

THE HUMAN COST OF SELF-DEPORTATION: HOW
ATTRITION THROUGH ENFORCEMENT AFFECTS
IMMIGRANT WOMEN AND CHILDREN

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INTRODUCTION

The past two decades have seen a rise in the undocumented population, but the population has remained steady for the past five years.¹ Recent evidence suggests that the largest wave of immigration to the United States from one country—Mexico—has subsided.² Immigration policy is at a crossroads. Although the undocumented population has stopped increasing,³ the sheer size of the undocumented population presents a problem with two diametrically opposed solutions: either we seek to expel the millions of undocumented immigrants within our borders or we incorporate them into American society by providing a path to legalization.⁴

For decades, the debate over federal immigration policy focused on reducing unlawful entry into the U.S. through a broad set of policy initiatives at the federal level.⁵ That strategy—sometimes referred to as “prevention through deterrence”—sought to discourage undocumented immigration by increasing the risks of unlawful entry.⁶ Now that the size of the undocumented population has leveled off,⁷ the discourse has shifted from reducing the influx of undocumented immigrants to reducing their numbers, and the “prevention through deterrence” strategy has given way to a new idea called “attrition

1. JEFFREY S. PASSEL & D’VERA COHN, PEW HISPANIC CENTER, A PORTRAIT OF UNAUTHORIZED IMMIGRANTS IN THE UNITED STATES, at i (2009) [hereinafter PORTRAIT OF UNAUTHORIZED IMMIGRANTS] available at <http://www.pewhispanic.org/files/reports/107.pdf>.

2. JEFFREY PASSEL, D’VERA COHN & ANA GONZALEZ-BARRERA, PEW HISPANIC CENTER, NET MIGRATION FROM MEXICO FALLS TO ZERO—AND PERHAPS LESS, 6 (2012) [hereinafter NET MIGRATION FALLS TO ZERO] available at <http://www.pewhispanic.org/2012/04/23/net-migration-from-mexico-falls-to-zero-and-perhaps-less>.

3. *Id.*

4. Within this article, the term “legalization” refers to any process whereby an undocumented immigrant is authorized to remain in the country or is no longer considered deportable.

5. See *infra* Part III.A.

6. Bill Ong Hing, *The Dark Side of Operation Gatekeeper*, 7 U.C. DAVIS J. INT’L L. & POL’Y 121, 128 (2001). See *infra* Part II.A, for more discussion on “prevention through deterrence.”

7. See NET MIGRATION FALLS TO ZERO, *supra* note 2, at 6.

through enforcement.”⁸ The fundamental goal of the attrition strategy is to reduce the quality of life for undocumented immigrants to such a degree that they believe self-deportation to be in their best interest.⁹ The strategy relies primarily on sub-federal measures that target the everyday lives of undocumented immigrants and make it nearly impossible to participate in society.¹⁰

The attrition strategy is most detrimental to immigrant women and their children.¹¹ Interactions with governmental authorities, such as police officers, social workers, or hospital attendants each become a potential immigration checkpoint. Undocumented immigrants are confined both physically and economically, as their lack of drivers’ licenses and identification limits their employment prospects. Further, fear of deportation reduces their ability to claim benefits on behalf of their children, many of whom are legal U.S. citizens. Not only does the strategy prevent this large group of immigrants from actively participating in society, it presents a moral problem for our national identity: do we want to be a nation that subjects undocumented immigrants to such intolerable hardships that they “choose” to self-deport?

Instead of seeking to expel the undocumented population, we should consider providing them with an earned pathway to legalization. Part I of this article will review the current state of immigration policy. Part II will describe the effects of these federal policies on immigrant communities at large and on immigrant women in particular. Part III will address the immigration enforcement measures in place at the federal level. Part IV will focus on the tenets of attrition through enforcement and a number of sub-federal¹² immigration enforcement measures aimed at encouraging undocumented immigrants to self-deport. Part V will describe the ways in which the attrition strategy is detrimental to the well-being of undocumented women and their children—as well as the country at large—and Part VI will argue in favor of legalization as a viable alternative to attrition.

I. THE MODERN INA AND ITS EFFECT ON IMMIGRANT WOMEN

A foreign national’s eligibility to enter the U.S. is determined by the Immigration and Nationality Act (INA), which itself has been shaped by decades of evolving views toward immigrants.¹³ During the first half of the

8. See *infra* Part IV; see also See also MARK KRIKORIAN, CENTER FOR IMMIGRATION STUDIES, DOWNSIZING ILLEGAL IMMIGRATION: A STRATEGY OF ATTRITION THROUGH ENFORCEMENT 1 (2005), available at <http://www.cis.org/articles/2005/back605.pdf>.

9. See *infra* Part IV. See also KRIKORIAN, *supra* note 8, at 1.

10. See *infra* Part IV.

11. See *infra* Part V, for a general discussion of immigration concerns particular to undocumented women).

12. The term “sub-federal” will be used in this article to describe state legislation, as well as city and county ordinances.

13. Immigration and Nationality Act, Pub. L. 82-414, 66 Stat. 163 (1952) (current version at 8 U.S.C. § 1101 (2006)); *Immigration and Nationality Act*, U.S. CITIZENSHIP AND IMMIGRATION SERVICES,

twentieth century, our immigration policy focused almost exclusively on restrictionist measures: Congress passed legislation meant to exclude Chinese laborers,¹⁴ epileptics, beggars, anarchists,¹⁵ feeble-minded people, and homosexuals,¹⁶ while also establishing a national origin system that limited the number of people from any given country admitted into America.¹⁷ The modern INA has moved away from its restrictionist roots and now prioritizes employment and family reunification.¹⁸ Of course, even under the modern INA, not all foreign nationals seeking to enter the country are accommodated.

A. Citizens, Immigrants, and Nonimmigrant Aliens under the INA

People born within U.S. borders are U.S. citizens (USCs) by right of birth.¹⁹ Some foreign-born immigrants can become USCs through the process of naturalization, whereby they are ostensibly given the same rights as USCs.²⁰ All non-citizens, whether immigrants or nonimmigrants, are considered aliens under the INA.²¹ A nonimmigrant seeking entry must be eligible for one of the statutorily enumerated nonimmigrant visas.²² They are admitted for a specific purpose—business, education, tourism, pending nuptials—and are allowed to remain in the country for a limited period of time, sometimes subject to renewal.²³ Immigrants seeking entry on a permanent basis must qualify to

<http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnnextchannel=f3829c7755cb9010VgnVCM10000045f3d6a1RCRD> (last visited Feb. 16, 2013) [hereinafter INA].

14. Act of May 6, 1882, ch. 126, 22 Stat. 58.

15. The Act of March 3, 1903, ch. 1012, 32 Stat. 1213 (excluding epileptics, insane persons, beggars, and anarchists).

16. The Immigration Act of February 20, 1907, ch. 1134, 34 Stat. 898 (banning feeble-minded individuals and those infected with tuberculosis).

17. Emergency Quota Law, ch. 8, 42 Stat. 5 (1921. *Immigration Timeline*, UNC.EDU, <http://www.unc.edu/~perreira/198timeline.html#The Era of Regulation> (last visited March 3, 2013) (under the national origin system, the annual influx of immigrants from any given country was limited to three-percent of the population of that country currently living in America).

18. Linda Kelly, *Family Planning, American Style*, 52 ALA. L. REV. 943, 953 (2001). The number of yearly immigration visas varies on a year-to-year basis but guarantees at least 226,000 visas will be granted for family-sponsored immigrants, 140,000 for employment-based immigrants, and 55,000 for diversity applicants. *Id.* at 954.

19. 8 U.S.C. § 1401(a) (2006), available at INA, *supra* note 13, at § 301(a).

20. 8 U.S.C. § 1101(a)(23) (2006), available at INA, *supra* note 13, at § 101(a)(23).

21. 8 U.S.C. § 101(a)(3) (2006), available at INA, *supra* note 13, § 101(a)(3) (“The term ‘alien’ means any person not a citizen or national of the United States”).

22. 8 U.S.C. § 1101(a)(15) (2006), amended by 8 U.S.C. § 1101(a)(15) (Supp. V 2012), available at INA, *supra* note 13, § 101(a)(15) (“The term ‘immigrant’ means every alien except an alien who is within one of the [enumerated] classes of nonimmigrant aliens”).

23. See generally 8 U.S.C. 1101(a)(15), available at INA, *supra* note 13, § 1101(a)(15) (click “Immigration and Nationality Act (Legal Code)” then “Act 101”).

become lawful permanent residents (LPR).²⁴ In order to do so, they must be sponsored by either a family member or an employer.²⁵

i. Employment-Based Preference

In 1942, faced with severe farm labor shortages brought about by World War II, Congress passed a temporary guest worker program.²⁶ The program admitted only men and was known as the *bracero* program.²⁷ Although the program has a mixed legacy, it is largely responsible for the relationship between U.S. employers' demand for low-wage workers and foreign nationals looking to come to America.²⁸ A version of this concept was codified in The Nationality Act of 1952 (INA of 1952),²⁹ which established the employment-based preference system.³⁰ The employment-based preference system sets aside

24. See "lawfully admitted for permanent residence" in 8 U.S.C. § 1101(a)(20) (2006), available at INA, *supra* note 13, § 101(a)(20).

25. See "Allocation of Immigrant Visas" in 8 U.S.C. § 1153 (2006), available at INA, *supra* note 13, § 203. Within the immigrant visas reserved for diversity immigrants, the INA includes a third designation intended by Congress to increase the number of immigrants from underrepresented countries. See 8 U.S.C. § 1153(c) (2006), available at INA, *supra* note 13, § 301(c) (regarding diversity immigrants within the INA). Diversity immigrants will be exempt from the foregoing discussion in order to avoid confusion. See STEPHEN H. LEGOMSKY & CRISTINA M. RODRÍGUEZ, IMMIGRATION AND REFUGEE LAW AND POLICY 337-41 (4th ed. 2005), for more information on diversity immigrants.

26. Walter A. Ewing, *Opportunity and Exclusion: A Brief History of U.S. Immigration Policy*, IMMIGR. POL'Y CENTER 5 (Jan. 2012) available at http://www.immigrationpolicy.org/sites/default/files/docs/Opportunity_Exclusion_011312.pdf.

27. See Bill Ong Hing, *Immigration Policy: Thinking Outside the (Big) Box*, 39 CONN. L. REV. 1401 (2007). The Bracero program—which by law was limited to men—is seldom referred to by its bureaucratic name, the "Labor Importation Program." The name Bracero was meant to connote *brazos*, which is Spanish for arms; it is a colloquial allusion to men of strength. Braceros eventually constituted a quarter of the farm labor force in California, Arizona, New Mexico, and Texas. *Id.* at 1422-1425.

28. The program, which was in effect from 1942 to 1964, brought approximately five million Mexican field workers (or *braceros*) to American farms, where they often worked under horrendous conditions and for little pay. Ewing, *supra* note 26, at 5. Many of these men entered the country without permission or remained in the U.S. longer than they had been authorized to stay. *Id.* The *bracero* program established the relationship between Mexican immigrants looking to improve their economic opportunities and American employers looking for low-wage labor. Emily B. White, Comment, *How We Treat Our Guests: Mobilizing Employment Discrimination Protections in a Guest Worker Program*, 28 BERKELEY J. EMP. & LAB. L. 269, 275 (2007).

29. 8 U.S.C. § 1101 (2006), available at INA, *supra* note 13, § 101.

30. Presently, most foreign nationals seeking admission into the U.S. must establish their eligibility under either the family-based or employment-based preference systems and will only be eligible for permanent residence if they are "family-sponsored immigrants" as defined in 8 U.S.C. § 1153(a) (2006), available at INA, *supra* note 13, § 203(a) or "employment-based immigrants" as defined in 8 U.S.C. § 1153(b) (2006), amended by 8 U.S.C. § 1153(b) (Supp. V. 2012), available at INA, *supra* note 13, § 203(b).

a quota preference for skilled workers from foreign countries.³¹ It remains one of the pillars of modern immigration policy, accounting for over 20% of yearly immigration visas.³²

However, the education required to qualify for employment-based visas is often unavailable to foreign-born women, particularly those who live in less developed regions.³³ The same is true of work experience: the worldwide rate of participation in the labor force among men is 77%, while that among women is 52%.³⁴ Consequently, most employment-based visas are granted to men.³⁵ Women that do qualify for such visas often qualify for lower preference categories.³⁶ As a result, immigrant men are more likely to find professional employment and, on average, earn \$8,351 more per year than immigrant women.³⁷

ii. Family-Based Preference

In 1965, Congress codified the principle of family reunification by passing the Hart-Cellar Act.³⁸ The Hart-Cellar Act added a preference category for family members of people currently residing in the United States.³⁹ Whereas guest worker programs predominantly focused on admitting men,⁴⁰ the policy shift toward family reunification opened the door for greater flows of

31. Benjamin Marquez & John F. Witte, *Immigration Reform: Strategies for Legislative Action*, 7 FORUM, no. 3, Oct. 2009, at 1.

