ARTICLE

BEYOND RESPECTABILITY: NEW PRINCIPLES FOR IMMIGRATION REFORM

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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

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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 agencies combined. See DORIS MEISSNER ET AL., MIGRATION POLICY INSTITUTE, IMMIGRATION
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
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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. 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.” This conceptualization lays the groundwork for their processing for arrest, detention, and removal. 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.” This dynamic is visible in advocacy for legalization schemes wrapped in talking points about immigrants who are valedictorians, parents, and innocent children. Instead of confronting the construction of

7 Id. at 75.
8 Id.
9 See infra Part II.
“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)
that target those who do not qualify for the legalization provisions. 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. 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 avoid offering legalization to some at the cost of making the system worse for many. The principles draw on theories of harm reduction, 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. Part III offers an application of the first princi-

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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-immigration-bill-is-a-good-start, archived at http://perma.cc/96TH-NBL (“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 Bosnak, 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 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. 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.” 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. 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.”).


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. 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.

The risk of deportation, formally known as removal, and its related harms form a consistent backdrop in the lives of people without lawful status. Under the current Immigration and Nationality Act, any person unlawfully present in the United States is subject to removal. Noncitizens with lawful status can also face removal if their conduct triggers a ground of deportability. The current levels of deportation enforcement are higher than they were.

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).

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 facing the worst manifestations of gender-based marginalization and exclusion . . . .

The Nonprofit Industrial Complex and Trans Resistance, 5 Sexualitv 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 . . . .”).

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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{24} Poverty and homelessness may result from deportation, as individuals return to places where they lack employment prospects.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{28} Human rights abuses against deportees are well documented,\textsuperscript{29} and begin with the act of deportation itself, during which deportees are shackled and can be forcibly medicated.\textsuperscript{30} Some are beaten by police upon arrival, and others are imprisoned for the simple fact of being deportees.\textsuperscript{31} Being deported is so closely linked with being considered a “criminal” that deportation is often associated with incarceration and stigma.

\begin{thebibliography}{9}
\bibitem{23} \textit{See Kanstroom, Aftermath, supra note 21, at ix.}
\bibitem{24} \textit{Human Rights Watch, Discrimination, Denial, and Deportation: Human Rights Abuses Affecting Migrants Living With HIV} (2009) (describing how deportees face harsh conditions, including lack of access to health care, upon arriving in their countries of origin).
\bibitem{26} \textit{See, e.g.,} Seth Fred Wessler, \textit{Applied Research Center, Shattered Families} 4 (2011) (estimating that 5,100 children are in foster care whose parents have been detained or deported); \textit{see also Kanstroom, Aftermath, supra note 21, at 139 (“Protocols given by law to the family are absent from much deportation law.”)}.
\bibitem{27} Daniel Kanstroom, \textit{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.”).
\bibitem{28} Vazquez, \textit{supra} note 25.
\bibitem{29} \textit{See, e.g., Human Rights Watch, Discrimination, Denial, and Deportation, supra note 24.}
\bibitem{30} Kanstroom, \textit{Aftermath, supra} note 21, at 147.
\bibitem{31} \textit{Id.} at 148.
\end{thebibliography}
tees, often 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 healthcare, 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 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.”).

35 See infra notes 36-40.


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

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, 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/3ZYS-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_detaineedeaths2003-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?page wanted=1, archived at http://perma.cc/6H6L-HHD P (describing the death of detainee Bouba Car 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.”). R

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

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


46 Id.
system. They are not allowed to leave the detention center or to move freely within it. 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. Prison administrators choose the times and spaces for detainees to eat, sleep, wake, wash, and socialize. Except for attorneys, all communication between prisoners and visitors happens through glass partitions. No physical contact between detainees and visitors is allowed.

Detainees have the right to an attorney, but often they cannot 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. Some detainees are eligible for release after paying a bond, but many cannot pay the bond amounts set. Many others are subject to mandatory detention while their deportation cases are pending. 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. For some, the humiliating...
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 gain, 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 who have not yet come into contact with immigration enforcement, but fear doing so on a daily basis.65

57 Amnest y 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.”).
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.
64 See 2011 Operations Manual, supra note 59, at 142.
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
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“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 abuses.72 Beyond *Hoffman,* the fear of being reported to immigration author-

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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 Chomsky, supra note 67, 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.


