PORTRAITS OF THE UNDOCUMENTED IMMIGRANT: A DIALOGUE

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I. Introduction

It has been fifty-six years since Henry Hart’s classic article, The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic, introduced dialectic into the world of legal scholarship. His imaginary exchange between two legal scholars rooted out the arguments for and against a congressional power to insulate legislation from Supreme Court review. Since then, legal scholars have occasionally returned to dialectic to tease out both theory and outcomes on other controversial issues of great public importance. This elegant instrument remains underutilized. For lawyers trained in the tradition of Socrates to practice a profession often involving reasoned argumentation, the benefits of adversarial dialectic are ample. It incentivizes each side to put forward its strongest arguments, with the theory—and the hope—being that these competing incentives will maximize the chance of getting to the truth. More often, there is no unique “truth,” just a menu of

2 Hart, supra note 1.
Dialectic serves both dialogic and monologic functions. Some sets of opposing arguments—those I am calling dialogic—form sequences of assertions, responses, replies to responses, and so forth. A classic example can be drawn from United States v. Figueredo, 350 F. Supp. 1031 (M.D. Fla. 1972), rev’d, United States v. Vaglica, 490 F.2d 799 (5th Cir. 1974). In Figueredo, eight defendants were charged with conspiracy to violate 18 U.S.C. § 1955, which prohibits certain gambling enterprises that “involv[ ] five or more persons.” 18 U.S.C. § 1955(b)(1)(ii) (2006). The dialogue might be characterized as follows:

Prosecution: The eight of you combined to violate section 1955. Therefore you are guilty of conspiracy.

Defendants: Under Wharton’s Rule, there can be no conspiracy to commit a crime that necessarily requires two or more participants.

Prosecution: Under the third person exception, Wharton’s Rule does not apply when the number of actual participants (here, eight) exceeds the number statutorily required (here, five).

Defendants: The third person exception does not apply when all the defendants are performing essential statutory roles.

In that example, each argument is a specific response to the one that immediately precedes it. Such instances offer true linear dialogues in which the parties are forced to engage one another directly. As the example illustrates, the dialogic format helps to define the area of disagreement, focus the analysis, and expose any logical flaws in either side’s arguments.

In contrast, when the issues require cost–benefit determinations and therefore value judgments by neutral adjudicators or objective policy makers, the arguments typically take the form of simultaneous independent monologues. In those instances, the two sides are not so much exposing logical flaws in each other’s reasoning as they are showcasing the strengths of their own arguments. Consider, for example, a case in which a court has to decide whether to overrule a common law precedent. The advocate who wants the precedent overruled will seek to persuade the court that the proposed new rule is superior on the merits. The opposing advocate might make little attempt to disagree, preferring instead to emphasize all the benefits of stare decisis. Rather than respond to specific points their opponents make, each side is focused on its own independent arguments. Even then, the dialectic format helps the decision maker list the opposing arguments and assess the weights that the competing interests should command. Thus, whether the arguments form a dialogue or simply multiple independent monologues, the dialectic format can facilitate thoughtful outcomes.

I summon the grand dialectical tradition here to develop an operational philosophy for addressing one of the great issues of our time: illegal immigration and the treatment of the undocumented population. Some twelve million undocumented immigrants live in the United States today. They are the subject of a lively—some would say virulent—discourse. Both reasoned discussion and plausible outcomes. Even then, the dialectic helps the neutral observer decide which of those outcomes is the most compelling.

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inflamed passions have been abundantly displayed at the national, state, and local government levels, as well as among nongovernmental organizations; industry, labor, religious, and ethnic associations; other interest groups; the media; and the general public.

Much of the debate is over basic facts, such as the origins, causes, and demographics of the undocumented population. Most of the factual debate, however, is over impact: What are the fiscal consequences of illegal immigration? How do unauthorized workers affect the jobs, wages, and working conditions of the domestic labor force, as well as the general economic health of the nation? What is their environmental impact? What are the racial, religious, and cultural implications of illegal immigration? What are undocumented immigrants’ crime rates? Do they threaten public health? Do they compromise national security?

Perhaps the fiercest debate is over the appropriate policy responses: should we beef up enforcement? If so, should we concentrate our resources at the border, in the interior, or both? Should we prioritize deportations, criminal prosecutions, or both? Should we strengthen the employer sanctions regime? Should we encourage self-deportation by making life in the United States as difficult as possible for undocumented immigrants, through such means as barring access to elementary, secondary, or tertiary education, or denying drivers’ licenses, credit cards, identification cards, bank accounts, and even housing? At the other end of the spectrum, should we offer legal status to at least a substantial percentage of the undocumented population and, if so, under what conditions? Should we insist on greater labor law protections for undocumented workers? Should we expand our formal programs for admitting permanent residents, temporary guest workers, or both, in order to dampen the incentive for illegal immigration? Should we make greater efforts to stimulate economic development in Mexico and other source countries?

Even the terminology is controversial, as discussed below in more detail. In this Article, I use the term *undocumented immigrant* and define it to mean a person who is not a national of the United

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See *infra* Part II.c.
A national of the United States is someone who is a citizen of the United States or who "owes permanent allegiance to the United States." 8 U.S.C. § 1101(a)(22) (2006). Under this definition, one who enters the United States clandestinely but with the intent to reside for a substantial period of time will become an undocumented immigrant at the moment of arrival. So expansive a definition might initially seem semantically counterintuitive and incompatible with the attention this Article devotes to the trappings of residence. Nonetheless, my definition of undocumented immigrant is consistent with the statutory definition of "immigrant," which embraces all noncitizens without regard to the lawfulness of their presence, except those who fit the various "nonimmigrant" categories of mainly temporary visitors. See id. § 1101(a)(15). Still, the breadth of the undocumented immigrant definition and the actual variance in the durations of undocumented immigrant stays in the United States affect the strength of the opposing arguments on specific treatments of undocumented immigrants. See infra notes 87–91 and accompanying text.

The substantiality element is admittedly vague. It is meant merely to exclude from the definition those individuals who come for very brief, albeit unauthorized, visits but who neither remain nor intend to remain long enough to establish anything resembling even temporary residence in the United States. Examples include people who come for brief shopping, family, or social visits.

There have, however, been some thoughtful forays into specific aspects of undocumented immigrants' legal identities. See generally Linda S. Bosniak, Exclusion and Membership: The Dual Identity of the Undocumented Worker Under United States Law, 1988 Wis. L. Rev. 955 (illustrating that undocumented immigrants have several important legal rights despite their unlawful immigration status); Hiroshi Motomura, Immigration Outside the Law, 108 Colum. L. Rev. 2037 (2008) (linking modern views on illegal immigration to themes articulated in Plyler v. Doe, 457 U.S. 202 (1982)); James F. Smith, United States Immigration Law as We Know It: El Clandestino, The American Gulag, Rounding Up the Usual Suspects, 38 U.C. Davis L. Rev. 747 (2005) (putting human face on undocumented immigrants).
undocumented immigrant that have shaped the opposing arguments in modern debates on this subject. I then test those conceptual portraits against empirical realities drawn from the social science literature.

As I will show, the typical arguments reveal two striking patterns. Each of these patterns has both explanatory and normative value. They help illuminate why the gulf that divides the opposing camps on the subject of illegal immigration is so wide and, when combined with reliable empirical data, they supply a governing philosophy for the treatment of undocumented immigrants.

The first pattern relates to impact. Those advocating more restrictive positions almost always emphasize the collective effects of the millions of undocumented immigrants on the larger society. Correspondingly, these positions typically evoke mental images of a large mass of human beings. I refer to this twin emphasis on visualizing undocumented immigrants en masse and focusing on their collective impact as aggregation or clustering. In contrast, those who advocate a less restrictive approach tend to evoke the mental image of an individual undocumented immigrant or a family. Consequently, their arguments tend to emphasize the impact of a proposed policy on these individuals and families.

The debate over the appropriate policy responses reveals a second pattern. The divergent prescriptions stem, I argue, from the truism that undocumented immigrants have two defining attributes—they are lawbreakers, and they are residents. On every issue, the arguments advanced in favor of the stricter position generally require emphasis on the lawbreaker, or outlaw, element. The arguments for leniency almost always require emphasis on the resident (and not just the human) dimension.

With these drastically different starting points, the opposing camps have resembled two ships passing in the night. The debate would be more constructive, I suggest, and the resulting policies more balanced, if instead all sides sought to visualize both the

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individual undocumented immigrant and the overall undocumented population, and if they reflected more deeply on the effects of a proposed policy on both individual immigrants and the host society. Similarly, effective advocacy by any of the opposing camps needs to take both the lawbreaker and the resident elements of undocumented immigrants' identities into account.

Less neutrally, I argue that the product of this more comprehensive and more balanced discourse is an argument for more lenient treatment of undocumented immigrants. Both aggregation and individualism are necessary conceptions. Responsible policymakers visualize both individuals and the larger society, and they fashion policies that fairly consider the impact on both. In the case of undocumented immigrants, however, the empirical data on societal impact remain maddeningly uncertain, both empirically and philosophically. Illegal immigration generates both benefits and costs to society and to particular segments of society, and it is nowhere near clear which set of effects predominates. In contrast, the effects of specific policies on the individual lives of the undocumented immigrants themselves and their lawfully and unlawfully present family members are typically easier to classify as clearly positive or clearly negative. There is little disagreement, for example, about whether undocumented immigrants would generally gain or lose from legalization, or from eligibility for government programs, drivers' licenses, or in-state resident college tuition rates. All else being equal, the combination of highly uncertain effects on society and relatively clear consequences for the undocumented immigrants and their families is reason to give greater weight to the latter.

The lawbreaker versus resident distinction reinforces that conclusion. Admittedly, both of these elements are inherent in the identities of undocumented immigrants, and both deserve consideration in any fair debate on illegal immigration. Synthesizing the relevant empirical data, however, I argue that in their daily lives, undocumented immigrants resemble other residents far more than they resemble other lawbreakers. Therefore, I contend, the premise on which generally less restrictive

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12 See infra Part III.b.
policies depend—an emphasis on undocumented immigrants as residents—reflects the empirical realities far more convincingly than does the necessary premise of the stricter position—i.e., an emphasis on undocumented immigrants as lawbreakers. The contrast thus supplies additional reason to give undocumented immigrants the benefit of the doubt whenever the particular policy question is close.

The organization of this Article tracks this Introduction. Part II is a fictional dialogue between two professors with diametrically opposed views on illegal immigration. Recognizing that real world opinions on this subject form a continuum rather than a dichotomy, and that many people therefore have more nuanced views that fall somewhere between those of my two hypothetical characters, I nonetheless focus on the poles in order to expose the competing assumptions, images, and ideologies in their purest forms. After the two principals have debated a range of issues that first address the impact of illegal immigration and then explore the policies, a fictional moderator steps in to identify the common patterns within each advocate’s set of arguments. Part III examines—in a more traditional format—the relevant empirical data on undocumented immigrants. Those data are then used to assess the argumentation patterns identified in Part II and to select the broad philosophy that will best guide our policy responses.

II. A DIALOGUE

The Scene: An academic conference on immigration law and policy. One of the panels features an informal dialogue between Professor Stern and Professor Clement, specialists with polar opposite views on illegal immigration. The moderator has introduced both panelists, and the conversation begins.

A. THE IMPACT

Professor Stern: As a starting point, can we agree that illegal immigration is a serious social harm and that any differences that
this debate might reveal in our positions go only to the question of how best to curb illegal immigration?

Professor Clement: No, I don’t accept that premise. Illegal immigration is problematic, but I think its negative effects have been caricatured and its positive effects overlooked. If indeed the cons outweigh the pros—and even that is not clear—I’m not at all convinced that the net impact is a “serious” negative.

Stern: I’m relieved to hear you at least acknowledge that illegal immigration is a problem to solve rather than tolerate.

Clement: I believe in the rule of law. If the rule of law is the thread that binds the social fabric, then mass violations of federal law weaken the public order. If democracy is what legitimates government power, then violations of valid laws enacted by the people’s elected representatives thwart democratic rule. And if sovereignty means anything at all, surely it means that a nation may decide whom to admit into its territory. So anyone who cares about public order, democracy, and sovereignty has to care about the cumulative effect of millions of unlawful acts.13

Stern: Very eloquent. But given the doubts you expressed a moment ago about the net impact of illegal immigration, I wonder how much weight you think the rule of law actually commands.

Clement: It commands great weight. But belief in the rule of law doesn’t help us measure social costs, and it doesn’t require one to advocate excessive penalties for violations or any particular level of resources for enforcement. To the contrary, I view proportionality as one essential element of the rule of law. Moreover, when a law is violated on such a large scale, it’s not as if the only response consistent with fidelity to the rule of law is to step up enforcement. An alternate response is to ask whether the absence of respect for that law is evidence that the law insufficiently accommodates the relevant interests. When that is the case, changing an unrealistic law might be preferable to heavier enforcement.

Stern: Is your only concern about illegal immigration the implications for the rule of law? If so, then I think you’re missing

something fundamental. Americans feel violated. They see this massive influx as an illegal foreign invasion of their personal space, a kind of trespass at the national level. The events of 9/11 have only intensified their distress. And they feel that even their own government cannot or will not protect them.

Beyond that, do you not think illegal immigration has a more tangible negative impact on our quality of life? Illegal immigration is not a victimless crime. Undocumented immigrants strain our fiscal budgets, especially at the state and local levels. They take jobs from American workers, a point of special salience during the current recession. They lower wages. They add to population growth and therefore to air and water pollution, congestion, and pressure on our infrastructures. They drain the resources of our health care system, our justice system, and our schools. They bring in diseases, they commit crimes, they pose road safety hazards, and they threaten our national security. All this happens because the illegality of their very presence enables them to bypass the screening mechanisms that our immigration laws establish precisely to prevent these problems. The American people clearly recognize these serious consequences and favor vigorous anti-illegal-immigration measures even if the policy elites don’t.

Clement: Of course undocumented immigrants add to the population like anyone else, but it’s not at all clear that they cause any of the other problems you attribute to them. In the meantime, they pay taxes, they help keep Social Security afloat, they take jobs Americans won’t do, they create jobs by consuming goods and services, they keep consumer costs down, and they embody exactly the kinds of family values that Americans claim to embrace. From my vantage point, their collective impact on the rest of us has been neutral at worst, maybe even a net positive.

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14 In the exchange that follows, Professors Stern and Clement make competing assumptions and claims concerning the impact of illegal immigration. The empirical validity of these assumptions and claims is examined infra in Part III.b.

15 See Peter H. Schuck, The Disconnect Between Public Attitudes and Policy Outcomes in Immigration, in Debating Immigration 17, 17 (Carol M. Swain ed., 2007) (discussing dissonance between scholars and general public).

But, thanks to media outlets like conservative talk radio, Lou Dobbs, and Fox News, pandering politicians; other demagogues and ideologues; and all the anti-immigrant “research” organizations that dispense their “findings” and their “studies” to the media, the public seldom gets a fair overall picture. The strategy of these groups is to demonize. If you listened to them, you would get the impression that the typical undocumented immigrant is a disease-ridden, drug-smuggling, violent criminal who will head straight to the local welfare office—all while stealing your job, of course. Maybe I lead too sheltered a life, but I must say I’ve never met that person. In a barrel of twelve million people there will inevitably be some bad apples, but the only undocumented immigrants I’ve ever met seem like perfectly nice folks who simply want to work and make better lives for themselves and their families. In short, they’re just like all other residents of the United States except for their immigration status.

Stern: I agree that the vast majority of undocumented immigrants are decent, hardworking people. I also agree that some of the anti-immigrant advocates too often resort to demonization. But that doesn’t mean the problems they cite are either fictional or trivial. And do you really think that the American Immigration Lawyers Association, the ethnic organizations, the industry lobbyists, and others who reflexively oppose every serious enforcement measure are any more objective?

Clement: They too have agendas, and naturally their arguments have to be evaluated with those agendas in mind. But at least these advocates have called attention to the impact of proposed policy initiatives on immigrants and their families. One of the troubling things about your preoccupation with the harm that illegal immigration supposedly inflicts on communities and the nation—and I say “supposedly” because I don’t concede that the net

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impact is negative—is that you never acknowledge the human costs to the immigrants and their families. Some of the policies that have been either adopted or proposed as “solutions” to illegal immigration entail unduly harsh consequences for these individuals. I have in mind tactics like constructing fences that divert border crossers to treacherous terrain that claims hundreds of lives each year; putting children in constant fear of household raids in the dead of night; piling prison sentences on top of deportation; denying innocent young people practical access to higher education; and the like. These responses are grossly out of proportion to the problems they are meant to solve.

Stern: I have given a good deal of thought to what weights we should attach to the rights and interests of those who enter or remain in the United States in violation of our laws. I propose that we take up that discussion in the contexts of some of the more specific policy responses.

Clement: All right, what do you propose we do about illegal immigration?

B. ENFORCEMENT

Stern: Let’s start with the obvious. First and foremost, we need to get serious about enforcement. Our lax laws and implementation practices virtually beg people to enter or remain illegally.

Clement: What enforcement mechanisms do you have in mind?

Stern: I’ll begin with the border. I want to see far more border patrol officers. I want fences that are longer, taller, and sturdier. And I want our border personnel to be equipped with the most sophisticated surveillance cameras, laser beams, helicopters, and other technology. I don’t suggest that these measures would halt all illegal immigration, but they would at least reduce the numbers.

Clement: We have increased appropriations for border personnel, fences, and technology for close to twenty years, and illegal

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18 See infra notes 24, 25–29, 56–61, and 153–182, respectively, and accompanying text.
19 For the debate over how to weigh the individual rights and interests of undocumented immigrants, see infra notes 81–91 and accompanying text (concerning legalization), and infra notes 102–103 and accompanying text (concerning enforcement through self-deportation).
immigration has continued to soar.\textsuperscript{20} Isn’t it clear that border fortification simply doesn’t work?