32. Fernando Riosmena, *International Migration In The Americas: U.S. Policy and Migration in the Americas: Policy Shocks: On the Legal Auspices of Latin American Migration to the United States*, 630 ANNALS 270, 275 (2010), available at LEXIS. In addition, “20.7 percent (140,000) [of visas are granted] to employment-based admissions, and the remaining 8.2 percent (55,000) to diversity visas.” *Id.*

33. The literacy rate among adults worldwide is 84%, while the literacy rate among women worldwide is only 79%. U.N. Secretariat Dep’t of Econ. and Soc. Affairs, *The World’s Women 2010: Trends and Statistics*, at 45, U.N. Doc. ST/ESA/STAT/SER.K/19 (2010) [hereinafter *The World’s Women*] available at http://unstats.un.org/unsd/demographic/products/Worldswomen/WW_fullreport_color.pdf. As such, nearly “[t]wo thirds of the 774 million adult illiterates worldwide are women.” *Id.* at 43. This gender gap is less pronounced in well-developed regions such as Europe and North America. *Id.* at 45. There, the literacy rate among women is over 95%. *Id.* However, where “the proportion of the illiterate population is high, women are more likely than men to be illiterate.” *Id.*

34. *Id.* at 76.

35. See Allison S. Hartry, Comment, *Gendering Crimmigration: The Intersection of Gender, Immigration, and the Criminal Justice System*, 27 BERKELEY J. GENDER L. & JUST. 1, 17 (2012).

36. See KAVITHA SREEHARSHA, IMMIGRATION POLICY CENTER, REFORMING AMERICA’S IMMIGRATION LAWS: A WOMAN’S STRUGGLE (SPECIAL REPORT) 5-6 (2010), available at http://immigrationpolicy.org/sites/default/files/docs/A_Womans_Struggle_062810.pdf.

37. Hartry, *supra* note 35, at 17.

38. Immigration & Nationality Act of 1965, Pub. L. No. 89-236, 79 Stat. 911 (1965) (codified as amended in scattered sections of 8 U.S.C.).

39. See Marquez & Witte, *supra* note 31, at 2.

40. See Ong Hing, *supra* note 27, at 1425 (explaining that the bracero program “limited admission to adult males”).

immigration by women, primarily from Latin America.⁴¹ The family-based preference system—which remains in effect—provides an avenue for entry to women who lack economic opportunities in their home country without regard for their potential lack of education and professional training.

The immediate relatives—meaning the children, spouses, and parents—of USCs are eligible for immigrant visas.⁴² Other qualifying relatives are divided into four reference categories with different numerical limitations for each preference.⁴³ More than half of the United States' total foreign-born population consists of women,⁴⁴ due in large part to the INA's prioritization of the family-based preference categories.⁴⁵ Presently, the INA grants 71.1% of its visas to family reunification.⁴⁶

B. Grounds for Removal

Once admitted, immigrants are granted LPR status, which allows them to remain in the country indefinitely and grants them work authorization.⁴⁷ However, unlike USCs, immigrants and non-immigrants are subject to deportation if they are in violation of one of the grounds for removal listed in the INA.⁴⁸ The list of grounds for removal is expansive, as it takes into account

41. Margot Mendelson, *The Legal Production Of Identities: A Narrative Analysis Of Conversations With Battered Undocumented Women*, 19 BERKELEY WOMEN'S L.J. 138, 141 (2004).

42. The term "immediate relatives" applies to "the children, spouses, and parents of a citizen of the United States, except that, in the case of parents, such citizens shall be at least 21 years of age." 8 U.S.C. § 1151(b)(2)(A)(i) (2006), *amended by* 8 U.S.C. § 1151(b)(2)(A)(i) (Supp. V 2012), *available at* INA, *supra* note 13, § 201 (b)(2)(A)(i). Children must be unmarried and under age 21. 8 U.S.C. § 1101(b)(1) (2006), *available at* INA, *supra* note 13, § 101(b)(1). Immediate relatives are not subject to the general quota. 8 U.S.C. § 1151(b)(2)(A)(i) (2006), *available at* INA, *supra* note 13, § 201(b)(2)(A)(i).

43. The preference categories include the following: (1) unmarried sons and sons and daughters of USCs; (2) spouses and unmarried sons and daughters of LPRs; (3) married sons and daughters of USCs; and (4) brothers and sisters of USCs over age 21. See 8 U.S.C. § 1153(a), *available at* INA, *supra* note 13, § 203(a). They are subject to certain numerical subceilings. 8 U.S.C. § 1151(c) (2006), *available at* INA, *supra* note 13, § 201(c).

44. U.S. Census Bureau, U.S. Dep't of Commerce, *American Community Survey*, <http://www.census.gov/acs/www/> (last visited Feb. 17, 2013) (Under "Data by Topic" click "Origins"; click "SELECTED CHARACTERISTICS OF THE NATIVE AND FOREIGN-BORN POPULATIONS"). A 2011 American Community Survey, following the 2010 Census, estimated that approximately 20.6 million foreign-born women live in the United States. *Id.*

45. See Kelly, *supra* note 18, at 953. See also OFFICE OF IMMIGRATION STATISTICS, DEP'T OF HOMELAND SEC., 2009 YEARBOOK OF IMMIGRATION STATISTICS, 26 tbl.9 (2010), *available at* http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2009/ois_yb_2009.pdf.

46. Riosmena, *supra* note 32, at 275. ("20.7 percent (140,000) [of visas are granted] to employment-based admissions, and the remaining 8.2 percent (55,000) to diversity visas.")

47. LEGOMSKY & RODRIGUEZ, *supra* note 25, at 238.

48. See "General Classes of Deportable Aliens" in 8 U.S.C. § 1227(a) (2006), *amended by* 8 U.S.C. § 1227(a) (Supp. V 2012), *available at* INA, *supra* note 13, § 237(a). Non-immigrant aliens are temporary visitors—e.g., guest workers, students, fiancés, etc.—and are subject to the same grounds for removal as LPRs. For the purposes of this

a person's health, criminal background, political affiliations, ability to support oneself financially, and presence without admission or admission under false pretenses.⁴⁹ Many of these grounds for removal are much broader than the statutory language indicates, and despite their authorization to enter the country, LPRs are often removed for being in violation of the INA.⁵⁰ In fact, approximately 20% of people deported due to a criminal offense were lawfully present.⁵¹ If removed, a person may be barred from re-entering the U.S. for a statutorily prescribed period.⁵²

C. A Snapshot of Undocumented Immigrants Living in the U.S.

A final group of foreign-born people living in the U.S. consists of undocumented aliens who are *de facto* removable due to their being present without admission.⁵³ The most recent estimates show that approximately 11.1

discussion, the difference between permanent and temporary visa holders is simply that visitors (non-immigrants) have temporary—rather than permanent—visas. For more information on the various nonimmigrant visas, see Types of Visas for Temporary Visitors, U.S. Department of State, Travel.State.Gov: A Service of the Bureau of Consular Affairs, available at http://travel.state.gov/visa/temp/types/types_1286.html (last visited Apr 7, 2013).

49. See 8 U.S.C. § 1227(a) (2006), available at INA, *supra* note 13, § 237(a).

50. For instance, an immigrant is inadmissible—therefore, removable—if she has committed “2 or more offenses. . . for which the aggregate sentences to confinement were 5 years or more.” 8 U.S.C. § 1182(a)(2)(B) (2006), available at INA, *supra* note 13, § 212(a)(2)(B). She will also be removable if convicted of only one crime that involves “moral turpitude,” a nebulous concept that courts have struggled to define yet managed to expand. See generally 8 U.S.C. § 1227(a)(2)(A)(i) (2006), available at INA, *supra* note 13, § 237(a)(2)(A)(i); see also DAVID WEISSBRODT & LAURA DANIELSON, IMMIGRATION LAW AND PROCEDURE 218 (5th ed. 2005). LPRs are also removable for committing “aggravated felonies,” which may be neither aggravated nor felonies. See *United States v. Pacheco*, 225 F.3d 148, 149-50 (2nd Cir. 2000). In *Pacheco*, a man with one prior misdemeanor was removed for stealing a ten dollar video game based on the fact that the one-year sentence he received constituted an aggravated felony for immigration purposes, even though the sentence was deferred. *Id.* LPRs are also removable for any violation of a law that involves the possession of controlled substances. 8 U.S.C. § 1227(a)(2)(B) (2006), available at INA, *supra* note 13, § 237 (a)(2)(B).

51. Allegra M. McLeod, *The U.S. Criminal-Immigration Convergence and Its Possible Undoing*, 49 AM. CRIM. L. REV. 105, 107-08 (Winter 2012).

52. See 8 U.S.C. § 1182(a)(9) (2006), available at INA, *supra* note 13, § 212(a)(9).

53. Under 8 U.S.C. § 1182(a)(6)(A) (2006), available at INA, *supra* note 13, § 212(a)(6)(A), aliens present without admission are considered inadmissible, and inadmissibility is grounds for removal under 8 U.S.C. § 1227(a)(1)(A) (2006), available at INA, *supra* note 13, § 237(a)(1)(A). Further, any alien “present in the United States in violation of [the INA]. . . is deportable” under 8 U.S.C. § 1227 (a)(1)(B) (2006), available at INA, *supra* note 13, § 237(a)(1)(B). The terms “illegal alien” and “undocumented alien” are colloquial rather than legal terms. See *Which Is Acceptable: ‘Undocumented’ vs. ‘Illegal’ Immigrant?*, NPR (Jan. 7, 2010), <http://www.npr.org/templates/story/story.php?storyId=122314131>. They encompass—among others—any alien present in the U.S. without authorization, including people who cross the border without authorization, people who overstay their visas, and people who remain in the country in violation of a removal order. See *id.*

million undocumented immigrants live in the U.S. today.⁵⁴ More than one-half of the undocumented population has been in the country since 2000, and about half of that group entered before 1996.⁵⁵ They have established families and deep ties to their communities. Half of all undocumented immigrants, including 64% of undocumented women, live in two-parent households with children.⁵⁶ Over the past decade, births have surpassed immigration as the main reason for growth in the Mexican-American population.⁵⁷ Of the 5.5 million children of undocumented parents, 4.5 million are native-born USCs.⁵⁸ These children are citizens by birth and are not removable under the INA.⁵⁹ This is a consequential shift in the population of the U.S. as a whole, and any policy seeking to deport undocumented immigrants must be mindful of the effect that deportation might have on American children.

The undocumented population grew steadily for twenty years until it hit its peak of 12 million in 2007.⁶⁰ The wave of immigration was driven primarily by immigrants from Mexico, who account for 58% of the undocumented population currently living in the U.S.⁶¹ Since 2007, net migration to and from Mexico has dropped to zero, and the largest wave of immigration from one country to the U.S. has come to an end.⁶² Accordingly, the size of the undocumented population as a whole has remained relatively stable for the past

54. Jeffery Passel & D'Vera Cohn, *Unauthorized Immigrants: 11.1 Million in 2011*, PEW HISPANIC CENTER (Dec. 6, 2012), available at <http://www.pewhispanic.org/2012/12/06/unauthorized-immigrants-11-1-million-in-2011/> [hereinafter *Unauthorized Immigrants (2011)*].

55. PAUL TAYLOR, MARK HUGO LOPEZ, JEFFREY S. PASSEL & SETH MOTEL, PEW HISPANIC CENTER, UNAUTHORIZED IMMIGRANTS: LENGTH OF RESIDENCY, PATTERNS OF PARENTHOOD, 3 (2011), available at <http://www.pewhispanic.org/files/2011/12/Unauthorized-Characteristics.pdf>.

56. PORTRAIT OF UNAUTHORIZED IMMIGRANTS, *supra* note 1, at 6.

57. PEW HISPANIC CENTER, PEW RESEARCH CENTER, THE MEXICAN-AMERICAN BOOM: BIRTHS OVERTAKE IMMIGRATION 2 (July 14, 2011) [hereinafter MEXICAN-AMERICAN BOOM] available at <http://www.pewhispanic.org/files/reports/144.pdf>. Although this figure does not differentiate between documented and undocumented Mexican immigrants, *see id.*, it should be considered in light of the fact that approximately 40% of the total Mexican-American population in the U.S. is immigrants. *Id.* at 4.

58. JEFFREY PASSEL & D'VERA COHN, UNAUTHORIZED IMMIGRANT POPULATION: NATIONAL AND STATE TRENDS, 2010, PEW HISPANIC CENTER 13 (Feb. 1, 2011) [hereinafter NATIONAL AND STATE TRENDS] available at <http://www.pewhispanic.org/files/reports/133.pdf>; *see also* MEXICAN-AMERICAN BOOM, *supra* note 57, at 8 (“Between March 2009 and March 2010, there were 350,000 children born to undocumented parents in the U.S.”).

59. *See* 8 U.S.C. §1401(a) (2006), available at INA, *supra* note 13, § 301(a).

