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# Race and Immigration, Then and Now: How the Shift to "Worthiness" Undermines the 1965 Immigration Law's Civil Rights Goals

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# ESSAY

## Race and Immigration, Then and Now: How the Shift to “Worthiness” Undermines the 1965 Immigration Law’s Civil Rights Goals

ELIZABETH KEYES\*

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*“Favoritism based on nationality will disappear. Favoritism based on individual worth and qualifications will take its place.”<sup>1</sup>*

## INTRODUCTION

Today at this Symposium focused on civil rights at a critical juncture, I am interested in examining the ways in which immigration reform itself mirrors critical challenges to civil rights happening beyond the field of immigration. Senator Kennedy’s quote, above, from 1965 demonstrates both the explicit civil rights character of the 1965 immigration law that reshaped America, and also the optimism that proved to be overstated in the intervening decades, as the factors determining “individual worth and qualifications” too often became proxies for race in ways that are deeply familiar to this audience. The criteria for worthiness that dominate today’s rhetoric of reform are, I argue, race-blind in name only, and I will show this by focusing on the bill that the Senate passed with bipartisan support in 2013,<sup>2</sup> which remains the most complete articulation of the state of political agreement on the role of immigrants, present and future. Finally, as I consider how worthiness and utility have supplanted—legally and rhetorically—the explicit goals of the 1965 law, I want to connect that shift to comparable issues facing communities of color more generally, for immigrants and citizens alike.

Questions of worthiness permeate immigration law, and they arise in different ways: how to define it, where to look for it, whether and when it is an appropriate guide for decision-making. While always present in immigration law’s history, worthiness has become an increasingly powerful concept and sorting device within immigration law, and provides a sharp, and I believe problematic, counterpoint to the egalitarianism envisioned by the civil rights era 1965 immigration law. Our immigration laws (both current and proposed) provide narrower and narrower openings for legal immigration, seeking only the “best and the brightest,” and will likely deploy a host of criteria from minor criminal issues to uneven employment histories to keep legalization out of reach for the millions presently here without status. And as that same undocumented population is largely comprised of people of color, the issues of economic marginalization, over-policing and

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1. 111 CONG. REC. 24226 (1965) (remarks of Sen. Kennedy).

2. S. 744, 113th Cong. (as passed by Senate, June 27, 2013) [hereinafter Senate Bill].

mass incarceration that affect people of color throughout society, narrow the possibilities for legalization even further.<sup>3</sup>

Race, worthiness, and immigration intersect in specific and powerful ways in contemporary immigration policy debates. The Senate Bill, as shown in far greater detail in Section II below, reveals this dramatically.<sup>4</sup> For future flows of immigrants, the bill elevates the highly skilled more explicitly than ever before, and for the present population of roughly eleven million undocumented immigrants, the bill legalizes only the hardest-working, most financially stable, and best educated among them. The multiple requirements to qualify for legalization create a composite of who is most worthy of more permanent membership in the U.S., and through these requirements, the bill excludes millions of the eleven million. It imposes criteria of worthiness at the expense of more completely addressing the problematic situation of the eleven million people, mostly people of color, living in our community without immigration status.

I am not speaking today about how the immigrant rights movement is a modern-day civil rights movement. Others have explored that idea—and its limitations—thoughtfully and thoroughly already.<sup>5</sup> Instead, I want to connect the shifts away from diversity and inclusion in the immigration context to similar shifts happening beyond the field of immigration. As critical race scholar Kevin Johnson, Dean of the University of California at Davis, has said, immigration law is a “help-

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3. In my earlier writings, I have explored how immigration law and practice is slowly narrowing the ways in which people, especially poor people and immigrants of color, can become “American.” In one article, I showed how our binary stories about worthy and unworthy immigrants limit legal remedies available to immigrants in court. Elizabeth Keyes, *Beyond Saints and Sinners: Discretion and the Need for New Narratives in the U.S. Immigration System*, 26 *GEO. IMMIGR. L.J.* 207, 207 (2012) [hereinafter Keyes, *Beyond Saints and Sinners*]. I noted how some of those stories intersect with stories about race and overly tie our hands as advocates for immigrants. *Id.* More recently, I looked at how claims to being American by immigrants brought to America as children (the “DREAMers”) rest upon their worthiness of citizenship and how such a claim may create significant problems for other immigrants and for citizens alike—particularly for economically and racially marginalized communities. Elizabeth Keyes, *Defining American: The DREAM Act, Immigration Reform and Citizenship*, *NEV. L.J.* (forthcoming 2014) [hereinafter Keyes, *Defining American*]. The DREAMers’ path to belonging, where they are seen as deserving the rights of membership in U.S. society, increasingly requires a high level of “worthiness”; in that earlier article, I argued that the worthiness framework echoed the treatment of African Americans in issues from welfare reform in the 1990s up through current-day issues like voter identification laws and felon disenfranchisement. *Id.*

4. S. 744, 113th Cong. For a full discussion of the Senate Bill, see Part II, *infra*.

5. See, e.g., Cristina M. Rodriguez, *Immigration and the Civil Rights Agenda*, 6 *STAN. J. C.R. & C.L.* 125, 126 (2010) (arguing that the conceptualization of immigration reform should be expanded beyond the civil rights framework).

ful gauge for measuring the nation's racial sensibilities.”<sup>6</sup> Johnson powerfully conceives that the ways America judges its prospective citizens form a “magic mirror” for understanding how America treats—or wishes to treat—citizens of color. I believe Johnson’s “magic mirror” is still a useful way of understanding immigration policy, and understanding America. I hope that by bringing that perspective to today’s Symposium, I can offer immigration reform as an example of yet another critical juncture in civil rights.

To draw these strands together, I first set out a very brief history of changing immigration laws in Part I, paying special note to how the 1965 Act reversed decades of often explicit, egregious racial discrimination found in U.S. immigration law. This section also looks at the *de facto* erosion of the 1965 Act’s egalitarian goals, as subsequent laws and immigration enforcement permitted discrimination to flourish amid, in particular although not exclusively, the undocumented population. In Part II, I assess the present attempt at reform, looking at the qualities of immigrants being welcomed under the Senate Bill, and the characteristics of those who will be excluded from reform, a group that can be called, in Michael Wishnie’s phrasing, the “super-undocumented.”<sup>7</sup> Finally, I conclude by turning to the costs I see in the current approach to reform, and I offer a view that as the reform focuses on documentation, as it potentially deepens troubling narratives about the undocumented population, and as it continues to move away from ideas of redemption and mercy, it mirrors civil rights challenges far beyond the issue of immigration itself.

## I. THE SHIFTING HISTORY OF IMMIGRATION AND IMMIGRATION RHETORIC

### A. Complicated Early Immigration History

To make the case that immigration reform today marks a significant break from past immigration policy, I want to briefly situate reform in the broader history of U.S. immigration policy. Widely perceived as being “a nation of immigrants,” and a country proud of the Statue of Liberty’s welcome to the world’s tired and poor, the history is considerably less welcoming than the mythology suggests. It is

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6. Kevin R. Johnson, *Race, the Immigration Laws, and Domestic Race Relations: A “Magic Mirror” into the Heart of Darkness*, 73 *IND. L.J.* 1111, 1148 (1998).

7. *ALBA Roundtable on Immigration Reform: What Can Be Done*, *THE VOLUNTEER* (June 15, 2013), <http://www.albavolunteer.org/2013/06/alba-roundtable-on-immigration-reform/>.

impossible to do justice to this subject in broad strokes, and others have thoughtfully and thoroughly explored it.<sup>8</sup> Here, I will look briefly at three periods: from the founding through the 1880s when the Supreme Court recognized a federal immigration power, the explicitly racialized period from the 1880s through 1965 when racial restrictions were lifted as part of the civil rights movement, and the erosion of that civil rights high-water point between 1965 and today.

### 1. Founding Through 1880s

For the first hundred years of the United States' existence, from the late eighteenth to late nineteenth century, the federal and state governments had largely unregulated stances toward immigration. The major exception, so morally and numerically significant as to hardly be an exception at all, was the forced migration of Africans as slaves, a practice that existed lawfully until 1808.<sup>9</sup> Africans and their descendants suffered the highest, most formal levels of exclusion from membership in the U.S. During this period, Africans and their descendants were denied anything approaching full membership, and even when free, were subject to the prospect of re-enslavement upon crossing state borders, a practice found constitutional in the infamous *Dred Scott* decision,<sup>10</sup> and lately brought to vivid life in the film *12 Years a Slave*.<sup>11</sup>

Other immigrants were welcome, provided they had the means to travel to the U.S. Individual states put up barriers that applied equally to individuals migrating from other countries as from other

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8. Scholars from law and history, alike, have examined this subject with great insight. See, e.g., HIROSHI MOTOMURA, *AMERICANS IN WAITING: THE LOST STORY OF IMMIGRATION AND CITIZENSHIP IN THE UNITED STATES* 3–14 (2006); MAE M. NGAI, *IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA* 1–14 (2004); Johnson, *supra* note 6, at 1119–48; Leti Volpp, *The Culture of Citizenship*, 8 *THEORETICAL INQUIRIES* L. 571, 572–75, 600 (2007).

9. The Act Prohibiting Importation of Slaves of 1807, 2 Stat. 426 (1807). The Act took effect in 1808, which, under the Constitution, was the first year that Congress could enact legislation regulating the slave trade. U.S. CONST., Art I, § 9 (“The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight.”).

10. *Scott v. Sandford*, 60 U.S. (19 How.) 393, 396 (1856).