Stern: It is not at all clear. There are multiple variables, and you can’t assume border fortification has failed simply because it has coincided with increases in the scale of illegal immigration. The real question is how the actual increases compare to those we would have experienced without these measures. We’ll never know the answer to that counter-factual, but common sense tells us that the harder and costlier it is to get here, the fewer will attempt illegal entry and the fewer will succeed.

Clement: Common sense tells us nothing about order of magnitude—whether the number of additional people whom these measures have either deterred or helped apprehend is significant or trivial. I am highly skeptical. When the economic opportunities on the two sides of our southern border diverge as dramatically as they do, people will find ways to get here. Among other things, they will rely much more heavily on professional smugglers.\textsuperscript{21} Further, since it is costly to pay a smuggler,\textsuperscript{22} the only result of heavier border enforcement is that those who manage to get here will remain for longer periods rather than take frequent trips home to visit their families.\textsuperscript{23} In the meantime, all these border enforcement initiatives consume tax dollars.

Stern: I’m sensing it’s more than tax dollars that are bothering you.

Clement: I don’t want to see tax dollars wasted, but you’re right. The human costs disturb me the most. Many of the people intercepted at the border are returning undocumented immigrants who had gone home to visit their families despite the risk of


\textsuperscript{21} See, e.g., id. at 8 (arguing increased border enforcement has resulted in smugglers offering upgraded service packages).

\textsuperscript{22} See id. (stating cost of hiring smuggler rose from approximately $400 in 1992 to $1,200 in 1999).

\textsuperscript{23} The correlation between increased border barriers and duration of unlawful stay has been well documented. See, e.g., id. at 8–9 (discussing increased trip lengths and decreased probability of return).
are so strong. For the sake of argument, however, let’s assume that entry without inspection is indeed a moral transgression. Do you really believe that subjecting violators to an increased risk of death—the clear consequence of erecting all these barriers—is a proportionate penalty?

Stern: Of course not. Again, however, it is not we who are subjecting them to that risk. It is they who are creating that risk by choosing to commit acts they know to be illegal.

Clement: I don’t dismiss either the illegality or the element of personal volition, but the fact remains that we as a nation are also making a conscious choice to compound the risks. To the extent that we have purchased a perceived reduction in illegal entries with a nearly certain increase in border deaths, we are complicit. Sadly, moreover, these hundreds of additional deaths per year are for naught, because the kind of border fortification you’re proposing won’t even be effective. We could build a wall that stretches from the Pacific Ocean to the Gulf of Mexico. We could make it one hundred feet tall and one hundred feet thick. We could station U.S. Marine sharpshooters with machine guns along the top of the wall at intervals of ten feet. And none of that would prevent a single person from simply going to the U.S. embassy or consulate, getting a tourist visa, presenting it at an authorized port of entry, entering lawfully, and then overstaying. When you consider everything—the fiscal cost, the limited effectiveness, and the certain increase in border deaths—I can’t muster much enthusiasm for yet another round of border reinforcement.

Stern: Then what do you suggest?

Clement: We have to accept reality. As long as the economic disparities remain huge, some level of illegal immigration will be a permanent fixture that we shall have to learn to live with, just as we live with imperfect enforcement of every other law.

Stern: You mean throw in the towel?

Clement: To some extent, yes. We should maintain a serious border presence, but I’m not convinced our border enforcement resources have to be any greater than current levels. And if we feel a need to bolster enforcement, we should prioritize interior enforcement.
Stern: I don’t see border and interior enforcement as mutually exclusive. We need to do both.

Clement: Agreed. But our resources are finite, and there are other national needs besides stemming illegal immigration. With all the costs, ineffectiveness, and deaths associated with border enforcement, interior enforcement should be the higher priority of the two.

Stern: I’m pleasantly surprised to hear you advocate interior enforcement. I would have expected you to resist that even more than border enforcement, since interior enforcement is more likely to cause hardship for those who have already made lives for themselves in the United States.

Clement: That is true, and I hope I didn’t mislead you. I’m speaking only in relative terms, and even then my level of tolerance for interior enforcement depends very much on the particular methods. The massive workplace raids in recent years, the home invasions in the middle of the night, and the racial profiling of Latinos and Latinas, for example, have no place in a democratic society. They terrorize whole populations, destroy the security and sanctity of the home, traumatize children, and inevitably involve either subtle or explicit racial discrimination. We’ve been seeing a major shift toward these kinds of heavy-handed tactics, and the resulting traumas are grossly disproportionate to any law enforcement benefits they might achieve.

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28 See, e.g., Thronson, supra note 25, at 398–401 (discussing high emotional costs of workplace and home immigration raids).
Stern: The only people who are adversely affected by these legitimate law enforcement operations are those who are not supposed to be here.

Clement: First of all, it’s not true that undocumented immigrants are the only victims of these raids. When immigration agents raid private homes in the dead of night, they terrorize not only any undocumented immigrants who turn out to be present, but also any U.S. citizens or other lawfully present family members, including children. They destroy the legitimate privacy expectations of all the occupants. When workplaces are raided, the entire workforce has to shut down—including U.S. citizen and other lawfully present employees—and the tension is palpable. And when Latino residents are stopped or arrested without any specific reason to suspect an immigration violation, I should hope we can agree that the racially discriminatory enforcement is itself a serious dignitary harm, especially to those who are innocent.

But more importantly, suppose undocumented immigrants were the only people those tactics harmed. They are still human beings, and more than that, they are residents. They live here. They don't lose all their legal rights just because they have violated the immigration laws.

Stern: I certainly agree that race-based arrests are wrong and that police who engage in those practices should be punished. I also concede that even the other strategies that you mentioned can cause intangible collateral damage to innocent parties. I would hope that law enforcement personnel take steps to minimize that damage. But I don't agree that the harms you've described are disproportionate with respect to the undocumented immigrants who are apprehended as a result. As long as there is some serious reason to believe that one or more undocumented immigrants are present at a given site—and we could debate whether the precise

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criterion should be “probable cause,” “reasonable suspicion,” or some other standard—then questioning should be permitted. And if that questioning reveals further grounds for suspicion, then arrest is also appropriate.

I might add that I would like to see more state and local law enforcement agencies enter into agreements with the Department of Homeland Security to assist in apprehending immigration violators, as federal law now permits. This would tremendously enhance our total enforcement capacity. Conversely, it angers me when states or municipalities adopt “sanctuary” policies that forbid police and other government employees from inquiring about a person’s immigration status or from reporting a suspected violator to the Department of Homeland Security. We should all be on the same side here, not operating as adversaries. I should think states and local communities would be eager to lend their assistance, because the effects of illegal immigration are felt most keenly at the state and local levels. Again, the people we’re talking about apprehending are, after all, lawbreakers.

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Clement: The issue of state and local immigration enforcement is not that simple. It has the advantages you’ve just noted, but there are also real costs. Those costs become evident once one recognizes that undocumented immigrants are, despite their immigration status, residents of their respective local communities. Most police officers understand the importance of commanding the trust of all residents of the community, whether documented or not. How do you expect undocumented immigrants to report crimes or otherwise cooperate with the local police if they know that any interactions with the police will risk detention and deportation? Besides, how are local police, who are not immigration agents, supposed to understand the intricacies of immigration law, with all its varied statuses and documents, well enough to judge the likelihood of someone being in violation? Moreover, do you really believe that they will exercise that authority equally, without regard to racial appearance and foreign accent? Of course there’s also the question of whether investigating possible immigration violations is the best use of the time of a police force that has far more violent and serious crimes to deal with.

Stern: We clearly have different priorities here. I would go a step further. In addition to lending the use of their law enforcement personnel, I am glad that states and municipalities are also doing a range of other things in such areas as employment, welfare, education, housing, and transportation to make undocumented immigrants’ lives difficult. I hope those efforts will multiply.

Clement: Let’s defer that discussion for a moment, because there are some other enforcement issues I want to raise before we leave that subject. One of them is the deportation process itself.

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25 See infra Part II.d.
Stern: You’re not going to tell me you’re against deporting undocumented immigrants, are you?

Clement: No. For purposes of this discussion, I shall accept the current world order. We inhabit a world in which nations exercise sovereignty over their own territories, classify all human beings as nationals or non-nationals, assign different bundles of rights and obligations to the two classes, and claim the authority to restrict the admission of foreign nationals. On those assumptions, there is nothing inherently unjust about enacting immigration laws. And once we enact them, there is nothing unjust about enforcing them. We can’t have a policy that permits a person to secure a lifelong residence in the United States simply by gaining physical entry into our territory. Without deportation as a remedy, precisely such a policy would be in effect. So I acknowledge the legitimacy of deportation.

But deportation has severe consequences. My view is that it ought not be ordered unless, in the individual case, the gravity of the violation outweighs the personal equities.

Stern: The system already contains more than enough safety valves. Every deportee receives a full and fair removal hearing, with a right of appeal, and the law provides a number of substantive relief provisions that enable the adjudicators to take special circumstances into account. I’m thinking of remedies like asylum, cancellation of removal, registry, and the like.

Clement: These are not enough. Every one of these provisions contains limitations that are both too demanding and too rigid.

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37 For a strong critique of the relationship between national sovereignty and citizenship, see Linda Bosniak, Citizenship Denationalized, 7 Ind. J. Global Legal Stud. 447, 453 (2000) (arguing “justice and democracy” support “nonnational conceptions of identity and solidarity”). As to the moral restrictions on the exclusion of noncitizens, see infra note 81 and accompanying text.
41 See generally id. § 1229(b).
42 See generally id. § 1259.
Asylum takes only certain overseas dangers into account;\textsuperscript{43} cancellation requires ten years of physical presence and a showing of “exceptional and extremely unusual hardship” to one of certain specified citizen or lawful permanent resident family members;\textsuperscript{44} and registry is only for people who have been here since 1972.\textsuperscript{45} Trying to anticipate every possible harm that might qualify someone for discretionary relief needlessly ties the hands of the adjudicators. Let’s trust them to do the balancing and use their common sense. If we must impose specific conditions for the exercise of that discretion, they should not be nearly as formidable as the ones currently in place.

Stern: Your proposal is a recipe for adjudicators to apply their own personal values rather than the policy judgments of the people’s representatives in Congress. If the news we have been hearing about the asylum cases is any indication,\textsuperscript{46} we could then expect extreme inconsistency. Deportation would hinge on which adjudicator the person has the good or bad fortune to land. Doesn’t that bother you?

Clement: Yes, I acknowledge the importance of consistency.\textsuperscript{47} I also concede that making deportation discretionary has other costs, as Gerald Neuman has thoughtfully explained.\textsuperscript{48} But the current system bothers me more. Many undocumented immigrants who face deportation live in mixed-status families, in which one or more of the children are U.S. citizens.\textsuperscript{49} In these cases, deportation of the

\textsuperscript{43} Id. § 1158(a)(1)(B).
\textsuperscript{44} Id. § 1229b(b)(1)(D).
\textsuperscript{45} Id. § 1259(a).

\textsuperscript{46} A recent empirical study exposed great disparities in the rates at which various adjudicators granted or denied asylum claims. See Jaya Ramji-Nogales, Andrew L. Schoenoltz & Philip G. Schrag, \textit{Refugee Roulette: Disparities in Asylum Adjudication}, 60 STAN. L. REV. 295 (2007) (finding great divergence in asylum grant rates within offices and among different courts, judges, and regions).


parents puts the parents in an impossible bind—either they accept the de facto deportation of their U.S. citizen children or they leave their children behind in someone else’s care. Unless they have lived here for the required ten years and their children will suffer a level of hardship that is “exceptional and extremely unusual”—a very hard standard to satisfy—the adjudicators have no discretion to waive deportation. Incidentally, we’re talking about large numbers. The Department of Homeland Security reports that, in the decade ending in 2007, we deported more than 100,000 parents of U.S. citizen children.

Stern: And rightly so. The U.S. citizen child will have every opportunity to return to the United States as soon as he or she is old enough to make that decision. In the meantime, as is always the case with young children, the parents will simply have to make the decisions they think best. Their options might not be ideal, but the point is that the parents should have obeyed our immigration laws.

Clement: That’s your answer?

Stern: Once again: They’re illegal!

Clement: But they live here!

Stern: Should having a U.S. citizen child insulate someone from deportation? Why don’t you just go on Mexican television and broadcast an invitation to all pregnant women to enter the United States illegally and bear their children here? You can explain that the children will be U.S. citizens and, therefore, tickets for their parents to get green cards.

Clement: So you’re playing the “anchor baby” card.

Stern: Am I wrong?

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See supra note 44 and accompanying text.


Clement: Yes, and for several reasons. First, it’s an offensive stereotype. It conjures up images of armies of pregnant Mexican women trying to storm our gates to have their babies here. Second, having a U.S. citizen child gets you no immigration preference whatsoever until the child turns twenty-one (and remains unmarried). So the women you’re describing would have to have a twenty-one-year strategy in mind. Perhaps there are some who do have precisely such a long-term plan, but surely we are not talking about large numbers.

Stern: The existing law indeed imposes the twenty-one-year waiting period that you’ve described, but the policy you have been advocating would basically convert a U.S. citizen child into a defense to deportation. Wouldn’t that alone create a large incentive to bear a child in the United States?

Clement: I’m not advocating an automatic defense against deportation. All I’m suggesting is that the immigration violation should be balanced against all the individual equities, including the harm deportation would cause for the children. They are innocent of all wrongdoing; their only crime was being born here. Moreover, like their parents, they are residents of our communities. And unlike their parents, they are United States citizens.

Stern: That doesn’t make the parents’ presence lawful. Nor do I think it would be so terrible for the parents to raise their children in Mexico, where the family would remain intact. At any rate, even if you think that the prospect of the parents achieving permanent residence in the United States by bearing a U.S. citizen child here—either by waiting twenty-one years or by avoiding deportation in the way you’ve suggested—is too remote to provide a meaningful incentive for illegal immigration, parents are also motivated by the dreams and aspirations they have for their children. So even if the parents didn’t stand to benefit directly—and they do—just knowing their child will be able to settle here one day is motive enough. For me, that alone would be a good reason to deny birthright citizenship to the U.S.-born children of undocumented parents in the first place. I won’t press that point here because the citizenship issue would

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See infra notes 56–61.
Clement: “Increasingly” is putting it mildly. Congress and the executive branch have gone on a feeding frenzy. For the past twenty years, Congress has been almost fully employed creating new immigration-related crimes and increasing the prison terms and the fines for existing offenses. During this same time period, federal prosecutors have been criminally prosecuting more and more immigration violators. In fiscal year 2008, an extraordinary 51% of all federal criminal prosecutions were for immigration offenses. I’m not talking about charges brought against the organizers of large smuggling rings or the owners or operators of companies that employ large numbers of unauthorized workers. The vast majority of these criminal charges are for garden-variety entries without inspection. Federal prosecutors recently charged ordinary landlords with “harboring” undocumented immigrants, even when the landlords were not attempting to shield anyone from the authorities. Last year’s raid of the Postville, Iowa meat packing plant epitomized prosecutorial excess. About three-quarters of the undocumented workers picked up in the raid were Guatemalan peasants who were simply hoping to earn enough money to support

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57 See Legomsky, supra note 56, at 479–81 (noting immigration cases became largest category of federal prosecutions).

58 TRANSNATIONAL RECORDS ACCESS CLEARINGHOUSE, SYRACUSE UNIV., BUSH ADMINISTRATION’S IMMIGRATION PROSECUTIONS SOAR: TOTAL OF ALL FEDERAL FILINGS REACH NEW HIGH (2009), http://trac.syr.edu/tracreports/crim/201/.

59 TRANSNATIONAL RECORDS ACCESS CLEARINGHOUSE, SYRACUSE UNIV., PROSECUTIONS FOR APRIL 2008 (2008), http://trac.syr.edu/tracreports/bulletins/overall/monthlyapr08/fil/ (citing “[e]ntry of alien at improper time or place” as most frequent lead charge in U.S. magistrate courts and “[r]eentry of deported alien” as most frequent lead charge in U.S. district courts in April 2008).

60 See, e.g., Sophie Marie Alcorn, Note, Landlords Beware, You May be Renting Your Own Room ... in Jail: Landlords Should Not Be Prosecuted for Harboring Aliens, 7 WASH. U. GLOBAL STUD. L. REV. 289, 305 (2008) (arguing against construing simple rental of housing as “harboring”).
their families back home.\textsuperscript{61} Prosecutors charged a total of 306 workers (only five of whom had prior criminal records) with crimes.\textsuperscript{62} Acting on instructions from Washington, the prosecutors offered each worker a uniform plea agreement.\textsuperscript{63} They could plead guilty to knowingly using a false social security number and agree to serve five months in jail.\textsuperscript{64} They were told that if they refused, they would be charged with “aggravated identity theft,” which carries a mandatory two-year prison sentence, and that they would languish in pre-trial detention for six to eight months if they insisted on going to trial.\textsuperscript{65} Either way, they would ultimately be deported after their release.\textsuperscript{66} Their assigned lawyers advised them that they were not guilty of aggravated identity theft unless they knew that the social security numbers they had been given belonged to other individuals—\textsuperscript{67}—a fact of which almost all were unaware—but wisely advised them to accept the plea offers nonetheless because the six to eight months of pre-trial detention were longer than the five-month sentences they had been offered.\textsuperscript{68} During the periods of imprisonment, the workers had no means to support their families.\textsuperscript{69} 

Stern: If the federal prosecutors in Postville really did abuse the threat of lengthy pre-trial detention to coerce guilty pleas to crimes of which the defendants were innocent, then of course they acted improperly. But let’s not throw out the baby with the bathwater. Obviously the threat of deportation, standing alone, is not enough to discourage illegal immigration. If it were, we wouldn’t have

\textsuperscript{61} See Erik Camayd-Freixes, Interpreting After the Largest ICE Raid in U.S. History: A Personal Account 2, 6 (June 13, 2008), http://graphics8.nytimes.com/images/2008/07/14/opinion/14ed-camayd.pdf (stating 290 of 390 arrested were Guatemalan and describing them as illiterate peasants).
\textsuperscript{62} Id. at 2–3.
\textsuperscript{63} Id. at 5, 7.
\textsuperscript{64} Id. at 5.
\textsuperscript{65} Id.
\textsuperscript{66} Id.
\textsuperscript{67} The Supreme Court has now confirmed such knowledge is a required element of the offense of aggravated identity theft. Flores-Figueroa v. United States, 129 S. Ct. 1886, 1888 (2009). See also Peter R. Moyers, Butchering Statutes: The Postville Raid and the Misinterpretation of Federal Criminal Law, 32 Seattle U. L. Rev. 651, 652 (2009) (arguing that knowledge is required element of aggravated identity theft).
\textsuperscript{68} Camayd-Freixes, supra note 61, at 6.
\textsuperscript{69} See id. (describing one worker as sole support for his family).
twelve million undocumented immigrants in the United States today. The additional, realistic risk of spending several months in prison might be enough to persuade many to leave voluntarily before they are caught, and at the very least to dissuade others from entering illegally in the first place.