60. *Unauthorized Immigrants (2011)*, *supra* note 54; NATIONAL AND STATE TRENDS, *supra* note 58, at 1.

61. *See* NET MIGRATION FALLS TO ZERO, *supra* note 2, at 7.

62. *Id.* at 6; *see also* Mendelson, *supra* note 41, at 142 (“[I]mportant economic and global factors converged to propel contemporary emigration from Mexico and immigration into the U.S. Mexico has been mired in an economic crisis since the currency crisis of 1982, during which inflation rose to nearly one hundred percent.”).

five years.⁶³ The reduced influx is variously attributed to the U.S. economic downturn, increased enforcement along the border, and broad socioeconomic changes in Mexico.⁶⁴ Although some may argue that the unwelcoming policies advocated by restrictionist groups also contributed to the downward trend of Mexican migration, evidence to the contrary shows that enforcement measures are not the primary cause of concern for undocumented immigrants seeking to enter the United States.⁶⁵

II. ADDITIONAL HURDLES FOR IMMIGRANT WOMEN IN AMERICA

The expansive immigration enforcement scheme is only one of the factors that make it difficult for immigrant women to thrive in America. Some obstacles, such as the inherent dangers of entering the country, are unique to undocumented immigrants, while others, such as the fear of deportation and the lack of governmental support, extend to LPRs and temporary immigrants as well. Both LPRs and undocumented women alike receive little to no support from government social programs.⁶⁶ Additionally, immigrants who lack work authorization often seek work in the informal sector, where they are not provided with benefits and deprived of most basic workplace protections.⁶⁷

A. *The Dangers of Unlawful Entry and Human Trafficking*

Between 1993 and 1997, the U.S. closed off traditional migrant paths by initiating Operation Gatekeeper in San Diego and Operation Hold-The-Line in

63. See *Unauthorized Immigrants (2011)*, *supra* note 54.

64. See generally NET MIGRATION FALLS TO ZERO, *supra* note 2, at 6; see also STEVEN A. CAMAROTA & KAREN JENSENIUS, HOMEWARD BOUND: RECENT IMMIGRATION ENFORCEMENT AND THE DECLINE IN THE ILLEGAL ALIEN POPULATION 1 (Backgrounder, Center for Immigration Studies 2008), available at <http://www.cis.org/articles/2008/back808.pdf>.

65. ANDREA NILL, ATTRITION THROUGH RECESSION: CIS REPORT MARRED BY INACCURACIES, CONTRADICTIONS, AND WISHFUL THINKING 1 (Immigration Policy Center 2008), available at <http://www.immigrationpolicy.org/sites/default/files/docs/CISPopulationReport7-30-08.pdf>. Nill compares the decline in the undocumented population during the recession to changes in the undocumented population during previous recessions and concludes that the drop in the undocumented population during those months was caused by the faltering American economy. *Id.* at 1.

66. See *infra* Part II.B.i.

67. In *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002), the Court held that federal immigration policy, as expressed by Congress in IRCA, foreclosed the NLRB from awarding backpay to an undocumented alien who has never been legally authorized to work in the United States. *Id.* at 151. The extent of the *Hoffman* ruling remains unclear. See Mariel Martinez, Comment, *The Hoffman Aftermath: Analyzing the Plight of the Undocumented Worker Through a "Wider Lens"*, 7 U. PA. J. LAB. & EMP. L. 661, 663 (2005) ("[T]he ambiguous reasoning used by the Court can and has been used by employers to threaten undocumented workers into believing: 1) that the Supreme Court's decision in *Hoffman* asserts that violation of immigration laws precludes an employee's ability to receive labor protections; and 2) that employers thus have a right to use the discovery process to show the courts that such a violation has taken place.").

El Paso (collectively, the “Gatekeeper Complex”).⁶⁸ By pinching off the safe and established migrant paths, Border Patrol re-routed undocumented immigrants to the sparsely populated Sonoran Desert of Arizona.⁶⁹ The purpose of the Gatekeeper Complex was to raise the risk of apprehension enough to make it a successful deterrent, a strategy the INS called “prevention through deterrence.”⁷⁰ The strategy proved to be a double-edged sword: it arguably dissuaded some people from entering the U.S., but it also led hundreds of people to die while attempting to enter the country.⁷¹

Since the implementation of the Gatekeeper Complex, undocumented immigrants entering the country must choose either the unforgiving terrain of the Sonora Desert or the Otay Mountains of East San Diego County.⁷² Of course, this includes the two-fifths of the undocumented population that are women.⁷³ Those who undertake the journey face heat exhaustion during the day and risk getting frostbite at night.⁷⁴ They pay *coyotes*—human smugglers—as much as 500 dollars to lead them on the dangerous trek.⁷⁵ A report by the United Nations estimates that 70% of women who cross without either a spouse or another trusted family member are sexually assaulted during the border crossing.⁷⁶ In fact, women are encouraged to prepare for the border crossing by taking birth control pills in anticipation of sexual assault.⁷⁷

68. Daniel A. Scharf, Note, *For Human Borders: Two Decades of Death and Illegal Activity in the Sonoran Desert*, 38 CASE W. RES. J. INT’L L. 141, 143-45 (2006). Between 1993 and 1997, the Gatekeeper Complex grew to encompass four areas along the border, including (1) San Diego, California; (2) El Paso, Texas; (3) Arizona, and (4) Brownsville, Texas. Ong Hing, *supra* note 6, at 128.

69. See Scharf, *supra* note 68, at 144.

70. Ong Hing, *supra* note 6, at 128.

71. *Id.* at 137.

72. *Id.* Gatekeeper’s closure of the westernmost corridors has led to increasing deaths among undocumented border crossers. Although the distances in Texas are enormous, the eastern edge of the California border contains the more difficult terrain. The challenges include rugged canyons and high desert, remote, desolate stretches, and risks of dehydration, in addition to the potential dangers of wildfires, falls, snakebites, and animal attacks. See *id.* 137-40.

73. See *Unauthorized Immigrants (2011)*, *supra* note 54. (“There were 11.1 million unauthorized immigrants living in the U.S. in March 2011”). In March 2008, there were 4.1 million women living as unauthorized immigrants. See PORTRAIT OF UNAUTHORIZED IMMIGRANTS, *supra* note 1, at 4.

74. Lizette Alvarez & John M. Broder, *More and More, Women Risk All to Enter U.S.* (hereinafter, “*Women Risk All*”), N.Y. Times, Jan. 10, 2006, <http://www.nytimes.com/2006/01/10/national/10women.html?sq=women%20immigrant%20risk%20arizona&st=nyt&scp=1&pagewanted=print>).

75. *Id.* A coyote is a human smuggler that gets paid large amounts of money to bring people into the country, typically by helping them cross the desert on foot. *Extended Interview: A Human Smuggler*, PBS FRONTLINE: WORLD, (April 3, 2008), <http://www.pbs.org/frontlineworld/stories/mexico704/interview/smuggler.html>.

76. Tim Vanderpool, *Price of Admission*, TUSCAN WEEKLY, June 5, 2008, <http://www.tucsonweekly.com/tucson/price-of-admission/Content?oid=1091501>; see also HUMAN RIGHTS WATCH, *DETAINED AND DISMISSED 54* (2008).

77. Vanderpool, *supra* note 76.

Although there was a time when fewer than 20% of those that crossed the desert were women, that number had doubled by 2006.⁷⁸ Some women make the journey in order to reunite with their families, while many others cross the desert primarily in search of economic opportunity.⁷⁹ They often believe that they will find better economic opportunities in America, and that living in the U.S. will give them the economic independence and empowerment that is often not available to them in their home countries.⁸⁰

Other women still are transported across the border against their will or under false pretenses as the fastest growing area of international criminal activity is the trafficking of women for prostitution and forced labor.⁸¹ Human trafficking brings between 14,500 and 17,500 people into the country every single year;⁸² the vast majority of them are women and girls.⁸³ Traffickers use forceful, fraudulent, or coercive tactics on women who are seeking to enter the United States in order to make them work in demeaning jobs that often involve prostitution.⁸⁴ They threaten their victims by telling them that they will be arrested or deported if they try to contact the authorities.⁸⁵ After risking life and limb to enter the country, the victimized women and girls are unlikely to endanger their chances of remaining here by reporting abuse.⁸⁶

B. Governmental Protections are Lacking

Although many people believe otherwise, undocumented immigrants—and the majority of LPRs—are ineligible for most social benefits. In addition,

78. *Women Risk All*, *supra* note 74.

79. *Id.*

80. See DEPARTMENT OF ECONOMIC AND SOCIAL AFFAIRS, UNITED NATIONS, 2009 WORLD SURVEY ON THE ROLE OF WOMEN IN DEVELOPMENT, WOMEN'S CONTROL OVER ECONOMIC RESOURCES AND ACCESS TO FINANCIAL RESOURCES, INCLUDING MICROFINANCE 21 (2009), available at <http://www.un.org/womenwatch/daw/public/WorldSurvey2009.pdf> [hereinafter 2009 WORLD SURVEY] (“Women make up an increasing percentage of international migrants, migrating independently in search of jobs and economic independence and empowerment.”).

81. Division for the Advancement of Women, Department of Economic and Social Affairs, United Nations, *Women and International Migration*, UN.ORG, 29 http://www.un.org/esa/population/meetings/thirdcoord2004/P01_DAW.pdf. (last visited Mar. 16, 2013).

82. DEPARTMENT OF STATE, UNITED STATES OF AMERICA, TRAFFICKING IN PERSONS REPORT 23 (2004), available at <http://www.state.gov/documents/organization/34158.pdf>.

83. *Id.*

84. *Id.* at 6, 10, 15.

85. *Human Trafficking*, PEEDEECOALITION.ORG, http://www.peedeecoalition.org/?page_id=583 (last visited April 7, 2013).

86. See Leslye E. Orloff, Mary Ann Dutton, Giselle Aguilar Hass & Nawal Ammar, *Battered Immigrant Women's Willingness to Call for Help and Police Response*, 13 UCLA WOMEN'S L.J. 43, 68 (2003). A study of battered immigrants' willingness to call the police for help in a domestic violence showed a strong correlation between immigration status and willingness to call the police. *Id.* The reporting rate among women with permanent status sought was 43.1%. *Id.* That rate dropped to 20.8% for women with temporary status and 18.8% for undocumented women. *Id.*

they do not receive the same labor law protections available to citizens and most others who have valid legal status.⁸⁷ Further, the fear of deportation keeps them from reporting workplace abuse.⁸⁸

i. Living without Recourse to the Social Safety Net

Under the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (hereinafter the “Welfare Reform Act”),⁸⁹ nearly all immigrants—including LPRs—are barred from receiving many federal benefits that are available to USCs, including “social security benefits, food stamps, welfare, unemployment benefits, health benefits, and disability entitlements.”⁹⁰ In addition, undocumented immigrants are ineligible for housing assistance and enrollment in postsecondary education because of their invalid immigration status.⁹¹ Living without these benefits adds to undocumented women’s feeling of illegality and often pushes them further underground.⁹² Withholding governmental protections is also detrimental to the millions of children of undocumented immigrants.⁹³ These protections would allow women access to education, work, credit, and other productive assets that have a stronger impact on child welfare in the hands of women than in the hands of men.⁹⁴

ii. Working in the Informal Sector

Female immigrants with work authorization often find employment in the service industries and engage in domestic labor.⁹⁵ However, undocumented women lack work authorization, as well as federal and (most) state-sponsored benefits.⁹⁶ Lack of access to employment and social programs limits women’s

87. See *infra* Part II.B.ii.

88. See *infra* Part II.B.ii.

89. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub.L. 104-193, tit. I, 103(a)(1), 110 Stat. 2105 (1996) (codified in scattered sections of 7, 8, 21, 25, and 42 U.S.C.) (hereinafter the “Welfare Reform Act”).

90. Mendelson, *supra* note 41, at 142; see generally 42 U.S.C. § 608(f).

91. See TANYA BRODER & JONATHAN BLAZER, OVERVIEW OF IMMIGRANT ELIGIBILITY FOR FEDERAL PROGRAMS, 2-6 (2011), available at <http://www.nilc.org/overview-immeligfedprograms.html>.

92. See Mendelson, *supra* note 41, at 207. Moreover, it runs counter to the battered women’s movement, which promotes “education, employment, [and] social services.” *Id.*

93. PORTRAIT OF UNAUTHORIZED IMMIGRANTS, *supra* note 1, at 7 (showing that, in 2008, 5.5 million children of undocumented immigrants were living in the United States).

94. 2009 WORLD SURVEY, *supra* note 80, at 7.

95. See *American Community Survey*, *supra* note 44 (from the home page, click “People,” then click “Foreign-Born,” then click “2010 Tables Package,” and then open the Table 1.6).