11. *12 YEARS A SLAVE* (Regency Enterprises 2013). Professor Karla McKanders has thoughtfully explored the parallels between this period of history and contemporary immigration enforcement practices. See generally Karla Mari McKanders, *Immigration Enforcement and the Fugitive Slave Acts: Exploring Their Similarities*, 61 *CATH. U. L. REV.* 921 (2012) (comparing the Fugitive Slave Acts with current immigration policies).

states,<sup>12</sup> but generally, this was a time of expansion in the U.S. population and economy, and there was neither a general system of visas or entry permits nor any means of excluding people from coming. For white immigrants who homesteaded, presence quickly became full membership, as homesteaders—typically white Europeans—could claim full legal status as citizens after fulfilling homestead requirements for a five-year period.<sup>13</sup> During this period, too, immigrants from Asia were able to enter freely and did so in significant numbers to work on the railroads or in mining camps in the West.<sup>14</sup>

## 2. 1880s Through 1965

In this time period, the federal government moved to assert its ability and authority to regulate immigration and imposed restrictions that were largely racially-based, although other categories were used as the basis to bar entry as well. In 1875, the Page Act created categories of exclusion for “any subject of China, Japan or any Oriental Country” (including for involuntary labor or “lewd and immoral purposes”); the Act also broadly regulated the immigration of prostitutes and those who had been convicted of “felonious crimes.”<sup>15</sup> This law was followed in 1882 by the Chinese Exclusion Act, which put a ten-year moratorium on Chinese immigration, and excluded “skilled and unskilled laborers.”<sup>16</sup> Congress extended the moratorium another ten years in 1892<sup>17</sup> and extended it indefinitely in 1902.<sup>18</sup> The 1917 Asiatic Barred Zone extended these restrictions to all prospective Asian

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12. See Kerry Abrams, *The Hidden Dimension of Nineteenth-Century Immigration Law*, 62 VAND. L. REV. 1353, 1355 (2009) (citing GERALD L. NEUMAN, *STRANGERS TO THE CONSTITUTION: IMMIGRANTS, BORDERS, AND FUNDAMENTAL LAW* (1996)).

13. Homestead Act, ch. 75, 12 Stat. 392 (1862). Homesteading was directed to and marketed at prospective European settlers, not immigrants from other parts of the world. See Abrams, *supra* note 12, at 1403. Beyond implementation targeted at Europeans, citizenship was only granted without regard to race through the Fourteenth Amendment in 1868, so the claim to citizenship from homesteading *de facto* only existed for white homesteaders. See *id.* at 1413–14. The Naturalization Act of 1870, which limited naturalization to “white persons and persons of African descent” also put the Homesteading possibility out of reach of immigrants from other ethnicities who could not meet the requirement that they be eligible for citizenship at the end of the homesteading period. *You Can, But You Can't!*, HOMESTEAD CONG. (Aug. 12, 2011, 9:00 AM), <http://homesteadcongress.blogspot.com/2011/08/you-can-but-you-cant.html>.

14. See ALEXANDER SAXTON, *THE INDISPENSABLE ENEMY: LABOR AND THE ANTI-CHINESE MOVEMENT IN CALIFORNIA* xi (1971); see also Leila Higgins, *Immigration and the Vulnerable Worker: We Built This Country on Cheap Labor*, 3 AM. U. LAB. & EMP. L.F. 522, 528–32 (2013).

15. Page Act, ch. 141, 18 Stat. 477 (1875).

16. Chinese Exclusion Act, ch. 126, 22 Stat. 58 (1882) (repealed 1952).

17. Geary Act, ch. 60, 27 Stat. 25 (1892).

18. Act of Apr. 29, ch. 641, 32 Stat. 176 (1902).

immigrants, and also put immigration off limits for “mental defectives,” interpreted to include homosexuals.<sup>19</sup>

The 1924 Johnson-Reed Act instituted quotas for immigrants, setting the level of available visas to two percent of the number of people from any given country living in the U.S. as of 1890, a time when immigration was dominated by Northern and Western Europeans.<sup>20</sup> The law entirely excluded Asians and banned immigrants from Asia from ever acquiring citizenship, no matter how long they lived in the U.S.<sup>21</sup> The 1924 law has been widely regarded as a law intending to freeze a certain racial make-up for the country.<sup>22</sup> In the same period, *de facto* barriers were set up for Mexicans and others, through literacy test, entry taxes and humiliating entry procedures, as has been comprehensively documented by historian Mae Ngai.<sup>23</sup>

## B. Attempting to Make Immigration a Civil Rights Issue: The 1965 Immigration Act

With some adjustments in between, including expanding the right to naturalize to immigrants of Asian descent,<sup>24</sup> the next great shift in U.S. immigration policy occurred during the heyday of the civil rights movement, with the passage of the Immigration and Nationality Act of 1965.<sup>25</sup> The 1965 Act was very much part of the civil rights movement’s emphasis on removing color-barriers from our laws, and the bill’s drafters consciously saw their role as crafting another piece of civil rights legislation by removing those barriers.<sup>26</sup> Senator Hiram Fong of Hawaii said at the time that the old quotas were like Jim

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19. See Gabriel J. Chin, *The Civil Rights Revolution Comes to Immigration Law: A New Look at the Immigration and Nationality Act of 1965*, 75 N.C. L. REV. 273, 281 n.30 (1996); Tracy J. Davis, *Opening the Doors of Immigration: Sexual Orientation and Asylum in the United States*, 6 HUM. RTS. BRIEF 19, 19 (1999).

20. Leticia M. Saucedo, *Mexicans, Immigrants, Cultural Narratives, and National Origin*, 44 ARIZ. ST. L.J. 305, 329 n.154 (2012).

21. (Johnson-Reed) Act of 1924, Pub. L. No. 68-139, 43 Stat. 153.

22. See Saucedo, *supra* note 20, at 328–29 n.154 (exploring the power of narratives about Mexican immigrants).

23. NGAI, *supra* note 8, at 64–75; see also Saucedo, *supra* note 20 at 328–29 n.154.

24. Chin, *supra* note 19, at 281–82.

25. Immigration and Nationality Act (“INA”) of 1965 (Hart-Cellar Act), Pub. L. 89-236, 79 Stat. 911 (1965).

26. Chin, *supra* note 19, at 299–302; see also Jennifer Ludden, *1965 Immigration Law Changed Face of America*, NPR (May 9, 2006, 3:35 PM), <http://www.npr.org/templates/story/story.php?storyId=5391395> (quoting Karen Narasaki of the Asian American Justice Center) (“It was not what people were marching in the streets over in the 1960s . . . . It was really a group of political elites who were trying to look into the future. And again, it was the issue of, ‘Are we going to be true to what we say our values are?’”).



Crow segregation that contradicted “America’s ideal of the equality of all men without regard to race, color, creed, or national origin.”<sup>27</sup> Representative Laurence Burton remarked that “[j]ust as we sought to eliminate discrimination in our land through the Civil Rights Act, today we seek by phasing out the national origins quota system to eliminate discrimination in immigration to this Nation composed of the descendants of immigrants.”<sup>28</sup> Seeing that the national-origins quota resulted in heavily racialized patterns of immigration, the Act eliminated those quotas, and established formal equality among nations in terms of the number of visas available: no nation could claim more than seven percent of the available visas in any given year.<sup>29</sup> In signing the bill, President Johnson stated:

[Signing the bill] is still one of the most important acts of this Congress and of this administration.

For it does repair a very deep and painful flaw in the fabric of American justice. It corrects a cruel and enduring wrong in the conduct of the American Nation.

....

[T]he fact is that for over four decades the immigration policy of the United States has been twisted and has been distorted by the harsh injustice of the national origins quota system.<sup>30</sup>

The Act, and its demolition of the quota system, began a decades-long period of intense demographic change in the U.S.—change that has been both lauded and lamented.<sup>31</sup> Although these demographic consequences were largely unforeseen to lawmakers,<sup>32</sup> several specific structures set up in the 1965 Act permitted them to happen. A look at two countries alone, among many others, shows the sweep of this. Dramatic increases in immigration from the Philippines show the

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27. *To Amend the Immigration and Nationality Act, and for Other Purposes: Hearings Before the Subcomm. on Immigration and Naturalization of the Comm. on the Judiciary*, 89th Cong. 43–45 (1965) (statement of Sen. Fong).

28. Chin, *supra* note 19, at 302 (quoting 111 CONG. REC. 21,783 (1965)).

29. See U.S.C. § 1152(a)(2) (2012).

30. President Lyndon B. Johnson’s Remarks at the Signing of the Immigration Bill, Liberty Island, New York, 2 PUB. PAPERS 546 (Oct. 3, 1965), available at <http://www.lbjlib.utexas.edu/johnson/archives.hom/speeches.hom/651003.asp>.

31. See Chin, *supra* note 19, at 276–78; see also *Three Decades of Mass Immigration: The Legacy of the 1965 Immigration Act*, CTR. FOR IMMIGRATION STUDIES (Sept. 1995), <http://cis.org/1965ImmigrationAct-MassImmigration>.

32. Chin, *supra* note 19, at 278. Chin argues that some of the change was expected, especially the increase in immigration from Asia. *Id.* at 305 (“The prevailing scholarly view does not give Congress enough credit. Close examination of the legislative history and interviews with people involved in the bill suggest that Congress knew more Asians would immigrate.”).

power of the immigration options created by the 1965 Act on the family-based side, where there were multiple paths for not just parents, spouses and children, but also siblings.<sup>33</sup> Drawing primarily on such paths, migration from the Philippines tripled between 1980 and 2006.<sup>34</sup> Likewise, on the employment-based side of immigration, the removal of racial restrictions has permitted enormous numbers of Indian immigrants to migrate for work in the technology sector, with Indian immigrants accounting for sixty-four percent of those who receive H1B visas for specialized workers.<sup>35</sup> Beyond these examples, immigration has also increased from many other non-European countries that had not historically sent any significant numbers of migrants.<sup>36</sup> The impact of the 1965 Act has been clear, and it has been one diversifying legal migration from historically under-represented countries. But as

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33. INA § 203(a).

