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ARTICLE

BEYOND RESPECTABILITY: DISMANTLING THE HARMS OF “ILLEGALITY”

ANGÉLICA CHÁZARO*

Current pro-immigrant reform efforts focus on legalization. Proposals seek to place as many of the eleven million undocumented people in the United States as possible on a “path to earned citizenship.” However, these reform efforts suffer from a significant and underappreciated blind spot: the strategies used to advocate legalization harm those to whom the path to citizenship is barred—such as those with prior deportation orders, prior criminal convictions, and those who have yet to arrive. The problem begins with rhetoric: in making the push for legalization, immigrant rights groups have deployed imagery of the undocumented as law-abiding, hard-working, and family-oriented—the ideal respectable candidates for an invitation into the protected sphere of citizenship. The flaw in this approach is evident in the comprehensive immigration reform bill passed by the Senate in 2013. While the bill would have provided additional safeguards for those who qualify for the path to legalization, it would have simultaneously rendered more vulnerable the millions of immigrants who do not qualify. For that latter group, the bill would have meant further criminalization of employment, increased border enforcement and deaths, and a cemented pipeline between local law enforcement, detention, and deportation.

This Article proposes that the push for legalization is responsible for the legislative bait-and-switch, which appears to fix a broken system by offering legalization to some, but in fact makes the system worse for many. To avoid that result, advocates should avoid prioritizing legalization, and instead address the systemic harms related to the category of “illegality.” Pro-immigrant advocacy and scholarship should be guided by the question, “Will this intervention increase or decrease the harms related to living without lawful status?” Such a strategy would move the focus away from an individual’s eligibility for citizenship and towards issues that confront the most vulnerable among the undocumented. By addressing those most harmed by “illegality,” new opportunities emerge for crafting reforms that dismantle immigrant vulnerability.

INTRODUCTION

The harms related to living without lawful immigration status in the United States are tremendous.¹ Every contact with local law enforcement has

* Visiting Assistant Professor, University of Washington School of Law. My thanks to Amna Akbar, Devon Carbado, Devon Knowles, and Dean Spade for their helpful comments, and to Law Librarian Cheryl Nyberg for her speedy responses to my varied requests. Law student Richard Devenport provided invaluable research assistance for this Article.

¹ Dean Kevin Johnson aptly summarizes this state of immigration affairs, stating “Congressional reform efforts over the last 15 years have tended to focus more on an amalgam of immigration enforcement, as well as on ways of punishing certain groups of immigrants, than on the meaningful pursuit of other important policy goals.” Kevin Johnson, *Ten Guiding Principles for Truly Comprehensive Immigration Reform*, 55 WAYNE L. REV. 1599, 1602 (2009). Executive action has also contributed to this bias, with current spending for the core immigration enforcement agencies exceeding that of all the other principal federal law enforcement

become a potential gateway to detention, with programs connecting local law enforcement to Immigration and Customs Enforcement (“ICE”) now active in every jurisdiction.² Beyond the significant harms associated with detention and deportation, the suffering created by the current immigration system extends to the daily lives of unauthorized migrants and severely impacts their life chances.³ This Article addresses the urgent need both to examine and respond to the effects of immigration policy on those most vulnerable to its harms.

The progressive response to the current immigration crisis in the United States has been to support proposals for legalization as part of a broader comprehensive immigration reform (“CIR”) package. CIR proposals involve the “coupling of provisions for an ‘adjustment of status’ for some undocumented migrants (and their eventual eligibility for U.S. citizenship) with new and more aggressive forms of border enforcement, workplace raids and surveillance, and more severe penalties for workers who knowingly hire undocumented workers.”⁴ The “adjustment of status” promised by CIR is designed to move those who face the harms of “illegality” across the line from “undocumented” to “documented.” In the face of Congressional inaction on CIR, the Executive Branch acted in November 2014 to shift this line slightly—granting part of the undocumented population protections from deportation in the form of “deferred action.”⁵ However, legalization remains

agencies combined. See DORIS MEISSNER ET AL., MIGRATION POLICY INSTITUTE, IMMIGRATION ENFORCEMENT IN THE UNITED STATES: THE RISE OF A FORMIDABLE MACHINERY 141 (2003), available at <http://www.migrationpolicy.org/pubs/enforcementpillars.pdf>, archived at <http://perma.cc/6QUE-V6YA>.

² See U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, ACTIVATED JURISDICTIONS (2013), available at <http://www.ice.gov/doclib/secure-communities/pdf/sc-activated.pdf>, archived at <http://perma.cc/6VZM-7ZUG>; see also Decl. of Jamison Matuszewski at 5, Am. Immigration Council v. U.S. Dep’t of Homeland Sec., No. 12-00355 (D. Conn. July 12, 2012), available at http://www.legalactioncenter.org/sites/default/files/docs/lac/27-2_Matuszewski_Declaration_%282%29.pdf, archived at <http://perma.cc/C97T-JFYK> [hereinafter *Decl. of Matuszewski*]. On November 20, 2014, as part of a series of executive actions on immigration, Department of Homeland Security (“DHS”) Secretary Jeh Johnson announced the end of the Secure Communities Program, and its replacement with the Priority Enforcement Program, which will continue to conduct immigration screenings by relying on the non-optional submission of fingerprint-based biometrics data by local law enforcement agencies to the FBI during bookings. See Memorandum from Jeh Charles Johnson, Sec’y, U.S. Dep’t of Homeland Sec., to Thomas S. Winkowski, Acting Dir., U.S. Immigration & Customs Enforcement (Nov. 20, 2014), available at http://www.dhs.gov/sites/default/files/publications/14_1120_memo_secure_communities.pdf, archived at <http://perma.cc/U9BW-HP75> [hereinafter *Secure Communities Memo*].

³ See *infra* Part I.

⁴ Nicholas De Genova, *Immigration “Reform” and Migrant “Illegality,”* in CONSTRUCTING IMMIGRANT “ILLEGALITY”: CRITIQUES, EXPERIENCES, AND RESPONSES 37, 57 (Cecilia Menjivar & Daniel Kanstroom eds., 2014).

⁵ See Barack Obama, Remarks by the President in Address to the Nation on Immigration (Nov. 20, 2014) (transcript available at <http://www.whitehouse.gov/the-press-office/2014/11/20/remarks-president-address-nation-immigration>, archived at <http://perma.cc/AC9S-XCFU>); see also Memorandum from Jeh Charles Johnson, Sec’y, U.S. Dep’t of Homeland Sec., to León Rodríguez, Dir., U.S. Citizenship & Immigration Servs., Thomas S. Winkowski, Acting Dir., U.S. Immigration & Customs Enforcement, R. Gil Kerlikowske, Comm’r, U.S. Customs &

the end goal. At its core, this legalization strategy proposes to resolve the harms faced by undocumented people through individualized government action to remove the label of “illegal.” However, the legalization strategy suffers from a significant and underappreciated blind spot: a successful push for legalization would guarantee increased harm to those immigrants to whom the path to citizenship is barred—such as those with prior deportation orders, prior criminal convictions, and those who have not yet arrived.

This Article argues that the current legalization strategy legitimizes an immigration policy that causes suffering by excluding, imprisoning and deporting people. This argument can be linked to what sociologists Cristian Paredes and Nestor Rodriguez identify as one of the key ideological themes of immigration enforcement: the delegitimization of migrants by immigrant enforcement bureaucracies that transform them into plausible targets.⁶ Delegitimization involves “promoting concepts of unauthorized migrants as being inferior to persons worthy of respect and dignified treatment,” leaving migrants dehumanized “as bodies to be processed.”⁷ This conceptualization lays the groundwork for their processing for arrest, detention, and removal.⁸ If the construction of immigrant “illegality” has transformed migrants into sub-humans worthy of harm, then transforming migrants into potential citizens through CIR theoretically reverses the delegitimization. The legalization strategy thus directly recognizes and responds to the delegitimization of migrants by attempting to re-legitimate them under the very terms used to deny their humanity. Those who do not qualify for the process of legalization are rendered permissible targets for being pursued, arrested, detained and removed.

Moreover, legalization is based on a value-driven assessment of the individual, holding up each unauthorized migrant as either deserving of citizenship and its benefits or deserving of “illegality” and its harms. The request for inclusion at the heart of the legalization strategy forces those making the request to present the most legitimate, respectable version of immigrants possible. Mainstream immigrant advocates have embraced this recurring dynamic in civil rights work, broadly referred to as the “politics of respectability.”⁹ This dynamic is visible in advocacy for legalization schemes wrapped in talking points about immigrants who are valedictorians, parents, and innocent children.¹⁰ Instead of confronting the construction of

Border Protection (Nov. 20, 2014), available at http://www.dhs.gov/sites/default/files/publications/14_1120_memo_deferred_action.pdf, archived at <http://perma.cc/WY8P-4WTD> [hereinafter *Prosecutorial Discretion Memo*].

⁶ Cristian Paredes & Nestor Rodriguez, *Coercive Immigration Enforcement and Bureaucratic Ideology*, in CONSTRUCTING IMMIGRANT “ILLEGALITY”: CRITIQUES, EXPERIENCES, AND RESPONSES 37, 57 (Cecilia Menjivar & Daniel Kanstroom eds., 2014).

⁷ *Id.* at 75.

⁸ *Id.*

⁹ See *infra* Part II.

¹⁰ See, e.g., Editorial, *Boston's Valedictorians Show Their Immigrant Spirit*, BOS. GLOBE, July 5, 2014, <http://www.bostonglobe.com/opinion/editorials/2014/07/04/boston-valedictorians-show-their-immigrant-spirit/IMT13pAaJR1DnVZyM9RREO/story.html>, archived at <http://>

“illegality” and the distribution of harm to those living in this category, advocates make appeals to the recognition of the humanity of immigrants based on their purportedly hard-working, law-abiding nature. The inclusion of enforcement enhancements in legalization bills translates into a guarantee of increased harms for those “unrespectable” immigrants whose humanity remains unrecognized.¹¹

In order to provide a baseline for the anti-legalization arguments that follow, Part I of this Article details the harms of “illegality,” describing how immigration policy produces vulnerability and suffering for people whose presence in the United States is not authorized by law. It details the harms of detention, deportation, and workplace exploitation, and analyzes how these and other harms are disproportionately distributed along lines of race and class. The deprivations of liberty, the conditions of immigration detention, and the due process challenges detention engenders make this form of immigration imprisonment one of the most acute harms of “illegality.” The short- and long-term effects of deportation on both the deportee and their family and community members render deportation the most severe harm of “illegality.” Part I examines how these and other harms are distributed along lines of race and class within undocumented populations.

Part II analyzes the rhetoric behind the legalization strategy. It gives specific examples of how, in making the push for legalization, immigrant rights groups have deployed imagery of the undocumented as law-abiding, hard-working, and family-oriented—the ideal respectable candidates for an invitation into the protected sphere of citizenship. Specifically, Part II examines how the politics of respectability is being articulated through three messages: “we are not criminal,” “we are hard working,” and “we deserve a pathway to legalization.” Through the embrace of the politics of respectability, pro-immigrant advocacy groups have come to accept the inclusion in CIR bills of harm-expanding measures (enforcement, raids, surveillance)

/perma.cc/R35Q-5CKD (“The inspiring presence each year of so many foreign-born students at the top of their class should remind all of us that they are also, and just as importantly, a blessing to be esteemed.”); Michael Alison Chandler, *Deportations of Parents Can Cast the Lives of U.S.-Citizen Kids into Turmoil*, WASH. POST, Dec. 29, 2013, http://www.washingtonpost.com/local/education/deportations-of-parents-can-cast-the-lives-of-us-citizen-kids-into-turmoil/2013/12/29/abdf23aa-6b4c-11e3-b405-7e360f7e9fd2_story.html, archived at <http://perma.cc/L3FJ-969S> (describing the experiences of a father and son separated by immigration detention); James Eng, *Almost-Deported Valedictorian Daniela Pelaez Helps Introduce Immigration Reform Bill*, NBC NEWS (May 30, 2012), http://usnews.nbcnews.com/_news/2012/05/30/11959331-almost-deported-valedictorian-daniela-pelaez-helps-introduce-immigration-reform-bill?lite;%20http://latino.foxnews.com/latino/news/2011/05/13/arizona-state-university-valedictorian-undocumented-immigrant/, archived at <http://perma.cc/HFL7-EK75> (reporting that high school valedictorian joins U.S. House Representative David Rivera to introduce S. 744).

¹¹ The most recent CIR bill to pass the Senate, the Border Security, Economic Opportunity, and Immigration Modernization Act, S. 744, 113th Cong. (2013), funded unprecedented enhancements to both interior and border enforcement. See *infra* Part II, A–C, for a detailed analysis of the bill’s enforcement aspects.

that target those who do not qualify for the legalization provisions.¹² Aligning immigrants with the respectable and distancing them from the unpalatable, however, limits the possibilities for the reduction of the harms of “illegality.” For example, arguing that certain noncitizens do not deserve the harms of detention because they are hard workers and not criminals does nothing to question the use and expansion of detention as an accepted response to the constructed category of “illegality,” or the continued expansion of the category of “criminal” in both immigration law and penal law.¹³ Ultimately, Part II demonstrates how the legalization strategy legitimizes immigration policy that causes suffering by excluding, imprisoning and deporting people. This strategy affirms the creation of “illegal” status categorically, and implicitly suggests that it is appropriate for well-being and harm to be distributed through this category.

Part III proposes alternative principles for thinking and acting on immigration reform that avoids offering legalization to some at the cost of making the system worse for many. The principles draws on theories of harm reduction,¹⁴ and posit that pro-immigrant advocacy should be guided by two considerations: (1) when considering proposals for reform, pro-immigrant advocates and scholars should consider whether the proposals would increase the harms facing unauthorized migrants, with the aim of stopping new laws and policies from cementing the harms to those left living without legal status; and (2) when actively crafting strategy, advocates should prioritize reducing the harms of the immigration caste system and seek to dismantle that system piece by piece.¹⁵ Part III offers an application of the first princi-

¹² The statements of the heads of leading immigrant-advocacy organizations following the introduction and passage of S. 744, the Senate’s enforcement-heavy CIR bill, signaled their acquiescence. *See, e.g., AILA Believes Senate Immigration Bill Is a Good Start*, AM. IMMIGRATION LAWYERS ASS’N (Apr. 18, 2013), <http://www.aila.org/advo-media/press-releases/2013/aila-believes-senate-immbill-is-a-good-start>, *archived at* <http://perma.cc/96TH-NJ8L> (“Overall, this legislation provides a solid foundation to fix our broken immigration system and bring our laws into the 21st century.”); *Civil and Human Rights Coalition Applauds Senate Judiciary Committee for Advancing Bipartisan Immigration Bill*, LEADERSHIP CONFERENCE ON CIVIL & HUMAN RIGHTS (May 22, 2013), <http://www.civilrights.org/press/2013/immigration-judiciary-committee-vote.html>, *archived at* <http://perma.cc/2P7K-RY6B> (“We applaud the efforts of the Senate Judiciary Committee and Chairman Leahy, who expertly led and managed a fair mark-up in regular order The pressure on this committee to sink this legislation was ferocious—yet the committee worked together to advance a strong compromise bill.”).

¹³ *See, e.g., Ali Noorani, Focusing U.S. Immigration Detention Costs*, REUTERS GREAT DEBATE (Mar. 4, 2013), <http://blogs.reuters.com/great-debate/2013/03/04/focusing-u-s-immigration-detention-costs/>, *archived at* <http://perma.cc/WJN3-93ZC> (“We are all for detaining criminals. But those now on supervised release are the kind of people who should never have been in detention in the first place.”).

¹⁴ Harm reduction offers a pragmatic yet compassionate set of strategies designed to reduce the harmful consequences of addictive behavior for both drug consumers and the communities in which they live. For a description of harm reduction, see G. Alan Marlatt, *Harm Reduction: Come As You Are*, 21 ADDICTIVE BEHAVIORS 779 (1996).

¹⁵ Various scholars have described the condition of unauthorized migrants in the United States as contributing to a caste-type system. *See, e.g., LINDA BOSNIAK, THE CITIZEN AND THE ALIEN* 37 (2006) (“Especially when alienage is a long-term, even potentially permanent condition, the privileging of citizens over noncitizens would seem to depend on, and to reinforce,

ple—considering whether a proposed reform expands harm to the unauthorized migrants—through an analysis of current CIR efforts and of the 2014 Immigration Executive Action. It concludes that the most recent CIR bill, 2013’s Senate Bill 744, would have ultimately expanded the harms of “illegality” by further criminalizing employment for unauthorized migrants and drastically enhancing both interior and border enforcement, and finds that the analysis, as applied to the recent Executive Action, yields a more ambiguous result.¹⁶ It also applies the second principle—reducing the harms related with “illegality”—by offering two examples of advocacy that decenter citizenship as the ultimate prize.

In this Article, the critique of legalization is not a critique of the category of citizenship itself, but of the all-consuming focus on achieving a “pathway to citizenship” for unauthorized migrants. The Article calls for a redirected focus on addressing the harms related to “illegality” independent of a push for legalization. In discussing his reasoning for pursuing a politically impractical idea like open borders, Joseph Carens states, “[e]ven if we must take deeply rooted social arrangements as givens for purposes of immediate action in a particular context, we should never forget about our assessment of their fundamental character. Otherwise, we wind up legitimating what should only be endured.”¹⁷ This Article does not seek to address directly the category of citizenship and the notion of open borders, as Carens does. It does, however, question the necessity of harms created by “deeply rooted social arrangements” that produce “illegality.” Thus, the proposal below is not a call for the end of citizenship *per se*, but rather, for the end of harms related to “illegality.” Although citizenship may be considered the flip-side of “illegality,” this does not dictate pursuing the pathway to citizenship as the sole or best strategy. Put another way, immigrant advocates would do well to center the harms related with “illegality” independent of the drive for citizenship.

In its analysis, this Article prioritizes the experiences of those immigrants whose needs are most quickly negotiated away in exchange for the advancement of immigrants with more “respectable” profiles. It builds on the work of critical race theorists and other legal scholars who advocate “looking to the bottom” and who warn that social justice does not trickle down.¹⁸ If a CIR bill passed today, those currently unlikely to benefit from a

caste-like stratification among societal groups.”); Cecilia Menjivar & Daniel Kanstroom, *Introduction*, in *CONSTRUCTING IMMIGRANT “ILLEGALITY”: CRITIQUES, EXPERIENCES, AND RESPONSES 2* (Cecilia Menjivar & Daniel Kanstroom eds., 2014) (“In most other legal arenas, illegality is not generally understood as an existential condition The reasons for this are deep and fundamental. To accept the idea of ‘illegal’ people is inevitably to risk accepting problematic and dangerous forms of castes.”).

¹⁶ Border Security, Economic Opportunity, and Immigration Modernization Act, S. 744, 113th Cong. (as passed by Senate, June 27, 2013).

¹⁷ JOSEPH CARENS, *THE ETHICS OF IMMIGRATION* 229 (2013).

¹⁸ Mari Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323, 324 (1987) (“Those who have experienced discrimination speak with a special voice to which we should listen.”); see also Rickke Mananzala & Dean Spade,

legalization strategy—people with criminal convictions, poor people without employment history, people with disabilities, transgender and gender non-conforming people, people who are not part of married families with children—would face even greater vulnerability as a result of the justified expansion of the harms of “illegality.” Put another way, the benefits of legalization will not trickle down to those at the bottom. Immigrant solidarity thus requires developing strategies for change that take as a starting point the needs of those most harmed by “illegality.” Ultimately, by focusing on the relationship between harm and “illegality,” this Article seeks to shape how scholars conceptualize the potential risks and benefits of immigration reform and to encourage immigrant advocates to divest from strategies that increase harms to the very groups they seek to protect.

I. THE HARMS OF “ILLEGALITY”

Because this Article proposes principles for thinking and acting on immigration reform focused primarily on the harms related to living without lawful status, it is important to understand the nature of those harms. This section details the worst harms of “illegality” and describes how they disproportionately fall on poor immigrants of color.

In this Article, “harm” is used to signify a detrimental effect or impact produced by “illegality.” There are approximately eleven million people in the United States who lack any lawful immigration status.¹⁹ The harms they face can be divided into various categories, many of which overlap: physical and psychological harms, financial and material harms, and harms in the form of limited life chances and opportunities.²⁰

The risk of deportation, formally known as removal, and its related harms form a consistent backdrop in the lives of people without lawful status.²¹ The current levels of deportation enforcement are higher than they

The Nonprofit Industrial Complex and Trans Resistance, 5 SEXUALITY RES. & SOC. POL’Y 53, 54 (2008) (“Given the strong trends of poverty, homelessness, incarceration, and downward mobility in trans communities, we are deeply unsatisfied by the idea of a movement that centralizes leadership in the hands of the few trans people who maintain economic and educational privilege and builds strategies for change that primarily affect those people. Instead, we think that trans politics should use a model based on the concept *social justice trickles up, not down*, prioritizing the needs and concerns of those facing the worst manifestations of gender-based marginalization and exclusion . . .”).

¹⁹ See JEFFREY S. PASSEL, PEW HISPANIC CENTER, AS GROWTH STALLS UNAUTHORIZED IMMIGRANT POPULATION BECOMES MORE SETTLED 4 (2014) (estimating that as of March 2013, the undocumented immigrant population in the United States was 11.3 million people).

²⁰ I recognize that the harms described below may not be considered universal, and could be considered instead subjective injustices rather than objective harms. Nonetheless, I find the framework of harm a useful one for this discussion, as it centers the experience of those at the receiving end of illegality’s deleterious effects.

²¹ Under the current Immigration and Nationality Act, any person unlawfully present in the U.S. is subject to removal. 8 U.S.C. § 1227(a)(1)(B) (2012). Noncitizens with lawful status can also face removal if their conduct triggers a ground of deportability. *Id.* § 1227(c). Only being a U.S. citizen protects one from the harm of being involuntarily removed from this country to another. See DANIEL KANSTROOM, AFTERMATH 12 (2012).

have ever been.²² Immigration scholar Daniel Kanstroom refers to the deportations of the last decade as a “radical social experiment” given that “we have never seen an immigration enforcement system of the size, ferocity, and scope” of the one currently carried out in the United States.²³ For immigrants who have spent time in the United States, deportation severs access to family members, friends, community, employment, assets, and health care, sometimes permanently. These separations affect the life chances of those deported. For example, an individual living with HIV/AIDS may lose access to the medication sustaining her life.²⁴ Poverty and homelessness may result from deportation, as individuals return to places where they lack employment prospects.²⁵ Parents may see their relationships with their children interrupted and, at times, their parental rights terminated if their children are placed in the foster care system.²⁶

It may seem hyperbolic to describe deportation as exile, as people are generally removed to their countries of origin, but for many, the length of their stay in the United States and their ties to this country makes them exiles in their home countries.²⁷ For some deportees, however, particularly those with criminal convictions, removal means incarceration in their home country, or living with stigma attached to their status as forced exiles.²⁸ Human rights abuses against deportees are well documented,²⁹ and begin with the act of deportation itself, during which deportees are shackled and can be forcibly medicated.³⁰ Some are beaten by police upon arrival, and others are imprisoned for the simple fact of being deportees.³¹ Being deported is so closely linked with being a “criminal” that deportees, often

²² Shankar Vendantam, *U.S. Deportations Reach Record High*, WASH. POST, Oct. 7, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/10/06/AR2010100607232.html>, archived at <http://perma.cc/M6X5-FGJ6> (“The Obama administration announced Wednesday that in the past year it has deported a record number of authorized immigrants—more than 392,000.”).

²³ See KANSTROOM, *AFTERMATH*, *supra* note 21, at ix.

²⁴ HUMAN RIGHTS WATCH, *DISCRIMINATION, DENIAL, AND DEPORTATION: HUMAN RIGHTS ABUSES AFFECTING MIGRANTS LIVING WITH HIV* 18 (2009) (describing how deportees face harsh conditions, including lack of access to health care, upon arriving in their countries of origin).

²⁵ Yolanda Vazquez, *Perpetuating the Marginalization of Latinos: A Collateral Consequence of the Incorporation of Immigration Law in the Criminal Justice System*, 54 HOW. L.J. 639, 667–68 (2011) (noting the lack of employment prospects for deportees, particularly for those who return to countries with economic difficulties).

²⁶ See, e.g., SETH FRED WESSLER, APPLIED RESEARCH CENTER, *SHATTERED FAMILIES* 4 (2011) (estimating that 5,100 children are in foster care whose parents have been detained or deported); see also KANSTROOM, *AFTERMATH*, *supra* note 21, at 139 (“Protections given by law to the family are absent from much deportation law”).

²⁷ Daniel Kanstroom, *Post-Deportation Human Rights Law: Aspiration, Oxymoron, or Necessity?*, 3 STAN. J. C.R. & C.L. 195, 218 (2007) (“Many deportees know no one in the countries to which they are removed and do not speak the native language.”).

²⁸ Vazquez, *supra* note 25.

²⁹ See, e.g., HUMAN RIGHTS WATCH, *DISCRIMINATION, DENIAL, AND DEPORTATION*, *supra* note 24.

³⁰ KANSTROOM, *AFTERMATH*, *supra* note 21, at 147.

³¹ *Id.* at 148.

labeled as gang members, are treated as “scapegoats for worsening crime and other societal problems,” and thus subject to social stigmatization and police abuses.³² Their mental health deteriorates, almost universally to the point of depression and anxiety.³³

The increased reliance on immigration detention as an integral part of the process of removal has meant that the harms of deportation extend to the process of removal itself. For those facing deportation from an immigrant detention center, these harms are compounded by a lack of access to health-care, adequate nutrition, or safe working conditions.³⁴ With Congress mandating the availability of 34,000 immigration detention beds on any given day, more immigrants than ever face deportation from behind bars.³⁵ In 2001, U.S. immigration officials imprisoned 95,000 people each year. By 2010, Immigration and Customs Enforcement was detaining 400,000 people.³⁶

The harms of detention are well-documented, and have led to widespread resistance from detainees held in ICE custody. In the spring of 2014, detainees at the Northwest Detention Center in Tacoma, Washington, carried out a fifty-six-day hunger strike to protest the dire conditions of their confinement.³⁷ The hunger-striking detainees in Tacoma named inadequate ac-

³² *Id.* at 150 (explaining how younger deportees, and those who have stayed in the United States longer face the greatest levels of stigmatization after deportation because they are easily identifiable as Americans in Mexico).

³³ *See id.* at 151 (“Another psychiatrist offered a demoralizing portrait of the typical Jamaican deportee: ‘You don’t know what to eat; you don’t know where to sleep.’ She said that almost 100 percent of deportees deal with depression and anxiety.”).

³⁴ *See infra* notes 36–40.