96. In a Special Report, the Comptroller of Texas divided major state-sponsored programs into those that are available to undocumented immigrants (K-12 education, emergency medical care, children with special care needs, substance abuse services, mental health services, immunizations, women and children’s health services, public health, EMS) and those that are unavailable (Medicare, Medicaid, TANF, Children’s Health Insurance Program, food stamps, Social Security Income, public housing assistance, job opportunities

economic mobility and drives many undocumented women toward the informal employment sector.⁹⁷ There, they earn significantly less than women who are USCs and approximately 13.2% less than similarly situated male immigrants.⁹⁸

Working in the informal sector also leaves undocumented women at the mercy of abusive employers looking to take advantage of their fear of deportation.⁹⁹ Sexual harassment is reported by 77% of Latina immigrants, many of whom also endure abuse and labor law violations at the hands of their bosses and supervisors.¹⁰⁰ Their employers are able to use the threat of deportation to ensure that the women will not report them for sexual violence, sexual assault, sexual harassment, and other gender-motivated exploitation.¹⁰¹ These employers do so with impunity because the National Labor Relations Board does not have the power to award back pay to undocumented workers.¹⁰² Undocumented women who provide domestic services in private homes often lose their freedom and privacy and are sometimes physically harmed by their employers.¹⁰³ Rather than risking their ability to stay in the country, many women choose to endure these abusive employment conditions.¹⁰⁴

for low-income individuals, child care and development). *See generally* CAROLE KEETON STRAYHORN, OFFICE OF THE COMPTROLLER OF TEXAS, UNDOCUMENTED IMMIGRANTS IN TEXAS: A FINANCIAL ANALYSIS OF THE IMPACT TO THE STATE BUDGET AND ECONOMY (2006) available at <http://www.window.state.tx.us/specialrpt/undocumented/undocumented.pdf>. The state benefits available in Texas are similar to those available in other states. *See generally* BENEFITS.GOV, <http://www.benefits.gov/benefits/browse-by-state> (last visited April 7, 2013) (outlining the various state benefit programs available within each state).

97. *See* SREEHARSHA, *supra* note 36, at 4. This applies to some visa holders as well because depending on their status, they may be ineligible for work authorization for several years before becoming LPRs. *Id.*

98. *Id.* at 6.

99. SOUTHERN POVERTY LAW CENTER, UNDER SIEGE: LIFE FOR LOW INCOME LATINOS IN THE SOUTH 28 (2009), available at <http://cdna.splcenter.org/sites/default/files/downloads/UnderSiege.pdf>.

100. *Id.*

101. *Id.*

102. Amanda Clark, *A Hometown Dilemma: Addressing the Sexual Harassment of Undocumented Women in Meatpacking Plants in Iowa and Nebraska*, 16 HASTINGS WOMEN'S L.J. 139, 145, Winter 2004 (citing *Hoffman Plastic Compounds v. NLRB*, 535 U.S. 137 (2002)). In *Hoffman*, the Supreme Court held that awarding backpay to undocumented workers would undermine federal immigration policy under IRCA. *Hoffman*, 535 U.S. 137.

103. One example is the couple charged with multiple criminal counts, including forced labor in *United States v. Sabhnani*, 493 F.3d 63 (2nd Cir. 2007). There have been a higher than expected number of cases prosecuted under the Trafficking Victims Protection Act since its passage 10 years ago. *See* U.S. DEP'T. OF JUSTICE, CIVIL RIGHTS DIVISION, REPORT ON THE TENTH ANNIVERSARY OF THE TRAFFICKING VICTIMS PROTECTION ACT 6-8 (2010), available at http://www.justice.gov/crt/about/crm/trafficking_newsletter/tpaanniversaryreport.pdf.

104. *See* Clark, *supra* note 102, at 145; Maria L. Ontiveros, *Lessons From the Field: Female Farm Workers and the Law*, 55 ME. L. REV. 157, 160-62 (2003).

C. Problems with the Family-Based Preference System

While men are much more likely to immigrate under the auspices of employment-based visas, women most often enter the country as the relatives of men or under the family-based preference system.¹⁰⁵ Therefore, women are much more likely to rely on men for their visas than they are to immigrate with legal status of their own accord.¹⁰⁶ This reliance becomes a problem when the spouse uses the threat of deportation as a weapon of abuse.

Immigrants who are sponsored by a LPR or USC spouse are granted conditional permanent residence during their first two years of permanent residence in the U.S.¹⁰⁷ If the marriage ends in divorce during this conditional period or the Attorney General determines that the marriage is fraudulent, the immigrant will lose her LPR status.¹⁰⁸ In such situations, the sponsoring spouse has the power to threaten the immigrant with deportation by seeking divorce or alleging that the immigrant entered the marriage under false pretenses.¹⁰⁹ Similarly, some immigrant women with temporary legal status rely on their husband's temporary employment-based visa.¹¹⁰ Most of these women are not granted work authorization and would jeopardize their ability to gain LPR status in the future if they were to work without authorization.¹¹¹ They are left to rely on their husbands financially as well as legally. Reliance on a relative causes a loss in agency and independence that reverberates through the female immigrant's experience in a number of ways.

i. Relying on a Potentially Abusive Male Sponsor

The family-based system requires that a USC or LPR petitioner apply to the U.S. Citizenship and Immigration Services (USCIS) on behalf of the immigrant.¹¹² When a woman is allowed to enter the country based on a man's petition for her admittance, her ability to remain in the country and live a normal life hinges on his continued support.¹¹³

The weak position of immigrant women is often exacerbated upon entry to the United States because domestic abuse rates increase after immigration.¹¹⁴ The relationship between petitioner and potential immigrant makes women particularly likely to suffer abuse, violence and other crimes at the hands of

105. Hartry, *supra* note 35, at 17.

106. *Id.*

107. 8 U.S.C. § 1186(a) (2006), *available at* INA, *supra* note 13, § 216(a).

108. 8 U.S.C. § 1186(b) (2008), *available at* INA, *supra* note 13, § 216(b).

109. *See id.* (allowing for termination of status upon a finding that the qualifying marriage was improper).

110. SREEHARSHA, *supra* note 36, at 8.

111. *Id.* at 8 n.23.

112. *See id.* at 8.

113. *See id.*

114. Giselle Aguilar Hass, Nawal Ammar & Leslye Orloff, *Battered Immigrants and U.S. Citizen Spouses* 3 (April 24, 2006), <http://action.legalmomentum.org/site/DocServer/dvusc.pdf?docID=314>.

their petitioners.¹¹⁵ As a result, many immigrant women are economically dependent on men and fall into domestic and submissive roles once they are admitted.¹¹⁶ Surveys have shown that “among immigrant Latinas who reported being currently married or having been previously married, the physical and sexual abuse rate” was as high as 59.5%.¹¹⁷

These women often end up in situations where their spouse has a great deal of control over their lives, including the information an immigrant woman receives regarding the U.S. legal system.¹¹⁸ Some men in this position use threats of deportation and separation from their children to keep abused women from calling the police.¹¹⁹ Used in this way, fear of deportation is a powerful weapon of abuse, as evidenced by the fact that reporting rates are much lower for undocumented victims of domestic abuse than they are for battered women generally.¹²⁰ In fact, the correlation between immigration status and reporting rates is consistent throughout the various groups of immigrants: battered women with temporary immigration status are half as likely to seek help from law enforcement than are women with permanent immigration status, and the rate is even lower among undocumented women.¹²¹

Abusive relationships of this type are aggravated when, as is often the case, the batterer and the victim are of the same race or ethnicity because law enforcement agents often view such abusive behavior as being “a part of the immigrant culture and the lives of immigrant women.”¹²² Police officers often assume that an immigrant woman’s hesitancy to interact with governmental authorities means that they will not follow through with prosecution on the case, and officers tend to side with the husband if he is a citizen and the woman is not.¹²³

ii. Federal Response to the Abuse of Female Immigrants

In recognition of the weak position of many immigrant women in the U.S., the federal government has made concessions to the strict enforcement of its immigration laws. One of the best-known concessions was made law in 2000 when Congress enhanced the provisions of the Violence Against Women Act (VAWA 2000) to protect immigrant women from domestic abuse.¹²⁴ The

115. *Id.* at 1.

116. *See id.* at 5 (discussing domestic violence and the dangers of unequal power dynamics in immigrant relationships).

117. *Id.* at 2.

118. Orloff et al., *supra* note 86, at 69.

119. *Id.* at 68.

120. *See id.* at 64.

121. Nawal H. Ammar et al., *Calls to Police and Police Response: A Case Study From the Latina Immigrant Women*, 7 INT’L J. POLICE SCI. & MGMT. 230, 239 (2005).

122. Orloff et al., *supra* note 86, at 54.

123. *Id.* at 54-55.

124. Violence Against Women Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 (codified as amended at 22 U.S.C. § 7101) (VAWA 2000). The future of VAWA is uncertain at the time of this writing. *See* Ashley Parker, *House Democrats Seek to Pass*

provisions of VAWA 2000 dealing with immigrant women were born of a recognition that the ability to decide another's immigration status is a powerful weapon in an abusive relationship and that women in the U.S. on a conditional status were subject to the whim of their petitioners.¹²⁵ Under VAWA 2000, immigrant victims of domestic violence can petition for temporary legal status, and after three years, she can become an LPR.¹²⁶

Another important consideration regarding not just victims of domestic abuse but also deportable aliens as a whole is the fact that U.S. Immigration and Customs Enforcement (ICE) only has the resources to deport about 400,000 people per year.¹²⁷ In response, ICE established a system of prioritization that gives ICE agents the discretion to remove certain high-priority immigration offenders above others.¹²⁸ Further, the director of ICE issued a memorandum asking the agents under his command to use their discretion when dealing with certain aliens, including victims of domestic abuse.¹²⁹ The policy is built on previous guidance on the proper exercise of prosecutorial discretion in T and U visa cases and sought to "minimize any effect that immigration enforcement may have on the willingness and ability of

Expansive Domestic Violence Law, NYTIMES.COM (January 23, 2013, 5:06 pm), <http://thecaucus.blogs.nytimes.com/2013/01/23/house-democrats-look-to-pass-expansive-domestic-violence-law/>. It requires periodic reauthorization that failed to pass the House in 2012 because of the House Republicans' opposition to, among other things, the provisions in the bill related to undocumented women. *Id.*

125. Mendelson, *supra* note 41, at 144.

126. 8 U.S.C. § 1154(a)(1)(A)(iii) (2006), *available at* INA, *supra* note 13, § 204(a)(1)(A)(iii); 8 U.S.C. § 1154(b)(2) (2006), *available at* INA, *supra* note 13, § 204(b)(2). Unfortunately, the protections suffer from a number of shortcomings that reduce its efficacy. Self-petition is limited to spouses of USCs and LPRs, such that victims who are not dependent on their spouse for legal immigration status are likely ineligible for relief. An ineligible victim can apply for a U-Visa. 8 U.S.C. § 1101(a)(15)(U) (2006), *available at* INA, *supra* note 13, § 101(a)(15)(U). The U-Visa is designed to protect those who suffered substantial physical or mental abuse from criminal activity, have information regarding the activity, and assist in its investigation or prosecution, as long as the crime violated U.S. law or occurred in the U.S. *See* Orloff et al., *supra* note 86, at 78-79. In order to qualify for a U-Visa, a victim must assist in a criminal investigation or prosecution and ask a law enforcement agent for certification of her assistance. *See id.* at 77-78.

127. *See infra* Part III.A (for more information on ICE (U.S. Immigration and Customs Enforcement)); Memorandum from John Morton, Director, U.S. Immigration and Customs Enforcement on Civil Immigration Enforcement: Priorities for the Apprehension, Detention, and Removal of Aliens to All ICE Employees (Mar. 2, 2011), *available at* http://www.ice.gov/doclib/foia/prosecutorial-discretion/civil-imm-enforcement-priorities_app-detn-reml-aliens.pdf (hereinafter "*Immigration Enforcement Priorities*").

128. In June 2011, the Director of ICE, John Morton, issued a memorandum in which he called for the proper exercise of prosecutorial discretion in "removal cases involving the victims and witnesses of crime, including domestic violence, and individuals involved in non-frivolous efforts related to the protection of their civil rights and liberties." Memorandum from John Morton, Director, U.S. Immigration and Customs Enforcement on Prosecutorial Discretion: Certain Victims, Witnesses and Plaintiffs, to All Field Office Directors, All Special Agents in Charge, & All Chief Counsel (June 17, 2011), *available at* <http://www.ice.gov/doclib/secure-communities/pdf/domestic-violence.pdf>.

129. *Id.*

victims, witnesses, and plaintiffs to call police and pursue justice.”¹³⁰ By focusing its resources on the agency’s top priorities, ICE is more likely to remove a dangerous criminal than a victim of domestic abuse.¹³¹

III. EFFORTS TO CONTROL UNAUTHORIZED IMMIGRATION

The preference categories of the modern INA have facilitated immigration for certain petitioners, but the INA does not accommodate all people who desire to immigrate. While it is true that the U.S. admits more immigrants per year than any other country, it ranks lower than Germany, the United Kingdom, and 19 other countries when the immigrant inflow is measured as a percentage of the country’s population.¹³² The truth is that coming to America is not easy. The fortunate few who are not “ineligible to receive visas”¹³³ and are granted admission must endure long wait times, sometimes lasting as long as twenty years.¹³⁴ Long wait times for visas and strict requirements for admissibility act

130. *Id.*; see also Immigration Enforcement Priorities, *supra* note 127.