34. Aaron Terrazas, *US in Focus: Filipino Immigrants in the United States*, MIGRATION POL'Y INST. (Sept. 2008), <http://www.migrationinformation.org/usfocus/display.cfm?ID=694> ("The number of Filipino immigrants in the United States tripled between 1980 and 2006, from 501,440 to 1.6 million, making them the second largest immigrant group in the United States after Mexican immigrants and ahead of the Chinese, Indian, and Vietnamese foreign born."). A separate MPI report attributes the migration to family-based immigration. Sierra Stoney & Jeanne Batalova, *US in Focus: Filipino Immigrants in the United States*, MIGRATION POL'Y INST. (June 2013), <http://www.migrationinformation.org/usfocus/display.cfm?ID=954> ("The foreign born from the Philippines gained LPR status mostly through family reunification. About 87 percent obtained green cards through family relationships, 13 percent through employment, and less than 1 percent through other routes, including a small number of refugees or asylees.").

35. Neil G. Ruiz, *H-1B Visas and Immigration Reform: A Sticking Point in the U.S.-India Relationship*, BROOKINGS INST. (Sept. 18, 2013, 12:10 PM), <http://www.brookings.edu/blogs/up-front/posts/2013/09/18-immigration-reform-us-india-ruiz>. Also notable, however, is the fact that for both countries, eligibility for visas surpasses the numbers available for issuing visas because of per-country limits, another piece of formal equality found in the 1965 Act. Mae M. Ngai, *Reforming Immigration for Good*, N.Y. TIMES, Jan. 29, 2013, <http://www.nytimes.com/2013/01/30/opinion/reforming-immigration-for-good.html>. The Act has also been criticized for perpetuating undocumented migration from Mexico. Professor Gerald Lopez notes, "Desirous of being perceived as the 'egalitarian champion of the "free world," 'Congress ended the 1920s system that favored Western European immigrants and established an open system based on family reunification and equality between countries of origin. The changes led to significant (and largely unanticipated) shifts in legal migration. But the new regime severely reduced to 120,000 the number of immigrant visas available to Mexico and the Western Hemisphere, leading immediately to a huge and growing backlog. And the egalitarian system made no room for—did not acknowledge and did not legally accommodate—the massive undocumented migration of Mexican labor that had already become an essential feature of U.S. and Mexican life and, not coincidentally, again avoided enacting employer sanctions." Gerald P. Lopez, *Don't We Like Them Illegal?*, 45 U.C. DAVIS L. REV. 1711, 1772 (2012). No country may claim more than seven percent of all available visas, so would-be immigrants from countries like India and the Philippines, where many are eligible for visas, face long waits before visa numbers are made available to them. Ngai, *supra* note 35.

36. The Center for Immigration Studies, which advocates heavily restricted immigration, presents a graph showing the changes, derived from the INS Statistical yearbook. *Three Decades of Mass Immigration: The Legacy of the 1965 Immigration Act*, CIS (Sept. 1995), <http://cis.org/1965ImmigrationAct-MassImmigration>.

Jack Chin noted in his thorough assessment of the law's intentions and impact, "[i]f the magnitude of the change was unexpected, it was also probably not a major issue to a group of legislators who, by passing laws prohibiting discrimination in a variety of contexts, demonstrated the sincerity of their faith in the irrationality of racial distinctions."<sup>37</sup>

### C. Formal Equality, Functional Inequality Since 1965

The 1965 Act was the high-water mark for seeing immigration as a place of equality in the law, as the 1960s were for civil rights generally. Just as the civil rights laws of the 1960s set broad societal changes in motion, from voting to workplaces to schools and beyond, the 1965 Immigration and Nationality Act set in motion significant demographic changes across the nation. And just as other civil rights era achievements are being rolled back in today's political climate, the civil rights achievement in immigration reform is likewise rolling back, with a widening gap between the formal equality created by the 1965 Act, and the functional inequality in amendments and enforcement since that time. This disparate impact has many sources, but I will look briefly today at two sources: the conjoining of immigration status and employment authorization in 1986, and the hyper-conflation of the criminal justice system with immigration enforcement since 1996.

The gap between the 1965 law's commitment to formal equality and the situation for immigrants of color has widened slowly and steadily. However, before turning to that general trend, I want to note two significant exceptions, one of which endures, and the other of which is being rolled back now. The first exception is the story of civil rights for gay and lesbian immigrants. Restrictions on entry for homosexuals, which existed since 1917 and were entrenched in the 1952 McCarran-Walter Act, persisted with the 1965 Act.<sup>38</sup> And while family-based immigration increased, gay and lesbian marriages were not recognized for immigration purposes<sup>39</sup> even before the Defense of Marriage Act.<sup>40</sup> As the movement for gay rights has led to state after

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37. Chin, *supra* note 19, at 278.

38. See JOYCE MURDOCH & DEB PRICE, *COURTING JUSTICE: GAY MEN AND LESBIANS V. THE SUPREME COURT* 89–101 (2001) (discussing a fascinating account of George Fleuti's experiences demonstrating how barriers against homosexual immigration were enforced).

39. First established through case law, the Ninth Circuit held that even if a gay marriage were locally valid, it could not provide the basis for a spousal petition because federal definitions controlled under the plenary power doctrine. *Adams v. Howerton*, 673 F.2d 1036, 1038, 1040 (9th Cir. 1982).

40. Defense of Marriage Act, Pub. L. No. 104-199, 3(a), 110 Stat. 2419, 2419 (1996).

state recognizing gay marriage, and Congress repealing DOMA, pathways for gay and lesbian immigrants opened up rapidly—a counterpoint to the story of erosion in the area of race, and one that is in no danger of being reversed.

A second exception extending the spirit of the 1965 Act was the 1986 creation (and 1990 extension) of the diversity visa for under-represented countries.<sup>41</sup> This new visa uses a lottery system to allocate visas to individuals from “low admission” countries—countries sending, relatively, the least numbers of immigrants annually (although Ireland was also prominently included, prompting it to be called the “Irish sweepstakes”).<sup>42</sup> Because other pathways depend on the existence of previous immigrant connections (family members who could petition for relatives) or employment (the bulk of other immigrant and nonimmigrant visas), legislators wanted to provide visas for those without such routes available.<sup>43</sup> Unlike President Johnson’s emphasis on the importance of removing racial barriers to immigration in 1965, however, President Bush’s remarks on the passage of the 1990 Act entirely omitted reference to the diversity visa, focusing instead on family reunification provisions and provisions related to the war on drugs.<sup>44</sup> And unlike the progress made for LGBT immigration since 1965, the diversity visa is, as discussed below, the first on the chopping block for reform.

On one side of the story then, we see increasing diversification of immigration since 1965, and doors being opened explicitly for immigrants from underrepresented countries in 1990 and, most recently, for LGBT immigrants. On the other side of the story is the disparate impact of immigration laws and enforcement on communities of color,

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41. Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, § 314, 100 Stat. 3359, 3439. The visa was extended, but with forty percent reserved for the Irish, in 1990. See Immigration Act of 1990, Pub. L. No. 101-649, § 132(c), 104 Stat. 4978, 5000; see also Andowah A. Newton, Note, *Injecting Diversity into U.S. Immigration Policy: The Diversity Visa Program and the Missing Discourse on Its Impact on African Immigration to the United States*, 38 CORNELL INT’L L.J. 1049 (2005) (discussing the impact of the diversity visa program on African immigration).

42. Richard A. Boswell, *Racism and U.S. Immigration Law: Prospects for Reform After “9/11?”*, 7 J. GENDER RACE & JUST. 315, 330 (2003).

43. The intent—and moral and ethical justifications for the program—have been debated and questioned. See Stephen H. Legomsky, *Immigration, Equality and Diversity*, 31 COLUM. J. TRANSNAT’L L. 319, 329 (1993); Victor C. Romero, *Symposium on Confronting Realities: The Legal, Moral, and Constitutional Issues Involving Diversity Panel II: Critical Race Theory in Three Acts: Racial Profiling, Affirmative Action, and the Diversity Visa Lottery*, 66 ALB. L. REV. 375, 383 (2003).

44. Presidential Signing Statement on Immigration Act of 1990, 26 WEEKLY COMP. PRES. DOC. 1946 (Nov. 29, 1990).

despite the promises of formal equality in the law, largely because the undocumented population is so predominantly non-European in origin.<sup>45</sup>

The first site of this disparate impact is in the workplace. The Immigration Reform and Control Act (IRCA) of 1986<sup>46</sup> legalized large numbers of the undocumented in exchange for workplace controls; IRCA required proof of work authorization (almost always available only through lawful immigration status) in order for workers to be lawfully hired.<sup>47</sup> This requirement pushed the new undocumented—those who either did not qualify for IRCA, or those who arrived subsequently<sup>48</sup>—into an underground economy where employers hired workers without the correct paperwork, leaving them extremely vulnerable to various forms of workplace exploitation.<sup>49</sup> As the undocumented population grew over the subsequent decades,<sup>50</sup> IRCA created a sizeable underclass of undocumented workers whose workplace rights were violated with great frequency and relative impunity.

Compounding these difficulties, the workplace also quickly became the principal site for enforcement after 9/11. During the Bush Administration, workplace enforcement was characterized first by militaristic workplace raids, such as the dramatic Postville Raid in Iowa, when immigration agents in helicopters and SUVs raided an agricultural factory and arrested 389 immigrants.<sup>51</sup> Under President

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45. The Department of Homeland Security notes that in 2011, fifty-nine percent of the undocumented population was from Mexico (6.8 million people), followed by El Salvador (600,000), Guatemala (520,000), Honduras (380,000) and China (280,000). MICHAEL HOEFER ET AL., DEP'T OF HOMELAND SEC., ESTIMATES OF THE UNAUTHORIZED IMMIGRANT POPULATION RESIDING IN THE UNITED STATES: JANUARY 2011, at 4 (2012).

46. Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, § 314, 100 Stat. 3359.