Clement: It’s not merely a problem of improper or overzealous enforcement officers in particular cases. Let’s assume all federal prosecutors meticulously follow the law. Let’s further assume that in some cases the immigration-related misconduct is serious enough to warrant a combination of criminal punishment followed by deportation. Still, for a simple entry without inspection and with no aggravating circumstances, the sanction of forcibly removing a community resident to a foreign land, thus potentially ending his or her livelihood and harming the whole family in the process, seems more than adequate. Adding prison time is just piling on. It’s also a waste of criminal justice resources. The government’s obsession with immigration violations has diverted resources from prosecuting weapons crimes, organized crime, and white collar and public corruption offenses, all of which have been prosecuted far less frequently in the past five years.71

Stern: That’s an argument you should be addressing to Congress. They passed the laws that make these violations criminal offenses and specified permissible sentences. They did so because they found the prescribed consequences to be reasonably proportionate.

Clement: I believe Congress was needlessly severe, but I also blame the prosecutors. Prosecutorial discretion demands a weighing of the seriousness of the offense, the impact of the punishment, and the availability of finite resources before prosecutors decide which potential criminal convictions to pursue.72

Stern: Then what alternatives are left? Absent some unusual aggravating circumstances, I take it from your earlier comments that you don’t want to deport someone “merely” for being unlawfully

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70 See supra note 5 and accompanying text.
71 Solomon Moore, Focus on Immigration Crimes is Said to Shortchange Other Cases, N.Y. TIMES, Jan. 12, 2009, at A15 (stating such crimes are routinely referred to state and county officials who cannot prosecute effectively).
72 The classic work on discretion in law enforcement is KENNETH CULP DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY (1969).
present, nor do you want to bring criminal charges. Should we simply let undocumented immigrants remain in the United States permanently, living underground and working illegally?

C. LEGALIZATION

Clement: We should acknowledge reality and enact a generous legalization program for the vast majority of undocumented immigrants already here.

Stern: That does it! I haven’t said anything about this until now, but I can’t bite my tongue any longer. These people are not “undocumented immigrants.” They are “illegal aliens.” And the program you’re referring to is not “legalization.” It’s “amnesty.” These politically-correct euphemisms are getting downright silly.

Clement: They are not euphemisms. Each of those terms is more accurate—both in theory and in practice—than the meaningless, and in some cases offensive, terms that you just used.

Stern: Like illegal alien?

Clement: The word alien, taken alone, is not legally incorrect. An alien is statutorily defined as “any person not a citizen or national of the United States.” I personally prefer not to use that word when I can avoid it because, to many, it brings to mind dehumanizing qualities of strangeness or even inferiority. It builds walls by making people feel like outsiders, even when they are our resident neighbors. And it strips human beings of their dignity. I also fear that its constant usage reinforces racial stereotypes.

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See Neuman, supra note 11, at 1428 (arguing term aliens is associated with xenophobia and government neglect of noncitizens).

I admit that's just a matter of personal preference. The term *illegal alien*, however, is different in kind. In addition to its unfortunate connotations, it is rarely used as a legal term of art and is syntactically incorrect. If you want to say that entry without inspection is an “illegal” act, or that someone entered the country “illegally,” I have no problem. But you don’t call a person *illegal* because he or she has violated a law. It would be like calling someone who speeds on the highway an “illegal driver,” or even an “illegal citizen.” Restrictionists have even converted *illegal* into a noun, usually in the plural, referring to *illegals*—as if you could sum up everything that constitutes a person by calling sole attention to his or her violation of the immigration laws. It’s not just imprecise and illogical—it’s utterly dehumanizing. Moreover, illegality should not be prejudged. Just as you don’t pronounce a criminal defendant guilty before a valid final conviction, so too you shouldn’t brand a noncitizen deportable—much less “illegal”—until there has been a final determination after a full and fair removal proceeding. This is not an academic point. As you’ve acknowledged, even individuals who appear to be unlawfully present often have valid claims to asylum or other legal remedies.

Stern: A better analogy than the speeder would be a person driving without a license. Calling that person an *illegal driver* seems unobjectionable. But for the sake of discussion, I’ll grudgingly accept the term *undocumented immigrant*. Still, I draw

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76 In the more than five hundred pages of the Immigration and Nationality Act, codified at 8 U.S.C. §§ 1101–1537 (2006), the only references to “illegal alien” that this author could find appear in provisions relating to federal reimbursement for small portions of the expenses states incur in connection with “illegal aliens.” See id. §§ 1356(r)(3)(ii), 1365(a)–(b), 1366(1)–(2). A recent Department of Homeland Security report used the terms “unauthorized immigrant,” “unauthorized resident,” and “unauthorized resident immigrant,” but not “illegal alien.”


78 Some have used the Spanish terms “clandestino” and “desaparecido.” For an example, see Smith, supra note 10, at 747 n.1.

79 Thanks are due to Peter Schuck for that analogy.
the line at substituting *legalization* for what you know perfectly well is simply *amnesty*.

Clement: The proposals I favor are not “amnesties” in any sense in which that word is commonly used. I advocate a program that, like the one recently introduced in Congress, imposes heavy fines on the beneficiaries as a condition of eligibility.\(^6\) A fine of several thousand dollars for a low-income family is not a slap on the wrist; it’s a serious punishment. Can you cite a single example of an “amnesty” in which the violators are punished for their offenses?

Stern: No, but this is different. Once the undocumented immigrants pay their fines, they will be allowed to permanently retain one of the fruits of their unlawful acts—the U.S. residence that they acquired illegally. It’s like letting a thief keep a $20,000 stolen car as long as the thief is willing to pay a $5,000 fine.

Clement: A better analogy would be that it’s like allowing a motorist caught speeding to pay a fine and then continue driving, which we do all the time. Would you call that an *amnesty*?

Stern: In the immigration context, *amnesty* is still a better term. To me, it implies forgiveness, which in turn implicitly acknowledges that there was some wrongful act to forgive in the first place. *Legalization* is an antiseptic term. It cleans the stain so thoroughly that it avoids any admission of wrongdoing.

Clement: I disagree. Legalization implies that the undocumented immigrant’s current status is *not* legal, so it too recognizes the initial illegality. The heavy punishment reinforces the notion that there was an initial wrong. So nothing is swept under the rug. In the meantime, however, the term *legalization* is positive and forward-looking. It implies that, once the person has been punished for the previous transgression, we’ll start again with a clean slate.

Stern: I’m still not convinced, but rather than get any further bogged down in semantics, I’ll humor you and use the terms *undocumented immigrant* and *legalization*, even though I find that language grating.

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\(^6\) S. 1639, 110th Cong. § 601(a), (e)(5) (2007) (providing for $1,000 penalty for applying for immigration status).
Clement: We’re making progress. For the record, however, I think you’re agreeing because you know I’m right, not just because you want to avoid semantical disputes.

Stern: Don’t push it.

Clement: All right. Then let’s talk about the merits of legalization.

Stern: How, exactly, is legalization going to reduce future illegal immigration?

Clement: It won’t. Nor will it cure cancer or halt nuclear proliferation. Those aren’t its purposes. Legalization will provide a sensible short-term resolution for many of the twelve million undocumented immigrants who are already here, have been living and working productively in our communities, and have no intention of leaving.

Stern: You sound as if you think undocumented immigrants are somehow entitled to legalization as a reward for their illegal work.

Clement: Frankly, I have mixed feelings about whether at least some undocumented immigrants have acquired a moral “right” to legalization. As residents of the community, their interests in remaining here increase with the passage of time. Their roots grow deeper, and their ties to local, state, and national communities become correspondingly more extensive. It might well be that at some point those interests so outweigh society’s interests in deporting them as to ripen into a moral right to remain.\textsuperscript{81}

Some have analogized legalization to adverse possession in property law.\textsuperscript{82} For various reasons, we recognize a legal right to possess land, even when the occupation was initially wrongful, as

\textsuperscript{81} See Joseph H. Carens, The Case for Amnesty: Time Erodes the State’s Right to Deport, \textit{Boston Rev.}, May/June 2009, at 7, 8 (arguing longer stays strengthen immigrants’ moral right to remain). For views skeptical of the moral claim but sympathetic to legalization on pragmatic grounds, see T. Alexander Aleinikoff, \textit{id.} at 11, 11 (finding pragmatic arguments for legalization most persuasive), Peter H. Schuck, \textit{id.} at 13, 13 (advocating amnesty despite lack of moral clarity), and Gerald L. Neuman, \textit{id.} at 16, 16 (favoring amnesty for reasons of both “humaneness and pragmatism”).

time passes and as the occupier’s activities lend added value to that land. One can plausibly argue that the same reasoning applies to long-residing undocumented immigrants.

Another analogy would be to statutes of limitation in either criminal or civil actions. The law recognizes the social value of stability and the individual interests in peace, repose, and progress, although statutes of limitations also reflect additional concerns, such as the deterioration of evidence.83

Stern: You’re not describing true “rights.” You can’t just break the law, evade apprehension for some period of time, and then proclaim a right to remain. Adverse possession simply reflects a policy decision to make certain individual interests legally enforceable. The same is true of statutes of limitation. You might feel that different policy interests favor legalization of undocumented immigrants, but you have to make an affirmative case for those policies.

Clement: I’ll make that case, but before I do, I want to respond to your suggestion that these are not true “rights.” The European Court of Human Rights has held on several occasions that states are legally bound to balance adverse immigration consequences such as deportation against individual interests such as family unity.84 At least one commentator has suggested that the same logic might dictate a “right” to legalization for some undocumented immigrants.85

Stern: Even if the United States were a party to the European Convention on Human Rights, I would have to disagree. Whatever balancing one might think is morally required, and however one might personally balance the competing interests, I still maintain this is a matter of the state’s sovereign policy discretion, not a matter of right.

85 Id. at 96.
Clement: Then let me suggest a second possible route to a moral right to legalization. The United States government’s own conduct has created and nurtured the phenomenon of illegal immigration. The government is therefore morally bound to accommodate the individual interests that have arisen as a result.

Stern: To what government conduct do you refer?

Clement: I’m thinking of two things. Today’s undocumented population has its origins in the Bracero guest worker program, which ultimately spawned a whole network of family and labor relationships that in turn have triggered and sustained illegal immigration. In addition, for decades, the United States consciously adopted a visible policy of lax immigration enforcement. Generations of prospective undocumented immigrants have reasonably interpreted that policy as a signal that their presence would be effectively tolerated as long as they behaved themselves once they were here. That was the unspoken deal. One could argue that the government is morally bound to give at least some effect to that reasonable reliance.

Stern: I don’t buy either of those arguments. Why should the government’s decision, several decades ago, to import guest workers under a legal program be viewed as creating a “right” for others to enter or remain unlawfully many decades later? As for the lax enforcement, I understand you to suggest that the government was giving a wink and a nod to prospective undocumented immigrants and therefore should not now be allowed to punish them for their reasonable reliance on that practice. That argument doesn’t persuade me either. Just a moment ago, you extolled the virtues of prosecutorial discretion. Police discretion is equally unavoidable. Governments always have to exercise some judgment as to how

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87 See, e.g., Carens, supra note 81, at 10 (arguing state complicity in irregular migration is part of case for amnesty).
much to invest in the enforcement of various laws. To make those judgments, governments have to weigh the degree of harm from violations of the particular law, any offsetting benefits that the conduct produces even though unlawful, the cost to the government of specific enforcement measures, the likely effectiveness of those measures, and any countervailing compassionate circumstances. The fact that the government elects to invest finite enforcement resources only at level $X$ rather than at some higher level $Y$ doesn’t create a right to violate that law, much less a right to a remedy.

Clement: Rights aside, I favor legalization as a matter of grace, partly out of compassion and partly out of pragmatism. Just to put those arguments in proper perspective, let’s keep in mind that Americans have always felt a certain ambivalence toward illegal immigration. Even when condemning it, they usually recognize that in many ways they benefit from it. Professor Linda Bosniak, for example, has argued that our selective recognition of undocumented immigrants’ legal rights is evidence of this ambivalence. She observes that we freely grant them many of the rights U.S. citizens enjoy while withholding certain other rights.

Stern: The fact that undocumented immigrants enjoy some rights and not others doesn’t help your case. It simply reflects two realities. One is that different people have different views as to what rights undocumented immigrants should have. The other reality is that there is no viable alternative to granting some of the rights that citizens enjoy while denying others. On the one hand, almost all would agree that even lawfully admitted immigrants should not have the same bundle of rights as citizens; a fortiori, undocumented immigrants aren’t entitled to the same package of rights. On the other hand, undocumented immigrants have some of the same rights that citizens and any other human beings possess, such as the right not to be tortured, the right to procedural due process, etc. So for present purposes, I attach no significance to

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88 Bosniak, supra note 10, at 956.
89 Id.
90 See, e.g., International Covenant on Civil and Political Rights art. 7, Dec. 19, 1966, 6 I.L.M. 570, 999 U.N.T.S. 171 (“No one shall be subjected to torture . . . .”).
91 See, e.g., Plyler v. Doe, 457 U.S. 202, 212 (1982) (stating Fourteenth Amendment applies to those “unlawfully present” in United States); Wong Wing v. United States, 163
the fact that U.S. law grants undocumented immigrants some rights and not others.

Clement: At any rate, there are both compassionate and pragmatic reasons to offer legalization to a large share of the undocumented population. The most compelling reason is that they live here now, and in many cases have for a long time. They’ve sunk deep roots. For compassionate reasons alone, there comes a point at which the decent thing to do is overlook the legal transgression when strict enforcement would destroy people’s lives.

Stern: You’re painting with too broad a brush. When you say that “they” live here now and that “they” have sunk deep roots, you’re ignoring distinctions within the group. Not all undocumented immigrants have sunk deep roots or, for that matter, any roots at all. Do you mean to treat the person who entered the United States without inspection an hour ago the same as the undocumented immigrant who came here twenty years ago as a child?

Clement: Let’s distinguish between definition and treatment. For definitional purposes, the person who entered without inspection an hour ago, with the intent to remain for a substantial time, became an undocumented immigrant at the moment of entry. By law, despite his or her unlawful entry and presence, that individual is an immigrant, and obviously an undocumented one. I would go so far as to define this person as not just an undocumented immigrant, but also a resident of the United States—a new one, admittedly, and unlawfully present—but a resident nonetheless. Except for the illegality, he or she is no less a resident of the United States than the U.S. citizen who moved from one state to another an hour ago with similar intentions is a resident of his or her new state. And just as U.S. citizens and other lawful state residents range widely from recent arrivals to long-term fixtures, the same is true of undocumented immigrants.

U.S. 228, 238 (1895) (striking down undocumented immigrant’s sentence of imprisonment at hard labor without full criminal procedural safeguards).

92 For this Article’s definition of undocumented immigrant, see supra notes 8–9 and accompanying text.


94 See infra note 237 and accompanying text.
Stern: You say “except for the illegality” as if that were a trivial caveat.

Clement: Don’t misunderstand me. My previous comment goes only to the question of definition. I have acknowledged the relevance—indeed, the importance—of illegality in the policy making phase.95 We routinely and rightly subject those residents who violate the law to consequences that we don’t impose on those who obey it. That is why I conceded earlier that deportation is a legitimate instrument of government and that undocumented immigrants do not and should not have the same rights as citizens or other lawfully present residents. Nor do I suggest that the duration of one’s residence is morally irrelevant. Legalization, for example, might reasonably be limited to those individuals who have resided in the United States for some specified time. So we can and should regard even recently arrived undocumented immigrants as residents and still leave room for treatment that varies, within that group, according to duration of residence.

Stern: Even with those qualifications, I find it hard to muster compassion for people who have known from the time they first arrived that their very presence is unlawful.

Clement: Even if you feel that strongly about the adults, you can’t possibly hold similar feelings about the children. They are innocent victims. There’s mounting evidence that the constant threat of deportation has induced stress levels that have affected their mental health.96

Stern: For the young children, I confess to feeling real sadness. But their plight is not the fault of the United States. It’s the fault of the parents who came or remained here illegally and either brought the children here illegally or gave birth to them here, knowing from the outset that the parents’ own future deportations were a real possibility. If they’re concerned about the mental health problems that their children are experiencing because of the

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95 See supra notes 36–37 and accompanying text.

constant fear of deportation, there is an easy remedy: stop violating the law, and return home.

Clement: Then forget about compassion and just think about the practicalities. There’s no way they are going to leave voluntarily, and there’s no possibility of identifying, apprehending, arresting, detaining, prosecuting, and deporting twelve million people. Legally or illegally, this population is here to stay.

Stern: I don’t share your premise that there is no way to get them to leave. I’ll return to that point in a moment. But if you really believe that they’re going to remain here no matter what we do, then what difference does it make whether we legalize them?