131. See Margaret Scotti, *Development In The Executive Branch: ICE Prioritizes Certain Aliens For Detention And Removal; Explores Options For Improving Detainment Conditions*, 25 GEO. IMMIGR. L.J. 227, 229 (2010). ICE divides deportable aliens into three groups, from highest to lowest priority: (1) convicted criminals, crime suspects, other national security threats; (2) non-immigrant aliens with expired visas, recent entrants stopped at the border; and (3) those facing deportation orders who have failed to leave the country. Immigration Enforcement Priorities, *supra* note 127. Priority 1 is further divided into three levels: (a) aggravated felons, (b) those convicted of either one non-aggravated felony or three misdemeanors, and (c) those convicted of one or two misdemeanors. *Id.* In 2011, nearly 55% of removals consisted of Priority 1 immigrants. U.S. Immigration and Customs Enforcement, *Removal Statistics*, ICE.GOV, <http://www.ice.gov/removal-statistics/> (last visited Jan. 24, 2012).

132. Adam Ozimek, *Is the U.S. the Most Immigrant Friendly Country in the World?*, FORBES.COM (Nov. 18, 2012, 8:41 PM), <http://www.forbes.com/sites/modeledbehavior/2012/11/18/is-the-u-s-the-most-immigrant-friendly-country-in-the-world/>.

133. See “General Classes Of Aliens Ineligible To Receive Visas. . .” in 8 U.S.C. § 1182(a) (2006), *available at* INA, *supra* note 13, § 212(a). Under the INA, aliens who apply for entry into the U.S. may be deemed inadmissible based on their health, criminal background, ability to sustain themselves economically, eligibility for labor certification, and previous interaction with American immigration enforcement agencies, i.e., whether they have been previously removed. *Id.* In addition, an applicant may be deemed inadmissible based on national security grounds under 8 U.S.C. § 1182(a)(3) (2006), *available at* INA, *supra* note 13, § 212(a)(3), a category that includes participation in or association with groups deemed terrorists or terrorist sympathizers as well as political membership or involvement in genocide or human rights abuses and any person “whose entry or proposed activities in the United States the Secretary of State has reasonable ground to believe would have potentially serious adverse foreign policy consequences for the United States is inadmissible.”

134. Unless the applicant is the “immediate relative” of a USC, as defined in INA § 201(b)(2)(A)(i), § 1151(b)(2)(A)(i), she must wait until a visa number becomes available; depending on her home country and her preference category, this could take upwards of twenty years. See generally U.S. Dept. of State, Visa Bulletin for June 2010, Number 21, Volume IX (http://www.travel.state.gov/visa/bulletin/bulletin_5640.html). The June 2010 visa bulletin published monthly by the U.S. Dept. of State indicates that the backlog for

as barriers or disincentives for potential immigrants to enter the country lawfully.¹³⁵ As a result, many would-be applicants forego the process altogether and enter the country by unlawful means.¹³⁶

The federal government has plenary power over matters dealing with immigration.¹³⁷ This power stems from the fact that the federal government has the authority to maintain its absolute independence and sovereignty from other nations.¹³⁸ Rather than facilitating entry or increasing quotas, the government's response to this issue has been to increase the enforcement of immigration laws.

A. The Federal Enforcement Scheme

The enforcement of U.S. immigration law is carried out by two agencies that operate under the Department of Homeland Security (DHS): Immigration Customs Enforcement (ICE) and Customs and Border Protection (CBP).¹³⁹ Since their inception, Congress has increased their funding, and the number of deportations is at an all-time high.¹⁴⁰

The modern immigration enforcement complex relies primarily on three principal pieces of legislation. The Immigration Reform and Control Act of 1986 (IRCA)¹⁴¹ enhanced border security and sought to prevent employers

family members ranges from 2.5 years to 22 years depending on the country of origin, family relationship, and the petitioner's status as either a USC or LPR. *Id.*

135. Anna Williams Shavers, *Welcome To The Jungle: New Immigrants In The Meatpacking And Poultry Processing Industry*, 5 J.L. ECON. & POL'Y 31, 45-46 (2009).

136. *Id.*

137. Congress' plenary power has been at the heart of U.S. immigration policy since it was first articulated by the court in *Chae Chan Ping v. United States (The Chinese Exclusion Case)*, 130 U.S. 581, 602, 604 (1889) ("While under our Constitution and form of government the great mass of local matters is controlled by local authorities, the United States, in their relation to foreign countries and their subjects or citizens, are one nation, invested with powers which belong to independent nations, the exercise of which can be invoked for the maintenance of its absolute independence and security throughout its entire territory.").

138. *Id.* at 603-04.

139. *Department Components*, U.S. DEP'T HOMELAND SEC., <http://www.dhs.gov/department-components> (last visited Feb. 17, 2013) (stating that the "United States Immigration and Customs Enforcement (ICE), promotes homeland security and public safety through the criminal and civil enforcement of federal laws governing border control, customs, trade, and immigration[]", and that the "United States Customs and Border Protection (CBP) is one of the Department of Homeland Security's largest and most complex components, with a priority mission of keeping terrorists and their weapons out of the U.S. It also has a responsibility for securing and facilitating trade and travel while enforcing hundreds of U.S. regulations, including immigration and drug laws.").

140. Julia Preston, *Record Number of Foreigners Were Deported in 2011, Officials Say*, N.Y. TIMES, Sept. 7, 2012, <http://www.nytimes.com/2012/09/08/us/us-deports-record-number-of-foreigners-in-2011.html> [hereinafter *Record Number of Foreigners Deported*].

141. Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (1986) (codified in scattered sections of 8 U.S.C.).

from hiring undocumented workers.¹⁴² It created an employment verification system and imposed sanctions on employers who hired undocumented workers.¹⁴³ The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) provided for tougher security measures along the border and made more LPRs subject to removal for prior offenses.¹⁴⁴ IIRIRA also instituted the 287(g) program, whereby federal ICE agents coordinate with local law enforcement agencies (LEAs) to detain and prosecute suspected removable aliens.¹⁴⁵ It tightened worker verification processes and barred re-entry for immigrants who had previously entered the U.S. unlawfully.¹⁴⁶ The third, the Homeland Security Act of 2002 (HSA),¹⁴⁷ was signed into law in the wake of the September 11, 2001 attacks and further escalated enforcement efforts.¹⁴⁸ HSA reorganized the Immigration and Naturalization Service (INS) under the newly established DHS and made border enforcement its top priority.¹⁴⁹

Since then, DHS has benefited from new technologies that focus on biometric markers and improved information-sharing systems, which have allowed it to track undocumented immigrants within the U.S. more efficiently

142. Bryn Siegel, *The Political Discourse of Amnesty in Immigration Policy*, 41 AKRON L. REV. 291, 297 (2008).

143. *Id.*

144. Illegal Immigrant Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546 (1996) (codified in scattered sections of 8 U.S.C. and 18 U.S.C.).

145. See 8 U.S.C. § 1357(g) (2006), available at INA, *supra* note 13, §287(g) (“[T]he Attorney General may enter into a written agreement [with states and local political subdivisions whereby its law enforcement agents can] perform a function of an immigration officer in relation to the investigation, apprehension or detention of aliens in the United States . . .”); see also *Fact Sheet: Delegation of Immigration Authority Section 287(g) Immigration and Nationality Act*, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, <http://www.ice.gov/news/library/factsheets/287g.htm> (last visited January 17, 2012).

146. See Siegel, *supra* note 142, at 298-99. Ironically, rather than discouraging immigration, the bars on re-entry seem to have encouraged undocumented immigrants to avoid detection at all costs and to stay in the country once they had entered so as to avoid triggering the bars. *Id.*

147. Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (2002) (codified in scattered sections of 6 U.S.C.).

148. Shoba Sivaprasad Wadhia, *Under Arrest: Immigrants’ Rights and the Rule of Law*, 38 U. MEM. L. REV. 853, 860-61 (2008). The Homeland Security Act of 2002 (HSA) abolished the Immigration and Naturalization Service and transferred control over immigration enforcement to a newly created cabinet-level department, the Department of Homeland Security (DHS). *Id.* The HSA also granted President Bush statutory authority to reorganize intelligence and immigration enforcement operations, which he used to consolidate immigration enforcement operations into two bureaus, Immigration Customs Enforcement (ICE) and Customs and Border Protection (CBP). *Id.*

149. David Firestone, *Senate Votes, 90-9, To Set Up A Homeland Security Dept. Geared to Fight Terrorism*, N.Y. TIMES (November 19, 2002), available at <http://www.nytimes.com/2002/11/20/us/threats-responses-legislation-senate-votes-90-9-set-up-homeland-security-dept.html?pagewanted=all&src=pm>; see also WEISSBRODT & DANIELSON, *supra* note 50, at 83-86.

than ever before.¹⁵⁰ The funding for ICE's 287(g) program, which provides models of cooperation between local law enforcement agencies and ICE, increased ten-fold between 2006 and 2009.¹⁵¹ In addition, ICE expanded the Secure Communities program (S-Comm), an information sharing program wherein local law enforcement agencies send the fingerprints of anyone arrested or booked into custody to DHS.¹⁵² Under this system of enforcement, the number of undocumented immigrants has stopped growing for the first time in decades.

B. The Move Toward Sub-Federal Forms of Immigration Quasi-Enforcement

Although the federal government's plenary power over immigration allows it to make distinctions on the basis of alienage without violating the Equal Protection Clause,¹⁵³ state and local governments do not have a comparable constitutional justification. Therefore, a state's power "to apply its laws exclusively to its non-citizen inhabitants as a class is confined within narrow limits."¹⁵⁴ Nevertheless, state and local governments have increasingly attempted to pass sub-federal—i.e., state and municipal—laws and ordinances that target undocumented immigrants. These measures are intended to address the perceived "symptoms" of undocumented immigration without violating the Equal Protection Clause.¹⁵⁵ For instance, some cities have passed maximum occupancy ordinances that do not expressly target immigrants but are passed

150. DORIS MEISSNER, DONALD M. KERWIN, MUZAFFAR CHISHTI & CLAIRE BERGERON, MIGRATION POLICY INSTITUTE, IMMIGRATION ENFORCEMENT IN THE UNITED STATES: THE RISE OF A FORMIDABLE MACHINERY, 3-6 (2013), available at <http://www.migrationpolicy.org/pubs/enforcementpillars.pdf>.

151. See RICHARD M. STANA, BILL CROKER & LORI KMETZ, U.S. GOV'T ACCOUNTABILITY OFFICE, IMMIGRATION ENFORCEMENT: BETTER CONTROLS NEEDED OVER PROGRAM AUTHORIZING STATE AND LOCAL ENFORCEMENT OF FEDERAL IMMIGRATION LAWS 7 (2009), available at <http://www.gao.gov/new.items/d09109.pdf>. Through its conference committee for DHS's appropriations, the program's budget increased from \$5 million in 2006 to \$54.1 million in 2009. *Fact Sheet: Updated Facts on ICE's 287(g) Program, IMMIGRATION AND CUSTOMS ENFORCEMENT*, <http://www.ice.gov/news/library/factsheets/287g-reform.htm> (last visited Jan. 17, 2012).

152. *Secure Communities*, IMMIGRATION AND CUSTOMS ENFORCEMENT, http://www.ice.gov/secure_communities (last visited Dec. 26, 2012). If a check reveals that the person is unlawfully present or "otherwise removable due to a criminal conviction, ICE takes enforcement action . . ." *Id.*

153. See generally *Chae Chan Ping v. United States (The Chinese Exclusion Case)*, 130 U.S. 581 (1889).

154. See *Takashi v. Fish & Game Comm'n*, 334 U.S. 410, 420 (1948) (holding that, although California sought to keep fishing licenses from anyone deemed ineligible for citizenship, this was inadequate grounds for discrimination on the basis of alienage); See *Graham v. Richardson*, 403 U.S. 365, 385 (1971) (holding that state law denying welfare benefits to those who are not United States citizens violated the Equal Protection clause); see also *Mathews v. Diaz*, 426 U.S. 67, 85 (1976) (holding federal law denying benefits to non-citizens but maintained that states do not have a legitimate basis for differentiating between citizens and non-citizens).