47. *Id.* § 314.

48. These two categories overlap substantially, as IRCA, itself, contained a provision limiting eligibility to those who had arrived by January 1, 1982. *Id.* § 201(a).

49. See KIM BOBO, WAGE THEFT IN AMERICA: WHY MILLIONS OF WORKING AMERICANS ARE NOT GETTING PAID—AND WHAT WE CAN DO ABOUT IT 62 (2011).

50. The Illegal Immigration Reform and Immigrant Responsibility Act, Pub. L. No. 104-208, div. C, 110 Stat. 3009-546 (1996) (IIRIRA). The Act also had the unintended consequence of trapping the undocumented in America. Where previous generations of the undocumented, from Mexico and Central America particularly had gone back and forth with some fluidity, working when there was work, leaving when there was none, IIRIRA's creation of a ten-year bar for the accrual of unlawful presence essentially stopped that. *Id.* § 301 (amending 8 U.S.C.A. § 1182). Anyone with a year or more of unlawful presence would be forbidden to re-enter for ten years. *Id.* As new migrants arrived, and previous migrants could not easily leave, the undocumented population grew.

51. For a dramatic account of the raid and its complicated aftermath, see Maggie Jones, *Postville, Iowa Is Up for Grabs*, N.Y. TIMES, Jul. 11, 2012, at <http://www.nytimes.com/2012/07/15/magazine/postville-iowa-is-up-for-grabs.html?pagewanted=all>.

Obama, less dramatic but equally consequential audits of workplaces brought undocumented workers to the attention of immigration authorities.<sup>52</sup>

A second powerful site to demonstrate how immigration enforcement disparately impacts communities of color is the criminal justice system. In 1996, the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA)<sup>53</sup> vastly expanded the number of crimes that would trigger deportation.<sup>54</sup> Such crimes included low level drug crimes and other minor offenses, and the law simultaneously removed most judicial discretion that could have given lower-level offenders a second chance.<sup>55</sup> Since 1996, second chances have been remarkably hard to come by, with only 10,000 slots available for the form of relief, or redemption, known as “Cancellation of Removal,”<sup>56</sup> which itself requires not repentance but a showing of exceptional and extremely unusual hardship to U.S. citizen spouses or children—a level of hardship far surpassing the known hardships of families being divided, incomes being lost, and lives built over years or decades in America being ended.<sup>57</sup> Although not an explicit racial barrier to immigration, the over-policing of communities of color and disparate rates of arrests and convictions of people—particularly men—of color means that this intersection of the criminal and immigration systems reintroduces race powerfully into immigration enforcement.<sup>58</sup>

This intersection is exacerbated by the issue of the extent to which racial profiling is permitted—and in the recent past, required—in the immigration context. First, in the national security setting, pro-

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52. Here again, the history of slave labor casts a shadow on today's immigration debates. As Karla McKanders has discussed, slave labor existed without the laborers being seen as members, as undocumented workers in oftentimes vulnerable, dangerous occupations are denied membership as well. McKanders, *supra* note 11, at 949 (“The key connection between the Fugitive Slave Acts and current migration policies is the ways in which immigration law and policy have facilitated dehumanization and created a quasi-citizen worker.”).

53. Pub. L. No. 104-208, div. C, 110 Stat. 3009-546 (1996).

54. IIRIRA also placed both deportation and exclusion proceedings under the rubric of “removal,” but the term deportation is still popularly used for the removal of any immigrant, whether formally admitted, seeking admission, or present without having been inspected. *Id.* tit. III.

55. See Nancy Morawetz, *Understanding the Impact of the 1996 Deportation Laws and the Limited Scope of Proposed Reforms*, 113 HARV. L. REV. 1936, 1940–41 (2000).

56. INA § 240A.

57. *In re Monreal-Aguinaga*, 23 I. & N. Dec. 56, 59 (BIA 2001) (holding that the exceptional and extremely unusual hardship standard requires hardship “substantially beyond that which ordinarily would be expected to result from the alien’s deportation.”).

58. See generally Keyes, *Defining American*, *supra* note 3 (illustrating the role played by race at every stage of the immigration pipeline, from acquiring status, to maintaining it, to becoming a citizen).

filing by national-origin was explicitly required for a decade. For a period of time following 9/11, country-specific immigration requirements retuned and slammed the doors closed for many Arabs and South Asians who had been here lawfully, or who aspired to come.<sup>59</sup> 1,200 noncitizens from predominantly Muslim countries were detained following the 9/11 attacks,<sup>60</sup> and interior enforcement efforts focused on men from countries where Al Qaeda had been active.<sup>61</sup> During this time, the government also implemented a program of special registration for men from those predominantly Muslim countries that remained in effect from 2002 until 2011.<sup>62</sup> Advocates also decried profiling and surveillance based on national origins in the broader immigration context (such as differential attention paid in border interviews and naturalization applications).<sup>63</sup>

Second, in immigration enforcement more generally, racial profiling is actually condoned—to a large extent—by the Supreme Court decision in *U.S. v. Brignoni-Ponce*,<sup>64</sup> which allows police to consider race alongside other factors (“Mexican appearance”) when making an

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59. Muzaffar Chishti & Claire Bergeron, *Post-9/11 Policies Dramatically Alter the US Immigration Landscape*, MIGRATION POL’Y INST. (Sep. 8, 2011), <http://www.migrationinformation.org/USFocus/display.cfm?ID=852>.

60. Muzaffar A. Chishti et. al., *America’s Challenge: Domestic Security, Civil Liberties, and National Unity After September 11*, MIGRATION POL’Y INST. 2003, at 12.

61. Memorandum from the Deputy Att’y Gen., U.S. Dep’t of Justice, Guidance for Absconder Apprehension Initiative (Jan. 25, 2002), <http://news.findlaw.com/hdocs/docs/doj/abscondr012502mem.pdf>. See generally Nora Demleitner, *Misguided Prevention: The War on Terrorism as a War on Immigrant Offenders and Immigration Violators*, 40 No. 6 CRIM. L. BULL. 2 (2004) (discussing “the connections among terrorism, crime and immigration within the last decade”).

62. *DHS Removes Designated Countries from NSEERS Registration*, DEP’T HOMELAND SEC. (May 2011), <https://www.dhs.gov/dhs-removes-designated-countries-nseers-registration-may-2011>; see also ARAB-AMERICAN INSTITUTE, NATIONAL SECURITY ENTRY EXIT REGISTRATION SYSTEM 1 (n.d.). Then-INS connected immigration and national security in the following way in setting up procedures for special registration:

Terrorist attacks have claimed the lives of thousands of Americans, as well as nationals from many other countries. As a result, new regulations have gone into effect to help ensure the safety of all persons in the United States. These regulations require the Immigration and Naturalization Service (INS) to register certain individuals in the interest of national security or law enforcement.

Special Registration Procedures, INS (Sep. 11, 2002), <http://www.ice.gov/doclib/nseers/SRProc.pdf>.

63. DEEPA IYER, SOUTH ASIAN AMERICANS LEADING TOGETHER, WRITTEN TESTIMONY FOR THE HOUSE COMMITTEE ON THE JUDICIARY SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS, AND CIVIL LIBERTIES, HEARING ON RACIAL PROFILING AND THE USE OF SUSPECT CLASSIFICATIONS IN LAW ENFORCEMENT POLICY 7–8 (2010).

64. *United States v. Brignoni-Ponce*, 422 U.S. 873, 887 (1975); see Kevin Johnson, *How Racial Profiling in America Became the Law of the Land: United States v. Brignoni-Ponce and Whren v. United States and the Need for Truly Rebellious Lawyering*, 98 GEO. L.J. 1005, 1007 (2010).

immigration stop.<sup>65</sup> Part of the Court's justification was the seeming uncontrollability of immigration from Mexico along the southern border<sup>66</sup> (a concern eerily reminiscent of the opinion upholding the Chinese Exclusion Act, speaking of the "hordes" of Chinese "invading" America<sup>67</sup>). This permissibility of profiling, except in egregious cases, exists alongside exceptionally heightened levels of federal immigration enforcement<sup>68</sup> that involve state law enforcement,<sup>69</sup> potentially creating a perfect storm for local law enforcement to engage in racial profiling in the name of implementing federal immigration law. Indeed, Sheriff Joe Arpaio of Maricopa County, Arizona, built his national reputation on his tough stance toward "illegal immigrants," and was a long-time participant in the federal government's 287(g) program to deputize local law enforcement entities to act as immigration enforcers.<sup>70</sup> He instructed his officers that "they could consider race or 'Mexican ancestry' as one factor among others in making law enforcement decisions during immigration enforcement operations without violating the legal requirements pertaining to racial bias in policing."<sup>71</sup> Arpaio, for example, launched "saturation patrols" to make pre-textual stops in the hopes of identifying undocumented im-

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65. Even if race were impermissibly used as the *only* factor in an immigration stop, excluding such evidence is difficult (although not impossible) under *Lopez-Mendoza*, because the Fourth Amendment's exclusionary rule does not *generally* apply in removal proceedings (although it can apply if the violation was egregious). *Immigration & Naturalization Serv. v. Lopez-Mendoza*, 468 U.S. 1032, 1050 (1984). Professor Kristina Campbell explores this subject in relation to the Arizona law. Kristina Campbell, *(Un)Reasonable Suspicion: Racial Profiling in Immigration Enforcement After Arizona v. United States*, 3 WAKE FOREST J.L. & POL'Y 367, 386 (2013).

66. "The Government makes a convincing demonstration that the public interest demands effective measures to prevent the illegal entry of aliens at the Mexican border. Estimates of the number of illegal immigrants in the United States vary widely. A conservative estimate in 1972 produced a figure of about one million, but the INS now suggests there may be as many as 10 or 12 million aliens illegally in the country. Whatever the number, these aliens create significant economic and social problems, competing with citizens and legal resident aliens for jobs, and generating extra demand for social services." *Brignoni-Ponce*, 422 U.S. at 878-79.