³⁵ *See Consolidated Appropriations Act of 2014*, Pub. L. No. 113-76, 128 Stat. 5 (providing that Border Patrol funding is contingent on the maintenance of 34,000 immigration detention beds); *see also* KANSTROOM, *AFTERMATH*, *supra* note 21, at 90 (“The average daily population of detained noncitizens has exploded, from approximately 5,500 in 1994, to 19,400 in 2001, and to over 30,000 by the end of 2009.”).

³⁶ DET. WATCH NETWORK, *EXPOSE AND CLOSE: EXECUTIVE SUMMARY 1* (2012) (“ICE currently incarcerates more than 400,000 immigrants every year in 33,400 prison and jail beds.”). This reliance on immigration prisons cannot be separated from the national trend toward imprisonment that has made the United States the country with the largest prison population in the world. The United States now imprisons one of out every hundred people. PEW CTR. ON THE STATES, *ONE IN 100: BEHIND BARS IN AMERICA 2008 5* (2008), available at http://www.pewtrusts.org/~media/legacy/uploadedfiles/wwwpewtrustsorg/reports/sentencing_and_corrections/onein100pdf.pdf, archived at <http://perma.cc/5267-H98A>. Despite having only five percent of the world’s population, the United States now holds twenty-five percent of the world’s prisoners. *The Prison Crisis*, ACLU, <https://www.aclu.org/safe-communities-fair-sentences/prison-crisis> (last visited Apr. 1, 2015), archived at <https://perma.cc/KP3J-L4FZ>. In all, sixty percent of these prisoners are people of color. DEAN SPADE, *NORMAL LIFE* 54 (2011).

³⁷ *See* Alex Altman, *Prison Hunger Strike Puts Spotlight on Immigration Detention*, TIME, Mar. 17, 2014, <http://time.com/27663/prison-hunger-strike-spotlights-on-immigration-detention/>, archived at <http://perma.cc/4LH6-6ZSK> (describing detainee Paulino Ruiz’s hunger strike to protest eating a single boiled potato for each meal, harsh punishment, and making only \$1 per day for custodial work at the Tacoma Detention Center); Bryan Cohen, *Immigrant Detainees Resume Hunger Strike at Washington State Facility*, REUTERS (Mar. 25, 2014, 9:05 PM), <http://www.reuters.com/article/2014/03/26/us-usa-hungerstrike-immigrants-idUSBREA2P03X20140326>, archived at <http://perma.cc/E3W5-6FWK> (reporting that detainees at the Northwest Detention Center in Tacoma, Washington began refusing food to demand im-

cess to health care,³⁸ execrable food quality,³⁹ low pay (\$1/day) for their work,⁴⁰ and discrimination from guards against non-English speakers among their complaints.⁴¹ Hundreds of people have died in detention,⁴² and despite the hunger strikes and other campaigns to close detention centers, conditions remain terrible.⁴³

For many detainees, it is not only the conditions, but also the deprivations of liberty caused by detention that constitute the greatest harm.⁴⁴ While immigration detention is technically civil, and not criminal, in nature, the harsh conditions of detention create what one commentator calls “an unmistakable penal reality for the people confined.”⁴⁵ Describing detention conditions, Cesar Cuauhtemoc Garcia Cardenas argues that “[a]s far as immigration detainees are concerned, it would seem, Congress succeeded at using immigration detention as a method of punishing noncitizens.”⁴⁶ Prisoners in immigration detention centers are held behind locked doors and issued prison uniforms that are color coded to mark their alleged levels of dangerousness, as measured by their past contacts with the criminal legal

proved conditions, and that several protestors were segregated from the general population and placed under medical observation).

³⁸ See SUNITA PATEL & TOM JAWETZ, ACLU NATIONAL PRISON PROJECT, CONDITIONS OF CONFINEMENT IN IMMIGRATION DETENTION FACILITIES 3–7 (2014) (“Among the most common complaint from detainees across the country is inadequate access to medical care.”).

³⁹ See *id.* at 8 (stating that detainees reported expired juices, spoiled food, worms, maggots, roaches, and rocks in their food).

⁴⁰ See Ian Urbina, *Using Jailed Immigrants as a Pool of Cheap Labor*, N.Y. TIMES, May 24, 2014, http://www.nytimes.com/2014/05/25/us/using-jailed-migrants-as-a-pool-of-cheap-labor.html?_r=0, archived at <http://perma.cc/Z3ZS-LSKQ> (reporting that during 2013, at least 60,000 detainees worked for an average of thirteen cents per-hour in immigration detention centers; some employees make one dollar per day, others earn no wages).

⁴¹ Alexis Krell, *330 Detainees Decline Meals at Northwest Detention Center, in Hunger Strike Supporters Say Started Friday*, THE NEWS TRIBUNE, Mar. 9, 2014, <http://www.thenewstribune.com/2014/03/09/3088342/330-detainees-decline-meals-at.html>, archived at <http://perma.cc/2C23-VG5T>.

⁴² See DET. WATCH NETWORK, LIST OF DEATHS IN ICE CUSTODY (2010), available at http://www.detentionwatchnetwork.org/sites/detentionwatchnetwork.org/files/001_detainee_deaths2003-present.pdf, archived at <http://perma.cc/4UCG-7VTT> (cataloguing 115 deaths in immigrant detention from October 2003–November 2010 in a table that describes the cause of death for each individual including numerous hangings, drownings and several diseases); see also Nina Bernstein, *Few Details on Immigrants Who Died in Custody*, N.Y. TIMES, May 5, 2008, <http://www.nytimes.com/2008/05/05/nyregion/05detain.html?pagewanted=1>, archived at <http://perma.cc/6H6L-HHDP> (describing the death of detainee Boubacar Bah, whose family members were not notified of his hospitalization and explaining that deaths are reviewed internally by ICE, which reports them to its inspector general to decide whether the death merits investigation and reporting, and that Congress found that the process leaves too much to the agency’s discretion, allowing “some deaths to be swept under the rug”); Nina Bernstein, *Officials Say Detainee Fatalities Were Missed*, N.Y. TIMES, Aug. 17, 2009, <http://www.nytimes.com/2009/08/18/us/18immig.html>, archived at <http://perma.cc/K9GQ-J44C> (“More than one in 10 deaths in immigration detention in the last six years have been overlooked and were omitted from the official list of detainee fatalities.”).

⁴³ See generally DET. WATCH NETWORK, EXPOSE AND CLOSE, *supra* note 36.

⁴⁴ See generally KANSTROOM, AFTERMATH, *supra* note 21, at 89.

⁴⁵ Cesar Cuauhtemoc Garcia Cardenas, *Immigration Detention as Punishment*, 61 UCLA L. REV. 1346, 1382 (2014).

⁴⁶ *Id.*

system.⁴⁷ They are not allowed to leave the detention center or to move freely within it.⁴⁸ Several times a day, the functions of the detention center slow to a halt as every detainee is counted to ensure that no one has escaped.⁴⁹ Prison administrators choose the times and spaces for detainees to eat, sleep, wake, wash, and socialize.⁵⁰ Except for attorneys, all communication between prisoners and visitors happens through glass partitions.⁵¹ No physical contact between detainees and visitors is allowed.⁵²

Detainees have the right to an attorney, but often they can't afford one. At the Northwest Detention Center, the site of the fifty-six-day detainee hunger strike, ninety percent of prisoners go forward unrepresented and must attempt to parse the complex immigration code while trained government prosecutors, who are ICE employees, argue for their deportation.⁵³ Some detainees are eligible for release after paying a bond, but many cannot pay the bond amounts set.⁵⁴ Many others are subject to mandatory detention while their deportation cases are pending.⁵⁵ A loss before an immigration judge can mean appeals before the Board of Immigration Appeals and a Federal Court of Appeals, which translate to being held for months, or even years, not knowing whether they will be deported.⁵⁶ For some, the humilia-

⁴⁷ See generally U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, ICE/DRO DETENTION STANDARD (2008), available at http://www.ice.gov/doclib/dro/detention-standards/pdf/classification_system.pdf, archived at <http://perma.cc/39AH-ULRD> (requiring staff to classify detainees by risk level based, in large part, upon a detainee's criminal history).

⁴⁸ HUMAN RIGHTS FIRST, JAILS AND JUMPSUITS: TRANSFORMING THE U.S. IMMIGRATION DETENTION SYSTEM—A TWO-YEAR REVIEW 8 (2011).

⁴⁹ *Id.* at 7.

⁵⁰ *Id.* at 8.

⁵¹ *Id.* at 9.

⁵² *Id.* See also Angélica Cházaro, *Rolling Back the Tide: Challenging the Criminalization of Immigrants in Washington State*, 11 SEATTLE J. SOC. JUST. 127, 135 (2012). Descriptions of detention center conditions are based on the author's own observations. For more information about human rights issues at the Northwest Detention Center, see SEATTLE UNIV. SCH. OF LAW INT'L HUMAN RIGHTS CLINIC, VOICES FROM DETENTION: A REPORT ON HUMAN RIGHTS CONDITIONS AT THE IN TACOMA 5 (2008), available at http://www.weareoneamerica.org/sites/default/files/OneAmerica_Detention_Report.pdf, archived at <http://perma.cc/E82K-33A5>.

⁵³ See KANSTROOM, AFTERMATH, *supra* note 21, at 52 (listing the numerous due process concerns for detained immigrants including no right to counsel, no right to bail, no right to have illegally seized evidence suppressed, no right against ex post facto laws, no right to a jury trial, no right against selective prosecution, limited judicial review, and a low "fundamentally fair" standard that allows incompetent court-appointed interpreters).

⁵⁴ See AMNESTY INT'L, JAILED WITHOUT JUSTICE: IMMIGRATION DETENTION IN THE USA 17 (2009), available at <http://www.amnestyusa.org/pdfs/JailedWithoutJustice.pdf>, archived at <http://perma.cc/2UXP-8ZQG> ("The minimum bond that may be set by an immigration judge is \$1,500, but bonds are regularly set at much higher rates. Across the United States, the average immigration bond is \$5,941.").

⁵⁵ See 8 U.S.C. § 1226(c) (2012) (imposing mandatory detention on immigrants who have committed a wide-range of offenses including the nebulous "crime of moral turpitude.").

⁵⁶ See Farrin R. Anello, *Due Process and Temporal Limits on Mandatory Immigration Detention*, 65 HASTINGS L.J. 363, 369 (2014) (citing expert declaration finding that the average detention for mandatory detainees was 427 days).

tions of prison life trump all else, so they give up fighting their cases, preferring the harms of exile to the harms of imprisonment.⁵⁷

About half of immigrant detainees are held not in immigration detention centers, but instead in county jails, with the federal government providing funding to local jail systems in exchange for holding detainees.⁵⁸ The abuses prevalent in the ICE facilities are heightened in the county facilities, where local officials frequently ignore ICE's detention standards.⁵⁹

Additionally, a growing number of immigrants face another form of immigration imprisonment—incarceration in federal prisons for the immigration crimes of unlawful entry and unlawful re-entry. Scholars have tracked the tremendous growth in the prosecution of immigration crimes for the enforcement of immigration laws.⁶⁰ In 1993, 5,400 individuals were convicted of unlawful entry or re-entry.⁶¹ In 2013, that number was 92,215.⁶² This form of immigration imprisonment is set to continue to grow, as the millions deported under the Obama Administration attempt return crossings that subject them to criminal prosecution, followed inevitably by deportation.⁶³

Even for those who do face the sometimes years-long removal process outside of detention, the impacts on their mental health from constantly facing deportation are tremendous. Participants in a 2008 study on the effects of deportation included reports of feelings of sadness, loss of energy, hopelessness, crying, anxiety, lost sleep, weight loss and again, anger, fear, distrust, nightmares, and worry.⁶⁴ These feelings extend to those who are not yet in removal proceedings, as the fear of deportation remains a constant for those

⁵⁷ AMNESTY INT'L, *supra* note 54, at 20.

⁵⁸ See KANSTROOM, *AFTERMATH*, *supra* note 21, at 90–91 (“Detention also became a growth enterprise for both private companies and a few counties, which received substantial federal funding to run ICE operations.”).

⁵⁹ See generally U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, PERFORMANCE-BASED NATIONAL DETENTION STANDARDS 2011, available at <http://www.ice.gov/doclib/detention-standards/2011/pbnds2011.pdf>, archived at <http://perma.cc/ZJ77-EGQ2> [hereinafter *2011 Operations Manual*] (outlining ICE's standards for detention); Kelsey E. Papst, *Protecting the Voiceless: Ensuring ICE's Compliance with Standards that Protect Immigrant Detainees*, 40 McGEORGE L. REV. 261, 275–76 (2009) (describing ICE's failure to comply with its own standards).

⁶⁰ See generally Jennifer Chacón, *Overcriminalizing Immigration*, 102 J. CRIM. L. & CRIMINOLOGY 613 (2013) (tracking major development in immigration law and immigration enforcement that have led to criminalization of immigrants, including growth in federal prosecutions of immigration crimes).

⁶¹ *Id.* at 635.

⁶² *Despite Rise in Felony Charges, Most Immigration Convictions Remain Misdemeanors*, TRAC IMMIGRATION PROJECT (June 26, 2014), <http://trac.syr.edu/immigration/reports/356/>, archived at <http://perma.cc/MQ2N-WKB8>.

⁶³ See generally ERIN R. HAMILTON, POLICY BRIEF CTR. FOR POVERTY RESEARCH, DEPORTEES WILL RISK HARSH PENALTIES TO RETURN TO FAMILIES IN U.S. (2014).

⁶⁴ See *2011 Operations Manual*, *supra* note 59, at 142.

who have not yet come into contact with immigration enforcement, but fear doing so on a daily basis.⁶⁵

"Illegality" also increases vulnerability and limits life chances beyond the constant risk of detention and removal. Lacking lawful status is a source of tremendous harm in the workplace. The undocumented constitute approximately 5.1% of the country's workforce, and approximately ten percent of the labor force in California, Texas, and Nevada.⁶⁶ Without the protections of employment authorization and social security numbers, they are subject to the whims of their employers. Undocumented workers are overrepresented in farm work,⁶⁷ the construction industry, and the service industry, as well as in what Aviva Chomsky calls "in-sourced" professions—professions like meat-packing that have moved from unionized, urban centers to rural areas where immigrants are brought to the point of production, with a corresponding deterioration in working conditions and reduction in wages.⁶⁸ Chomsky notes that these jobs are characterized by "low pay, insecurity and lack of benefits, difficult hours, and isolated, heavy, sometimes dangerous working conditions."⁶⁹ The theft of wages is a common harm, with one study showing that forty-one percent of Texas construction workers are subject to payroll fraud.⁷⁰

Supreme Court decisions like *Hoffman Plastic Compounds Inc. v. NLRB*,⁷¹ which denied back pay for undocumented workers, have cemented their vulnerability by limiting their capacity to fight against workplace

⁶⁵ The pervasive fear of deportation is clearest in the case of survivors of domestic violence and others at-risk groups; fear of removal is so great that it is often cited by people suffering abuse in domestic violence relationships as the primary reason they remain with their abusive partner. See Tien-Li Loke, *Trapped in Domestic Violence: The Impact of United States Immigration Laws on Battered Immigrant Women*, 6 B.U. PUB. INT. L.J. 589, 591 (1997) ("Battered immigrant women live with a fear that is unique to their situation—fear of deportation. This is the single largest concern for battered immigrant women seeking to leave an abusive relationship."). See generally Sarah Rebecca Sullivan & Amy Cosentino, *Immigration, Domestic Violence, and What the Family Practitioner Should Know*, 81 FLA. B.J. 47 (2007) (explaining that underlying cultural pressures, and use of immigration status as a control device by the abuser, is a fear that the legal system will deport an undocumented victim who reports domestic violence).

⁶⁶ See JEFFREY S. PASSEL & D'VERA COHN, PEW RESEARCH HISPANIC TRENDS PROJECT, UNAUTHORIZED IMMIGRANT TOTALS RISE IN 7 STATES, FALL IN 14 (2014), <http://www.pewhispanic.org/2014/11/18/authorized-immigrant-totals-rise-in-7-states-fall-in-14/>, archived at <http://perma.cc/ACB8-FZC2>.

⁶⁷ See AVIVA CHOMSKY, UNDOCUMENTED: HOW IMMIGRATION BECAME ILLEGAL 118 (2014) (estimating that undocumented workers in farming range from twenty percent to ninety percent); PASSEL & COHN, UNAUTHORIZED IMMIGRANT TOTALS, *supra* note 66 (estimating twenty-five percent of farm workers are undocumented).

⁶⁸ See *id.* at 134 (explaining that meatpacking wages fell forty-five percent between 1980 and 2007, and that by the late 1990s, "fully a quarter of meatpacking workers were estimated to be undocumented").

⁶⁹ *Id.* at 142.

⁷⁰ *Id.* at 131.

⁷¹ 535 U.S. 137, 150–52 (2002).

abuses.⁷² Beyond *Hoffman*, the fear of being reported to immigration authorities keeps many workers from acting as whistleblowers and reporting harmful conditions. While the Obama Administration has eschewed the spectacular violence of the workplace raids of the Bush era,⁷³ its focus on “soft” raids—paperwork-based raids that involve checking on employment authorization documents and mass resignations or firings—has resulted in the harms associated with loss of employment for thousands of workers.⁷⁴

The combination of difficult working conditions brought about by a lack of employment authorization and lack of access to health coverage⁷⁵ means that undocumented people’s workplace injuries often go unaddressed, leading to long-term injuries and shortened life spans.⁷⁶ Farmworkers and meat packing workers particularly bear the brunt of exploitative labor conditions and lack of health care—repetitive stress injuries are rampant, and working years are shortened for many undocumented workers by the combination of brutal working conditions and lack of treatment for injuries.⁷⁷

Lack of status also increases harm by denying the undocumented access to the protections of the social safety net, including food stamps, medical care, and cash assistance.⁷⁸ As limited as these forms of assistance have become to citizens in the years since “the end of welfare as we know it” in

⁷² See Maria L. Ontiveros, *Immigrant Workers’ Rights in a Post-Hoffman World: Organizing Around the Thirteenth Amendment*, 18 GEO. IMMIGR. L.J. 651, 656 (2004) (describing the application of *Hoffman* throughout the lower courts). A narrow reading limits the ability of the NLRB to award back pay to undocumented workers. *Id.* A broader reading precludes claims for back pay or other remedies under other labor statutes. *Id.* The broadest reading precludes all claims under the theory that an undocumented worker never had a right to enter employment. *Id.*

⁷³ See KANSTROOM, *AFTERMATH*, *supra* note 21, at 54–55.

⁷⁴ See generally David Bacon & Bill Ong Hing, *The Rise and Fall of Employer Sanctions*, 38 FORDHAM URB. L.J. 77 (2010) (arguing that the “softer” approach to employer sanctions enforcement is not “gentle” for the thousands of workers terminated pursuant to paperwork raids).

⁷⁵ See Seth Motel & Eileen Patten, *Statistical Portrait of the Foreign-Born Population of the United States, 2011*, PEW RESEARCH HISPANIC TRENDS PROJECT (Jan. 29, 2013), <http://www.pewhispanic.org/2013/01/29/statistical-portrait-of-the-foreign-born-population-in-the-united-states-2011/#38>, archived at <http://perma.cc/K26U-ACQM>. More than half of adult unauthorized immigrants (fifty-one percent) had no health insurance during all of 2011. *Id.* Among their children, over one-third of those who are unauthorized immigrants (thirty-four percent) were uninsured and 10.9% of those who were born in the U.S. were uninsured. *Id.*

⁷⁶ See CHOMSKY, *supra* note 67, at 132 (presenting a study of construction workers in Texas found that one in five will require hospitalization for a workplace injury).

⁷⁷ See, e.g., Human Rights Watch, *Blood, Sweat, and Fear: Workers’ Rights in U.S. Meat and Poultry Plants* 29 (2004) (“Almost every worker interviewed by Human Rights Watch for this report began with a story of a serious injury he or she suffered in a meat or poultry plant, injuries reflected in their scars, swellings, rashes, amputations, blindness, or other afflictions.”).

⁷⁸ See Aileen L. Lachs, *Some Repair of the Damage: Alien Eligibility for Public Benefits*, 24 VT. B.J. & L. DIG. 45, 45 (1998); Tanya Broder & Jonathan Blazer, *Overview of Immigrant Eligibility for Federal Programs*, NATIONAL IMMIGRATION LAW CENTER, <http://www.nilc.org/overview-immeligfedprograms.html> (last updated Oct. 2011), archived at <http://perma.cc/EEM3-M36L>.

1996,⁷⁹ they are virtually unavailable to the undocumented, except for the handful of states that have chosen to provide these protections despite the federal government's limitations.⁸⁰ The low-wage work available to the undocumented and the lack of access to the social safety net likely contributes to one fifth of adult unauthorized immigrants living in poverty, double the rate of their U.S.-born counterparts.⁸¹ Notably, undocumented immigrants "do not attain markedly higher incomes the longer they live in the United States,"⁸² a fact that underlines the relatively permanent nature of the harms of poverty related to "illegality."

Lack of identification related to "illegality" also produces harm. Few states grant driver's licenses to those without lawful status.⁸³ The opposition to providing licenses to unauthorized migrants peaked in the years following 9/11, when national security concerns came to the forefront.⁸⁴ Without a driver's license, the very act of driving to work, to school, or to the grocery store becomes criminalized. Being pulled over for a traffic infraction can lead to repeated convictions for driving without a license, arrests, and detention and deportation.⁸⁵ Because driving without a license often equals driving uninsured, minor car accidents become debt-producing moments, harming undocumented people financially. Most states and municipalities will not provide a state or municipal ID as an alternative to the driver's license, and the forms of identification the undocumented do have are often not recognized.⁸⁶ Without government-issued ID, many other transactions

⁷⁹ Personal Responsibility And Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105.

⁸⁰ See SHAWN FREMSTAD & LAURA COX, KAISER COMM'N ON MEDICAID & THE UNINSURED, COVERING NEW AMERICANS: A REVIEW OF FEDERAL AND STATE POLICIES RELATED TO IMMIGRANTS' ELIGIBILITY AND ACCESS TO PUBLICLY FUNDED HEALTH INSURANCE *i* (2004), available at <https://kaiserfamilyfoundation.files.wordpress.com/2013/01/covering-new-americans-a-review-of-federal-and-state-policies-related-to-immigrants-eligibility-and-access-to-publicly-funded-health-insurance-report.pdf>, archived at <https://perma.cc/6ZX8-JVZ6>.

⁸¹ Median household income of unauthorized immigrants was \$36,000 in 2007 as compared to \$50,000 for their U.S.-resident counterparts. See JEFFREY S. PASSEL & D'VERA COHN, PEW RESEARCH HISPANIC TRENDS PROJECT, A PORTRAIT OF UNAUTHORIZED IMMIGRANTS IN THE UNITED STATES (2009), available at <http://www.pewhispanic.org/files/reports/107.pdf>, archived at <http://perma.cc/RG82-2XBA>.

⁸² *Id.*

⁸³ For a survey of recent efforts to expand undocumented immigrants' access to driver's licenses, see NAT'L IMMIGRATION LAW CTR., INCLUSIVE POLICIES ADVANCE DRAMATICALLY IN THE STATE: IMMIGRANTS' ACCESS TO DRIVER'S LICENSES, HIGHER EDUCATION, WORKERS' RIGHTS, AND COMMUNITY POLICING 1-6 (2013).

⁸⁴ Kevin R. Johnson, *Driver's Licenses and Undocumented Immigrants: The Future of Civil Rights Law?*, 5 NEV. L.J. 213, 217 (2004).

⁸⁵ See *Secure Communities and ICE Deportation: A Failed Program?*, TRAC IMMIGRATION PROJECT (Apr. 8, 2014), <http://trac.syr.edu/immigration/reports/349/>, archived at <http://perma.cc/4MM4-CQL7> (presenting an analysis of ICE deportation records that shows 47,249 deportations for traffic violations in 2013 alone).

⁸⁶ See, e.g., CTR. FOR POPULAR DEMOCRACY, WHO WE ARE: MUNICIPAL ID CARDS AS A LOCAL STRATEGY TO PROMOTE BELONGING AND SHARED COMMUNITY IDENTITY 8 (2013), available at <http://populardemocracy.org/sites/default/files/municipal%20id%20report.pdf>, archived at <http://perma.cc/4QUC-TKDU>. The undocumented may possess consular ID cards issued by their country of origin, current or expired US visas or foreign passports, drivers

(leasing an apartment, registering for school, opening a bank account) are likewise limited, furthering vulnerability.⁸⁷

The undocumented also face limited access to higher education, as lawful status is a prerequisite for federal financial aid and loans, as well as for many private loans, and higher education remains out of reach.⁸⁸ Homeownership and business ownership may also remain unattainable, because of similar limiting of loans to those with lawful status (and the valid social security numbers that accompany that status).⁸⁹

It is important to note that the harms described above do not apply equally to all of the undocumented. The primary vulnerability—the vulnerability to enforcement that results in the harms of detention and deportation—disparately affects immigrants who entered without inspection (colloquially known as “EWIs”). Approximately forty percent of people without lawful status in the United States have overstayed their visas—they had permission to enter the country but have stayed past the permission granted by their visa or otherwise violated the terms of their visa.⁹⁰ And yet the bulk of immigration enforcement, and thus the bulk of the harms of detentions and deportation, are carried out against the undocumented who entered without inspection.⁹¹

The racial and class implications of this focused enforcement cannot be underestimated. Express racial exclusions were eliminated from the immigration laws by the Immigration Act of 1965,⁹² ending decades of facially discriminatory national origins quotas⁹³ that openly favored white, northern European migration to the United States.⁹⁴ However, the racial and class

licenses or birth certificates. *Id.* “In most case these forms of ID will not be sufficient to grant access to basic services in US cities.” *Id.*

⁸⁷ *Id.* at 7 (“Without the right form of ID you may not be able to open a bank account or even cash a check, see a doctor at a hospital, register your child for school, apply for public benefits, file a complaint with the police department, borrow a book from a library, vote in an election, or even collect a package from the post office.”).

⁸⁸ See Marino Alexio et al., *Analysis of Policies Toward Applications from Undocumented Immigrant Students at Big Ten Schools*, 30 LAW & INEQ. 1, 2 (2012) (“Each year an estimated sixty-five thousand undocumented students who graduate from high school are unable to pursue their dreams of attending college because of their lack of legal immigration status in the United States.”). See generally 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 (2012) (describing attempts by state legislature to modify and limit higher education access to undocumented students in the wake of the failure of the 2010 DREAM Act).

⁸⁹ See, e.g., CTR. FOR POPULAR DEMOCRACY, *supra* note 86 and accompanying text.

⁹⁰ See Kevin R. Johnson, *The Intersection of Race and Class in U.S. Immigration Law and Enforcement*, 72 LAW & CONTEMP. PROBS. 1, 21 (2009).

⁹¹ *Id.*

⁹² Pub. L. No. 89-236, 79 Stat. 911 (1965) (codified as amended in scattered sections of 8 U.S.C. (2012)).

