial real estate builders looking for alternative sources of funding to keep their projects alive during a time when sources of domestic capital have dried up.¹⁰⁹ Once the regional centers receive capital investments from EB-5 investors,¹¹⁰ they are able to complete their real estate projects by hiring more construction workers. After the construction project is completed, the regional centers are able to sell the commercial project or lease out the spaces to retailers. Subsequently, these retail businesses will hire local workers for their operations and stimulate local consumer spending, thereby stimulating local economic growth.

3. The EB-5 Program Generates Tax Revenue

The MiG study also found that the EB-5 program has generated \$346 million in federal tax revenue and \$218 million in state and local tax revenue.¹¹¹ The study looked at both direct investment and indirect economic factors, such as immigrant investors' household spending, moving costs, and other various immigration expenses, including attorney fees.¹¹² EB-5 investors' capital investments into regional centers generate tax revenue because the government benefits from additional social insurance taxes, indirect business taxes, corporate profits taxes, and personal taxes.¹¹³

4. EB-5 Investors' Capital Investments Stimulate the U.S. Economy

The IIPP has been successful in attracting foreign capital investments into the United States, which have substantial and tangible benefits on the U.S. economy.¹¹⁴ Foreign capital investments are crucial for the U.S. economy, especially during

¹⁰⁸ Nick Leiber, *The EB-5 Program: Create American Jobs, Get a Green Card*, BLOOMBERG BUSINESSWEEK (Aug. 4, 2011), <http://www.businessweek.com/printer/articles/862-the-eb-5-program-create-american-jobs-get-a-green-card>.

¹⁰⁹ Kelleher et al., *supra* note 1.

¹¹⁰ For instance, American Redevelopment Solutions, LLC is a regional center aimed at attracting EB-5 investors to invest in "targeted economic areas" of Southern California—for example, cities like Temecula, Murrieta, and Ontario. The regional center purports to look for commercial real estate projects in these areas that promote economic growth, create jobs, provide low risk and stable investment opportunities, and allow timely and secure exit strategies to meet the requirements of immigrant investors. See AM. REDEVELOPMENT SOLUTIONS LLC, http://www.arregionalcenter.com/Eng_pr-Murrietta_retail.php (last visited Nov. 2, 2014).

¹¹¹ Press Release, IIUSA, *supra* note 105.

¹¹² *Id.*

¹¹³ ICF INT'L, *supra* note 25, at 23.

¹¹⁴ Press Release, IIUSA, *supra* note 105.

an economic downturn when domestic lending is less accessible for businesses.¹¹⁵ EB-5 investors provide capital investments, which allow U.S. commercial enterprises to obtain funding, complete their projects, hire workers, and stimulate local economies. Furthermore, regional centers generate federal, state, and local tax revenue that benefits the U.S. government and its citizens.¹¹⁶

B. Problems with the EB-5 Program

While the Immigrant Investor Pilot Program part of the EB-5 program is successful, the direct-employment creation part is not working; the United States is not actually attracting many immigrant entrepreneurs.¹¹⁷ This is often overlooked because the EB-5 program is usually assessed as a whole,¹¹⁸ even though there are clearly two distinct parts at work. This section will discuss problems with the IIPP, the lack of entrepreneurship in the EB-5 program, and why the EB-5 program as currently implemented is not consistent with legislative intent.

1. The IIPP Has Rendered the EB-5 Requirements Superfluous

First, the IIPP has rendered the EB-5 program requirements superfluous because the job creation requirement cannot be accurately measured or attributed to EB-5 investors. EB-5 investors are admitted as conditional residents when USCIS has determined that the requisite investment amount has been invested into an approved regional center and ten full-time jobs have been created.¹¹⁹ In reality, however, USCIS's staff does not directly monitor the marketing, success, or failure of the regional centers.¹²⁰ The agency can only attempt to verify that the regional centers receiving money do actually create the jobs they promise based on a mathematical forecast,¹²¹ because the

¹¹⁵ Kelleher et al., *supra* note 1.

¹¹⁶ ICF INT'L, *supra* note 25, at 23–24.

¹¹⁷ U.S. CITIZENSHIP & IMMIGRATION SERVS., *supra* note 15, at 15 (stating that approximately ninety to ninety-five percent of EB-5 investors are investing in the IIPP program).

¹¹⁸ *See, e.g.*, U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 10; U.S. CITIZENSHIP & IMMIGRATION SERVS., *supra* note 21; ICF INT'L, *supra* note 25.

¹¹⁹ *See supra* Part II.B.

¹²⁰ AUDREY SINGER & CAMILLE GALDES, IMPROVING THE EB-5 INVESTOR VISA PROGRAM: INTERNATIONAL FINANCING FOR U.S. REGIONAL ECONOMIC DEVELOPMENT 10 (2014), available at http://www.brookings.edu/~media/research/files/reports/2014/02/05%20eb5/eb5_report.

¹²¹ Kelleher et al., *supra* note 1; 8 C.F.R. § 204.6 (2014). However, since the number of jobs boasted is based on "reasonable methodologies," regional centers like American Redevelopment Solutions, LLC can forecast job creation numbers based on the square

regional centers cannot accurately measure the number of jobs created as a direct result of the EB-5 investment. Additionally, the U.S. Government Accountability Office (“GAO”) cannot “determine a reliable estimate of the number of jobs created by immigrant investors” because USCIS attributes all of the jobs created by an enterprise to the individual EB-5 investor even if non-EB-5 investors are involved.¹²² Thus, aside from the actual amount of capital investment invested by each EB-5 applicant, economic impact studies regarding the EB-5 program can only estimate the indirect economic impact induced by the capital investment.¹²³

Second, the IIPP has rendered the \$1 million investment amount superfluous because the program provides little incentive for investors to invest more than the \$500,000 minimum investment amount. Since the IIPP allows EB-5 investors to passively invest,¹²⁴ the natural thing to do is invest the minimum amount required, \$500,000, to obtain legal permanent residency. The \$1 million investment requirement is misleading because although the requirement suggests that some investors are investing \$1 million, USCIS’s data does not distinguish how many EB-5 investors invest \$1 million and how many invest \$500,000. Therefore, the total amount of investments received by the United States from the EB-5 program may be manipulated by both advocates and critics to persuade the public on the pros and cons of the EB-5 program, depending on their agenda.¹²⁵

Third, Congress lowered the investment amount for targeted employment areas to entice immigrant entrepreneurs to immigrate and establish businesses in certain geographic areas with high unemployment rates; however, the IIPP has rendered this incentive moot. Although EB-5 investments are being directed into targeted employment areas, the goal was to promote long-term economic growth rather than short-term economic stimulus into these areas.¹²⁶ Statistics show more than half of EB-5 investors are immigrating to major metropolitan areas in the United States, mostly to New York and California,¹²⁷ yet

footage of the project. See *Job Creation*, AM. REDEVELOPMENT SOLUTIONS LLC, http://www.arregionalcenter.com/Eng_JobCreation.php (last visited Oct. 26, 2014).

¹²² U.S. GOV’T ACCOUNTABILITY OFFICE, *supra* note 10, at 4, 19.

¹²³ See Press Release, IIUSA, *supra* note 105.

¹²⁴ See *supra* Part II.B.

¹²⁵ Compare ERIC A. RUARK & ANIQA MOINUDDIN, FED’N FOR AM. IMMIGRATION REFORM, *SELLING AMERICA SHORT: THE FAILURE OF THE EB-5 VISA PROGRAM 3* (2012), available at http://www.fairus.org/site/DocServer/FAIR-EB5-2012_rev.pdf, with Press Release, IIUSA, *supra* note 105.

¹²⁶ Immigration Act of 1990, Pub. L. No. 101-649, sec. 121, § 203(b)(5), 104 Stat. 4978, 4989-90.

¹²⁷ Monger & Yankay, *supra* note 23, at 4 tbl.4, 5 tbl.5.

there are 480 regional centers operating in all fifty states, as well as Puerto Rico and Guam.¹²⁸ The discrepancy between where EB-5 investors are living and the rapid increase of regional centers all over the United States clearly indicates that EB-5 investors are not living in the targeted employment areas where they are investing. Immigrant entrepreneurs that invest in the targeted employment areas where they live arguably make a greater and long-term economic impact on the areas, because these are the areas where they establish their businesses, purchase their homes, work, go to school, and make most of their living and business expenditures. By contrast, an immigrant investor's one-time capital injection into an area only has a short-term effect on the area.

2. The IIPP Has Transformed the EB-5 Program from an Entrepreneur's Visa into an Investor's Visa

As discussed above, since the EB-5 requirements no longer serve much purpose after the IIPP, the program has become predominantly an investor's visa because there is little incentive for immigrants to participate in the direct-employment creation program. The EB-5 program is essentially an investor's visa because the program in its present form is too stringent to attract entrepreneurs, but is relatively easier for investors to adhere to.¹²⁹ Immigrant investors can passively invest the minimum amount of \$500,000, then apply for an EB-5 visa, and be on the path to becoming lawful permanent residents in the United States within two years.¹³⁰ The investment amount required by the EB-5 program is the lowest in comparison to other developed countries,¹³¹ and IIPP investors do not need to be actively managing an enterprise, nor are they required to directly create jobs. IIPP investors can easily satisfy the EB-5 requirements by simply becoming a limited partner in a limited partnership that invests in a regional center, which indirectly creates jobs¹³² that are attributable to the EB-5 investor.¹³³

On the other hand, for immigrant entrepreneurs, the EB-5 program requirements are difficult to meet because not only is

¹²⁸ *Immigrant Investor Regional Centers*, *supra* note 88.

¹²⁹ RUARK & MOINUDDIN, *supra* note 125.

¹³⁰ *See supra* Part II.B.

¹³¹ *See* ICF INT'L, *supra* note 25.

¹³² Immigration Act of 1990, Pub. L. No. 101-649, sec. 121, § 203(b)(5), 104 Stat. 4978, 4989-90. Looking at American Redevelopment Solutions, LLC again, this regional center was approved by USCIS without creating any direct jobs. The "reasonable methodology" in this case calculates job creation based on square footage developed by the project. *See Job Creation*, *supra* note 121.

¹³³ 8 C.F.R. § 204.6 (2014).

the \$500,000 investment an enormous amount to be put at risk in a new commercial enterprise, but also the enterprise must have directly created ten full-time jobs before the immigrant entrepreneur may apply for conditional residency under the EB-5 program. Based on the EB-5 application process,¹³⁴ in order to invest in and establish a new commercial enterprise, the immigrant entrepreneur would first need to obtain legal status by other means,¹³⁵ and then build up the business to create ten full-time jobs prior to becoming eligible for the EB-5 program. Therefore, immigrant entrepreneurs are less likely to be taking advantage of EB-5's direct-employment creation program.

Furthermore, while the program is currently designed to attract immigrant entrepreneurs, it is actually discouraging immigrant entrepreneurs because EB-5 entrepreneurs take significantly higher risks than IIPP investors. Investors immigrating under the IIPP take the minimal risk of only losing a \$500,000 investment amount. While the regional centers cannot guarantee the return of the \$500,000 investment, return is possible usually within five years, and often a regional center's track record may indicate the amount of annual interest investors may expect.¹³⁶ Additionally, investors investing into regional centers will most likely attain permanent resident status because investors who exercise due diligence can easily access a list of established and USCIS-approved regional centers.¹³⁷ These regional centers have also been pre-approved for meeting the ten full-time jobs requirement even before the investors make the investment.¹³⁸ As soon as the IIPP investor makes the \$500,000 investment, the EB-5 investor has satisfied all of the EB-5 visa requirements; thus, the investor may apply for conditional residency. Although the IIPP investors' monetary investment may be at risk, their green cards are probably not at risk.

In comparison, immigrant entrepreneurs take substantial risk because their capital investment into a commercial enterprise under the direct-employment creation program does not automatically translate into ten full-time jobs like the investment does for IIPP investors. Under the direct-employment creation program, immigrant entrepreneurs must commit a

¹³⁴ ICF INT'L, *supra* note 25, at 2.

¹³⁵ Makar, *supra* note 65, at 1.

¹³⁶ *Is There Usually a Return on EB-5 Investments?*, EB5INVESTORS, <http://www.eb5investors.com/qa/is-there-usually-a-return-on-eb5-investments> (last updated Dec. 3, 2012).

¹³⁷ 8 C.F.R. § 204.6.

¹³⁸ See *supra* Part II.B.

minimum of \$500,000¹³⁹ into a new commercial enterprise with no track record, and statistics show that fifty percent of small businesses fail during the first five years.¹⁴⁰ Immigrant entrepreneurs are not even eligible to apply for conditional residency under the EB-5 program until they have directly created ten full-time jobs.¹⁴¹ Not only is the immigrant entrepreneur at risk of losing \$500,000, and possibly more, to sustain the business long enough to create ten full-time jobs, but the immigrant entrepreneur will likely leave the United States with a failed business and without a green card.

With all other requirements being equal, immigrant entrepreneurs will most likely choose to passively invest into a regional center rather than actively establish a new commercial enterprise. Immigration under the IIPP is thus more attractive because the investment amount is the same, the risk of business failure is much lower, and the chance of obtaining legal permanent residency is much higher.

3. EB-5 as an Investor's Visa Is Contrary to Legislative Intent

Currently, the United States is left with an immigration program intended to attract entrepreneurs, but being widely used by immigrant investors. Since the United States does not make distinct requirements for investors and entrepreneurs, it essentially disguises the fact that the EB-5 program may be construed as a "citizenship-for-sale" scheme.¹⁴² Although a visa for the wealthy is clearly against legislative intent,¹⁴³ this is not necessarily bad, if the United States is accomplishing its economic goals in exchange for U.S. citizenship. As discussed above, physical capital investments are important in stimulating the economy.¹⁴⁴ Countries like the United Kingdom, Australia, and Canada have separate immigration programs to target

¹³⁹ This is if the entrepreneur chooses to establish the new commercial enterprise in a targeted employment area. According to a small business survey that rated the friendliest cities for small businesses, counties in targeted employment areas are nowhere near the most advantageous cities that can help ease the difficulties in creating a successful business. See NATHAN ALLEN & SANDER DANIELS, 2013 THUMB TACK.COM SMALL BUSINESS FRIENDLINESS SURVEY: METHODOLOGY & ANALYSIS app. b, at 20 tbl.2 (2013), available at www.kauffman.org/~media/kauffman_org/research%20reports%20and%20covers/2013/04/thumbtackmethodologypaper2013.pdf; IMPACTDATASOURCE, EB-5 TEA LIST OF AREAS QUALIFYING AS HIGH UNEMPLOYMENT (2013), available at http://www.impactdata.com/Download_Files/2012%20EB-5%20TEA%20High%20Unemp%20Areas.pdf.

¹⁴⁰ See SBA OFFICE OF ADVOCACY, FREQUENTLY ASKED QUESTIONS 1 (2014), available at http://www.sba.gov/sites/default/files/FAQ_March_2014_0.pdf.

¹⁴¹ 8 U.S.C. § 1153 (2012).

¹⁴² RUARK & MOINUDDIN, *supra* note 125, at 4–5.

¹⁴³ S. REP. NO. 101-55, at 21 (1989).

¹⁴⁴ See *supra* Part III.A.

entrepreneurs and investors.¹⁴⁵ In these countries, investors must initially invest, on average, US\$1.2 million, and they must have a net worth of, on average, US\$2.2 million.¹⁴⁶ These countries understand the most important criteria to be the amount of physical capital invested and how much an investor can bring to the country, because other requirements, such as job creation or active management, are difficult to measure. Ultimately, these countries recognize capital investments will either directly or indirectly stimulate the overall economy.

While immigrant investor programs in other developed countries allow these countries to extract maximum value from investors who wish to immigrate to those countries, the United States has allowed sufficient flexibility in the IIPP to allow immigrant investors to take advantage of the EB-5 program for a comparatively low investment amount. Although “provid[ing] immigrant visas to wealthy individuals”¹⁴⁷ is clearly against legislative intent, the United States is now providing visas to wealthy individuals at an unjustifiable discount.

In order to maximize the potential of immigrant investors and entrepreneurs, the United States should revisit its EB-5 program and make targeted changes to its structure and requirements. The next section will discuss current proposals as well as recommend changes Congress could make to the EB-5 program to better incentivize and target each of the immigrant groups.

IV. PROPOSALS TO AMEND THE EB-5 PROGRAM

Currently, there is a “reverse brain drain” phenomenon where U.S.-educated entrepreneurs are returning to their home countries, such as China and India, to start their businesses.¹⁴⁸ U.S.-educated entrepreneurs are flocking to their home countries to take advantage of the lower cost and ease of starting a business in those countries, while maintaining their close ties with customers, collaborators, and sources of information in the United States.¹⁴⁹ The United States can benefit by restructuring its immigration policies to slow down the “reverse brain drain” phenomenon and encourage potential foreign-born entrepreneurs to start and maintain businesses in the United States.¹⁵⁰

¹⁴⁵ See ICF INT'L, *supra* note 25, at 54–75.

¹⁴⁶ *Id.*

¹⁴⁷ S. REP. NO. 101-55, at 21.

¹⁴⁸ WADHWA ET AL., *supra* note 43, at 3.

¹⁴⁹ *Id.* at 7.

¹⁵⁰ *Id.* at 8.

A. Current Proposals: StartUp Visa Act of 2013

Senator Mark Udall (D-CO) introduced the StartUp Visa Act of 2013 in the Senate on January 30, 2013 to create a sixth category of employment-based visas for sponsored entrepreneurs.¹⁵¹ The proposed bill seeks to steer some of the unused visas from the EB-5 program to three categories of immigrant entrepreneurs.¹⁵²

The first category is for immigrant entrepreneurs who obtain sponsorship from a U.S. qualified super angel investor¹⁵³ or a U.S. qualified venture capitalist.¹⁵⁴ The qualified investor must make an investment of at least \$100,000 on behalf of the immigrant entrepreneur. Once the visa is issued, the immigrant entrepreneur's commercial enterprise has two years to create at least five jobs and either raise \$500,000 in capital investment from a U.S. commercial entity, or generate at least \$500,000 in revenue.¹⁵⁵

The second category applies to immigrant entrepreneurs who hold an unexpired H-1B visa¹⁵⁶ or have completed a graduate level degree from a U.S. university in a STEM-related field. The immigrant entrepreneur must also demonstrate an annual income of at least 250% of the federal poverty level or possession of twice that equivalent amount in assets.¹⁵⁷ A qualified super angel investor or qualified government entity must also sponsor the immigrant entrepreneur by investing at least \$20,000 on the entrepreneur's behalf.¹⁵⁸

The third category is reserved for immigrant entrepreneurs who have a controlling interest in a foreign company that has

¹⁵¹ StartUp Visa Act of 2013, S. 189, 113th Cong. (as introduced in Senate, Jan. 30, 2013), available at <http://www.gpo.gov/fdsys/pkg/BILLS-113s189is/pdf/BILLS-113s189is.pdf>. This visa was originally introduced in 2010 as the StartUp Visa Act of 2010 by Senator John Kerry (D-MA). StartUp Visa Act of 2010, S. 3029, 111th Cong. (as introduced in Senate, Feb. 24, 2010), available at <http://www.gpo.gov/fdsys/pkg/BILLS-111s3029is/pdf/BILLS-111s3029is.pdf>.

¹⁵² S. 189.

¹⁵³ A qualified super angel investor must be a U.S. citizen and an accredited investor, as defined in 17 C.F.R. § 230.501(a), who has made at least two equity investments of at least \$50,000 in each of the previous three years. *Id.*

¹⁵⁴ A qualified venture capitalist is defined as a U.S.-based venture capital company, as defined in 29 C.F.R. § 2510.3-101(d), that is comprised of partners, a majority of whom are U.S. citizens. *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ H-1B is a temporary, non-immigrant status work visa that allows foreign workers to perform work for U.S. companies in the United States in specialized occupations (defined as requiring "theoretical and practical application of a body of specialized knowledge" and "attainment of a bachelor's or higher degree in the specific specialty"). 8 U.S.C. § 1101(a)(15)(H) (2012); 8 U.S.C. § 1184(i).

¹⁵⁷ S. 189.

¹⁵⁸ *Id.*

generated at least \$100,000 in revenue from sales in the United States during the last twelve months. After the visa is issued, the foreign company's commercial activities must create at least three new U.S. full-time jobs, raise at least \$100,000 in capital investment in furtherance of a commercial entity based in the United States, or generate at least \$100,000 in revenue.¹⁵⁹

In order to promote entrepreneurship in the United States, the StartUp Visa proposal lowers the amount of capital investment required to \$100,000 as well as the number of jobs an immigrant entrepreneur must create under the program. The program also further attracts immigrant entrepreneurs with graduate level education in a STEM-related field by lowering the investment amount to \$20,000 and eliminating the job creation requirement. However, this proposal depends heavily on the entrepreneur's ability to obtain investment from a qualified investor in the United States.¹⁶⁰ Such a requirement may create an additional hurdle for immigrant entrepreneurs, as most small businesses are financed through owner savings, loans from family and friends, and commercial lenders.¹⁶¹ Another difficulty is that the proposal still requires that immigrant entrepreneurs meet all the program requirements in two years.¹⁶² Depending on a business's break-even analysis, a small business may take years to generate a profit.¹⁶³

B. Striking the Balance

If the United States wants to attract more immigrant entrepreneurs, it should design an immigration policy with requirements that foster entrepreneurship and encourage long-term physical and human capital investments into the United States. This Comment proposes that Congress should amend the current EB-5 program into an immigrant investor's program, create a separate category for immigrant entrepreneurs, and create distinct requirements to accurately reflect how each targeted immigrant group actually does business.

For the immigrant investor visa category, Congress should first consider amending the requirements to reflect the type of

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ SBA OFFICE OF ADVOCACY, *supra* note 140, at 3; WADHWA ET AL., *supra* note 43, at 11.

¹⁶² S. 189.