155. Sofia D. Martos, *Coded Codes: Discriminatory Intent, Modern Political Mobilization, and Local Immigration Ordinances*, 85 N.Y.U. L. REV. 2099, 2108 (2010).

with the knowledge that immigrant working families are six times more likely to be living in crowded conditions than are similarly situated non-immigrant families.¹⁵⁶ Such quality of life ordinances are less likely to conflict with Congress' plenary power over immigration and therefore much more likely to survive a pre-emption challenge in court.¹⁵⁷

IV. ATTRITION THROUGH ENFORCEMENT

The principle underlying most sub-federal immigration laws and ordinances is the strategy of attrition through enforcement. The attrition strategy was first articulated by a restrictionist think-tank,¹⁵⁸ though the concept did not fully enter the public discourse until it was backed by presidential candidate Mitt Romney under the banner of "self-deportation."¹⁵⁹ Attrition through enforcement promotes the passage of state legislation intended to mirror federal laws, thereby engaging governmental powers that have traditionally been left to the states—e.g., the police power—in the effort to enforce federal immigration laws.¹⁶⁰

The central tenet of attrition through enforcement is that the undocumented should be identifiable by their lack of documentation.¹⁶¹ The attrition strategy advocates the creation of strict verification procedures at "events that are necessary for life in a modern society," thereby imposing virtual choke points for those immigrants who lack the proper government-issued identification to go about their daily business.¹⁶² By using state government tools to enforce federal immigration laws, proponents of attrition through enforcement hope to deter new undocumented immigrants from entering the country and to encourage those unlawfully present to leave of their own volition.¹⁶³ After a period of transition, undocumented immigrants will—

156. *See id.* at 2111-12.

157. *See id.* at 2107. Federal preemption has been one of the main obstacles to local ordinances addressing immigration. *Id.*

158. *See* KRİKORIAN, *supra* note 8, at 2. Although many of the policies underlying the strategy of attrition through enforcement are not unique to Mr. Krikorian's article, the Center for Immigration Studies claims that his article is the first to articulate the strategy cohesively. Jessica Vaughan, *CIS Assists Arizona in Defending SB1070*, CENTER FOR IMMIGRATION STUDIES (July 22, 2010), <http://www.cis.org/vaughan/sb1070-declaration>.

159. *See* Julia Preston, *Romney's Plan for 'Self-Deportation' Has Conservative Support*, N.Y. TIMES CAUCUS POL. AND GOV'T BLOG (Jan. 24, 2012, 5:37 PM), <http://thecaucus.blogs.nytimes.com/2012/01/24/romneys-plan-for-self-deportation-has-conservative-support/>.

160. *See* KRİKORIAN, *supra* note 8, at 5 ("Among the other measures that would facilitate enforcement. . . [is] passage of the CLEAR Act, which would enhance cooperation between federal immigration authorities and state and local police.").

161. *Id.* ("An important element in the firewall tactic is . . . to formally prohibit acceptance of consular registration cards, chiefly Mexico's 'matricula consular' card, which functions as an illegal-alien ID; when accepted by U.S. jurisdictions and companies as a valid ID, it enables illegal aliens to pass through many firewalls.").

162. *Id.*

163. *Id.* at 1 ("Shrink the illegal population through consistent, across-the-board enforcement of the immigration law.").

in theory—realize that living in the U.S. without the proper identification is worse than the life they escaped and will gradually self-deport.¹⁶⁴

A. Controlling Immigration as a Local Matter

Local ordinances targeting undocumented immigrants first arose in mid-size suburban areas that had seen a substantial increase in their immigrant population.¹⁶⁵ Residents complained that undocumented immigrants were a strain on schools and city services, and they felt the federal government was unwilling to address the issue.¹⁶⁶ Some municipalities that did not see an increase in immigrants passed these as preemptive measures to discourage undocumented immigrants.¹⁶⁷

The town of Hazleton, Pennsylvania passed a tough immigration ordinance on July 13, 2006.¹⁶⁸ It included provisions that denied licenses to businesses that employ undocumented immigrants, fined landlords \$1,000 per undocumented immigrant renting their properties, and required that city documents be printed in English only.¹⁶⁹

164. *Id.* at 2 (explaining that an attrition strategy aims to encourage gradual rather than abrupt self-deportation in order to cushion the otherwise unavoidable economic shock of losing millions of consumers and laborers at once).

165. Kyle Walker, *Immigration, Suburbia, and the Politics of Population in US Metropolitan Areas 2* (Minn. Population Ctr. Univ. of Minn., Working Paper No. 2008-05, 2008). Throughout the 1990s, immigrants began to move away from large urban areas, and by the year 2000, more immigrants lived in suburban areas than in large metropolitan cities. *See id.*

166. *See* Abby Goodnough, *A Florida Mayor Turns to an Immigration Curb to Fix a Fading City*, N.Y. TIMES, July 10, 2006, at A11, available at http://www.nytimes.com/2006/07/10/us/10florida.html?sq=immigration%20hazleton&st=nyt&scp=1&pagewanted=all&_r=1&v [hereinafter *Florida Mayor*]. For further information on these measures *see id.* (denying business permits to those who hire illegal immigrants.; *see generally* Jill P. Capuzzo, *Immigrants Hated Law, And Now It's Repealed*, N.Y. TIMES, Sept. 19, 2007, at B2, available at <http://www.nytimes.com/2007/09/19/nyregion/19immig.html?scp=24&sq=immigration+ordinance&st=nyt> (illustrating the effects of errant immigration laws)).

167. Sean D. Hamill, *Altoona, With No Immigrant Problem, Decides to Solve It*, N.Y. TIMES, Dec. 7, 2006, at A34, available at <http://www.nytimes.com/2006/12/07/us/07altoona.html?scp=8&sq=immigration+ordinance&st=nyt> (quoting Joe Ricker, Member, Altoona City Council (“We don’t have a problem here with immigrants False But we want to say ahead of the curve.”)).

168. Julia Preston, *Pennsylvania Town Delays Enforcing Tough Immigration Law*, N.Y. TIMES, Sept. 2, 2006, at A11, available at <http://www.nytimes.com/2006/09/02/us/02hazleton.html?scp=6&sq=immigration+ordinance&st=nyt>. While promoting the law, Hazleton’s mayor, Lou Barletta, noted that it would make the city one of the toughest places in the United States for undocumented immigrants to live. *Id.*

169. The Assoc. Press, *Strict Immigration Ordinance Approved in Pennsylvania City*, N.Y. TIMES (July 14, 2006), <http://www.nytimes.com/2006/07/14/us/14brfs-006.html?scp=2&sq=immigration+hazleton&st=nyt>.

The Hazleton ordinance became popular in anti-immigration circles, and similar ordinances were soon proposed in several cities across the country.¹⁷⁰ These early ordinances focused on making it nearly impossible for undocumented immigrants to find housing and employment as a way of getting them to leave town of their own accord.¹⁷¹ They often attacked employers who hired undocumented workers and penalized landlords who did not ensure that their tenants had a proper immigration status.¹⁷² Rather than directly discriminating based on alienage, similar ordinances have included anti-loitering decrees and provisions that banned the solicitation of employment including “shouting at cars, waving arms or signs, making hand signals, approaching motor vehicles, or standing in public roads facing in the direction of oncoming traffic.”¹⁷³ Some communities sought to pass English-only ordinances that they believed would discourage immigrants and keep their property values from dropping.¹⁷⁴ By the summer of 2007, one hundred municipalities across the country had considered passing similar bans or English-only provisions.¹⁷⁵

170. Mary Swanton, *Local Lockdown States and cities pressure employers to bar undocumented workers*, INSIDE COUNSEL, Oct. 2006, at 26. In Avon Park, Florida, Mayor Tom Macklin proposed an ordinance similar to Hazleton’s after hearing Mayor Barletta address the issue on a radio talk-show. See *Florida Mayor*, *supra* note 166. He compared Mayor Barletta to a preacher conducting a religious revival, citing in particular the desire to directly impact the living conditions of undocumented immigrants. *Id.* The Avon Park ordinance failed to pass the City Council when Councilwoman Brenda Gray changed her vote after a heated public hearing. Abby Goodnough, *Florida City Rejects Stringent Law on Migrants*, N.Y. TIMES, July 25, 2006, at A17, available at <http://www.nytimes.com/2006/07/25/us/25immig.html?scp=2&sq=tom+macklin&st=nyt>. Ms. Gray voted against the law because she found no support for the ordinance’s claim that illegal immigration “leads to higher crime rates, contributes to overcrowded classrooms and failing schools, subjects our hospitals to fiscal hardship and legal residents to substandard quality of care, and destroys our neighborhoods and diminishes our overall quality of life.” *Id.*

171. *Florida Mayor*, *supra* note 166. Mayor Tom Macklin of Avon Park said, “If we address the housing issue — make it as difficult as possible for illegals to find safe haven in Avon Park — then they are going to have to find someplace else to go.” *Id.*

172. See Gretel C. Kovach, *Voters in Dallas Suburb Back Limit on Renting to Illegal Immigrants*, N.Y. TIMES, May 13, 2007, at 20, available at <http://www.nytimes.com/2007/05/13/us/13dallas.html?scp=13&sq=immigration+ordinance&st=nyt> (for an example).

173. Robin Finn, *Town Divides Over Law Aimed at Day Laborers*, N.Y. TIMES, Dec. 27, 2009, at CT1 (quoting Oyster Bay Ordinance 205-32), available at <http://www.nytimes.com/2009/12/27/nyregion/27immig.html?sq=riverside%20ordinance&st=nyt&scp=5&pagewanted=all>. Opponents of the measure have labeled it a law against “waving while Latino.” *Id.*

174. Walker, *supra* note 165, at 12. In support for the English-only measure proposed in Farmers Branch, Texas, two city council members argued that “[f]rom 2002 to 2006, our overall property values have gone down from approximately \$3.9 billion to \$3.5 billion. We must draw the line now and reverse the trend.” (citing Tim O’Hare & Ben Robinson, City Council Members (2007)). *Id.*

175. Julia Preston, *Judge Voids Ordinances on Illegal Immigrants*, N.Y. TIMES, July 27, 2007, at A14, available at

B. The Spread of Sub-Federal Laws in State Houses

Proponents of the attrition strategy encourage state legislatures to pass omnibus state laws that focus on specific policy points that subtly target undocumented immigrants.¹⁷⁶ The laws typically prevent undocumented immigrants from receiving public benefits, gaining employment, and obtaining identification documents such as drivers' licenses.¹⁷⁷ By mirroring certain provisions of the INA at the state level, states can effectively empower their own law enforcement agencies to enforce and investigate immigration law violators, thereby increasing the probability that immigrants will be detained.¹⁷⁸

Over the past five years, the American Legislative Exchange Council (ALEC), an organization of business leaders and state legislators that solicits model bills to promote among the many states,¹⁷⁹ has promoted state laws that advance the attrition strategy.¹⁸⁰ These laws have dealt with a variety of subjects but often include employment sanctions, verification requirements, collaboration with federal law enforcement agencies, immigration detention, and restrictions or verification requirements for public benefits.¹⁸¹

http://www.nytimes.com/2007/07/27/us/27hazelton.html?scp=15&sq=immigration+ordinance&st=nyt&_r=0. Many of these ordinances faced legal challenges, and the courts struck some down. See Julia Preston, *A Professor Fights Illegal Immigration One Court at a Time*, N.Y. TIMES, July 21, 2009, at A10 [(hereinafter *Lawyer Leads an Immigration Fight*)]. A number of them were defended by now Secretary of State of Kansas, Attorney Kris Kobach. *Id.*

176. Kris W. Kobach, *Reinforcing the Rule of Law: What States Can and Should Do to Reduce Illegal Immigration*, 22 GEO. IMMIGR. L.J. 459, 482 (2008).

177. *Id.* at 466, 470. The attrition strategy focuses on eight policy points that are likely to avoid or survive a preemption challenge: (1) Denying public benefits to illegal aliens; (2) Denying resident tuition rates to illegal aliens; (3) Prohibiting the employment of unauthorized aliens; (4) Enacting state-level crimes that mirror federal immigration crimes; (5) Enacting state-level crimes against identity theft; (6) Providing state and local law enforcement assistance to ICE; (7) Presuming illegal aliens to be flight risks for bail purposes; and (8) Denying driver licenses to illegal aliens. *Id.* at 465.

178. *Id.* at 475.

179. See generally AM. LEGIS. EXCHANGE COUNCIL, <http://www.alec.org> (last visited Mar. 18, 2013) (describing ALEC).

180. See Brooke Meyer, Fall Fellow, Joy Segreto, April Carter & Ann Morse, *2011 Immigration-Related Laws and Resolutions in the States (January 1–December 7, 2011)*, NAT'L CONF. ST. LEGISLATURES (Dec. 2011), <http://www.ncsl.org/issues-research/immig/state-immigration-legislation-report-dec-2011.aspx> [hereinafter *2011 Immigration-Related Laws*] (explaining that the number of immigration-related proposals in state legislatures increased dramatically between 2005 and 2011). The proposed state legislation related to immigrants in 2005 was 300, 570 in 2006, 1,562 in 2007, 1,305 in 2008, 1,500 in 2009, 1,400 in 2010, and 1,607 in 2011. *Id.*; see also NAT'L CONF. ST. LEGISLATURES, <http://www.ncsl.org> (last visited Mar. 19, 2013) (detailing more information on immigration).