⁹³ See Johnson, *Intersection of Race and Class*, *supra* note 90, at 3.

⁹⁴ See, e.g., Chinese Exclusion Act, ch. 126, 22 Stat. 58 (1882) (barring entry to all Chinese whether or not they had a “certificate of re-entry”); Act of Oct. 19, 1888, 25 Stat. 565 (suspending Chinese immigration for another ten years; and providing for the deportation of those who could not obtain a certificate of residence in the United States within one year); Act

impact of immigration laws and immigration enforcement only altered form with this change. As Kevin Johnson explains,

Although Congress eliminated the racial exclusions from the immigration laws, provisions of the current U.S. Immigration laws regulating entry into the United States, such as economic litmus tests and arbitrary annual limits on the number of immigrants per country, have racially disparate impacts. Everything else being equal, people from the developing world—predominantly “people of color” as that category is popularly understood in the United States—find it much more difficult under the U.S. immigration laws to migrate to this country than similarly situated noncitizens from the developed (and predominantly white) world . . . Although racial exclusions are something of the past, the express—and aggressive—exclusion of the poor remains a fundamental function of modern U.S. immigration law.⁹⁵

This exclusion of poor people of color from lawful migration channels forces this population into unlawful migration channels, and, ultimately, into permanently remaining in the United States rather than risking the harms of repeated border crossings associated with cyclical migration.

The inability of poor people of color to migrate lawfully to the United States contrasts starkly with the avenues available to the predominantly wealthier residents of nations in the Global South, as well as with the comparative ease of movement that citizens of wealthier nations enjoy.⁹⁶ The vetting process for visa-holders entering the United States favors those who can show significant wealth in their home country, with the assumption being that those who have financial ties to their home countries will not be coming to the United States to stay. With avenues for lawful entry remaining closed to them, poor and working class people tend to enter without inspec-

of May 5, 1892, 27 Stat. 25 (suspending Chinese immigration for another ten years; and provided for the deportation of those who could not obtain a certificate of residence in the United States within one year); Act of April 29, 1902, 32 Stat. 176 (extending as permanent the Chinese Exclusion law); Act to Repeal the Chinese Exclusion Act, to Establish Quotas, and for Other Purposes, Pub. L. No. 78-199, 57 Stat. 600 (1943) (suspending the entry of Chinese laborers for ten years, allowing those in the United States who traveled abroad to return only if they could present a certificate of reentry, and prohibiting naturalization of Chinese nationals); *see also* Chae Chan Ping v. United States (The Chinese Exclusion Case), 130 U.S. 581, 623–24 (1889) (rejecting a constitutional challenge to the Chinese Exclusion Act by finding that Congress had the power exclude aliens from, or prevent their return for any reason it may deem sufficient).

⁹⁵ See Johnson, *Intersection of Race and Class*, *supra* note 90, at 3.

⁹⁶ See *Visa Waiver Program Overview*, BUREAU OF CONSULAR AFFAIRS, U.S. DEP'T OF STATE, <http://travel.state.gov/content/visas/english/visit/visa-waiver-program.html> (last visited Mar. 30, 2015), archived at <http://perma.cc/9982-8MFZ> (explaining that for the thirty-eight eligible countries, citizens may use the Visa Waiver Program to travel to the United States without a visa for stays of ninety days or less). For a graphic representation of the relative power of national passports to provide travel freedom, see Ricky Linn, *How Powerful is Your Passport?*, GOOD MAG. (June 20, 2014), <http://magazine.good.is/infographics/how-powerful-is-your-passport#open>, archived at <http://perma.cc/S2SY-RC7Z>.

tion,⁹⁷ and are further impoverished by the debt owed to the smugglers who bring them to the United States.⁹⁸ These harms of “illegality” also accrue on the basis of national origin: approximately fifty-nine percent of undocumented immigrants are from Mexico,⁹⁹ but sixty-eight percent of those who were deported in 2013 were of Mexican origin.¹⁰⁰

The poor and working class people who enter the country without inspection are subjected to enforcement both at the moment of entering the country and through internal enforcement efforts. The levels of harm experienced by migrants at the U.S.-Mexico border have been well documented, and have increased since the implementation of a “prevention through deterrence” strategy begun in the mid-1990s.¹⁰¹ This strategy has led to a doubling of migrant deaths since 1995.¹⁰² Death is now a daily occurrence for migrants—the Border Patrol reported 445 people died in crossing in 2013 and 447 in 2012.¹⁰³ Because many bodies are never found, the number is likely higher.¹⁰⁴ The Border Patrol themselves have directly added to the death toll—shooting deaths of unarmed migrants by Border Patrol agents have been recorded, with international human rights monitors expressing alarm at the culture of impunity within the agency.¹⁰⁵ Death is only the most extreme harm suffered by the poor immigrants of color crossing the southern border. Those who survive suffer from the physical and psychological toll of the crossing, during which they are frequently robbed and raped, often by the very smugglers they have paid.¹⁰⁶ For those caught and detained by the

⁹⁷ See Johnson, *Intersection of Race and Class*, *supra* note 90, at 21.

⁹⁸ See Richard L. Johnson, *Migrant Debts and Obama's Non-Solution to the Child Immigrant Crisis*, HUFFINGTON POST (Aug. 10, 2014), http://www.huffingtonpost.com/richard-l-johnson/migrant-debts-and-obamas_b_5663821.html, archived at <http://perma.cc/UH7D-MNSJ>.

⁹⁹ PASSEL & COHN, UNAUTHORIZED IMMIGRANT TOTALS, *supra* note 66, at 21.

¹⁰⁰ See U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, ERO ANNUAL REPORT: FY 2013 ICE IMMIGRATION REMOVALS 4 (2013), available at <https://www.ice.gov/doclib/about/offices/ero/pdf/2013-ice-immigration-removals.pdf>, archived at <https://perma.cc/J78W-66EQ>.

¹⁰¹ See David K. Androff & Kyoko Y. Tavassoli, *Deaths in the Desert: The Human Rights Crisis on the U.S.-Mexico Border*, 57.2 SOC. WORK 165, 167 (2012).

¹⁰² See generally U.S. GOV'T ACCOUNTABILITY OFFICE, REP. NO. GAO-06-770, ILLEGAL IMMIGRATION: BORDER-CROSSING DEATHS HAVE DOUBLED SINCE 1995; BORDER PATROL'S EFFORTS TO PREVENT DEATHS HAVE NOT BEEN FULLY EVALUATED (2006).

¹⁰³ *Southwest Border Sectors: Southwest Border Deaths By Fiscal Year*, U.S. BORDER PATROL, <http://www.cbp.gov/sites/default/files/documents/U.S.%20Border%20Patrol%20Fiscal%20Year%20Statistics%20SWB%20Sector%20Deaths%20FY1998%20-%20FY2013.pdf> (last visited Mar. 30, 2015), archived at <http://perma.cc/AS85-4LWP>.

¹⁰⁴ See Androff & Tavassoli, *supra* note 101, at 167 (“Medical examiners can only investigate deaths where remains are recovered; as most of the Sonoran desert is an uninhabited, remote wilderness, the discovery of remains is dependent on their identification by U.S. Border Patrol agents or others, and researchers agree that not all remains are recovered . . .”).

¹⁰⁵ See *The IACHR Expresses Deep Concern Over the Deaths of Migrants Caused by the U.S. Border Patrol*, INTER-AM. COMM'N ON HUMAN RIGHTS, ORG. OF AM. STATES (Feb. 24, 2014), http://www.oas.org/en/iachr/media_center/PReleases/2014/018.asp, archived at <http://perma.cc/5HSK-UNQ5>.

¹⁰⁶ Jude Joffe-Block, *Women Crossing the U.S. Border Face Sexual Assault with Little Protection*, PBS NEWSHOUR (Mar. 31, 2014), <http://www.pbs.org/newshour/updates/facing-risk-rape-migrant-women-prepare-birth-control/>, archived at <http://perma.cc/J97A-YG4U>.

Border Patrol, the harms of incarceration—whether in the form of immigrant detention or of federal incarceration for the crimes of illegal entry or illegal re-entry—are added to their suffering.

Racial profiling and high levels of internal enforcement mean that immigrants who make it through the border gauntlet remain vulnerable to the harms of detention and removal.¹⁰⁷ The ever-increasing connection between local criminal authorities and federal immigration enforcement authorities provides one of the primary points of vulnerability. The over-policing of communities of color poses extra dangers to young immigrant men of color whose interactions with local law enforcement frequently lead to their transfer to immigration custody.¹⁰⁸

Kevin Johnson rightly points out the importance of examining the harms suffered by migrants through an intersectionality framework,¹⁰⁹ as migrants at the intersection of various identities (women, LGBT migrants, people with disabilities) face heightened harms related to the way their lack of lawful status interacts with their other identities.¹¹⁰ Given the extreme nature of these intersecting harms, the solution posited has been to legalize those facing them—in essence, to move them to a category of persons that is not subject to these harms. However, as described below, the rhetoric employed to push for legalization ends up excluding those most likely to suffer the brunt of the harms of “illegality.”

II. THE POLITICS OF RESPECTABILITY: A CENTRAL IMMIGRANT RIGHTS MOVEMENT DYNAMIC

As described in the Introduction, immigrant rights advocates focus on pursuing legalization as their primary strategy for addressing the harms facing immigrant communities. The single-minded emphasis on obtaining law-

¹⁰⁷ See, e.g., Bennett Capers, *Crime Legitimacy, and Testifying*, 83 IND. L.J. 835, 850 (2008) (“A report by the Maryland State Police found that African Americans comprised 72.9% of all of the drivers that were stopped and searched along a stretch of Interstate 95, even though they comprised only 17.5% of the drivers violating traffic laws on the road.”); Poojah Gehi, *Gendered Insecurity: Migration and Criminalization in the Security State*, 35 HARV. J.L. & GENDER 357, 365 (2012) (“The United States has a long history of hyper-criminalization, disproportionate imprisonment, and law enforcement profiling of people of color.”); April Walker, *Racial Profiling-Separate and Unequal Keeping the Minorities in Line-The Role of Law Enforcement in America*, 23 ST. THOMAS L. REV. 576, 587 (2011) (arguing that racial profiling and implicit bias makes people of color more likely to be victims of police brutality and over enforcement). See generally Bennett Capers, *Rethinking the Fourth Amendment: Race, Citizenship and the Equality Principle*, 46 HARV. C.R.-C.L. L. REV. 1 (2011).

¹⁰⁸ See Chacón, *Overcriminalizing Immigration*, *supra* note 60, at 650.

¹⁰⁹ See Johnson, *Intersection of Race and Class*, *supra* note 90, at 34.

¹¹⁰ See, e.g., Gehi, *supra* note 107, at 357–75 (2012) (arguing that transgendered, undocumented immigrants face even higher risks of improper treatment). The combination of racial profiling, a susceptibility to poverty through employment discrimination, susceptibility to survival crimes, as well as misidentification of transgendered people as prostitutes result in unique vulnerabilities to the population of transgender immigrants before, during, and after detention. *Id.*

ful status for unauthorized immigrants leads to advocacy squarely in line with a recurring civil rights dynamic—the engagement of the politics of respectability to advance gains for stigmatized groups. According to Professor Randall Kennedy, the politics of respectability requires a stigmatized group to make every effort to present itself so as to enhance the “reputation of the group” and “avoid the derogatory charges lying in wait in a hostile environment.”¹¹¹ In line with the politics of respectability, the stigmatized group seeks to distance itself as far as possible from negative stereotypes.¹¹² If the stigmatized group presents themselves as above reproach, the idea is that those in power will have no choice but to see and accept them as fully human, productive members of society.¹¹³ The onus of ending the harm relating to the stigmatized identity is on those experiencing the harm, through individual action and personal responsibility.

In the context of immigration, immigrant advocates do their utmost to enhance the reputation of the undocumented and distance them from the “criminals” through constant appeals to immigrants’ purportedly hard-working, law-abiding nature.¹¹⁴ These appeals are carried out by everyone from executive directors of large immigrant advocacy organizations to individual immigrants marching with signs proclaiming, “We are not criminals, we are workers.”¹¹⁵ The goal of these interventions is to make legalization inevitable for some percentage of the unauthorized migrant population.

As in other civil rights struggles, the embrace of the respectable immigrant by pro-immigrant groups is a predictable reaction to decades of negative portrayals of immigrants. While anti-immigrant animus is not a new story in the United States, changes to the immigration laws in the 1960s led

¹¹¹ Devon Carbado, *(E)racing the Fourth Amendment*, 100 MICH. L. REV. 946, 1039 (2002) (quoting RANDALL KENNEDY, *RACE, CRIME AND THE LAW* 20 (1997)).

¹¹² *Id.*

¹¹³ See SPADE, *supra* note 36, at 223 (“We are invited to demand that trans people are ‘human’ when ‘human’ is still defined through norms of race, indignity, gender, ability, and immigration status that actually limit the invitation to a very small part of the trans population.”).

¹¹⁴ See *About the Campaign*, REFORM IMMIGRATION FOR AM., <http://reformimmigrationforamerica.org/blog/item/15-0about.html> (last visited Mar. 30, 2015), *archived at* <http://perma.cc/2Q7L-7YSM> (“We are reaching out to all Americans who want a common-sense solution to our broken immigration system that strengthens equal opportunity and the rule of law, treats hardworking immigrant families with respect and dignity, and moves all communities and families in America forward together. If you agree, please join us today.”); *Why You Should Care About Immigration*, LEADERSHIP CONFERENCE ON CIVIL & HUMAN RIGHTS, <http://www.civilrights.org/immigration/care.html> (last visited Mar. 30, 2015), *archived at* <http://perma.cc/ZZ4B-9NAG> (“Hard-working immigrants who are contributing to this country should be encouraged to come out of the shadows and regularize their status.”).

¹¹⁵ Daniel Altschuler, *Immigrant Activists Regroup*, NATION, Dec. 2, 2010, <http://www.thenation.com/article/156809/immigrant-activists-regroup#>, *archived at* <http://perma.cc/94P2-JXZA> (“As Andrew Friedman, co-executive director of Make the Road New York, explained, ‘This issue is made understandable through the experiences of actual people. Everyone can raise the specter of the negative impact of immigrants. But when you actually look at it, you’ve got hardworking folks, raising kids, who are going to school—the stories are on our side.’”); see also ANNE MCNEVIN, *CONTESTING CITIZENSHIP: IRREGULAR MIGRANTS AND NEW FRONTIERS OF THE POLITICAL* 127–28 (2013).

to the surge in unauthorized migration by Mexican immigrants.¹¹⁶ The Immigration Act of 1965 for the first time imposed a quota on migration from the Western Hemisphere.¹¹⁷ Douglas Massey and others have argued that this move, in conjunction with the simultaneous end of the Bracero Program (a 1942 wartime guest-worker measure for short-term admission of Mexican migrants) led directly to the creation of a large unauthorized Mexican immigrant population.¹¹⁸ Massey posits that “illegal migration rose after 1965 not because there was a sudden surge in Mexican migration, but because the temporary labor program had been terminated and the number of permanent resident visas had been capped, leaving no legal way to accommodate the long-established flows.”¹¹⁹

The rise of what Luis Chavez calls the “Latino threat” narrative in U.S. media followed, with negative media portrayals rising steadily after the 1960s.¹²⁰ Immigration began to be framed as a crisis, and the use of both marine metaphors (Latino immigrants as a “rising tide,” a “flood,” “drowning” American culture) and martial metaphors (immigrants as “invaders” against whom Border Patrol agents tried to “defend” and “hold the line”) proliferated.¹²¹ Politicians quickly latched onto the narrative, embracing the benefits of demonizing Latinos and unauthorized immigrants.¹²² The threat narrative gained new dimensions with the Oklahoma City bombing and first World Trade Center bombings in the mid-1990s, leading to the passage of laws criminalizing immigration in unprecedented ways.¹²³ Post-9/11, the perceived foreign terror threat has justified further enforcement-heavy legislative and policy responses to immigration.¹²⁴

¹¹⁶ See *infra* notes 155–158.

¹¹⁷ Pub. L. No. 89-236, 79 Stat. 911 (codified as amended in scattered sections of 8 U.S.C.).

¹¹⁸ See Douglas Massey & Karen Pren, *Unintended Consequences of US Immigration Policy: Explaining the Post-1965 Surge from Latin America*, 38 *POPUL. DEV. REV.* 1, 3 (2012).

¹¹⁹ *Id.* at 5.

¹²⁰ *Id.* at 5–6.

¹²¹ Massey & Pren, *supra* note 118, at 6.

¹²² *Id.* at 5.

¹²³ See, e.g., Illegal Immigration Reform and Immigration Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (codified as amended in scattered sections of 8, 18 U.S.C.); Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended at 8 U.S.C. § 1182); see also Chacón, *Overcriminalizing Immigration*, *supra* note 60, at 642 (arguing that the Antiterrorism and Effective Death Penalty Act (“AEDPA”) and the Illegal Immigration Reform and Immigration Responsibility Act (“IIRIRA”) expanded the power of the state and local law enforcement to enforce immigration laws in three ways: AEDPA allowed sub-federal law enforcement to arrest and detain noncitizens convicted of a felony, and IIRIRA allowed the Attorney General to authorize local officials to enforce immigration laws, and to delegate enforcement authority to state and local police).

¹²⁴ See, e.g., USA PATRIOT Act of 2001, Pub. L. No. 107-56, 115 Stat. 272; Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 213 (abolishing the Immigration and Naturalization Service and transferring a majority of immigration functions to the newly created DHS); REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 231.

Given this backdrop, immigrant advocates have unsurprisingly embraced respectability as the obvious response to imagery depicting unauthorized migrants as threats to the nation.¹²⁵ The myriad negative stereotypes attached to unauthorized migration have therefore been met with the deployment of blanket stereotypes of immigrants as hard-working, law-abiding, family-loving people.

However, the profile of the acceptable unauthorized immigrant, worthy of being placed on the pathway to citizenship, is one riddled with contradictions. The acceptable immigrant must be paying their taxes,¹²⁶ implying that they have been and are currently employed, even though their work is unauthorized and their employer is breaking the law by paying them.¹²⁷ They must have managed to avoid arrest, despite, in many states, lacking a driver's license,¹²⁸ and thus violating traffic laws on a daily basis, and lacking a valid social security number, and thus possibly committing identity theft to earn their paycheck.¹²⁹ The acceptable immigrant preferably has U.S. citizen children,¹³⁰ but hopefully not too many of them,¹³¹ and despite their likely low wages, they ideally have not had to rely on public benefits to assist them in

¹²⁵ See Elizabeth Keyes, *Defining American: The Dream Act, Immigration Reform and Citizenship*, 14 Nev. L.J. 101, 112 (2013); Elizabeth Keyes, *Race and Immigration, Then and Now: How the Shift to "Worthiness" Undermines the 1965 Immigration Law's Civil Rights Goals*, 57 How. L.J. 899, 914–15 (2014).

¹²⁶ See, e.g., Border Security, Economic Opportunity, and Immigration Modernization Act, S. 744, 113th Cong. § 245c(b)(2) (as passed by Senate June, 27, 2013) ("An applicant may not file an application for adjustment of status under this section unless the applicant has satisfied any applicable Federal tax liability.").

¹²⁷ See 8 U.S.C. § 1324a(a)(2) (providing that an employer must terminate employee upon discovery of undocumented status); 8 U.S.C. § 1324a(e)(4)(A) (providing for civil penalties for hiring or continuing employment of an undocumented person); 8 U.S.C. § 1324a(f)(1) (applying criminal penalties for pattern or practice violations).

¹²⁸ See CTR. FOR POPULAR DEMOCRACY, *supra* note 86 and accompanying text.

¹²⁹ See *Flores-Figueroa v. United States*, 556 U.S. 646, 647 (2009) (addressing an undocumented immigrant's use of counterfeit Social Security and alien registration cards, the Court held that a charge of aggravated identity theft requires knowledge that the identification belongs to another person). *But see* Adam Liptak & Julia Preston, *Justices Limit Use of Identity Theft Law in Immigration Cases*, N.Y. TIMES, May 4, 2009, http://www.nytimes.com/2009/05/05/us/05immig.html?_r=2&_archived_at=http://perma.cc/6GMZ-BUYJ ("The Court's ruling is unlikely to aid the immigrants in the Postville cases. Most of them have long since been deported.").

¹³⁰ See Memorandum from John Morton, Dir., U.S. Immigration & Customs Enforcement, to All Field Office Dirs., All Special Agents in Charge & All Chief Counsel 4 (June 17, 2011), available at <http://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf>, archived at <http://perma.cc/XAE9-7H96> (urging the use of prosecutorial discretion for persons with a U.S. citizen child.); see also 8 U.S.C. § 1229b(b)(1)(D) (providing that the Attorney General may cancel removal if the undocumented person establishes "that removal would result in exceptional and extremely unusual hardship to the alien's spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence").

¹³¹ See generally Leo R. Chavez, " 'Illegality' Across Generations," in *CONSTRUCTING IMMIGRANT "ILLEGALITY": CRITIQUES, EXPERIENCES, AND RESPONSES* (Cecilia Menjivar & Daniel Kanstroom eds. 2014) (discussing the threat of Mexican fertility to American society).

feeding and housing their children.¹³² If they entered the United States as a child, they are hopefully still young, but not so young that they are considered to have no ties to the country, and they hopefully were brought to the United States “through no fault of [their] own”¹³³ and immediately enrolled in school, rather than coming to the United States with the intention to work and help provide for their family.¹³⁴

To understand the creation and promotion of this impossible immigrant, and the ways that this immigrant remains central to immigrant rights advocacy, it is helpful to examine more closely a few examples of the politics of respectability in action. This strategy of aligning immigrants with the respectable and distancing them from the unpalatable ends up limiting the scope of pro-immigrant advocacy and thus may end up harming both the idealized citizens-to-be and those who do not make the cut. Three of the most common tools in the respectability belt—“we are not criminals,” “we are hard-working,” and “we deserve a pathway to citizenship”—are discussed in more detail below.

A. *Respectability Claim 1: “We Are Not Criminals”*

*When the president told us he was going to only go after criminal aliens, we all said, ‘OK, go do that, but don’t go after people whose only crime is that they’re living here undocumented.’*¹³⁵

—Richard Trumka, president of the A.F.L.-C.I.O.

¹³² See generally Kevin R. Johnson, *Public Benefits and Immigration: The Intersection of Immigration Status, Ethnicity, Gender, and Class*, 42 UCLA L. REV. 1509 (1995).

¹³³ Senate leaders have repeatedly employed the “no fault of your own” rhetorical gloss in support of the DREAM Act. See e.g., *Durbin, Reid, Menendez, 30 Others Introduce the Dream Act*, DICK DURBIN, U.S. SENATOR FOR ILL. (May 11, 2011), <http://www.durbin.senate.gov/public/index.cfm/pressreleases?ID=fe132a1c-073d-4b99-94f1-c61d25793c2f>, archived at <http://perma.cc/AU89-PV95> (quoting Senate Majority Leader Harry Reid as saying “[t]he Dream Act will give children brought to this nation by their parents through no fault of their own . . . the opportunity to earn legal status”); *id.* (quoting Senator Dianne Feinstein as saying “[m]any young adults who have worked hard to contribute to this country but, through no fault of their own, find themselves without legal status”); *id.* (quoting Senator Merkley as saying “[t]he opportunity to meet their full potential is out of reach through no fault of their own”).

¹³⁴ Leslie Berestein Rojas & Josie Huang, *2 Years After the Start of DACA, Haves and Have-Not*s, SCPR (Aug. 15, 2014), <http://www.scpr.org/blogs/multiamerican/2014/08/15/17155/two-years-after-the-start-of-daca-haves-and-have-not/>, archived at <http://perma.cc/D5H4-E73K>.

¹³⁵ Ginger Thompson & Sarah Cohen, *More Deportations Follow Minor Crimes, Records Show*, N.Y. TIMES, Apr. 6, 2014, <http://www.nytimes.com/2014/04/07/us/more-deportations-follow-minor-crimes-data-shows.html?hp>, archived at <http://perma.cc/3KYG-DSK7>.

*]We are all for detaining criminals. But those now on supervised release are the kind of people who should never have been in detention in the first place.*¹³⁶

—Ali Noorani, Executive Director of the
National Immigration Forum

The embrace of the “we are not criminals” framework by mainstream immigrant advocates is a textbook deployment of the politics of respectability.¹³⁷ The general consensus among those who are pushing for legislative reforms favorable to immigrants seems to be that distancing immigrants from charges of criminality is a necessary tactic in pro-immigrant advocacy. This tactic, which might have begun as a response to the increased criminalization of unlawful migration, has come to represent more than just pushback against right-wing anti-immigrant forces. The positive agenda sought by immigrant rights advocates has fully embraced the “we are not criminals” messaging, with the result being that legislative and policy changes proposed by immigrant advocates explicitly disavow immigrants who cannot escape the title of “criminal” due to past contacts with law enforcement.¹³⁸

The quotes by Richard Trumka and Ali Noorani above—who represent the largest U.S. union, and one of the most influential pro-immigrant advocacy groups, respectively—demonstrate acceptance of the notion of a “criminal alien” and the idea that mass immigrant detention, a relatively recent development at its current levels, is necessary.¹³⁹ Trumka and Noorani both imply that for a segment of the immigrant population, detention and deportation are fitting ends to their time in the United States.

¹³⁶ Noorani, *supra* note 13.

¹³⁷ See, e.g., LOIS ANN LORENTZEN, HIDDEN LIVES AND HUMAN RIGHTS IN THE UNITED STATES 209 (2014); Uri Dash, *Immigrants Are Not Criminals*, CARNEGIE ENDOWMENT FOR INT’L PEACE (Nov. 7, 2013), <http://carnegieendowment.org/2013/11/07/immigrants-are-not-criminals>, archived at <http://perma.cc/DS6R-VF8R>; *From Anecdotes to Evidence: Setting the Record Straight on Immigrants and Crime*, IMMIGRATION POLICY CTR. (July 25, 2013), <http://www.immigrationpolicy.org/just-facts/anecdotes-evidence-setting-record-straight-immigrants-and-crime-0>, archived at <http://perma.cc/JH8M-6E4C> (presenting evidence that immigrants are no more likely to engage in criminal conduct than non-immigrants); Brendan Kuty, *Illegal Immigrants ‘Workers, Not Criminals,’ Protester Says at Reform Rally*, NJ.COM (Aug. 8, 2013, 3:18 PM), http://www.nj.com/morris/index.ssf/2013/08/immigration_reform_were_workers_not_criminals_protester_says.html, archived at <http://perma.cc/354Z-PGRB>; Alicia Maule & Traci G. Lee, *Immigrant Advocate: ‘These Children are Not Criminals,’* MSNBC (Oct. 10, 2014), <http://www.msnbc.com/msnbc/immigrant-advocate-these-children-are-not-criminals>, archived at <http://perma.cc/XH42-X8ZK>.