¹⁶³ Bethany K. Laurence, *Will My New Business Ever Make Money?*, FORBES (Jan. 16, 2007, 12:00 PM), http://www.forbes.com/2007/01/16/smallbusiness-break-even-business-plan-ent-fin-cx_bl_0116nolo.html.

investors Congress wishes to attract. Second, Congress should consider increasing the investment amount required to attract high-net-worth individuals and simply eradicating the job creation and management requirements, as these requirements cannot be accurately measured. Third, Congress should increase the investment amount as demand for U.S. citizenship increases.¹⁶⁴

For the immigrant entrepreneur category, distinct requirements should be made to reflect the type of entrepreneurs Congress wishes to attract and to better meet the needs of the entrepreneurs. Congress should design the program based on characteristics possessed by successful entrepreneurs, such as access to funds, education level, industry knowledge, and intent to maintain a business in the United States.¹⁶⁵ Since entrepreneurs are concerned with creating a sustainable business that will grow and generate profit in the long run, program requirements should be realistically obtainable to create an environment that fosters the development of a successful business.

This Comment proposes that an immigrant entrepreneur should have up to five years of conditional residency status to establish and actively engage in a new commercial enterprise to create a minimum of three full-time jobs. The immigrant entrepreneur should be required to invest at least \$100,000, obtained either from personal savings or through investors, into the new commercial enterprise. The entrepreneur should also have access to at least \$400,000 in additional maintenance funds to demonstrate his or her ability to endure the period before the business becomes profitable. Additionally, the entrepreneur should be required to have at least two years of business operations experience or a graduate level degree from a U.S. university in a STEM-related field.

This proposed program would minimize the initial risk for an entrepreneur; if the business fails, the entrepreneur can redirect the business instead of committing \$500,000 into one business model. The extra time gives the entrepreneur a more realistic

¹⁶⁴ Robert Frank, *Wealthy Chinese Flee China, Taking Fortunes with Them*, NBC NEWS (Jan. 17, 2014, 12:53 PM), <http://www.nbcnews.com/business/economy/wealthy-chinese-flee-china-taking-fortunes-them-n11756>; Jeremy Page, *Plan B for China's Wealthy: Moving to the U.S., Europe*, WALL ST. J. (Feb. 22, 2012), <http://online.wsj.com/news/articles/SB10001424052970203806504577181461401318988>.

¹⁶⁵ Countries like the United Kingdom, Australia, and Canada consider immigrant entrepreneurs' backgrounds, including: language proficiency; lack of criminal record; age; availability of maintenance funds; intent to directly engage in business activity; job creation; past business experiences; and annual business revenue. See ICF INT'L, *supra* note 25, at 54–70.

time frame to build and grow a business. The lower job creation requirement is more obtainable because this allows the entrepreneur to add employees as he or she expands, instead of rushing to create ten full-time jobs right away and overloading on overhead costs. An entrepreneur visa program with more realistic goals will allow the immigrant entrepreneur to focus on the sustainability of the business. Furthermore, the business experience requirement or education requirement will allow for better prediction of the entrepreneur's success in his or her chosen industry.¹⁶⁶ Together, these requirements more accurately reflect how entrepreneurs develop their businesses and create an environment to cultivate successful businesses in the long run.

CONCLUSION

If the EB-5 program can be separated into two distinct programs, one for immigrant entrepreneurs and one for immigrant investors, the programs can have distinct requirements better designed to specifically target investors and entrepreneurs. Since the EB-5 program is already gaining popularity and is successful in attracting immigrant investors, revamping the program can better attract immigrant entrepreneurs, like Kyung Kim, who have real desires to maintain a business in the United States. While investors make one-time monetary investments into the economy, entrepreneurs make both physical and human capital investments. Thus, entrepreneurs are better for stimulating the economy in the long run because successful businesses can continuously provide goods and services to induce consumer spending, and because growth of such businesses will also steadily create jobs for U.S. citizens. The United States cannot afford to have an immigration policy that ignores a labor asset as valuable to its economy as immigrant entrepreneurs.

¹⁶⁶ See *supra* Part I.B.

The Regulation of Gestation: A Call for More Complete State Statutory Regulation of Gestational Surrogacy Contracts

*Amanda M. Herman**

In 2006, Angelia Robinson agreed to act as a gestational surrogate and carry a pregnancy for her brother, Donald Hollingsworth, and his same-sex spouse, Sean.¹ Robinson became pregnant and gave birth to twin girls, who were genetically related to Sean and an anonymous egg donor.² Five months after giving birth, Robinson filed a lawsuit to gain physical and legal custody of the twins.³ Despite not being genetically related to the twins, a superior court judge ruled that Robinson was the legal mother of the children.⁴ After a five-year-long court battle, full custody was awarded to the biological father, Sean, but Robinson maintained parental visitation rights.⁵

Gestational surrogacy arrangements have become increasingly common in recent years as they provide a way for infertile couples to have children.⁶ However, as the example above illustrates, these agreements have the potential to end negatively, often in prolonged litigation. States have approached the issue of gestational surrogacy in varying ways, with no uniformity amongst the many approaches.⁷ Without clear and comprehensive guidelines for gestational surrogacy arrangements, individuals will be left without guidance in creating these contracts, which will ultimately lead to the courts

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¹ Stephanie Saul, *New Jersey Judge Calls Surrogate Legal Mother of Twins*, N.Y. TIMES (Dec. 30, 2009), http://www.nytimes.com/2009/12/31/us/31surrogate.html?_r=1&.

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ Ted Sherman, *N.J. Gay Couple Fight for Custody of Twin 5-Year-Old Girls*, NJ.COM (Dec. 20, 2011, 7:00 AM), http://www.nj.com/news/index.ssf/2011/12/nj_gay_couple_fight_for_custod.html.

⁶ See *infra* Part I.

⁷ See *infra* Part I.

having to decide who is legally responsible for the children born of these agreements.

Without federal guidance, states have been left to formulate their own approaches for permitting, enforcing, and regulating gestational surrogacy agreements. This has led to a complete lack of uniformity among the states, with some expressly prohibiting these agreements⁸ and others failing to address this issue at all.⁹ The District of Columbia has even gone so far as to criminalize surrogacy arrangements, subjecting offenders to civil fines, imprisonment, or both.¹⁰ Therefore, the outcome of each gestational surrogacy agreement is entirely dependent on which state law controls the situation and how that particular state has chosen to handle gestational surrogacy contracts.

California and Connecticut are two states that have chosen to permit gestational surrogacy arrangements by statutorily regulating the gestational surrogacy process. However, despite the fact that California and Connecticut have taken similar approaches to regulating gestational surrogacy, the statutory schemes utilized by these states differ greatly from one another. As will be discussed below, California's statutes provide more specific and thorough regulations of the gestational carrier process, while Connecticut's statutes provide the bare minimum in terms of detail.

This Comment will argue that states should implement comprehensive statutory regulations for gestational surrogacy agreements that provide specific and complete guidelines for parties wishing to create these contracts. Part I will provide relevant background information and a brief history of assisted reproductive technology in the United States. Part II will outline and analyze the relevant California and Connecticut gestational surrogacy statutes, identifying the strengths and weaknesses of the current regulations in place in those states. Part III will propose that states wishing to enact legislation to regulate and enforce gestational agreements should emulate the approach utilized by the California legislature, as opposed to that of the Connecticut legislature, since California's statutory scheme is more complete, stringent, and efficient. Finally, Part IV will

⁸ John A. Robertson, *Assisted Reproductive Technology and the Family*, 47 HASTINGS L.J. 911, 924 (1996); see also *infra* Part I.C.

⁹ See Diane S. Hinson, *State-by-State Surrogacy Law: Actual Practices*, CREATIVE FAM. CONNECTIONS (2013), <http://www.creativefamilyconnections.com/state-map-surrogacy-law-practices>.

¹⁰ D.C. CODE § 16-402 (2014) ("Any person . . . who . . . violates this section, shall be subject to a civil penalty not to exceed \$10,000 or imprisonment for not more than 1 year, or both.").

briefly discuss the need for state legislatures to strike a delicate balance when creating surrogacy-based statutory regulations.

I. A BRIEF HISTORY

A. Assisted Reproductive Technology

For people who are unable to conceive or carry a child naturally, there are many alternative approaches that can be utilized to help start a family. Many couples choose adoption, which is both a costly and time-consuming process.¹¹ In recent years, however, an increasing number of people have turned to assisted reproductive technology, commonly referred to as “ART,” as a means to have children. ART has been defined in varying ways, but the broadest definition includes “any technology that is employed to conceive a child by means other than sexual intercourse.”¹² Such technology includes egg donation, embryo donation, in vitro fertilization, and the transfer of fertilized embryos.¹³

The first uses of ART began in the mid-1970s, and the world’s first “test-tube baby” was born as a result of these early ART procedures in 1978.¹⁴ The number of ART cycles performed in the United States per year has drastically increased, and in 2011 a total of 151,923 ART cycles took place.¹⁵

The possibilities ART provides to individuals who need assistance starting a family are great. Unlike adoption, couples

¹¹ Adoptions performed independently or through private adoption agencies can cost upwards of \$40,000. CHILD WELFARE INFORMATION GATEWAY, U.S. DEPT OF HEALTH & HUMAN SERVS., COSTS OF ADOPTING 2 (2011), available at https://www.childwelfare.gov/pubs/s_cost/s_costs.pdf. Inter-country adoptions often take well over a year to complete, and some countries even require adoptive parents to live in the foreign country for six months before completing the adoption. James G. Dwyer, *Inter-country Adoption and the Special Rights Fallacy*, 35 U. PA. J. INT’L L. 189, 191 (2013).

¹² CHARLES P. KINDREGAN, JR. & MAUREEN MCBRIEN, ASSISTED REPRODUCTIVE TECHNOLOGY: A LAWYER’S GUIDE TO EMERGING LAW AND SCIENCE, at xii (2006)); see also *Assisted Reproductive Technology (ART)*, CENTERS FOR DISEASE CONTROL & PREVENTION (Nov. 27, 2013), <http://www.cdc.gov/art/> (defining “assisted reproductive technology” as “all fertility treatments in which both eggs and sperm are handled”).

¹³ Richard F. Storrow, *Parenthood by Pure Intention: Assisted Reproduction and the Functional Approach to Parentage*, 53 HASTINGS L.J. 597, 597 (2002).

¹⁴ Louise Brown was the first child born as a result of in vitro fertilization (IVF). Judith F. Daar, *Regulating Reproductive Technologies: Panacea or Paper Tiger?*, 34 Hous. L. Rev. 609, 619 (1997).

¹⁵ CTRS. FOR DISEASE CONTROL & PREVENTION, U.S. DEPT OF HEALTH & HUMAN SERVS., ASSISTED REPRODUCTIVE TECHNOLOGY NATIONAL SUMMARY REPORT 2011, at 47 (2013), available at http://www.cdc.gov/art/ART2011/PDFs/ART_2011_National_Summary_Report.pdf. This number more than doubled from a total of 64,681 ART cycles that took place in 1996. CTRS. FOR DISEASE CONTROL & PREVENTION, U.S. DEPT OF HEALTH & HUMAN SERVS., 2005 ASSISTED REPRODUCTIVE TECHNOLOGY SUCCESS RATES: NATIONAL SUMMARY AND FERTILITY CLINIC REPORTS 61 (2007), available at http://www.cdc.gov/art/ART_2005/508PDF/2005ART508.pdf.

utilizing ART have the ability to be genetically related to the resulting child.¹⁶ Women who are unable to carry a child to term, but are otherwise reproductively healthy, can still be genetically related to their child through these technologies.¹⁷ Reproductive technology has even come so far as to allow a child to be genetically related to two mothers, as well as a father.¹⁸

B. Surrogacy: A Form of ART

One form of ART is surrogacy, which includes two specific subcategories: traditional surrogates and gestational carriers. A traditional surrogate is a woman who becomes pregnant by way of a sperm donor and carries the pregnancy to term.¹⁹ In a traditional surrogacy arrangement, the woman carrying the child is the biological mother and agrees to relinquish all parental rights to her child upon giving birth.²⁰ Statistics on the rates of traditional surrogacy in the United States are rare, and some studies have gone so far as to say there is “no data whatsoever on the use of traditional surrogacy.”²¹ Lack of statistical data aside, traditional surrogacy has been present in society for hundreds, if not thousands, of years.²²

A gestational carrier, however, is a woman who is not related to the child she carries and ultimately bears. In a gestational carrier arrangement, the woman “is implanted with the sperm of the biological father and the eggs of the biological mother[,] . . . eliminating any biological relationship between the surrogate mother and child.”²³ Gestational carrier arrangements

16 Richard A. Posner, *The Ethics and Economics of Enforcing Contracts of Surrogate Motherhood*, 5 J. CONTEMP. HEALTH L. & POL'Y 21, 22 (1989) (arguing for contractual enforcement of traditional surrogacy contracts, which allow for “genetic continuity” between at least one intended parent and the child).

17 Jean Macchiaroli Eggen, *The “Orwellian Nightmare” Reconsidered: A Proposed Regulatory Framework for the Advanced Reproductive Technologies*, 25 GA. L. REV. 625, 640–41 (1991).

18 In a technique known as “egg cell nuclear transfer,” the nucleus of one woman’s egg cell can be joined with an enucleated egg cell from another woman, which creates an egg cell comprised of two different sets of DNA. Bonnie Steinbock, *Defining Parenthood, in FREEDOM AND RESPONSIBILITY IN REPRODUCTIVE CHOICE* 107, 107 (JR Spencer & Antje du Bois-Pedain eds., 2006).

19 SUSAN L. CROCKIN & HOWARD W. JONES, *LEGAL CONCEPTIONS: THE EVOLVING LAW AND POLICY OF ASSISTED REPRODUCTIVE TECHNOLOGIES* 209 (2010).

20 MAGDALINA GUGUCHEVA, *COUNCIL FOR RESPONSIBLE GENETICS, SURROGACY IN AMERICA* 1, 6 (2010), available at <http://www.councilforresponsiblegenetics.org/page/documents/kaevej0a1m.pdf>.

21 *Id.*

22 Christine L. Kerian, Note, *Surrogacy: A Last Resort Alternative for Infertile Women or a Commodification of Women’s Bodies and Children?*, 12 WIS. WOMEN’S L.J. 113, 116–17 (1997) (positing that surrogacy dates back to the Old Testament).

23 Carla Spivack, *The Law of Surrogate Motherhood in the United States*, 58 AM. J. COMP. L. 97, 98–99 (2010).

in the United States have grown rapidly in recent years, nearly doubling in frequency from 2004 to 2008.²⁴

C. Surrogacy Statutes Throughout the United States

With the increased frequency of ART and surrogacy arrangements in the United States, legislation to regulate these procedures became a necessary and logical step for states. Yet, how states have chosen to go about regulating surrogacy and gestational carrier agreements is entirely inconsistent. Some states have decided to ban surrogacy and prohibit the enforcement of traditional or gestational surrogacy agreements entirely.²⁵ A few states have held that surrogacy contracts are only legal if the woman carrying the child is not compensated.²⁶ Other states have explicitly enacted legislation holding these arrangements to be valid,²⁷ while some states merely rely on case law to uphold surrogacy agreements.²⁸ Yet, some states have simply left the issue alone for now, and remain without case law or statutes addressing the validity of surrogacy.²⁹ Given this lack of consensus amongst states regarding surrogacy, a great responsibility is placed upon all parties entering into such

²⁴ The Society for Assisted Reproductive Technology (SART) found the number of children born via gestational surrogacy per year to rise from 738 in 2004 to 1395 in 2008. GUGUCHEVA, *supra* note 20, at 11–12. In the last several years, many celebrities have even turned to gestational carriers as a way to have children. *Celebrities Who Used Surrogate Mothers*, FOX NEWS MAG. (Aug. 30, 2012), <http://magazine.foxnews.com/at-home/celebrities-who-used-surrogate-mothers>.

²⁵ Robertson, *supra* note 8, at 924. Indiana's statute declares enforcement of a surrogacy contract to be against public policy. IND. CODE § 31-20-1-1 (2014). Michigan's statutes also prohibit surrogacy contracts on the basis of public policy. MICH. COMP. LAWS § 722.855 (2014).

²⁶ Spivack, *supra* note 23, at 101 (including Kentucky, Louisiana, Nebraska, New York, North Carolina, and Washington). Furthermore, Louisiana's surrogacy laws are presently in a state of flux, with the governor vetoing a recently proposed bill. *Louisiana House Bill 187*, LEGISCAN, <http://legiscan.com/LA/bill/HB187/2014> (last visited Jan. 10, 2015). This bill sought to permit gestational surrogacy only in the case of a married man and woman using their own genetic material. H.R. 187, 40th Leg., Reg. Sess. (La. 2014). Aside from limiting the use of egg and sperm donors in these arrangements, this bill restricted homosexual couples from engaging in gestational carrier contracts in Louisiana whatsoever. *Id.* Critics of the bill considered this proposed legislation a reminder that true reproductive freedom is not yet a reality. See Richard Vaughn, *Louisiana Surrogacy Bill Advances from Bad to Worse*, INT'L FERTILITY L. GROUP (Apr. 15, 2014), <http://www.iflg.net/louisiana-surrogacy-bill-advances-from-bad-to-worse/>.

²⁷ These states include California and Illinois. CAL. FAM. CODE § 7962 (West 2014); 750 ILL. COMP. STAT. 47/25 (2014).

²⁸ For Ohio's Supreme Court decision finding gestational surrogacy contracts do not violate public policy see *J.F. v. D.B.*, 879 N.E.2d 740 (Ohio 2007). Maryland case law supports the enforcement of gestational surrogacy contracts as well. See *In re Roberto d.B.*, 923 A.2d 115 (Md. 2007) (finding a gestational carrier was allowed to not be listed as the child's birth mother and, instead, the child's father could be listed as the only parent).

²⁹ Hinson, *supra* note 9 (citing Alaska, Georgia, Delaware, and several other states as having no definitive case law or statute on the issue of gestational surrogacy).

agreements to be well informed of the legal landscape of their particular state.³⁰

II. THE CURRENT STATE OF GESTATIONAL CARRIER REGULATIONS: CALIFORNIA AND CONNECTICUT AS EXAMPLES

As if the inherent disparity between how states choose to address gestational carrier agreements isn't enough, there is a great lack of uniformity among states that have enacted legislation protecting surrogacy and regulating the process. While these states have all determined that surrogacy and gestational carrier agreements are permissible, a shockingly small number have enacted comprehensive regulatory schemes to control the surrogacy process. Without thorough and detailed guidelines for gestational carrier agreements, the courts, legal professionals, and citizens looking to enter into these agreements are left in need of answers.

California and Connecticut are states that have both determined gestational carrier contracts to be permissible³¹ and have enacted legislation specifically addressing such contracts. However, the differences between California's and Connecticut's regulation of gestational carrier agreements are vast. This section will discuss those differences in depth and identify the ways Connecticut's statutory scheme is lacking in substance.

A. California Case Law

1. Establishing the Intent Doctrine for Determining Parentage

The current framework of California's gestational surrogacy statutes had its beginning in case law. The most influential case, *Johnson v. Calvert*, established the intent doctrine for determining legal parentage.³² In *Johnson*, Mark and Crispina Calvert were a married couple who could not have a child traditionally.³³ They contracted with Anna Johnson to gestate an embryo comprised of Mark's sperm and Crispina's egg.³⁴ However, the relationship between the Calverts and Johnson deteriorated and the Calverts initiated suit to declare that they were the legal parents of the child. Johnson responded with an

³⁰ CROCKIN & JONES, *supra* note 19, at 212-13.

³¹ While both California and Connecticut allow parties to enter into gestational carrier agreements, Connecticut's statutes do not contain a presumption of validity provision for these contracts. See *infra* Part II.C.5.

³² *Johnson v. Calvert*, 851 P.2d 776 (Cal. 1993).

³³ *Id.* at 778.

³⁴ *Id.*

action to assert her status as the child's legal mother.³⁵ In holding that Johnson had no legal rights to the child, the court reasoned that the Calverts were the legal parents of the child based on their intention in entering into the gestational carrier contract.³⁶ The court articulated the intent doctrine, which it identified as the proper way to determine the child's parentage, as "when [genetic consanguinity and giving birth] . . . do not coincide in one woman, she who intended to procreate the child—that is, she who intended to bring about the birth of a child that she intended to raise as her own—is the natural mother under California law."³⁷

2. Expanding the Intent Doctrine

After *Johnson v. Calvert*, case law in California quickly expanded the application of the intent doctrine to extend beyond married heterosexual couples who were genetically related to the child. In *In re Marriage of Buzzanca*, the California Court of Appeal extended the intent doctrine to include parents who were not genetically related to a child born via a gestational surrogacy arrangement.³⁸ Luanne and John Buzzanca entered into a contract with a gestational carrier, under which the woman would carry and give birth to a child genetically unrelated to either John or Luanne.³⁹ After divorcing, Luanne claimed that she and John were the lawful parents, while John claimed he had no legal obligation to the child.⁴⁰ Astonishingly, the trial court found that the child had *no* legal parents.⁴¹ The Court of Appeal disagreed with the trial court's decision and found that John and Luanne were the child's legal parents "given their initiating role as the intended parents in [the child's] conception and birth."⁴²

The court in *Buzzanca* expressed concern that the state of gestational surrogacy laws was woefully underdeveloped and specifically made a call for the legislature to address the problem. The court noted that artificial reproduction, including artificial insemination, traditional surrogacy, gestational surrogacy, and

³⁵ *Id.*

³⁶ *Id.* at 782.

³⁷ *Id.*

³⁸ *In re Marriage of Buzzanca*, 72 Cal. Rptr. 2d 280, 282 (Cal. Ct. App. 1998).