Clement: It makes an obvious difference for them and for their families. Legalization would mean no more hiding in constant fear from authorities; no more need for subterfuge to get work; no more exploitative wages or working conditions; no more exclusions from a variety of daily activities; the possibility of relocating close family members; and an eventual path to naturalization and full participation in the civic and political life of their new homeland.

Stern: That’s nice for them, but I’m not inclined to support legalization solely because it will benefit the lawbreakers themselves. I want to know how the larger society would benefit.

Clement: An underground shadow population isn’t healthy for anyone. Legalization would promote transparency. The government would learn the names and addresses of the nation’s inhabitants. By ending the vulnerability of undocumented residents to exploitation, we could raise the market wages and working conditions for everyone. We could also provide educational opportunities for their children, including their U.S. citizen children.

More generally, legalization would be the single most effective vehicle for integrating undocumented immigrants into American life. If people are going to live in the United States for substantial amounts of time, we should want them to participate in the political life of the community. They can do this by becoming lawful permanent residents and eventually naturalized citizens. They also become a part of the social, educational, and economic fabric of the nation. All these things help them to be more productive. It’s a win–win situation. The alternative is a lose–lose situation in which they continue to live here but remain vulnerable to ruthless
employers, professional smugglers, dealers in false documents, and violent criminals.

Stern: What is our message to those immigrants who have been playing by the rules, waiting patiently in the queue for years on end to reunite with their American family members—that they would have been better off entering clandestinely?

Clement: Like the legalization provisions that Congress has been recently considering, the program I favor would require legalization beneficiaries to wait at the end of the queue for permanent resident status. The grant of residence to those already in line would not be delayed in the least and at any rate would occur before the legalization of those who are present unlawfully.

Stern: Even if I accepted all that, there is still one remaining problem. Granting legalization cannot help but incentivize future illegal entries. A certain number of people who are otherwise unwilling to take the risk will now do so in the hope that they will qualify for a future legalization.

Clement: They have no reason to expect one legalization program to follow right on the heels of another. There has not been a major legalization program since 1986. One program every twenty years is hardly a meaningful additional incentive.

At any rate, if we don’t have legalization, what exactly do you propose we do with this population of twelve million people living in the United States without valid immigration status? I’ve already told you why I think the status quo is unhealthy, and I suspect you will concede that even the enhanced enforcement measures that you advocated earlier would never enable us to round up, arrest, detain, prosecute, and remove more than a small fraction of these twelve million people whose addresses we don’t even know.

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Stern: Yes, I will concede the impossibility of eliminating this huge population through mass apprehension efforts. But I believe that the combination of enhanced enforcement and other measures would dramatically reduce the undocumented population.

Clement: What “other measures” do you have in mind?

D. THE THIRD WAY: ATTRITION THROUGH SELF-DEPORTATION

Stern: I’m thinking of those steps that would make undocumented immigrants’ daily lives so difficult that they choose to “self-deport.” It’s the strategy some have called “attrition through enforcement,” or the “third way.” Since we can’t deport them and we shouldn’t legalize them, we should encourage them to leave voluntarily.

Clement: How do you propose we do that?

Stern: A large part of it is what we discussed earlier—some heavy-duty interior enforcement. Its value lies not just in the relatively small proportion of the undocumented population who would actually be apprehended and ultimately removed, but in the mindset it would create. I want every undocumented immigrant to understand that at any moment he or she might be caught, arrested, imprisoned on criminal charges, and then deported. The messages

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100 The cost of a mass deportation effort has been conservatively estimated at $200 billion over five years, assuming such a project is even possible. Rajeev Goyle & David A. Jæger, Ctr. for American Progress, Deporting the Undocumented: A Cost Assessment 1 (2005), available at http://www.americanprogress.org/kf/deporting_the_undocumented.pdf.


I want to send are “Don’t come illegally” and “If you’re already here illegally, leave.”

Look, when people speed on the highway, we don’t say that our only two choices are apprehending all speeders or overlooking all of them. We do what we can. If the police start ruthlessly ticketing speeders along a particular stretch of road, people won’t speed along that stretch because they won’t want to get caught; interior enforcement of our immigration laws will similarly deter people from entering or remaining unlawfully.103

Clement: The speeding analogy is inapt. For one thing, the proportionality point applies here as well. Speeding is far more dangerous to the public than crossing a border without inspection or overstaying a visa. As for deterrence, it is much easier for people to give up speeding along a defined stretch of highway than to give up the opportunity to work in the United States and return to a country where very few opportunities await them.

Stern: Every little bit helps. At any rate, a continuous fear of deportation is only part of the discomfort that I want to inflict on undocumented immigrants.

Clement: You’re starting to send chills up my spine.

Stern: I’m just getting warmed up. Rigorous interior enforcement is only half of it. The other half is making routine daily transactions increasingly difficult for people who are present unlawfully. This means getting serious about employer sanctions to make it hard for undocumented immigrants to find work; prohibiting public assistance for undocumented immigrants, with only very limited exceptions; cutting off access to education, possibly even at the elementary and secondary levels; denying them driver’s licenses and other state-issued identification documents; prohibiting banks from opening accounts for undocumented immigrants or giving them loans or credit cards; making them ineligible for income tax refunds; and prohibiting landlords from renting housing to them.104 These are some of the things that I believe would not only force undocumented immigrants to contemplate returning home, but also deter future illegal immigration.

103 This analogy is offered in Kobach, supra note 101, at 156.
104 See infra notes 142–152.
Clement: In other words, you ratchet up their fears of detection and make the lives of these people and their families so unbearable that they are willing to go back to the poverty that drove them here rather than withstand another minute of pain in the United States.

Stern: They don’t call me “Stern” for nothing.

Clement: I think “cruel” is more accurate, and in saying this I’m not merely passing moral judgment. From a purely legal standpoint, there are certain fundamental human rights that every person possesses. Surely you acknowledge that human rights don’t disappear simply because a person is not in lawful immigration status. If that were the case, governments could torture or kill or deny due process to undocumented immigrants.

Stern: Of course not. As I happily acknowledged when we discussed legalization, all persons possess certain inalienable human rights. But that gets you only so far. Do you really believe that every tourist, every foreign academic who came here to attend this conference, and every person who sneaks across the border at night thereby acquires a human right to work without permission, or to receive welfare or a state-subsidized college education or a driver’s license, or to open a bank account or obtain a loan? Those kinds of benefits generate the harder questions, and you can’t dispose of them simply by observing that every person possesses human rights.

Clement: I spoke too broadly. For the kinds of rights you’ve listed as examples, more than personhood is required. Even more than physical presence in our territory is required. For me, the key is that undocumented immigrants are residents.

Stern: Illegal residents.

Clement: Yes, they have broken a law. But they are still residents. Murderers, rapists, and other violent criminals who live in our communities are not denied these sorts of benefits. Doesn’t it seem incongruous to deny them to someone whose only transgression was entering without inspection or overstaying a visa?

Stern: I can’t deny that garden-variety immigration offenses are far less serious than the violent crimes you just mentioned. My view, however, is that it is the nature, not the severity, of immigration violations that makes them distinctive. The violators’ very presence in the country is unlawful. They are not even
supposed to be here. They shouldn’t profit from their wrongdoing and, therefore, should be treated as if they were still outside our doors. If they were, they wouldn’t receive the kinds of benefits we’ve been discussing.

Clement: That argument proves too much. Immigration violations aren’t unique in the way you’ve described. Common trespassers on private property similarly aren’t supposed to “be” there, but that doesn’t mean they lose all their rights as long as they remain on the property. Do you remember Katko v. Briney105 from your torts course? A burglar was allowed to recover money damages for the injury he suffered when shot by a spring gun that the property owner had set, even though the burglar was unlawfully present on the property.106

Stern: You’re talking about the right not to be shot at. The court didn’t award the burglar a college education and a driver’s license. I think you’re getting a bit carried away here, my friend.

Clement: My only point is that you can’t justify denying a particular right to a resident of our country simply by observing that the person has violated a law, even when, as I admit is the case here, that violation accounts for the person’s very presence in the territory. The scope of each of these rights has to be assessed on its own particular merits, not just by shouting the word “illegal.”

Stern: Just to be clear, then, you’re not suggesting that all “residents,” whether legally present or not, should be regarded as full members of the community?

Clement: No. As I acknowledged earlier, every sovereign state has the right to decide which foreign nationals may enter and remain in its territory and which may not.107 Therefore the unlawful nature of a person’s presence has to count for something. I recognize a hierarchy starting with personhood and progressing to

105 183 N.W.2d 657 (Iowa 1971).
106 Id. at 658, 662.
107 See supra notes 36–37 and accompanying text. One exception is the obligation not to return refugees to countries of persecution. See Convention Relating to the Status of Refugees art. 33(1), July 28, 1951, 189 U.N.T.S. 137 (“No Contracting State shall expel or return (‘refouler’) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.”).
physical presence, residence, lawful residence, and citizenship. Each of these spawns a different set of rights. Consequently, one could contrast any one of those sources of rights with the outlaw model to which you attach such overriding significance. My reason for fixating on residence is that some of the rights we’re discussing—for example, a state-subsidized college education or a driver’s license—are not owed to all humans. But my view is that they are owed to all residents who otherwise qualify. At the other end of the spectrum, I concede there are rights that countries should confine to those residents whom they have lawfully admitted, and still other rights that countries should further confine to their own citizens.

Stern: Can we agree, then, that neither illegality nor residence enables us to approve or disapprove this whole set of benefits for undocumented immigrants as a single package? We need to examine each benefit on its own merits.

Clement: I agree with that statement, but I also don’t want to lose sight of the forest for the trees. I still see generic problems with this whole concept of attrition by encouraging self-deportation. Aside from what we are and aren’t willing to classify as “rights,” there are huge practical problems. For one thing, suppose this kind of strategy were to “succeed” in suddenly driving a large percentage of the twelve million undocumented immigrants out of the country. Don’t you worry about disrupting the U.S. economy?

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Stern: That’s part of the beauty of this strategy. It will work gradually. As people begin to leave, wages and working conditions will improve and unemployed Americans will step in to fill the vacated jobs. There’s no sudden economic trauma.

Clement: And the social and other institutional costs? You’re taking vast numbers of ordinary federal, state, and local government employees—like health, welfare, and education personnel—as well as a whole array of private actors—like employers, landlords, and bank employees—and turning them into junior immigration agents whose jobs would be to investigate people’s immigration statuses, decide whether they are lawfully present, and in some cases report suspected violators to the federal authorities. The cost of the training alone, if done properly, would be prohibitive. The ongoing costs of their time and the paperwork would be even greater.

Stern: It’s a lot cheaper when people leave voluntarily than when we have to spend resources to apprehend, arrest, detain, prosecute, and physically deport them.

Clement: But neither of those alternatives is cheaper than a one-time legalization that allows them to get on with their lives and contribute to the economy.

Stern: Which I’m against, for all the reasons we discussed a moment ago.

Clement: I don’t want to get sidetracked, but an additional concern is that most of your suggestions for making life difficult for undocumented immigrants involve extensive state and local immigration policy making. Earlier, I expressed misgivings about heavy state and local policing of the immigration laws, but what you’re describing now entails even broader state and local regulation of undocumented immigrants in an endless range of daily transactions. This worries me.

Stern: I really don’t see why. Everyone knows that immigration affects the fifty states and their cities and towns. It obviously shapes the compositions of state and local populations and affects state and local taxes and expenditures, businesses, job markets, education, and health care. In short, it affects practically every

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110 See supra notes 33–34 and accompanying text.
activity in which states, municipalities, and their people engage. Why would you want to minimize their role?

Clement: Aside from the serious constitutional issues, which I’ll agree to put aside in this policy debate, there are important reasons for the strong constitutional preference for federal immigration control. From the moment the United States first passed real immigration legislation in 1875, all three branches of government—Congress, the Executive Branch, and the Judiciary, including the U.S. Supreme Court—whether controlled by Democrats, Republicans, liberals, conservatives, or anyone in between—whether in wartime or in peacetime—have been clear and consistent on one basic principle: when it comes to immigration, the nation must speak with a single voice. We cannot have fifty states and thousands of cities and towns all setting their own immigration policies and priorities.

Stern: Why not?

Clement: For one thing, we don’t deploy the Border Patrol along state lines. Once a person enters the United States, legally or illegally, as a practical matter there is nothing to prevent that person from moving from one state to another. If there are fifty different sets of state laws, or, even worse, if there are hundreds of

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113 See, e.g., Chy Lung v. Freeman, 92 U.S. 275, 280 (1875) (“The passage of laws which concern the admission of citizens and subjects of foreign nations to our shores . . . belongs solely to the national government.”); Henderson v. Mayor of New York, 92 U.S. 259, 273 (1875) (finding immigration laws “ought to be[ ] the subject of a uniform system or plan”).
different municipal laws that govern the treatment of immigrants on a variety of subjects, then each state and local law affects all the other states and municipalities.

Stern: That’s true of many policy areas. One town’s policies can affect whether people move there or stay there.

Clement: With immigration, the problems are exacerbated by federal laws that are complicated beyond belief. The current Immigration and Nationality Act is hundreds of pages long and still growing, and it’s supplemented by hundreds of pages of federal administrative agency regulations issued by the Department of Homeland Security, the Department of Justice, the Department of Labor, and the Department of State. More specifically, there are more immigration statuses than most people can count. A person can acquire U.S. citizenship in several different ways, and there are lots of cases in which it is very difficult to tell whether a person is a U.S. citizen, because either the facts or the laws are not clear. More importantly, even when it’s clear that a particular individual is not a U.S. citizen, there are countless subcategories. They range from permanent resident, to conditional permanent resident, to any of about twenty-two categories of temporary visitors (which are subdivided into some eighty-two subclasses), to refugees, to asylum applicants, to parolees, to a number of other miscellaneous statuses. Each of these groups is subject to different rules that govern how long the person is allowed to stay (which in many cases is determined by an event, such as remaining enrolled in a full-time study program, rather than by a fixed date) and the activities in which the person may engage.

Moreover—and this is crucial—each of these statuses is evidenced by a different document, which doesn’t describe all the

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116 See Robert A. Mautino, Acquisition of Citizenship, IMMIGR. BRIEFINGS, Apr. 1990 (analyzing difficult factual scenarios and problem of proof in acquiring citizenship).
conditions of the person’s stay. In addition, the document doesn’t reveal whether an application for an extension of stay is pending or whether removal proceedings are pending. And finally, even one who has mastered all these legal intricacies might well be unable to identify a false document.

So while it’s easy for a state legislature or a city or town council to pass a law that puts restrictions on individuals who are out of status, these laws create nightmares for the state and local officials and private citizens who have to apply them on the ground. These are not the kinds of judgments that employees of schools, universities, health care facilities, and Department of Motor Vehicles offices are equipped to make.

Stern: I think you’re getting a bit hysterical. Unlawful status is usually pretty obvious, and in a case where a person’s immigration status is in doubt, all the state or local officials or even private actors have to do is check with the federal immigration officials or link to an electronic federal database.

Clement: Good luck making contact with a live human, and good luck relying on the notoriously inaccurate federal databases. And even if you could, the point is that even the federal immigration officials can’t make these kinds of judgments without first holding a fair hearing that embodies the careful procedural safeguards built into the deportation process.

But the logistical problems are not the only reason that the nation has to speak with a single voice on immigration. These decisions can have major foreign policy consequences. Every immigration decision operates on the national of a foreign nation,
and foreign governments often take umbrage at what they perceive as actions directed at their citizens. No one state or municipality should be allowed to impose those consequences on the country as a whole.\textsuperscript{123} 

Stern: That is all well and good, but as I noted at the outset, federal policies on immigration affect people at the state and local levels, where taxpayers have to pick up the tab for education and emergency medical care.

Clement: \textit{All} federal policies affect individuals, municipalities, and states. Every time the federal government makes a decision involving military procurement, or foreign affairs, or patent and copyright laws, it affects the residents and the taxpayers of all the states. We accept this as the price for being part of a larger nation, because we recognize that there are a few specific areas in which it is more important for the nation to speak with a single voice than to adopt exactly the policies that each of us would personally prefer. Immigration has always been one of those areas.

Stern: The problem here is that the federal government simply isn’t doing its job. We have twelve million undocumented immigrants in this country, and if the federal government won’t solve the problem, the states, cities, and towns have no choice but to step in.

Clement: Whatever might have been the case in the past, a good deal of anger has been expressed in recent years about illegal immigration, and there can be no serious doubt that this anger has caught the attention of Congress and the President. As you have acknowledged—even emphasized—the federal government has dramatically stepped up enforcement in the past few years.\textsuperscript{124}

Stern: I agree, but even with this long overdue effort, we still have millions of undocumented immigrants present and many more coming.

Clement: That problem is not confined to immigration. No law—whether relating to speeding, driving under the influence, tax

\begin{footnotesize}
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\item See Chy Lung v. Freeman, 92 U.S. 275, 280 (1875) (“The passage of laws which concern the admission of citizens and subjects of foreign nations to our shores belongs to Congress, and not to the States . . . . If it were otherwise, a single State can, at her pleasure, embroil us in disastrous quarrels with other nations.”).
\item See supra notes 55–61 and accompanying text.
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fraud, or immigration—is capable of 100% enforcement. With finite tax revenues, the question in all cases is how high a priority enforcement is, and thus what level of resources is worth investing. We disagree as to what level of immigration enforcement is optimal, but the mere fact that the undocumented population is large doesn’t mean the federal government has “failed.”

Stern: Apart from the federalism issues and the personal hardships that I understand you find too great, will you at least admit that this “third way”—the combination of enhanced enforcement and disrupting undocumented immigrants’ everyday transactions—will greatly encourage self-deportation?