¹³⁸ See, e.g., *Comprehensive Reform of Our Immigration Laws*, NAT’L IMMIGRATION FORUM (Oct. 17, 2014), <http://immigrationforum.org/blog/comprehensive-reform-of-our-immigration-laws/>, archived at <http://perma.cc/NSYU-7U29> (“Finally the American people, in poll after poll, have indicated that they prefer a realistic, comprehensive, and fair approach to immigration reform—one that includes a path to citizenship for immigrants who, though undocumented, are otherwise obeying our laws.”).

¹³⁹ DETENTION WATCH NETWORK, *supra* note 36, at 1 (“ICE currently incarcerates more than 400,000 immigrants every year in 33,400 prison and jail beds.”).

This line of thinking allows only those immigrants who are respectable—namely those who have managed to avoid criminal convictions—to be championed. The immigrants around whom claims for citizenship are built must therefore seek to distance themselves as far as possible from any charge of criminality. This can be seen in the now-common signs held at immigrant rights rallies proclaiming, “We are not criminals.”

As a result, it is now rare to find a comprehensive immigration reform framework written by immigrant advocates that does not include language on safety and enforcement.¹⁴⁰ The “values” and “points of unity” sections of some of the primary immigrant rights coalitions publications reflect this trend, with phrases like “fair enforcement,” “common-sense enforcement,” and “public safety” making frequent appearances.¹⁴¹ These organizations have internalized the message of migrant criminality, as evinced by their calls for reform that forward the linking of public safety and immigration. Thus, the “we are not criminals” framework appears both to champion possible legalization for those who have no convictions, and to sanction harm (in the form of detention and removal) for those who cannot meet the “not criminal” category.

The embrace of “we are not criminals” also renders it more difficult to advocate against the harms of criminalization. It is now common knowledge

¹⁴⁰ See, e.g., MARSHALL FITZ & ANGELA KELLEY, CTR. FOR AM. PROGRESS, PRINCIPLES FOR IMMIGRATION REFORM: GUIDELINES FOR FIXING OUR BROKEN IMMIGRATION SYSTEM 2–3 (2009) (seeking the development of “strong enforcement mechanisms,” protections for immigrant “workers from exploitation,” and “labor protections”); Donna De La Cruz, *Fair Immigration Reform Movement Principles*, FIRM (Jan. 22, 2014), <http://www.fairimmigration.org/2014/01/22/fair-immigration-reform-movement-principles>, archived at <http://perma.cc/Z8YM-KYDD> (seeking “Safe Future Migration” and respect for the “Safety and Security of All in Immigration Enforcement”); *Our Principles*, REFORM IMMIGRATION FOR AM., <http://reformimmigrationforamerica.org/about-us/our-principles.html> (last visited Mar. 30, 2015), archived at <http://perma.cc/4CKR-XRAK> (seeking “a reformed legal immigration that is fair to families and assures family unity,” “worker protections,” and “fair enforcement”); *Principles for Comprehensive Immigration Reform*, CCIR, http://www.cirnow.org/content/en/about_principles.htm (last visited Mar. 30, 2015), archived at <http://perma.cc/GT8K-ZA68> (seeking immigration reform that recognizes “the need for tailored, targeted, effective enforcement,” and protects “civil and human rights”); *SEIU Principles for Comprehensive Immigration Reform*, SEIU, <http://www.seiu.org/a/immigration/seiu-principles-for-comprehensive-immigration-reform.php> (last visited Mar. 30, 2015) archived at <http://perma.cc/XE7W-7SJL> (supporting reform that will “allow for future workers to come to the U.S. in a safe, legal and orderly manner,” and provide “smart and balanced” enforcement). But see *Core Principles for Immigration Reform*, UNITED WE DREAM NETWORK (Feb. 6, 2013), <http://www.nnirr.org/~nnirrorg/drupal/sites/default/files/uwd-principles-for-reform-feb-6-2013.pdf>, archived at <http://perma.cc/MSVC-XPT5> (seeking to eliminate “the artificial quota of 400,000 deportations per year,” and enforcement organizations should “not direct more tax dollars to unaccountable and discriminatory practices”); *Immigration Reform Bullet Points: A Proposal for Alternative Immigration Reform Based on Human, Civil, and Labor Rights for All*, DIGNITY CAMPAIGN, <http://dignitycampaign.org/the-dignity-campaign-proposal/bullet-points/> (last visited Mar. 30, 2015), archived at <http://perma.cc/ZP5Q-5Q89> (seeking prohibitions on local law enforcement agencies, and a budget reduction “for border enforcement and detention”).

¹⁴¹ See, e.g., De La Cruz, *supra* note 140 (“humane and safe treatment for all individuals”); REFORM IMMIGRATION FOR AM., *Our Principles*, *supra* note 140 (“fair enforcement”); SEIU, *supra* note 140 (“Common Sense reform”).

that more immigrants have been removed under the Obama Administration than under any previous presidency.¹⁴² The President and his staff have explained the rise in numbers as the result of targeted removals of “criminal aliens.”¹⁴³ The fact that no mainstream immigrant advocacy organization has advocated on behalf of immigrants with criminal convictions may have encouraged the President to take this tack. While the White House has denied the use of this tactic as anything other than “common sense enforcement,” it was arguably designed to appeal to both anti-immigrant and pro-immigrant groups.¹⁴⁴ Advocates believe that the rise in removals may have been the Obama Administration’s attempt to prove to Republicans that enforcement was a priority, and thus open the path to serious consideration of CIR.¹⁴⁵ By claiming to focus enforcement efforts on “dangerous criminal aliens,” and not on the respectable majority that immigrant rights groups support, the President may have relied upon immigrant rights advocates not aligning themselves with deportees with criminal records. Of course, this strategy has backfired, with Republicans seemingly unsatisfied with any show of enforcement as sufficient, and pro-immigrant groups taking Obama to task as “Deporter-in-Chief.”¹⁴⁶

However, the resistance from immigrant rights groups has been based on what is thought to be an over-broad use of the category “criminal alien.” The various advocacy reports describing the two million removals under Obama cite to the minor or non-existent criminal history of many of those removed since 2008 as proof of the failure of Obama’s enforcement strat-

¹⁴² BIPARTISAN POLICY CTR., ISSUE BRIEF: INTERIOR IMMIGRATION ENFORCEMENT BY THE NUMBERS 1 (2014); *Current ICE Removals of Noncitizens Exceed Numbers Under Bush Administration*, TRAC IMMIGRATION PROJECT (Aug. 2, 2010), <http://trac.syr.edu/immigration/reports/234/>, archived at <http://perma.cc/H5SN-T7FM>.

¹⁴³ See, e.g., Thompson & Cohen, *supra* note 135 (“With the Obama administration deporting illegal immigrants at a record pace, the President has said the government is going after ‘criminals, gang bangers, people who are hurting the community.’”); Cecilia Muñoz: “Even Broken Laws Have to Be Enforced”, PBS FRONTLINE (Oct. 18, 2011, 7:53 PM), <http://www.pbs.org/wgbh/pages/frontline/race-multicultural/lost-in-detention/cecilia-munoz-even-broken-laws-have-to-be-enforced/>, archived at <http://perma.cc/44SL-9VX8> (“I think it’s to DHS’s credit that they have built a strategy that makes sense, that is appropriate from a law enforcement perspective”).

¹⁴⁴ See Muñoz, *supra* note 143.

¹⁴⁵ *President Obama’s Shameful Milestone*, ACLU, https://www.aclu.org/secure/president_obama_deportations (last visited Mar. 1, 2015), archived at <https://perma.cc/52JG-6PK3>.

¹⁴⁶ See, e.g., Thompson & Cohen, *supra* note 135 (reporting that Janet Murguia, the President of the National Council of La Raza, has joined the “chorus of unions, religious groups and immigrant advocacy organizations that have labeled Mr. Obama the nation’s ‘deporter in chief’”); Molly Moorhead, *Marco Rubio says Obama shows ‘reluctance’ to enforce immigration law*, TAMPA BAY TIMES POLITIFACT (May 7, 2013, 11:00 AM), <http://www.politifact.com/truth-o-meter/statements/2013/may/07/marco-rubio/marco-rubio-says-obama-shows-reluctance-enforcl>, archived at <http://perma.cc/2GN7-SF6L>; see also Editorial, *Mr. Obama Feels the Heat*, N.Y. TIMES, Mar. 14, 2014, http://www.nytimes.com/2014/03/15/opinion/mr-obama-feels-the-heat.html?_r=0, archived at <http://perma.cc/XR25-ZNA2> (“An escalating campaign by immigration advocates against President Obama’s get-tough policies (nearly two million deportations and counting) is having an effect on the deporter in chief.”).

egy.¹⁴⁷ While these are important points, they are still framed within the politics of respectability. Thus, in questioning removals and detention, immigrant advocates like Trumka and Noorani question not the exponential growth of removal and detention, but rather that they have been misled as to who was going to be removed. Likewise, immigrant advocates frequently ground their opposition to detention in the idea that immigrants are not criminals and therefore do not deserve to be locked up.¹⁴⁸ This argument presupposes the existence of a population that does merit detention and deportation. It relies on the notion that the harms of detention are not harmful per se, but harmful because they are being applied to respectable innocents. This kind of pushback does not question the category of “criminal alien” itself, or any of the policies that led to contact with the criminal legal system to begin with. Harsh drug laws and sentencing laws,¹⁴⁹ high levels of racial profiling,¹⁵⁰ and the disproportionate likelihood that men of color will be arrested for deportable offenses¹⁵¹ remain unquestioned when the argument against the number of deportations under Obama is limited to protesting the deportation of the respectable.

Language and imagery about hardworking, family-oriented, non-criminal immigrants is partially a response to the unprecedented criminalization

¹⁴⁷ See, e.g., Walter Ewing, *New Reports Undermine Obama Administration's Claims About Deportations*, AM. IMMIGRATION COUNCIL (Apr. 8, 2014), <http://immigrationimpact.com/2014/04/08/new-reports-undermine-obama-administrations-claims-about-deportations/>, archived at <http://perma.cc/Y7VS-77AJ> (“Immigrant advocates and serious researchers have known for years that the deportation dragnet cast by the Obama administration is capturing thousands and thousands of people who pose no serious threat to public safety.”); *Secure Communities: A Fact Sheet*, IMMIGRATION POLICY CTR. (Nov. 29, 2011), <http://www.immigrationpolicy.org/just-facts/secure-communities-fact-sheet>, archived at <http://perma.cc/93AK-TEXR> (“[T]he program has not focused exclusively on convicted criminals, dangerous and violent offenders, or threats to public safety and national security.”).

¹⁴⁸ See NAT'L IMMIGRATION FORUM, *THE MATH OF IMMIGRATION DETENTION: RUNAWAY COSTS FOR IMMIGRATION DETENTION DO NOT ADD UP TO SENSIBLE POLICIES I* (2013), available at <http://immigrationforum.org/wp-content/uploads/2014/10/Math-of-Immigration-Detention-August-2013-FINAL.pdf>, archived at <http://perma.cc/NAG4-YV77> (“However, ICE’s use of discretion has been limited so far, and resources are still used to detain and deport aspiring citizens who pose no risk.”); Arya Reena, *Denying Justice to NJ’s Immigrants*, ACLU OF N.J., <https://www.aclu-nj.org/theissues/immigrantrights/denyingjusticetonjsimmigra/> (last visited Mar. 31, 2015), archived at <https://perma.cc/5ELU-L63U> (“Though having committed no crime, immigration detainees don’t even enjoy the legal protections afforded criminal defendants.”).

¹⁴⁹ See TRAC IMMIGRATION PROJECT, *Current ICE Removals*, *supra* note 142.

¹⁵⁰ See, e.g., FRED T. KOREMATSU CTR. FOR LAW AND EQUALITY, SEATTLE UNIV. SCH. OF LAW, *TERROR IN TWILIGHT: THE REAL-LIFE LEGACY OF U.S. BORDER PATROL ON THE OLYMPIC PENINSULA OF WASHINGTON STATE 12–13* (2013) (describing the Border Patrol’s practice on the Olympic Peninsula of stopping vehicles based on ethnic appearance and Latino surnames).

¹⁵¹ See AARTI KOHLI & LISA CHAVEZ, CHIEF JUSTICE EARL WARREN INST. ON LAW & SOC. POLICY, *THE FEDERAL SECURE COMMUNITIES PROGRAM & YOUNG MEN OF COLOR IN CALIFORNIA 2* (2013), available at https://www.law.berkeley.edu/files/BMOC_Secure_Communities_Program_FINAL.pdf, archived at <https://perma.cc/VR3U-23CB> (“Not surprisingly, the vast majority of individuals sent to immigration authorities because of an encounter with local law enforcement are men of color (88%).”).

of immigration, including the growth of Operation Streamline,¹⁵² the expansion of criminal grounds of removability,¹⁵³ and the creation of programs empowering local law enforcement to target migrants for immigration enforcement.¹⁵⁴ It is understandable that the treatment of migration as criminal would lead migrants and their allies to cling to the opposite notion—that of the innocence of unauthorized migrants. However, the centering of the most respectable among unauthorized immigrants in the immigration debate has had the perverse result of limiting the positive vision for immigration reform as well as making it more difficult to address the most deleterious effects of the criminalization of immigration.

B. *Respectability Claim 2: “We Are Hard Workers”*

The flip side of “we are not criminals” is the “we are hard workers” language deployed by immigrants and their allies. In fact, the statements can be seen as two sides of the same coin, joined, as they are, on dozens of signs held by people at immigrant rights protests, stating some variant of the message, “we are workers, not criminals.”

The language of “hard workers” centers immigrants’ contributions to the economy as the primary reason to recognize their humanity, and thus a reason to provide them with lawful status. The narrative of basing immigrants’ humanity in their ability to labor is rooted in the history of undocumented immigration to the United States. Daniel Kanstroom has argued that the Bracero program, the large-scale guest worker program terminated in 1965, “legitimized a particularly instrumentalist view of Mexican immigrant workers,” marking Mexican workers as temporary and disposable.¹⁵⁵ The

¹⁵² See generally JOANNA LYDGATE, CHIEF JUSTICE EARL WARREN INST. ON LAW & SOC. POLICY, ASSEMBLY LINE JUSTICE: A REVIEW OF OPERATION STREAMLINE (2010), available at https://www.law.berkeley.edu/files/Operation_Streamline_Policy_Brief.pdf, archived at <https://perma.cc/MCB8-NRZ2> (reporting that Operation Streamline removed the possibility for prosecutorial discretion for migrants with criminal records or reported border crossing attempts, and requires criminal prosecution of all undocumented border crossers and that, as a result, misdemeanor immigration caseloads more than quadrupled between 2002 and 2008).

¹⁵³ See Illegal Immigration Reform and Immigration Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (codified as amended in scattered sections of 8, 18 U.S.C.); Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214.

¹⁵⁴ See 8 U.S.C. § 1357(g) (2012) (allowing the Attorney General to enter agreements with States, or political subdivision of states for the state officers may perform the duties of immigration officers); see also *Secure Communities*, U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, http://www.ice.gov/secure_communities/ (last visited Mar. 31, 2015), archived at <http://perma.cc/9SNH-WCC3> (“Secure Communities is a simple and common sense way to carry out ICE’s priorities. It uses an already-existing federal information-sharing partnership between ICE and the Federal Bureau of Investigation (FBI) that helps to identify criminal aliens without imposing new or additional requirements on state and local law enforcement.”). For a comprehensive critique of the Secure Communities program, see DET. WATCH NETWORK ET AL., RESTORING COMMUNITY: A NATIONAL COMMUNITY ADVISORY REPORT ON ICE’S FAILED “SECURE COMMUNITIES” PROGRAM (2011), available at <http://altopolimigra.com/documents/FINAL-Shadow-Report-regular-print.pdf>, archived at <http://perma.cc/DNN6-SK5J>.

¹⁵⁵ DANIEL KANSTROOM, DEPORTATION NATION 219 (2007).

end of the Bracero program did not mean the end of Mexican migration.¹⁵⁶ The pre-established patterns of migration continued, but workers now came to the United States without status, and with the rise of border enforcement, began staying in the country rather than risking apprehension.¹⁵⁷ The undocumented population grew, and the workers that previously filled Bracero positions now filled similar positions as undocumented workers.¹⁵⁸ While the Bracero workers faced exploitation unique to their temporary status, the end of the Bracero program and the growth of undocumented Mexican immigration led to new forms of exploitation for the workers who continued to fill difficult jobs.

The changes brought about by the Immigrant Reform and Control Act of 1986, which for the first time criminalized the hiring of undocumented workers,¹⁵⁹ made exploitation an even more salient feature of the system of employment for undocumented workers. As Massey states, “US immigration policy evolved to generate a larger population of people without labor rights in the United States, inducing scrupulous employers to exclude documented migrants as well as those who might be undocumented, while at the same time providing unscrupulous employers with new leverage to increase exploitation of all workers, both documented and undocumented.”¹⁶⁰

In response to this history, pro-immigrant advocates have taken the basis for immigrants’ exploitation—their status as vulnerable laborers—and turned it around, embracing the identity of immigrants as hard workers to justify their claims for immigrant inclusion. Unauthorized migrants’ labor precarity leads them to work in some of the most difficult conditions in the United States, whether in the fields or in meatpacking and fruit-packing factories.¹⁶¹ The difficulty of the labor, and immigrants’ commitment to their employment is held up as proof of their deservingness for status. Advocates describe the labor with adjectives such as “honest” and “back-breaking,” often in the same sentence.¹⁶² Immigrants’ potential brokenness as a result of

¹⁵⁶ See Massey & Pren, *supra* note 118, at 5.

¹⁵⁷ See *id.*

¹⁵⁸ See *id.*

¹⁵⁹ 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.).

¹⁶⁰ Douglas S. Massey & Julia Gelatt, *What Happened to the Wages of Mexican Immigrants? Trends and Interpretations*, 8 *LATINO STUDIES* 328, 346–47 (2010).

¹⁶¹ See, e.g., CHOMSKY, *supra* note 67, at 120–51 (examining undocumented immigrant overrepresentation in agriculture, meat packing, landscaping and construction industries). For an extended analysis of the exploitation of immigrant workers in the agriculture, fruit-packing, and meat and poultry industries, see PHILLIP MARTIN, *IMPORTING POVERTY?: IMMIGRATION AND THE CHANGING FACE OF RURAL AMERICA* (2009).

¹⁶² See, e.g., AFL-CIO, *DELIBERATED RESOLUTION 5: A NATION OF IMMIGRANTS* 30, available at <http://www.aflcio.org/content/download/6951/75037/file/res5.pdf> (last visited Mar. 31, 2015), archived at <http://perma.cc/V8XR-9NBW> (“At the same time, it is critical that measures to ensure our security not overreach to permit discrimination, racial or ethnic profiling or other abusive treatment of honest, hardworking immigrants or to countenance workplace inequities.”); Michael Cox, *SEIU California Leaders Stand with President Obama in Las Vegas, Join Call for Congress to Support Comprehensive Immigration Reform*, SEIU CAL.

difficult and dangerous labor works to absolve them of the original sin, the act of entering or remaining in the United States without lawful status. Under the “hard-worker” rhetoric, their supposed dishonesty at crossing the border without legal authorization can only be forgiven by dint of their labor.

Those who are unable to engage in “honest” and “back-breaking” labor—those with disabilities, those who have been injured in their “back-breaking” workplaces, single parents who cannot find childcare, and the generally unemployed or unemployable—lose the opportunity to fall into the charmed circle of potentially respectable would-be citizens.¹⁶³ Immigrants who are hard workers (read: respectable) are to be included in the fights for lawful status and possibly recognized as citizens, while immigrants who are criminals (read: unrespectable), or otherwise unemployable are to be excluded, seen as expendable, and ultimately deportable, the harms against them justified by their lack of legal recognition.

Nowhere in this deployment of “hard-working” are the underlying conditions of immigrants’ labor questioned. The system that would require backs to be broken in order to grant legal recognition remains intact. The use of “we are not criminals” and of “we are hard workers” ultimately upholds the current forms of immigration enforcement and labor exploitation. As Dean Spade argues, demands for recognition grounded in the politics of respectability may actually increase harms:

In fact, legal inclusion and recognition demands often reinforce the logics of harmful systems by justifying them, contributing to the illusion of fairness and equality, and reinforcing the targeting of certain perceived ‘drains’ or ‘internal enemies,’ carving the group into ‘the deserving’ and ‘the undeserving’ and then addressing only the issues of the favored sect.¹⁶⁴

(Jan. 29, 2013), <http://www.seiuca.org/2013/01/29/seiu-california-leaders-stand-with-president-obama-in-las-vegas-join-call-for-congress-to-support-comprehensive-immigration-reform/>, archived at <http://perma.cc/LB3A-FEPL> (“Today, millions of immigrants do the backbreaking work that is vital to our economy, asking in return only a fair shot at the American Dream for their families.”); Frank Islam & Ed Crego, *Thanksgiving Thoughts on Our Immigrant Nation*, HUFFINGTON POST POLITICS BLOG (Nov. 25, 2013, 5:14 PM), http://www.huffingtonpost.com/frank-islam/thanksgiving-thoughts-on-_b_4333850.html, archived at <http://perma.cc/2Y4S-6E4G> (“It’s also been the incalculable contributions that immigrants have made in doing the back-breaking work required to eke out a living—to make the economy hum and make the future better for their children.”); Margarita Maldonado, *The Dance of Unity*, SEIU CAL. (June 12, 2012, 2:49 PM), <http://www.seiu.org/2012/06/the-dance-of-unity.php>, archived at <http://perma.cc/LB3A-FEPL> (“To treat undocumented immigrants as common criminals is absurd. We wouldn’t have food on our tables if it was not for the back-breaking work of undocumented immigrants.”).

¹⁶³ For example, in the most recent CIR bill that passed the Senate, remaining employed was a prerequisite for maintaining lawful status, and a period of unemployment of more than sixty days could result in termination of the status. S. 744, 113th Cong. § 245c(b)(3)(A)(i)(I) (2013).

¹⁶⁴ See SPADE, *supra* note 36, at 36.

In this case, the circle is a closed one, and immigrant advocates push a “path to citizenship” as the primary issue of the favored sect. Their very status as favored (hard-working/non-criminal), limits the issues that such an approach can address, with systems of criminalization and labor exploitation left untouched.

C. Respectability Claim 3: “We Deserve a Pathway to Citizenship”

With questions of criminalization and labor exploitation of immigrants pushed aside by the embrace of the politics of respectability, the request becomes an obvious one: respectable unauthorized migrants have shown their deservingness, and thus, in line with the politics of respectability, the dominant group should have no choice but to see and accept them as fully human, productive members of society and grant them lawful status.

The nature of the ask for legalization has shifted in the past few years, and the current legalization framing has itself come to echo the politics of respectability. The last bill that offered legalization to millions, the Immigration Reform and Control Act of 1986 (“IRCA”),¹⁶⁵ included a legalization provision widely considered an amnesty.¹⁶⁶ As the undocumented population began to grow again in the 1990s, new calls for amnesty-style legalization began to be heard. However, in the 2000s, immigrant advocates and pro-immigrant politicians began to distance themselves from asks for amnesty, embracing instead the language of “earned citizenship” and “pathway to legalization.”¹⁶⁷ The fact that the undocumented population continued to grow following IRCA’s passage led many to view its legalization program as a failed amnesty.¹⁶⁸ Republican politicians and conservatives began using

¹⁶⁵ 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.).

¹⁶⁶ Other immigration law interventions since 1986 have cumulatively offered paths to legalization to hundreds of thousands of unauthorized migrants, but IRCA’s wide-scale legalization provisions remain unique. See DONALD M. KERWIN, MIGRATION POLICY INST., MORE THAN IRCA: US LEGALIZATION PROGRAMS AND THE CURRENT POLICY DEBATE 7–8 (2010).

¹⁶⁷ The phrase “path to citizenship” begins to appear regularly in congressional testimony in 2005. See H.R. Res. 2330, 109th Cong. (2005). “Earned citizenship” does not appear regularly in the congressional testimony until 2013. See 2014 Appropriations: Hearing Before the H. Appropriations Subcommittee on Homeland Security, 113th Cong. (2013) (statement of Janet Napolitano, Secretary, Department of Homeland Security). In legislation, the phrase “pathways to citizenship” begins to appear regularly in 2011. See H.R. Res. 759, 112th Cong. (2012); S. Res. 453, 112th Cong. (2011). The phrase “earn citizenship” becomes similarly common the same year. See Reform America’s Broken Immigration Act, S. 6, 112th Cong. (2011).

¹⁶⁸ See e.g., Ryan D. Frei, Comment, *Reforming U.S. Immigration Policy in an Era of Latin American Immigration: The Logic Inherent in Accompanying the Inevitable*, 39 U. RICH. L. REV. 1355, 1373 (2005) (“Despite the ‘sweeping changes’ it introduced to immigration law, IRCA has a relatively minor impact that did little to ameliorate the growing problem of illegal immigration.”).

amnesty as a disparaging term, most commonly stating that amnesty rewards illegal behavior and encourages further undocumented immigration.¹⁶⁹

“Amnesty” is defined as “[a] pardon extended by the government to a group or class of persons, usu. for a political offense.”¹⁷⁰ “Pardon,” in turn, is defined as “[t]he act or an instance of officially nullifying punishment or other legal consequences of a crime.”¹⁷¹ The dictionary offers IRCA as its example of an amnesty.¹⁷² Immigration amnesties like IRCA were designed to officially nullify punishment or other legal consequences for the offense of entering unlawfully or remaining in unlawful status. The person receiving an immigration amnesty does not need to continue to demonstrate that they deserve the amnesty after it has been granted.¹⁷³ For anti-immigrant advocates, this nullification of punishment appears to be central to the arguments against future immigration amnesties.

At pains to differentiate legalization proposals from amnesty, immigrant advocates have embraced terms like “earned citizenship” and “path to legalization.”¹⁷⁴ Amnesty does not require a moral judgment on the character of those who are granted the pardon. However, the abandonment of “amnesty” and the embrace of “path to legalization” is a concession that the undocumented are automatically unrespectable by dint of having entered without lawful status or having fallen out of lawful status. By reinforcing

¹⁶⁹ Remarks to the United States Conference of Mayors, 40 WEEKLY COMP. PRES. DOC. 123 (Jan. 26, 2004) (“Now, this isn’t an amnesty program. Let me be clear about this. This is a temporary-worker program to be registered and above-board. I oppose amnesty because amnesty—amnesty would encourage further illegal immigration. And I oppose amnesty because amnesty would reward those who have broken the laws of the United States.”); Sen. John Boozman, *Rewarding Bad Behavior: New Deportation Policies*, SENATOR JOHN BOOZMAN’S COLUMN (Aug. 31, 2011), <http://www.boozman.senate.gov/public/index.cfm/weekly-columns?ID=a653a995-ea65-45bf-ba2d-9d6369806dbf>, archived at <http://perma.cc/4GZF-Y2B2> (“It’s unfair to provide a shortcut towards legalization for illegal immigrants and I don’t support a guest worker program that rewards illegal aliens with blanket amnesty while ignoring the needs of American workers.”); Ed Meese, *We’ve Seen the Effect of “Amnesty” Before*, DAILY SIGNAL (May 17, 2013), <http://dailysignal.com/2013/05/17/morning-bell-weve-seen-the-effect-of-amnesty-before/>, archived at <http://perma.cc/C7BU-JM9D> (“Why didn’t it work? Well, one reason is that everything else the 1986 bill promised—from border security to law enforcement—was to come later. It never did. Only amnesty prevailed, and that encouraged more illegal immigration.”).