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.* The trial court reasoned that the gestational carrier and her husband were not the lawful parents because neither was genetically related to the child. The trial court then found that Luanne was not the mother because she had neither provided the egg nor given birth to the child. Finally, the court found that John was not the legal father because he had not contributed his sperm to the embryo implanted in the gestational carrier. *Id.* The Court of Appeal also noted that the woman and man who donated the egg and sperm to create the embryo made no legal claim to the child. *Id.* at 288.

⁴² *Id.* at 293.

even cloning, is something that the courts will have to address. The court asked the legislature to enact a law that, even if not perfectly implemented on a case-by-case basis, “would bring some predictability to those who seek to make use of artificial reproductive techniques.”⁴³

In 2000, the California Court of Appeal further expanded the reach of the intent doctrine for determining parentage to include parents who were not married when they contracted to bring about the birth of the child. In *Dunkin v. Boskey*, an unmarried couple entered into an agreement to use artificial insemination by an anonymous sperm donor to conceive their child.⁴⁴ After the child was born, the parents ended their relationship and sought to establish a custody agreement.⁴⁵ The court held that the intent doctrine also applies to unmarried couples and the man who contracted to create the child was the legal father.⁴⁶ The court noted that the decision to apply the intent test in this way “serves . . . the compelling public policies of family law to legitim[ize] children, provide for their support, foster the best interests of the child, and promote familial responsibility.”⁴⁷

In 2005, the Supreme Court of California expanded the intent doctrine again to apply to situations where same-sex couples had intended to create a child through ART. In *Elisa B. v. Superior Court*, an unmarried lesbian couple utilized artificial insemination to conceive children with the aid of a sperm donor.⁴⁸ After ending their relationship, the women sought to establish the legal parentage of their three children.⁴⁹ The court held that both women were the legal parents of all three children under the intent doctrine.⁵⁰ In *Elisa B.*, the court referenced the legislature’s declaration that “[t]here is a compelling state interest in establishing paternity for all children,” as doing so provides children with “both emotional and financial support.”⁵¹

⁴³ *Id.*

⁴⁴ *Dunkin v. Boskey*, 98 Cal. Rptr. 2d 44, 48 (Cal. Ct. App. 2000). There are two kinds of artificial insemination: homologous and heterologous. Homologous insemination involves the use of the husband’s sperm to create the child and, as a result, does not raise any questions about the child’s paternity. Heterologous insemination utilizes the semen of a third-party donor to conceive a child. *People v. Sorenson*, 437 P.2d 495, 498 n.2 (Cal. 1968).

⁴⁵ *Dunkin*, 98 Cal. Rptr. 2d at 48.

⁴⁶ *Id.* at 56.

⁴⁷ *Id.*

⁴⁸ *Elisa B. v. Superior Court*, 117 P.3d 660, 663 (Cal. 2005).

⁴⁹ *Id.*

⁵⁰ *Id.* at 670.

⁵¹ *Id.* at 669.

B. Connecticut Case Law

1. Early Case Law

Connecticut case law, as compared to California's, has been slower to adopt the intent doctrine for determining legal parentage in gestational carrier agreements. In 2007, a Connecticut superior court found that a husband and wife were the legal parents of a child conceived under a gestational carrier agreement.⁵² In that case, and many others with similar factual situations, the court examined the gestational carrier agreement and determined that the agreement was reasonable, fair, and valid.⁵³ However, the courts in Connecticut were not consistent with their decisions concerning gestational carrier agreements. In 2008, a Connecticut superior court explicitly refused to apply the intent doctrine and held that the biological father's same-sex partner needed to legally adopt the child in order to be included on the birth certificate as a parent.⁵⁴ Instead of utilizing the intent doctrine, the court focused on the best interests of the child and reasoned that a formal adoption process was better suited to serve the child's overall interests.⁵⁵ In support for the best interest test, the court cited legal scholars who advocated that a child's interests were better served by adoption than by the more removed and less thorough intent doctrine.⁵⁶ The court raised concerns about the state of Connecticut's gestational surrogacy laws and called upon the legislature to establish a regulatory scheme to govern such transactions.⁵⁷

⁵² *De Bernardo v. Gregory*, No. FA074007658S, 2007 WL 4357736, at *4 (Conn. Nov. 7, 2007).

⁵³ *See Griffiths v. Taylor*, No. FA084015629, 2008 WL 2745130, at *7 (Conn. June 13, 2008) (finding that two homosexual domestic partners were the legal parents of a child born via a valid gestational surrogacy agreement); *Davis v. Kania*, 836 A.2d 480, 483 (Conn. Super. Ct. 2003) (finding a gestational carrier agreement valid, enforceable, and irrevocable under the laws of Connecticut).

⁵⁴ *Oleski v. Hynes*, No. KNLFA084008415, 2008 WL 2930518, at *12 (Conn. July 10, 2008).

⁵⁵ *Id.* at *10.

⁵⁶ *Id.* (quoting Ilana Hurwitz, *Collaborative Reproduction: Finding the Child in the Maze of Legal Motherhood*, 33 CONN. L. REV. 127 (2000)).

⁵⁷ *Id.* at *11. The court posed the following concern about continuing to leave regulation of gestational carrier agreements in the hands of the judiciary:

The combination of high vulnerability on the part of their consumers, the presumably lucrative environment in which these services are being provided, the lack of public awareness as to what they do and how they do it, and the fundamental, lifelong consequences to the children whose lives their efforts literally bring into being all warrant discussion of whether our becoming one of the few, if not the only venue in this land in which such a business can be carried on without effective supervision, is a desirable goal.

Id.

2. Establishing the Intent Doctrine for Determining Parentage

In 2011, the Supreme Court of Connecticut followed California's lead and adopted the intent doctrine for deciding a child's legal parentage under gestational surrogacy agreements.⁵⁸ In *Raftopol v. Ramey*, two male domestic partners contracted with a woman to carry children who were to be genetically related to one of the two men.⁵⁹ The court found both men were properly named as the legal parents of the children and reasoned "that the legislature intended . . . to confer parental status on an intended parent who is a party to a valid gestational agreement irrespective of that intended parent's genetic relationship to the children."⁶⁰ The court noted its decision to adopt the intent test was influenced directly by *Johnson v. Calvert*.⁶¹ Finally, the Connecticut Supreme Court in *Raftopol* expressed concerns about the "many remaining ambiguities" in Connecticut's gestational carrier statutes and impliedly called upon the legislature to remedy these ambiguities.⁶²

C. Current Statutes in California and Connecticut

In response in part to the judicial pleas in *Buzzanca* and *Raftopol*, both California and Connecticut enacted and currently follow statutory schemes that attempt to regulate the surrogacy process. At first glance, it appears that California and Connecticut have both adopted sufficient legislation and, therefore, taken the steps necessary to appropriately regulate traditional and gestational surrogacy. However, further analysis reveals that California's statutory scheme is much more comprehensive and effective than Connecticut's legislation, which leaves much to be desired.

1. Definitions Provided

a. Definitions in California and Connecticut Statutes

Under current California law, the legislature has provided definitions for many terms relating to ART and, specifically, gestational carrier agreements. These definitions have fully incorporated the intent doctrine, first established in *Johnson*

⁵⁸ See *Raftopol v. Ramey*, 12 A.3d 783 (Conn. 2011).

⁵⁹ *Id.* at 787.

⁶⁰ *Id.* at 799.

⁶¹ *Id.* at 801.

⁶² *Id.* at 797. The court identified some of the ambiguities present in Connecticut law, which included the nature and scope of the phrase "order of a court of competent jurisdiction," the types of gestational agreements that were covered under the law, and who could be recognized as an intended parent. *Id.*

v. Calvert,⁶³ into California law. The term “assisted reproduction agreement” is defined as “a written contract that includes a person who *intends* to be the legal parent of a child or children born through assisted reproduction and that defines the terms of the relationship between the parties to the contract.”⁶⁴ California law also defines the term “intended parent” to mean an “individual, married or unmarried, who manifests the intent to be legally bound as the parent of a child resulting from assisted reproduction.”⁶⁵ The statute also provides a definition of the term “assisted reproduction.”⁶⁶

As previously discussed, there are two types of surrogacy and each gives rise to unique concerns regarding implementation and public policy. The California legislature took care to define these terms separately and make clear that each type of surrogacy presents a very different factual situation.⁶⁷ Other terms that are statutorily defined include “non-attorney surrogacy facilitator,” “surrogacy facilitator,” and “fund management agreement.”⁶⁸

Turning to Connecticut’s relevant surrogacy statutes, Connecticut law defines “gestational agreement” as “a written agreement for assisted reproduction in which a woman agrees to carry a child to birth for an intended parent or intended parents, which woman contributed no genetic material to the child.”⁶⁹ The statute also defines “intended parent” to mean “a party to a gestational agreement who agrees, under the gestational agreement, to be the parent of a child born to a woman by means of assisted reproduction, regardless of whether the party has a genetic relationship to the child.”⁷⁰ This definition makes no mention of whether the party to the gestational agreement may be married or unmarried, as the California definition provides.⁷¹ Importantly, Connecticut law does not provide a definition for

⁶³ See *Johnson v. Calvert*, 851 P.2d 776, 782 (Cal. 1993).

⁶⁴ CAL. FAM. CODE § 7606(b) (West 2014) (emphasis added).

⁶⁵ *Id.* § 7960(c).

⁶⁶ “Assisted reproduction” is defined by the California Family Code as “conception by any means other than sexual intercourse.” *Id.* § 7606(a).

⁶⁷ The term “surrogate” is defined as “a woman who bears and carries a child for another through medically assisted reproduction and pursuant to a written agreement.” *Id.* § 7960(f). “Surrogate” is then further defined to include traditional and gestational surrogates. “Traditional surrogate” is defined as “a woman who agrees to gestate an embryo, in which the woman is the gamete donor and the embryo was created using the sperm of the intended father or a donor arranged by the intended parent or parents.” *Id.* § 7960(f)(1). “Gestational carrier,” or “surrogate,” is defined as “a woman who is not an intended parent and who agrees to gestate an embryo that is genetically unrelated to her pursuant to an assisted reproduction agreement.” *Id.* § 7960(f)(2).

⁶⁸ See *id.* § 7960(b), (d), (e).

⁶⁹ CONN. GEN. STAT. § 7-36(16) (2014).

⁷⁰ *Id.* § 7-36(17).

⁷¹ See CAL. FAM. CODE § 7960(c).

surrogacy, nor does it distinguish between traditional surrogacy and gestational carrier agreements.

b. Analysis of Definitions Provided

California law provides more complete definitions regarding statutory terms and language. Connecticut law makes no mention of the marital status of intended parents, while California specifically provides that intended parents can be either married or unmarried. This may present significant problems for the Connecticut judiciary in interpreting the current statute and determining whether it even applies to unmarried intended parents.⁷² Absent statutory language indicating otherwise, the question of whether the intent doctrine applies to unmarried couples will necessarily be left up to the courts.

Furthermore, Connecticut law does not explicitly make clear the distinction between traditional and gestational surrogates. Although Connecticut law does indicate that gestational agreements apply only to women who have contributed no genetic material to the child,⁷³ greater clarity could be achieved by explaining the difference between traditional and gestational surrogacy arrangements. In enacting the current statutory scheme in California, the legislature made clear that separating out the definitions of traditional and gestational surrogates would help to specifically limit the other provisions of the statute to gestational carrier agreements, rather than traditional surrogates.⁷⁴ This increased level of clarity helps provide contracting parties with a better understanding of what type of agreements are permitted under the law.

2. Requirements for the Contents of Gestational Agreements

Gestational carrier and surrogacy agreements are a type of contract governed by contract law.⁷⁵ There are issues that arise when considering the implications of utilizing contract law to govern these agreements; however, efficient statutory schemes, like California's, specifically address certain terms and

⁷² California case law first answered this question in *Dunkin v. Boskey*, holding that the intent doctrine for determining parentage applies to unmarried couples, as well as married couples. See *Dunkin v. Boskey*, 98 Cal. Rptr. 2d 44, 56 (Cal. Ct. App. 2000). Connecticut case law, however, has never specifically addressed the issue of whether the intent doctrine applies to unmarried couples.

⁷³ CONN. GEN. STAT. § 7-36(17).

⁷⁴ Assemb. 1217, 2012 Leg., Reg. Sess. (Cal. 2012).

⁷⁵ See Richard A. Epstein, *Surrogacy: The Case for Full Contractual Enforcement*, 81 VA. L. REV. 2305 (1995) (arguing that surrogacy contracts can be fully regulated under the canons of contract law).

conditions that must be included in these contracts.⁷⁶ This specificity provides contracting parties with more certainty and predictability before the child is even conceived.⁷⁷ The more detailed contractual requirements mandated by California's statutes provide more guidance for intended parents, gestational carriers, legal professionals, and the courts.

a. Requirements Under California and Connecticut Law

California law includes many requirements for gestational carrier agreements to be presumed valid. Written gestational carrier agreements must include the following: (1) the date on which the agreement was executed; (2) information identifying the persons from which the gametes originated, unless donated anonymously; and (3) the identity of the intended parent or parents.⁷⁸ Before parties complete the written gestational carrier agreement, each party must secure independent legal counsel to represent them in the execution of the agreement.⁷⁹ This means both the intended parents and gestational carrier must find and retain licensed attorneys of their choosing before any written agreement can be created. The agreement must also be signed by all parties and notarized.⁸⁰

Connecticut law requires three main components for gestational surrogacy agreements. The agreement must: (1) name each party to the agreement and indicate each party's respective obligations under the agreement; (2) be signed by each party to the agreement and the spouse of each party, if any; and (3) be witnessed by at least two disinterested adults and acknowledged in the manner prescribed by law.⁸¹ Under Connecticut law, the parties are not required to identify the sperm and egg donors, or even indicate where the gametes were obtained. Furthermore, Connecticut law does not require that the parties be represented by separate legal counsel. In fact, under Connecticut law, the parties to a gestational carrier agreement need not be represented by legal counsel at all.

⁷⁶ *Id.* at 2335.

⁷⁷ Lori B. Andrews, Commentary, *Beyond Doctrinal Boundaries: A Legal Framework for Surrogate Motherhood*, 81 VA. L. REV. 2343, 2368 (1995) (arguing that enforcing surrogacy contracts will not allow surrogates to change their mind and initiate long, taxing court battles to determine the legal parents of the child; instead, all parties involved will know who is to be the legal parents from the time the contract is entered into, creating certainty).

⁷⁸ CAL. FAM. CODE § 7962(a)(1)–(3) (West 2014).

⁷⁹ *Id.* § 7962(b).

⁸⁰ *Id.* § 7962(c).

⁸¹ CONN. GEN. STAT. § 7-36(16) (2014).

b. Analysis of Statutory Requirements

California's legislation provides clearer guidelines as to what gestational carrier contracts must contain. California law requires the parties to identify where the gametes came from, unless donated anonymously,⁸² and to be represented by independent legal counsel before entering into the agreement⁸³—provisions the Connecticut statutes make no mention of. Requiring that parties to the agreement obtain separate legal counsel ensures that the interests of all parties will be advocated for and protected by a licensed attorney. Absent a similar provision, Connecticut's statutes would allow for one attorney to represent both parties in the agreement or, worse, for neither party to be represented by an attorney in drafting the contract. Although attorneys are bound by the applicable rules of professional conduct,⁸⁴ having one attorney represent both parties does not ensure that each side will receive proper and effective representation. Legislative history reveals that the California legislature was specifically concerned with the possibility of ineffectual representation, and it was this fear that led to the inclusion of the independent counsel provision.⁸⁵ Independent counsel for both parties was considered necessary "because of the complexities of surrogacy agreements," and independent counsel was seen as a way to ensure both the contract's validity and that all parties were clear on their rights and responsibilities under the agreement.⁸⁶

3. Regulation of the Gestational Carrier Process

The actual process of conceiving a child through ART and utilizing a surrogate or gestational carrier's services is incredibly complex. Obtaining the donor gametes and implanting the embryos involves many medical procedures and various types of medications.⁸⁷ Intended parents often utilize the services of companies that specialize in facilitating and creating gestational carrier agreements, which introduces a third party into the situation.⁸⁸ Finally, gestational carrier contracts often concern a

⁸² CAL. FAM. CODE § 7962(a)(2).

⁸³ *Id.* § 7962(b).

⁸⁴ The Connecticut Rules of Professional Conduct prohibit attorneys from representing a client where the client's interests are adverse to that of an existing client. CONN. RULES OF PROF'L CONDUCT R. 1.7(a)(1) (2014).

⁸⁵ Assemb. 1217, 2012 Leg., Reg. Sess. (Cal. 2012).

⁸⁶ *Id.*

⁸⁷ See *ART: Step-by-Step Guide*, SOC'Y FOR ASSISTED REPROD. TECH., www.sart.org/detail.aspx?id=1903 (last visited Oct. 31, 2014).

⁸⁸ *Patient Resources*, CENTERS FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/art/PatientResources.htm> (last updated July 2, 2013) (explaining that "[i]n the

great deal of money used for medical procedures, medications, and monetary compensation for the woman carrying the pregnancy.⁸⁹ Monitoring the medical and financial aspects of the gestational carrier process requires that states include specific statutory language to address these issues.

a. Regulation of Process in California and Connecticut

Aside from regulating the contents of the gestational carrier agreement itself, the process of actually conceiving a child and managing the finances are also controlled by the applicable California statutes. First and foremost, before any medical steps can be made towards conceiving a child, California law mandates that the gestational carrier agreement be properly executed and completed.⁹⁰ Unless the agreement meets all of the requirements listed in the previous section, parties are not permitted to even begin medically preparing for an anticipated embryo transfer.

The gestational surrogacy process is further regulated by statute through requirements concerning the handling of money related to the agreement. The statute provides clear instructions for surrogacy facilitators and attorneys regarding how to handle client funds. All client funds must be placed in either “[a]n independent, bonded escrow depository maintained by a licensed, independent, bonded escrow company” or “[a] trust account maintained by an attorney.”⁹¹ Furthermore, the statute explains that “[c]lient funds may only be disbursed by the attorney or escrow agent as set forth in the assisted reproduction agreement and fund management agreement.”⁹² The statute also provides guidelines for funds that do not need to meet these stringent requirements.⁹³

Connecticut law does not specifically contain any provisions that regulate the process of gestational carrier agreements. The statutes make no mention of the general timeline of the process

United States, more than 440 clinics provide services to patients seeking to overcome infertility” through the use of ART).

⁸⁹ See *generally Financial Information*, SOC’Y FOR ASSISTED REPROD. TECH., <http://www.sart.org/detail.aspx?id=1891> (last visited Oct. 31, 2014).

⁹⁰ See CAL. FAM. CODE § 7962(d) (West 2014) (“The parties to an assisted reproduction agreement for gestational carriers shall not undergo an embryo transfer procedure, or commence injectable medication in preparation for an embryo transfer for assisted reproduction purposes, until the assisted reproduction agreement for gestational carriers has been fully executed as required by subdivisions (b) and (c) of this section.”).

⁹¹ *Id.* § 7961(a).

⁹² *Id.* § 7961(c).

⁹³ See *id.* § 7961(d) (“This section shall not apply to funds that are both of the following: (1) Not provided for in the fund management agreement. (2) Paid directly to a medical doctor for medical services or a psychologist for psychological services.”).

or of how monetary funds are to be managed and maintained throughout the process.

b. Analysis of Statutory Regulation of Process

California law requires that the parties hold off on all medical procedures, including the injection of medication in preparation for procedures, until a valid agreement is in place.⁹⁴ Connecticut law is void of any similar requirement and does not regulate the actual gestational carrier process in any way. This type of provision provides procedural safeguards for both the intended parents and the gestational carrier and demands that each side is fully aware of their obligations under the contract before beginning the process of actually conceiving a child. This kind of regulation provides the contracting parties with a clear timeline of how the entire gestational carrier process must be executed, which provides predictability to all involved parties.

As previously stated, gestational carrier arrangements can be incredibly expensive and often require that a great deal of money change hands. Connecticut statutes are completely void of any regulation for the monetary aspects of these agreements. These kinds of regulations are absolutely essential in safeguarding parties against fraud. A recent example of such fraud comes from California where Tonya Collins, founder and operator of surrogacy agency SurroGenesis, defrauded dozens of families looking to have a child through gestational carriers.⁹⁵ Collins created a fake financial firm to handle the financial aspects of the gestational carrier business and used upwards of \$2 million of client funds for cars, jewelry, vacations, and other personal expenses.⁹⁶ State laws regulating the handling of money in gestational carrier arrangements provide an important financial safeguard for intended parents who invest a significant amount of money in these arrangements.

4. Establishing the Parent-Child Relationship

Determining the legal parentage of a child born pursuant to a gestational carrier agreement is of the utmost importance to ensure that someone is legally responsible for the well-being of the child. Some states require that the intended parents legally

⁹⁴ See *id.* § 7962(d).

⁹⁵ See Carlos Saucedo, *Surrogacy Scam Unites Valley Families*, ABC30 (May 15, 2013, 12:03 AM), <http://abclocal.go.com/kfsn/story?id=9100963>.

⁹⁶ *Id.*; see also Maria Medina, *SurroGenesis Scams Women Wanting Children*, CBS SACRAMENTO (Apr. 20, 2012, 11:50 PM), <http://sacramento.cbslocal.com/2012/04/20/surrogeneis-scams-women-wanting-children/>.

adopt the child after he or she is born.⁹⁷ However, California and Connecticut have opted to utilize pre-birth judgments to establish legal parentage, and both states have provided for this option in their respective statutes.⁹⁸ This statutory approach provides more certainty to the intended parents and stability to the child, which ultimately supports the child's best interests.⁹⁹

California law provides for pre-birth judgments so that the intended parents can be listed on the child's birth certificate as the legal parents.¹⁰⁰ An action to achieve this "may be filed before the child's birth" and "[t]he judgment or order may be issued before or after the child's or children's birth."¹⁰¹ Furthermore, an action to establish the parent-child relationship may be brought by any party to the gestational carrier agreement, so long as the order sought is consistent with that agreement.¹⁰²

Connecticut's approach to establishing a parent-child relationship is essentially identical to California's statutory language. Just as in California, pre-birth judgments are permitted in Connecticut and, as a result, the intended parents can be listed on the child's birth certificate from the moment the child is born.¹⁰³ Furthermore, Connecticut law provides that the replacement birth certificate issued, which will list the intended parents as the child's parents, "shall include all information required to be included in a certificate of birth" and be exactly the same as a birth certificate issued for a child who is not the product of a gestational agreement.¹⁰⁴

⁹⁷ See, e.g., *In re Adoption of Sebastian*, 879 N.Y.S.2d 677 (N.Y. Sur. Ct. 2009) (holding that the genetic mother to the child in question could only legally establish parentage through adoption when the child was born to the genetic mother's wife through means of implanting the embryo into the wife's uterus).