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.
ities 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 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 un-

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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, P EWHISPANIC.ORG (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-five 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.”).
documented 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. Notably, undocumented immigrants “do not attain markedly higher incomes the longer they live in the United States,” 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. The opposition to providing licenses to unauthorized migrants peaked in the years following 9/11, when national security concerns came to the forefront. 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 infractions can lead to repeated convictions for driving without a license, arrests, and detention and deportation. 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. Without government-issued ID, many other transactions (leasing an apartment, registering for school, opening a bank account) are likewise limited, furthering vulnerability.
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.\textsuperscript{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).\textsuperscript{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.\textsuperscript{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.\textsuperscript{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,\textsuperscript{92} ending decades of facially discriminatory national origins quotas\textsuperscript{93} that openly favored white, northern European migration to the United States.\textsuperscript{94} However, the racial and class

\textsuperscript{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).

\textsuperscript{89} See, e.g., CTR. FOR POPULAR DEMOCRACY, supra note 86 and accompanying text.

\textsuperscript{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).

\textsuperscript{91} Id.


\textsuperscript{93} See Johnson, Intersection of Race and Class, supra note 90, at 3.

\textsuperscript{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 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 re-entry, 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
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. 

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. 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 inspection, and are further impoverished by the debt owed to the smugglers who bring them to the United States. These harms of “illegality” also accrue on the basis of national origin: approximately fifty-nine percent of undocu

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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.
97 See Johnson, Intersection of Race and Class, supra note 90, at 21.
mented immigrants are from Mexico, but sixty-eight percent of those who were deported in 2013 were of Mexican origin.

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. This strategy has led to a doubling of migrant deaths since 1995. Death is now a daily occurrence for migrants—the Border Patrol reported 445 people died in crossing in 2013 and 447 in 2012. Because many bodies are never found, the number is likely higher. 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. 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. For those caught and detained by the 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

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99 Passel & Cohn, Unauthorized Immigrant Totals, supra note 66, at 21.
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 . . . .”).
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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 emphasis on obtaining lawful 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 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

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\(^{108}\) 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.
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 “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 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

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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.”).


116 See infra notes 155–58.
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the Western Hemisphere.\textsuperscript{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.\textsuperscript{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.”\textsuperscript{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.\textsuperscript{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.\textsuperscript{121} Politicians quickly latched onto the narrative, embracing the benefits of demonizing Latinos and unauthorized immigrants.\textsuperscript{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.\textsuperscript{123} Post-9/11, the perceived foreign terror threat has justified further enforcement-heavy legislative and policy responses to immigration.\textsuperscript{124}

Given this backdrop, immigrant advocates have unsurprisingly embraced respectability as the obvious response to imagery depicting unauthorized migrants as threats to the nation.\textsuperscript{125} The myriad negative stereotypes

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\textsuperscript{119} Id. at 5.
\textsuperscript{120} Id. at 5–6.
\textsuperscript{121} Massey & Pren, supra note 118, at 6.
\textsuperscript{122} Id. at 5.
\textsuperscript{125} See, e.g., Elizabeth Keyses, Defining American: The Dream Act, Immigration Reform and Citizenship, 14 Nev. L.J. 101, 112 (2013); Elizabeth Keyses, Race and Immigration, Then and
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, 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. They must have managed to avoid arrest, despite, in many states, lacking a driver’s license, 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. The acceptable immigrant preferably has U.S. citizen children, but hopefully not too many of them, and despite their likely low wages, they ideally have not had to rely on public benefits to assist them in feeding and housing their children. 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


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.”).


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.”).


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).

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United States “through no fault of [their] own” and immediately enrolled in school, rather than coming to the United States with the intention to work and help provide for their family.

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.’

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

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.

—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 respectabil-

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, Have and Have-Not,


136 Noorani, supra note 13.
ity. 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.

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. 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. 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


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.”).
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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 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


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”).


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
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.\textsuperscript{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.\textsuperscript{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.”\textsuperscript{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 strategy.\textsuperscript{147} While these are important points, they are still framed within the politics of respectability. Thus, in questioning removals and detention, immi-

\textsuperscript{144} See Muñoz, supra note 143.


\textsuperscript{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-enforcement/, 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.”).

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grant 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. 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, high levels of racial profiling, and the disproportionate likelihood that men of color will be arrested for deportable offenses 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 of immigration, including the growth of Operation Streamline, the expansion of criminal grounds of removability, and the creation of programs

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149 See TRAC Immigration Project, Current ICE Removals, supra note 142.


empowering local law enforcement to target migrants for immigration enforcement.\textsuperscript{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.\textsuperscript{155} The end of the Bracero program did not mean the end of Mexican migration.\textsuperscript{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.\textsuperscript{157} The undocumented population grew, and the workers that previously filled Bracero positions now filled similar positions as undocumented workers.\textsuperscript{158}


\textsuperscript{155} DANIEL KANSTROOM, DEPORTATION NATION 219 (2007).