¹⁷⁰ BLACK’S LAW DICTIONARY 103 (10th ed. 2014).

¹⁷¹ *Id.* at 1286.

¹⁷² *Id.* at 103.

¹⁷³ See MARC R. ROSENBLUM, MIGRATION POL’Y INST., GETTING IT RIGHT: LEGALIZATION IN THE UNITED STATES 5 (2010) (explaining that prospective qualifications—additional criteria immigrants must meet to during the legalization status—give legalization an air of being earned: “[T]he more burdensome these requirements, the less an earned legalization resembles an ‘amnesty,’ a term which is politically toxic in some countries”).

¹⁷⁴ See, e.g., Angela Maria Kelley et al., *Principles for Immigration Reform: Guidelines for Fixing Our Broken Immigration System*, CTR. FOR AM. PROGRESS (June 24, 2009), <http://www.americanprogress.org/issues/immigration/news/2009/06/24/6164/principles-for-immigration-reform/>, archived at <http://perma.cc/T5J4-XHEH> (proposing “a clear but rigorous path toward citizenship”); REFORM IMMIGRATION FOR AM., *Our Principles*, *supra* note 140 (proposing a “Path to Citizenship”); SEIU, *supra* note 140 (promoting “earned legalization with a roadmap to citizenship”).

the idea of immigrants as in need of atonement, the new language demands the division of the undocumented into two categories—those who will have the capacity to “earn” forgiveness and the privileges of citizenship, and those who will not.

The abandonment of the term “amnesty” points to a significant concession by pro-immigrant advocates. Amnesty is often carried out when forgiveness is deemed more expedient for the public welfare than prosecution and punishment.¹⁷⁵ Thus, amnesty implies not only forgiveness, but also a recognition that the public welfare is better served by a pardon. In some limited ways, an immigration amnesty signals that the public welfare has not been served by unlawful migration. Phrases like “earned citizenship” and “pathway to legalization” sit on the other end of the spectrum, implying a long and arduous journey to forgiveness that must be earned by immigrant wrong-doers.¹⁷⁶ It reinforces the idea of the government’s laws as correct and fair ones as applied to those seeking to “earn” admission to the charmed circle of citizenship. By abandoning the term “amnesty” due to pushback from the right-wing, and embracing “earned citizenship” and “path to legalization,” Democrats and immigrant advocates are thus embracing the idea of immigrants as wrong-doers breaking reasonable laws who require a long period of atonement on a path many may ultimately be unable to navigate.

The claims of “we are not criminal” and “we are hard-working” would seem to contradict the need for a long path of atonement. Why would hard-working, law-abiding immigrants need to work so hard to earn legalization? However, the very idea of a pathway is supported by advocacy that consistently implies that immigrants deserve recognition and inclusion because of their respectability. Those who are able to traverse the path, by remaining employed (“we are hard workers”), paying fines, avoiding falling into poverty, avoiding arrest (“we are not criminal”) will earn their citizenship.¹⁷⁷

The switch from amnesty to earned legalization implies that to earn citizenship, each individual undocumented person must be put on a pathway to respectability, where only the most palatable of the undocumented will eventually earn the possibility for the true respectability promised by lawful status. Thus, the current push for legalization as a solution to the harms related to unlawful status is a push for the case-by-case adjudication by the U.S. government of millions of individuals. Each individual unauthorized migrant would be set against the factors (hard-working, law-abiding) for being judged deserving of status or deserving of the continued harms of lack of status. This focus on individual eligibility at the heart of legalization

¹⁷⁵ BLACK’S LAW DICTIONARY 103 (10th ed. 2014).

¹⁷⁶ ROSENBLUM, GETTING IT RIGHT, *supra* note 173 (“Systems that combine retrospective qualifications and prospective requirements can be described as ‘earned legalization’—a process in which eligible unauthorized immigrants must earn legal status by fulfilling various criteria.”).

¹⁷⁷ See S. 744, 113th Cong. (2013). See also *supra*, Part II, A–C, for description of legalization requirements.

schemes serves to mask the greater systemic harms related to the entire category of “illegality.” If the majority of the government’s immigration power is focused on deciding whether people are deserving or undeserving of a pathway to citizenship, attention is necessarily drawn towards each individual’s particular culpability or deservingness and away from the systemic harms of “illegality.” It becomes difficult, for example, to question the legitimacy of an immigration detention system, of a workplace enforcement system, or of increased Border Patrol presence when the focus is on whether individuals (potentially millions of individuals, but individuals, nonetheless) meet the criteria for avoiding the harms of detention, the workplace, border enforcement, and deportation.

Additionally, legalization’s individualizing thrust treats those subject to “illegality” as if they somehow existed in isolation from their families and communities. Mixed-status households and communities—those in which different members hold different types of immigration status—have become the norm.¹⁷⁸ Under a legalization scheme, specific members of one family or community may avoid detention and deportation. However, the harms of “illegality” will continue to impact family and community systems as long as some members are excluded from the protections legalization offers. Moreover, those who chose not to come forward to be adjudicated because of their fear or their doubts about their qualifications would still be subject to the new set of rules for who deserves status and who deserves removal by virtue of their continued presence in a country that has redrawn the lines around deserving and undeserving. Thus, those who did not apply for legalization would automatically be subject to the harms reserved for the “undeserving.” Particularly for those on whom the majority of enforcement is focused, the inaccessibility of the “path to legalization” is the legislative manifestation of the harms of the politics of respectability.

In proposing guiding principles for advocacy that do not rely on the politics of respectability, the next section of this Article explores the costs of legalization to those left off the path. It makes the claim that those who cannot meet the requirements for legalization will be subject to increased enforcement and continued exploitation that is further justified by the existence of a path for the good, deserving immigrants.¹⁷⁹

¹⁷⁸ See Paul Taylor et al., *Unauthorized Immigrants: Length of Residency, Patterns of Parenthood*, PEW RESEARCH HISPANIC TRENDS PROJECT (Dec. 1, 2011), <http://www.pewhispanic.org/2011/12/01/unauthorized-immigrants-length-of-residency-patterns-of-parenthood/>, archived at <http://perma.cc/TZE9-C6HG> (“Overall, at least 9 million people are in ‘mixed-status’ families that include at least one unauthorized adult and at least one U.S.-born child. This makes up 54% of the 16.6 million people in families with at least one unauthorized immigrant. There are 400,000 unauthorized immigrant children in such families who have U.S.-born siblings.”).

¹⁷⁹ Nicholas De Genova comments on this phenomenon in his critique of CIR strategies, stating, “If some undocumented migrants who have already served their arduous apprenticeships in ‘illegality’ may be rendered eligible for ‘amnesty’ and eventual citizenship, and thus exempted from the worst of these severities, it is only as part of the larger functioning of a highly predictable machinery that will relegate a far greater number of present—and future—

III. NEW PRINCIPLES FOR IMMIGRANT RIGHTS ADVOCACY: REDUCING THE HARMS OF “ILLEGALITY”

Having critiqued the discourse underlying the dominant strategy of immigrant rights groups, this Section proposes alternative principles that do not rely on the politics of respectability. The strategy of presenting immigrants as respectable in a bid to promote legalization by definition centers citizenship as the ultimate prize. The principles proposed below—ones that focus on reducing the harms related with “illegality” for all, rather than on gaining citizenship for some—would have the indirect effect of displacing citizenship’s central place in the current pro-immigrant discourse, with the focus turning instead to the systemic harms of “illegality.” This displacement is necessary if those most vulnerable to “illegality’s” harms are to be the starting point for reform. Admittedly, a legislative approach that seeks citizenship for millions would in fact provide protection from the harms of “illegality” for those who eventually gained that status. However, an approach that mitigates the harms of “illegality” rather than attempts to increase legalization would reduce these harms for those who remain within “illegality.” This insight animates the proposed framework below.

A. “First Do No Harm”: Would the Intervention Increase the Harms Associated With Living Without Lawful Status?

The first of two proposed principles for guiding immigrant advocacy this Article proposes invites an embrace of the classic enjoiner to “first do no harm.”¹⁸⁰ For this principle, the subjects of the exhortation are those most affected by the harms of “illegality,” as laid out in Part I. Whether the question is legalization or some other intervention, one of the guiding questions for pro-immigrant advocates and scholars should be, would this intervention increase the harms associated with “illegality” facing unauthorized migrants? In other words, would achieving the proposed change make life harder for unauthorized migrants? Would the reform make the category of “illegality” an even more lethal one?

Applying the “first do no harm” principle requires prioritizing the unpopular, unpalatable undocumented. Those who have most suffered under the harms of “illegality”—low-income immigrants of color, queer and transgender immigrants, immigrants with disabilities, immigrants with criminal convictions, unemployed immigrants—stand to lose the most if the harms related to “illegality” increase, as they are the least likely to benefit from any added protections, as discussed below. With the “first do no harm”

‘illegal aliens’ to their respective assignments of protracted servitude.” De Genova, *supra* note 4, at 58.

¹⁸⁰ For a discussion on the origins, use, meaning, and relevance of *primum non nocere*, see Cedric M. Smith, *Origin and Uses of Primum Non Nocere—Above All, Do No Harm!*, 45 J. OF CLINICAL PHARMACOLOGY 371 (2013).

principle, the needs of these groups are a starting point for proposed changes, rather than an afterthought or a compromise to be traded away. Crafting advocacy efforts with the “first do no harm” maxim in mind would therefore provide a direct counterpoint to the politics of respectability, as the prioritization of those commonly framed as undeserving is central to this approach.

In the following sections, “first do no harm” is applied to two recent immigration reforms: the recent comprehensive immigration reform proposal, Senate Bill 744, and the November 2014 Immigration Accountability Executive Action.

1. “First Do No Harm” Applied to the Border Security, Economic Opportunity, and Immigration Modernization Act of 2013

The analysis below seeks to demonstrate that an immigrant justice strategy that benefits those most vulnerable to the harms of “illegality” requires legislative analysis on the effects CIR bills have on those who cannot benefit from their passage. Although S. 744 has joined the pantheon of previously failed CIR bills,¹⁸¹ this post-mortem analysis remains relevant precisely because S. 744 was heralded as a qualified success by many mainstream immigration rights organizations who purport to represent the interests of unauthorized migrants and their families and communities.¹⁸²

¹⁸¹ See, e.g., MARC R. ROSENBLUM, MIGRATION POLICY INST., “COMPREHENSIVE” LEGISLATION VS. FUNDAMENTAL REFORM: THE LIMITS OF CURRENT IMMIGRATION PROPOSALS (2006), available at http://www.migrationpolicy.org/pubs/PolicyBrief13_Jan06_13.pdf, archived at <http://perma.cc/FJQ6-24CM> (critiquing the failed Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005 H.R. 4437); 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 (2008) (critiquing the failed 2007 attempt to pass comprehensive immigration reform legislation); Dan Nowicki & Erin Kelley, *Immigration Reform Died with Cantor's Defeat, Analysts Say*, THE AZ. REPUBLIC, June 12, 2014, <http://www.azcentral.com/story/news/politics/2014/06/12/immigration-reform-died-cantors-defeat-analysts-say/10358855/>, archived at <http://perma.cc/WTH2-B7WG> (“Any last hope that the House of Representatives might pass immigration reform this year died this week with the shocking defeat of Majority Leader Eric Cantor in his Republican primary, political analysts and Capitol Hill lawmakers predicted Wednesday.”); Vivek Wadhwa, *Cantor's Loss Won't Kill Immigration Reform; It Was Already Dead*, WASH. POST, June 12, 2014, <http://www.washingtonpost.com/blogs/innovations/wp/2014/06/12/cantors-loss-wont-kill-immigration-reform-it-was-already-dead/>, archived at <http://perma.cc/BH4V-QMBW> (“Comprehensive immigration reform may well be dead; immigration reform need not be.”).

¹⁸² See AM. IMMIGRATION LAWYERS ASS'N, *AILA Believes Senate Immigration Bill Is a Good Start*, *supra* note 12 (“Overall, this legislation provides a solid foundation to fix our broken immigration system and bring our laws into the 21st century.”); *AILA Commends Senate “Gang of Eight” for Bipartisan Immigration Bill*, AM. IMMIGRATION LAWYERS ASS'N (Apr. 17, 2013), <http://www.aila.org/content/default.aspx?bc=6714%7C6729%7C47096%7C44068>, archived at <http://perma.cc/BXP9-JW32> (“Is it perfect? No compromise measure ever is. Is it a good bill? Yes, for the most part it is, and perhaps it is even a great bill in some respects.”); LEADERSHIP CONFERENCE ON CIVIL & HUMAN RIGHTS, *Coalition Applauds Senate Judiciary Committee*, *supra* note 12 (“We applaud the efforts of the Senate Judiciary Committee and Chairman Leahy, who expertly led and managed a fair mark-up in regular order The

Senate Bill 744, the Border Security, Economic Opportunity, and Immigration Modernization Act (“S. 744”),¹⁸³ a comprehensive immigration bill introduced in April 2013, passed the Senate by a 68-32 vote in June 2013.¹⁸⁴ This bipartisan bill reflects the fruits of the recent efforts by immigrant advocates to push for a mass legalization program for unauthorized migrants. Immigrant advocates analyzed the bill for its potential effects on those unauthorized migrants who might qualify for its provisions.¹⁸⁵ Others examined its effect on the economy,¹⁸⁶ with the Congressional Budget Office’s estimation that the bill would positively affect the GDP and unemployment in the long term either heralded or refuted by commentators, depending on their position on the bill.¹⁸⁷ This Article applies a different analysis to the bill, one that follows the “first do no harm” principle and asks whether the bill would have increased harms to those who remain outside of its protections. In other words, would the adoption of S. 744 have made “illegality” more harmful?

Comprehensive immigration reform bills are characterized by a combination of elements, including, usually, a legalization prong for the currently undocumented, a guest worker prong, and an enforcement prong. S. 744 was no exception to this general rule. Split into five titles, two sections focused on enforcement (Border Security and Interior Enforcement), one section on creating a new legalization program (Immigrant Visas),¹⁸⁸ and one section on creating new avenues for temporary immigration (Nonimmigrant Visa Programs).¹⁸⁹ A final section, entitled “Jobs for Youth” was added as an amendment dedicated to creating employment opportunities for low-income youth.¹⁹⁰ The sections most relevant for the “first do no harm” analysis are

pressure on this committee to sink this legislation was ferocious—yet the committee worked together to advance a strong compromise bill.”).

¹⁸³ S. 744, 113th Cong. (2013).

¹⁸⁴ *Id.*

¹⁸⁵ See generally, ALLIANCE FOR CITIZENSHIP, ANALYSIS OF THE “BORDER SECURITY, ECONOMIC OPPORTUNITY, AND IMMIGRATION MODERNIZATION ACT” S. 744 (2013), available at <http://www.werestrangerstoo.files.wordpress.com/2013/04/a4c-s744-policy-table-analysis.pdf>, archived at <http://perma.cc/ZF4K-4LR5>; AM. IMMIGRATION LAWYER’S ASS’N, SECTION-BY-SECTION SUMMARY OF S. 744 (2013), available at <http://www.aila.org/content/default.aspx?bc=675378612566744901>, archived at <http://perma.cc/GXJ2-25AA>; IMMIGRATION POL’Y 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, archived at <http://perma.cc/PM3R-V2NR>.

¹⁸⁶ See, e.g., DANIEL COSTA, ECON. POL’Y INST., FUTURE FLOWS AND WORKER RIGHTS IN S. 744: A GUIDE TO HOW THE SENATE IMMIGRATION BILL WOULD MODIFY CURRENT LAW (2013), available at <http://www.epi.org/files/2013/Future-Flows-and-Worker-Rights-Immigration-Bill.pdf>, archived at <http://perma.cc/F76J-UY97>.

¹⁸⁷ See CONG. BUDGET OFFICE, THE ECONOMIC IMPACT OF S. 744, THE BORDER SECURITY, ECONOMIC OPPORTUNITY, AND IMMIGRATION MODERNIZATION ACT 3–8 (2013), available at <http://www.cbo.gov/sites/default/files/cbofiles/attachments/44346-Immigration.pdf>, archived at <http://perma.cc/L8KD-ZGTY>.

¹⁸⁸ S. 744, 113th Cong. §§ 2101–2555 (2013) (addressing immigrant visas).

¹⁸⁹ *Id.* §§ 4101–4913 (addressing reforms to nonimmigrant visa programs).

¹⁹⁰ *Id.* §§ 5101–5105 (addressing jobs for youth).

Title I (Border Security and Interior Enforcement) and Title III (Interior Enforcement). The circuitous route to lawful status laid out in Title II (Immigrant Visa) also merits commentary. Rather than examine the Bill by title, the analysis below is organized by the type of harms the Bill would have created and exacerbated.

a. Unauthorized migrants entering the United States: subject to early death

From the point of view of migrants seeking to enter or re-enter the United States without inspection, S. 744 guarantees a more dangerous crossing. Title I, entitled Border Security, calls for a vast expansion of resources to the southern border, with the goal of “achiev[ing] and maintain[ing] effective control between and at the ports of entry in all border sectors along the Southern Border.”¹⁹¹ The current strategy of enhanced border enforcement began in 1993, with an annual allocation of \$363 million to the Border Patrol.¹⁹² Subsequent expansions have brought the Border Patrol’s budget to \$3.5 billion,¹⁹³ and S. 744 would have allocated a further \$46.3 billion for border enforcement.¹⁹⁴

The Immigration Policy Center summarized what the \$46.3 billion would fund. Among other things, the funds would have gone towards:

[D]eploying at least 38,405 full-time Border Patrol agents along the southern border (including an additional 19,200 more than currently in place); mandating an electronic exit system at all ports where Customs and Border Protection agents are deployed; constructing at least 700 miles of fencing, including double fencing; increasing mobile surveillance; deploying aircraft and radio communications; constructing additional Border Patrol stations and operating bases The bill specifies mandatory area-specific technology and infrastructure that includes watch towers, camera systems, mobile surveillance systems, ground sensors, fiber-optic tank inspection scopes, portable contraband detectors, radiation isotope identification devices, mobile automated targeting systems, unmanned aircraft, radar systems, helicopters, and marine vessels, among other minimum requirements. The bill mandates 24-hour surveillance of the border region using mobile, video, and portable systems, as well as unmanned aircraft, and deploys 1,000 distress beacon stations in areas where migrant deaths occur.¹⁹⁵

¹⁹¹ *Id.* §§ 1101–1203 (addressing border security and other provisions).

¹⁹² IMMIGRATION POL’Y CTR., A GUIDE TO S. 744, *supra* note 185, at 5.

¹⁹³ *Id.* at 3.

¹⁹⁴ S. 744, 113th Cong. § 6 (2013); *see also* NAT’L IMMIGRATION LAW CTR., ANALYSIS OF SENATE IMMIGRATION REFORM BILL, TITLE I: BORDER SECURITY I (2013), available at <http://www.nilc.org/document.html?id=896>, archived at <http://perma.cc/5C8H-ZJ3J>.

¹⁹⁵ *See* IMMIGRATION POL’Y CTR., A GUIDE TO S. 744, *supra* note 185, at 5.

At a time when spending on immigration enforcement has reached all-time highs, S. 744's call for border patrol enhancements would succeed in further militarizing an already heavily guarded zone.¹⁹⁶ The contracts involved in "securing the border" would offer huge profits to the private defense industry¹⁹⁷ for building fencing and providing the technologies called for by the Bill in order to achieve its two goals, persistent surveillance in all sectors along the southern border, and a ninety percent effectiveness rate—the apprehension of nine out of every ten immigrants who attempt to enter the country without permission in the border patrol sectors covered by the Bill.¹⁹⁸ S. 744 appears to be a direct response to the "Latino threat" narrative discussed in Part II, with the martial metaphors deployed by anti-immigrant advocates leading to an actual military presence on the southern border in an attempt to seal off access to the United States.¹⁹⁹ In 2012, the Border Patrol apprehended the lowest numbers of unauthorized migrants since 1970.²⁰⁰ The levels of enforcement staffing at the border are higher than they have ever been.²⁰¹ The justification for S. 744's border enforcement expansion is thus difficult to trace to anything other than political expediency.²⁰²

¹⁹⁶ U.S. GOV'T ACCOUNTABILITY OFFICE, REP. NO. GAO-01-842, INS' SOUTHWEST BORDER STRATEGY: RESOURCE AND IMPACT ISSUES REMAIN AFTER SEVEN YEARS 2-3 (2001), available at <http://www.gao.gov/new.items/d01842.pdf>, archived at <http://perma.cc/UP28-HH5R> (summarizing study of increased Immigration and Naturalization Service (INS) enforcement efforts along southern border with Mexico and shifting of migrant traffic to more dangerous routes); see also Bill Ong Hing, *The Dark Side of Operation Gatekeeper*, 7 U.C. DAVIS J. INT'L L. & POL'Y 121, 161 (2001) ("Beefing up Gatekeeper, in effect militarizing the border, has only ensured that the tragedy will continue. Yet the United States continues to spend up to \$2 billion a year on the 'deterrence' strategy along the Southwest border.").

¹⁹⁷ See, e.g., Samantha Sais, *Price Tag for 700 Miles of Border Fencing: High and Hard to Pin Down*, NBC NEWS (June 21, 2013), http://usnews.nbcnews.com/_news/2013/06/21/19062298-price-tag-for-700-miles-of-border-fencing-high-and-hard-to-pin-down?lite, archived at <http://perma.cc/A73B-K3PG> ("For a sense of the scope of the contracts, consider a 2009 push to erect 38 miles of 19-foot fence near El Paso, Texas. The contractor, New Mexico-based Kiewit, said in a summary that more than 1,100 people and 600 pieces of equipment were mobilized to complete it in four months. The total cost of that segment: \$170 million.").

¹⁹⁸ S. 744, 113th Cong. § 3 (2013).

¹⁹⁹ The bill authorizes the deployment of the National Guard to the southern border to (1) construct fencing, including double-layer and triple-layer fencing; (2) increase ground-based mobile surveillance systems; (3) deploy aerial systems and aircraft to maintain continuous surveillance of the southern border; (4) construct checkpoints along the southern border; and (5) engage in other tasks. The Corker-Hoeven amendment would establish a program to actively recruit (through incentives such as bonuses) former members of the armed forces to serve in CBP and U.S. Immigrations and Customs Enforcement (ICE). S. 744, 113th Cong. § 1103 (2013); see also NAT'L IMMIGRATION LAW CTR., ANALYSIS OF SENATE IMMIGRATION REFORM BILL, TITLE 1: BORDER SECURITY, *supra* note 194, at 2, 5.

²⁰⁰ NAT'L IMMIGRATION LAW CTR., ANALYSIS OF SENATE IMMIGRATION REFORM BILL, TITLE 1: BORDER SECURITY, *supra* note 194, at 2.

²⁰¹ *Id.* ("There are record-high levels of staffing at the border at a time when net unauthorized migration from Mexico has fallen to zero or below (more people are leaving the U.S. than entering).").

²⁰² See Suzy Khimm, *Want Tighter Border Security? You're Already Getting It.*, WASH. POST. WONKBLOG, Jan. 29, 2013, <http://www.washingtonpost.com/blogs/wonkblog/wp/2013/01/29/the-2007-immigration-bill-set-border-security-targets-weve-hit-most-of-them>, archived at <http://perma.cc/5C7U-HXTE>.

The implementation of the Border Security title of S. 744 would come at the cost of the lives of unauthorized migrants seeking to enter the country. The greatest harm of “illegality,” as discussed in Part I, is premature death. The already existing Border Patrol expansion has contributed to thousands of border deaths, with the current rate averaging at least one death per day.²⁰³ The previous expansion of Border Patrol presence predictably led unauthorized migrants to attempt crossings in more remote regions, where the chance for crossing undetected increased, as did the chance for death from exposure to the elements.²⁰⁴ S. 744 does call for the deployment of 1000 distress beacon stations in areas where border deaths occur,²⁰⁵ which could mitigate some of the possible deaths. However, the inclusion of the beacons in the Bill signals that its drafters are aware of the greatly increased potential for border deaths S. 744 creates. The coroners of counties on the southern border are already overwhelmed by the task of identifying the bodies of migrants that have been found in their regions.²⁰⁶ The unfinished forensic task of sifting through the remains of hundreds of migrants whose bodies have been found in the deserts of Texas and Arizona should itself be a warning against the expansion of death-producing technologies at the southern border; the United States should at least finish identifying the victims of the last “border surge” before moving on to the next one.

Apart from death or injury to undocumented immigrants, S. 744’s Border Security measures would increase harm to all residents of the southern border whose Latino appearance makes them a target of the bolstered enforcement. Already, the huge Border Patrol presence has led to excessive use of force and racial profiling of border residents.²⁰⁷ The increase of drone surveillance, in addition to the new officers, presents civil liberties challenges for all residents of the southern border. The Border Patrol has proven

²⁰³ See U.S. GOV’T ACCOUNTABILITY OFFICE, REP. NO. GAO-06-770, *supra* note 102; U.S. BORDER PATROL, *supra* note 103.

²⁰⁴ See Androff & Tavassoli, *supra* note 101.

²⁰⁵ S. 744, 113th Cong. § 1107(c) (2013).

²⁰⁶ See, e.g., Christopher Sherman, *Rising Immigrant Deaths Burden Texas County*, WASH. POST, Aug. 23, 2013, http://www.washingtonpost.com/politics/rising-immigrant-deaths-burden-texas-county/2013/09/22/aab06876-239f-11e3-b75d-5b7f66349852_story.html, archived at <http://perma.cc/KM87-GDU2> (“Immigrants are shifting their routes away from the well-worn paths into Arizona and instead crossing into deep-southern Texas. The changing patterns have put an extra burden on local governments . . . the county handled 129 bodies last year, which Judge Raul Ramirez, the county’s top administrator, says blew a hole in the budget.”).