⁹⁸ Pre-birth judgments present several benefits to the parties in a gestational carrier agreement, including the ability of the intended parents to make all medical decisions for the child from the moment of its birth, the ability of the hospital to discharge the child to the intended parents, the solidification of insurance coverage for the child under the intended parent's plan, and emotional stability for both the intended parents and the child from the moment of birth. Steven H. Snyder & Mary Patricia Byrn, *The Use of Prebirth Parentage Orders in Surrogacy Proceedings*, 39 FAM. L.Q. 633, 634–35 (2005).

⁹⁹ See Andrea E. Stumpf, *Redefining Mother: A Legal Matrix for New Reproductive Technologies*, 96 YALE L.J. 187, 196 (1986).

¹⁰⁰ A recently approved California bill requires that birth certificates in California replace the existing fields currently labeled as "Name of Mother" and "Name of Father" with "Name of Parent." Each parent is then able to further identify as the child's "mother," "father," or "parent" by checking the applicable box. Assemb. 1951, 2014 Leg., Reg. Sess. (Cal. 2014).

¹⁰¹ CAL. FAM. CODE § 7962(e), (f)(2) (West 2014).

¹⁰² *Id.* § 7630(f).

¹⁰³ CONN. GEN. STAT. § 7-48a(b) (2014).

¹⁰⁴ *Id.*

5. Presumption of Validity

Finally, if gestational carrier contracts are deemed to be presumptively valid, courts will not have to determine whether the contract is valid. Such a presumption will provide greater certainty to both the intended parents and the woman acting as the gestational carrier in these agreements.

a. Presumption of Validity in California and Connecticut Statutes

California law contains specific provisions that provide a presumption of validity for gestational surrogacy contracts. Addressing the concern that surrogate mothers giving birth to the child may attempt to assert their rights as parents, California law states:

A notarized assisted reproduction agreement for gestational carriers signed by all the parties, with the attached declarations of independent attorneys, and lodged with the superior court . . . shall rebut any presumptions . . . as to the gestational carrier surrogate, her spouse, or partner being a parent of the child or children.¹⁰⁵

Furthermore, California law extends a presumption of validity to all gestational carrier agreements executed in accordance with California Family Code section 7962, meaning the agreement cannot be revoked or rescinded without a court order.¹⁰⁶

Unlike California law, Connecticut statutes do not contain a presumption of validity provision for gestational carrier agreements. Parties who enter into these agreements in Connecticut are not provided statutory protection as to the validity of their agreements, regardless of whether the agreement complies with the other provisions of Connecticut law.

b. Analysis of Statutory Approaches to Presumption of Validity

Connecticut's lack of presumed validity for gestational carrier agreements provides less protection to parties engaged in these contracts. When the law presumes the validity of these agreements, all parties involved have much more certainty when entering into the contract. If a state presumes these agreements to be valid, surrogate mothers will be less likely to believe they have a right to custody of the child, and intended parents will

¹⁰⁵ CAL. FAM. CODE § 7962(f)(1).

¹⁰⁶ *Id.* § 7962(i).

have more certainty that when their baby is born, they, and they alone, will have a legal claim to custody.¹⁰⁷

III. PROPOSED SOLUTION: STATES ENACTING GESTATIONAL CARRIER STATUTES SHOULD EMULATE CALIFORNIA'S STATUTORY SCHEME TO BETTER REGULATE THESE ARRANGEMENTS

In creating the statutes currently in place, the California legislature expressed its desire to provide intended parents, surrogates, and courts with “a clear procedure to follow in creating and enforcing surrogacy agreements and determining parental rights.”¹⁰⁸ While Connecticut law does provide some guidance to parties wishing to enter into these agreements, Connecticut’s statutory scheme is just one example of how some states may be able to do a better job of comprehensively regulating gestational carrier agreements. Ultimately, states looking to enact statutes for the first time, or to amend their current laws, should more closely follow California’s statutory approach in order to provide clearer and more complete guidelines for gestational carrier agreements.

All states should write or amend their gestational surrogacy statutes to include more complete definitions of relevant terms. It is necessary for the legislature to provide definitions for statutory terms so that questions do not arise as to a word’s meaning. The Supreme Court has noted the importance of providing definitions for terms given that “statutory definitions control the meaning of statutory words.”¹⁰⁹ If a statute provides a definition for a term, courts “must follow that definition, even if it varies from that term’s ordinary meaning.”¹¹⁰ Furthermore, “[a] definition which declares what a term “means” . . . excludes any meaning that is not stated.”¹¹¹ If the legislature fails to provide a definition for a term, it falls on the judiciary to interpret the meaning of those terms. In doing so, courts may turn to dictionaries, uses of the same term in other statutes, the legislative purpose in enacting the statute, and other forms of legislative history.¹¹² However, if the legislature does provide a definition and meaning of terms, courts must simply look to the statutory definition alone, and the

¹⁰⁷ June R. Carbone, *The Role of Contract Principles in Determining the Validity of Surrogacy Contracts*, 28 SANTA CLARA L. REV. 581, 610 (1988).

¹⁰⁸ CAL. SENATE JUDICIARY COMM., BILL ANALYSIS FOR CA A.B. 1217: SURROGACY AGREEMENTS 10 (2012), available at http://www.leginfo.ca.gov/pub/11-12/bill/asm/ab_1201-1250/ab_1217_cfa_20120702_135152_sen_comm.html.

¹⁰⁹ *Lawson v. Suwannee Fruit & S.S. Co.*, 336 U.S. 198, 201 (1949).

¹¹⁰ *Stenberg v. Carhart*, 530 U.S. 914, 942 (2000).

¹¹¹ *Colautti v. Franklin*, 439 U.S. 379, 392 n.10 (1979) (internal citations omitted).

¹¹² Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2085, 2104 (2002).

judiciary does not need to resort to guessing at the legislature's meaning.¹¹³

As previously mentioned, traditional and gestational surrogacy are different procedures that lead to different legal outcomes and varying policy implications.¹¹⁴ States should explicitly make clear this important distinction to provide courts and contracting parties with a greater understanding of what kinds of agreements will be permitted. Definitions provided in statutes can often be the deciding factor in a court's interpretation of a case, and statutory definitions have even given rise to political debates.¹¹⁵

States should also include specific statutory requirements for the legal representation of parties when creating written gestational carrier agreements. California's provision for each party to be represented by independent legal counsel in creating the agreement ensures that both parties will be on an equal playing field. Many critics of surrogacy argue that women who agree to carry another family's child are driven solely by monetary concerns and are forced by their economic situation to sell their reproductive abilities.¹¹⁶ Such situations lead to concerns of duress or coercion in contracting.¹¹⁷ Legal representation will help parties be fully informed of their obligations under the agreement and to understand the legal implications of the surrogacy contract. Requiring parties to be represented by legal counsel ensures that the parties will discuss all essential terms and obligations, which will result in an accurate contractual depiction of each party's wants and needs under the agreement.¹¹⁸ Furthermore, parties to gestational carrier agreements are often from different states, which necessitates that a trained legal professional research the laws of both states in order to draft agreements that comply with the

¹¹³ *Id.*

¹¹⁴ CROCKIN & JONES, *supra* note 19, at 213–14 (explaining that gestational surrogacy agreements are often treated more liberally than traditional surrogacy arrangements).

¹¹⁵ See Rosenkranz, *supra* note 112, at 2110 (noting that the Defense of Marriage Act provided a definition for the term “marriage” which only identified a union between a man and a woman as a marriage, giving rise to significant debate and controversy).

¹¹⁶ See Kerian, *supra* note 22, at 151–52 (discussing whether women are truly harmed by participating in surrogacy arrangements); Paula M. Barbaruolo, *The Public Policy Considerations of Surrogate Motherhood Contracts: An Analysis of Three Jurisdictions*, 3 ALB. L.J. SCI. & TECH. 39, 72–73 (1993); Denise E. Lascarides, Note, *A Plea for the Enforceability of Gestational Surrogacy Contracts*, 25 HOFSTRA L. REV. 1221, 1234 (1997).

¹¹⁷ See Daniel D. Barnhizer, *Inequality of Bargaining Power*, 76 U. COLO. L. REV. 139, 146 n.24 (citing *United States v. Bethlehem Steel Corp.*, 315 U.S. 289, 300 (1942), which characterizes duress as “feebleness on one side, overpowering strength on the other”).

¹¹⁸ Russell A. Hakes, *Focusing on the Realities of the Contracting Process—An Essential Step to Achieve Justice in Contract Enforcement*, 12 DEL. L. REV. 95, 103 (2011).

laws of all states that are involved.¹¹⁹ For all of these reasons, states should implement a statutory provision similar to California's, requiring parties to be represented by independent legal counsel before entering into gestational carrier agreements.

With regard to contract completion and how that relates to the overall timeline for gestational surrogacy, states should require that parties complete the written agreements before beginning any medical procedures. By requiring that parties complete their contract before beginning medical procedures, states can better ensure that parties will memorialize and agree upon their respective obligations and responsibilities *before* a child is conceived.¹²⁰ This will eliminate situations where parties engage in litigation to determine parental rights and legal responsibilities after the child is born. By creating valid agreements before the medical processes begin, the best interests of the child are served, as they will have valid, legal parents from the moment they are born.¹²¹

With regard to the financial aspects of gestational surrogacy, states should also include statutory regulations for how money is to be handled during the gestational carrier process. The cost to intended parents for one child born via gestational surrogacy is often around \$100,000.¹²² When using a surrogacy agency to facilitate the process, the cost can be even higher.¹²³ Surrogacy agencies usually require that any funds used for the surrogacy process go through their agency, which means intended parents are entrusting the agency with tens of thousands of dollars.¹²⁴ By regulating the financial aspects of surrogacy agreements and providing procedures regarding how funds should be handled through state law, state legislation can help protect intended parents against fraud.

States should also enact initial legislation or amend their current laws to include a provision that gestational carrier

¹¹⁹ Debra E. Guston & William S. Singer, *A Well-Planned Family: How LGBT People Don't Have Children by Accident*, N.J. LAW. MAG., June 2013, at 25, 28.

¹²⁰ See Hakes, *supra* note 118, at 101, 103.

¹²¹ Linda D. Elrod, *A Child's Perspective of Defining a Parent: The Case for Intended Parenthood*, 25 BYU J. PUB. L. 245, 267 (2011).

¹²² Susan Donaldson James, *Infertile Americans Go to India for Gestational Surrogates*, ABC NEWS (Nov. 7, 2013), <http://abcnews.go.com/Health/infertile-americans-india-gestational-surrogates/story?id=20808125>.

¹²³ When utilizing the services of a large surrogacy agency, the price can often be as much as \$120,000. See Mike Anderson, *Surrogacy Financing: How to Afford That \$60K Price Tag*, U.S. NEWS (Oct. 21, 2013, 2:45 PM), <http://money.usnews.com/money/blogs/my-money/2013/10/21/surrogacy-financing-how-to-afford-that-60k-price-tag>.

¹²⁴ See *What to Expect when Working with a Surrogacy Agency*, REPROD. POSSIBILITIES, http://www.reproductivepossibilities.com/parents_expect.cfm (last visited Jan. 10, 2015) (noting that this particular surrogacy agency requires the intended parents to put all funds into an escrow account).

agreements are presumptively valid. Without this presumption, both parties are harmed because the enforceability of the contract is in question.¹²⁵ A presumption of validity provides both parties with an understanding that the agreement will be carried through, and this certainty provides legitimacy to the process as a whole.¹²⁶ Furthermore, by providing that gestational carrier agreements are presumptively valid, doctors, hospitals, and clinics are protected from potential liability. If a gestational carrier agreement is completed, signed, and notarized, medical professionals know that they are legally permitted to act on the parties' wishes and that they will not be subject to liability for allowing the intended parents to make medical decisions pursuant to the agreement.¹²⁷

Additionally, clearer and more complete regulation of gestational carrier contracts will help keep costs down for intended parents because increased predictability will lead to less litigation and lower attorneys' fees.¹²⁸ This will help reduce the number of couples who cannot utilize gestational surrogates because of the prohibitively high cost of these arrangements.¹²⁹ Therefore, states should draft their gestational surrogacy laws in the interest of judicial efficiency because the overall impact these arrangements have on courts will be lower if state statutes provide greater predictability. Greater certainty with regard to these contracts will also allow more infertile couples to confidently utilize the services of gestational carriers.

IV. STRIKING THE PERFECT BALANCE: HOW MUCH SPECIFICITY IS TOO MUCH?

While this Comment supports the statutory approach taken by the California legislature, it should be noted that some states have very comprehensive and even more specific gestational surrogacy statutes that provide an even greater level of detail than California's. Illinois, for example, has statutes that provide for how a married surrogate's husband is to be included in the

¹²⁵ Posner, *supra* note 16, at 23.

¹²⁶ See Christine Metteer Lorillard, *Informed Choices and Uniform Decisions: Adopting the ABA's Self-Enforcing Administrative Model to Ensure Successful Surrogacy Arrangements*, 16 CARDOZO J.L. & GENDER 237, 255 (2010) (arguing that certainty in contracting is essential because "[a]n uncertain outcome makes the [gestational carrier] contract less valuable to both parties").

¹²⁷ Alyssa James, Note, *Gestational Surrogacy Agreements: Why Indiana Should Honor Them and What Physicians Should Know Until They Do*, 10 IND. HEALTH L. REV. 175, 208 (2013).

¹²⁸ Michelle Ford, Note, *Gestational Surrogacy Is Not Adultery: Fighting Against Religious Opposition to Procreate*, 10 BARRY L. REV. 81, 97 (2008).

¹²⁹ *Id.*

contract,¹³⁰ the right of the surrogate to use a physician of her choosing,¹³¹ and requirements for a woman to even become a surrogate in the first place.¹³² However, this statutory scheme is not without its deficiencies. Illinois's statute has effectively removed the judiciary from the surrogacy process entirely, making it possible for intended parents to establish their parentage without a court order.¹³³ This opens the door for legal issues when intended parents who travel to Illinois to utilize a surrogate return home to their own state, which may or may not have a favorable view of surrogacy. Authorities may question the intended parent's legal custody of their child and, if asked to produce documentation of their parentage, they will not have a court order identifying themselves as the child's legal guardians. As this area of the law develops, it will be important for legislatures and advocates alike to consider the practical implications of statutory schemes, whether they provide minimal or specific amounts of detail.

CONCLUSION

By adopting a statutory model similar to California's, states can better regulate and monitor gestational surrogacy arrangements. Although Connecticut has created a workable statutory framework to enforce gestational surrogacy agreements, more can be done to provide a greater level of certainty and predictability for those who are parties to these contracts. Surrogacy agreements are here to stay, and states should not take a minimalist approach to the regulation of these complex contracts. In working towards creating statutory provisions with predictable practical implications, legislatures

¹³⁰ See 750 ILL. COMP. STAT. 47/25(c)(2) (2014) ("A gestational surrogacy contract shall provide for[,] . . . if the gestational surrogate is married, the express agreement of her husband to: (i) undertake the obligations imposed on the gestational surrogate pursuant to the terms of the gestational surrogacy contract; [and] (ii) surrender custody of the child to the intended parent or parents immediately upon the birth of the child.").

¹³¹ See 750 ILL. COMP. STAT. 47/25(c)(3) ("A gestational surrogacy contract shall provide for . . . the right of the gestational surrogate to utilize the services of a physician of her choosing, after consultation with the intended parents, to provide her care during the pregnancy.").

¹³² See 750 ILL. COMP. STAT. 47/20. To be eligible to be a gestational carrier under this statute, a woman must be at least twenty-one years old, have given birth to at least one child, completed a medical and mental health evaluation, undergone legal consultation regarding the terms and potential consequences of the contract, and obtained a health insurance policy that will cover major medical expenses throughout the intended pregnancy and for eight weeks after the birth of the child. 750 ILL. COMP. STAT. 47/20(a).

¹³³ See 750 ILL. COMP. STAT. 47/35. Under this statutory scheme, "a parent-child relationship shall be established prior to the birth of a child born through gestational surrogacy if . . . the attorneys representing both the gestational surrogate and the intended parent or parents certify that the parties entered into a gestational surrogacy contract intended to satisfy the requirements" of the Act. 750 ILL. COMP. STAT. 47/35(a).

will be one step closer towards creating a more uniform state-statutory approach in regulating surrogacy. By including more specific and comprehensive regulations of the contents of gestational carrier contracts and the surrogacy process itself, states can better provide intended parents with certainty and assurance that they will be recognized as the legal parents of their children born through a gestational surrogate.

“The More Muslim You Are, the More Trouble You Can Be”:¹ How Government Surveillance of Muslim Americans² Violates First Amendment Rights

Madiha Shahabuddin*

INTRODUCTION

When Imam Hamid Hassan Raza, leader of Brooklyn’s Masjid Al-Ansar, meets newcomers at his mosque, he treads carefully.³ After learning of the New York Police Department (NYPD)’s targeted surveillance of Muslim “hotspots”⁴ such as

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¹ Taken from a quote by a nineteen-year-old female Muslim student at Brooklyn College, New York, on how the NYPD’s surveillance of the Muslim community treats their religious expression and behavior. Her full quote reads: “It’s as if the law says: the more Muslim you are, the more trouble you can be, so decrease your Islam.” MUSLIM AMERICAN CIVIL LIBERTIES COALITION (MACLIC) ET AL., MAPPING MUSLIMS: NYPD SPYING AND ITS IMPACT ON AMERICAN MUSLIMS 12 (2012) [hereinafter MAPPING MUSLIMS], available at <http://www.law.cuny.edu/academics/clinics/immigration/clear/Mapping-Muslims.pdf>.

² The term “Muslim Americans” will be used throughout this Comment to describe citizens and residents of the United States who are Muslim, i.e., ascribe to the faith of Islam. For an interesting discussion on the “hyphenated identities” of second generation Muslims in the United States, see generally Selcuk R. Sirin & Michelle Fine, *Hyphenated Selves: Muslim American Youth Negotiating Identities on the Fault Lines of Global Conflict*, 11 APPLIED DEV. SCI. 151 (2007); YVONNE YAZBECK HADDAD, NOT QUITE AMERICAN?: THE SHAPING OF ARAB AND MUSLIM IDENTITY IN THE UNITED STATES (2004). As a reflection of such hybrid identities, according to a 2011 Gallup Report, “Muslim Americans [i]dentify [w]ith the United States and [t]heir [f]aith [e]qually.” ABU DHABI GALLUP CTR., MUSLIM AMERICANS: FAITH, FREEDOM, AND THE FUTURE 50 (2011) [hereinafter GALLUP REPORT], available at http://turcopolier.typepad.com/files/mar_rep_ort_adgc_bilingual_072011_sa_lr_web.pdf.

³ Complaint at 14, *Raza v. City of New York*, 998 F. Supp. 2d 70 (E.D.N.Y. 2013) (No. 13–CV–3448), 2013 WL 6177392 at *1, available at https://www.aclu.org/sites/default/files/assets/nypd_surveillance_complaint_-_final_06182013_1.pdf.

⁴ See Petra Bartosiewicz, *NYPD Surveillance of Muslims Has Created a Climate of Fear*, NATION (Mar. 18, 2013), <http://www.thenation.com/article/173400/nypd-surveillance-muslims-has-created-climate-fear> (“The NYPD’s counterterrorism strategy, which was developed in part by former and current CIA officials, has focused on ‘intelligence collection’ intended to thwart potential terrorist plots through the heavy scrutiny of

Muslim businesses and mosques for counterterror intelligence gathering, he “is hesitant to approach newcomers until they are better known in the Masjid Al-Ansar community.”⁵ Due to multiple “chance” encounters with plainclothes police officers,⁶ threats of his sermons being taken out of context and used against him,⁷ and his fears of what being targeted by the NYPD would mean for his wife and child,⁸ Raza has “considered leaving the pulpit.”⁹

Ironically, Masjid Al-Ansar is named after the Arabic word *ansar*, which means “the helpers” and in the Islamic tradition refers to the support and sense of community fostered during the time when the Prophet Muhammad and his followers had newly arrived to the city of Madina.¹⁰ After the Associated Press broke the news about the NYPD’s “Muslim Surveillance Program” in August 2011,¹¹ mosque

[c]ongregants grew even more suspicious of newcomers [for fear they were informants], and a constant sense of suspicion now exists among the mosque’s congregants. There [was] . . . a steep decline in mosque attendance, as the number of worshippers attending afternoon prayers on weekdays . . . declined from approximately twenty people to just two or three people.¹²

A once “vibrant and lively mosque community” dwindled into a fearful group of isolated individuals apprehensive about the consequences of their mosque attendance and regular interaction with others in their community, disallowing the opportunity for Masjid Al-Ansar to live up to its name.¹³ Raza in particular found that his wariness of new mosque attendees prevented him from

so-called Muslim ‘hot spots’ such as mosques.”); *see also* MAPPING MUSLIMS, *supra* note 1, at 12 (noting that the NYPD “mapped, photographed or infiltrated at least 250 mosques in the New York City [area] . . . and deemed these places of worship ‘hot spots,’ with any activity in or around the mosques meriting surveillance”).