\textsuperscript{156} See Massey & Pren, supra note 118, at 5.

\textsuperscript{157} See id. Id.

\textsuperscript{158} See id.
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, made exploitation an even more salient feature of the system of employment for undocumented workers. “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.”

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 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. 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.

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difficult and dangerous labor absolves 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. 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.

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"). included a legalization provision widely considered an amnesty. 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." The fact that the undocumented population continued to grow following IRCA’s passage led many to view its legalization program as a failed amnesty. Republican politicians and conservatives began using amnesty as a disparaging term, most commonly stating that amnesty rewards illegal behavior and encourages further undocumented immigration.

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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: U.S. Legalization Programs and the Current Policy Debate 7–8 (2010).


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.").

The abandonment of the term “amnesty,” however, points to a significant concession by pro-immigrant advocates. Namely, the rejection of “amnesty”—which does not require a moral judgment on the character of those who are granted relief—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 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. Moreover, adopting this anti-immigrant rhetoric 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 switch from amnesty to earned legalization requires a moral assessment of the individual immigrant, 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 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.170 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.

Finally, 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.171

III. NEW PRINCIPLES FOR IMMIGRANT RIGHTS ADVOCACY: REDUCING THE HARM 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

170 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-ofparenthood/, 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.”).

171 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—‘illegal aliens’ to their respective assignments of protracted servitude.” De Genova, supra note 4, at 58.
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 enjoinder to “first do no harm.”172 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” 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.

172 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. CLINICAL PHARMACOLOGY 371 (2013).
Beyond Respectability


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,\(^\text{173}\) 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.\(^\text{174}\)

Senate Bill 744, the Border Security, Economic Opportunity, and Immigration Modernization Act (“S. 744”),\(^\text{175}\) a comprehensive immigration bill introduced in April 2013, passed the Senate by a 68-32 vote in June 2013.\(^\text{176}\) 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.\(^\text{177}\) Others


\(^{174}\) 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%7C4068, 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 pressure on this committee to sink this legislation was ferocious—yet the committee worked together to advance a strong compromise bill.”).

\(^{175}\) S. 744, 113th Cong. (2013).

\(^{176}\) Id.

\(^{177}\) See generally, ALLIANCE FOR CITIZENSHIP, ANALYSIS OF THE “BORDER SECURITY, ECONOMIC OPPORTUNITY, AND IMMIGRATION MODERNIZATION ACT” S. 744 (2013), available at
examined its effect on the economy, 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. 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 of the bill focused on enforcement (Border Security and Interior Enforcement), one section on creating a new legalization program (Immigrant Visas), and one section on creating new avenues for temporary immigration (Nonimmigrant Visa Programs). A final section, entitled “Jobs for Youth” was added as an amendment dedicated to creating employment opportunities for low-income youth. The sections most relevant for the “first do no harm” analysis are 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 “achieving and maintaining...
effective control between and at the ports of entry in all border sectors along the Southern Border.”

The current strategy of enhanced border enforcement began in 1993, with an annual allocation of $363 million to the Border Patrol. Subsequent expansions have brought the Border Patrol’s budget to $3.5 billion, and S. 744 would have allocated a further $46.3 billion for border enforcement.

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

- Deploying 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.

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. The contracts involved in “securing the border” would offer huge profits to the private defense indus-