Clement: No. We’re talking about folks who left everything behind to come here, in many cases risked their lives to do so, have willingly lived with constant fear rather than return home, and have put up with exploitative employers and a host of other vulnerabilities. Through it all, they have stayed. Many have been here a long time, have jobs, go to school, own homes and businesses, have American spouses and American children, and feel very little emotional attachment to their countries of origin. The conditions in their countries of origin are abysmal. The average wages in the United States are about nine times those in Mexico, where 50% of the rural population (from which most of the undocumented immigrants come) live in poverty and 25% of the population are malnourished. The level of misery one would have to inflict on this already battered population in order to persuade them to abandon their homes here is so extreme that no morally or politically acceptable set of sanctions will ever be able to achieve that result as long as world conditions remain fundamentally unchanged.

Stern: On that point, you’re clearly wrong. According to a recent study by a nonpartisan research organization, the enhanced enforcement of the past year or so has already spurred a significant decline in the undocumented population. If the trend were to

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126 Smith, *supra* note 10, at 749 n.4 (citations omitted).

127 See Steven A. Camarota & Karen Jensenius, *Homeward Bound: Recent Immigration*
continue, the attrition strategy alone has the potential to cut the undocumented population in half within five years.\textsuperscript{128}

Clement: You’re referring to the recent paper published by the Center for Immigration Studies (CIS)—which I would note might be “nonpartisan” but is hardly a neutral source. CIS is an anti-immigration lobbying organization, and the “study” you’re referring to might more aptly be called an advocacy paper. CIS might be correct that the undocumented population has declined,\textsuperscript{129} but it does not offer one iota of evidence that “attrition by enforcement” has been a significant cause. One obvious reason for the drop has been the downturn in the U.S. economy—particularly the increase in the unemployment rate. Since people come to the U.S. for jobs, it’s not surprising that migration flows would respond to changes in the labor market.

Stern: You’re not giving CIS enough credit. Its study acknowledges that the economic downturn might be playing a significant role, but offers several reasons to believe that the sharply increased enforcement efforts are also largely responsible. For one thing, the decline in the undocumented population started before the unemployment rates in the relevant sectors of the economy began rising.\textsuperscript{130} So you can’t casually dismiss this as the product of increased unemployment.

Clement: CIS has its facts wrong. Since it had no hard data on the unemployment rates among undocumented immigrants, it used


\textsuperscript{128} Id. at 1.

\textsuperscript{129} It is not clear whether the undocumented population has actually shrunk, but a more recent study from an ideologically neutral research center confirms that, at the very least, the growth rate has slowed from an average net annual growth of 525,000 during the 2000–2005 period to an average annual growth of 275,000 during the 2005–2008 period. Passel & Cohn, supra note 5, at 2. \textit{See also Pew Hispanic Ctr., Indicators of Recent Migration Flows from Mexico 1 (2007), available at} http://pewhispanic.org/files/factsheets/33.pdf (“Overall migration flows to the U.S. . . . fell off by more than a quarter following the 2001 recession and the slow recovery of the U.S. labor market.”). A macabre new twist that appears to be spurring renewed illegal immigration and slowing return migration is the spate of kidnappings for ransom of Mexicans who have family members in the United States. \textit{See} Sam Dillon, Kidnappings, Long Feared in Mexico, Send Shivers Across Border, \textit{N.Y. Times}, Jan. 5, 2009, at A1.

\textsuperscript{130} Camarota & Jensenius, supra note 127, at 4 fig.2.
the rates for what it regarded as a close proxy—foreign-born Hispanics between ages eighteen and forty, living in the United States, who have a high school diploma or less. That proxy, however, is inadequate for present purposes. In the particular industries in which undocumented immigrants are most frequently employed, unemployment rates began rising several months before the undocumented immigrant population started to decline.

Besides, the logic of the argument is internally contradictory. At one point, the CIS report repeats the familiar refrain that even introducing a legalization bill is harmful because the mere possibility of enactment attracts additional undocumented immigrants hopeful of qualifying. To further prove its point, it says that, once it becomes fairly clear that a legalization bill will not pass, the immigrants tend to leave. I assume there’s some truth to this. It would seem only natural for people who think they might qualify for an imminent legalization to come to the United States and then to leave once that hope has been extinguished. The point is that CIS offers this observation only as an argument against legalization. Tellingly, they seem not to notice how much this same observation undercuts their argument that enhanced enforcement has caused the drop in the undocumented population.

Stern: I’m not following.

Clement: Well, CIS claims the undocumented population started to decline around the end of summer 2007. This is a crucial point for them, because they say the rise in the unemployment rates didn’t begin until several months later, in January 2008, and therefore could not have been the main cause of the population decline. But by the end of summer 2007, it had become clear that

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131 Id. at 3.
133 Camarota & Jensenius, supra note 127, at 8.
134 See id. (linking failure of legalization bill to decrease in less-educated Hispanic population).
135 See id. at 3 (noting decline beginning in August 2007).
136 See id. at 4 fig.2 (comparing number of immigrants to unemployment rate).
legalization had very little chance of passing in the foreseeable future.\textsuperscript{137} So by CIS’s own logic, whatever decline in the undocumented population occurred between the end of summer 2007 and January 2008 might very well have been largely attributable to the failure of legalization legislation—not to enhanced enforcement. Of course, the rise in the relevant unemployment rates had also begun well before the undocumented population started dropping and was most likely an additional cause.\textsuperscript{138} Either way, there remains no evidence and no logical argument to support the claimed causal connection between greater enforcement and an exodus of undocumented immigrants from the United States.

Stern: CIS offered other evidence of the connection between enforcement and a reduction in the undocumented population, however. They noted that only the undocumented population, not the legal immigrant population, declined during this period.\textsuperscript{139} How do you account for that if enforcement had nothing to do with it?

Clement: Noncitizens who have been lawfully admitted for permanent residence in the United States would be giving up a lot more in returning to their countries of origin than undocumented immigrants would. Obviously the former are going to think twice before abandoning their valuable rights to permanent residence because of a temporary economic downturn. So, of course they are less likely to leave. That contrast tells us nothing.

Stern: All right, you make some fair points about the defects in the CIS methodology. Still, the most you can say is that a causal link between enforcement and the recent decline in the undocumented population has not been conclusively demonstrated. There is similarly no basis for the opposite conclusion that no significant causal connection exists. All we can say is that maybe it does and maybe it doesn’t. Since we don’t know, why don’t we at least try tougher enforcement? The coming years should give us a clearer indication. If enforcement continues and even expands, and if the economy starts to improve but the undocumented population

\textsuperscript{137} Id. at 8.
\textsuperscript{138} See supra note 132 and accompanying text.
\textsuperscript{139} Camarota & Jensenius, supra note 127, at 4.
keeps falling, the benefits of the attrition strategy will be clearer. So why rush legalization? Let’s wait for the verdict on attrition. If it doesn’t work, then come back later, and I’ll reconsider my views on legalization.

Clement: The costs of the attrition strategy are too great. Too many people are hurt, and the waste of the finite resources of government, industry, and everyone else who is called upon to contribute to the enforcement effort is prodigious. If I thought there were some serious chance that attrition by enforcement worked, I might be more willing to accept some of those human and material costs, at least in the short term. But since there is no evidence that attrition works and overwhelming reason to believe it doesn’t, since there is clear evidence that the human and fiscal costs are huge, and since the “harms” that illegal immigration is assumed to generate are shaky enough to raise proportionality problems, I don’t agree that it’s worth even an experiment.

Stern: Maybe our discussion has been too abstract. I think we can put all this in sharper focus by discussing at least one concrete component of the self-deportation strategy. We could select any of a number of specific issues—employer sanctions; labor law enforcement; public assistance; health care; drivers’

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140 See supra Part II.B.
141 See infra Part III.B.


E.g., Lipman, supra note 125, at 4–5 (discussing filing of tax returns among undocumented immigrants); Vaughan, supra note 102, at 6–8 (discussing Internal Revenue Service issuance of Individual Tax Identification Numbers to noncitizen residents).

E.g., Alcorn, supra note 60, at 289–90 (discussing ordinances prohibiting landlords from renting to undocumented immigrants).

E.g., Jagdeep S. Bhandari, Strange Visions of Alien Shadows, 13 Sw. J. L. & Trade Am. 63, 66 (2006) (stating undocumented immigrants are less likely to file tort suits than lawful residents); Bosniak, supra note 10, at 978 (discussing undocumented immigrants’ standing to sue).

E.g., David B. Thronson, Of Borders and Best Interests: Examining the Experiences of Undocumented Immigrants in U.S. Family Courts, 11 Tex. HISP. J.L. & Pol’y 45, 48 (2005) (examining impact immigration status can have on family law determinations).

“third way” strategy for reducing the undocumented population by attrition, and the arguments for and against it are a microcosm of that larger debate.

Clement: I agree with everything you just said. Let’s talk about education.

Stern: Consistent with my view that we should not reward immigration violators by giving them taxpayer-funded benefits, I don’t see why they should receive free or government-subsidized educations.

Clement: Even elementary or secondary education?

Stern: As a policy matter, I don’t believe undocumented children should receive even elementary or secondary education at public expense. I won’t press that point, because in *Plyler v. Doe*, the Supreme Court constitutionalized the right of undocumented children to a free public education through high school. At the very least, however, undocumented students should be barred from state colleges and universities, and they certainly shouldn’t qualify for the subsidized tuition rates available to in-state residents.

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154 At this writing, ten states charge their undocumented residents the lower in-state resident tuition at post-secondary educational institutions. See *South Carolina Illegal Immigration Reform Act*, § 17, 2006 S.C. ACTS 280 (2008) (codified at S.C. CODE Ann. § 59-101-430(A)) (“An alien unlawfully present in the United States is not eligible to attend a public institution of higher learning in this State . . . .”).

Clement: Why is this such a problem for you?

Stern: First of all, like most taxpayers, I resent having to subsidize the college educations of trespassers, which is precisely what these undocumented immigrants are.

Clement: That argument has two premises. The unstated premise is that taxpayers and undocumented immigrants are two distinct, non-overlapping groups. The more explicit premise is that the prospective college students whom you would classify as out-of-state residents are trespassers.

The first premise is plainly false. Undocumented immigrants are subject to exactly the same federal and state income tax obligations as lawfully present residents, and in some respects they are actually taxed at higher rates because of their ineligibility for certain deductions available to citizens and lawful permanent residents. They also pay the same sales taxes, gasoline taxes, property taxes (indirectly through their landlords if they rent), and federal social security taxes—the latter even though they are ineligible to receive the retirement benefits that those contributions fund.

Stern: You're assuming they pay the taxes they owe. Many undocumented residents, particularly some of those who work for small businesses or for homeowners, receive their salaries under the table and thereby avoid having to pay income and social security taxes altogether.

Clement: Actually, a majority of undocumented workers pay their income taxes. Conversely, not all authorized workers pay their taxes. At any rate, neither documented nor undocumented workers can easily avoid their other tax liabilities.

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arguing yes); Kris W. Kobach, Immigration Nullification: In-State Tuition and Lawmakers Who Disregard the Law, 10 N.Y.U. J. LEGIS. & PUB. POL’Y 473, 475 (2007) (arguing no). Various versions of the so-called “DREAM Act,” which would explicitly permit states to charge in-state tuition for undocumented immigrants attending post-secondary public educational institutions while simultaneously providing a path for eventual permanent resident status, have also been introduced in Congress, but they have not yet passed. See Olivas, supra, at 112–13 (discussing DREAM Act).

156 Lipman, supra note 125, at 7.


159 See infra notes 244–253 and accompanying text.
Stern: Even if undocumented workers were to pay the income taxes they owe, they tend to be lower-wage workers, so they are unlikely to contribute as much per capita tax revenue as their lawfully present counterparts.

Clement: I'll assume that is true, but one of the rationales for state-subsidized higher education in the first place is to make it accessible to families who could not otherwise afford it. The argument that the low income of one’s parents should be a reason not to offer state-subsidized education would turn this principle on its head. No one would argue that low-income U.S. citizen students should be denied in-state resident tuition rates because their tax contributions are small.

Stern: I accept that principle when the beneficiaries are our own citizens and other lawful residents, but I don’t accept a responsibility to fund the educations of those who are here in violation of our laws.

Clement: In effect, then, you’re forcing undocumented students and their families to doubly subsidize the rest of us. They help fund these institutions not only through their tax dollars, but also through their much higher tuition charges that enable all the other resident students to receive their college educations below cost. That fact alone wipes out this whole notion that “we” are somehow supporting “them.”

Stern: All right, I'll recede on the taxpayer subsidy point. The bottom line, however, holds true: undocumented immigrants are still trespassers and, for that reason alone, should be denied in-state resident tuition whether their parents pay taxes or not.

Clement: It is impossible to ascribe any kind of moral culpability to those who were brought here as children. You can as easily question the morality of someone who was kidnapped and forcibly trafficked into the United States. I can only imagine what you think these children should have said to their parents when told that the family was about to move to the United States:

\[160\] See Lipman, supra note 125, at 17 (“Almost sixty-six percent of unauthorized workers earn less than twice the minimum wage and are categorized as low-wage workers.” (footnote omitted)).
I know I'm only four years old, but I have carefully researched the U.S. immigration laws and have discovered that under 8 U.S.C. § 1182(a)(6)(A)(i), it is not permissible to enter the United States other than at a designated port of entry. I would very much like to accompany you, but it would be wrong. So I have decided to stay behind. Don’t worry, though. I'm old enough to take care of myself.

Stern: Not all children who accompanied their parents to the United States were four years old at the time.

Clement: As the age of the child at the time of entry increases, the weight my last point carries diminishes correspondingly. Even during their teenage years, however, when a child is more likely to understand that surreptitious entry violates U.S. law, I would suggest it is a rare adolescent who would separate from his or her family and refuse to come with them. Before you condemn the child for failing to make that choice, you might ask yourself whether you would have acted any differently under similar circumstances. The free will of the child at the time of entry simply cannot be assumed.

Stern: Fair enough. But now these children have grown up. They are adults who are old enough to start college. Morally innocent as they might have been when they first arrived, they now understand that their continued presence is unlawful, they are old enough to get jobs and support themselves, and they could return to their home countries if they wished. Yet they don’t. They have made the conscious decision to extend their unlawful residence in the United States. They can no longer be defended as innocent victims.

Clement: That argument has some theoretical appeal, but it ignores too many human realities. A person who has spent his or her formative years in the United States, whose family and friends are here, and who is in every sense a product of American culture cannot be expected to pack up at age eighteen and move, *permanently and alone*, to an unfamiliar land in which the economic, educational, and other life opportunities are likely to be bleak.

Stern: That’s precisely how billions of the world’s people live out their daily lives. The only thing that distinguishes undocumented
immigrants is that they have illegally come to the United States. Why should their illegal actions entitle them to better treatment than their compatriots who refrained from violating our laws and stayed where they were?

Clement: The fact that worldwide poverty causes billions of people to live in dire conditions is tragic. It is still different, in kind as well as degree, to expect a young adult who has been raised in the United States to agree to be thrust, suddenly and alone, into a strange environment in which his or her life opportunities are drastically curtailed. One should think long and hard before assigning moral culpability to a person for declining that option.

But suppose it were otherwise. Assume, contrary to reality, that the young people in question had committed serious moral transgressions when they overstayed their visas or allowed their parents to bring them here. How exactly does that translate into a reason to deny them the tuition rates that the state charges its other residents?

Stern: It translates for two reasons. First, their wrongful conduct—and despite what you’ve said, I still consider it wrongful for college-age adults to remain here when they know that the law forbids it—diminishes their equities. We shouldn’t reward wrongdoers with a subsidized college education.

Clement: Surely that argument proves too much. Should the thousands of people who exceed the posted speed limit when they drive—a far more dangerous violation than overstaying a visa, one would think, and a criminal offense to boot—be punished with the denial of in-state tuition rates for their children? Even for murderers, rapists, and other violent criminals, criminal punishments do not include denying their children in-state-resident tuition status.

Stern: That argument returns us to our earlier discussion, and it leads into my second reason for translating their wrongful conduct into ineligibility for in-state-resident tuition: unlike the other violators you mentioned, undocumented immigrants are not real state residents because they are not supposed to be here.
Clement: But they are here. More important, most of them have been here for a long time, and perhaps more important still, they intend to remain here. Like any other residents, they might one day change their minds and leave the state. A small minority of them might even be apprehended one day and removed involuntarily. They are still residents of the state, in every theoretical and practical sense. The well-settled understanding of residence is simply the act “of living in a given place for some time.”

Undocumented inhabitants of a state fit that understanding as well as any other state residents do. They work, study, attend religious services, play sports, participate in community activities, and socialize. They might be recent arrivals or they might have lived in the state for many years—just as is true of their documented neighbors. They might have future plans to leave, or they might intend to remain for the long haul—just like their documented neighbors. Nor, I might add, do states seem troubled by treating them as “real” residents for tax purposes.

Stern: I don’t agree they’re “real” residents, but even if they were, your argument essentially calls for doing more than treating them the same as “other” residents. You’re giving them preferential treatment over U.S. citizens.

Clement: Come again?

Stern: If a U.S. citizen from one state wants to attend a public college in another state, the citizen student will be charged the higher nonresident tuition rate. Yet you argue that the undocumented student should pay the lower rate. Federal law recognizes that anomaly would be grossly unfair. How can you possibly justify it?

Clement: Your logic is—how shall I put this?—non-Euclidean. No state does, or would even contemplate doing, anything of the sort. Citizens are not selectively disadvantaged; they are simply not receiving in-state-tuition benefits as a positive reward for their citizenship. Citizens who live in the state receive in-state-resident

\[161\textit{See infra}\textit{ notes 237–239 and accompanying text.}\]
\[162\textit{BLACK’S LAW DICTIONARY} 1423 (9th ed. 2009).\]
status, and so should undocumented residents of the state. Citizens who live in other states are treated as nonresident students, as they should be, and so are undocumented students who live in other states. No U.S. citizen student is being treated less favorably than an otherwise similarly situated undocumented student. A state that does not single out its undocumented residents for special adverse tuition rates is simply choosing to base its tuition policies on residence in the state rather than on U.S. citizenship.