⁵ Complaint, *supra* note 3, at 14.

⁶ *Id.* at 10–11.

⁷ *Id.*

⁸ *Id.* at 14.

⁹ *Id.*

¹⁰ *Ansar - Definition*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/ansar> (last visited Mar. 6, 2014).

¹¹ *See generally* Matt Apuzzo & Adam Goldman, *With CIA Help, NYPD Moves Covertly in Muslim Areas*, ASSOCIATED PRESS, Aug. 23, 2011, available at <http://www.ap.org/Content/AP-In-The-News/2011/With-CIA-help-NYPD-moves-covertly-in-Muslim-areas>; *Highlights of AP’s Pulitzer Prize-Winning Probe into NYPD Intelligence Operations*, ASSOCIATED PRESS, <http://www.ap.org/media-center/nypd/investigation> (last visited Oct. 13, 2013) [hereinafter *AP NYPD Probe*].

¹² Complaint, *supra* note 3, at 15.

¹³ *Id.* at 16.

“effectively [fulfilling] his role as a religious and spiritual counselor and teacher.”¹⁴

On June 18, 2013, the American Civil Liberties Union (ACLU), Creating Law Enforcement Accountability and Responsibility (CLEAR) Project, and New York Civil Liberties Union (NYCLU) filed a lawsuit on behalf of Raza (the named plaintiff) and other Muslim individuals who were targeted by NYPD surveillance, alleging that they suffered injuries caused by such conduct.¹⁵ The lawsuit was filed against the City of New York, Mayor Bloomberg, Police Commissioner Raymond W. Kelly, and other city officials. The complaint alleged “suspicionless surveillance” of “mapped” Muslim individuals and organizations and the deployment of informants “without any suspicion of wrongdoing.”¹⁶ *Raza v. City of New York* represents one of the more recent and publicized legal challenges to the government’s surveillance of Muslim Americans without any other indication of suspicion or wrongdoing *except* being Muslim, or perhaps, as this Comment will discuss, being “too Muslim.”¹⁷

On April 15, 2014, after months of public outcry—and undoubtedly bad press¹⁸—the NYPD announced it would disband the controversial and constitutionally suspect “Zone Assessment

¹⁴ *Id.* at 14.

¹⁵ *Id.* at 2; Raza v. City of New York - Legal Challenge to NYPD Muslim Surveillance Program, AM. CIV. LIBERTIES UNION, <https://www.aclu.org/national-security/raza-v-city-new-york-legal-challenge-nypd-muslim-surveillance-program> (last visited Oct. 13, 2013).

¹⁶ Complaint, *supra* note 3, at 1.

¹⁷ *Hassan v. City of New York*, filed in federal district court in New Jersey, similarly alleged NYPD spying on Muslim individuals and institutions, including an all-girls Muslim school. Federal District Judge William Martini dismissed the suit on February 20, 2014. It was “[t]he first legal challenge to the New York police department’s blanket surveillance of Muslims in the wake of the 9/11 terrorist attacks.” Ed Pilkington, *Federal Judge Tosses Out Legal Challenge over NYPD Surveillance of Muslims*, GUARDIAN (Feb. 21, 2014), <http://www.theguardian.com/world/2014/feb/21/nypd-muslim-surveillance-legal-challenge-judge>. The *Hassan* plaintiffs alleged similar violations of the First Amendment caused by law enforcement surveillance and its resulting effect on religious expression, such as: lowered mosque attendance, avoidance of public prayer, and discontinuance of religious or political discussions. *Hassan v. City of New York*, No. 2:12–3401 (WJM), 2014 WL 654604, at *2–3 (D. N.J. Feb. 20, 2014). The plaintiffs filed a Notice of Appeal on March 21, 2014. *Hassan v. City of New York*, CENTER FOR CONST. RTS., <http://www.ccrjustice.org/Hassan> (last visited Apr. 27, 2014).

¹⁸ See, e.g., Laila Alawa, *America Is the Land of the Free — Unless You’re Muslim*, POLICYMIC (Feb. 25, 2014), <http://www.policymic.com/articles/83443/america-is-the-land-of-the-free-unless-you-re-muslim> (disapproving of *Hassan* case dismissal); Faiza Patel, *Blanket Spying on Muslims ‘Makes Us Less Safe’*, BRENNAN CENTER FOR JUST. (Mar. 25, 2014), <https://www.brennancenter.org/analysis/blanket-spying-muslims-%E2%80%98mak-es-us-less-safe%E2%80%99> (pointedly critiquing New York City officials’ conduct in connection with NYPD spying); Carla Murphy, *NYPD (Finally) Gets Independent Oversight*, COLORLINES (Mar. 28, 2014, 5:55 PM), http://colorlines.com/archives/2014/03/nypd_finally_gets_independent_oversight.html (applauding the announcement of a first-ever inspector general with subpoena power and oversight authority over the NYPD in the wake of stop-and-frisk and Muslim spying programs).

Unit” (formerly called “Demographics Unit”) within their department used to map Muslim communities in the region.¹⁹ This action by the NYPD could be heralded as the right step towards ending the stigmatization of religious expression by Muslim Americans and tells us that it is possible to refrain from alienating and burdening an entire religious community in the name of counterterrorism. Despite this move, however, some question whether it will mean any real difference.²⁰

This Comment will argue that the government’s targeted, suspicionless surveillance of Muslim Americans in the name of counterterror efforts has effectively restricted the Muslim community’s First Amendment freedoms of association, religion, and speech. Part I will discuss a brief background of surveillance, leading up to a report on the current effects of surveillance programs on Muslim Americans today. The discussion in Part II will turn to the case law and legal standards for First Amendment claims in the context of Muslim surveillance, advocating for and applying the strict scrutiny test to establish that the government’s conduct has in fact infringed on Muslim Americans’ rights to free association, religion, and speech. Part III will then conclude by offering solutions to counterterror efforts which do not criminalize mere adherence to a particular faith, including a cease of widespread government surveillance (i.e., not treating Muslims as a suspect class) and offering gang intervention models as a possible alternative to the current practice of government counterterrorism programs.

I. THE SLIPPERY SLOPE OF SURVEILLANCE

A. What Is Surveillance?

Professor Christopher Slobogin defines surveillance as “government efforts to gather information about people from a distance, usually covertly and without entry into private spaces.”²¹ Surveillance as a general phenomenon is then broken

¹⁹ Editorial, *Spying at the N.Y.P.D.*, N.Y. TIMES, (Apr. 16, 2014), <http://www.nytimes.com/2014/04/17/opinion/spying-at-the-nypd.html>.

²⁰ See Anna Lekas Miller, *The NYPD Has Disbanded Its Most Notorious Spy Unit, but Is the Age of Muslim Surveillance Really Over?*, NATION (Apr. 23, 2014), <http://www.thenation.com/article/179504/nypd-has-disbanded-its-most-notorious-spy-unit-age-muslim-surveillance-really-over>. One community leader noted that although the Zone Assessment Unit “doesn’t exist anymore, there is all this information that they have compiled . . . [and w]e have questions about whether . . . the forms of profiling that the unit was engaged in will transform or change into newer forms of profiling under the auspices of other units.” *Id.*

²¹ CHRISTOPHER SLOBOGIN, *PRIVACY AT RISK: THE NEW GOVERNMENT SURVEILLANCE AND THE FOURTH AMENDMENT* 3 (2007); see also NORMAN ABRAMS, *ANTI-TERRORISM AND CRIMINAL ENFORCEMENT* 443 (2003) (explaining that “political surveillance . . . is aimed

down into three categories: 1) communications surveillance, which is “the real-time interception of communications”; 2) physical surveillance, which is “the real-time observation of physical activities”; and 3) transaction surveillance, which is the “accessing [of] *recorded* information about communications, activities, and other transactions.”²² According to Slobogin, since 9/11, “the United States government has been obsessed, as perhaps it should be, with ferreting out national security threats,” but “more than occasionally it has also visited significant intrusion on large numbers of law-abiding citizens—sometimes inadvertently, sometimes not.”²³ Within the context of national security, intelligence gathering²⁴ of pattern occurrences in neighborhoods and communities is intended to “analyze broad or meaningful trends” as a means of assessing the validity and likelihood of a national security threat.²⁵

Such intelligence gathering, however, armed with a prejudicial purpose can result in “selective surveillance” that imposes burdens on Muslim Americans’ First Amendment rights, further alienating this particular community from the government.²⁶ The surveillance of Muslim Americans operates along a similar, yet covert, vein of the “Broken Windows”²⁷ theory of policing. Developed by James Q. Wilson and George L. Kelling, this theory posits that when a community riddled with violence and crime becomes less tolerant of the minor causes of social disorder, a decrease in violent crime will result.²⁸ Implementation of the Broken Windows theory has resulted in aggressive “zero tolerance policing” in New York City, with its stated goal being to increase misdemeanor arrests on the streets

at uncovering criminal behavior” and occurs “in contexts where there is no specific evidence of criminal behavior that triggered the investigatory activity”).

²² SLOBOGIN, *supra* note 21, at 3.

²³ *Id.* at 3–4.

²⁴ Like David Smith’s work, this Comment will treat surveillance and intelligence gathering as synonymous. See generally David Smith, *Presumed Suspect: Post-9/11 Intelligence Gathering, Race, and the First Amendment*, 11 *UCLA J. ISLAMIC & NEAR E.L.* 85, 131 (2012).

²⁵ *Id.*

²⁶ *Id.* at 133; TREVOR AARONSON, *THE TERROR FACTORY: INSIDE THE FBI’S MANUFACTURED WAR ON TERRORISM* 49–50 (2013); see also ABRAMS, *supra* note 21 (noting the “concern about the chilling effect of government’s intrusion into the arena of political and religious discourse and possible trenching on First Amendment freedoms”).

²⁷ This theory is named after an analogy George L. Kelling and James Q. Wilson espoused in a 1982 article they published in *The Atlantic*: “[I]f a window in a building is broken and is left unrepaired, all the rest of the windows will soon be broken. . . . One unrepaired broken window is a signal that no one cares, and so breaking more windows costs nothing.” GEORGE L. KELLING & CATHERINE M. COLES, *FIXING BROKEN WINDOWS: RESTORING ORDER AND REDUCING CRIME IN OUR COMMUNITIES* 19 (1996).

²⁸ *THE ENCYCLOPEDIA OF POLICE SCIENCE* 112 (Jack R. Greene ed., 3d ed. 2007).

in an effort to reduce other, more violent crime.²⁹ While there has been much social science research conducted to test the Broken Windows theory, “there is no reliable empirical support for the proposition that disorder causes crime or that broken-windows policing reduces serious crime.”³⁰

Taken from a broader lens, this theory, which supports the policing and monitoring of one another within a community, creates a problematic phenomenon when placed within the context of Muslim American surveillance. Implementation of forms of the Broken Windows theory into Muslim intelligence gathering has resulted in the widespread distrust and fear of the Muslim community vis-à-vis not only law enforcement, but also vis-à-vis *itself*.³¹ It is an unfortunate and inherently unjust consequence of the billions of dollars the government has invested to survey, track, infiltrate, and even prosecute Muslim Americans.³² Indeed, as civil rights attorney Fatima Dadabhoy poses it, it seems the question now remains: “Does this mean that Muslims are merely subjected to a second tier system of free speech that relates to their faith?”³³

B. A Brief History of Surveillance

While government surveillance of certain individuals and communities is nothing new, its objectionable nature persists. In the 1920s, under the direction of J. Edgar Hoover, the Department of Justice’s General Intelligence Division maintained a list of 450,000 names of individuals who were considered “Bolshevik” or “Soviet-inspired.”³⁴ In addition to wiretapping and trespassing, among the individuals the Justice Department identified for their list were Hellen Keller and future Supreme Court justices Felix Frankfurter and Arthur Goldberg.³⁵

²⁹ *Id.*

³⁰ *Id.*

³¹ See *infra* notes 136–143 and accompanying text.

³² AARONSON, *supra* note 26, at 16–17, 44–45, 49–50, 234; see also STEPHEN DOWNS & KATHY MANLEY, PROJECT SALAM & NAT’L COAL. TO PROTECT CIVIL FREEDOMS, *INVENTING TERRORISTS: THE LAWFARE OF PREEMPTIVE PROSECUTION* 33 (2014), available at <http://www.projectsalam.org/Inventing-Terrorists-study.pdf> (“It may be that in order to bypass constitutional prohibitions against mass surveillance, the government has preemptively prosecuted hundreds of (mostly) Muslims in the last decade in order to create the illusion of a terrorist threat to the U.S.—which would justify the secret mass surveillance spy network.”).

³³ Interview with Fatima Dadabhoy, Civil Rights Manager, Council on Am. Islamic Relations, in Anaheim, Cal. (Jan. 31, 2014).

³⁴ Nancy Murray & Sarah Wunsch, *Civil Liberties in Times of Crisis: Lessons from History*, 87 MASS. L. REV. 72, 78 (2002).

³⁵ *Id.* at 78–79.

During World War II, the Japanese community in California was mapped much like the mapping of Muslim communities in the United States today, the justification then being that it would protect America from another attack after Pearl Harbor.³⁶ Local law enforcement have recently implemented mapping and surveillance programs of Muslims, as evinced by the 2007 Los Angeles Police Department (LAPD) plan to map local Muslims and the more recent NYPD surveillance of East Coast/New York area Muslims, which “[e]erily . . . bears [a] striking resemblance to the mistreatment experienced by Japanese Americans in the wake of Pearl Harbor.”³⁷

In 1956, the Federal Bureau of Investigations (FBI) began its Counter Intelligence Program (COINTELPRO), which spied on individuals and groups identified as “subversive” to “neutralize . . . radical or immoral activity.”³⁸ Dr. Martin Luther King, Jr., the NAACP, civil rights groups, the ACLU, and even the Boy Scouts of America were targets of government spying in this era, for fear that these organizations or individuals were infiltrated, or influenced, by Communism.³⁹ A few decades later, during the 1960s and 1970s, the government cast its net of surveillance wider, to include anti-Vietnam War advocates, the Black Panthers, the “New Left,” and women’s rights groups.⁴⁰ It was around this time that local law enforcement set up their own programs to conduct surveillance on a local level, such as the “New York Red Squad,” which “was reported to have files on over one million people.”⁴¹ After the 1972 attacks at the Munich Olympic Games and “[a]s early as 1986, the government was considering plans to use two military bases to detain Arab- and Iranian-Americans in the same vein as the Japanese internment of World War II.”⁴²

³⁶ Rabea Chaudhry, *Effective Advocacy in a Time of Terror: Redefining the Legal Representation of a Suspected Terrorist Facing Secret Evidence*, 8 UCLA J. ISLAMIC & NEAR E.L. 101, 106 (2009).

³⁷ *Id.* at 106–07 (“Just as Asian Americans have been “raced” as foreign, and from there as presumptively disloyal, Arab American[s] and Muslims have been “raced” as “terrorists”: foreign, disloyal, and imminently threatening.”) (quoting Natsu Taylor Saito, *Symbolism Under Siege: Japanese American Redress and the “Racing” of Arab Americans as “Terrorists”*, 8 ASIAN AM. L.J. 1, 12 (2001)); see also Complaint, *supra* note 3, at 1–3.

³⁸ Murray & Wunsch, *supra* note 34, at 81 (internal quotations omitted); see also Elizabeth Rindskopf Parker, *Civil Liberties in the Struggle Against Terror*, in LEGAL ISSUES IN THE STRUGGLE AGAINST TERROR 141, 163 n.46 (John Norton Moore & Robert F. Turner eds., 2010) (describing COINTELPRO tactics as “generally illegal and focused on repressing political dissent”).

³⁹ Murray & Wunsch, *supra* note 34, at 81; Smith, *supra* note 24, at 140–41.

⁴⁰ Murray & Wunsch, *supra* note 34, at 81; Eric Lane, *On Madison, Muslims, and the New York City Police Department*, 40 HOFSTRA L. REV. 689, 695–96 (2012).

⁴¹ Murray & Wunsch, *supra* note 34, at 81.

⁴² Wadie E. Said, *The Terrorist Informant*, 85 WASH. L. REV. 687, 705 (2010).

Most recently, the post-9/11 era has been characterized by government surveillance of Muslim American communities in the name of counterterrorism efforts.⁴³ The government's conduct in this surveillance program was highlighted in news stories that broke around August 2011 about the NYPD conducting mass surveillance of Muslim communities in New York.⁴⁴ The Associated Press ran a series of investigative reports on this topic, noting that the NYPD effectively "monitored every aspect of Muslim life and built databases on where innocent Muslims eat, shop, work and pray."⁴⁵ And in July 2014, it was revealed that the U.S. National Security Agency (NSA) had—at the minimum—spied on five "politically active" Muslim American leaders, including a past Bush administration official, a successful attorney, a Rutgers professor, a former California State University professor, and an executive director of the Council on American-Islamic Relations (CAIR).⁴⁶

At the root of these investigations is the tool of profiling, which allows the NYPD, FBI, or other governmental entity to target certain groups of individuals solely based upon their religious affiliation and pursue an almost carte blanche "fishing expedition" for evidence condemning the targeted Muslim of some link to terrorist activity.⁴⁷ Justification for this treatment of Muslim American communities has come from the idea that the post-9/11 era calls for "urgent" action to thwart mass destruction that can come from a potential terror attack, and therefore—as the argument goes—constitutional infringements like this are a "small price to pay for [America's] safety."⁴⁸

C. Surveillance of Muslim Americans

At the core of this issue is what Sahar F. Aziz has called "selective counterterrorism enforcement."⁴⁹ This manifests itself

⁴³ See generally MAPPING MUSLIMS, *supra* note 1; Bartosiewicz, *supra* note 4.

⁴⁴ See generally AP NYPD Probe, *supra* note 11.

⁴⁵ Lane, *supra* note 40, at 699 (citing Matt Apuzzo, *NYPD-CIA Alliance's Authority Questioned*, ASSOCIATED PRESS, Jan. 21, 2012, available at http://usatoday30.usatoday.com/USCP/PNI/NEWS/2012-01-21-BCUSNYPD-Intelligence3rd-LdWritethru_ST_U.htm).

⁴⁶ Elias Isquith, *New Greenwald Bombshell: NSA Spied on 5 Politically Active Muslim-Americans*, SALON (July 9, 2014, 7:11 AM), http://www.salon.com/2014/07/09/new_greenwald_bombshell_nsa_targeted_5_politically_active_muslim_americans/.

⁴⁷ See generally Lane, *supra* note 40, at 702–07 (noting that if the NYPD cannot find their Muslim terror suspect, "they will watch as many [Muslims] as possible in hopes of catching a glimpse of one who appears to be traveling along the route they judge to be leading to committing or aiding in terrorism").

⁴⁸ Andrew E. Taslitz, *Racial Profiling, Terrorism, and Time*, 109 PENN. ST. L. REV. 1181, 1199 (2005).

⁴⁹ Sahar F. Aziz, *Policing Terrorists in the Community*, 5 HARV. NAT'L SECURITY J. 147, 183–84 (2014).

in: the disproportionate targeting of Muslims for surveillance;⁵⁰ government-sent informants tasked with infiltration and what many have argued should be legally considered entrapment of individuals;⁵¹ and mapping and spying on predominantly Muslim neighborhoods, Muslim-owned businesses, mosques, and Muslim Student Associations.⁵² Outside the scope of this Comment, but still critically troubling, are the deportations of religious leaders and imams for sermons “deemed too critical of the American government,”⁵³ the criminalization and prosecution of *charitable* and *humanitarian aid* organizations under sweeping material support statutes,⁵⁴ and private acts of prejudice against Muslims in the form of mosque vandalism and employment discrimination.⁵⁵

As author and investigative journalist Trevor Aaronson argues, in the context of surveillance of Muslims, the government has used intelligence gathering as a means of “manufacturing” counterterrorism prosecutions that result in “what a federal judge has called a ‘fantasy terror operation’” created and incited by a government informant.⁵⁶ Such intelligence gathering assists the government “in furtherance of an adversarial system that prioritizes bolstering the number of terrorism investigations, prosecutions, and convictions of Muslims in America.”⁵⁷

50 See Kirstie Ball & Frank Webster, *The Intensification of Surveillance, in THE INTENSIFICATION OF SURVEILLANCE: CRIME, TERRORISM AND WARFARE IN THE INFORMATION AGE 1*, 20 (Kirstie Ball & Frank Webster eds., 2003) (“Responses to September 11 have increased possibilities for ‘racial’ profiling along ‘Arab’ lines in particular, the consequences of which are already seen in the American detention of several thousand ‘suspects’ and a FBI trawl of more than 200 campuses to collect information about ‘Middle Eastern’ students.”).

51 Aziz, *supra* note 49; see also AARONSON, *supra* note 26, at 146, 195.

52 *AP NYPD Probe*, *supra* note 11; Complaint, *supra* note 3, at 5–9.

53 Aziz, *supra* note 49, at 184.

54 *Id.* at 184–85; 18 U.S.C. § 2339A (2012). “The government employs an extremely broad criminal substantive standard—material support—which encompasses any activity in association with a group classified as a terrorist organization. Giving [an] organization money is the most obvious example of material support, but even the volunteering of one’s time also constitutes material support.” Symposium, *Left Out in the Cold? The Chilling of Speech, Association, and the Press in Post-9/11 America*, 57 AM. U. L. REV. 1203, 1213–14 (2008).

55 Aziz, *supra* note 49, at 186; see, e.g., Press Release, U.S. Equal Emp’t Opportunity Comm’n, *Abercrombie & Fitch Liable for Religious Discrimination in EEOC Suit*, Court Says (Sept. 9, 2013), available at <http://eeoc.gov/eeoc/newsroom/release/9-9-13.cfm> (noting employer unlawfully discriminated against female Muslim employee wearing a headscarf). The “secret evidence” problem similarly strips Muslim defendants of their rights. David Cole, professor of law at Georgetown University Law Center, has stated that in the context of terror prosecutions, “[t]he government has . . . informed us that it is relying on classified evidence that it cannot tell us about. So we must defend the group without knowing the accusations against it, and without seeing most of the evidence in the file.” Symposium, *supra* note 54, at 1216. See generally Chaudhry, *supra* note 36.