²⁰⁷ See, e.g., Fernanda Santos, *Shootings by Agents Increase Border Tensions*, N.Y. TIMES, June 10, 2013, http://www.nytimes.com/2013/06/11/us/shootings-by-agents-increase-border-tensions.html?pagewanted=all&_r=0, archived at <http://perma.cc/8MRE-FTD7> (“As rocks hurled from Mexico rained down on United States Border Patrol agents one night last October, at least one of the agents drew his gun and fired across the border, striking a teenager 11 times, 7 times in the back.”); *The IACHR Expresses Deep Concern Over the Deaths of Migrants Caused by the U.S. Border Patrol*, INTER-AM. COMM’N ON HUMAN RIGHTS, ORG. OF AM. STATES (Feb. 24, 2014), http://www.oas.org/en/iachr/media_center/PReleases/2014/018.asp, archived at <http://perma.cc/MX38-AY93> (considering twenty-eight deaths caused by agents of the U.S. Customs and Border Protection Agency since January 2010 and reporting that nine persons were accused of throwing rocks toward agents when they were killed).

unable or unwilling to police itself,²⁰⁸ and while the new bill calls for the creation of use of force policies and trainings,²⁰⁹ it is unrealistic to believe that these trainings and policies providing the necessary counterbalance to a mandate of “persistent surveillance” along the entire southern border.

Finally, the bill would increase harms to migrants even before they make it to the U.S.-Mexico border. S. 744 calls for sharing increased technology and resources for Mexican and Central American law enforcement and border officials. The abuses that occur during migrants’ journeys to the United States from Mexico and Central and South America are well documented, with border guards themselves often active participants in severe human rights violations.²¹⁰ Exporting the United States’s failed enforcement-only strategy (and the harms these strategies produce) beyond the United States borders increases harms to unauthorized migrants even before they arrive at the southern border.

b. Unauthorized migrants apprehended at the border: subject to prolonged incarceration

From the point of view of migrants apprehended while trying to enter the United States, S. 744 would also increase the harms related to “illegality” by increasing the criminal prosecution of unauthorized migrants captured along the southern border. Namely, S. 744 proposed to increase the number of prosecutions in the Tucson, Arizona area for unlawful entry (a misdemeanor offense) and unlawful re-entry (a felony offense) from the current 70 a day to 210 a day,²¹¹ even as unlawful entry and re-entry are already the two most prosecuted federal crimes in the United States.²¹²

These kinds of federal prosecutions already result in criminal sentences for tens of thousands of unauthorized migrants, who can spend years in federal prisons only to be deported at the end of their punishment.²¹³ S. 744 not

²⁰⁸ See, e.g., DANIEL MARTÍNEZ ET AL., AM. IMMIGRATION COUNCIL, NO ACTION TAKEN: LACK OF CBP ACCOUNTABILITY IN RESPONDING TO COMPLAINTS OF ABUSE (2014), available at http://www.americanimmigrationcouncil.org/sites/default/files/No%20Action%20Taken_Final.pdf, archived at <http://perma.cc/8HJD-9ZRW> (summarizing data obtained from the U.S. Customs and Border Protection pursuant to a Freedom of Information Act (“FOIA”) request). The data covered 809 complaints of alleged abuse lodged against Border Patrol Agents including large amounts of physical, sexual and verbal abuse. *Id.* For the cases in which a formal decision was issued, ninety-seven percent resulted in “No Action Taken.” *Id.*

²⁰⁹ S. 744, 113th Cong. § 1112 (2013) (addressing training for border security and immigration enforcement officers).

²¹⁰ See, e.g., Cesar Infante et al., *Violence Committed Against Migrants in Transit: Experiences on the Northern Mexican Border*, 14 J. IMMIGRANT & MINORITY HEALTH 449, 456 (2012).

²¹¹ S. 744, 113th Congress §1104 (2013).

²¹² See Q&A: *The Senate Immigration Bill*, HUMAN RIGHTS WATCH (June 3, 2003), <http://www.hrw.org/news/2013/06/03/qa-senate-immigration-bill#3>, archived at <http://perma.cc/2U8S-ZF2L> (“Illegal entry and illegal reentry are now the most prosecuted federal crimes in the United States, outnumbering prosecutions of drug offenses, white-collar crime, and other federal offenses.”).

²¹³ *Id.*

only called for increased prosecutions, but also dictated an increase to the penalty for entering the United States without permission from the current sentence of two years to a maximum of fifteen years.²¹⁴ Thus, under S. 744, the harms of civil immigrant detention described in Part I of this Article would have been compounded by the harms of prolonged criminal incarceration.

Many of the two million removed under the Obama Administration's first six years will continue to seek to return to the United States to rejoin their families, and thus would be prime candidates for the harms of expanded re-entry prosecutions under S. 744. The National Immigration Law Center notes that the "profile of border-crossers has changed from first-time crossers to people who have crossed before and are trying to rejoin families in the US."²¹⁵ A recent Human Rights Watch report substantiates this claim, adding that many of those already being prosecuted for unlawful entry and re-entry have also sought asylum; then, instead of protection from persecution, they receive criminal sentences followed by deportation.²¹⁶

The steady pace of convictions for entry and re-entry (currently thirty percent of inmates entering the federal system are serving time for these offenses)²¹⁷ demonstrates that this program does not function as a deterrent to unauthorized entry into the United States.²¹⁸ Increasing the penalties associated with re-entry, instead of stopping border crossers trying to rejoin their families and communities, will only subject them to prolonged incarceration. The effect of these prosecutions is devastatingly cumulative—a misdemeanor conviction for the crime of entry means that getting caught again will result in a felony conviction with an even harsher sentence. The loss of freedom, loss of wages, and loss of connection to family and community can devastate the lives of those imprisoned under these charges. The harms extend to family and community members who may be destitute without the economic support of the imprisoned person.²¹⁹ The immediate and collateral consequences of such convictions on both the undocumented and their families constitute an expanded harm of "illegality" proposed by S. 744.

²¹⁴ S. 744, 113th Cong. §276(b)(2) (2013).

²¹⁵ NAT'L IMMIGRATION LAW CTR., ANALYSIS OF SENATE IMMIGRATION REFORM BILL, TITLE I: BORDER SECURITY, *supra* note 194, at 6.

²¹⁶ See HUMAN RIGHTS WATCH, TURNING MIGRANTS INTO CRIMINALS: THE HARMFUL IMPACT OF US BORDER PROSECUTIONS 62–68 (2013), available at http://www.hrw.org/sites/default/files/reports/us0513_ForUpload_2, archived at <http://perma.cc/HZT8-6DBC>.

²¹⁷ See *id.*

²¹⁸ See, e.g., *id.* at 71 ("Numerous defense attorneys and judges told Human Rights Watch how criminal prosecution and even lengthy prison sentences frequently do not deter people from trying to enter the United States again, particularly when they have strong family ties to the US.").

²¹⁹ See *id.* at 44 ("One man we met in a Texas jail, who was facing a likely sentence of 8 to 14 months in federal prison for illegal reentry after prior illegal entry and reentry convictions, asked his attorney, 'Can we ask the judge for less time because my children have nothing to eat?'").

c. *Unauthorized migrants already in the United States: subject to increased immigration enforcement*

From the point of view of unauthorized migrants already in the United States, S. 744 would help guarantee a continuation of the harms of detention and deportation by leaving intact the programs that funnel them from criminal custody to immigration custody, and by expanding the grounds under which they could be found inadmissible or deportable. S. 744 called for reauthorization of the State Criminal Alien Assistance Program (“SCAAP”).²²⁰ SCAAP reimburses state and local law enforcement for the cost of holding immigrants for later pick up and transfer from local jails and prisons to ICE custody.²²¹ The current practice is for SCAAP reimbursements to be disbursed only for those immigrants convicted of crimes.²²² S. 744 would expand the program to reimburse state and local law enforcement for holding noncitizens whom have merely been charged with crimes.²²³ This continuation and expansion of SCAAP indicates Congress’s tacit approval of the Obama Administration’s embrace of programs creating channels for the wholesale transfer of noncitizens from local law enforcement custody to federal immigrant detention centers, regardless of convictions.

The first version of ICE ACCESS programs, a set of federal initiatives that grant immigration authorities access to people coming into contact with local law enforcement,²²⁴ initially came into being following the passage of the last comprehensive immigration reform bill. IRCA contained a provision that required the Attorney General to remove “an alien who is convicted of an offense which makes the alien subject to deportation . . . as expeditiously as possible after the date of conviction.”²²⁵ One of the primary ICE ACCESS programs, the Criminal Alien Program (“CAP”), is the successor of Institutional Removal Program and the Alien Criminal Apprehension Program created pursuant to IRCA. CAP is currently active in all ICE field offices, all state and federal prisons, and many local jails, and has led to hundreds of

²²⁰ S. 744, 113th Cong. § 1110 (2013).

²²¹ See *State Criminal Alien Assistance Program (SCAAP)*, BUREAU OF JUSTICE ASSISTANCE, U.S. DEPT. OF JUSTICE, https://www.bja.gov/Funding/15SCAAP_Guidelines.pdf (last visited Mar. 31, 2015), archived at <https://perma.cc/6ZLH-SD9W> (“BJA administers the State Criminal Alien Assistance Program (SCAAP) in conjunction with the Bureau of Immigration and Customs Enforcement (ICE) and Citizenship and Immigration Services, Department of Homeland Security (DHS). SCAAP provides federal payments to states and localities that incurred correctional officer salary costs for incarcerating undocumented criminal aliens with at least one felony or two misdemeanor convictions for violations of state or local law, and incarcerated for at least 4 consecutive days during the reporting period.”).

²²² *Id.*

²²³ S. 744, 113th Cong. § 1110(b) (2013).

²²⁴ See *Delegation of Immigration Authority Section 287(g) Immigration and Nationality Act*, U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, <http://www.ice.gov/factsheets/287g> (last visited Mar. 31, 2015), archived at <http://perma.cc/765V-6F92>.

²²⁵ Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, § 701, 100 Stat. 3359.

thousands of deportations.²²⁶ Secure Communities, the more recently created, technologically driven version of CAP, has likewise contributed to deportations.²²⁷ Thus, contact with local law enforcement, whether or not the contact results in a conviction, has become one of the leading ways immigrants are exposed to the harms of detention and removal. This approach has been widely criticized, with unlikely allies including prosecutors and police chiefs calling for an end to the partnerships between local law enforcement and immigration law enforcement.²²⁸ By including long-term funding for SCAAP in S. 744, the Senate signaled that this flawed approach should continue. The passage of a bill like S. 744 would thus mean continuing vulnerability to detention and deportation for noncitizens coming into contact with local law enforcement.

S. 744 further expands vulnerability to detention and deportation with the addition of new categories of criminal conduct that can render a noncitizen more likely to be denied admission to the United States, denied access to lawful status, and deported. S. 744 creates new grounds of inadmissibility and deportability relating to crimes of domestic violence,²²⁹ driving under the influence or while intoxicated,²³⁰ and gang membership,²³¹ adding these categories to the already broad disqualifying criminal bars to legalization. The expansion of these categories under S. 744 forms part of the trend of the past thirty years to vastly increase the reasons a noncitizen can be kept out of or removed from the United States.²³²

²²⁶ While not every "CAP encounter" ends in a deportation, from 2007 to approximately mid-2012 there were approximately 2.5 million CAP encounters between immigrants and immigration officials. *See Decl. of Matuszewski*, *supra* note 2, at 8.

²²⁷ For a description of Secure Communities, see U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, *Secure Communities*, *supra* note 154. For a statistical analysis of deportations under Secure Communities, see generally AARTI KOHLI ET AL., CHIEF JUSTICE EARL WARREN INST. ON LAW & SOC. POLICY, *SECURE COMMUNITIES BY THE NUMBERS: AN ANALYSIS OF DEMOGRAPHICS AND DUE PROCESS* (2011), available at https://www.law.berkeley.edu/files/Secure_Communities_by_the_Numbers.pdf, archived at <https://perma.cc/X7PK-6XNY?type=pdf>.

²²⁸ *See, e.g.*, Robert M. Morgenthau, *Obama's Assault on Immigrants*, N.Y. DAILY NEWS, Apr. 28, 2014, <http://www.nydailynews.com/opinion/obama-assault-immigrants-article-1.1769345>, archived at <http://perma.cc/ZA4G-2TFK> (critiquing Secured Communities); Daniel C. Vock, *Backlash Grows Against Federal Immigration Screening in Jails*, USA TODAY, Sept. 25, 2013, <http://www.usatoday.com/story/news/nation/2013/09/25/backlash-grows-against-federal-immigration-screening-at-jails/2868507/>, archived at <http://perma.cc/XU6W-EA7P> (detailing the California State Sheriffs Association's complaints).

²²⁹ S. 744, 113th Cong. § 3711(c)(1)(K)(i) (2013).

²³⁰ *Id.* § 3702(a)–(b).

²³¹ *Id.* § 3701(a)–(b).

²³² *See, e.g.*, Illegal Immigration Reform and Immigration Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (codified as amended in scattered sections of 8, 18 U.S.C.); Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214; S. 744, 113th Cong. § 3701 (2013) (expanding grounds for deportation for driving under the influence, gang membership, and sexual abuse of a minor). The entire field of criminal immigration has emerged from this development. *See* Mary Fan, *The Case for Crimmigration Reform*, 92 N.C. L. REV. 75, 80 (2013) ("Crimmigration" refers to the use of criminal sanctions to enforce civil immigration law and the increasing erosion of boundaries between criminal and civil immigration law."). *See generally* Juliet Stumpf, *The Crimmigration Crisis*:

The expansion of the grounds of inadmissibility and removability to include “gang membership” constitutes a particularly dangerous development. Under S. 744, a person would only need to be determined to be a “willing participant in a criminal street gang” to be subject to deportation.²³³ This translates to young men of color being disqualified from legalization for nothing more than a law enforcement agency’s unreviewable decision to label them gang members.²³⁴

Scholars have argued that IRCA’s inclusion of provisions requiring the removal of so-called “criminal aliens” helped set the groundwork for the explosion of deportations centered on the idea of migrant criminality.²³⁵ Bills like S. 744, by continuing in the same tradition, would only guarantee another generation of noncitizens vulnerability to the harms of detention and exile.

d. Unauthorized migrants already in the United States: subject to increased workplace exploitation

Even if they can avoid death on the border, apprehension on the border, or apprehension in the interior, the undocumented would nonetheless face increased harm through S. 744’s mandated implementation of an Electronic Employment Eligibility Verification System (“EEVS”).²³⁶ In 1986, the passage of the IRCA created employer sanctions, for the first time making it unlawful to employ an unauthorized migrant.²³⁷ In the intervening years, the development of technology has made it possible to further expand IRCA’s employment-criminalizing provisions. S. 744 continues that expansion in the form of mandated nation-wide implementation of EEVS, which all employers would be required to use to verify the employment eligibility of newly-hired employees within five years.²³⁸

Immigrants, Crime, and Sovereign Power, 56 AM. U. L. REV. 367 (2006). The extreme harms of detention and removal that can result from certain criminal actions/convictions have even led the Supreme Court to rule that criminal defenders render ineffective assistance of counsel when they fail to warn their noncitizen clients of the immigration consequences of certain pleas. See *Padilla v. Kentucky*, 559 U.S. 356, 392 (2010).

²³³ S. 744, 113th Cong. § 3701(a)(J)(i)(II) (2013).

²³⁴ See *Senate Bill 744 Analysis*, IMMIGRANT JUST. NETWORK (June 20, 2013), <http://immigrantjusticenetowork.org/?portfolio=senate-immigration-bill-s-744-needs-more-work-to-ensure-fundamental-fairness-for-all-immigrants>, archived at <http://perma.cc/C64H-LWRH> (“Because challenging such a classification is so difficult, these legislative proposals will exacerbate existing problems of misidentification, increase profiling, and target children and youth, many of whom are the victims of crime and human trafficking.”).

²³⁵ See generally Javier Xavier Inda, *Subject to Deportation: IRCA ‘Criminal Aliens,’ and the Policing of Immigration*, 1 MIGRATION STUD. 292 (2013).

²³⁶ See generally S. 744, 113th Cong. §§ 3101–3306 (2013).

²³⁷ See Illegal Immigration Reform and Immigration Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (codified as amended in scattered sections of 8, 18 U.S.C.).

²³⁸ S. 744, 113th Cong. § 3101(d)(2)(G) (2013).

The current version of EEVS, the E-verify system, currently covers only 3 percent of U.S. employers²³⁹ and has been plagued by errors that tend to disproportionately affect women (whose names more commonly change at marriage) and people with non-Western European names (whose names are more likely to be misspelled in the DHS and SSA databases, upon which E-verify relies).²⁴⁰ Like the border provisions of S. 744 that would place both citizens and noncitizens in border communities in a state of near permanent vigilance, the EEVS requirements could create serious difficulties for U.S. citizens with immigrant-sounding names or appearances seeking employment. Again, the harms of “illegality” would extend beyond those who lack status to those who could be profiled as lacking status.

For unauthorized migrants, successfully navigating through EEVS would be nearly impossible, as the database checks not only names, but also photographs, and calls for the issuance of tamper-resistant, fraud-proof, identity theft-resistant social security cards.²⁴¹ Critics fear that such cards could be a precursor to national identification cards that could eventually become requirements for basic survival actions such as renting a home.²⁴² The creation and common usage of such a card would create even more vulnerability for unauthorized migrants, who already face challenges related to lack of government-issued identification.²⁴³ Even without the creation of a national identity card, the unauthorized workers who do not qualify for S. 744’s legalization provisions would be forced into even more precarious employment situations and be even more vulnerable to the whims of unscrupulous employers still willing to hire them.

An analysis of S. 744’s employment verification provisions requires a consideration of IRCA and the creation of employer sanctions, as S. 744’s provisions build on the harms produced by this previous legalization bill. When viewed from the point of view of the current population of unauthorized migrants, the provisions of IRCA continue to exacerbate the harms related with “illegality.” One of the centerpieces of IRCA was the creation of employer sanctions—IRCA made it a crime to hire people who are unauthorized to work in the United States, establishing a series of punishments

²³⁹ See Marc Rosenblum & Lang Hoyt, *The Basics of E-Verify, the U.S. Employer Verification System*, MIGRATION POLICY INST. (July 13, 2011), <http://www.migrationpolicy.org/article/basics-e-verify-us-employer-verification-system>, available at <http://perma.cc/6DSW-P7MX>.

²⁴⁰ See NAT’L IMMIGRATION LAW CTR., ANALYSIS OF SENATE IMMIGRATION REFORM BILL, TITLE III: INTERIOR ENFORCEMENT 4 (2013), available at <http://www.nilc.org/document.html?id=899>, archived at <http://perma.cc/JX4C-D5TF>.

²⁴¹ S. 744, 113th Cong. § 3102 (2013).

²⁴² See, e.g., Chris Calabrese, *Mandatory E-Verify: A Giant Plunge Into a National ID System*, ACLU BLOG OF RIGHTS (Apr. 17, 2013, 12:23 PM), <https://www.aclu.org/blog/immigrants-rights-technology-and-liberty/mandatory-e-verify-giant-plunge-national-id-system>, archived at <https://perma.cc/5DSC-HNNE> (voicing concerns over police access, the program’s expansion into TSA’s “no fly” list, mandatory use for gun dealers, and requirements for rentals and mortgages).

²⁴³ See *supra* notes 83–87 and accompanying text.

meant to discourage employers from hiring undocumented workers.²⁴⁴ Although these provisions technically were aimed at employers, the provisions ended up primarily impacting unauthorized migrants, not the companies that hired them. Employers who hire undocumented workers have often received an amnesty of their own from sanctions as long as they cooperate in the investigations of the immigration status of their workers.²⁴⁵ Moreover, employer sanctions and the *de facto* criminalization of work did not mean the end of unauthorized migrant labor. Instead, unscrupulous employers received another tool to keep unauthorized workers in precarious, dependent relationships, vulnerable to the risk of being reported to immigration authorities.²⁴⁶ Due to IRCA's provisions, the harms related with unlawful employment fell squarely on the backs of the most vulnerable.

Various labor historians have pointed to labor precarity as a central feature of the immigration landscape. In rejecting the idea of a "broken" immigration system, Nicholas DeGenova notes how the system that has been renounced as broken is actually vastly lucrative for employers:

It is plain to see that the U.S. immigration system has rather routinely and predictably ensured that U.S. employers have had at their disposal an eminently flexible, relatively pliable, and highly exploitable mass of labor migrants, whose "illegality"—produced by U.S. immigration lawmaking and enforcement practices—has related them to a condition of enduring vulnerability.²⁴⁷

²⁴⁴ 8 U.S.C. § 1324a(e)(4)(A) (providing cease and desist orders for hiring undocumented workers and civil penalties between \$250 and \$10,000 for each undocumented worker employed).

²⁴⁵ See, e.g., Leigh N. Ganchan, *DHS Worksite Enforcement: Creating a Culture of Compliance*, HOUS. LAWYER (Mar. 2009), http://www.thehoustonlawyer.com/aa_mar09/page16.htm, archived at <http://perma.cc/JUG8-GNUH> (describing four high-profile raids in Houston during the Bush Administration, in two of which the prosecutors declined to bring criminal charges against the employers, and in one the prosecutors opted for a non-prosecution agreement); see also Raquel Aldana, *Of Katz and "Aliens": Privacy Expectations and the Immigration Raids*, 41 U.C. DAVIS L. REV. 1081, 1129 (2008) (describing how, post-IRCA, employers are incentivized to cooperate with ICE investigations and raids to limit liability and avoid criminal charges); Bacon & Hing, *supra* note 74, at 90–91 ("Despite Obama's contention that sanctions enforcement will punish those employers who exploit immigrants, employers are rewarded for cooperating with ICE by being immunized from prosecution. Javier Murillo, president of SEIU Local 26 says 'the promise made during the audit is that if the company cooperates and complies, they won't be fined.'").

²⁴⁶ See, e.g., CHOMSKY, *supra* note 67, at 116 ("By making a large group of workers more vulnerable to exploitation—because they have little recourse under the law—sanctions enable employers to lower wages and working conditions, with little fear that workers will protest or organize. Thus, the sanctions paradoxically make undocumented immigrants a more desirable workforce."); De Genova, *supra* note 4, at 50 ("IRCA's provision primarily served to introduce greater instability into the labor market experiences of undocumented migrants, and thereby instituted an internal 'revolving door.' What were putatively 'employer sanctions,' then, actually aggravated the migrants' conditions of vulnerability and imposed new penalties upon the 'unauthorized' workers.").

²⁴⁷ *Id.* at 58.

In this system, unauthorized migrants end up bearing the health risks, risks of sexual harassment, and other workplace harms.

Thus, when read from the point of view of the currently undocumented, one of the chief effects of IRCA was to create, or at the very least reinforce, the insecure conditions under which they labor. While at least two and a half million families can trace some of their current levels of stability to the grant of status they received under IRCA,²⁴⁸ eleven million unauthorized migrants today can thank IRCA for rendering their employment illegal. Many of the attorneys and community organizations that participated in the large-scale legalization drives and lawsuits that followed the 1986 law have now spent over two decades fighting the effects of the criminalization of employment on undocumented communities. IRCA, in hindsight, increased the harm related to living without status by increasing the power of employers to harm undocumented workers, and expanding the grounds under which immigration enforcement could occur. S. 744, with its expanded employment verification requirement, would constitute a further expansion of these harms.

e. The verdict: S. 744 guarantees increased harm for unauthorized migrants

S. 744's legalization provisions offer a new kind of status, registered provisional immigrant ("RPI") status, to the millions of unauthorized migrants the bill sought to benefit.²⁴⁹ RPI status would serve as a precursor to Lawful Permanent Residence (which itself acts as precursor to U.S. citizenship).²⁵⁰ People in RPI status could only apply for Lawful Permanent Residence after ten years of RPI status.²⁵¹ Three years later, they could apply for citizenship. Already, the status of Lawful Permanent Residents ("LPRs") has become a relatively unstable one due to the enormous expansion of the grounds of deportability, statutory provisions that can result in the loss of LPR status and deportation for criminal activity as petty as shoplifting.²⁵²

²⁴⁸ See generally KERWIN, *supra* note 166.

²⁴⁹ S. 744, 113th Cong. § 2101 (2013).

²⁵⁰ *Id.* § 2102.

²⁵¹ *Id.* Exceptions to this thirteen year timeline to citizenship are made for people brought to the United States as children, and for agricultural workers, as S. 744 incorporates the oft-introduced Dream Act (Development, Relief, and Education for Alien Minors Act) and AgJobs (Agricultural Job Opportunities, Benefits, and Security Act). See S. 744, 113th Cong. §§ 2103, 2211 (2013). In line with the politics of respectability, those seen as most innocent (immigrants brought to the United States as youth) and as most hardworking (immigrants working in agriculture) would be rewarded for their respectability. Although historically, agricultural workers have moved to less back-breaking employment after being offered work authorization, in order to benefit from the AgJobs provisions, they would need to remain in their back-breaking line of work for an additional three to five years, guaranteeing a continued supply of pliant, dependent workers to the agricultural industry.

²⁵² KANSTROOM, DEPORTATION NATION, *supra* note 155, at 243.

Hundreds of thousands of long-term LPRs have been removed since these statutory changes took effect in the mid-1990s.²⁵³

In implementing RPI status—a prolonged temporary status—Congress would be creating an even more vulnerable category than LPR, with even fewer protections from deportation.²⁵⁴ While LPRs can generally only lose their status through criminal acts or through prolonged absence from the United States, people in RPI status could lose their eligibility for this status (and thus face deportation) not only for the LPR grounds of deportability, but also if they were unemployed for a period of over 60 days²⁵⁵ or if they were found to be delinquent on their taxes.²⁵⁶ The passage of S. 744 demonstrates the pitfalls of an immigrant rights strategy premised on respectability: the limited form of status it provides is premised on hard-working, law-abiding immigrants continuing to work, always, without stopping, or risk losing their status.²⁵⁷

S. 744 was drafted so that the expanded harms to those who do not qualify for RPI serve as a prerequisite for the legalization aspects of the Bill.²⁵⁸ The unauthorized migrants who could benefit from the long and circuitous route to lawful status envisioned by S. 744 would not be able to do so unless certain “enforcement triggers” went into effect.²⁵⁹ The drafters of the Bill made legalization for some contingent on the guarantee of harms to those who would remain undocumented by making the vast expansion of border enforcement a prerequisite to the implementation of the registered provisional immigrant status provisions.

S. 744 further links full implementation of electronic employment verification to the ability of people in RPI status to become lawful permanent residents, along with certification that 700 miles of fencing is complete and 38,405 border patrol agents are deployed.²⁶⁰ In other words, the federal government must certify that increased harms to the undocumented are in place—that it has become more dangerous than ever to live without status—before those who can pass through the arduous RPI to LPR process have a

²⁵³ See KANSTROOM, *AFTERMATH*, *supra* note 21, at 12 (outlining the expansion of the grounds for deportation through the Antiterrorism and Effective Death Penalty Act and the Illegal Immigration Reform and Immigrant Responsibility Act).