67. *Chae Chan Ping v. United States*, 130 U.S. 581, 606 (1889).

68. President Obama's administration removed 1.9 million immigrants by the end of fiscal year 2013, although the rate slowed somewhat in 2013. Julia Preston, *U.S. Deportations Decline; Felons Made Up Big Share*, N.Y. TIMES, Dec. 20, 2013 at A20.

69. Whether this involvement is encouraged, required, or commandeered is a matter of debate, as the recent debate over California's TRUST Act demonstrated. Under the TRUST Act, California would only honor Immigration and Custom Enforcement detainers for immigrants convicted of serious offenses, instead of for all those arrested. Patrick McGreevy, *Brown Resets Bar on Migrant Rights; Governor Signs Trust Act, Giving Expanded Protections for Those Here Illegally*, L.A. TIMES, Oct. 6, 2013, at A1.

70. INA § 287(g).

71. *Melendres v. Arpaio*, 2013 WL 2297173, at \*5-6 (D. Ariz. May 24, 2013).



migrants.<sup>72</sup> A federal court found that Arpaio had engaged in impermissible racial profiling in 2013.<sup>73</sup> But as states continue seeking ways to use state law enforcement agents to enforce federal immigration law, such as the S.B. 1070 law in Arizona,<sup>74</sup> the threat of racial profiling persists.

As a result of these various trends, enforcement itself became heavily racialized even while the 1965 Act's formal equality remained in place. This erosion of the egalitarian goals of 1965 mirrors the widely critiqued problems of disparate racial impacts from health to education to criminal justice despite the nation's explicit abandonment of racial discrimination in the law.

## II. REFORM TODAY: A NEW PARADIGM OF WORTHINESS AND THE CREATION OF THE "SUPER UNDOCUMENTED"<sup>75</sup>

Our current efforts at immigration reform spring from this muddled context, where goals of equality have been undermined by an increasingly draconian enforcement system, with its criminal justice and national security intersections. Immigration reform is intended to fix the "broken" immigration system, one whose broken-ness is underscored by the fact of eleven million people living in the U.S. without any legal immigration status.<sup>76</sup> Scholars have noted how this undocumented population leads the public to conflate the phenomenon of immigration with "illegality" and how the status quo under-

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72. *Id.* at \*114.

73. *Id.* at \*273.

74. Support Our Law Enforcement and Safe Neighborhoods Act, S.B. 1070, 49th Leg., 2d Reg. Sess. (Ariz. 2010). The law contained a provision permitting police to stop individuals suspected of lacking immigration status. While conceding that the law's opponents had voiced fears of racial profiling, the Supreme Court upheld that provision in *Arizona v. United States* to give the state a chance to find a way of enforcing the law that would not fall afoul of racial profiling prohibitions. *Arizona v. United States*, 132 S. Ct. 2492 (2012); see also ACLU & RIGHTS WORKING GROUP, *THE PERSISTENCE OF RACIAL AND ETHNIC PROFILING IN THE UNITED STATES: A FOLLOW-UP REPORT TO THE U.N. COMMITTEE ON THE ELIMINATION OF RACIAL DISCRIMINATION* 43 (2009).

75. This term was coined by Mike Wishnie, Director, Jerome N. Frank Legal Services Organization at Yale Law School, and I first heard the term used by his colleague Muneer Ahmad, Clinical Professor of Law at Yale University, at the AALS Clinical Conference in San Juan, Puerto Rico, Apr. 2013.

76. Although the size of the undocumented population is necessarily an estimate, eleven million is a widely accepted figure. See, e.g., PEW RESEARCH CTR. & PEW HISPANIC CTR., *A NATION OF IMMIGRANTS: A PORTRAIT OF THE 40 MILLION, INCLUDING 11 MILLION UNAUTHORIZED* (2013).

mines the rule of law.<sup>77</sup> The reform efforts seek to address these problems while improving the future flows of immigrants so that the law does not generate millions of *new* undocumented in subsequent decades, as happened after the 1986 reform. Unfortunately, the Senate Bill, passed in July 2013, and still the most detailed articulation of what comprehensive reform could look like, is estimated to leave out several *million* of the eleven million undocumented.<sup>78</sup> And piecemeal bills that could be taken up by the House of Representatives are, as described below, unlikely to do any better, which means that one impetus driving reform—fixing the situation of the eleven million in the shadows—will not be fully addressed. Thus, while immigration reform is theoretically fixing a problem affecting, in particular, communities of color in the U.S., and while there is much to appreciate and celebrate in the bill for fixing some of the difficulties described above, what is equally clear is that it will exclude many, especially from marginalized communities of color, as the framework deliberately, ever more explicitly, shifts from away from formal equality to worthiness. Indeed, a problem of the new “super undocumented”—those left out of reform entirely for a broad range of reasons—will be created the day any such reform is signed into law, creating inequalities that undermine and reverse the egalitarian goals of the 1965 Act.

#### A. The People Excluded from Immigration Reform

With such dramatic numbers of people left out of reform, it is clear that fixing the problem of the eleven million undocumented is not the only goal of the legalization component of immigration reform. Rather, reform offers an opportunity to pick and choose those most worthy of inclusion. While many of these factors are understandable and some are normatively appealing (the idea that length of time and connection to the community matter, for example), two problems bear mentioning immediately. First, it is a specific choice to cut into the size of the legalization program by making inclusion contingent on meeting so many factors—and such contingencies undermine the “rule of law” goal of legalization (addressing the concern that a vast population of people indefinitely living without documents

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77. See Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law*, 119 *YALE L.J.* 458, 536 (2009).

78. The Congressional Budget Office estimates that 3.5 million will not gain legal status as a result of the law. CONG. BUDGET OFFICE, *COST ESTIMATE: S.744, BORDER SECURITY, ECONOMIC OPPORTUNITY, AND IMMIGRATION MODERNIZATION ACT 21* (2013).

undermines the rule of law generally). Second, and explored in more detail below, reform that purposefully excludes millions also purposefully creates a new, profoundly marginalized class of “super undocumented.” If the undocumented is the subject of controversy and even hatred pre-reform,<sup>79</sup> those left out of reform are likely to be even more reviled, as their lack of status will signify their status as those least desired among the undocumented population. Before discussing the implications of this, I am interested in who these new “super undocumented” are and how they reflect America’s sense of who least deserves inclusion—the true “aliens” in our midst, those not worthy of being brought under the reform umbrella. I turn now to these groups.

The first group left out of reform comprises those who arrived most recently, upholding a tradition of valuing connection to community. The Senate Bill stops relief for those who entered after December 2011.<sup>80</sup> Indeed, the only affirmative eligibility requirement, before the bill defines exceptions to eligibility, is physical presence before December 31, 2011.<sup>81</sup> It has been a common wisdom in immigration law, as in other areas of the law, that longevity is significant, and that our willingness to remove immigrants may rightfully diminish the longer they are present here.<sup>82</sup> The “cancellation of removal” provision in the Immigration and Nationality Act explicitly recognizes that, as it opens the possibility for individuals without lawful permanent residence (LPR status) who have been in the U.S. ten years or more continuously to obtain LPR status, if they can show that their removal would cause exceptional and extremely unusual hardship to citizen spouses or children (another element of the relief that approximates membership and integration in America).<sup>83</sup> The December 30, 2011 requirement knocks out a significant percentage of the currently undocumented, perhaps 500–700,000 (or approximately 4–6%).<sup>84</sup> In-

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79. See Keyes, *Beyond Saints and Sinners*, *supra* note 3, at 250.

80. S. 744, 113th Cong. § 2101.

81. *Id.*

82. See generally HIROSHI MOTOMURA, *AMERICANS IN WAITING: THE LOST STORY OF IMMIGRATION AND CITIZENSHIP IN THE UNITED STATES* (2006) (tracing, among other ideas, the multiple ways that immigration law has recognized and rewarded longevity and connection). In the context of removing immigrants convicted of crimes, Juliet Stumpf has explored how longevity matters far less as “the law privileges the moment of the crime as the determining factor for often-permanent expulsion.” Juliet Stumpf, *Doing Time: Crimmigration Law and the Perils of Haste*, 58 UCLA L. REV. 1705, 1709 (2011).

83. INA § 240A.

84. David Nakamura, *Immigration Deal Would Exclude Millions*, WASH. POST, July 28, 2013, at A03.

deed, when I asked my immigration clinic students at the University of Baltimore to consider how many of our clients during the fall 2013 semester might benefit from reform, this provision alone knocked eleven of the twelve clients out of contention. All had arrived too recently. Despite the appeal of requiring a degree of connection to community, using the proxy of time in the U.S., this provision will be a major source of the new “super undocumented,” with all the attendant problems discussed below.

Another requirement to benefit from reform is that individuals demonstrate that they have met all their tax liabilities.<sup>85</sup> This requirement occurs both at the initial application stage, and the ultimate adjustment of status stage (at the end of the twelve year waiting period).<sup>86</sup> This understandable requirement comes from the perception, a grossly overstated one, that undocumented immigrants uniformly do not pay taxes. While the truth is far more ambiguous, the commitment to paying taxes is of a piece with the legalization plan in general, bringing people into the rule of law where they had been in the shadows previously. However, there is going to be considerable difficulty for many immigrants as they try to assemble documentation to retrace tax obligations from years when employers were paying them in cash and not providing W2s. Many immigrants work in occupations where they are the sole employee, like domestic work or being a home health care companion, where employers are less likely to generate the paperwork that would help the employees comply with their tax obligations.<sup>87</sup>

Another provision will challenge immigrants working at society’s economic margins, namely, the requirement that people be able to work for the twelve years it will take before receiving permanent residence, with no more than a sixty-day gap in employment.<sup>88</sup> In a recessionary period where the workforce is increasingly irregular and

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85. S. 744, 113th Cong. § 2101. The extent of the liabilities is not detailed in the bill and will presumably be governed by the tax code, which currently treats most immigrants working in the United States the same as citizens in terms of their tax obligations.