181. *2011 Immigration-Related Laws*, *supra* note 180. In Alabama, all immigrants are ineligible for assistance under Temporary Assistance for Needy Families (TANF), and attempts to ban immigrants from receiving Medicaid were carried out in Louisiana and Wyoming. Raquel Aldana, *On Rights, Federal Citizenship, and the "Alien,"* 46 WASHBURN L.J. 263, 273-74 (2007).

In 2010, the state of Arizona passed, the most far-reaching and consequential immigration law ever passed by a state legislature.¹⁸² Section 1 of that law, known as SB1070, declares that “the intent of this act is to make attrition through enforcement the public policy of all state and local government agencies in Arizona.”¹⁸³ SB1070 is an omnibus bill that requires all state and local law enforcement officers to request specific identification from a person involved in a lawful stop, detention, or arrest whenever the officer has a reasonable suspicion that the person is unlawfully present;¹⁸⁴ the officer must also examine the immigration status of anyone who is arrested.¹⁸⁵ Under SB1070, failure to meet the INA’s registration requirements is a state violation, as is disrupting the flow of traffic while hiring or transporting a worker.¹⁸⁶ It is also a state law violation to harbor an undocumented immigrant in reckless disregard of the person’s unlawful immigration status.¹⁸⁷ Further, officers are authorized to stop a person for a civil traffic violation and to arrest that person without a warrant if the officer has probable cause to believe that the person has committed any public offense that makes the person removable under the INA.¹⁸⁸

SB1070 immediately entered the national debate over immigration policy and spawned a series of copy-cat bills across the country.¹⁸⁹ Perhaps the most notorious of these is Alabama’s HB56, which tracks the law enforcement provisions of SB1070, along with the registration requirement, and the ban on public benefits.¹⁹⁰ HB56 creates choke points by requiring employers to use the E-Verify system and state agencies to use the SAVE program to determine a petitioner’s immigration status before being granted public benefits.¹⁹¹ HB56 makes it unlawful for landlords to enter into rental agreements in reckless

182. Randal C. Archibold, *Arizona Enacts Stringent Law on Immigration*, N.Y. TIMES, Apr. 23, 2010, at A1, available at http://www.nytimes.com/2010/04/24/us/politics/24immig.html?_r=0.

183. S.B. 1070, 49th Leg., 2d Reg. Sess., 2010 Ariz. Sess. Laws 450. The term SB1070 will refer to the law as amended by HB 2162.

184. Ann Morse, *Arizona’s Immigration Enforcement Laws*, NAT’L CONF. ST. LEGISLATURES (revised July 28, 2011), <http://www.ncsl.org/issues-research/immig/analysis-of-arizonas-immigration-law.aspx> [hereinafter *Arizona’s Immigration Law*]. Certain portions of the law were enjoined on July 28, 2010. *Id.*

185. *See id.*

186. *See id.*

187. *See id.*

188. *See id.*

189. Julie Myers-Wood, *Arizona’s Controversial Immigration Law*, 2010 EMERGING ISSUES 5019 (May 2010). Alabama, Georgia, Indiana, South Carolina, and Utah passed omnibus immigration bills that year. Ann Morse et al., *State Omnibus Immigration Legislation and Legal Challenges* (hereinafter *State Omnibus Immigration Legislation*), NATIONAL CONFERENCE OF STATE LEGISLATURES: IMMIGRANT POLICY PROJECT (August 27, 2012), available at <http://www.ncsl.org/issues-research/immig/omnibus-immigration-legislation.aspx>

190. *See State Omnibus Immigration Legislation*, *supra* note 189.

191. *Id.*

disregard of their tenants' immigration status.¹⁹² It also requires anyone caught driving without a license to appear before a magistrate and remain in custody until prosecuted or handed over to immigration authorities.¹⁹³

V. THE HUMAN COST OF ATTRITION THROUGH ENFORCEMENT

Restrictionists promote decreasing the size of the undocumented population as an end in itself;¹⁹⁴ they portray self-deportation as a choice and the attrition strategy as a humane and economically sound middle path.¹⁹⁵ In so doing, they ignore the human cost of their policies. The 11.1 million undocumented immigrants constitute a sizeable portion of the U.S. population who are active participants in the economy and in local communities.¹⁹⁶ The attrition strategy actively seeks to diminish the quality of life of the undocumented population, and in so doing, it enacts a form of social engineering more callous than mass deportation.

A. Identification and Driving Privileges

As discussed in Part IV, the attrition through enforcement strategy seeks to identify undocumented immigrants by their lack of identification documents. Consequently, the attrition strategy promotes federal standards for state issued IDs and encourages states to require proof of valid immigration status before such documents are issued.¹⁹⁷ It also discourages state governments from acknowledging proof of identification issued in foreign nations.¹⁹⁸ Participation in day-to-day activities such as driving, owning a home, or cashing a paycheck requires passing through a series of firewalls that, in turn, require proof of identity—e.g., obtaining a driver's license, applying for a mortgage, or opening a bank account.¹⁹⁹ Those advocating for the attrition strategy hope that without the ability to participate in these activities, undocumented immigrants would gradually choose to self-deport.²⁰⁰

192. *Id.*

193. *Id.*

194. Attrition through enforcement seeks to shrink the size of the undocumented population to "a manageable nuisance, rather than today's looming crisis." KRIKORIAN, *supra* note 8, at 1.

195. *See id.* at 2 (listing reasons why mass deportation is an unlikely option). First, "[T]he invention of new rights for illegal aliens . . . and the growth of a cadre of activist attorneys [make it more expensive for the government to deport undocumented immigrants]." *Id.* Secondly, abruptly removing the 6-7 million undocumented immigrants currently in our workforce would cause a shock to the economy. *Id.* Finally, mass deportations would cause a public relations nightmare for anti-immigration groups and "[P]olitical support for a new commitment to enforcement might well be undermined if an exodus of biblical proportions were to be televised in every American living room." *Id.*

196. *See supra* Part I.C.

197. KRIKORIAN, *supra* note 8, at 5.

198. *Id.* at 5 ("[W]hen accepted by U.S. jurisdictions and companies as a valid ID, [a consular registration card] enables illegal aliens to pass through many firewalls.").

199. *Id.* at 5-6.

200. *Id.* at 2, 5.

For undocumented women, who are often driven indoors to hide from any form of authority, identification cards and driver's licenses provide a way out of seclusion and isolation.²⁰¹ Driver's licenses, in particular, represent "independence, mobility, agency, and access to social support."²⁰² Without them, women are unable to break out of their social circles and are effectively shut out of the public sphere.²⁰³ This is particularly important to immigrant women whose social networks are primarily composed of their husbands' friends and relatives.²⁰⁴ Unable to break out, these women are made to feel powerless, vulnerable, and attacked.²⁰⁵ As the dominant scholarship in the battered women's movement has come to realize, "the key to empowerment is public participation."²⁰⁶ By depriving undocumented women of IDs and driver's licenses, the attrition strategy forces them out of the public sphere and into more dependent relationships.

In addition, the lack of public identity and free movement has a psychological effect on immigrant women, who are very conscious of being undocumented.²⁰⁷ This ever-present sense of inferiority translates into feelings of powerlessness and vulnerability.²⁰⁸ Every interaction with the public, including shelters or women's groups, seems more dangerous.²⁰⁹ It creates a distrust of the public that affects, among other things, their desire to report domestic abuse, which in turn reduces the protections that Congress intended to provide immigrants in VAWA.²¹⁰

B. Domestic Abuse and Reporting Crime

Undocumented women in abusive relationships often find it difficult to escape the relationships because of their distrust of law enforcement agents and their reluctance to report violent incidents.²¹¹ For this reason, ICE has a policy against initiating removal proceedings "against an individual known to be the

201. See Mendelson, *supra* note 41, at 191-95. Proponents of attrition through enforcement rely on this fact, sometimes callously so, when discussing immigration policy. For example, when asked whether he would be concerned that local enforcement of immigration laws would make it less likely that an undocumented rape victim would report the crime, Massachusetts Representative Ryan Fattman responded, "My thought is that if someone is here illegally, they should be afraid to come forward." Tim Murphy, *Mass. GOPer: Undocumented Women Should Live in Fear*, MOTHER JONES (June 9, 2011, 6:14 AM), <http://www.motherjones.com/mojo/2011/06/mass-state-rep-ryan-fattman-undocumented-women-should-live-fear>.

202. Mendelson, *supra* note 41, at 191.

203. *See id.* at 191-92.

204. *Id.* at 164.

205. *See id.*

206. *Id.* at 174.

207. *Id.* at 177.

208. *Id.* at 179.

209. *Id.* at 181.

210. *Id.* at 144, 208.

211. See *supra* Part II.B.ii (for a discussion of undocumented women's distrust of law enforcement fear of reporting violence or sexual harassment in the workplace).

immediate victim or witness to a crime.”²¹² The attrition strategy’s reporting requirements stand in stark contrast to this policy. For instance, Arizona’s SB 1070 prohibits law enforcement agents from restricting the enforcement of federal immigration laws and requires them to determine the immigration status of any person involved in an incident if the officer has reasonable suspicion that she is unlawfully present.²¹³ This requirement places a burden on an officer seeking to exercise the traditional law enforcement function—investigating an instance of domestic abuse. Even though ICE policy prevents removal proceedings from being initiated against the victim in question, the state law enforcement agent is compelled to refer the victim to the federal government if he has reasonable suspicion that the victim is unlawfully present.²¹⁴

Even women who have pending T Visa and U Visa applications are at risk. Unless someone at the Victims and Trafficking Unit of the Vermont Service Center is specifically contacted, neither the police officer nor the responding ICE agent will be made aware of the woman’s visa application.²¹⁵ Without police discretion, women who suffer domestic abuse face the potential of prosecution for violating state-level immigration laws as a consequence of seeking assistance during a domestic disturbance.

C. Undocumented Immigrant Women as Mothers

Policies that seek to detain undocumented mothers without discretion have a pernicious effect on family unification—the driving force behind American immigration policy.²¹⁶ Over the past ten years, more than 108,000 parents of U.S. citizen children have been deported.²¹⁷ This number would almost certainly increase if the attrition strategy were adopted in every state, especially in light of the fact that births have surpassed immigration as the main reason for growth in the Mexican-American population.²¹⁸

Hundreds of thousands of USC children are born to undocumented immigrants every year,²¹⁹ and women are most often the children’s primary caretakers.²²⁰ Even though these children qualify for government benefits by

212. Morton, *supra* note 128, at 1.

213. Morse, *supra* note 184.

214. *Id.*; Morton, *supra* note 128, at 1.

215. See 8 U.S.C. § 1367 (a)(2) & (b). VAWA’s confidentiality provisions generally prohibit disclosure to a third-party of any information relating to an alien who is an applicant for relief under VAWA, subject to certain, limited exceptions. *Id.*

216. See Kelly, *supra* note 18, at 953.

217. DEPARTMENT OF HOMELAND SECURITY, OFFICE OF INSPECTOR GENERAL, REMOVALS INVOLVING ILLEGAL ALIEN PARENTS OF UNITED STATES CITIZEN CHILDREN fig. 2 (2009), available at http://www.oig.dhs.gov/assets/Mgmt/OIG_09-15_Jan09.pdf; see *supra* Section IV for a discussion on “virtual choke points.”

218. MEXICAN-AMERICAN BOOM, *supra* note 57, at 2.

219. *Id.*, at 8 (finding that between March 2009 and March 2010, there were 350,000 children born to undocumented parents in the U.S.).

220. See RANDY CAPPS ET AL., THE HEALTH AND WELL-BEING OF YOUNG CHILDREN IMMIGRANTS 13 (2004).

virtue of their citizenship status,²²¹ many undocumented mothers fail to claim the benefits on their children's behalf because they fear interaction with government authorities and are afraid to be separated from their families.²²²

Even interactions with immigration authorities that do not end in deportation can have harmful effects on family unity as immigration-related arrest apprehension and detention can trigger a complex chain of events that potentially deprives mothers of their parental rights.²²³ Women held for immigration proceedings are often detained for long periods of time.²²⁴ During this time, they may not have access to family law courts or may be unable to comply with the courts' reunification plan to show that they are competent parents.²²⁵ Immigrant mothers may lose custody of their children when detention renders them incapable of complying with strict family reunification plans.²²⁶

The attrition strategy exploits this fear by increasing the likelihood that an interaction with the government would end in the mother's deportation. One of the most alarming means by which this is accomplished is embodied in Section 28 of Alabama's HB56.²²⁷ Although this provision was subsequently blocked by the U.S. Court of Appeals for the 11th Circuit,²²⁸ it is indicative of the type of measures that result from the attrition strategy. Section 28 required public schools to inquire as to the immigration status of their students' parents and to

221. *See id.* at 21-24.