56 AARONSON, *supra* note 26, at 234–35.

57 Aziz, *supra* note 49, at 182.

Additionally, Aziz refutes the presumption about domestic or “homegrown” terrorism in the United States being the result of radicalization of all Muslim Americans within their own communities.⁵⁸ One category of these “homegrown terrorism” cases involve most often “young, vulnerable men with mental health or financial problems upon whom paid informants prey. Often, these informants also play leading roles in concocting and implementing the fake terrorist plot.”⁵⁹

Ironically, for all the emphasis placed on rooting out the “homegrown” terrorists in Muslim communities, Aziz argues that “[i]ndeed, Muslim communities know much less than law enforcement about these cases because, unlike community members, law enforcement has information drawn from extensive surveillance networks and intelligence databases at the local, state, and federal level.”⁶⁰ As a result of this “[p]ervasive government scrutiny of Muslim communities,” Muslims feel “pressured to downplay their religious identity” and “fear becoming too active in . . . religious activities” because they worry that these are “indicative” to the government of “terrorist inclinations.”⁶¹

In a report prepared by the Muslim American Civil Liberties Coalition (MACLC), the Creating Law Enforcement Accountability & Responsibility (CLEAR) project, and the Asian American Legal Defense and Education Fund (AALDEF), East Coast Muslims were interviewed to assess their experiences with being a part of a community targeted by NYPD surveillance. Most interviewees acknowledged that the public appearance of a Muslim identity would “invite[] unwanted attention or surveillance from law enforcement.”⁶² Traditional or Islamic garb, a beard, a *hijab* (headscarf), or a *niqaab* (face covering) were such displays of a Muslim identity which, to the NYPD, would “serve as indicators of ‘dangerousness.’”⁶³ Some Muslims

⁵⁸ See *id.* at 215.

⁵⁹ *Id.* at 214–15. See generally Said, *supra* note 42. See also Jon Sherman, “A Person Otherwise Innocent”: Policing Entrapment in Preventative, Undercover Counterterrorism Investigations, 11 U. PA. J. CONST. L. 1475, 1478 (2009); Interview with Fatima Dadabhoy, *supra* note 33; see AARONSON, *supra* note 26, at 146, 195; HUMAN RIGHTS WATCH, COLUMBIA LAW SCH. HUMAN RIGHTS INST., ILLUSION OF JUSTICE: HUMAN RIGHTS ABUSES IN US TERRORISM PROSECUTIONS 22 (2014), available at http://www.hrw.org/sites/default/files/reports/usterrorism0714_ForUpload_0_0_0.pdf (noting that in the sting operation cases studied, the government “often chose targets who were particularly vulnerable—whether because of mental disability, or because they were indigent and needed money that the government offered them”).

⁶⁰ Aziz, *supra* note 49, at 215.

⁶¹ *Id.* at 180–81; Interview with Fatima Dadabhoy, *supra* note 33.

⁶² MAPPING MUSLIMS, *supra* note 1, at 15.

⁶³ *Id.*

have stopped religious expression through praying in public, wearing headscarves, growing beards (an Islamic tradition), or donning Islamic or “Muslim looking” garb.⁶⁴ As one interviewee, an interfaith community organizer, put it, “[a] *hijab* or beard isn’t just about being different and not fitting in . . . it’s also that people will see me as [someone who is] prone to violence.”⁶⁵

One Muslim student attending Brooklyn College said his parents forbid him from attending Muslim Student Association events on campus and wearing the Islamic skullcap in public, out of fear of being openly identified as a Muslim based on appearances.⁶⁶ In addition, “[l]aw enforcement scrutiny of outward manifestations of ‘Muslim’ characteristics” prompted some Muslims to alter their appearances and *the practice of their faith*.⁶⁷ A City University of New York (CUNY) student found that this scrutiny of outward Muslim appearances made some people “water down” the practice of their religion, an unfortunate and unwarranted consequence of the government surveillance.⁶⁸ One professor at Baruch College stated that in a class discussion, her Muslim students told her that participating in a Muslim Student Association could lead to law enforcement scrutiny and being labeled an extremist.⁶⁹

These actions by the government and the resulting response of fear by the Muslim community raise serious First Amendment concerns, including the chilling of free association, which is considered an expressive right. Implementing a form of guilt by association, government surveillance and law enforcement create a presumption that “Muslims . . . know more about each other than other communities with members that have engaged in domestic terrorism.”⁷⁰

64 Aziz, *supra* note 49, at 181.

65 MAPPING MUSLIMS, *supra* note 1, at 15.

66 *Id.*

67 *Id.* at 17.

68 *Id.* One interviewee in the report said she hid her religious identity at her place of employment, and another interviewee “wondered whether she should ‘water down’ her ‘Muslimness’ on her resume.” *Id.* at 30–31. The stigma Muslims carry for merely *being Muslim* are stifling and stunting their opportunities for growth in society and the workplace, forcing them to choose between their ability to freely express their religion or practice a form of socially palatable Islam (if, even that, is palatable to begin with).

69 *Id.* at 31.

70 Aziz, *supra* note 49, at 182.

For example, law enforcement has yet to invest in community policing programs focused on Christian evangelical communities that support bombing abortion clinics or attacking doctors who administer abortions, far-right Christian communities that stockpile weapons because they wish to overthrow the government or believe the end of the world is near, or predominantly Anglo

II. FIRST AMENDMENT RIGHTS INFRINGED

A. Freedom of Association

Freedom of association is a fundamental right expressly recognized by the Supreme Court under the First Amendment.⁷¹ Associational freedoms have been recognized in two forms: expressive and intimate.⁷² The United States Supreme Court in *Griswold v. Connecticut*⁷³ held that while freedom of association “is not mentioned in the Constitution nor in the Bill of Rights,” it is a peripheral First Amendment right.⁷⁴ Moreover, the Court declared “the First Amendment has a penumbra where privacy is protected from government[] intrusion.”⁷⁵ And emphasizing its sanctity in relation to free expression, Justice Douglas noted that

[t]he right of “association,” like the right of belief . . . is more than the right to attend a meeting; it includes the right to express one’s attitudes or philosophies by *membership in a group or by affiliation with it or by other lawful means*. Association in that context is a form of expression of opinion; and while it is not expressly included in the First Amendment its existence is necessary in making the express guarantees fully meaningful.⁷⁶

The right to associate is thus a penumbral right of the First Amendment, an “emanation[] from those guarantees [of the Bill of Rights] that help give them life and substance.”⁷⁷ The government may, however, punish an individual with membership in a particular association, but only if it can make a showing that the individual “actively affiliated with a group, knowing of its illegal objectives, and with the specific intent to further those objectives.”⁷⁸

patriot groups that engage in violence against undocumented immigrants based on their opposition to immigration reform.

Id.

⁷¹ ERWIN CHERMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 1198 (4th ed. 2011).

⁷² David A. Anderson, *Jail, Jail, the Gang’s All Here: Senate Crime Bill Section 521, The Criminal Street Gang Provision*, 36 B.C. L. REV. 527, 529 (1995); *Roberts v. U.S. Jaycees*, 468 U.S. 609, 617–18 (1984).

⁷³ *Griswold v. Connecticut*, 381 U.S. 479 (1965).

⁷⁴ *Id.* at 482.

⁷⁵ *Id.* at 483.

⁷⁶ *Id.* (emphasis added); see also SUSAN N. HERMAN, TAKING LIBERTIES: THE WAR ON TERROR AND THE EROSION OF AMERICAN DEMOCRACY 212 (2011) (“Civic associations have proven indispensable in enabling individuals to stand up to the government in the past decade, as they have at other points in our history.”).

⁷⁷ *Griswold*, 381 U.S. at 484.

⁷⁸ CHERMERINSKY, *supra* note 71, at 1199.

1. *NAACP v. Alabama ex rel. Patterson*

In *NAACP v. Alabama ex rel. Patterson*,⁷⁹ the Court proclaimed that the of right of freedom of association warranted strict scrutiny protection in the face of state coercion requiring the NAACP's Alabama regional office to produce membership lists of their "rank-and-file" to the Alabama Attorney General.⁸⁰ In *Patterson*, the state Attorney General sought to enjoin and oust the NAACP from operating in Alabama because it was allegedly violating an Alabama statute that required foreign (i.e., out of state) corporations to file a corporate charter with the Secretary of State and designate a place of business for service of process.⁸¹ When the NAACP refused to comply because it believed it fell under an exemption in the state statute, the Attorney General obtained a court order against the NAACP, forcing it to produce "a large number of the Association's records and papers, including bank statements, leases, deeds, and records containing the names and addresses of all Alabama 'members' and 'agents' of the Association."⁸² After being held in civil contempt and assessed a \$10,000 fine, the NAACP "substantially" complied with the production request, except for producing the membership lists, which the Association argued was a constitutional violation of their freedoms of speech and assembly (as incorporated against the state of Alabama under the Fourteenth Amendment).⁸³

In agreeing with the NAACP, the Court reasoned that "[i]t is *beyond debate* that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech."⁸⁴ In applying strict scrutiny⁸⁵ to government action that "may have the *effect* of curtailing the freedom to associate," the Court highlighted the NAACP's "uncontroverted showing" of the past harmful effects members of the Association suffered as a result of revealing their

79 *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958).

80 *Id.* at 460, 466.

81 *Id.* at 451–52.

82 *Id.* at 453.

83 *Id.* at 453–54. At this point, the Alabama Circuit Court declared the NAACP in continuing contempt and increased the fine to \$100,000. *Id.* at 454.

84 *Id.* at 460 (emphasis added).

85 In this test the Supreme Court applies to certain highly protected rights, the Court asks whether the governmental action in question is narrowly tailored (or necessary) to achieve a compelling government interest. *Id.* at 460, 463. See generally *Korematsu v. United States*, 323 U.S. 214, 216 (1944) (announcing a new standard of "the most rigid scrutiny" for suspect government classifications); CHEMERINSKY, *supra* note 71, at 554; MILTON R. KONVITZ, *FUNDAMENTAL RIGHTS: HISTORY OF A CONSTITUTIONAL DOCTRINE* 16–18 (2001).

rank-and-file members, including “economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility.”⁸⁶ The Court held that such state action—compelled disclosure of membership lists revealing the identities of members and the resulting stigma that came with it—was

likely to affect adversely the ability of [the NAACP] and its members to pursue their collective effort to foster beliefs which they admittedly have the right to advocate, in that *it may induce members to withdraw from the Association and dissuade others from joining it* because of fear of exposure of their beliefs shown through their associations and of the consequences of this exposure.⁸⁷

Thus, the Court prioritized the right of individuals as a group to be free from government action that targeted them in a manner that would cause them to feel reluctant or afraid to continue participating in that group, because of the very important right at the root of associational rights: free expression and speech.

2. *Roberts v. U.S. Jaycees*

Notwithstanding the strength of First Amendment protections of the freedom of association, the Court in *Roberts v. U.S. Jaycees*⁸⁸ still noted that “[t]he right to associate for expressive purposes is not, however, absolute.”⁸⁹ The government may infringe on that right if their conduct is justified and “serve[s] compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms.”⁹⁰ One compelling state interest the Court has already recognized is an interest in eradicating discrimination.⁹¹ *Roberts* dealt with the U.S. Jaycees, a national organization of young men seeking to exclude female membership and deny them equal benefits, which allegedly violated a Minnesota state statute that prohibited discrimination in public accommodation on the basis of race, religion, sex, color, creed, disability, or national origin.⁹²

⁸⁶ *Patterson*, 357 U.S. at 460–62.

⁸⁷ *Id.* at 462–63 (emphasis added). The Court went on to reject the State’s argument that those “harmful effects” were merely due to private conduct (i.e., private biases, societal prejudices, etc.) not attributable to the state action of compelled production of membership lists. *Id.* at 463. It emphasized that such a distinction is immaterial and that “[t]he crucial factor is the interplay of governmental and private action, for it is only after the initial exertion of state power represented by the production order that private action takes hold.” *Id.*

⁸⁸ *Roberts v. U.S. Jaycees*, 468 U.S. 609 (1984).

⁸⁹ *Id.* at 623.

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.* at 609.

The Court held that the state's goal in fighting historical discrimination of minorities and women was a compelling interest that did not attempt to suppress any particular message of the U.S. Jaycees, and therefore justified state interference in forcing the association to allow female members full benefits.⁹³ Thus, *Roberts* establishes some limits on the right to the freedom of association, namely, that the state may infringe upon the right if it can prove: (1) a compelling interest, (2) the state action is unrelated to the suppression of the association's ideas, and (3) there is no other less restrictive means of achieving that compelling state interest.⁹⁴ This test will later be applied to the government surveillance of Muslim Americans.

3. *Presbyterian Church v. United States*

In 1989, the Ninth Circuit Court of Appeals decided in the affirmative on standing issues regarding the infiltration by the Immigration Naturalization Services (INS) of several churches in Arizona, upon the suspicion that these churches were harboring refugees from El Salvador and Guatemala.⁹⁵ The plaintiff churches in *Presbyterian Church v. United States* alleged violations of their First and Fourth Amendment rights due to the INS's covert surveillance and infiltration of churches with agents wearing "body bugs" that recorded prayers and church services without a warrant or probable cause.⁹⁶ The allegations regarding the government's violation of First Amendment rights to free exercise of religion, speech, and association stemmed from what the Court of Appeals concluded were "actual injuries as the result of the INS' conduct."⁹⁷

The churches alleged that, as a result of the INS surveillance, the organization suffered from the withdrawal of members from active participation in church, a decline in the amount of support given to the church, members' reluctance in seeking counseling or being open during prayer, and a diversion of the clergies' time from regular pastoral duties to those related to handling the shortfall due to the surveillance.⁹⁸ News of the government infiltration and "bugging" of conversations also left congregants with a sense of fear and apprehension that led to a distinct impact on their church attendance and morale.⁹⁹ The

⁹³ *Id.* at 623–29.

⁹⁴ *Id.* at 623; Smith, *supra* note 24, at 139.

⁹⁵ *Presbyterian Church v. United States*, 870 F.2d 518, 520 (9th Cir. 1989).

⁹⁶ *Id.* at 520–21.

⁹⁷ *Id.* at 521.

⁹⁸ *Id.* at 521–22.

⁹⁹ *Id.* at 522.

Court of Appeals rejected the INS's argument that the alleged "chilling effect" on the congregants' religious exercise and expression was too speculative and conjectural, and that it did not derive from "coercive action" by the government.¹⁰⁰ In fact, the court held that "[t]he alleged effect on the churches is not a mere subjective chill on their worship activities; it is a concrete, demonstrable decrease in attendance at those worship activities. The injury to the churches is 'distinct and palpable.'"¹⁰¹

The court's analysis here also distinguished *Laird v. Tatum*¹⁰² from the case at bar.¹⁰³ In *Laird*, the plaintiffs alleged injury from the mere "existence and operation" of a domestic surveillance program administered by the Army, and did not claim a "specific present objective harm or threat of specific future harm."¹⁰⁴ While *Presbyterian* was mostly decided on standing issues,¹⁰⁵ the plaintiffs would only need to substantiate their factual allegations regarding the diminished church attendance, cancellation of Bible class, and the diversion of clergy time to non-pastoral duties related to handling the fallout from the surveillance in order to establish that the INS's surveillance "directly interfered with the churches' ability to carry out their religious mission."¹⁰⁶ Thus, the court set forth as persuasive authority the principle that "[c]hurches, as organizations, suffer a cognizable injury when assertedly illegal government conduct deters their adherents from freely participating in religious activities protected by the First Amendment."¹⁰⁷

B. Muslim American Associational Rights Infringed

The jurisprudence on associational rights discussed above provides a few key methods of first assessing whether government conduct rises to the kind of level that merits strict

¹⁰⁰ *Id.*

¹⁰¹ *Id.* Interestingly, the court also pointed out the idea that the church suffered something similar to "reputational" or "professional" harm because of the negative impact that knowledge of the INS infiltration had on the church's image, ability to raise funds, and the religious services they offered. *Id.* at 522-23.

¹⁰² *Laird v. Tatum*, 408 U.S. 1 (1972).

¹⁰³ *Presbyterian*, 870 F.2d at 522.

¹⁰⁴ *Laird*, 408 U.S. at 9-11; *Presbyterian*, 870 F.2d at 522.

¹⁰⁵ See *Presbyterian*, 870 F.2d at 520-23.

¹⁰⁶ *Id.* at 523; Smith, *supra* note 24, at 143.

¹⁰⁷ *Presbyterian*, 870 F.2d at 523. The plaintiffs had pled for, *inter alia*, injunctive relief in the form of a court order prohibiting the INS from continuing the surveillance without first showing a compelling interest. *Id.* at 521. The court went on to note that because the criminal prosecution related to the investigation and surveillance was already underway, it was unable to assess the likelihood that the churches would be subjected to the surveillance again, and therefore remanded that issue to be decided by the district court. *Id.* at 523.

scrutiny, and then deciding whether the “compelling interest” and “narrowly tailored” elements of the strict scrutiny test itself are met. As established by case law, government conduct that may have the effect of curtailing the freedom to associate should be subjected to strict scrutiny.¹⁰⁸ Such “effects” have included “economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility.”¹⁰⁹ The Ninth Circuit provided more relevant examples of suppression of religious expression, including (1) withdrawal by congregants from actively participating, (2) decline in financial support or donations, (3) congregants’ reluctance in seeking religious counseling or being open during prayer, (4) diversion of clergies’ or religious leaders’ time from congregation duties to dealing with the effects of surveillance, and (5) fear or apprehension of conversations being “bugged” (recorded), which have a negative impact on congregants’ morale.¹¹⁰ Muslim American surveillance has exhibited similarly chilling effects on mosque-goers, demonstrating the need for strict scrutiny application of the government programs aimed at widespread Muslim surveillance.

Like the curtailment the Court found in *Patterson*, Muslim Americans in regions like the East Coast have also suffered from the loss of business; diminished or affected employment opportunities;¹¹¹ “other manifestations of public hostility” such as stigma;¹¹² and the enabling or furthering justification of hate crimes against Muslims¹¹³ because of the specter left upon the

¹⁰⁸ NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 460–61 (1958).

¹⁰⁹ *Id.* at 462.

¹¹⁰ *Presbyterian*, 870 F.2d at 521–22.

¹¹¹ MAPPING MUSLIMS, *supra* note 1, at 30–31 (“Several young, educated [Muslim] professionals . . . expressed concern that the public discourse about radicalization within Muslim communities, further propagated by the NYPD’s surveillance program, would affect their colleagues’ impressions of them. . . . [For example, two] interviewees, both young attorneys working at corporate law firms, felt that they could not engage in pro bono work on issues relating to Muslim civil rights and Muslim immigrants generally because the firm does not want to get entangled (even indirectly) in these controversial issues.”).

¹¹² *Id.* at 29 (noting that such state-sponsored targeting of Muslim Americans has ingrained stigmatic harm against their community). Muslim Americans “fear that their colleagues, neighbors, classmates or customers will view them with suspicion because law enforcement has branded them a population ‘of concern’ that is prone to dangerous behavior. . . . [This can] contribute to an overall public discourse that is hostile towards Muslims.” *Id.*; see also Susan J. Tabrizi, *At What Price? Security, Civil Liberties, and Public Opinion in the Age of Terrorism*, in AMERICAN NATIONAL SECURITY AND CIVIL LIBERTIES IN AN ERA OF TERRORISM 185, 193–95 (David B. Cohen & John W. Wells eds., 2004) (discussing American public support for racial profiling based measures to fight terrorism in the years after 9/11, such as stopping and questioning “anyone who fits the general description of suspected terrorists” and questioning 5000 immigrants from the Middle East without more cause than their religion or national origin).

¹¹³ Mark Potok, *FBI Reports Dramatic Spike in Anti-Muslim Hate Violence*, HUFFINGTON POST (Nov. 14, 2011, 2:34 PM), <http://www.huffingtonpost.com/mark-potok/>

Muslim community in the wake of media reports of NYPD surveillance.¹¹⁴ Moreover, the surveillance of Muslims has placed a particularly ominous mark on the community through the government's use of informants to infiltrate mosques, Muslim Student Associations on college campuses, and the Muslim community in general.

1. The Informant Problem

The government's use of informants to infiltrate mosques throughout the country is particularly troubling, reminiscent of the days of COINTELPRO and the massive distrust the government sowed throughout the politically dissident community.¹¹⁵ Agencies like the FBI—and by extension local law enforcement like the NYPD—have aggressively sought to recruit and send informants to mosques to infiltrate Muslim American communities, befriend unwitting mosque attendees, Muslim community leaders, and even Muslim student organization members to record, report, and in many instances, incite violence or discussions of violence to see which Muslims will be caught in the dragnet.¹¹⁶ Investigative journalist and author Trevor Aaronson dedicated years to studying the terrorism prosecutions that resulted from the use of government informants.¹¹⁷ According to data he collected in August 2011, almost ten years since 9/11, out of 508 terrorism defendants, “243 had been targeted through an FBI informant, 158 had been caught in an FBI terrorism sting, and 49 had encountered an agent provocateur.”¹¹⁸ By numbers alone, then, during that time period, nearly forty-eight percent of the defendants prosecuted for

fbi-reports-dramatic-spik_b_1092996.html; see also GALLUP REPORT, *supra* note 2, at 40 (noting that compared to other major national religious groups—Protestant, Catholic, Jewish, and Mormon—and people who do not ascribe to a religion, Muslims are most likely to have experienced racial or religious discrimination); Interview with Fatima Dadabhoy, *supra* note 33 (highlighting that the prosecution of Muslim Americans through what “should be legally considered entrapment” fuels the fire for hate groups to speak in favor of such surveillance and prosecutions against Muslims).