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183 Id. §§ 1101–1203 (addressing border security and other provisions).
184 IMMIGRATION POL’Y CTR., A GUIDE TO S. 744, supra note 177, at 5.
185 Id. at 3.
187 See IMMIGRATION POL’Y CTR., A GUIDE TO S. 744, supra note 177, at 5.
188 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.”).
try\footnote{See, e.g., Samantha Sais, \textit{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.").} 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—\hspace{1em} 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.\footnote{190 S. 744, 113th Cong. § 3 (2013).} 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.\footnote{191 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 186, at 2, 5.} In 2012, the Border Patrol apprehended the lowest numbers of unauthorized migrants since 1970.\footnote{192 NAT’L IMMIGRATION LAW CTR., ANALYSIS OF SENATE IMMIGRATION REFORM BILL, TITLE 1: BORDER SECURITY, supra note 186, at 2.} The levels of enforcement staffing at the border are higher than they have ever been.\footnote{193 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").} The justification for S. 744’s border enforcement expansion is thus difficult to trace to anything other than political expediency.\footnote{194 See Suzy Khimm, Want Tighter Border Security? You’re Already Getting It., WASH. POST. WOKN’L BLOG, 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.\footnote{195 See U.S. GOV’T ACCOUNTABILITY OFFICE, REP. NO. GAO-06-770, supra note 102; U.S. BORDER PATROL, supra note 103.} 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.\footnote{196 See Androff & Tavassoli, supra note 101.}
distress beacon stations in areas where border deaths occur, 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. 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. 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 unable or unwilling to police itself, and while the new bill calls for the creation of use of force policies and trainings, it is unrealistic to believe that these trainings and policies provide the necessary counterbalance to a mandate of “persistent surveillance” along the entire southern border.

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197 S. 744, 113th Cong. § 1107(c) (2013).
198 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.”).
200 See, e.g., DANIEL MART´INEZ 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/8HDJ-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.
201 S. 744, 113th Cong. § 1112 (2013) (addressing training for border security and immigration enforcement officers).
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 with 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. 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, even as unlawful entry and re-entry are already the two most prosecuted federal crimes in the United States.

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. S. 744 not 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. 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

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203 S. 744, 113th Cong. §1104 (2013).
204 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.”).
205 Id.
crosiers to people who have crossed before and are trying to rejoin families in the U.S.”207 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.208

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)209 demonstrates that this program does not function as a deterrent to unauthorized entry into the United States.210 Increasing the penalties associated with re-entry, instead of stopping border crosiers 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.211 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.

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”).212 SCAAP reimburses state and local law enforcement for the cost of holding immigrants for later pick up and transfer from local jails and

207 NAT’L IMMIGRATION LAW CTR., ANALYSIS OF SENATE IMMIGRATION REFORM BILL, TITL

E 1: BORDER SECURITY, supra note 186, at 6.


209 See id.

210 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 U.S.”).

211 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?’”).

212 S. 744, 113th Cong. § 1110 (2013).
prisons to ICE custody.\footnote{See State Criminal Alien Assistance Program (SCAAP), BUREAU OF JUSTICE ASSISTANCE, U.S. DEP’T OF JUSTICE, \url{https://www.bja.gov/Funding/15SCAAP_Guidelines.pdf} (last visited Mar. 31, 2015), archived at \url{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.”).} The current practice is for SCAAP reimbursements to be disbursed only for those immigrants convicted of crimes.\footnote{Id.} S. 744 would expand the program to reimburse state and local law enforcement for holding noncitizens that have merely been charged with crimes.\footnote{S. 744, 113th Cong. § 1110(b) (2013).} 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,\footnote{See Delegation of Immigration Authority Section 287(g) Immigration and Nationality Act, U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, \url{http://www.ice.gov/factsheets/287g} (last visited Mar. 31, 2015), archived at \url{http://perma.cc/76SV-6F92}.} 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.”\footnote{Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, § 701, 100 Stat. 3359.} One of the primary ICE ACCESS programs, the Criminal Alien Program (“CAP”), is the successor of the 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 thousands of deportations.\footnote{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 Matuszewki, supra note 2, at 8.} Secure Communities, the more recently created, technologically driven version of CAP, has likewise contributed to deportations.\footnote{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), \url{available at https://www.law.berkeley.edu/files/Secure_Communities_by_the_Numbers.pdf}, archived at \url{https://perma.cc/X7PR-6XNY?type=pdf}.} 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
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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. 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, driving under the influence, and gang membership, 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.

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. This translates to young men of color being disqualified from legalization.

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222 Id. § 3702(a)–(b).

223 Id. § 3701(a)–(b).


for nothing more than a law enforcement agency’s unreviewable decision to label them gang members.226

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.227 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”).228 In 1986, the passage of the IRCA created employer sanctions, for the first time making it unlawful to employ an unauthorized migrant.229 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.230

The current version of EEVS, the E-verify system, currently covers only 3 percent of U.S. employers 231 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).232 Like the border provisions of S. 744 that would place both citizens and noncitizens in border communities in a state of near permanent

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226 See Senate Bill 744 Analysis, IMMIGRANT JUST. NETWORK (June 20, 2013), http://immigrantjusticenetwork.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.”).