²⁵⁴ See Geoffrey Heeren, *Persons Who Are Not the People: The Changing Rights of Immigrants in the United States*, 44 COLUM. HUM. RTS. L. REV. 367, 374 (2013) (“Today, non-citizens are balkanized into a host of hierarchical categories, and even the Lawful Permanent Residents (LPRs) at the top cannot lay claim to many of the rights of membership that ‘declarant aliens’ enjoyed during an earlier era.”).

²⁵⁵ S. 744, 113th Cong. § 2101(a) (2013) (adding § 245B(c)(8)(B)(i)(I)).

²⁵⁶ *Id.* (adding § 245B(c)(8)(C)).

²⁵⁷ For an extension of registered provisional immigrant status, an applicant must demonstrate that she was regularly employed, not likely to become a public charge, an average income or resources above the Federal poverty level, and payment of all applicable Federal taxes. *See id.* § 245B(c)(9)(B).

²⁵⁸ *Id.* § 3.

²⁵⁹ *Id.*

²⁶⁰ *Id.*

chance at obtaining the safety of status. Thus, under S. 744, the sphere of legality cannot be extended to the undocumented until the harms of the sphere of “illegality” are guaranteed.

The result of the passage and implementation of a bill like S. 744 would be the phenomenon Reva Siegel has labeled “preservation through transformation.”²⁶¹ While S. 744 would offer a reduction of harm for some undocumented people by giving them a path to temporary status (transformation), it would do so only by mandating the bolstering of the current apprehension, detention, and removal apparatus (preservation). Those immigrants who could pay taxes, stay employed, and stay out of jail could be absorbed by the polity, but the very logics that require such respectability to avoid the worst harms of “illegality” would not only remain in place, they would be strengthened. While S. 744 gives many people a chance to comply with the new and presumably improved rule of law, it also develops harsher penalties and consequences for those who remain outside the now expanded sphere of legality. In other words, with S. 744, the cost of expanding the sphere of legality is the expansion of the harms of “illegality.”

Applying the “first do no harm” principle makes clear that for the millions in the United States who would not qualify for its protections and the millions yet to come, S. 744 would make living without lawful status more harmful. As discussed in the next section, the application of the principle to the 2014 Immigration Accountability Executive Action yields more ambiguous results.

f. “First Do No Harm” applied to the 2014 Immigration Accountability Executive Action

On November 20, 2014, President Obama announced the “Immigration Accountability Executive Action,” a proposed series of reforms to the immigration system.²⁶² This announcement came after months of pressure from activists and advocates, pushing the Executive to act to curb the record number of deportations.²⁶³ The pressure on the Executive Branch had increased after it became clear that the House of Representatives would not be taking

²⁶¹ See Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1113 (1997).

²⁶² See President Barack Obama, *Remarks by the President in Address to the Nation on Immigration*, WHITE HOUSE (Nov. 20, 2014, 8:01 PM), <http://www.whitehouse.gov/the-press-office/2014/11/20/remarks-president-address-nation-immigration>, archived at <http://perma.cc/SYSC-62MV>.

²⁶³ See, e.g., Rory Carroll, *Washington Detainees Begin Hunger Strike as Part of Immigration Protest*, GUARDIAN, July 30, 2014, <http://www.theguardian.com/world/2014/jul/30/undocumented-migrants-washington-detainees-hunger-strike>, archived at <http://perma.cc/Q6LJ-TAUW> (reporting that hundreds of detainees at the northwest detention center in Tacoma Washington began refusing food in preparation for a march on the White House to demand presidential resolution to immigration reform delay); Sam Levine, *Why Some Immigration Activists Want to Stop Meeting with Obama*, HUFFINGTON POST (July 28, 2014), http://www.huffingtonpost.com/2014/07/28/obama-immigration-boycott_n_5628245.html, archived at <http://perma.cc/A273-72ZX> (reporting that coalition of immigration activists picketed the White

up Senate Bill S. 744, or any other comprehensive immigration reform bill.²⁶⁴ As of this writing, the implementation of the Executive Action was just beginning and remained contested. Thus, this Section seeks to apply the “first do no harm” analysis to the Executive Action as proposed.

The details of the action were laid out in a series of eleven memoranda from the Secretary of DHS to the heads of the federal immigration agencies, simultaneously released on November 20, 2014.²⁶⁵ These memoranda covered topics ranging from border enforcement, to interior enforcement, to an increase in technology-related visas, to an expansion in protections from deportation for certain noncitizens.²⁶⁶ Most controversially, DHS announced that protection from deportation and work authorization documents would be made available to unauthorized migrants who arrived in the United States as children (through an expansion of Deferred Action for Childhood Arrivals, or “DACA”), as well as to migrant parents of U.S. citizens and Lawful Permanent Residents (through the creation of Deferred Action for Parental Accountability, or “DAPA”).²⁶⁷ Opponents immediately decried the “imperial presidency” and called the action “executive amnesty,” while pro-immigrant advocates celebrated the partial victory but noted that it had not gone far enough.²⁶⁸ As of this writing, the implementation of the deferred action programs has been temporarily halted by a lawsuit brought by twenty-six states.²⁶⁹ The Department of Justice has indicated its confidence that it will ultimately prevail in court and that DHS will be able to implement the new deportation protection programs, but the final outcome remains unclear.²⁷⁰

House to urge advocacy groups to boycott meetings with the President until undocumented immigrants are included in discussions).

²⁶⁴ Dan Nowicki & Erin Kelley, *supra* note 181 (“Any last hope that the House of Representatives might pass immigration reform this year died this week with the shocking defeat of Majority Leader Eric Cantor in his Republican primary, political analysts and Capitol Hill lawmakers predicted Wednesday.”).

²⁶⁵ *Fixing Our Broken Immigration System Through Executive Action—Key Facts*, U.S. DEPT. OF HOMELAND SEC., <http://www.dhs.gov/immigration-action> (last updated Jan. 5, 2015), archived at <http://perma.cc/9JDN-BLV5>.

²⁶⁶ *Id.*

²⁶⁷ See *Prosecutorial Discretion Memo*, *supra* note 5.

²⁶⁸ See Eli Saslow, *Conservative Expert on Immigration Law to Pursue Suit Against Executive Action*, WASH. POST, Nov. 22, 2014, http://www.washingtonpost.com/national/2014/11/22/f6d2b3fe-728a-11e4-ad12-3734c461eab6_story.html, archived at <http://perma.cc/38KZ-4G2Y> (quoting Kansas Secretary of State Kris Kobach as characterizing the Executive Action as “imperial, executive amnesty,” and “the sacrificial shredding of our Constitution”); Marc A. Thiessen, *How to Push Back on Obama’s Executive Amnesty*, WASH. POST, Dec. 1, 2014, http://www.washingtonpost.com/opinions/marc-thiessen-how-to-push-back-on-obamas-executive-amnesty/2014/12/01/b1a494f2-7963-11e4-84d4-7c896b90abdc_story.html, archived at <http://perma.cc/PDS4-EUXU> (characterizing the Executive Action as “de facto amnesty” and “executive amnesty”).

²⁶⁹ See *Texas v. United States*, No. B-14-254, 2015 U.S. Dist. LEXIS 18551 (S.D. Tex. Feb. 15, 2015).

²⁷⁰ See Molly Hennessy-Fiske, *Advocates Urge Immigrants Not to be Deterred by Ruling Blocking Obama Plan*, L.A. TIMES, Feb. 17, 2015, <http://www.latimes.com/nation/nationnow/la-na-immigration-lawsuit-applications-daca-dapa-20150217-story.html>, archived at <http://perma.cc/R2VP-QQW9> (reporting that DHS Secretary Jeh Johnson issued a statement in response to the preliminary injunction in *Texas v. United States*, claiming “we fully expect to ultimately

If fully implemented as proposed, will the Executive Action increase the harms to those left without legal status? Unlike the analysis of S. 744, the answer is more ambiguous. This is due in part to the fact that the deferred action memorandum makes clear that the Executive Action does not actually grant legal status, provisional or otherwise, to anyone.²⁷¹ Recipients of deferred action—who in the context of CIR might receive more lasting protection in the form of provisional residence and eventual lawful permanent residence—instead are granted only temporary protection and arguably remain planted in “illegality.”²⁷²

Thus, the question becomes, does the Executive Action increase the harm to those who receive deferred action? The benefits of deferred action include a three-year deferral of immigration enforcement (the deportation of recipients will not be actively sought), as well as an employment authorization document.²⁷³ However, the three-year period of deferred action could be cut short at any point at the discretion of the Executive. Future presidents could choose to terminate the deferred action program, as presidential candidate Mitt Romney promised to do with the most recent iteration of deferred action, the initial DACA program announced in June 2012.²⁷⁴ Moreover, there are no guarantees that the biometric data and biographical information applicants provide to DHS in their deferred action applications will not be used to find and arrest them if a future administration decides to pursue a mass deportation agenda. Thus, even for the intended beneficiaries of deferred action, future harms could outweigh the benefits provided.

Despite the risks, the benefits of deferred action, while not rising to the level of legal status, should not be underestimated. Some of the primary harms of living without lawful status described in Part II—including detention, deportation, and workplace exploitation due to lack of work authorization—would be avoided by deferred action recipients, at least in the short term. For many potential applicants, these benefits will outweigh the potential future harms, and they will come forward and apply if given the opportunity to do so.²⁷⁵

prevail in the courts, and we will be prepared to implement DAPA and expanded DACA once we do”); see also *Crane v. Napolitano*, 920 F. Supp. 2d 724 (N.D. Tex. 2013) (wherein ICE agents brought suit against DHS officials to challenge the constitutional and statutory validity of a directive and memorandum promulgated by officials that changed ICE deportation procedures and prosecutorial discretion, *id.* at 729–30, but the Court held that the plaintiffs lacked standing on all the issues, *id.* at 736, 738, 743, 746).

²⁷¹ *Prosecutorial Discretion Memo*, *supra* note 5, at 5 (“This memorandum confers no substantive right, immigration status or pathway to citizenship.”).

²⁷² *Id.*

²⁷³ *Id.*

²⁷⁴ *Mitt Romney Camp Says He Will Not Continue Deferred Action After Taking Office*, FOX NEWS LATINO (Oct. 3, 2012), <http://latino.foxnews.com/latino/politics/2012/10/03/mitt-romney-campaign-says-would-not-continue-deferred-action-program-after/>, archived at <http://perma.cc/DR93-CFW4>.

²⁷⁵ Nevertheless, there is a burgeoning concern with the potential social and legal costs of “liminal legality” such as that created by DACA and DAPA. See *Navigating Liminal Legalities along Pathways to Citizenship: Immigrant Vulnerability and the Role of Mediating Institu-*

However, for those left out of the proposed protections of DACA and DAPA, the question remains—does the Executive Action increase harm? The White House estimates that nearly five million unauthorized migrants in the United States may qualify for DACA and DAPA.²⁷⁶ For the seven million that remain vulnerable, will executive action make the harms of living without lawful status more acute? While most media attention has focused on the deferred action program, three of the Executive Action memos outlined the potential treatment of the seven million who remain unprotected, as well as of those unauthorized migrants yet to arrive. The “Policies for the Apprehension, Detention and Removal of Undocumented Immigrants” memorandum (the “Priorities Memo”) described the new policies for targeted enforcement of noncitizens in the United States, establishing a three-tiered priority system for distributing these efforts.²⁷⁷ The “Secure Communities” memorandum announced the discontinuation of the Secure Communities program, an interior enforcement program focused on apprehending noncitizens through partnerships with local criminal justice agencies, and its replacement with the Priorities Enforcement Program (“PEP”).²⁷⁸ The “Southern Border and Approaches Campaign” memorandum (the “Border Memo”) reiterates the focus and commitment to high levels of border enforcement, establishing three joint task forces to coordinate border enforcement efforts among different DHS agencies.²⁷⁹

The Priorities Memo named as part of the “Priority 1” category for immigration enforcement efforts “aliens apprehended at the border or ports of entry while attempting to unlawfully enter the United States.”²⁸⁰ When read side-by-side with the Border Memo, this makes clear that noncitizens who have not yet arrived in the United States and/or those noncitizens who have been deported and are attempting to return to their families and communities will continue to be the focus of enforcement efforts. The growing immigrant detention apparatus is designed with these arrivals in mind—the

tions, RUSSELL SAGE FOUND., <http://www.russellsage.org/awarded-project/navigating-liminal-legalities-along-pathways-to-citizenship-immigrant-vulnerability> (last visited Mar. 31, 2015), archived at <http://perma.cc/AYP2-NCYE>.

²⁷⁶ *Fact Sheet: Immigration Accountability Executive Action*, WHITE HOUSE (Nov. 20, 2014), <http://www.whitehouse.gov/the-press-office/2014/11/20/fact-sheet-immigration-accountability-executive-action>, archived at <http://perma.cc/W39Q-54Z2>.

²⁷⁷ Memorandum from Jeh Charles Johnson, Sec’y, U.S. Sep’t of Homeland Sec., to Thomas S. Winkowski, Acting Dir., U.S. Immigration & Customs Enforcement, R. Gil Kerlikowske, Comm’r, U.S. Customs and Border Protection, Leon Rodriguez, Dir., U.S. Citizenship & Immigration Servs., Alan D. Bersin, Acting Assistant Sec’y for Policy (Nov. 20, 2014), available at http://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf archived at <http://perma.cc/Y3AD-DYNA> [hereinafter *Priorities Memo*].

²⁷⁸ See *Secure Communities Memo*, *supra* note 2.

²⁷⁹ See Memorandum from Jeh Charles Johnson, Sec’y, U.S. Dep’t of Homeland Sec., to Thomas S. Winkowski, Acting Dir., U.S. Immigration & Customs Enforcement, R. Gil Kerlikowske, Comm’r, U.S. Customs & Border Protection, Leon Rodriguez, Dir., U.S. Citizenship & Immigration Servs., Alan D. Bersin, Acting Assistant Sec’y for Policy (Nov. 20, 2014), http://www.dhs.gov/sites/default/files/publications/14_1120_memo_deferred_action.pdf, archived at <http://perma.cc/VHF4-WU84> [hereinafter *Border Memo*].

²⁸⁰ *Priorities Memo*, *supra* note 277, at 3.

creation of a new detention center in Dilley, Texas, designed to house 4,500 women and children, primarily recent arrivals in the United States, is part and parcel of this reinforced border-enforcement strategy.²⁸¹ Additionally, the increasing reliance of Criminal Alien Requirement prisons, facilities designed to house noncitizens convicted of illegal entry or illegal re-entry (crimes facing those who attempt to return to the United States post-deportation), signals the emphasis on the “Priority 1” category.²⁸² The Obama Administration’s focus on defending the parts of the Executive Action offering deferred action for parents of U.S. citizens and immigrants who arrived in the country as youth may provide political cover for this expansion of harms against a different population of parents and youth—women and children, primarily asylum seekers, recently arrived in the United States, as well as recently deported men seeking to return to their families.

The Priorities Memo names individuals who have been convicted of “significant misdemeanors” as part of “Priority 2” for enforcement efforts.²⁸³ This category, which has no statutory basis and was created wholesale by the Executive, makes those noncitizens guilty of petty offenses, including a single DUI, subject to immigration enforcement efforts to detain and deport them.²⁸⁴ The Priorities Memo also names those who are convicted of three or more misdemeanors as priorities for enforcement.²⁸⁵ When read side-by-side with the Secure Communities memo, which incorporates the Priorities Memo by naming which noncitizens will be the target of ICE/local police collaborations,²⁸⁶ the explicit strategy of targeting petty-offenders for enforcement is revealed. This population is explicitly left out of DACA/DAPA protections—the same categories that mark them as priorities render them ineligible for deferred action.²⁸⁷

Immigrant advocates pushed for the Executive to expand deferred action in the hopes of curbing deportation. If all the memoranda are implemented, the five million who might receive deferred action will be temporarily removed from the ICE/CBP crosshairs, while those who remain unprotected will be subject to possibly increased enforcement efforts, efforts

²⁸¹ See, e.g., *ICE’s new family detention center in Dilley, Texas to open in December*, U.S. IMMIGRATION & CUSTOMS ENFORCEMENT (Nov. 17, 2014), <https://www.ice.gov/news/releases/ices-new-family-detention-center-dilley-texas-open-december>, archived at <https://perma.cc/F4PR-K9V5> (“The South Texas Residential Center in Dilley is the fourth facility the Department of Homeland Security (DHS) has used to increase its capacity to detain and expedite the removal of adults with children who illegally crossed the Southwest border.”).

²⁸² See ACLU, *WAREHOUSED AND FORGOTTEN* (2014), available at <https://www.aclu.org/sites/default/files/assets/060614-aclu-car-reportonline.pdf>, archived at <https://perma.cc/CGC9-Q98V>; *About our Facilities: Contract Prisons*, FED. BUREAU OF PRISONS, http://www.bop.gov/about/facilities/contract_facilities.jsp (last visited Mar. 31, 2015), archived at <http://perma.cc/W3FR-P4RV>.

²⁸³ *Priorities Memo*, *supra* note 277, at 4.

²⁸⁴ *Id.*

²⁸⁵ *Id.* at 3–4.

²⁸⁶ *Secure Communities Memo*, *supra* note 2, at 2.

²⁸⁷ *Prosecutorial Discretion Memo*, *supra* note 5, at 4.

that will now target a smaller, more easily targeted population. Presumably most of those who are considered deserving of relief will receive DACA or DAPA.²⁸⁸ Thus, the Executive Action may succeed in further naturalizing the targeting of the remaining unauthorized migrants as “criminal aliens.” The Executive Action’s offer of deportation relief for some will not result in a proportionate decrease in immigration enforcement efforts against those who remain left out. If anything, the sharpened priorities and refined form of Secure Communities could facilitate their detention and removal.

Despite these possible outcomes, the “first do no harm” analysis remains ambiguous when applied to executive action as opposed to legislative action. The drafters of S. 744 made the legalization provisions of the bill contingent on a vast expansion of border enforcement and the implementation of electronic employment verification.²⁸⁹ As discussed in the previous section, both of these elements of the Bill would have vastly expanded the harms related to living without lawful status for those who did not benefit from S. 744.²⁹⁰ With the Executive Action, however, there are no such “enforcement triggers.” The implementation of the Priorities Memo, the Secure Communities Memo, and the Border Enforcement Memo do not depend on the implementation of DACA and DAPA. To put it another way, the Executive Action does not guarantee expanded harms in the way S. 744 did because the implementation of DACA and DAPA will proceed independently from the implementation of the enforcement memoranda. So, while those who are left out of deferred action protections will face the full force of immigration enforcement efforts, the creation of DACA and DAPA did not mandate that result in the way that comprehensive immigration reform bills like S. 744 do by inextricably linking enforcement to legalization.

This points to the greater potential of executive action as an avenue of reducing the harms related to illegality. The President’s decision to release enforcement memoranda alongside the deferred action memorandum was a purely political one. The memorandum announcing the creation of Deferred Action for Childhood Arrivals in June 2012, the President’s first large-scale immigration Executive Action, was not accompanied by enforcement-enhancing memos.²⁹¹ While it is difficult to imagine a viable comprehensive

²⁸⁸ For the previous deferred action program, the initial Deferred Action for Childhood Arrivals, the Citizenship and Immigration Services, the sub-agency of DHS charged with administering the benefit, had received 727,164 applications as of December 31, 2014, denying 38,597 and approving 638,897. The rest of the applications remained pending. See Neufeld Decl. at 10, *State of Texas v. United States of America*, No. 1:14-CV 254 (S.D. Tex. Jan. 30, 2015), available at <http://crimmigration.com/wp-content/uploads/2015/01/Neufeld-declaration-1-30-15.pdf>, archived at <http://crimmigration.com/wp-content/uploads/2015/01/Neufeld-declaration-1-30-15.pdf>.

²⁸⁹ See *supra* Part III.A.1.a.

²⁹⁰ *Id.*

²⁹¹ 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 Mayoral, Dir., U.S. Citizenship & Immigration Servs., & John Morton, Dir., U.S. Immigration & Customs Enforcement (June 15, 2012), available at <http://www.dhs.gov/xlibrary/assets/s1-exercising->

immigration reform bill that does include vast expansions in enforcement, future iterations of executive action extending protections from deportation do not mandate such compromises.

The next Section argues that refusing to increase harm to unauthorized migrants as a starting point for any proposed changes to the current immigration system would necessarily result in a refocusing of energy on reducing the harms of “illegality” themselves.

B. Harm Reduction: Which Interventions Could Actively Decrease the Harms of Living Without Lawful Status?

Although refusing invitations to expand the current levels of state-sanctioned harms to unauthorized migrants would be an important start, the desire and need for relief from harm for those most impacted by “illegality” remains. For this reason, avoiding harm is only the first step in the two-step reframe on immigrant rights strategy this Article proposes. The second step requires looking to the principles of harm reduction. Briefly stated, immigrant advocates should seek to reduce the harms associated with living without lawful status. The guiding question for proactive immigrant strategy should therefore shift from “how can the undocumented be put on the pathway to citizenship” to “how can we reduce the harms related with ‘illegality’ for the undocumented.” This question takes as a given that there will continue to be people without lawful status in the United States, and that specific harms currently attach to “illegality,” and starts planning action from that point.

Harm reduction is associated with the principles of neutrality, pragmatism, humanism, and reduction of risk and vulnerability.²⁹² In regards to neutrality, the activity itself is not judged as normatively right or wrong. Instead, the risks and health-related harms are considered.²⁹³ In regards to pragmatism, understanding that illicit behavior will happen whether or not the law prohibits it, pragmatic interventions are considered and weighed by their effectiveness at reducing the harmful consequences of the behavior or activity.²⁹⁴ Deviance from legal norms is not considered reason enough to ignore the effects of the harms on people’s lives; a humanistic regard for individuals’ self-worth is central. All of these principles acknowledge that input from those most affected by the harmful behavior is prioritized over top-down policies.²⁹⁵

prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf, archived at <http://perma.cc/928E-MFJ3> [hereinafter *June 15, 2012 Discretion Memo*].

²⁹² See Joanna N. Erdman, *Access to Information on Safe Abortion: A Harm Reduction and Human Rights Approach*, 34 HARV. J. L. & GENDER 413, 423 (2011).

²⁹³ *Id.* at 424.

²⁹⁴ *Id.* at 451–52.

²⁹⁵ *Id.*

In the illicit drug-use arena, where harm reduction has most traditionally been applied, harm reduction is not synonymous with legalization (the removal of criminal penalties for possession of some or all illicit drugs). “Although many harm reduction advocates support legalization to some extent, legalization is a broader approach to drug policy that is not necessarily informed by the social and medical concerns underlying harm reduction.”²⁹⁶ Decriminalization, the advocacy for selected laws not to be enforced and for penalties for possession to be substantially reduced, sometimes constitutes a component of harm reduction, inasmuch as decriminalization aims to reduce harms to drug users from the criminal justice system itself.²⁹⁷

What lessons does the harm reduction approach hold for immigrant advocates? Given the polarized immigration debate in the United States and the repeated failure of comprehensive immigration reform bills, it is not a stretch to imagine that undocumented people will continue to be a fact of life in the United States for the foreseeable future. Just as the United States is nowhere near the point where drug use will come to be non-existent, the United States is not at a point where having no unauthorized migrants is a reality.

Unlike much licit and illicit drug use, unlawful migration and unlawful presence in the United States is not, per se, harmful. Rather, “illegality” has been constructed and made harmful by specific government actions (through the creation and implementation of both laws and policies), as tracked by various scholars.²⁹⁸ Thus, taking a harm reduction approach in the immigration sphere could mean targeting the ways local, state, and federal actors produce harm for unauthorized migrants. The neutrality principle would entail refusing to judge unlawful migration as right or wrong. The pragmatism principle implies accepting the ongoing likelihood of unlawful migration and creating policies and laws that diminish the harms associated with “illegality.” Thus, a harm reduction approach would be premised on the notion that less vulnerability and risk should attach to the category of undocumented migrants and that interventions should be aimed at making “undocumented” a less dangerous category.

A harm reduction approach would also guarantee that those most vulnerable to the harms of “illegality” are centered. Prioritizing solidarity with unauthorized migrants most subject to the harms of “illegality” would unquestionably be a large leap. It would require giving up the well-funded dream of CIR (at least for now). This is where the harm reduction principle of humanism can be most illuminating. In drug-related harm reduction, “an

²⁹⁶ Amanda Kay, Comment, *The Agony of Ecstasy: Reconsidering the Punitive Approach to United States Drug Policy*, 29 FORDHAM URB. L.J. 2133, 2149–50 (2002).

²⁹⁷ See *id.* at 2150.

²⁹⁸ See generally MAE NGAI, IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA (2004); CONSTRUCTING IMMIGRANT “ILLEGALITY” CRITIQUES, EXPERIENCES, AND RESPONSES (Cecilia Menjivar & Daniel Kanstroom eds., 2014).

acceptance [of] the simple humanity of the drug user”²⁹⁹ and the sense that individuals should be treated as deserving of concern for their health and lives regardless of their deviance from legal norms is centered. In applying a harm reduction approach to immigration, the humanity of the undocumented is centered, and it becomes unacceptable to trade benefits for some for increased harms for others, as CIR bills like S. 744 would undoubtedly do.

Given the highly contested terrain of immigration reform, it is understandable that a proposal to essentially destigmatize undocumented status would face incredulity, if not outright opposition. In its focus on public health harms and on neutrality and pragmatism, “harm reduction can bring together disparate political and other actors, maximize the appeal of an intervention, and afford political legitimacy to action on an otherwise controversial issue.”³⁰⁰ This is the best-case scenario; the opposition to harm reduction measures in the drug world has been steep,³⁰¹ even as the research backing it shows its effectiveness at saving lives and reducing harm.³⁰² In the immigration field, where the “Latino threat” narrative, the troubled economy, and the sheer political expediency of targeting the undocumented render CIR efforts a repeated failure, an approach that focuses instead on the needs of unauthorized migrants least likely to qualify for CIR may appear naive. However, the alternative, where victory in the form of comprehensive immigration reform would generate compromises leading to increased harms and decreased life chances for the next generation of unauthorized migrants, points to the need for a new direction in immigrant advocacy.

When pushing back on CIR, harm reduction is instructive. In calling for those most affected to help craft policy, harm reduction rejects top-down policy approaches. While various iterations of CIR have enjoyed broad support at different times, the driving forces behind CIR are Washington-based immigration advocacy groups with annual budgets in the millions.³⁰³ However, those most affected by the harms of “illegality” would be unlikely to embrace changes that would leave them out of the running for the pathway to citizenship and in the running for increased enforcement, detention, and removal. The harm reduction approach provides this population a framework for planning and executing advocacy efforts, and provides allies to immigrants a supporting role that does not depend on narratives based on immigrant exceptionalism.