222. Krista M. Pereira, et al, *Barriers to Immigrants' Access to Health and Human Services*, ASSISTANT SECRETARY FOR PLAN. & EVALUATION 11 (May 2012), available at <http://aspe.hhs.gov/hsp/11/ImmigrantAccess/Barriers/rb.pdf>; see also Josh Bernstein & Jonathan Blazer, *Legalizing Undocumented Immigrants: An Essential Tool in Fighting Poverty*, 42 CLEARINGHOUSE REV. 408, 409 (Nov. – Dec. 2008). Children in undocumented families are in particular need of benefits. *See id.* The average undocumented family earns approximately \$28,900 a year, less than 60% of what the average U.S. family earns. *Id.* Undocumented immigrants, as a whole, are twice as likely as native-born persons to live in poverty, and the poverty rate among children living with at least one undocumented parent is 35%. *Id.*

223. WOMEN'S REFUGEE COMMISSION, *TORN APART BY IMMIGRATION ENFORCEMENT: PARENTAL RIGHTS AND IMMIGRATION DETENTION* 6, December 2010 (hereinafter *TORN APART*), available at <http://womensrefugeecommission.org/programs/detention/parental-rights>.

224. *See id.*

225. *See id.*

226. *Id.* Despite some courts' strong opinions in favor of maintaining the integrity of the family in spite of deportations, e.g. *In re Angelica L.*, 767 N.W.2d 74, 92 (2009), parental rights are typically denied due to the mother's inability to participate in the family reunification plan due to the constraints of detention. While not terminating parental rights as a direct consequence of deportation, less significant interactions with the authorities still tend to impact the prospects of family unity.

227. *State Omnibus Immigration Legislation*, *supra* note 189. Section 28 of Alabama's HB56 requires every public school to determine whether a student was born outside of the United States or to parents unlawfully present at the time of enrollment; schools must then report their findings to the state board of education. *See id.*

228. This section was found in violation of the Equal Protection Clause in *United States v. Alabama*, 691 F. 3d 1269, 1280-81 (11th Cir. 2012).

report the results to the State Board of Education.²²⁹ In *Plyler v. Doe*, the Supreme Court made it illegal for public schools to withhold education from undocumented children.²³⁰ The case has become a target of restrictionist groups seeking to reduce the level of state funding provided to undocumented immigrants.²³¹ Restrictionists were hoping to use the information gathered under Section 28 to mount a legal challenge against *Plyler*.²³² Even though the provision in the law was blocked, news of its enactment had a negative impact on the attendance figures among Hispanics in Alabama.²³³

VI. LEGALIZATION AS AN ALTERNATIVE TO SELF-DEPORTATION

One of the most serious shortcomings of the attrition strategy is the fact that it dismisses legalization as an illegitimate topic for discussion.²³⁴ The most efficient way to benefit immigrants—and the country at large—is to create a path to citizenship, which would revitalize the immigrant community and lead to positive economic effects.

A. The Economic Impact of Legalization

For decades, any attempt at legalization was tainted by the shortcomings of IRCA, which granted legal status to millions of people but did not achieve

229. See *State Omnibus Immigration Legislation*, *supra* note 189.

230. In *Plyler v. Doe*, 457 U.S. 202 (1982), Justice Brennan rejected the notion that states should be allowed to withhold public education from undocumented children. He said:

“The State has no assurance that any child, citizen or not, will employ the education provided by the State within the confines of the State’s borders. . . It is difficult to understand precisely what the State hopes to achieve by promoting the creation and perpetuation of a subclass of illiterates within our boundaries, surely adding to the problems and costs of unemployment, welfare, and crime. It is thus clear that whatever savings might be achieved by denying these children an education, they are wholly insubstantial in light of the costs involved to these children, the State, and the Nation.”

Id. at 230.

231. According to CIS, the costs of educating undocumented children was nearly \$12 billion in 2004, but the figure rose to \$28 billion when the group included the USC children of undocumented immigrants. Steven A. Camarota, *Immigration’s Impact on Public Coffers*, CENTER FOR IMMIGRATION STUDIES, (August 2006), <http://www.cis.org/node/565>.

232. Restrictionist groups see this law as an ambitious attempt to gather data that can be used in court to overturn *Plyler v. Doe*. Campbell Robertson, *Critics See ‘Chilling Effect’ in Alabama Immigration Law*, NEW YORK TIMES, (Oct. 27, 2011), <http://www.nytimes.com/2011/10/28/us/alabama-immigration-laws-critics-question-target.html?scp=2&sq=alabama+immigration+school+children&st=nyt>. Speaking with regard to his attempt to overturn *Plyler*, Robertson said: “The toughest question has been obtaining reliable — and I mean reliable for peer-reviewed research purposes — censuses of the number of illegal alien students enrolled in school districts.” *Id.* He said. “That information could be compared with other sorts of performance or resource allocation issues.” *Id.*

233. *Id.*

234. See KRİKORIAN, *supra* note 8, at 6.

its intended effect of shrinking the size of the undocumented population.²³⁵ The prevailing belief among scholars and politicians was that the failure of IRCA gave “amnesty” a bad name and made it nearly impossible to craft any political deal that involved legalization.²³⁶ Recent events should make politicians reconsider this assessment. Migration into the U.S. from Mexico is down and deportations are up.²³⁷ Programs such as S-Comm use technological advances in relatively low cost, yet innovative, ways to effectively track undocumented immigrants within U.S. borders.²³⁸ ICE then prioritizes the removal of those who present the most significant threats to public safety as determined by “the severity of their crime, their criminal history, and other factors.”²³⁹ In conjunction, advances in technology and the prioritized removal of certain undocumented immigrants will potentially spare us the social cost of indiscriminately deporting every person that is deemed removable.

In order to successfully promote legalization, there must also be a focus on the economy. Following IRCA, the average wage of previously undocumented male immigrants rose by about 10% and that of previously undocumented female immigrants rose by over 20%.²⁴⁰ When granted legal status, immigrants are more likely to invest in their future by obtaining “education, job training, and English language instruction that would increase their wages” in the long-term.²⁴¹ Further, a broad legalization program would reduce the cost to employers of expensive verification processes and would provide more stability to the U.S. workforce by limiting the potential for turnover inherent in an undocumented workforce.²⁴²

Further, the immigration reforms of 1986 led to a modest increase in salaries among native-born Americans.²⁴³ The legalization of previously undocumented immigrants grants them more mobility by allowing them to cross state lines more freely and to settle in unfamiliar communities.²⁴⁴ Encouraging immigrants to move to labor markets with more demand for their skills would raise their wages and decrease their competition with low-wage earners—citizens and immigrants alike—in their current communities.²⁴⁵ More importantly, their newly granted legal status would provide them with

235. See Siegel, *supra* note 142, at 297-98.

236. See *id.* (“The failure of IRCA to control illegal immigration now stands as the central hurdle in any campaign for a legalization statute. Known commonly as the ‘first amnesty,’ IRCA has a pervasive legacy.”).

237. See NET MIGRATION FALLS TO ZERO, *supra* note 2; see also *Record Number of Foreigners Deported*, *supra* note 140.

238. See *supra* Part III.A.

239. *Secure Communities*, *supra* note 152.

240. Robert J. Shapiro & Jiwon Vellucci, *The Impact of Immigration and Immigration Reform on the Wages of American Workers*, NEW POLICY INSTITUTE 3 (May 2010), http://www.immigrationworksusa.org/uploaded/file/NPI_Report_Shapiro_5_26_10.pdf.

241. Bernstein & Blazer, *supra* note 222, at 410.

242. See *id.*

243. *Id.*

244. *Id.*

245. *Id.*

protections under the law, including overtime and minimum wage rules, which are currently unavailable to them.²⁴⁶ These protections would reduce the downward pressure caused by employers' current ability to hire undocumented workers for less than the minimum wage, which would in turn raise the average wage of native-born low-skilled workers.²⁴⁷

B. The DREAM Act and President Obama's Deferred Action Program

In June 2012, President Obama took a step toward legalization. Under the power of prosecutorial discretion, Secretary Janet Napolitano announced that DHS would accept requests for Deferred Action for Childhood Arrivals (DACA), an initiative designed to suspend the deportation of certain young undocumented immigrants.²⁴⁸ DACA allows individuals who meet its criteria to apply for deferred action on a case by case basis.²⁴⁹ Deferred action grants a qualifying immigrant a two-year suspension of deportation, subject to renewal, and makes her eligible for work authorization.²⁵⁰

Although DACA represents a move in the right direction, it is an executive action that is subject to change when a new President is elected.²⁵¹ In order to make the underlying policy behind DACA permanent, Congress should enact a version of the DREAM Act.²⁵² Various iterations of the DREAM Act have been introduced in Congress, but they tend to involve criteria similar to that of DACA.²⁵³ The DREAM Act would grant conditional

246. *Id.*

247. *Id.*

248. *Secretary Napolitano Announces Deferred Action Process for Young People Who Are Low Enforcement Priorities*, HOMELAND SECURITY (June 15, 2012), <http://www.dhs.gov/news/2012/06/15/secretary-napolitano-announces-deferred-action-process-young-people-who-are-low>.

249. *Id.* DACA is available to undocumented immigrants who: (1) Came to the United States under the age of sixteen; (2) Have continuously resided in the United States for a least five years preceding the date of this memorandum and are present in the United States on the date of this memorandum; (3) Are currently in school, have graduated from high school, have obtained a general education development certificate, or are honorably discharged veterans of the Coast Guard or Armed Forces of the United States; (4) Have not been convicted of a felony offense, a significant misdemeanor offense, multiple misdemeanor offenses, or otherwise pose a threat to national security or public safety; and (5) Are not above the age of thirty. *Id.*

250. *Id.*

251. *See Consideration of Deferred Action for Childhood Arrivals Process*, U.S. CITIZENSHIP AND IMMIGRATION SERVICES, <http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=f2ef2f19470f7310VgnVCM10000082ca60aRCRD&vgnnextchannel=f2ef2f19470f7310VgnVCM10000082ca60aRCRD> (last updated Jan. 18, 2013).

252. *Development, Relief, and Education for Alien Minors Act*, S. 2075, 109th Cong. (2005), available at <http://www.gpo.gov/fdsys/pkg/BILLS-109s2075is/pdf/BILLS-109s2075is.pdf>.

253. *Compare* Youngro Lee, *To Dream or Not to Dream: A Cost-Benefit Analysis of the Development, Relief, and Education for Alien Minors (DREAM) Act*, 16 CORNELL J.L. & PUB. POL'Y 231, 237-238 (2006) (discussing the DREAM Act) *with Secretary Napolitano*

permanent resident status to qualifying immigrants for a period of six years.²⁵⁴ During this time, they must maintain good moral character, comply with the INA, and remain residents of the United States.²⁵⁵ They must also complete either two years of college or of service in the Armed Forces.²⁵⁶ Those who satisfy all of the requirements would be granted permanent resident status and would eventually be eligible for citizenship under the existing naturalization procedure.²⁵⁷

Passage of the DREAM Act would benefit the U.S. economy by ensuring that the investment made in the public education of young immigrants will be fully realized when they go to college.²⁵⁸ An immigrant with a college education will provide \$9,000 more in tax revenue on average to her state than a non-college graduate.²⁵⁹ It is imperative that any version of the DREAM Act that becomes law include a provision—such as the one included in the above-cited DREAM Act of 2005—that would repeal Section 505 of IIRIRA, which section bans states from freely granting in-state tuition rates to undocumented immigrants.²⁶⁰ Only then could the essence of Justice Brennan's opinion in *Plyler v. Doe* be fully realized.²⁶¹

CONCLUSION

The United States is a high-immigration nation.²⁶² While it is true that the recent wave of immigration from Mexico was larger than any previous influx of undocumented immigrants from a specific country, the wave has subsided.²⁶³ Rather than depressing their quality of life to encourage self-deportation, it is in the best interest of the country to create the conditions under which these families and communities can thrive.

We have two options. The first option—attrition through enforcement—requires the mobilization of local police forces and makes every citizen an immigration enforcement agent. It clogs up the criminal justice system, crowds our county jails, and forces millions of people living in the U.S. to remain on the fringes of society. The emphasis on self-deportation sows the seeds of distrust in immigrant communities and lowers the rate of crime-reporting by battered immigrant women.²⁶⁴ The second option is legalization. It would allow the undocumented population to enter the legal workforce where they can be

Announce Deferred Action Process for Young People Who Are Low Enforcement Priorities, *supra* note 248 (discussing DACA).

254. Lee, *supra* note 253, at 238.

255. *Id.*

256. *Id.*

257. *Id.* at 238-39.

258. *Id.* at 248.

259. *Id.*

260. *Id.* at 239.

261. See generally *Plyler v. Doe*, 457 U.S. 202 (1982).

262. Bernstein & Blazer, *supra* note 222, at 409.

263. NET MIGRATION FALLS TO ZERO, *supra* note 2, at 6.

264. See *supra* Part V.B.

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protected under the law and qualify for affordable medical care, and it would encourage young undocumented immigrants to plan for their future and maximize their potential. Legalization would increase wages for citizens and non-citizens alike. It would allow immigrants to contribute a portion of their income in the form of taxes and would reduce the cost of immigration enforcement. The time is right for a forward-thinking strategy that involves a path to citizenship.