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


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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. 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. 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. 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 centerpiece 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 meant to discourage employers from hiring undocumented workers. 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. Moreover, em-

233 S. 744, 113th Cong. § 3102 (2013).
235 See supra notes 83–87 and accompanying text.
236 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).
237 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 Immigr-
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.238 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 relegated them to a condition of enduring vulnerability. 239

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,240 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...

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238 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.”).

239 Id. at 58.

240 See generally KERWIN, supra note 166.
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.241 RPI status would serve as a precursor to Lawful Permanent Residence (which itself acts as precursor to U.S. citizenship).242 People in RPI status could only apply for Lawful Permanent Residence after ten years of RPI status.243 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.244 Hundreds of thousands of long-term LPRs have been removed since these statutory changes took effect in the mid-1990s.245

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.246 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 days247 or if they

241 S. 744, 113th Cong. § 2101 (2013).
242 Id. § 2102.
243 Id. § 2102.
244 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 backbreaking employment after being offered work authorization, in order to benefit from the AgJobs provisions, they would need to remain in their backbreaking line of work for an additional three to five years, guaranteeing a continued supply of pliant, dependent workers to the agricultural industry.
245 KANSTROOM, DEPORTATION NATION, supra note 155, at 243.
246 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).
247 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.’”).
248 S. 744, 113th Cong. § 2101(a) (2013) (adding § 245B(c)(8)(B)(i)(I)).
were found to be delinquent on their taxes. 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.

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. 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. 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. 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 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.” 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

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248 Id. (adding § 245B(c)(8)(C)).
249 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).
250 Id. § 3.
251 Id.
252 Id.
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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. This announcement came after months of pressure from activists and advocates, pushing the Executive to act to curb the record number of deportations. The pressure on the Executive Branch had increased after it became clear that the House of Representatives would not be taking up Senate Bill S. 744, or any other comprehensive immigration reform bill. 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 the Department of Homeland Security to the heads of the federal immigration agencies, simultaneously released on November 20, 2014. These memoranda covered topics ranging from border enforcement, to interior enforcement, to an increase in technology-related visas, to an ex-


256 Dan Nowicki & Erin Kelley, supra note 173 (“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.”).

pansion in protections from deportation for certain noncitizens. Most contro-

versially, DHS announced that work authorization documents and protection from deportation would be made available to unauthorized mi-
gants 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 crea-
tion of Deferred Action for Parental Accountability, or “DAPA”). Oppo-
nents 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. As of this writing, the implementation of the deferred action programs has been temporarily halted by a lawsuit brought by twenty-six states. 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.

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 partly because the deferred action memorandum makes clear that the Executive Action does not actually grant legal status, provisional or otherwise, to anyone. 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—

258 Id.
259 See Prosecutorial Discretion Memo, supra note 5.
sponse to the preliminary injunction in Texas v. United States, claiming “we fully expect to ultimately 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).
263 Prosecutorial Discretion Memo, supra note 5, at 5 (“This memorandum confers no substantive right, immigration status or pathway to citizenship.”).
instead are granted only temporary protection and arguably remain planted in “illegality.”

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. 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. 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.

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. 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

264 Id.
265 Id.
267 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 Institutions, 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.
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. 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”). 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.

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.” 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 creation of a new detention center in Dilley, Texas, designed to house 2,400 women and children, primarily recent arrivals in the United States, is part and parcel of this reinforced border-enforcement strategy. Additionally, the increasing reliance on 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-deporta-


270 See Secure Communities Memo, supra note 2.


272 Priorities Memo, supra note 269, at 3.

273 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.”).
tion), signals the emphasis on the “Priority 1” category.\textsuperscript{274} 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.\textsuperscript{275} 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.\textsuperscript{276} The Priorities Memo also names those who are convicted of three or more misdemeanors as priorities for enforcement.\textsuperscript{277} 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,\textsuperscript{278} 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.\textsuperscript{279}

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 that will now focus increased resources on a smaller population. Presumably, most of those who are considered deserving of relief will receive DACA or DAPA.\textsuperscript{280} 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


\textsuperscript{275} Priorities Memo, supra note 269, at 4.

\textsuperscript{276} Id.

\textsuperscript{277} Id. at 3–4.

\textsuperscript{278} Secure Communities Memo, supra note 2, at 2.

\textsuperscript{279} Prosecutorial Discretion Memo, supra note 5, at 4.

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. 281 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. 282 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. 283 While it is difficult to imagine a viable comprehensive 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.