Like the first “do no harm” principle, the harm reduction approach also provides a direct counterpoint to the politics of respectability. Rather than

²⁹⁹ See Erdman, *supra* note 292, at 437.

³⁰⁰ *Id.* at 426.

³⁰¹ See generally Gerry Stimson, *Harm Reduction: Moving Through the Third Decade*, 21 INT’L J. DRUG POL’Y 91 (2010) (describing challenges to harm reduction strategies throughout the world, including government refusal and woeful under-funding of existing programs).

³⁰² See *id.*

³⁰³ See, e.g., Kevin Bogardus, *Chamber spent \$50 million on lobbying amid push for immigration reform*, THE HILL (Jan. 21, 2014, 1:43 PM), <http://thehill.com/business-a-lobbying/195997-chamber-spent-50m-amid-immigration-push>, archived at <http://perma.cc/P9N9-U8X2>.

further strengthening the category of citizenship by showing how certain immigrants are “deserving” of the pathway to it, it disengages from the politics of respectability. Instead, it engages with the harms against those left behind by that dynamic. In pushing forward narratives about immigrants’ hard-working, law-abiding nature, the politics of respectability hide or ignore the most vulnerable immigrants. By focusing on reducing vulnerability and risk, a harm reduction approach instead takes as subjects those whom the politics of respectability would hide. Those who are most vulnerable to the harms of “illegality,” including those with criminal convictions, with disabilities, who are gender non-conforming, who are unemployable, and who are unmarried or have no United States citizen offspring, become the subjects (and agents) of interventions, rather than being pushed aside as inconvenient to a movement based on poster-children.

The politics of respectability, by definition, make value judgments on its subjects, investing in categories of “deserving” and “undeserving” and championing the former at the expense of the latter. In focusing on the harms of “illegality” rather than on a value judgment on the act of unlawful migration, a harm reduction approach avoids the pitfalls of the deserving/undeserving immigrant dichotomy. The pragmatic humanism of a harm reduction approach also challenges the politics of respectability by focusing on interventions to address harms to the most affected based on the simple fact of their existence rather than on achieving gains to the most palatable based on their proximity to accepted norms.

Rejecting the politics of respectability and adopting a framework that prioritizes the reduction of harm to the unpalatable undocumented could lead to several outcomes, many of which are beyond the scope of this Article to describe. In applying harm reduction, the focus below is on two possible types of interventions for which this framework provides an opening. One is a state-level bill intervention that offers immediate relief in the form of universal identification and the second is a broad cross-movement intervention that offers long-term possibilities for relief from the harms of detention.

1. Harm Reduction Applied to State-level Driver’s License Bills

Recent immigrant-led victories on the state and local level provide an example of the harm reduction framework in action. These victories should be viewed in light of the local anti-immigrant campaigns that preceded them. The passage of Arizona’s Support Our Law Enforcement and Safe Neighborhoods Act (“S.B. 1070”)³⁰⁴ in 2010 marked a low point, with state governments doing everything in their power to increase the harms related to “illegality” for their local immigrant populations by, among other things, creating a new state misdemeanor for undocumented immigrants who applied for or solicited work and permitting a state police officer to arrest,

³⁰⁴ See 2010 Ariz. Legis. Serv. Ch. 211 (H.B. 2162) (West).

without a warrant, any individual whom the officer has probable cause to believe is removable.³⁰⁵ That bill, and the copycat bills that followed, sought to make it even more difficult and dangerous to live without lawful status in certain states.³⁰⁶ The federal government intervened, and in *Arizona v. United States*,³⁰⁷ the Supreme Court limited the implementation of S.B. 1070, holding that three of the four contested provisions were preempted by federal law. The Court's arguments against the sections of S.B. 1070 it struck down were based partially in the plenary power doctrine,³⁰⁸ which under the harm reduction framework might be defined as the federal government, not the states, having a monopoly on generating harm for immigrants.³⁰⁹ Accordingly, in opposing S.B. 1070, the Obama Administration was not focused on upholding the dignity of the undocumented residents of Arizona.³¹⁰ Instead, it sought to reaffirm the federal government's authority to decide what level of harm undocumented people face, and limit the states from engaging in this practice themselves.

S.B. 1070 generated intense opposition among immigrants and their allies to its anti-immigrants provisions. Some of the concrete pro-immigrant wins that have resulted since can arguably be traced to this pro-immigrant backlash.³¹¹ At the time S.B. 1070 became law in Arizona, only two states

³⁰⁵ *Id.*

³⁰⁶ See e.g., 2011 Utah Laws Ch. 21 (H.B. 497); 2011 Ga. Laws Act 252 (H.B. 87); 2011 Ala. Acts 2011-535 (H.B. 56).

³⁰⁷ See *Arizona v. United States*, 132 S. Ct. 2492, 2510 (2012) (holding that §§ 3, 5C, and 6 of S.B. 1070 are preempted by federal law).

³⁰⁸ Professor Kerry Abrams has termed the Court's application of federal preemption doctrine in *Arizona* "plenary power preemption." Kerry Abrams, *Plenary Power Preemption*, 99 VA. L. REV. 601, 602-03 (2013) ("I label the type of analysis used by the majority opinion 'plenary power preemption.' The plenary power doctrine is one of the oldest features of immigration law. Under this doctrine, courts give extraordinary deference to federal legislative and executive action in the immigration context, even where federal action abridges individuals' constitutional rights.").

³⁰⁹ Dean Kevin Johnson has examined the race and class based impacts of the plenary power doctrine, concluding, "[t]hrough invocation of this doctrine, the courts routinely permit 'aliens' to be expressly disfavored under the immigration laws in ways that U.S. citizens—including the poor and racial minorities—could never be." Johnson, *Driver's Licenses*, *supra* note 84, at 7.

³¹⁰ This was clear from the outset of the oral arguments in the case, when the Solicitor General immediately conceded, "[w]e're not making any allegation about racial or ethnic profiling in this case." Transcript of Oral Argument at 33-34, *Arizona v. United States*, 132 S. Ct. 2492 (2012), available at http://www.supremecourt.gov/oral_arguments/argument_transcripts/11-182.pdf, archived at <http://perma.cc/P99R-WNS4>. Professor Jennifer M. Chacón has explored the consequences of the Court upholding the "show me your papers" provision of S.B. 1070, concluding that "the Court left in place a provision that was a source of deep concern for opponents of the law, and effectively green-lighted systematic state and local participation in immigration enforcement in a way that failed to account for the inevitable discriminatory effects of such participation." Jennifer M. Chacón, *The Transformation of Immigration Federalism*, 21 WM. & MARY BILL RTS. J. 577, 580 (2012).

³¹¹ Professor Cristina Rodriguez suggests that this same phenomenon was at play in the formulation of "sanctuary city" resolutions, suggesting that these resolutions may have been crafted in response "to the federal government's expanding efforts to enlist state and local police voluntarily in the enforcement of immigration laws in the years after the attacks of

provided drivers' licenses to all of their residents, including undocumented immigrants.³¹² In every other state, one of the harms related to lacking lawful status was lacking a driver's license (and the related harms of lacking car insurance,³¹³ lacking a way to get to work or school,³¹⁴ and lacking a defense against criminal and traffic citations for driving without a license³¹⁵).

However, the past three years have seen the introduction of a series of bills that seek to reduce the harms of not having a license, with eight states—California, Colorado, Connecticut, Illinois, Maryland, Nevada, Oregon, and Vermont—joining New Mexico, Utah, and Washington in extending driver's license eligibility to unauthorized residents, with Georgia and Maine enacting more limited license laws.³¹⁶ This kind of intervention—one in which a benefit is granted that both reduces the harms of “illegality” and does not increase harm to anyone—is one of the clearest examples of the harm reduction strategy in action.³¹⁷ The granting of driver's licenses to all of a state's residents provides an individual benefit to those who receive the licenses and previously had none, as well as reducing the vulnerability of the undocumented on a population level. As importantly, this type of intervention adheres to the principles of “first do no harm” as it does not depend on a trade-off where increased harm is justified for some segment of the undocumented population in exchange for a benefit granted to another segment.³¹⁸

Some might argue that this gradual granting of benefits typically associated with formal citizenship—like driver's licenses, in-state tuition, or the right to vote in local races—is about building up social citizenship in the

September 11, 2001.” Cristina Rodriguez, *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. 567, 601 (2008).

³¹² See NAT'L IMMIGRATION LAW CTR., STATE LAWS PROVIDING ACCESS TO DRIVER'S LICENSES OR CARDS REGARDLESS OF IMMIGRATION STATUS (2014), available at <http://www.nilc.org/document.html?id=979>, archived at <http://perma.cc/A2PC-NKZC>. At the time of S.B. 1070's passage in 2010, only two states provided driver's licenses for all of their residents: New Mexico and Washington State. Utah was close, providing a driving privilege card for individuals without a social security number.

³¹³ See Kari E. D'Ottavio, *Deferred Action for Childhood Arrivals: Why Granting Driver's Licenses to DACA Beneficiaries Makes Constitutional and Political Sense*, 72 MD. L. REV. 931, 962 (2013); Johnson, *Driver's Licenses*, *supra* note 84, at 213.

³¹⁴ See Johnson, *Driver's Licenses*, *supra* note 84, at 222.

³¹⁵ See *id.* at 224.

³¹⁶ See NAT'L CONFERENCE STATE LEGISLATURES, 2013 IMMIGRATION REPORT 1 (2013), available at http://www.ncsl.org/Portals/1/Documents/immig/2013ImmigrationReport_Jan21.pdf, archived at <http://perma.cc/3NJ2-U5B7>.

³¹⁷ Other examples of this type of intervention include legislation broadening education access by facilitating access to education for immigrants regardless of status, and legislation mandating language access resources. See *id.* at 6–13.

³¹⁸ In fact, such interventions can provide relief to other vulnerable populations. See CTR. FOR POPULAR DEMOCRACY, *supra* note 86, at 9 (“Immigrants are not the only constituency that may benefit from a municipal ID program. Other vulnerable groups, such as the homeless, youth in the foster system, the low-income elderly, people with mental illness and disabilities, and formerly incarcerated individuals re-entering society, all face obstacles to acquiring the documentation necessary to access the basic services that, in many cases, their lives depend upon.”).

absence of the availability of formal citizenship for the undocumented.³¹⁹ However, if the goal becomes one of inclusion and recognition through social citizenship, rather than one of reducing the harms for those who are undocumented, the same tropes of deserving, hard-working immigrant/undeserving criminal alien could be deployed. Instead, a victory like a driver's license bill, which covers everyone, regardless of status, and increases risk of harm for no one, can be distinguished from a request for inclusion or recognition by its refusal to leave anyone out of the sphere of inclusion. These types of bills provide concrete goals and potential wins for an immigrant rights movement centered on the most vulnerable.

2. Harm Reduction Applied to Immigrant Detention

A harm reduction approach demands a focus on the greatest harms of "illegality." Given the extreme harms of immigrant detention described in Part I, this form of imprisonment becomes an obvious target. ICE has highlighted so-called "criminal aliens" as a priority for both detention and removal, and thus, under a harm reduction approach, people in this category would be prioritized as those most likely to suffer the harms of detention.³²⁰ Both pro- and anti-immigrant advocates have seemingly accepted that there exists a category of immigrants who deserve the worst harms of "illegality" because of their supposed criminality,³²¹ and few explicitly champion the cause of the "criminal alien."³²² And yet the harms faced by so-called "criminal aliens" are among the most serious harms the current immigration system doles out—prolonged, often mandatory detention, deportation after years in the United States notwithstanding any family or community connections, and use of solitary confinement, to name a few.³²³ These harms can become central targets for advocacy when the focus is no longer on hiding or ignoring the members of the unauthorized migrant communities deemed unrespectable by dint of their prior contact with the criminal system. Additionally, because contact with the criminal legal system has become one of the

³¹⁹ For a discussion of social citizenship and its limitations, see Leti Volpp, *Divesting Citizenship: On Asian American History and the Loss of Citizenship Through Marriage*, 53 UCLA L. REV. 405, 480–81 (2005).

³²⁰ See Memorandum from John Morton, Dir., U.S. Immigration & Customs Enforcement, to All ICE Employees 1–2 (Mar. 2, 2011), available at <https://www.ice.gov/doclib/news/releases/2011/110302washingtondc.pdf>, archived at <https://perma.cc/SZ2P-CQ82>.

³²¹ See, e.g., Noorani, *supra* note 13 ("We are all for detaining criminals."); Thompson & Cohen, *supra* note 135 (quoting AFL-CIO President Richard Trumka as saying "[w]hen the president told us he was going to only go after criminal aliens, we all said 'OK go do that'").

³²² See Kevin Johnson, *Ten Guiding Principles for Truly Comprehensive Immigration Reform*, 55 WAYNE L. REV. 1599, 1607 (2009) ("[T]he 'criminal alien' continues to be one of the most reviled characters of all of U.S. law, with many enemies and extremely few political friends (even among immigrant rights advocates).").

³²³ For an in-depth review of the harms faced by so-called "criminal aliens," see KANSTROOM, *AFTERMATH*, *supra* note 23, at 135–64.

most common pathways to detention and deportation,³²⁴ a harm reduction framework makes interrupting that pathway a priority for advocacy.

As a point of contrast, the politics of respectability discourse sticks to language and imagery about hard-working, family-oriented, non-criminal immigrants as the primary response to the unprecedented criminalization and resulting detention of immigrants, as discussed in Part II. Understandably, and somewhat predictably, the reaction to the treatment of immigrants as criminals has led immigrant advocates to cling to the opposite narrative, one that focuses on “ideal” immigrants who deserve a pathway to citizenship, not detention.³²⁵ People who have had contact with the criminal system—a growing sector of the population—are not seen as plausible spokespeople for the harms of detention because they are not plausible recipients of the benefits of legalization.³²⁶ Immigrant advocates go to great pains to explain that detention should be opposed for some immigrants because “they have done nothing wrong” or “they have committed no crimes.” While this is often true—technically, immigration detention is civil detention, and many held have violated no criminal laws—the championing of non-criminal ideal immigrants justifies the harms of detention against those who fall outside the ideal by entering detention through contact with the criminal system. In fact, the distinctions made between the two groups (immigrants and criminals) are often at the heart of the arguments for better treatment of detainees. Those “ideal” immigrants who do end up detained are used as examples of the excesses of a system that is otherwise, presumably, not excessive. This, in turn, obscures the tremendous growth of immigration detention as a strategy of harmful immigration enforcement. Ultimately, claims of the relative innocence of some detained immigrants do nothing to dismantle the growing use of immigrant detention.³²⁷

However, without immigrants seeking to differentiate themselves from “criminals” and appealing to respectability, the joint interests of prisoners of the criminal punishment system and prisoners of the civil immigration detention system can come to the forefront. The harms towards people placed into categories of “illegal” and “criminal” are justified by the adoption of the idea that detention centers and prisons can create safety, security, and order. Advocacy strategies that seek to draw distinctions between immigrants and criminals and thus abandon “criminal aliens” ultimately limit challenges to the larger logics underlying the detaining and abandonment of entire populations.

³²⁴ See MEISSNER ET AL., *supra* note 1, at 7 (“The growing interconnectedness, combined with increased resources, congressionally mandated priorities, and broad programs for federal-state-local cooperation are responsible for placing ever larger numbers of removable noncitizens—both unauthorized and authorized—in the pipeline for removal.”).

³²⁵ See *supra* Part II.

³²⁶ See S. 744, 113th Cong. § 3701 (2013) (criminal street gangs); *id.* § 3702 (drunk drivers); *id.* § 3703 (sexual abuse of a minor).

³²⁷ See MEISSNER ET AL., *supra* note 1.

The growing movements to dismantle prisons have made some nascent connections with immigrant rights advocacy.³²⁸ Still, more often than not, immigrant advocates' insistence on distancing immigrants from charges of criminality has limited possibilities for cross-collaboration with anti-prison advocates. The rejection of narratives of innocence/respectability and the centering of the harms related to "illegality" point to a necessary focus on dismantling detention. This in turn provides a bridge for connections to movements to more broadly challenge mass incarceration.

This move is long overdue. The corporations that benefit from the incarceration of primarily poor people of color made the connection over a decade ago, and continue to advocate for changes to both the immigration laws and the criminal laws that will guarantee the success of their businesses.³²⁹ GEO Group, Correction Corporation of America, and other private prison companies do not differentiate between the types of prisoners from which they profit. They have facilities exclusively housing immigrant prisoners, those exclusively housing prisoners mandated from criminal courts, and those that are used for both populations.³³⁰ Prison phone companies, prison commissary companies, and other for-profit prison service companies likewise decline to differentiate between the types of prisoners to whom they offer their services at often-exorbitant rates.³³¹ An approach centered on re-

³²⁸ See generally BEYOND WALLS AND CAGES: PRISONS, BORDERS, AND GLOBAL CRISIS (Jenna M. Loyd et al. eds., 2012) (bringing together writings on anti-prison and anti-border movements, and proposing linkages between the two).

³²⁹ See CODY MASON, THE SENTENCING PROJECT, TOO GOOD TO BE TRUE: PRIVATE PRISONS IN AMERICA 13 (2012), available at http://sentencingproject.org/doc/publications/inc_Too_Good_to_be_True.pdf, archived at <http://perma.cc/8ZKG-PJ8P> (outlining massive monetary contributions by private prison giant CCA to lobbying firms and state-base lobbyists to promote the use of private prisons and increase the nation's prison population through immigration laws); Laura Sullivan, *Prison Economics Help Drive Ariz. Immigration Law*, NPR (Oct. 28, 2010, 11:01 AM), <http://www.npr.org/2010/10/28/130833741/prison-economics-help-drive-ariz-immigration-law>, archived at <http://perma.cc/H8WF-7MZ2> ("NPR spent the past several months analyzing hundreds of pages of campaign finance reports, lobbying documents and corporate records. What they show is a quiet, behind-the-scenes effort to help draft and pass Arizona Senate Bill 1070 by an industry that stands to benefit from it: the private prison industry.").

³³⁰ See, e.g., *Golden Sate Modified Community Correctional Facility*, GEO GROUP, <http://geogroup.com/Maps/LocationDetails/28> (last visited Mar. 28, 2015) archived at <http://perma.cc/4NWV-KCZR> (describing a facility housing adult male and female inmates for the US Marshals and ICE); *Joe Corley Detention Facility*, GEO GROUP, <http://geogroup.com/Maps/LocationDetails/45> (last visited Mar. 28, 2015), archived at <http://perma.cc/GQJ9-DXVT> (describing a medium security facility for inmates and parole violators for California Department of Corrections and Rehabilitation); *Northwest Detention Center*, GEO GROUP, <http://geogroup.com/Maps/LocationDetails/52> (last visited Mar. 28, 2015), archived at <http://perma.cc/7Z2C-NSED> (describing a facility under contract with ICE to house detainees pending removal).

³³¹ See, e.g., *About Keefe Group*, KEEFE GROUP, <http://www.keefegroup.com/>, archived at <http://perma.cc/83H3-ZNQ4> (last visited Mar. 30, 2015) ("Keefe Group, through its affiliates . . . is the nation's leading supplier of food products, personal care products, electronics, clothing, technology, telecommunications and software solutions to the correctional market."); see OFFICE OF DETENTION OVERSIGHT, U.S. Immigration & Customs Enforcement, Compliance Inspection of Adelanto Correctional Facility 1 (2012), available at <http://www.ice.gov/doclib/>

ducing the worst harms of “illegality” would allow immigrant justice and prison justice advocates to join forces against these different manifestations of the prison industrial complex.

Possibilities for solidarity and joint action against imprisonment between immigrant advocates and anti-prison advocates can be seen in the recent prisoner-led hunger strikes that have crossed over from criminal punishment facilities to immigrant detention facilities and back again.³³² Prisoners in immigration detention centers and federal prisons produce similar demands, including better medical treatment, better food, an end to the use of solitary confinement, and access to legal counsel. Because these demands are being generated by those most harmed by the excesses of the immigration and criminal systems, advocates should take those demands seriously. A harm reduction approach allows for immigrant advocates to take the lead from these prisoner-led movements, and invites a focus on a reduc-

foia/odo-compliance-inspections/adelantoCorrectionalFac_Adelanto-CA-Sept_18-20-2012.pdf, archived at <http://perma.cc/WYU5-MK4H> (“GEO provides both the food service and medical care at [Adelanto Correctional Facility]. Commissary services are provided under contract by Keefe Group.”); *Announcements: DHS-ICE*, TALTON (Sept. 1, 2009), <http://www.taltoncommunications.com/announcements.html>, archived at <http://perma.cc/6FYF-LR44> (“Talton has won a major new contract with the Department of Homeland Security to provide phone services to ICE facilities and detainees.”); *Communications & Services*, TALTON, <http://www.taltoncommunications.com/communications-services.html> (last visited Mar. 28, 2015), archived at <http://perma.cc/8DL2-NZ6T> (“Talton’s Inmate Phones are designed for correctional institutions and offer complete end-to-end calling solutions. Talton’s technology is developed exclusively for the corrections market by a dedicated and proven development.”).

³³² See Alex Altman, *Prison Hunger Strike Puts Spotlight on Immigration Detention*, TIME, Mar. 17, 2014, <http://time.com/27663/prison-hunger-strike-spotlights-on-immigration-detention/>, archived at <http://perma.cc/A2R3-KVMD> (describing detainee Paulino Ruiz’s and other immigrant detainees’ hunger strike to protest eating a single boiled potato for each meal, harsh punishment, and making only \$1 per day for custodial work at the Tacoma Detention Center); Dan Berger & Angélica Cházaro, *What’s Behind the Hunger Strike at Northwest Detention Center*, SEATTLE TIMES Mar. 19, 2014, http://seattletimes.com/html/opinion/2023173231_danbergerangelicachazaropedprisonhungerstrike20xml.html, archived at <http://perma.cc/T7JC-RZE4> (describing how the hunger strikes in the Tacoma detention facility sparked a series of efforts around the country, including displays of protest, and other hunger strikes, and explaining that this “activism has prompted a series of legislative hearings, judicial rulings and conversations about long-term isolation, mass incarceration and the force-feeding of detainees”); *Punishment and the California Prison Hunger Strike*, HUFFINGTON POST (Aug. 16, 2013, 5:01 PM), http://www.huffingtonpost.com/rodrigo-ribera-debre/prison-hunger-strike-california_b_3768258.html, archived at <http://perma.cc/K5F3-GXP4> (describing how in 2002, and again in 2011, inmates in Pelican Bay, Corocan, and Folsom prisons began refusing food to demand an end to group punishment, an end to administrative abuse, revision of prison policies, provision of adequate and nutritious food, and expansion of programs and privileges for indefinite inmates); Donna Willmott, *To Celebrate the Movement: The California Prisoner Hunger Strike One Year Later*, S.F. BAYVIEW (July 14, 2014), <http://sfbayview.com/2014/07/to-celebrate-the-movement-the-california-prisoner-hunger-strike-one-year-later/>, archived at <http://perma.cc/XH68-WEM6> (“This strike was history-making in other ways as it fueled ongoing human rights struggles among prisoners in Alabama, Georgia, Ohio and Virginia as well as among immigration detainees in Washington state and Texas. Led by hundreds in Pelican Bay who have spent decades in isolation in violation of all international standards of confinement, their demands became the basis of a renewed call from behind the bars for the public to recognize the humanity of imprisoned people and to call for an end to mass imprisonment.”).

tion of the harms of detention, one of the worst manifestations of the harms of “illegality.”

IV. CONCLUSION

Once again, the chances of the passage of a comprehensive immigration reform bill have faded.³³³ As of this writing, the President is locked in a struggle with Congress over the fate of his November 2014 Executive Action.³³⁴ Despite this most recent tussle between the Executive and the Legislative Branches (and by extension, between the Democrats and the Republicans), the unrelenting focus on expanding immigration enforcement does not seem to be at issue—the questions arising are on the scope and form of that expansion.

In light of this development, the death of the Senate’s most recent CIR bill provides an opening to reassess strategy. Should advocates push for a resurrection of the Senate’s bill, an expansion of pro-immigrant Executive Action, or a third way? Unlike CIR proposals, the two-step framework outlined in this article is not a demand for inclusion or recognition premised on citizenship, formal or otherwise. Instead, it focuses on reducing harms related to unauthorized immigration. For example, granting driver’s licenses to undocumented people makes lack of status less harmful.³³⁵ Ending partnerships between local law enforcement and federal law enforcement that lead people to immigration detention makes lack of status less harmful.³³⁶ Curbing immigration detention makes lack of status less harmful.³³⁷ A successful campaign for a moratorium on deportations would make lack of status less harmful.³³⁸ All of these interventions prioritize the needs of the most marginalized—those most likely to suffer detention, deportation, and the myriad forms of violence living without lawful immigration status entails. Beyond benefiting the most marginalized, these types of wins would trickle

³³³ Nowicki & Kelley, *supra* note 181 (“Any last hope that the House of Representatives might pass immigration reform this year died this week with the shocking defeat of Majority Leader Eric Cantor in his Republican primary, political analysts and Capitol Hill lawmakers predicted Wednesday.”).

³³⁴ See *supra* note 269 and accompanying text.

³³⁵ See *supra* Part III.B.1.

³³⁶ See, e.g., Cherri Gregg & Matt Rivers, *Philadelphia Ends Local Cooperation With ICE Detainers*, CBS PHILLY (Apr. 16, 2014, 3:33 PM), <http://philadelphia.cbslocal.com/2014/04/16/philadelphia-ends-local-cooperation-with-ice-detainers/>, archived at <http://perma.cc/BKF7-64K9> (describing Philadelphia mayor Michael Nutter’s reasons for signing an executive order for a new policy in which Philadelphia police will no longer hold undocumented immigrants for ICE officials unless the detainee is being released following a first or second degree felony conviction—reasons which include public safety and erasing a fear that government interaction will result in detention).

³³⁷ See *supra* Part III.B.2.

³³⁸ See, e.g., #NOTIMORE: About, NAT’L DAY LABORER ORG. NETWORK, <http://www.notonemoredeportation.com/about/> (last visited Mar. 28, 2015), archived at <http://perma.cc/5GJ7-Z8QX> (“Together we say: not one more family destroyed, not one more day without equality, not one more indifferent reaction to suffering, not one more deportation.”).

up to benefit others. Ultimately, this framework has the potential to make “undocumented and unafraid” not just a battle cry,³³⁹ but also a lived reality for all unauthorized migrants.

³³⁹ Amy Goodman & Juan González, “*Undocumented and Unafraid*”: 30 Immigrants Detained Crossing Into U.S. at Border Protest, DEMOCRACY NOW (Oct. 4, 2013), http://www.democracynow.org/2013/10/4/undocumented_and_unafraid_30_immigrants_detained, archived at <http://perma.cc/YP3H-TPMG>.