Such a decision is perfectly rational. State residents pay the bulk of the taxes that support these institutions. As I pointed out earlier, undocumented residents are among those taxpayers. U.S. citizens who live in other states are not. Moreover, there is nothing irrational about allocating finite state revenues to those who live in the state and participate in their local communities. Those who live in other states—whether they’re U.S. citizens or not—act out their daily lives in their own communities.

Stern: Even if you think that all you’re doing is treating citizens and undocumented immigrants equally, isn’t that still offensive? Shouldn’t citizenship count for something?

Clement: It already counts for plenty. Citizens are free from immigration control; they may come and go whenever they like and may remain for as long as they wish.¹⁶⁴ They have broader rights to petition for the admission of their family members than do even lawfully admitted permanent resident noncitizens,¹⁶⁵ and undocumented immigrants have no analogous rights to bring in their families at all. Citizens are favored over even lawful permanent residents with respect to various professional licenses, government employment, public benefits, property ownership, and political participation.¹⁶⁶

But not every legal right can, or should, be conditioned on U.S. citizenship. Federal law incorporates this principle in its creation

¹⁶⁴ See id. §§ 1182(a), 1227(a) (rendering only “aliens,” not citizens, inadmissible and deportable, respectively).
¹⁶⁵ See id. § 1151(b)(2)(A)(ii) (exempting “immediate relatives” of citizens from numerical limitations on immigration); id. § 1153(a) (awarding preference to certain family members of lawful permanent residents but imposing numerical limits).
¹⁶⁶ See Legomsky & Rodríguez, supra note 118, at 1374–75 (discussing advantages of citizenship).
of constitutional rights to elementary and secondary education, as in *Plyler*,\(^{167}\) or a statutory right to emergency medical care.\(^{168}\) The right not to be tortured\(^{169}\) does not contain an exception for the undocumented, and no one today could responsibly argue for such an exception in order to avoid putting undocumented immigrants on a par with citizens. Some rights are enjoyed only by citizens, some by citizens and other lawful residents, some by all residents, and some by all who are physically present. Reasonable minds can disagree over where these various boundaries should be drawn, but simply observing that not *all* rights are linked to citizenship does not establish injustice.

Stern: Then forget about the comparison to citizens. Let’s compare undocumented immigrants to other noncitizens who attend college lawfully in the United States after obtaining student visas. How can you justify charging the latter the higher nonresident tuition rates while letting undocumented students pay the lower amounts? You’re essentially offering a financial reward for breaking the law.\(^{170}\)

Clement: The only undocumented immigrants whom I favor classifying as in-state residents are those who have actually been living in the state. The noncitizens who apply from abroad for student visas are obeying the law, and that is admirable, but they are still charged the state’s nonresident tuition rates for one obvious reason: they aren’t residents of the state. The people I’m talking about are residents. And as I just explained, it’s perfectly rational for a state to treat its own residents more favorably than the residents of other jurisdictions, whether the latter are U.S. citizens from other states or noncitizens coming from overseas.


\(^{169}\) See *Foreign Affairs Reform and Restructuring Act of 1998*, Pub. L. No. 105-277 § 2242, 112 Stat. 2681 (codified at 8 U.S.C. § 1231) (stating U.S. policy is not to “expel, extradite, or otherwise effect the involuntary return of any person to a country in which there are institutional grounds for believing the person would be in danger of being subjected to torture”).

\(^{170}\) See, *e.g.*, Kobach, *supra* note 155, at 500 (arguing such situation creates perverse incentive structure).
Stern: It’s also rational for a state to treat law-abiding individuals more favorably than violators.

Clement: You’re taking a needlessly dichotomous approach to the whole question of community membership. It’s not as if everyone who is lawfully present has to have full membership privileges in the community, while everyone who is unlawfully present has to have no membership privileges at all. I much prefer a continuum model, in which membership is a matter of degree, and the eligibility of a given class of individuals for a given public good reflects a targeted consideration of all the relevant variables—the importance of the good to the individual, the positive and negative effects on the larger society, and so on. I am ready to factor in any negative effects that might result from including immigration violators in some of the benefits that other state residents receive, but in the case of college education I find any negatives outweighed by the benefits for both the affected students and the public. You and I might balance the competing factors differently, but you can’t just ignore them.

Stern: Keep in mind that I’m not advocating denying undocumented immigrants a college education. They remain free to go to a private college without taxpayer subsidies, attend a state college at the same tuition rate charged to nonresidents, or return to their home countries for college.

Clement: For many, if not most, undocumented immigrants, all those options are unrealistic. The admonition to go “home” for college ignores the reality that the United States is home and that the country of birth is not. It also ignores the difficulty, if not the impossibility, of financing their educations overseas. The options to attend either state college at nonresident tuition rates or private college are theoretically open, and in some cases practically open as well. But at state colleges, the nonresident tuition is typically between two and three-and-a-half times as much as the resident tuition.\textsuperscript{171} Furthermore, undocumented families have well below

average incomes,\textsuperscript{172} and undocumented students are ineligible for federal and state financial aid, including loans.\textsuperscript{173} Unless one’s family is wealthy, therefore, all of those alternatives are foreclosed.

It’s a terrible waste. About 65,000 undocumented students graduate from America’s high schools each year.\textsuperscript{174} As one commentator has noted, “[t]hey are honor roll students, athletes, class presidents, valedictorians, and aspiring teachers, engineers, and doctors.”\textsuperscript{175} They work hard, and they dream of continuing their educations in the same way as their classmates. Yet, largely because of the combination of financial hurdles, only 5% to 10% of all undocumented high school graduates are able to go to college.\textsuperscript{176}

Stern: Once again, while I harbor no ill will toward these students, their very presence violates the immigration laws, and the fact that they will not receive a government-subsidized college education simply doesn’t move me. I care more about the interests of the larger society.

Clement: Society’s interests coincide with those of the students. When a bright, talented student who studies hard and prepares for college is excluded because of finances, we are all denied the social and economic contributions that a college education would have enabled that student to make. Higher education will become increasingly important in tomorrow’s economy. Of the fifteen occupations projected to grow at twice the national average, nine require at least an associate’s degree.\textsuperscript{177} Moreover, these students tend to be bilingual—another critical attribute in our increasingly global economy. Furthermore, raising college graduation rates ultimately reduces public expenditures on health and welfare and increases workers’ tax contributions.\textsuperscript{178}

\textsuperscript{172} See Lipman, supra note 125, at 16 (”[U]ndocumented immigrant families are many times more likely to have family incomes below the poverty level.” (footnote omitted)).


\textsuperscript{175} Gonzales, supra note 174, at 2.

\textsuperscript{176} Id. at 1.

\textsuperscript{177} Id. at 6.

\textsuperscript{178} Id. at 5 (citing 1999 RAND study).
Stern: You’re assuming they’ll still be here when they’re ready to enter the workforce. Remember, these individuals are undocumented. There’s no assurance they’ll continue to evade apprehension. Even if they do, they can’t legally work. Nor will they easily find illegal employment that utilizes their college educations, since employers who hire college graduates are especially unlikely to hire unauthorized workers.179

Clement: And you’re assuming once undocumented, always undocumented. As the Supreme Court said in Plyler, “the illegal alien of today may well be the legal alien of tomorrow.”180 Congress could enact legalization as part of a comprehensive package of immigration reform, or it could at least pass the DREAM Act.181 Or a person might individually regularize his or her status through marriage, employment, or discretionary relief from removal.182

Stern: All of this is highly speculative.

Clement: Perhaps so, but we can safely assume that some percentage of the affected students—most likely a very high percentage, since as you have acknowledged there is no realistic possibility of apprehending and deporting more than a small fraction of them—will remain here indefinitely. Whether or not you approve of their presence, it’s still better to have these individuals in school, educated and productive, than on the streets, uneducated and idle.

Stern: The latter is not the only alternative. Denying in-state tuition is just one more way to encourage self-deportation. The specter of uneducated young people loitering on the street won’t occur if in the end these individuals aren’t here.

179 See Kobach, supra note 155, at 503 (noting undocumented college graduates have been unable to secure high-paying jobs).


181 See supra note 155 and accompanying text.

Clement: This is a reckless, high-stakes gamble. If the individuals in question are kept out of college and still don’t leave the country, then we have a recipe for needlessly diminished productivity and perhaps even social unrest. It’s also very likely a losing gamble. These individuals and their families simply won’t leave. People are coming for jobs, not for education.

Stern: True enough, one can assume, but even when employment is the attraction, it doesn’t follow that people would still come or remain if they knew that doing so would prevent their children from receiving adequate educational opportunities.

Clement: In the case of post-secondary education, the deterrent effect of relegating the children of prospective undocumented immigrants to nonresident tuition status, perhaps several years down the road, seems highly unlikely to offset the vastly enhanced economic opportunities that immigration is expected to bring—especially given the uncertainty as to whether college education would have been financially possible anyway in the country of origin.

Stern: You can’t assess the deterrent effect of this one strategy in isolation. It’s just one in a bundle of deterrents that together will tip the balance in favor of leaving the United States, or at least the state.

Clement: In reality, it seems difficult to predict that, even in combination, these strategies will have a more powerful influence on potential immigrants than the dramatic differences between the economic opportunities available here and those available in the major source countries of illegal immigration. As it is, most of these deterrents have been in place for many years. Formidable as they are, they have not had their desired effect. I will not make the tenuous argument that during the time these policies have been in effect illegal immigration has only increased. I recognize that linking cause and effect is difficult given the myriad of factors. Admittedly, we don’t know whether the numbers would have been greater without these policies. But it is clear that millions of people have voted with their feet. At least for these millions, the attractions of coming have outweighed the deterrents. One can only speculate, but if the current staggering array of existing deterrents
has been inadequate, there seems little reason to expect the proposed new ones to add more than marginally to the mix.

Stern: Your argument is self-contradictory. On the one hand, you contend that my proposals would do terrible harm to undocumented students. Now you’re claiming that these measures are too tame to add much additional deterrence. Which is it?

Clement: I will concede an irony but not a contradiction. The adverse effects of making college a practical impossibility for talented, diligent, aspiring, and morally innocent undocumented children are powerful, permanent, and devastating. But they still will not deter their parents from coming to the United States, illegally if necessary, because their parents have concluded that the alternatives—sadly—are worse still. I repeat what I said earlier: the level of misery one would have to inflict on undocumented immigrants to tip the balance is so extreme that no morally or politically acceptable set of sanctions will ever be able to achieve that result as long as world conditions remain fundamentally unchanged. Nor, in my view, can the United States tolerate the creation of a permanent caste of undereducated immigrants whose diminished life opportunities are the product of U.S. law rather than personal culpability.

Stern: To sum up, then, you’re against enhanced immigration enforcement. You’re for legalization, which you have admitted won’t stem future illegal immigration, and which I think will affirmatively encourage it. And you’re against the “third way”—encouraging self-deportation to achieve attrition. It sounds as if you’re against every program for controlling and reducing illegal immigration. Do we just open our borders and let anyone who wants to move to the United States do so?

Clement: There are philosophically plausible arguments, as well as utilitarian arguments, for open borders,\(^{183}\) and an open borders

advocate might well believe that undocumented immigrants should be treated just as favorably as those whose presence is lawful. (I say “might” rather than “necessarily would” because even an open borders advocate might subordinate his or her preference for open borders to respect for the law, so as to recognize a moral obligation to respect even laws with which one disagrees.) But for the purposes of our present discussion, I take the existing world order as a given: sovereign states, defined by national borders and national citizenships, and a concomitant national right—subject to some international legal constraints—to control the admission and stay of noncitizens. I’m not dismissing open borders; it’s just too large an issue to take up here.

Stern: If you’re not arguing for open borders, then what exactly should we do about illegal immigration?

Clement: I too favor a “third way.” It consists of multiple elements. Border enforcement is a practical necessity, though it’s true that I’m not in favor of further expanding our already bloated border presence. We also haven’t discussed employer sanctions. I believe we are within our rights to prohibit employers from hiring unauthorized workers, even requiring employers to verify the identification and work authorization of the people they hire.\(^{184}\) I will even endorse E-Verify, the government’s electronic database of authorized workers, if the government is willing to invest the resources necessary to make it reliable.\(^{185}\) I also support foreign economic aid to stimulate development in source countries and reduce the need for folks to work here illegally. Since one of the current incentives for hiring unauthorized workers is employers’ opportunity for exploitation, I favor more rigorous enforcement of our labor laws. Additionally, I believe that more immigration would be healthy and that we should particularly expand some of the legal programs for the admission of both permanent residents and temporary workers to further diminish the incentive for illegal immigration.

Stern: Can you be more specific on that last point?


\(^{185}\) See supra note 121 and accompanying text.
Clement: We should liberalize the criteria for family-related immigration and probably for labor-related immigration as well—and not just for humanitarian reasons. Doing so will reduce—admittedly not eliminate—the need for illegal immigration. Here’s just one example: if you are lawfully admitted to the United States as a permanent resident, and you then marry another noncitizen or have a child born abroad who is a noncitizen—both common occurrences—our laws allow you to petition for the admission of your new spouse or child,\(^{186}\) as they should. There’s just one catch. As a result of the annual numerical limits that the same law imposes on the admission of these family members,\(^{187}\) the waiting period is now almost five years (and more than seven if the spouse or children are from Mexico).\(^{188}\) As a humanitarian matter alone, I find it unconscionable to separate newlyweds for the first several years of their marriage, or to separate parents from their newborn children for the first several years of the children’s lives. And remember, I’m now talking about people who have played by the rules. They’ve waited patiently in the queue, have been lawfully admitted as permanent residents, and now they’re told that a condition of staying is to separate from their future spouses or future newborn children for as long as the first seven years of their relationships.

Stern: I hadn’t considered that, and I agree that so long a separation is needlessly hard. But what does that have to do with illegal immigration?

Clement: These long separations practically beg people to enter or remain illegally. Human nature will have to be remade before spouses willingly separate from one another, or parents willingly separate from their children, for so long. Eliminating the statutory ceilings for this one group of people, just as we do for the spouses and young children of U.S. citizens,\(^{189}\) would make illegal


\(^{187}\) See id. (providing for calculation of number of visas).


immigration unnecessary for a significant chunk of the undocumented population. 190

E. THE PATTERNS

Moderator: This seems like a good place for me to jump in. You’ve debated a range of illegal immigration issues, and I couldn’t help but notice two clear patterns in your arguments.

This first pattern registered the most forcefully at the start, when you debated the impact of illegal immigration and the impact of U.S. responses. Professor Clement continually focused on the hardship that anti-illegal-immigration strategies impose on the individual undocumented immigrant or his or her family. He stressed, for example, that longer fences subject border-crossers to higher risks of death; home raids traumatize families; ordinary entrants without inspection are often criminally incarcerated before being removed; young people are barred from college; and undocumented workers are denied drivers’ licenses. Professor Stern was much more inclined toward what I’ll call “aggregation,” or emphasizing the collective impact of the entire undocumented population on the host society. He believes illegal immigration has adverse fiscal effects; collectively depresses market wages; adds to population growth; strains school budgets; raises crime rates; and so on.

This pattern is not unique to the two of you; “hardliners” typically invoke the collective impact of illegal immigration on society and argue it is adverse, 191 while those who favor more lenient policies


typically invoke the impact on the individual undocumented immigrant and his or her family (in addition to questioning the adverse collective effects on factual grounds, as Professor Clement did).

Stern: I think you’re on to something, but the distinction between individual and societal impact is not so clear-cut. Any impact that the twelve million undocumented immigrants have on the host society is ultimately experienced by individuals—whether through higher tax burdens, loss of jobs, lower wages, or any other effects.

Moderator: I take your point, but I mean to distinguish Professor Clement’s emphasis on the interests of the individual undocumented immigrants themselves from your emphasis on the interests of the native population.

I also appreciate that the contrasting emphases on individual impact and collective impact don’t always conflict. Professor Clement, for example, believes that legalization would benefit not only the individual recipients but also the rest of society, and that preventing undocumented students from attending college harms not only the undocumented immigrant but also, ultimately, society itself. Generally, however, the pattern that I’ve identified seems to hold.

See supra note 16 and accompanying text.

See supra notes 177–178 and accompanying text.
Clement: I wonder why we place these contrasting emphases on group impact and individual impact.

Moderator: I have a theory on that as well. Let me test it. Professor Stern, when you hear the phrase “illegal immigration,” what mental image first comes to mind?

Stern: I picture a large group of people streaming across the border, and I picture them working in a large field or factory under terrible conditions. I also picture them as Mexicans, mainly because the majority of undocumented immigrants are from Mexico. 195

Clement: I picture a young, hard-working Mexican man living in the shadows, in fear of apprehension. I say “man” because a majority of undocumented immigrants are males. 196 And I must admit I picture a Mexican, probably because, as Professor Stern has said, a majority of this population is Mexican.

Moderator: All right, but for present purposes the key point is that Professor Clement is visualizing individuals and Professor Stern is visualizing a large group—a second component of aggregation. I suspect this too is a common pattern, but that part of my theory is merely hypothesis. To find out whether those mental associations typify advocates on the various sides of this debate, we would need to test a sample larger and more representative than the two of you.

Stern: I hope you're not using the term aggregation pejoratively. Responsible policy makers take into account the impact a proposed policy will have on the general public.

Clement: Those same responsible policy makers also have to consider the specific impact of their decisions on the targeted individuals.

Moderator: Your two perspectives jointly require policy makers to consider both kinds of consequences and, to the extent they conflict, balance them. But I want to suggest a second pattern, one which was most evident in your debates over policy responses. The language of the competing opinions in Plyler v. Doe epitomizes this

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195 As of March 2008, Mexicans accounted for 59% of the undocumented population. Passel & Cohn, supra note 5, at 4.