281 See supra Part III.A.1.a.
282 Id.
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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. In regards to neutrality, the activity itself is not judged as normatively right or wrong. Instead, the risks and health-related harms are considered. 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. 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.

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.”

Decriminalization, the advocacy for selected laws not to be enforced and for penalties for possession to be substantially reduced, sometimes constitutes a

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285 Id. at 424.
286 Id. at 451–52.
287 Id.
component of harm reduction, inasmuch as decriminalization aims to reduce harms to drug users from the criminal justice system itself.289

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.290 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 acceptance [of] the simple humanity of the drug user”291 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

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289 See id. at 2150.
291 See Erdman, supra note 284, at 437.
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together disparate political and other actors, maximize the appeal of an intervention, and afford political legitimacy to action on an otherwise controversial issue."\(^{292}\) This is the best-case scenario; the opposition to harm reduction measures in the drug world has been steep,\(^{293}\) even as the research backing it shows its effectiveness at saving lives and reducing harm.\(^{294}\) 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.\(^{295}\) 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 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

\(^{292}\) Id. at 426.

\(^{293}\) 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).

\(^{294}\) See id.

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, makes 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 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”) 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, without a warrant, any individual whom the officer has probable cause to believe is removable. 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. The federal government intervened, and in Arizona v. United States, the Supreme Court limited the implementation of S.B. 1070, holding that three of the four contested provisions were preempted by federal law.

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296 See 2010 Ariz. Legis. Serv. Ch. 211 (H.B. 2162) (West).
297 Id.
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federal law. The Court’s arguments against the sections of S.B. 1070 it struck down were based partially in the plenary power doctrine, which under the harm reduction framework might be defined as the federal government, not the states, having a monopoly on generating harm for immigrants. Accordingly, in opposing S.B. 1070, the Obama Administration was not focused on upholding the dignity of the undocumented residents of Arizona. 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. At the time S.B. 1070 became law in Arizona, only two states provided drivers’ licenses to all of their residents, including undocumented immigrants. 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

300 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.”).

301 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.

302 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).

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

304 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.
insurance, \textsuperscript{305} lacking a way to get to work or school, \textsuperscript{306} and lacking a defense against criminal and traffic citations for driving without a license\textsuperscript{307}).

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.\textsuperscript{308} 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.\textsuperscript{309} 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.\textsuperscript{310}

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 absence of the availability of formal citizenship for the undocumented.\textsuperscript{311} 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

\textsuperscript{305} 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.

\textsuperscript{306} See Johnson, Driver’s Licenses, supra note 84, at 222.

\textsuperscript{307} See id. at 224.


\textsuperscript{309} 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.

\textsuperscript{310} 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.

\textsuperscript{311} 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.”).

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.312 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,313 and few explicitly champion the cause of the “criminal alien.”314 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.315 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 most common pathways to detention and deportation,316 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

313 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’”).
314 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).”).
315 For an in-depth review of the harms faced by so-called “criminal aliens,” see KANSTROOM, AFTERMATH, supra note 23, at 135–64.
316 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.”).
that focuses on “ideal” immigrants who deserve a pathway to citizenship, not detention.317 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.318 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.319

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.

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.320

317 See supra Part II.
318 See S. 744, 113th Cong. § 3701 (2013) (criminal street gangs); id. § 3702 (drunk drivers); id. § 3703 (sexual abuse of a minor).
319 See MEISSNER ET AL., supra note 1.
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 reduction 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.321 As of this writing, the President is locked in a struggle with Congress over the fate of his November 2014 Executive Action.322 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 re-

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321 Nowicki & Kelley, supra note 173 (“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.”).  
322 See supra note 261 and accompanying text.
lated to unauthorized immigration. For example, granting driver’s licenses to undocumented people makes lack of status less harmful. Ending partnerships between local law enforcement and federal law enforcement that lead people to immigration detention makes lack of status less harmful. Curb-}

ing immigration detention makes lack of status less harmful. A successful campaign for a moratorium on deportations would make lack of status less harmful. 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 up to benefit others. Ultimately, this framework has the potential to make “undocumented and unafraid” not just a battle cry, but also a lived reality for all unauthorized migrants.

323 See supra Part III.B.1.
324 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).
325 See supra Part III.B.2.
326 See, e.g., #NOT1MORE: About, NAT’L DAY LABORER ORG. NETWORK, http://www.notonemoredeportation.com/about/ (last visited Mar. 28, 2015), archived at http://perma.cc/SGJ7-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.”).