¹¹⁴ See MAPPING MUSLIMS, *supra* note 1, at 31 (“By singling out Muslims as potentially dangerous, as meriting close law enforcement attention, and by *not* applying the same standards as varied as Reverend Dr. Martin Luther King Jr.’s and the Ku Klux Klan.”) (emphasis added).

¹¹⁵ “In fact, the FBI today has ten times as many informants as it did in the 1960s, when former FBI director J. Edgar Hoover made the Bureau infamous for inserting spies into organizations as varied as Reverend Dr. Martin Luther King Jr.’s and the Ku Klux Klan.” AARONSON, *supra* note 26, at 26; see also *id.* at 44–45.

¹¹⁶ See generally Aziz, *supra* note 49, at 187–90. The NYPD’s Intelligence Division went as far as sending one informant to canvass a white-water river-rafting trip held by a Muslim Student Association, because such an activity apparently merited suspicion. MAPPING MUSLIMS, *supra* note 1, at 40.

¹¹⁷ AARONSON, *supra* note 26, at 11–15.

¹¹⁸ *Id.* at 15.

terrorism-related crimes had been apprehended by the use of a government-sent informant, tasked with setting up—and often supplying materials for—a terror plot and bringing the targeted individual into the fold of it.¹¹⁹

The informant stories are all quite similar.¹²⁰ An FBI informant—usually with a checkered past¹²¹—is tasked with posing as a Muslim with “contacts” to terrorist organizations and told to approach certain targets who are often antisocial, almost “loner” types with few ties to a community¹²²—and sometimes with mental health issues¹²³—to conjure a terror plot that will lead to those individuals’ prosecution and conviction.¹²⁴ Hefty financial incentives abound for the informants, who can be paid up to \$100,000 or more per case, with the added possibility of earning tens of thousands more if their operation results in a conviction.¹²⁵ The FBI does not stop there, supplying the informants with thousands of dollars at their disposal to offer as financial inducements to their targets, thereby increasing the likelihood they will get a “prosecutable” case.¹²⁶ In addition, the FBI often uses the vulnerable immigration statuses of some Muslims (e.g., an overstayed student visa or undocumented status) to coerce or exert immense pressure upon immigrant Muslims to become informants in exchange for their immigration problems “going away.”¹²⁷ Such individuals are faced with the

119 *Id.* at 234 (“Most of the targets in these stings were poor, uneducated, and easily manipulated. In many cases, it’s likely they wouldn’t have come up with the idea at all without prodding by one of the FBI’s 15,000 registered informants.”).

120 See Sherman, *supra* note 59, at 1499.

121 AARONSON, *supra* note 26, at 155–80 (discussing the FBI’s use of criminals as informants, including—among others—a convicted rapist and child molestor, drug dealers, a man on parole for bank fraud, and a suspected murderer).

122 Interview with Fatima Dadabhoy, *supra* note 33.

123 AARONSON, *supra* note 26, at 138, 175–76, 195.

124 For a survey of several informant stories that Aaronson and others have argued verge on or constitute entrapment, see generally *id.* at 9–11, 19–24, 31–33, 91–97, 106–07, 115–35, 137–51; Aziz, *supra* note 49, at 214–15, 217; MAPPING MUSLIMS, *supra* note 1, at 40–45; Said, *supra* note 42, at 712–32; Teresa Watanabe & Paloma Esquivel, *L.A. Area Muslims Say FBI Surveillance Has a Chilling Effect on Their Free Speech and Religious Practices*, L.A. TIMES (Mar. 1, 2009), <http://articles.latimes.com/2009/mar/01/local/me-muslim1> (discussing infamous infiltration of informant Craig Monteilh into mosque communities in Orange County, California and the Muslim community response).

125 AARONSON, *supra* note 26, at 45.

126 See *id.* at 146, 148, 177, 187 (describing, for example, how during one operation, an informant paid for the targeted individuals’ rent, offered to buy one target a barbershop, and was authorized by the FBI to offer \$5000 to each of the four recruited men to stage a terrorist plot); see also Interview with Fatima Dadabhoy, *supra* note 33 (noting one case where an informant in his thirties befriended two young converts in their early twenties, bought them laptops, and *paid* them to participate in a terrorist plot).

127 For accounts of some ways the FBI has used immigration status or threats of deportation to strong arm individuals into becoming informants, see AARONSON, *supra* note 26, at 91–93, 98–101; see also Said, *supra* note 42, at 710. According to renowned immigration law expert Ira Kurzban, “It’s clearly the *modus operandi* of the FBI to (a)

“choice” of either being deported, or, if they refuse, being prosecuted for terrorism crimes themselves.¹²⁸ Even Muslim Americans with lawful status are approached by the FBI to become informants and threatened with being placed on the no-fly list and barred from commercial air travel.¹²⁹

The lengths to which the FBI has gone and is apparently willing to go to keep the informant system in place—despite its legally dubious nature—shows how adamant the agency is in employing morally suspect informants to catch would-be terrorists in terror plots orchestrated by the FBI.¹³⁰ Also troubling is the fabrication of reports by informants that are later used in prosecuting the suspected terrorists who were the targets of such operations all along.¹³¹ But perhaps most disconcerting is the FBI’s heavy hand in, as Aaronson argues, “manufacturing” these terror plots in order to implicate an easy target into taking the blame. Prosecuting someone and placing them behind bars creates palpable, tangible evidence the Bureau can point to as proof they are doing their job.¹³² In fact, during the 2011 “Newburgh Four” sentencing of four ill-equipped and impressionable men who were walked through the steps of a terrorism plot with an experienced FBI informant, presiding U.S. District Judge Colleen McMahon noted:

“The essence of what occurred here is that the government, understandably zealous to protect its citizens from terrorism, came upon a man both bigoted and suggestible, one who was incapable of committing an act of terrorism on his own [The government] created acts of terrorism out of his fantasies of bravado and bigotry, and then made those fantasies come true I suspect real terrorists

recruit people who are going to be informants and (b) to use whatever leverage they can to get them to be informants.” AARONSON, *supra* note 26, at 99.

¹²⁸ AARONSON, *supra* note 26, at 91–98.

¹²⁹ See, e.g., Eyder Peralta, *In Lawsuit, American Muslims Claim FBI Used No-Fly List to Bully Them*, NPR (Apr. 23, 2014, 2:33 PM), <http://www.npr.org/blogs/thetwo-way/2014/04/23/306223445/in-lawsuit-american-muslims-claim-fbi-used-no-fly-list-to-bully-them>; AARONSON, *supra* note 26, at 103–05.

¹³⁰ See AARONSON, *supra* note 26, at 106 (noting the FBI told informant Craig Monteilh to dig up any information that could be used to pressure Muslims into becoming informants, including immigration status issues, criminal activity, drug use, and extramarital affairs and sanctioned his engagement in sexual relationships with women to “engender trust” with people); see also Complaint, *supra* note 3, at 8–9. For a detailed overview of major cases Human Rights Watch studied, looking at the kinds of “inciting tactics” used by informants against their targets, see generally HUMAN RIGHTS WATCH, *supra* note 59, at 23–26 (noting, among other tactics, an informant sending one target websites and photographs of human rights abuses of Muslims, including a young Iraqi girl’s rape by an American and children mangled, decapitated, or burned alive).

¹³¹ See Said, *supra* note 42, at 726–27 & n.245 (describing how “wholly fabricated” words and “routinely exaggerated” reports by one informant served as the basis of one FBI case that led to a fifteen year prison sentence).

¹³² AARONSON, *supra* note 26, at 234.

would not have bothered themselves with a person who was so utterly inept . . . Only the government could have made a terrorist out of Mr. Cromitie [the primary defendant], whose buffoonery is positively Shakespearean in scope.”¹³³

She went on to say, “I believe beyond a shadow of a doubt that there would have been no crime here except the government instigated it, planned it and brought it to fruition.”¹³⁴ As Judge McMahon so succinctly put it, the reality is that the government can make a terrorist out of even the most unassuming and incompetent individuals, which bears a striking resemblance to classic entrapment cases like *United States v. Hollingsworth*.¹³⁵

While a full discussion on the legality and utility of informants is beyond the scope of this Comment, the effects of government informants on the Muslim American community is particularly relevant to Muslims’ right to freedom of association. Aside from the ramifications of distrust and suspicion that such use of informants has on the Muslim community, sending informants amongst Muslim groups—whether they are mosques or Muslim Student Associations—“may . . . interfer[e] with a group’s expressive association merely by occupying membership positions for reasons other than furthering the group’s goals.”¹³⁶ Informant infiltration has sent waves through Muslim American communities throughout the country, and understandably so.¹³⁷ It breeds fear amongst individual Muslims, who are forced to

¹³³ *Id.* at 150 (quoting U.S. District Court Judge Colleen McMahon). Judge McMahon sentenced the defendants to twenty-five years in prison, the minimum allowed under federal guidelines, refusing to order life in prison, which the government had sought. *Id.* at 150–51; Graham Rayman, *Newburgh 4 Terror Case: Judge Sentences Three to 25 Years in Prison, U.S. Constitution Shivers*, VILLAGE VOICE (June 29, 2011, 3:33 PM), http://blogs.villagevoice.com/runninscared/2011/06/newburgh_4_terr_3.php. For an account of the FBI informant’s pursuit of Cromitie as a potential terrorist target and the progression of the terrorism scheme, see Paul Harris, *Newburgh Four: Poor, Black, and Jailed Under FBI ‘Entrapment’ Tactics*, GUARDIAN (Dec. 12, 2011), <http://www.theguardian.com/world/2011/dec/12/newburgh-four-fbi-entrapment-terror>, and AARONSON, *supra* note 26, at 137–51.

¹³⁴ Harris, *supra* note 133.

¹³⁵ *U.S. v. Hollingsworth*, 9 F.3d 593, 595–96, 599–600 (7th Cir. 1993), *aff’d en banc*, 27 F.3d 1196, 1199–200 (7th Cir. 1994); see also Said, *supra* note 42, at 697–98 (“[T]he government creates a serious risk of inducing crime when it provides the means for individuals to carry out crimes that they otherwise would not have been able to commit.”).

¹³⁶ Smith, *supra* note 24, at 148. Smith describes the usual trajectory that comes from the aftermath of the informant’s infiltration: “Once the alleged plot is complete, and the government prosecutes the individuals involved, members become suspicious of each other, attendance declines, and individuals become reluctant to discuss religious or political issues.” *Id.*

¹³⁷ See, e.g., Watanabe & Esquivel, *supra* note 124; H.G. Reza, *New Fears in Muslim Community Follow Reports of U.S. Monitoring*, L.A. TIMES (May 29, 2008), <http://articles.latimes.com/2008/may/29/local/me-mosques29>; FAIZA PATEL, BRENNAN CTR. FOR JUSTICE, RETHINKING RADICALIZATION 21–23 (2011), available at http://brennan.3cdn.net/f737600b433d98d25e_6pm6beukt.pdf.

wonder whether their Muslim neighbor, new friend from the Muslim Student Association, or person praying next to them at the mosque is actually an informant.¹³⁸ For example, one report on the NYPD surveillance of Muslims found that “[n]early all interviewees thought they knew someone who was an informant or an undercover officer.”¹³⁹ Whether or not they were right is beside the point. Only one religious group, Muslim Americans, in the greater New York City area admitted that they knew or thought they knew of an individual who was specifically sent by their local law enforcement to their mosque or religious community simply to track their movements and record and report on their statements to find and prosecute terrorists. This shows the disproportionate burden placed on American Muslims today.¹⁴⁰

The actions of the government have created a climate of suspicion amongst the Muslim American community. In the wake of reports of informant Craig Monteilh infiltrating Orange County mosques in Southern California, Hussam Ayloush, Executive Director of the Council on American-Islamic Relations (CAIR) in Los Angeles, stated in 2010 that “[e]very Muslim I know just assumes that the person praying next to them is an informant.”¹⁴¹ Much like the observations of Imam Raza,¹⁴² religious leader of the Brooklyn mosque and named plaintiff in the 2013 lawsuit, “[i]n mosques around the country, newcomers are met with a suspicion that didn’t exist before 9/11—a particularly sad state of affairs, as for centuries mosques had

138 Interview with Fatima Dadabhoy, *supra* note 33 (“When cases like these break, it doesn’t just impact the defendant or even his family. It impacts the whole community, because all those who know that individual are then approached by the FBI to get more information from them about themselves and about the defendant.”).

139 MAPPING MUSLIMS, *supra* note 1, at 26.

140 In *Presbyterian*, the Ninth Circuit Court of Appeals held: “When congregants are chilled from participating in worship activities, when they refuse to attend church services because they fear the government is spying on them and taping their every utterance . . . we think a church suffers organizational injury because its ability to carry out its ministries has been impaired.” *Presbyterian Church v. United States*, 870 F.2d 518, 522 (9th Cir. 1989).

141 AARONSON, *supra* note 26, at 112; see also HUMAN RIGHTS WATCH, *supra* note 59, at 23 (“Some of the cases we reviewed appear to have begun as virtual fishing expeditions, where the FBI had no basis to suspect a particular individual of a propensity to commit terrorist acts. In those cases, the informant identified a specific target by randomly initiating conversations near a mosque. Assigned to raise controversial religious and political topics, these informants probed their targets’ opinions on politically sensitive and nuanced subjects, sometimes making comments that appeared designed to inflame the targets. If a target’s opinions were deemed sufficiently troubling, officials concerned with nascent radicalization pushed the sting operation forward.”). Given the backdrop of an environment like this, it is no wonder that Muslim Americans attending a mosque would reasonably fear that the person who just came up to speak with them may in fact be an informant, casting out his net for potential sting operation leads.

142 See *supra* notes 1–16 and accompanying text.

been considered welcoming places for strangers and travelers, a tradition that dates back to . . . the earliest days of Islam.”¹⁴³

2. Self-Censorship of Religious and Political Expression

According to civil rights attorney Fatima Dadabhoy, Muslim religiosity has become a reason for closer government scrutiny. Based on questions FBI agents pose in “voluntary interviews,” it is as if “just the act of going to a mosque and being religious is suspicious.”¹⁴⁴ Questions such as “What mosque do you go to?” “How often do you go to the mosque?” and “What made you decide to become religious?” are commonly asked by the FBI and are apparently meant to gauge the level of the individual’s “suspiciousness.”¹⁴⁵ Such forms of surveillance and intelligence gathering have resulted in what the Ninth Circuit Court of Appeals called a “withdrawal” of mosque attendees.

In 2009, after news broke of Craig Monteilh, the notorious FBI informant who infiltrated mosques and Muslim communities in Orange County, California, many Muslims in the area simply stopped attending their mosque, unable to partake in and receive their religious services out of fear that the FBI would spy on them too.¹⁴⁶ Donations at the Islamic Center of Norco in Corona, California declined thirty to fifty percent in the years leading up to the revelation of the informant, which was attributed in part to the economy’s decline, but also to the very real consequences of prosecutions under the “material support” statute.¹⁴⁷

In 2011, when Associated Press investigative reporting revealed the NYPD surveillance of Muslims and the existence of a pervasive informant named Shamiur Rahman, “[there was] a steep decline in mosque attendance, as the number of worshippers attending afternoon prayers on weekdays . . . declined from approximately twenty people to just

¹⁴³ AARONSON, *supra* note 26, at 112.

¹⁴⁴ Interview with Fatima Dadabhoy, *supra* note 33; see also HUMAN RIGHTS WATCH, *supra* note 59, at 18–19 (noting the FBI’s use of “voluntary interviews” and events presented as “community outreach” to gather information from American Muslims, further fueling the Muslim American community’s fears and distrust of law enforcement).

¹⁴⁵ Interview with Fatima Dadabhoy, *supra* note 33; see also MAPPING MUSLIMS, *supra* note 1, at 12 (noting that due to NYPD surveillance, “attendance at a mosque—a religious duty for many Muslims—has become tantamount to placing oneself on law enforcement’s radar”); AARONSON, *supra* note 26, at 53 (discussing how an FBI training manual released by *Wired* magazine instructed that “[t]he more devout a Muslim was . . . the more likely he was to be violent”). Such “radicalization theories” have been largely debunked in Patel’s report. See generally PATEL, *supra* note 137, at 3–18.

¹⁴⁶ Watanabe & Esquivel, *supra* note 124.

¹⁴⁷ *Id.* (“Since 9/11, federal authorities have also shut down at least six of the Muslim community’s major charitable organizations, accusing them of involvement in terrorist financing.”); see also Reza, *supra* note 137; 18 U.S.C. § 2339A (2012).

two or three people.”¹⁴⁸ With news of such informant operations, some Muslim Americans have become much more wary of what they say in the presence of others, out of fear it will be recorded or misconstrued in a manner that can incriminate them.¹⁴⁹ In fact, even speaking Urdu or Arabic in public could prompt surveillance.¹⁵⁰ Muslim business owners, who have also been targeted, are affirmatively censoring what TV programming is shown in their establishment and what kinds of discussions are had there.¹⁵¹ To some, it is a frustrating result of sweeping generalizations, a burden Muslims have to shoulder simply because of the religion they belong to.¹⁵² What makes their situation even more challenging is the fact that Muslim Americans are so afraid they do not even wish to speak out openly against the surveillance leveled against them, lest they come on the government’s radar or trigger even more scrutiny for their actions.¹⁵³ Such effects of government surveillance have resulted in the kind of fear and apprehension that the church members in *Presbyterian* felt upon learning that government agents were infiltrating their churches wearing “body bugs” and recording conversations.¹⁵⁴

Moreover, just like the clergy in *Presbyterian* who were diverted away from their religious duties in order to deal with the effects of the surveillance on their congregants,¹⁵⁵ mosque leaders like Imam Raza have had to divert time away from their responsibilities to their congregation to handle the fallout in

148 Complaint, *supra* note 3, at 15. See *Presbyterian Church v. United States*, 870 F.2d 518, 522 (9th Cir. 1989) (“The alleged effect on the churches is not a mere subjective chill on their worship activities; it is a concrete, demonstrable decrease in attendance at those worship activities.”).

149 MAPPING MUSLIMS, *supra* note 1, at 18. One New York area Sunday school teacher stated, “I have to think twice about the sentences I say just in case someone can come up with a different meaning to what I’m saying.” *Id.*

150 *Id.* at 20.

151 *Id.* In a feat of illustrative irony, leaked NYPD documents showed that the law enforcement agency already knew that one Muslim business owner stopped showing *Al-Jazeera* on his television because he did not want to bring unwanted attention from the government. *Id.* at 22. It appears his attempts were in vain.

152 One Muslim woman felt caught in a Catch-22: “When your speech is limited, you can’t really do much: you can’t write on the internet, you can’t talk on the phone because they’re tapped, you can’t speak in public.” *Id.* at 23; see also Complaint, *supra* note 3, at 13.

153 MAPPING MUSLIMS, *supra* note 1, at 41 (noting some Muslim Student Associations implemented bans on political discussions to prevent further surveillance). For a personal account of the NYPD surveillance experience from a New York University Muslim law student, see Elizabeth Dann, *Singling Us Out: NYPD’s Spying on Muslim Americans Creates Fear and Distrust*, AM. CIV. LIBERTIES UNION (Apr. 19, 2012), [https://www.ac lu.org/blog/racial-justice-national-security-religion-belief/singling-us-out-nypds-spying-muslim-americans](https://www ACLU.org/blog/racial-justice-national-security-religion-belief/singling-us-out-nypds-spying-muslim-americans).

154 See *Presbyterian Church v. United States*, 870 F.2d 518, 522 (9th Cir. 1989).

155 *Id.*

their membership caused by the government surveillance. For example, Raza purchased a professional camera and three external hard drives to save the videos of sermons he gave, in order to have proof of his own words in case he would need to defend himself if his words were taken out of context—all of which cost the mosque about \$2200.¹⁵⁶ He has had to devote hours to mediate conflicts that arise between mosque congregants about the suspicion and distrust that has come between some due to informant infiltration.¹⁵⁷ Thus, the government’s conduct within the sphere of surveillance in the name of counterterrorism has caused a “distinct and palpable”¹⁵⁸ chilling effect upon the Muslim American community and their freedom of association.

3. Applying the *Roberts* Strict Scrutiny Test to Surveillance of Muslim Americans

Under the strict scrutiny test as applied here, (1) the government purpose for the surveillance must be compelling, (2) it must be unrelated to the suppression of ideas, and (3) there must be no other less restrictive means of achieving that purpose.¹⁵⁹ First, while gross injustices have been carried out against racial minorities in the name of national security, the Court has repeatedly held that national security is a compelling interest that would suffice the “purpose” prong of the strict scrutiny test.¹⁶⁰ It cannot be denied that the true costs of life, limb, stability, and security that come from terrorism of all forms are serious and tragic. They warrant true vigilance and swift action by authorities when a pressing danger presents itself. While the debates about the existence of “real” national security

¹⁵⁶ Complaint, *supra* note 3, at 10–11.

¹⁵⁷ *Id.* at 15.

¹⁵⁸ *Presbyterian*, 807 F.2d at 522 (quoting *Allen v. Wright*, 468 U.S. 737, 751 (1984)).

¹⁵⁹ *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984); *see supra* notes 85, 88–94 and accompanying text.