196 Fifty-eight percent of undocumented adults are men. Passel, supra note 49, at 7.
latter pattern.  The majority opinion, recognizing the right of undocumented students to elementary and secondary education, said that “undocumented children are ‘basically indistinguishable’ from legally resident alien children.” The dissent, rejecting such a right, said that “the dispositive issue . . . is whether . . . a state has a legitimate reason to differentiate between persons who are lawfully within the state and those who are unlawfully there.” The two of you captured the debate more succinctly: “They’re illegal!” “But they live here!”

In all your exchanges over the various policy responses, that would be the most consistent common thread. By definition, of course, undocumented immigrants are both lawbreakers and residents. But your arguments place differing degrees of emphasis on those two attributes. No matter which anti-illegal-immigration strategy you debated, the arguments of Professor Stern almost always laid primary emphasis on the lawbreaker characteristic, as is typical of the more restrictive positions advanced in debates on illegal immigration and its various issues.

198 Id. at 229 (quoting Doe v. Plyler, 458 F. Supp. 569, 589 (E.D. Tex. 1978)).
199 Id. at 243–44 (emphasis added). Cf. Motomura, supra note 10, at 2083–92 (exploring relationships between integration and unlawful presence as articulated in Plyler).
200 See supra p. 22.
characteristic, as is equally typical of the arguments advanced by other proponents of leniency.\footnote{202 See, e.g., Linda S. Bosniak, Opposing Prop. 187: Undocumented Immigrants and the National Imagination, 28 CONN. L. REV. 555, 583 (1996) (discussing progressives’ opposition to Proposition 187 as violating basic rights of undocumented immigrants who “live and work among us”); M. Isabel Medina, At the Border: What Tres Mujeres Tell Us About Walls and Fences, 10 J. GENDER RACE & JUST. 245, 246–47 (2007) (arguing for binational protected border region rather than stringent enforcement and emphasizing common resident attributes of those who live in United States and Mexican border communities); Katie Annand, Note, Still Waiting for the DREAM: The Injustice of Punishing Undocumented Immigrant Students, 59 HASTINGS L.J. 683, 685–86 (2008) (arguing for in-state-resident tuition for undocumented students who “grow up as Americans and consider this country their home”); Yates, supra note 171, at 586, 609 (objecting to denial of in-state-resident tuition for undocumented students who have been living in state); DREAM Act Portal, http://dreamact.info/ (last visited Sept. 17, 2009) (supporting DREAM Act because undocumented college-age students should be “recognized as American citizens” since they have “lived in the United States all their lives”); National Council of La Raza, DREAM Act, http://www.nclr.org/content/policy/detail/1331/ (last visited Sept. 17, 2009) (emphasizing that DREAM Act would allow states to offer in-state-resident tuition to “immigrant students residing in their state” who grew up in U.S. schools and share U.S. culture and values).}

I don’t want to overstate the point. As you’ve both said, some of the issues can be resolved simply on the basis that undocumented immigrants are human beings with certain fundamental human rights. But those tend to be the easier issues. No one is seriously proposing that undocumented immigrants be tortured, or deprived of food and water, or criminally convicted without a fair trial. For the most part, however, human rights law doesn’t definitively resolve the closer issues—the ones that remain the subject of serious political debate. These issues tend to revolve around whether to recognize the kinds of rights that most people would grant only to citizens or other residents, not to all human beings in the world or even to all human beings who are momentarily present, such as tourists. I’m thinking of issues like employment,\footnote{203 See supra note 142 and accompanying text.} state-subsidized college education,\footnote{204 See supra note 154–182 and accompanying text.} and drivers’ licenses.\footnote{205 See supra note 146 and accompanying text.} On those kinds of issues, the two sides frequently, if not typically, break down along the lines of the two competing conceptualizations that I’m hearing from you two—undocumented immigrants as outlaws versus undocumented immigrants as residents.
That difference in emphasis dominated the arguments of both of you on every one of the policy responses that you just discussed—border enforcement, interior enforcement, state and local enforcement assistance, substantive discretionary relief from deportation, de facto deportation of the children of undocumented immigrants, criminal prosecutions, legalization, attrition by encouraging self-deportation, and post-secondary education.\textsuperscript{206} The same difference in emphasis drove you even on the issue of terminology.\textsuperscript{207}

So undocumented immigrants by definition are both lawbreakers and residents, and that means that neither label can stand alone. A fair normative analysis of undocumented immigrant policy choices has to take account of both of those competing conceptualizations.

Stern: I don’t think it’s that simple. Some of our differences have been purely empirical or predictive. We disagree, for example, on whether some of these tough measures would encourage large numbers of undocumented immigrants to self-deport. We also differ on whether legalization would entice future undocumented immigrants.

Moderator: I accept that qualification. I don’t claim that literally all your arguments reflect the emphases that I’ve just described. But illegality and residence were the logical prerequisites to the vast majority of your competing arguments.

Clement: I too think you’re on to something, but I believe there’s an elephant in the room. For many of the hard-liners on this subject—and I do not impute this view at all to Professor Stern—illegal immigration is a convenient proxy for race. Bigotry often drives people to take positions on illegal immigration that they know would be socially unacceptable if articulated in explicit racial terms. Xenophobia can be a cover for cruder forms of either conscious or unconscious bigotry, and all too often it is Latinos or Latinas who are singled out.\textsuperscript{208}


\textsuperscript{207} See supra notes 73–80 and accompanying text.

\textsuperscript{208} See, e.g., Johnson, supra note 146, at 216 (“Alienage status . . . may serve as a proxy for race.”). In the wake of the September 11 attacks, many have called attention to analogous anti-Arab and anti-Muslim animus in immigration debates. See, e.g., Muneer I. Ahmad, A
Stern: Sadly, I have to agree that race has played a significant unspoken—and sometimes even explicit\textsuperscript{209}—role in the debate over illegal immigration. But that observation goes only to the motive of the advocate. It doesn’t resolve the merits of the possible policy responses to illegal immigration.

Moderator: I agree. Unlike the opposing emphases on illegality and residence, race has not been a logical predicate for your competing arguments on the policy responses.\textsuperscript{210} In addition, the racial and cultural implications of illegal immigration have been extensively covered in the scholarly literature.\textsuperscript{211} For both reasons, we should leave that subject for another day.

Stern: Then where do we go from here?

Moderator: Since you both made assumptions about the impact of illegal immigration, and since you offered differing depictions of undocumented immigrants as lawbreakers and residents, I think it’s time to examine the data.

III. LAWBREAKERS AND RESIDENTS, GROUPS AND INDIVIDUALS

The fictional dialogue in Part II flushes out the philosophical foundations of the major competing arguments over illegal immigration. There were two noticeable patterns. The first one was...
what our fictional moderator called “aggregation.” Aggregation has two components. The hard-liners, as the moderator observed, are prone to think primarily about the collective impact of undocumented immigrants on the host society and to assume the impact is negative and large,\(^\text{212}\) while those who advocate more lenient responses tend to think primarily about the impact of the various anti-illegal-immigration strategies on the individual immigrant and his or her family.\(^\text{213}\) The moderator also suggested, and the two fictional adversaries confirmed, a second element of aggregation. For Professor Stern, the mention of illegal immigration evoked a mental image of a large mass of humanity. Early on, Professor Stern used the terms “massive influx” and “foreign invasion.”\(^\text{214}\) In one of the leading immigration cases, in fact, the Supreme Court characterized even lawful immigration as “aggression and encroachment” in the form of “vast hordes of [a foreign nation’s] people crowding in upon us,” the clear mental image being that of a profuse multitude.\(^\text{215}\) In contrast, Professor Clement’s mental image was that of an individual undocumented immigrant, or possibly the immigrant and his or her family.

The aggregation-versus-individualizing distinction has both explanatory and normative value. Insofar as the differing emphases highlight either undocumented immigrants’ collective impact on the general public or the impact of proposed policy strategies on the individual immigrant, the debate reminds policy makers of the need to perform a careful balancing. As the dialogue suggested, a responsible policy maker has to weigh both individual and public interests. That balancing, in turn, requires both empirical data and normative value judgments concerning the competing priorities. If the value judgments were the only source of indeterminacy, policy makers could assign the collective impact whatever weight they deem appropriate and balance that impact against any conflicting individual impact. Unfortunately, however, many of the crucial empirical data on collective impact are fuzzy. Some of the collective

\(^{212}\) See supra note 191 and accompanying text.
\(^{213}\) See supra note 192 and accompanying text.
\(^{214}\) See supra p. 10.
\(^{215}\) Chae Chan Ping v. United States, 130 U.S. 581, 606 (1889).
Some effects are inherently unquantifiable, and still others are theoretically quantifiable but too intermingled with other phenomena to isolate cause and effect with any degree of confidence. Among the former would be the impact of undocumented immigrants on the prevailing culture, political outcomes, societal racial attitudes, language norms, and religious diversity. Among the latter would be their net effects on economic growth, infrastructure needs, education, and health care.

The other component of aggregation—the mental image that illegal immigration triggers—has potential explanatory utility but less normative value. For one thing, as the moderator acknowledged, the suggestion that hardliners tend to envision undocumented immigrants as an undifferentiated human mass, while advocates of a softer approach are more likely to envision individual immigrants, was just conjecture. The confirmations of that conjecture came from characters who are, after all, fictional creations. The hypothesis is a plausible corollary to a more general, well-established psychological principle: human beings are far more likely to empathize with individual suffering than with the suffering of large groups. Still, the application of that general psychological norm to the specific context of illegal immigration would require empirical verification. Moreover, even if the hypothesis proves to be true, it would not tell us what we should do. I discuss this component of aggregation in the hope that it will spur scholars to explore the multiple forces that have made the debate over illegal immigration so polarized. For similar reasons, it is worth contemplating what role deeply held attitudes toward race,

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216 Some effects are inherently unquantifiable, and still others are theoretically quantifiable but too intermingled with other phenomena to isolate cause and effect with any degree of confidence. Among the former would be the impact of undocumented immigrants on the prevailing culture, political outcomes, societal racial attitudes, language norms, and religious diversity. Among the latter would be their net effects on economic growth, infrastructure needs, education, and health care.

217 The fiscal impact of illegal immigration is a perfect example. See infra Part III.B.

218 See, e.g., David Fetherstonhaugh et al., Insensitivity to the Value of Human Life: A Study of Psychophysical Numbing, 14 J. Risk & Uncertainty 283, 284 (1997) ("[C]onstant increases in the magnitude of a stimulus typically evoke less and less of a change in response."); Paul Slovic, "If I Look at the Mass I Will Never Act": Psychic Numbing and Genocide, 2 Judgment & Decision Making 79, 90 (2007) (arguing mass suffering produces apathy because “[s]ur capacity to feel is limited”); see also Nicholas D. Kristof, Save the Darfur Puppy, N.Y. Times, May 10, 2007, at A33 (“Evidence is overwhelming that humans respond to the suffering of individuals rather than groups.”).
ethnicity, religion, language, and culture have played in producing such a contentious discourse.

The second pattern recurring in the exchanges over policy responses to illegal immigration was the unsurprising correlation between the more restrictive positions and emphasis on undocumented immigrants as lawbreakers, juxtaposed with the correlation between more lenient positions and emphasis on undocumented immigrants as residents. This pattern, like the collective-impact versus individual-impact pattern, has both explanatory and normative significance. It helps both to identify and to evaluate the logical premises that underlie the arguments for and against proposed treatments of undocumented immigrants.

Since these two differing emphases have formed the essential predicates for the vast majority of the competing arguments, we need to consult the social science literature to see which of those emphases more closely matches reality. First, in their daily lives, whom do undocumented immigrants really resemble more—other lawbreakers or other residents? Subpart A addresses that question. Second, what do we actually know about either the collective impact of illegal immigration or the effects of immigration enforcement on the undocumented individuals themselves? Subpart B supplies some of the relevant data.

A. LAWBREAKERS AND RESIDENTS

1. Undocumented Immigrants as Lawbreakers. Not all lawbreakers are equal. Murderers and shoplifters differ so drastically with respect to their physical conduct, their states of mind, the social harms they cause, and their resulting moral culpabilities that no one today would visualize them equally, much less advocate subjecting them to the same punishment. If the conception of undocumented immigrants as lawbreakers is going to inform our social policy choices, we need to ask what kind of lawbreakers they are.

That inquiry has at least two strands, one definitional and the other empirical. A slight majority of the twelve million undocumented immigrants in the United States entered the United
States without inspection,219 thereby committing misdemeanors.220 They are “lawbreakers” by definition. Those who became undocumented by overstaying lawful temporary visas have not committed criminal acts, but they too have violated the immigration laws and are subject to removal on that ground.221 Overstayers, therefore, are also “lawbreakers.”

One can certainly argue that the practical consequences of illegal immigration are mild enough to place these sorts of violations at the low end of the culpability spectrum. As the next subsection will show, the nebulous net impact of undocumented immigrants makes more serious condemnations problematic. That observation, however, would be a thin reed on which to rest the case for leniency; it would not impress those who believe it clear—contrary to the evidence assembled in the next subsection—that the impact of illegal immigration is a serious net negative. I thus offer a different basis for viewing garden-variety immigration violations as different in kind from the vast majority of other legal transgressions. Our society regards neither the conduct in question nor the other acts commonly associated with illegal immigration—situating oneself in the United States and working—as inherently wrongful. The conduct is both legally and socially acceptable when U.S. citizens and other authorized workers engage in it. Indeed, employment is generally affirmatively encouraged both for personal success and for its contribution to the general welfare.

I do not suggest that the conduct of one person can never be wrongful whenever the law permits another person to engage in the same conduct. A law that prohibits convicted felons from possessing firearms, for example, is not unjust solely because the same law allows others to possess them. But the question here—how much emphasis one should attach to the fact that undocumented immigrants have violated the law—is one of degree. That issue turns on where we place immigration violations in the hierarchy of

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219 Pew Hispanic Center, Modes of Entry for the Unauthorized Migrant Population 1 (2006) (finding 6 to 7 million of 11.5 to 12 million undocumented immigrants entered United States without inspection).
221 Id. § 1227(a)(1)(B).
offenses. All else being equal, the fact that the law tolerates and even values the same conduct when others engage in it speaks to the level of moral culpability and, therefore, makes immigration violations different in kind from most other violations of law. Perhaps more importantly, the same distinction separates immigration violators themselves from the vast majority of other lawbreakers.

The second strand of the lawbreaker conception relates to undocumented immigrants’ commissions of criminal acts independent of the immigration violations themselves. Here we have questions of both popular perception and empirical reality. Surveys consistently show that the public associates immigrants—whether or not undocumented—with high rates of crime. This perception is not surprising. The public is bombarded with foreign criminal characters on television crime shows, anti-immigrant media commentators, and inflammatory statements from elected leaders. State and local anti-illegal-immigration legislation frequently contains language “finding” or “declaring”—without citing evidence—that illegal immigration brings crime to the community. Moreover, it would not be irrational to predict above-average crime rates for undocumented

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222 By analogy, the criminal laws distinguish offenses that are mala in se (inherently wrongful) from offenses that are merely mala prohibita (wrongful only because the law says so). WAYNE R. LAFAVE, CRIMINAL LAW 36–39 (4th ed. 2003).
224 See, e.g., Legomsky, supra note 56, at 508 (discussing proliferation of public statements associating illegal immigration and crime); Suro, supra note 17, at 24 (noting media focus on illegality and criminality associated with immigration); MEDIA MATTERS ACTION NETWORK, supra note 17, at 2 (finding Lou Dobbs, Bill O’Reilly, and Glenn Beck often link illegal immigration and crime on their shows); RUMBAUT & EWING, supra note 223, at 3 (arguing “[m]yths and stereotypes about immigrants and crime . . . are propagated through movies and television . . . ”).
225 See Legomsky, supra note 56, at 508 (discussing language in Proposition 187 and Hazleton, Pennsylvania ordinance); RUMBAUT & EWING, supra note 223, at 3 (discussing same legislative efforts).
immigrants. After all, the undocumented population tends to be young, heavily male, relatively poor, and living in congested, often high-crime, neighborhoods, all factors that correlate with high crime rates.\footnote{Legomsky, supra note 56, at 501 (footnote omitted); see also Rumbaut & Ewing, supra note 223, at 6 (stating “vast majority” of prison and jail inmates are young men).}

Are the stereotypes true in this case? Because the data on crime rates among immigrants rarely disaggregate documented and undocumented immigrants, definitive conclusions are not possible. Nonetheless, the aggregate data on immigrant crime rates generally, combined with several indicators of low crime rates among undocumented immigrants in particular, make it very likely that these stereotypes are unfounded.