86. S. 744, 113th Cong. §§ 2101–2102.

87. See generally Sharon Parrott and Robert Greenstein, *Benefit Restrictions Beyond Those in Senate Immigration Bill Would Jeopardize Legalization for Many and Risk Severe Hardships for Others*, CTR. FOR BUDGET AND POL’Y PRIORITIES (June 14, 2013), <http://www.cbpp.org/cms/?fa=view&id=3974> (detailing the effect the Senate Immigration Bill would have on undocumented workers).

88. S. 744, 113th Cong § 245B(c)(9)(B)(i)(I). Registered provisional immigrant status cannot be extended unless the immigrant can show that her or she was regularly employed throughout the period of admission as a registered provisional immigrant, allowing for brief periods lasting not more than 60 days. *Id.* The bill provides exceptions for time when the immigrant was

unstable, such job stability is challenging. Workers in occupations that vary by seasons, from construction to landscaping, may be productively employed over the course of a year in terms of income-earned, but exceed sixty-day unemployment periods within any given year, and these occupations rely heavily on immigrant labor. Worse, it provides an incentive for workers to stay in bad employment because the immigration consequences of leaving are too great.

The reform's requirement of demonstrating English-language skills<sup>89</sup> will eliminate many more from legalization. Many immigrants do learn English, and wait lists for ESL classes have historically been lengthy.<sup>90</sup> Many obstacles, however, limit the effectiveness of those classes or the ability of people to take them or learn English in other ways. Whether because working multiple jobs limits the time available for studying, because classes are unavailable, or because learning language at later stages of life is difficult even for the most educated (and many of the undocumented were poorly educated in their own countries),<sup>91</sup> English language proficiency is a hurdle. Currently, approximately one half of the undocumented lack the English skills to be able to pass the proficiency test associated with citizenship,<sup>92</sup> which suggests that even slightly less stringent proficiency requirements will be responsible for 3.6 million people not qualifying.

Finally, any of a series of criminal convictions will remove people from the umbrella of reform. Someone with a single state felony conviction, a single immigration "aggravated felony" (a term of art encompassing crimes that states might classify as misdemeanors) or three or more misdemeanor convictions will be ineligible.<sup>93</sup> This is

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on medical, maternity, or employment leave, or enrolled full-time in school. §§ 245C(b)(3)(D), (E).

89. § 245C(b)(4) provides that only those who meet the standards for English proficiency required for naturalization under INA § 312 may adjust their status to lawful permanent residence.

90. JAMES THOMAS TUCKER, NALEO ED. FUND, *THE ESL LOGJAM: WAITING TIMES FOR ADULT ESL CLASSES AND THE IMPACT ON ENGLISH LEARNERS* 1 (2006).

91. According to the Pew Hispanic Center, "Adult unauthorized immigrants are disproportionately likely to be poorly educated. Among unauthorized immigrants ages 25–64, 47% have less than a high school education." JEFFREY S. PASSEL & D'VERA COHN, PEW HISPANIC CTR., *A PORTRAIT OF UNAUTHORIZED IMMIGRANTS IN THE UNITED STATES* iv (2009).

92. One-third clearly fall below the standard, with Level 3 proficiency. A majority lack Level 4 proficiency or below, but because the citizenship test currently requires a level between Level 3 and Level 4, it is not quite possible to say where the percentage falls. Marc R. Rosenblum et al., *Earned Legalization: Effects of Proposed Requirements on Unauthorized Men, Women, and Children*, MIGRATION POL'Y INST., Jan. 2011, at 7.

93. S. 744, 113th Cong. § 245B(b)(3)(A)(i). There is the possibility of a waiver for those with three or more misdemeanors, "for humanitarian purposes, to ensure family unity, or if such a waiver is otherwise in the public interest." § 245B(b)(B)(i).

uncontroversial for most—if anyone is to be left out, it should be those who committed crimes while “guests on our shores.” That impulse to expel criminals runs deep in immigration history, and as noted above, has been deepening over recent decades; immigration is overwhelmingly depicted in the media as a crime control issue.<sup>94</sup> It is therefore utterly unsurprising to see it as a factor in the Senate Bill, but it does mean that many more immigrants will not qualify for reform.

Even without ineligibility problems at the outset, problems of application fees and lack of information may limit the reach of reform, as happened with IRCA in 1986.<sup>95</sup> The Senate Bill imposes a \$1,000 penalty, in addition to application filing fees, for anyone seeking to benefit from the legalization provisions.<sup>96</sup> Recent experience with the Administration’s program to provide temporary employment authorization for certain immigrant youth (the Deferred Action for Childhood Arrivals, or “DACA,” program) suggests that such fees put relief out of reach for many families. Many perceived DACA to be a precursor to the rollout of immigration reform, and this economic barrier—intended not to exclude but simply to generate fees to cover the program’s costs—provides a cautionary tale for the roll-out of broader immigration reform.<sup>97</sup> With an estimated twenty percent of adult, undocumented immigrants living in poverty,<sup>98</sup> the monetary penalty and fees may make otherwise eligible individuals unable to participate. Indeed, the Social Security Administration estimates that as many as 400,000 might drop out of the legalization program because of these costs.<sup>99</sup>

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94. Anil Kalhan, *Immigration Policing and Federalism Through the Lens of Technology, Surveillance, and Privacy*, 74 OHIO ST. L. J. 1106, 1112 (2013) (citing BROOKINGS INST. & UNIV. OF S. CAL., ANNEBERG SCH. FOR COMM’N, *DEMOCRACY IN THE AGE OF NEW MEDIA: A REPORT ON THE MEDIA AND THE IMMIGRATION DEBATE* 13, 23–27 (2008)) (analyzing coverage of immigration since 1980 and concluding that it has “focused overwhelmingly” on crime and other illegality).

95. See Betsy Cooper & Kevin O’Neil, *Lessons from the Immigration Reform and Control Act of 1986*, MIGRATION POL’Y INST., Aug. 2005.

96. S. 744, 113th Cong. § 245C(c)(5)(B).

97. Gordon Whitman, *How Many Could Be Left Out of Immigration Reform?*, HUFFINGTON POST (May 7, 2013, 5:29 PM), [http://www.huffingtonpost.com/gordon-whitman/how-many-could-be-left-ou\\_b\\_3222685.html](http://www.huffingtonpost.com/gordon-whitman/how-many-could-be-left-ou_b_3222685.html).

98. PEW HISPANIC CTR., *A PORTRAIT OF UNAUTHORIZED IMMIGRANTS IN THE UNITED STATES*, 17 (2009).

99. Nakamura, *supra* note 84.

B. Who, by Contrast, is Welcome

Beyond the steadily-employed, English-proficient, financially able immigrants with limited or no criminal records, the Senate Bill also provides a simpler, shorter path for two other groups. One group comprises the youth who were brought to the U.S. before the age of sixteen, usually by their parents.<sup>100</sup> These youth, known collectively as the DREAMers, qualify for permanent residence much more quickly—after five years instead of twelve.<sup>101</sup> They also do not need to pay the \$1,000 penalty required of registered provisional immigrants.<sup>102</sup> A second group consists of agricultural workers who must meet comparable requirements as the general legalization program, but who can obtain special “blue cards” immediately and apply for permanent residence after five years (as opposed to twelve under the general program) if they continue working in agriculture, pay a fine, and show that they have paid their taxes.<sup>103</sup>

The Senate Bill does more than provide a pathway for certain currently undocumented immigrants to legalize their immigration status. It also restructures future flows, and in ways that diverge from the 1965 Act’s civil rights ethos and commitment to opening doors to new, previously underrepresented or excluded populations. Many of the changes are welcomed by advocates for immigrants, particularly the ability of lawful permanent residents to apply for their own immediate relatives (spouses and children) just as citizens can (instead of facing a multi-year backlog before visas are available, as is presently the case).<sup>104</sup> The commitment to family unification, although defining “family” more narrowly now than in 1965, will continue to be a major source for future immigration flows.

The interesting change comes from the emphasis, both rhetorical and legal, on the *utility* of future immigrants. Economic concerns have always been part of immigration history, but perhaps never more clearly, prominently and at the rhetorical forefront as with the current reforms, which share a vision of admitting people based upon their

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100. § 245D (“Adjustment of Status for Certain Aliens who Entered the United States as Children”).

101. § 245D(b)(1)(A)(i).

102. § 245C(c)(5)(B).

103. § 2211 (“Requirements for Blue Card Status”).

104. America’s Voice, a pro-immigrant advocacy organization cited thirty-two different provisions as being positive in a blog post after passage of the Senate Bill. *What We Won with Senate Bill S. 744*, AMERICA’S VOICE (June 27, 2013), <http://americasvoice.org/research/what-we-won-with-senate-immigration-bill-s-744/>.

likelihood of contributing to the economy while not undercutting opportunities for citizens. The Senate Bill does this by creating a two-track points-based architecture for “merit-based” immigration, each of which is divided into tiers.<sup>105</sup> For Track 1, which would comprise half of the merit-based immigrants, employment and education matter most.<sup>106</sup> In descending order of importance, applicants receive points for years of employment experience in occupations that require “considerable” or “extensive” preparation (i.e., high-skill) employment (up to twenty points),<sup>107</sup> and points for formal education (fifteen points for a doctorate, or ten points for a master’s degree). Applicants also receive points if currently employed in certain occupations or have a job offer in a high-demand occupation. Lower on the points scale are English language skills or having a U.S. sibling or parent, being young, coming from a nation that sends relatively few immigrants, and—least important—civic involvement (maximum of two points).<sup>108</sup> For the less-skilled Track 2 applicants, employment is far and away the most important criteria (maximum of forty points when exceptional employment records or employment in high-demand occupations are factored in). On this track, individuals can earn ten points for English language skills, for having a U.S. sibling or parent, and/or for being a caregiver tied behind that (maximum of ten points each).<sup>109</sup> The Migration Policy Institute estimates that this would mean instead of six percent of immigrant visas going to skills-based applicants (or fourteen percent, if you include the accompanying family members of those immigrants), sixteen to nineteen percent of immigrant visas would go to those applicants (or thirty-five to forty-one percent, if including family members).<sup>110</sup> Compared to other countries, this increase still keeps the U.S. fairly low in its reservation of

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105. See §§ 2301–02.