¹⁶⁰ *See, e.g., Korematsu v. United States*, 323 U.S. 214, 217–18 (1944) (upholding Japanese and Japanese American internment for national security threats in World War II); *Haig v. Agee*, 453 U.S. 280, 305 (1981) (“The Court recognized that the legitimacy of the objective of safeguarding our national security is ‘obvious and inarguable.’”) (citing *Aptheker v. Sec’y of State*, 378 U.S. 500, 509 (1964)); *Snapp v. United States*, 444 U.S. 507, 509 n.3 (1980) (“The Government has a compelling interest in protecting both the secrecy of information important to our national security and the appearance of confidentiality so essential to the effective operation of our foreign intelligence service.”). *But see* *United States v. U.S. Dist. Court for the E. Dist. of Mich., S. Div.*, 407 U.S. 297, 313 (1972) (“National security cases . . . often reflect a convergence of First and Fourth Amendment values not present in cases of ‘ordinary’ crime. Though the investigative duty of the executive may be stronger in such cases, so also is there greater jeopardy to constitutionally protected speech.”); *Parker, supra* note 38, at 162 (“Too often in our history unfounded suspicions based on free association have led to intrusive forms of unwarranted domestic information collection in the name of national security.”).

issues¹⁶¹ are outside the scope of this discussion, if the government's asserted purpose in the widespread surveillance of Muslim Americans, informant infiltration, and sting operations is national security, past precedent has established that such a purpose is, indeed, compelling.

Second, while the government may argue that its purpose or intention with the surveillance is not to dissuade expression, the reality is that it is still having a concrete impact on Muslim American expression. Nonetheless, absent facts indicating otherwise, this analysis will operate upon the assumed presumption that the government's purpose was not related to an intent to actually dissuade expression.

Third, and finally, this leaves the primary issue: whether the government's methods are truly narrowly tailored. The Court has held that "even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved."¹⁶² The means used here have consisted of sweeping, undiscerning surveillance; the targeting of the Muslim American community; and the act of doing so without articulable suspicion or probable cause, other than the observation that the group targeted belongs to—or appears to belong to—the Islamic faith.

As many have argued,¹⁶³ the government need not use such sweeping methods of law enforcement to achieve their goal of counterterrorism. In fact, these approaches have proved counterproductive, and instead have led to significant backlash from the Muslim American community itself, which feels suspicious and distrustful of the government.¹⁶⁴ This, in turn, has

¹⁶¹ See generally HERMAN, *supra* note 76, at 207 (discussing how during *Korematsu*, the government withheld facts in the report provided to the Supreme Court of the United States in order to establish that a "national security" threat existed).

¹⁶² *Shelton v. Tucker*, 364 U.S. 479, 488 (1960) (declaring unconstitutional a state law requiring all teachers to annually disclose their group memberships).

¹⁶³ See, e.g., Aziz, *supra* note 49, at 222–23 (asserting that current counterterrorism methods subordinate Muslim Americans by targeting them unnecessarily); Atif Choudhury, *Confessions of a Former Muslim Students Association Board Member*, HUFFINGTON POST (Mar. 25, 2014, 2:31 PM), http://www.huffingtonpost.com/atif-choudhury/confessions-muslims-students-association_b_4863368.html ("Categorically bugging all mosques and 'infiltrating' [Muslim Student Associations] might be the quick and easy option for our government to show us that it is 'doing something' to combat terror, but is it really the most optimal method for serious law enforcement?").

¹⁶⁴ Muslim Americans have the lowest confidence in the FBI, compared to other major national religious groups (Protestant, Catholic, Jewish, Mormon) and those who do not have a religion. GALLUP REPORT, *supra* note 2, at 24; see also Aziz, *supra* note 49, at 198 ("When coupled with multiple discoveries that informants have induced young Muslim men with diminished mental capacity or financial problems toward violence, it

shut off the possibility of fruitful cooperation amongst the government and the Muslim American community, because they constantly feel treated as a suspect class, rather than a productive, equal partner.¹⁶⁵ As Part III will discuss, there are many other means the government can employ that are less restrictive than the ones currently in place.

III. PROPOSED SOLUTIONS: OPTIMISTIC, BUT REALISTIC

As discussed in Parts I and II, the government's current methods of fighting domestic terrorism are exceeding constitutional bounds because they are not narrowly tailored to achieving the goal of fighting domestic terrorism. While much has been discussed about the problems that the government's methods pose,¹⁶⁶ articulating solutions for this issue is particularly difficult, given the varied and competing interests of all the players involved.¹⁶⁷ Thus, it may be fruitful to step outside the traditional bounds of this discussion to seek possible solutions from other contexts. At the heart of the government's concern here is domestic terrorism. Analyzing the government's domestic counterterrorism strategies through the lens of gang injunction and gang intervention models in the United States proves illuminating in understanding what methods, articulated goals, and types of administration have been effective—or at least promising—and which have been detrimental.

Before embarking on this analysis, however, it should be noted that while there are some common themes between both, domestic terrorism and gang violence also have their obvious differences.¹⁶⁸ On the one hand, the problem of gang violence in

should come as no surprise that some Muslim communities are distrustful of state and federal law enforcement agencies[. . .].”

¹⁶⁵ PATEL, *supra* note 137, at 29–31 (urging the repudiation of prior biases regarding Muslim “radicalization”); MAPPING MUSLIMS, *supra* note 1, at 46–47 (describing boycotts and protests in response to NYPD surveillance); Aziz, *supra* note 49, at 223 (“[A]s they beseech their government to respect their civil liberties, Muslims must also seek the protection of law enforcement against private acts of violence and discrimination. For many Muslims, the government may come across as more foe than friend.”).

¹⁶⁶ See *supra* notes 49–70 and accompanying text.

¹⁶⁷ E.g., Muslim Americans, Muslim community leaders, local law enforcement, and the federal government to name a few.

¹⁶⁸ Interestingly, there was a case in New York where gang violence was prosecuted under an anti-terrorism statute. In 2012, a gang member who shot and wounded another rival gang member to avenge his friend's death also accidentally shot and killed a ten-year-old girl. Glenn Greenwald, *New York's Top Court Highlights the Meaninglessness and Menace of the Term 'Terrorism'*, GUARDIAN (Dec. 16, 2012, 6:36 AM), <http://www.theguardian.com/commentisfree/2012/dec/16/court-terrorism-morales-gangs-meaningless>. In *People v. Morales*, the gang member was prosecuted and found guilty at the trial court level under an anti-terrorism statute. *Id.* The New York Court of Appeals overturned the conviction. *Id.*

the United States is similar to domestic terrorism due to both of their troubling potential to cause loss of life and disruption of social stability. Both threats often also come from those individuals who are, or feel, marginalized by society.¹⁶⁹ However, both phenomena are different in that gang violence is more embedded within the fabric of daily life in many urban centers of the United States, such that its effects are largely localized; while threats of terrorism are more sporadic or intermittent, unpredictable, and have a wider effect on a national—and even international—level.¹⁷⁰ Nonetheless, the most common thread between the two issues is how the government has attempted to address them and the challenges they each pose, not only to law enforcement, but also those communities most affected by it. This Comment presents two recommendations: First, there should be end to the constitutionally suspect practice of surveillance of Muslim Americans without prior evidence of wrongdoing because this method is not narrowly tailored to achieve the compelling interest of national security. Second, to address those individuals who have found themselves feeling marginalized by society, the Muslim American community could implement grassroots “intervention” or “prevention” programs for individuals who exhibit signs of potentially going down a path of violence because they lack access to proper resources to address the sources of their marginalization.

A. Cease Widespread Surveillance of Muslim Americans

The government—both federal and local—should stop the practice of widespread, suspicionless surveillance of Muslim Americans in the form of mosque infiltration and informant sting operations. Community and grassroots activists, legal civil rights groups, and Muslim American leaders are all calling for the end of such a practice.¹⁷¹ Choosing to spy on Muslims simply because

¹⁶⁹ See, e.g., Irving A. Spergel, *Youth Gangs: Continuity and Change*, 12 CRIME & JUST. 171, 259 (1990) (noting that in particular, youths become gang members to “develop[] alternate social, cultural, and economic sub-systems to meet common human needs in an increasingly complex urban society”); Thomas A. Myers, Note, *The Unconstitutionality, Ineffectiveness, and Alternatives of Gang Injunctions*, 14 MICH. J. RACE & L. 285, 302 (2009) (quoting the Sergeant of the Washington D.C. Police Department as stating that the root of the gang violence problem is a social one).

¹⁷⁰ E.g., drive-by shooting on a street corner targeting local individuals versus a bombing in a large public place targeting many and prompting national and international attention.

¹⁷¹ See MAPPING MUSLIMS, *supra* note 1, at 50–51 (calling for the end of “blanket surveillance of the Muslim population of New York City and its environs”); Noa Yachot, *NYPD Shatters Muslim Mapping Unit – But What About Other Tactics?*, AM. CIV. LIBERTIES UNION (Apr. 15, 2014, 7:01 PM), <https://www.aclu.org/blog/national-security-religion-belief/nypd-shatters-muslim-spying-unit-what-about-its-tactics> (noting discriminatory surveillance practices that still exist after the NYPD officially disbanded

they are Muslim and attend a mosque is based upon a faulty¹⁷² and invidious presumption that terrorist threats only come from Muslims, and namely those Muslims who are more “religious.”¹⁷³ Such a presumption must be retracted in order for the government’s approach to be narrowly tailored. Moreover, the current surveillance techniques have not proved effective in achieving their stated goals. In 2012, Assistant Chief Thomas Galati of the NYPD himself attested under oath that during the more than six years of its implementation, the surveillance program did not yield a single lead, nor did it spark the need to initiate any terror investigations.¹⁷⁴ There are also limits to how useful a tool surveillance can be for crime prevention.¹⁷⁵

Myers argues that gang injunctions, which literally criminalize associative behaviors such as walking down the street or riding in a car with another individual who is suspected to be a gang member, are unconstitutional for the same reasons that Muslim surveillance is: there are other reasonable alternatives to achieving the government’s goal of fighting gang violence.¹⁷⁶ The criteria that law enforcement use to label someone a gang member has been seen as too subjective, arbitrary, and burdensome of expressive rights, such as the ability to wear a certain colored t-shirt, sport a tattoo, or speak with another person on the street.¹⁷⁷ These are much like the

its Muslim mapping unit); Interview with Fatima Dadabhoy, *supra* note 33 (proposing as part of the solution that the Muslim American community not be treated as a suspect class).

¹⁷² In the United States, compared to other major religious groups (Protestant, Catholic, Jewish, and Mormon) and those with no religion, Muslim Americans are the most likely to reject violence through individual attacks on civilians. GALLUP REPORT, *supra* note 2, at 31.

¹⁷³ In fact, frequent mosque attendance and a strong religious identity are associated with greater civic engagement and emotional health among Muslim Americans. *Id.* at 44; see also Aziz, *supra* note 49, at 182.

¹⁷⁴ Adam Goldman & Matt Apuzzo, *NYPD: Muslim Spying Led to No Leads, Terror Cases*, ASSOCIATED PRESS, Aug. 21, 2012, available at <http://www.ap.org/Content/AP-In-The-News/2012/NYPD-Muslim-spying-led-to-no-leads-terror-cases>.

¹⁷⁵ Bell & Webster, *supra* note 50, at 24 (“Surveillance can only anticipate up to a point, and in some very limited circumstances. Searchable databases and international communications interception were fully operational on September 10 to no avail. The likely result will be that internal surveillance of citizens by the state will increase.”); see also HUMAN RIGHTS WATCH, *supra* note 59, at 22 (quoting former FBI agent Michael German) (“Today’s terrorism sting operations reflect a significant departure from past practice. When the FBI undercover agent or informant is the only purported link to a real terrorist group, supplies the motive, designs the plot, and provides all the weapons, one has to question whether they are combatting terrorism or creating it. Aggrandizing the terrorist threat with these theatrical productions only spreads public fear and divides communities, which doesn’t make anyone safer.”).

¹⁷⁶ Myers, *supra* note 169, at 303.

¹⁷⁷ *Id.* Those who were labeled as gang members are disproportionately low income, young, and people of color, which has led to “the criminalization of the[ir] daily lives.” Beth Caldwell, *Criminalizing Day-to-Day Life: A Socio-legal Critique of Gang Injunctions*,

“indicators” law enforcement use to label Muslims as terrorist threats because of their garb, physical appearance, or political ideologies. Thus, Myers’s call for “[t]ighter and more definite standards, like beyond a reasonable doubt” for law enforcement to meet before subjecting an individual to closer scrutiny within the gang injunction context also applies to Muslim surveillance.¹⁷⁸ In the early 1990s, Irving A. Spergel, an expert on gangs, also suggested that gang intervention programs for youth should focus on those who “are *already engaged* in law-violating behaviors.”¹⁷⁹ The latter idea is key in implementing a successful approach, for then it means the government’s method will truly be narrowly tailored to achieve the government’s national security interest. Such a standard, albeit simple, does not infringe upon free exercise, association, or speech rights, but still does offer a basic minimum standard to follow, creating something closer to a “bright line” rule. Approaches such as the ones suggested for the gang context may equally apply to the Muslim surveillance issue, for the government should operate upon more than an individual’s mere adherence to Islam to target them. This will also be more narrowly tailored to achieve the government’s purpose of protecting against domestic terrorism, because it will attempt to target real criminals, rather than everyday mosque congregants.

B. Muslim American Community-Based Intervention Programs

The final proposition involves controversial and constantly changing attitudes about how to address crime by using “the community” as a vehicle for counterterrorism. The government’s decision to conduct mosque surveillance and infiltration of Muslim groups—along with the slew of prosecutions that have resulted from such programs—has left Muslim Americans feeling wary of who to trust in their own communities and, more particularly, in the government.¹⁸⁰ While many law enforcement branches have community relations liaisons to attempt to

37 AM. J. CRIM. L. 241, 243 (2010). This is strikingly similar to the effect NYPD surveillance had on the daily lives of Muslim Americans. See generally *supra* Part I.

178 Myers, *supra* note 169, at 303–04.

179 Spergel, *supra* note 169, at 262 (emphasis added).

180 Muslim Americans are afraid of providing information directly to the FBI due to its aggressive use of informants, and instead prefer to provide information to civil rights groups like CAIR, which then relay it to the government. AARONSON, *supra* note 26, at 113; see also HUMAN RIGHTS WATCH, *supra* note 59, at 20 (noting that the FBI justifies its “domain mapping” program “by arguing that ‘terrorist and criminal groups target ethnic and geographic communities for victimization and/or recruitment’”). The Human Rights Watch report concludes that such an “approach to investigation is discriminatory and counterproductive, undermining trust in authorities in precisely the communities where law enforcement claims to want to build that trust.” *Id.*

collaborate and forge ties with groups such as Muslim Americans, much of these attempts by law enforcement have been viewed with skepticism by Muslim American leaders.¹⁸¹

In the context of American gangs, Spergel has suggested creating collaborative agencies consisting of many key players, such as local government agencies, law enforcement, and community groups, to address the issues of gang violence through gang intervention.¹⁸² However optimistic the idea sounds, the reality is that many conflicts arise with such a multi-faceted body of groups attempting to work together, because although they are all united in the cause of addressing the same issue, they each may have decidedly different, if not sometimes conflicting, interests.¹⁸³ That is not to say, however, that the gang intervention model is not a useful tool in addressing true potential “at-risk” individuals. Currently, when law enforcement, through its channels of intelligence, finds an individual who appears susceptible to going down a path of potential violence due to mental health, economic, or social factors, rather than intervening to direct them to help, law enforcement sends them an informant, who hatches a prosecutable terror plot, which lands that individual in prison. Not only does this exploit and permanently damage the individual’s future, it does not really fight true terrorist threats.

This Comment proposes that instead of swooping in to prosecute that individual, that person should be directed to the proper services and resources to address the underlying issues that placed this individual in such a position in the first place.¹⁸⁴

¹⁸¹ See, e.g., MAPPING MUSLIMS, *supra* note 1, at 36–37 (discussing how NYPD outreach efforts are counterproductive because they operate on the premise that all the Muslims they interact with need to be “de-radicalized”); Aziz, *supra* note 49, at 150–52 (arguing that community policing “co-opts” Muslim American leaders into gathering intelligence on their fellow Muslims because the government would not be able to constitutionally reach such information); Jessica Garrison, *Counter-Terrorism Becomes Part of Law Enforcement*, L.A. TIMES (Sept. 6, 2011), <http://articles.latimes.com/2011/sep/06/nation/la-na-911-homeland-security-enforcement-20110907/2> (noting concerns by some officials that the LAPD’s counterterrorism department trainings were spreading misinformation and false rumors about how Muslim Americans wanted to impose Shari’ah law the United States).

¹⁸² Spergel, *supra* note 169, at 261. He also suggested it be run by an official agency with law enforcement or other rehabilitative or educational functions. *Id.*

¹⁸³ E.g., the FBI or local law enforcement may feel the need to justify its budget and seek to aggressively prosecute suspected Muslims of terror crimes, while Muslim community leaders may seek to avoid making their members more vulnerable to already targeted scrutiny by refusing to give any information about their congregation. See AARONSON, *supra* note 26, at 113.

¹⁸⁴ See Choudhury, *supra* note 163 (“Would not a smarter more effective use of our law enforcement resources be to work with Muslim communities and organizations to help identify these outliers rather than treating ‘existing while openly Muslim’ as a crime?”).

Such a plan of action would be a remarkable improvement upon the current sense of distrust that exists between the Muslim community and law enforcement. To address the problems of gang violence, Myers suggested as an alternative to gang injunctions social programs providing employment, education, and even recreation opportunities to “would-be” gang members.¹⁸⁵ Such “prevention” or “intervention” programs would aim to keep “would-be” gang members from following that path, and similarly could allow law enforcement and community relations to soften.¹⁸⁶

Myers’s suggested gang intervention model fits quite well into the Muslim American community context. As can be seen from the stories Aaronson chronicled,¹⁸⁷ the individuals prosecuted for terrorism are precisely those “would-be” terrorists who are more likely to suffer from mental, social, or emotional problems than pose a real terrorist threat. One important distinction, however, persists. It would be more fruitful to have those social services programs provided from the “ground up” by grassroots Muslim American community organizations. Their presence would be a welcome sight to many Muslims who have felt they have been treated as a suspect class for years. Additionally, it would still help law enforcement accomplish its goals of diminishing the threat of potential terrorism-related violence, because such programs would reach out to the—as Aaronson coins it—“wannabe” terrorists who, in reality, likely need mental health counseling or social programs, not prosecution and jail time.¹⁸⁸ While there is no way for such organizations to reach out to all these individuals—who are often social outcasts outside the circle of a mosque or other community—for those they can serve, such an effort would be welcome relief from prosecution and imprisonment, cataclysmic events that send waves through an entire community, not just the defendant’s family and friends.

Perhaps most importantly, such a project could prove particularly empowering to the Muslim American community, which has experienced years of political and social “subordination.”¹⁸⁹ Unlike the kind of community policing Aziz

¹⁸⁵ Myers, *supra* note 169, at 305.

¹⁸⁶ *Id.* (“If would-be gang members are employed at a job, at an after-school program, or are engaged in a recreational program[,] . . . then they will not be on the streets engaging in violent gang activity.”).

¹⁸⁷ See *supra* notes 120–135 and accompanying text.

¹⁸⁸ See *supra* notes 120–135 and accompanying text.

¹⁸⁹ Aziz, *supra* note 49, at 177–78 (“Subordination theory posits that particular groups are racialized into the outsider ‘Other’ deserving of harsh treatment by the state to protect the majority from a perceived threat. These ‘out-groups’ disproportionately carry

describes and wholly refutes,¹⁹⁰ this campaign would not be instigated by government intervention, but rather would be inspired by its own local Muslim communities that would seek to provide social services to its community members. The only law enforcement role present here would be its *lack of* a role, in that it should refrain from targeting and prosecuting such vulnerable individuals, along with implementing the suggested methods of narrowing their surveillance methods to only those whose actions constitute illegal conduct.

This model, based on the current realities of the Muslim American experience, is cognizant of the discriminatory policies and practices in place that perpetuate and erroneously conflate terrorism and Islam. The only way society can move away from such stigmatic stereotypes of an entire religious class is to firmly reject such biased presumptions, in order to stop government practices of *de facto* discrimination that offend the constitutional principles of free exercise, speech, and association.

CONCLUSION

Although the government has proffered the compelling interest of national security as a justification for its widespread network of surveillance and informants for the purpose of essentially monitoring Muslim American daily life, the means it has employed are not sufficiently narrowly tailored to survive strict scrutiny in the face of constitutional First Amendment protections of free association and speech. This has led to a significant “chilling” of religious and political expression, as well as the curtailment of actual religious activities such as mosque attendance, donations for charity, or participation in a Muslim Student Association on college campuses. Through the refining of the government’s scope of surveillance, and the creation of objective, transparent criteria for individuals who *do* warrant such government scrutiny, Muslim Americans can be secured their fundamental rights, while still allowing law enforcement to accomplish its goal of fighting actual terrorism. Additionally, the government should not prosecute those vulnerable, and easily susceptible individuals who were unsuspectingly caught in the government “dragnet” of informant sting operations. Instead, law enforcement should allow the Muslim American community its own space to address the issue on its own terms, by offering such individuals social programs and mental health services as

the burden of distributional inequalities arising from abusive practices sanctioned by the majority.”) (footnotes omitted).

¹⁹⁰ *Id.* at 213–17.

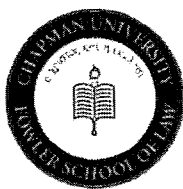
needed, without fear of government scrutiny or prosecution. This will not only empower Muslim Americans, a community largely marginalized post 9/11, but also allow them to mold their own destinies in this nation. It is not the place of a government based on fundamental constitutional principles of freedom to punish individuals for mere adherence to their faith, no matter how stigmatized they are. Courts must now step in to uphold those fundamental rights that have been pushed aside out of misunderstanding and fear.

The *Chapman Law Review* is published two times per year by its student members at Chapman University Dale E. Fowler School of Law. The *Chapman Law Review* can be reached by phone at (714) 628-2582, online at www.chapmanlawreview.com, or by e-mail at chapmanlawreviewonline@gmail.com. The office of the *Chapman Law Review* is located in Donald P. Kennedy Hall on the campus of Chapman University, One University Drive, Orange, CA 92866.

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Chapman Law Review

Volume 18

Summer 2015

Number 3

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