106. § 2301(c)(4).

107. § 2301(c)(9)(G), (H).

108. As one pro-immigrant policy organization noted, “The message of this distribution is very clear: it prioritizes educated, experienced, skilled, English-fluent, young immigrants. The inclusion of family ties and diversity in this system, on the other hand, seems more like an extra bonus than an attribute that the system aims to embrace.” AM. IMMIGRATION POLICY CTR., DEFINING “DESIRABLE” IMMIGRANTS: WHAT LIES BENEATH THE PROPOSED MERIT-BASED POINT SYSTEM (May 20, 2013), <http://www.immigrationpolicy.org/just-facts/defining-desirable-immigrants-what-lies-beneath-proposed-merit-based-point-system>.

109. See § 2301(c)(5).

110. Madeleine Sumption & Claire Bergeron, *Remaking the US Green Card System: Legal Immigration under the Border Security, Economic Opportunity, and Immigration Modernization Act of 2013*, MIGRATION POL’Y INST., June 2013, at 6.



visas for immigrants with particularly desired skills and employment contributions.<sup>111</sup>

One way to make space for these changes without dramatically increasing overall immigration levels is the elimination of some existing immigrant flows. Two particular programs have historically drawn fire and were eliminated in the Senate Bill: the diversity visa and the sibling category for family-based immigration. First, the Senate Bill eliminates the diversity visa, the program described above from 1990, which intentionally formed a path for immigrants from historically underrepresented nations, immigrants not likely to enter through employment or existing family ties.<sup>112</sup> Discussions in the House revealed the shift as a clear policy choice away from providing opportunity to random individuals dreaming of a new life in America—a common profile in American immigration mythology—toward industry-specific needs. One House bill attempted to take the 55,000 diversity visa slots and move them into visas for students graduating from U.S. schools with various science, technology, engineering and math degrees.<sup>113</sup> As House Republican leader Bob Goodlatte noted, “[t]he visa lottery, we think, is the best example that there is of how to issue green cards on a basis that has absolutely no correlation to what is in the interest of growing the American economy or family unification, because it does neither. It’s based on pure luck.”<sup>114</sup> The randomness of the program—literally, a lottery program—sustains this kind of argument, but notably, diversity visa immigrants have, on average, higher educational and employment attainment than typical immigrants through the family-based immigration channels, and the program has been particularly effective at bringing educated African immigrants with managerial-level experience into the country.<sup>115</sup>

The second eliminated immigration pathway is that for siblings, currently the “fourth preference” in family-based permanent resident visas, after unmarried sons and daughters of citizens, is spouses and

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111. *See id.*

112. *See* § 2303.

113. H.R. 2131, 113th Cong. (2013).

114. Jennifer Martinez, *Goodlatte and Issa Defend Cutting Diversity Visa Program*, THE HILL (May 23, 2013, 5:10 PM), <http://thehill.com/blogs/hillicon-valley/technology/301605-goodlatte-and-issa-defend-cutting-diversity-visa-program-in-tech-visa-bill>.

115. Arun Lobo, *Unintended Consequences: Liberalized U.S. Immigration Law and the African Brain Drain*, in THE NEW AFRICAN DIASPORA IN NORTH AMERICA 203 (Kwado Konadu-Agyemang et. al, eds., 2006) (quoted in Michael Kremer, *The Diversity Visa Lottery: A Study Linking Immigration Politics to Immigrant Characteristics and Experiences* (2011), available at [dl.tufts.edu/file\\_assets/tufts:UA005.004.061.00001](http://dl.tufts.edu/file_assets/tufts:UA005.004.061.00001) (unpublished thesis, Tufts University)).

children (below eighteen) of lawful permanent residents, and married sons and daughters of citizens.<sup>116</sup> (Spouses and minor children of citizens are considered immediate relatives and do not need separate petitions or visa numbers to be able to get permanent residence.)<sup>117</sup> This category has been criticized as expanding too far the pool of people who can enter the U.S. already in the pipeline for citizenship, who can then petition for their circle of eligible family members, and so forth: for critics, “‘chain migration’ [is] a concept whose connotation is almost as poisonous as ‘amnesty’ among the bill’s detractors.”<sup>118</sup> Notably, the category has also been credited with bringing in many immigrants of color, especially from the Philippines, where the popularity of the sibling-category visa has led to an infamous backlog of twenty years in visa availability.<sup>119</sup>

The 1965 Act shifted the demographics of this country and permitted less skilled and less educated people to come through family members and through slots for unskilled workers; reform today focuses on immigrants’ likely economic contributions. This has attracted a coalition of business interests who champion reform. Michael Bloomberg created the Partnership for a New American Economy in 2010, pushing for reform because of its likely economic impacts.<sup>120</sup> Chamber of Commerce President Thomas J. Donahue makes similar arguments, noting that “America cannot compete and win in a global economy without the world’s best talent, hardest workers, or biggest dreamers. We cannot sustain vital programs for the elderly and needy without more workers—both low skilled and high skilled—to grow our economy and tax base.”<sup>121</sup> Technology sector leaders like Bill Gates and Mark Zuckerberg more recently created FWD.US to call for reform that establishes, among other things, “a streamlined process for admitting future workers to ensure that we

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116. See 8 U.S.C. § 1153(a).

117. See *id.* § 1151(b)(2)(A)(i).

118. David Grant, *Immigration Reform: When Is Family Reunification Also ‘Chain Migration’?*, CHRISTIAN SCI. MONITOR (May 6, 2013), [http://www.csmonitor.com/USA/DC-De coder/2013/0506/Immigration-reform-When-is-family-reunification-also-chain-migration/\(page\)/2](http://www.csmonitor.com/USA/DC-De coder/2013/0506/Immigration-reform-When-is-family-reunification-also-chain-migration/(page)/2).

119. For the most recent length of wait for visas, see U.S. STATE DEP’T, VISA BULLETIN, available at [http://travel.state.gov/visa/bulletin/bulletin\\_1360.html](http://travel.state.gov/visa/bulletin/bulletin_1360.html).

120. See Marc LaVorgna, *Mayor Bloomberg Discusses Need for Comprehensive Immigration Reform*, CITY OF N.Y. OFFICIAL WEBSITE (July 26, 2013), <http://www1.nyc.gov/office-of-the-mayor/news/257-13/mayor-bloomberg-need-comprehensive-immigration-reform>.

121. *Reforming Immigration for a Better America*, U.S. CHAMBER OF COM. (Apr. 26, 2013) (remarks by Thomas J. Donohue President and CEO), available at <https://www.uschamber.com/speech/reforming-immigration-better-america-remarks-thomas-j-donohue-president-and-ceo-us-chamber>.

continue to promote innovation and meet our workforce needs.”<sup>122</sup> In September 2013, a coalition of 100 business leaders from companies, including but well beyond the technology sector (such as Coca-Cola, American Express, Johnson & Johnson, among others), sent a letter to House of Representatives leaders arguing that reform would be “a long overdue step toward aligning our nation’s immigration policies with its work force needs at all skill levels to ensure U.S. global competitiveness.”<sup>123</sup>

### CONCLUSION: WHAT THESE CHANGES MASK AND SIGNIFY

There are many reasons to applaud the innovations to the immigration system, and during an era of recession, the shift to an emphasis on economic productivity and job-creation makes intuitive policy sense. It also provides a timely counter-narrative to the common argument *against* immigration, that it takes jobs away from Americans—an argument with extra resonance during a recession. It sounds particularly good when accompanied by calls like those from Gates, Zuckerberg, and others, to improve the educational system in the U.S., to improve the competitiveness of U.S. citizens graduating with record levels of unemployment for jobs currently being filled by immigrants.

My concern with basing reform on worthiness (the plan for the legalization of the undocumented) and utility (reforming future flows) is what such a shift both masks and signifies. First, what it masks: As this Symposium focuses on new civil rights challenges, I have been considering how far the current debates over immigration reform have come since the 1965 Act—the only law that explicitly attempted to set immigration law in a civil rights paradigm. As with other laws of the time, the 1965 Act was righting obvious and overt historical wrongs: the litany of race-based exclusions that run in a straight, bold line through the history of immigration law in the U.S. The frank acknowledgment by leaders in 1965 of the racism in America’s prior immigration law history is entirely absent from today’s bill; in lieu of any

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122. FWD.US, [http://www.fwd.us/immigration\\_reform](http://www.fwd.us/immigration_reform) (last visited Feb. 5, 2013).

123. Letter from Coalition of 100 Business Leaders to John Boehner, Speaker of the House of Representatives, and Nancy Pelosi, Minority Leader of the House of Representatives, (Sept. 10, 2013), available at [http://www.hrpolicy.org/downloads/2013/CHRO\\_Immigration\\_Reform\\_Letter.pdf](http://www.hrpolicy.org/downloads/2013/CHRO_Immigration_Reform_Letter.pdf); see also Julia Preston, *Business Leaders Tell Lawmakers Not to Forget About Immigration*, N.Y. TIMES (Sept 10, 2013, 1:13 PM), [http://thecaucus.blogs.nytimes.com/2013/09/10/business-leaders-tell-lawmakers-not-to-forget-about-immigration/?\\_r=0](http://thecaucus.blogs.nytimes.com/2013/09/10/business-leaders-tell-lawmakers-not-to-forget-about-immigration/?_r=0).

discussion of equality and removing barriers as values and pillars of immigration policy, the rhetoric and structure of the reforms suggest that utility is the new lodestar guiding reform. This is a plausible policy choice, but what I hope to convey today by contrasting reform with what happened in the height of the civil rights era, is that it *is* a choice, not an inevitability.

Second, what the reforms signify: Reform that excludes millions creates significant new problems for those left out, the “super undocumented” whose vulnerability to discrimination and exploitation will far exceed the already tremendous vulnerability of today’s undocumented population because they will be seen as even more culpable for their own lack of status. I fear that being undocumented the day after immigration reform will make being undocumented today look good by comparison. And three of the emerging problems—the demonization and blaming of those excluded; the increasingly pervasive focus on documentation; and society’s abandonment of the notion of redemption—show us something about America more broadly, beyond the specific context of America’s immigrants.

I fear the narratives that will be told about immigrants who do not qualify for immigration reform. The narrative being created about immigration reform is that it is fixing the broken system, and solving the problem of the eleven million undocumented. As I have hopefully demonstrated today, with millions left out for varying reasons, reform does nothing of the kind—and those whose situation is not resolved are likely to be understood by the public as criminal because of the ongoing conflation of undocumented status with illegality and criminality. Undocumented immigrants already suffer this stigma, and those left out of reform will surely be perceived as even less worthy members of society. And although some will be excluded literally because of criminal convictions, the majority of those excluded are excluded because of poverty, lack of education, and lack of financial stability. In my earlier work, I have explored the problematic psychological power of narratives about immigrants, and how tales of unworthiness in society seep into our laws and our courtrooms.<sup>124</sup> In the new world post-reform, that power will be multiplied by the public’s perception that this problem was already fixed—so those for whom the problem was not fixed must be deeply unworthy characters.

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124. See Keyes, *Beyond Saints and Sinners*, *supra* note 3.

The implications of such an attitude toward the new “super undocumented” can only be known through time, but it is easy to imagine that if undocumented workers face challenges accessing the courts now to file wage complaints against their employers—as they do in my experience litigating wage and hour claims in Maryland—such challenges will be worse when juries define the workers first and foremost as lawbreakers. If undocumented students—a highly sympathetic portion of the undocumented population—now have access to higher education only through powerful grassroots organizing campaigns like the extraordinarily effective Maryland DREAM campaign,<sup>125</sup> the ability of the “super undocumented” to access loans or maintain the ability to attend public institutions of higher education will be more difficult when the story shifts post-reform.

As noted above, many of the reasons people will not qualify for reform flow not from personal failing but from poverty and lack of education. Yet the narrative of the “super undocumented” is unlikely to be anything other than accusatory: “you stayed undocumented because of your failings.” Such accusations are sadly in line with attacks on the poor generally, from cutting food stamps to limiting unemployment benefits, all with the idea that such supports encourage laziness. As Charles Blow wrote recently in the *New York Times*:

[S]omehow, when some poor people, or those who unexpectedly fall on hard times, take advantage of benefits for which they are eligible it’s an indictment of the morality and character of the poor as a whole. The poor are easy to pick on. They are the great boogymen and women, dragging us down, costing us money, gobbling up resources. . . . We have gone from a war on poverty in this country to a war on the poor, in which poor people are routinely demonized and scapegoated and attacked . . . .<sup>126</sup>

Race and poverty intersect as a matter of reality and rhetoric alike, and as Peter Edelman has shown throughout his scholarship, the demonization of poor people as undeserving of benefits intersects too frequently with racial politics.<sup>127</sup> Nothing in this conflation is new—

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125. See Elizabeth Keyes, *Examining Maryland’s Views on Immigrants and Immigration*, 43 U. BALT. L.F. 1 (2012).

126. Charles Blow, *The Appalling Stance of Rand Paul*, N.Y. TIMES (Dec. 11, 2013), [http://www.nytimes.com/2013/12/12/opinion/blow-the-appalling-stance-of-rand-paul.html?ref=charlesmblow&\\_r=0](http://www.nytimes.com/2013/12/12/opinion/blow-the-appalling-stance-of-rand-paul.html?ref=charlesmblow&_r=0).

127. Peter Edelman explores this persuasively by looking both at race as a proxy for “undeserving”-ness and exclusion of people of color from welfare rolls, and at race as a means of demonizing welfare programs generally. See Peter Edelman, *Welfare and the Politics of Race: Same Tune, New Lyrics?*, 11 GEO. J. ON POVERTY L. & POL’Y 389 (2004). Of course, immi-

political scientist Theda Skocpol has traced the line of deserving/undeserving in welfare back until the Civil War era—and I mention it here simply to remind us of its enduring power, and connect the blame likely to be assigned in the immigration context, disproportionately affecting immigrants of color—with the same phenomenon that has been a feature of the American political landscape in other contexts for so many decades.

As the narrative deepens in its demonization of those who have “failed” to fix their status, it will conflate with the increasing centrality of documentation itself, in both the workplace and beyond. The Senate Bill creates a social security card that is “fraud-resistant, tamper-resistant, wear-resistant, and identity theft-resistant,”<sup>128</sup> and mandates the use of E-Verify,<sup>129</sup> the federal database for employers to verify employment authorization. The only employment left for the millions of undocumented immigrants not included in immigration reform will be employment even deeper in the shadows than what is available now. Because such employment is rife with workplace abuse, any additional barriers to emerging from the shadows to avail of courts for enforcement will permit such abuses to flourish. The day after immigration reform, those who do not qualify for all the reasons I have described above will be without documents in a world that demands them even more than it does today. And as social security numbers become ever more central to daily life, used as a means of identification far beyond the employment context,<sup>130</sup> the absence of a card puts people at a significant disadvantage.

The focus on documents as a way to separate “them” and “us” also mirrors a similar division created by voter ID laws, where the

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grants, themselves, were part of the group deemed undeserving in 1996, and even lawful permanent residents were excluded from many public benefits following the passage of the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA) of 1996. Michael J. Wishnie, *Welfare Reform After a Decade: Integration, Exclusion, and Immigration Federalism*, in *IMMIGRANTS AND WELFARE: THE IMPACT OF WELFARE REFORM ON AMERICA'S NEWCOMERS* 69, 69 (Michael E. Fix ed., 2009).

128. S. 744, 113th Cong. § 3102(a)(1).

129. § 274A(d)(2)(G) (“Except as provided in subparagraph (H) [concerning tribal government employers], not later than 4 years after regulations are published implementing this subsection, all employers shall participate in the System with respect to all newly hired employees and employees with expiring temporary employment authorization documents.”).

130. As the Congressional Research Service has noted, “In the view of some, a person’s SSN has attained the status of a quasi-universal personal identification number. Today one can be required to furnish one’s SSN to obtain a driver’s license, apply for public assistance, donate blood, or take out a loan.” KATHLEEN S. SWENDIMAN, CONG. RESEARCH SERV., RL30318, *THE SOCIAL SECURITY NUMBER: LEGAL DEVELOPMENTS AFFECTING ITS COLLECTION, DISCLOSURE, AND CONFIDENTIALITY* (2008).

existence and availability of documentation is the dividing line between being able to vote or not. These laws are seen as disproportionately affecting communities of color, as current Justice Department lawsuit against the North Carolina voter ID law alleges.<sup>131</sup> As Kevin Johnson argued with his “magic mirror” metaphor, this treatment of immigrants tells something about America more generally, where the centrality of documents is a way to further marginalize those at society’s edges, with disproportionate impacts on communities of color.

Even for those in this population of super undocumented who are excluded because of crimes committed, the clear message of immigration reform is that, for them, there are no second chances. Among my own clients, some of the hopefulness about America that I have heard and felt most powerfully from my clients comes from those who came with the least but are working to help their children succeed, and among these, I count many who have amassed relatively minor criminal convictions, and one or two with more serious or lengthy criminal records whose turnaround has been extraordinary—but unforgivable in immigration terms. By excluding them from reform, we are saying that nothing they could do in the future would make up for the wrongs done in their past. I think of my client who fled Sudan who is thrilled to now be working at a difficult, dangerous job in a poultry factory in the South, or my client who finally laid the demons of drug abuse to rest and is raising her two young boys in rural Maryland with her partner, and I find this societal abandonment of the idea of redemption short-sighted and deeply sad.

And this says something about America more generally, where second chances are harder and harder to come by for immigrants and nonimmigrants alike. Expectations like these are higher for American citizens at society’s margins as well, where mistakes (real or perceived), can be the difference between liberty and deprivation of liberty. Symptoms of this are all around: the mass incarceration of black men,<sup>132</sup> and the often-permanent disenfranchisement of felons even after they have completed their sentences.<sup>133</sup>

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131. Carrie Johnson, *Justice Department Sues North Carolina over Voter ID Law*, NPR (Sept. 30, 2013), <http://www.npr.org/blogs/thetwo-way/2013/09/30/227591062/justice-department-to-sue-north-carolina-over-voter-id-law>.

132. See MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 2 (2012).

133. Jamin Raskin, *Lawful Disenfranchisement: America’s Structural Democracy Deficit*, 32 HUM. RTS. 12, 15 (2005) (examining the “democracy deficit” created by felon disenfranchise-

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In closing, I do celebrate the efforts to fix the broken system and to solve the intolerable situation of having eleven million members of our community living without legal status. But as we move slowly but surely forward toward reform, we must beware of creating a new set of even deeper problems for the future. As Erika James, the *Howard Law Journal's* Editor-in-Chief, said in her inspiring opening comments this morning, we must “ensure that what is being done is just and what is just is done.” Let immigration reform be done, and let us ensure that it is done justly.

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ment, ballot validation problems, and other measures that disproportionately impact African American and Hispanic voters).