On the subject of crime rates for immigrants generally, a frequently cited statistic is that 27% of the federal prison population is foreign-born.\footnote{See U.S. Government Accountability Office, Information on Criminal Aliens Incarcerated in Federal and State Prisons and Local Jails, GAO-05-337R, at 9 (2005), available at http://gao.gov/news.items/d05337r.pdf (giving this figure for years 2001–2004).} Since the foreign-born comprise only about 12% of the total U.S. population,\footnote{See Luke J. Larsen, U.S. Census Bureau, The Foreign Born Population in the United States: 2003, at 1 (2004), available at http://www.census.gov/prod/2004pubs/p20-551.pdf (citing estimate for March 2003).} it might initially appear that immigrants are disproportionately predisposed to crime. Those figures, however, reveal very little. The foreign-born will always be overrepresented in federal prison facilities because such a large subgroup of federal crimes are border-related; as noted earlier, 51% of all federal criminal prosecutions in fiscal year 2008 were for immigration violations.\footnote{As of the end of 2005, the total U.S. prison population was 2,193,798, of whom 179,220 (about 8%) were then in federal facilities. Paige M. Harrison & Allen J. Beck, Prisoners in 2005, Bureau of Justice Statistics Bulletin, Nov. 2006, at 2.} The more useful data pertain to state incarcerations, since they are free of that sampling bias and because they account for 92% of the total U.S. prison population, including most prisoners convicted of the more serious crimes.\footnote{See Butcher & Piehl, supra note 223, at 483–84 (concluding data imply immigrants are} Other studies indicate that, for all U.S. prison and jail populations combined, the incarceration rates of the foreign-born are lower, not higher, than those of the native-born.\footnote{See Butcher & Piehl, supra note 223, at 483–84 (concluding data imply immigrants are} Most strikingly, among
males aged eighteen to thirty-nine—the demographic cohort with the highest crime rates—the native-born are incarcerated at five times the rate of the foreign-born.\textsuperscript{232} Consistent with these data, crime rates have been lowest in cities experiencing rapid growth in the immigrant population.\textsuperscript{233}

Do the lower crime rates for immigrants carry over specifically to the undocumented population? Here there is more uncertainty, but there are several reasons to think they do. With respect to young males aged eighteen to thirty-nine, one of the leading studies found the following:

\begin{quote}
[F]or every ethnic group without exception, incarceration rates among young men are lowest for immigrants, even those who are the least educated. \textit{This holds true especially for the Mexicans, Salvadorans, and Guatemalans who make up the bulk of the undocumented population}. What is more, these patterns have been observed consistently over the last three decennial censuses . . . .\textsuperscript{234}
\end{quote}

Furthermore, since 1994 the undocumented population has doubled, while the nation’s violent crime rate has declined 34.2% and the property crime rate has declined 26.4%.\textsuperscript{235} Again, cause and effect cannot be assumed, but the data are at least compatible with low immigrant crime rates. Two local police departments (among the few that record the immigration statuses of arrestees) report low crime rates among undocumented immigrants.\textsuperscript{236} If one assumes

\begin{footnotesize}
\textsuperscript{232} RUMBAUT & EWING, supra note 223, at 1.
\textsuperscript{233} \textit{Id.} at 4 (citing Los Angeles, San Diego, El Paso, New York, Chicago, and Miami as examples).
\textsuperscript{234} \textit{Id.} at 1 (emphasis added). For more details, see \textit{id.} at 6–8 (providing incarceration rates of men ages 18–39 by ethnicity and national origin).
\textsuperscript{235} \textit{Id.} at 1, 4–5.
\textsuperscript{236} The two police departments are St. Charles and O’Fallon, Missouri. \textit{See} Eric Becker, \textit{Does Illegal Immigration Lead to More Crime? Police, Advocates Say Link Is Tough to Find}, \textit{St. Charles J.}, May 10, 2008, http://stcharlesjournal.stltoday.com/articles/2008/05/10/news/doc482091aab351a281774302.txt (stating percentages of arrestees in 2006 in St. Charles County and the city of O’Fallon who were undocumented immigrants were 2.4% and less than 1%, respectively).
\end{footnotesize}
that undocumented immigrants come to the United States for employment, and that people who are unlawfully present have every incentive not to engage in conduct that is likely to call attention to themselves, then these results are not surprising.

Thus, neither the definitional nor the empirical arguments justify relative emphasis on the lawbreaker element of undocumented immigrants’ identities. The immigration violations themselves are different in kind from, and reflect a far lower degree of culpability than, most criminal violations. The data—cloudy as they admittedly are—at least reveal an absence of evidence that undocumented immigrants are disproportionately prone to other, independent criminal acts. To the contrary, they suggest a likelihood that if anything, undocumented immigrants tend to be more law-abiding than the native-born. As a description of undocumented immigrants’ actual behavior or daily lives, therefore, the lawbreaker label seems far removed from the empirical realities.

2. Undocumented Immigrants as Residents. One’s identity as a resident of a community comprises too many elements, and the undocumented population in particular is too diverse, to permit a meaningful composite of the undocumented immigrant as a “resident.” It is possible, however, to examine averages, distributions, and other statistical indicators of the individual qualities commonly associated with residency.

One of those attributes is duration of presence—both actual and intended. Only about 13% of the undocumented immigrants present as of March 2008 arrived after 2004; another 31% have lived here four to eight years; 26% have lived here nine to thirteen years; 17% have lived here fourteen to eighteen years; and 13% have lived here nineteen years or longer.237 The lengthy durations of stay are consistent with the extremely low probability of deportation. Even with the dramatic recent increase in workplace raids, far fewer than 1% of undocumented workers have been arrested.238 Approximately one to one-and-a-half million undocumented

237 See Passel & Cohn, supra note 5, at 3 (noting dates of arrival and separating recent arrivals from longer-term residents).

238 Urban Institute, Decision Points 08: Unauthorized Immigrants (Feb. 12, 2008) (on file with author).
immigrants, in fact, are people who will eventually qualify for lawful permanent resident status, typically as the spouses or children of U.S. citizens or of other permanent residents, but whose applications remain in the pipeline because of either statutory numerical limits or administrative processing backlogs.\(^\text{239}\)

Undocumented immigrants come mainly for employment,\(^\text{240}\) and invariably they find it. A leading study on the size and characteristics of the undocumented population estimates that 94% of the undocumented males aged eighteen to sixty-four are employed, compared to 83% of native-born males in the same age group.\(^\text{241}\) The reasons for the high employment rate include the fact that undocumented immigrants tend to be younger and less likely to forego employment in favor of college.\(^\text{242}\) Work hours for undocumented immigrants tend to be very long. One worker, when asked to describe her life, replied, “Home to work and back home and then back to work again: that was my life.”\(^\text{243}\)

Undocumented immigrants pay taxes. They are subject to the federal income tax.\(^\text{244}\) The Internal Revenue Service estimates that six million undocumented immigrants,\(^\text{245}\) or about 75% of those required to file federal income tax returns,\(^\text{246}\) do so. On the one hand, because their incomes are lower than average, so too are their income tax obligations;\(^\text{247}\) on the other hand, because they are ineligible for certain tax benefits available to authorized workers,

\[^{239}\text{Martin, supra note 182, at 1.}\]
\[^{240}\text{Lipman, supra note 125, at 11.}\]
\[^{241}\text{Passel, supra note 49, at 9.}\]
\[^{242}\text{Id. Undocumented women in the same age range, in contrast, are less likely than native-born women to be employed (54% versus 72%). The difference most likely reflects the fact that undocumented women are generally younger and therefore more likely to have children. In addition, undocumented women are more likely to be married, and married women generally have lower rates of employment. Id. at 10.}\]
\[^{244}\text{For an explanation of the applicable law, see Lipman, supra note 125, at 18–48 (discussing undocumented immigrants and the Internal Revenue Code).}\]
\[^{245}\text{E.g., U.S. Congressional Budget Office, The Impact of Undocumented Immigrants on State and Local Governments 6 (2007) [hereinafter CBO]; Lipman, supra note 125, at 24.}\]
\[^{246}\text{CBO, supra note 245, at 6.}\]
\[^{247}\text{Id. at 2.}\]
they are taxed at higher effective rates than authorized workers with comparable gross incomes.248

The Social Security Administration estimates that between one-half and three-quarters of undocumented immigrants also pay social security taxes, even though they will be ineligible for the retirement benefits that those contributions fund.249 Their contributions amount to approximately $6–$7 billion per year.250 Projected contributions from undocumented immigrants are almost $500 billion between 1998 and 2022 and $2 trillion by 2072.251

Undocumented immigrants also pay state income taxes, sales taxes, and property taxes.252 Again, because their disposable incomes are below average, their sales tax and property tax contributions are also below average.253

Aside from duration of presence, work patterns, and tax payments, undocumented immigrants behave like other residents in additional ways. Using taxpayer identification numbers, they buy homes and obtain legal mortgages from banks. Their foreclosure rate is below the national average.254

Like other residents, undocumented immigrants have a range of family statuses. Eighty-four percent of undocumented immigrants are adults, of whom 58% are men.255 Approximately one-half of the male adults and about 80% of the female adults are here with one or more members of their families.256 Together, these families have 1.8 million undocumented resident children and more than

248 Lipman, supra note 125, at 40–43 (discussing unauthorized immigrant workers’ inability to obtain earned income tax credit benefits without social security numbers). They file tax returns using either false social security numbers or genuine taxpayer identification numbers. Id. at 21–26.
249 See, e.g., CBO, supra note 245, at 6 (estimating 50%); Capps, supra note 238 (estimating 75%).
250 Capps, supra note 238.
251 Lipman, supra note 125, at 12.
256 Id.
three million U.S. citizen children. 3. An Emerging Portrait. As subpart III.A.1 suggests, the lawbreaker label is a poor fit for undocumented immigrants. They are lawbreakers by definition, since they are present in violation of the immigration laws, but the proscribed conduct is legal and applauded when U.S. citizens engage in it. To that extent, it is different in kind, and reflects a lesser moral culpability, than most other violations of law. Moreover, undocumented immigrants are no more prone than the native-born, and probably are less prone, to commit independent crimes. In their day-to-day behavior, they defy the criminal stereotype.

Subpart III.A.2 demonstrates that, in contrast, the resident label fits the vast majority of undocumented immigrants rather well. In the durations of their stays, the centrality of work in their daily lives, their tax payments, their home purchases and rentals, and their sense of family obligation, they are hard to distinguish from the other residents who comprise our communities and our nation.

B. AGGREGATION AND INDIVIDUALIZING

How much do we actually know about the societal impact of illegal immigration? The data in subpart III.A.1 suggest that illegal immigration probably reduces the overall crime rate. At the least, the data offer no reason to believe illegal immigration increases the crime rate. Perhaps the most complex questions, however, revolve around the economic impact of illegal immigration. Here, the two most contentious issues have been its fiscal effects and its labor market effects.

On the positive side of the fiscal ledger, like other residents, undocumented immigrants pay taxes. They also contribute indirectly to government revenues. Through working, owning

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257 See id. at 8; Kremer, Moccio & Hammell, supra note 49, at 1 (estimating three million U.S. citizen children).
258 Passel, supra note 49, at 7.
259 See supra notes 244–253 and accompanying text.
businesses, and consuming goods and services, undocumented immigrants boost productivity in ways that lead to tax contributions from others.\textsuperscript{260}

On the negative side of the fiscal ledger, undocumented immigrants increase the expenditures of federal, state, and local governments. They are ineligible for almost all the major federal and state welfare programs,\textsuperscript{261} but one exception is emergency medical care,\textsuperscript{262} which undocumented immigrants utilize frequently because only a small percentage of the undocumented population has health insurance.\textsuperscript{263} Still, the Congressional Budget Office has found that undocumented immigrants account for only a small share of most state and local governments’ total health care costs.\textsuperscript{264}

Much larger—and for state and local governments the single largest expenditure for undocumented immigrants—are the costs of elementary and secondary education.\textsuperscript{265} Some 4\% of all schoolchildren living in the United States are undocumented.\textsuperscript{266} Although there is no evidence that undocumented immigrants are incarcerated at higher rates than the general population, and some reason to believe their incarceration rates are lower,\textsuperscript{267} total incarceration and other law enforcement costs attributable to undocumented immigrants are fiscally significant.\textsuperscript{268} There are, in addition, indirect costs. Like anyone else, undocumented immigrants add to the overall population and, therefore, to general

\begin{itemize}
  \item\textsuperscript{260} See CRS 2005, supra note 252, at 8–9; Clark & Passel, supra note 253.
  \item\textsuperscript{261} For detailed descriptions, see, e.g., RUTH ELLEN WASEM, U.S. CONGRESSIONAL RESEARCH SERVICE, UNAUTHORIZED ALIENS’ ACCESS TO FEDERAL BENEFITS: POLICY AND ISSUES 6–10 (2008) (discussing restrictions on noncitizens’ eligibility for means-tested public assistance); Lipman, supra note 125, at 5–6 (listing government benefits from which undocumented immigrants are barred).
  \item\textsuperscript{262} 8 U.S.C. § 1611(b)(1)(A) (2006).
  \item\textsuperscript{263} See CBO, supra note 245, at 8 (discussing unauthorized immigrants’ increased propensity to use emergency rooms and public clinics).
  \item\textsuperscript{264} Id.
  \item\textsuperscript{265} Id. at 7. The Supreme Court held in Plyler v. Doe, 457 U.S. 202 (1982), that the Equal Protection Clause of the Fourteenth Amendment requires states to provide free elementary and secondary education to undocumented immigrants.
  \item\textsuperscript{266} Id. at 8.
  \item\textsuperscript{267} See supra notes 223–236 and accompanying text.
  \item\textsuperscript{268} See CBO, supra note 245, at 9 (“[T]he number of unauthorized immigrants in some state and local criminal justice systems adds significantly to law enforcement costs.”).
\end{itemize}
infrastructure and personnel costs for roads, bridges, libraries, police and fire services, and the like.

What, then, is the fiscal bottom line for undocumented immigrants? The data are frustratingly inconclusive. The Congressional Research Service, reviewing almost all the major studies undertaken since 1990, found two reasons for the absence of reliable estimates: the difficulty of obtaining essential basic data on undocumented immigrants has forced researchers to make sketchy assumptions, and the studies vary greatly as to which revenue sources and expenditures are counted.\footnote{CBO, supra note 245, at 2.}

Still, some tentative conclusions can be ventured. In 2007, the Congressional Budget Office reviewed twenty-nine studies of the fiscal impact of undocumented immigrants on the budgets of state and local governments.\footnote{Id. at 3.} State and local expenditures on undocumented immigrants appear to account for less than 5% of total expenditures in the states that were studied, although unsurprisingly there is wide variance from state to state, with expenditures on undocumented immigrants close to 10% in California.\footnote{Id.} More relevant here, the studies found that undocumented immigrants generate a net fiscal loss for state and local government budgets but that the magnitude of that loss is “most likely modest.”\footnote{Id.}

A somewhat different picture emerges when the fiscal impact of undocumented immigrants on state and local budgets is combined with the effects on the federal budget. Here there is greater disagreement; some studies show an overall fiscal deficit (a small one according to many of those studies),\footnote{See CRS 2005, supra note 252, at 11–13 app. A (summarizing findings of various studies as to net cost of undocumented immigrants to federal, state, and local governments).} while others find a “fiscal windfall.”\footnote{Id.}

Thus, the studies on the fiscal implications of illegal immigration yield three conclusions: (1) No one has produced any reliable overall estimates. (2) It seems likely that the net impact of undocumented
immigrants on state and local budgets is small but negative. (3) The net impact on national, state, and local budgets combined is also small and might be either positive or negative.

If the net fiscal effects of illegal immigration are elusive, the data on undocumented immigrants’ labor market impact are equally so. The jobs undocumented immigrants perform span a wide range, but for the most part require little education. Approximately 31% of undocumented workers are in service occupations; 19% in construction and extractive work; 15% in production, installation, and repair; 12% in sales and administrative support; 8% in transportation and material moving; 10% in management, business, and professional employment; and 4% in farming. To get a better sense of the significance of these figures, consider that undocumented workers account for only 4.9% of the total workforce but 36% of all insulation workers; 29% of all agricultural workers; 29% of all roofers; 28% of drywall installers; 27% of all meat, poultry, and fish processing center workers; 25% of all ground maintenance workers; 25% of all construction workers; 23% of all dishwashers; and 22% of all maids and house cleaners.

The impact of this employment on the labor market remains unclear. Do undocumented immigrants take jobs that Americans or earlier immigrants are unwilling to take? Or is it the case that, if not for illegal immigration, employers would be forced to bid up the prevailing wages to levels that would entice sufficient numbers of American workers? In the latter scenario, what would be the effects on industry and on consumer prices?

Economists are deeply divided on these questions. Undocumented immigrants both take and create jobs. Some economists believe that low-skilled immigrants generally—and as seen above, the vast majority of undocumented immigrants fit that description—do indeed reduce job opportunities for low-wage,

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275 Passel, supra note 49, at 10. The 4% figure for farming might seem surprisingly low, but it compares to only 0.5% for the native population. Id.
276 Id. at 12. For more detailed descriptions of the work these jobs entail, see, for example, Phillip L. Martin, Unauthorized Workers in U.S. Agriculture: Old Versus New Migrations, in I LLEGAL IMMIGRATION IN AMERICA: A REFERENCE HANDBOOK 133–56 (David W. Haines & Karen E. Rosenblum eds., 1999); David Griffith, Social and Cultural Bases for Undocumented Immigration into the U.S. Poultry Industry, in id. at 157–71; Janet E. Benson, Undocumented Immigrants and the Meatpacking Industry in the Midwest, in id. at 172–92.
unskilled U.S. workers and, at the same time, depress the wage levels for those jobs. Other economists disagree. Probably the most comprehensive study is that of the National Research Council, performed at the request of the U.S. Commission on Immigration Reform. This study examined the economic impact of immigration generally and did not disaggregate the effects of illegal immigration. It is instructive nonetheless because it found that immigration allowed U.S. workers to be deployed more productively, taking jobs that befit their skills, a point that should apply with equal logic to undocumented immigrants in particular.

At the same time, the study acknowledged that labor immigration produces both winners and losers. Generally, it found, higher-skilled American workers tend to profit from illegal immigration because they reap the economic benefits without suffering from the competition, while U.S. workers with lesser skills generally suffer some loss in jobs and wages from the employment of lower-skilled foreign workers—again, a category that includes most undocumented workers. The study concluded, however, that even for those American workers who compete with immigrant workers, the effect on wages is small—probably a decrease of approximately 1% to 2%—and that the wages of noncompeting native workers increase.

As just noted, undocumented immigrants, like anyone else living in the United States, not only take jobs but also create them. They create jobs by consuming goods and services and by “filling millions of ‘essential worker’ positions resulting in subsidiary job creation, increased productivity and lower costs of goods and services.”

277 A leading proponent of this view is George Borjas. See George J. Borjas, Heaven’s Door: Immigration Policy and the American Economy 62 (1999) (arguing some native workers have much to fear from unskilled immigrant workers).
280 Id. at 5.
281 Id.
282 Id. at 6.
283 Lipman, supra note 125, at 3 (footnote omitted).
these and other reasons, 74% of the economists in one survey found
the net economic impact of undocumented immigrants to be positive,
and another 11% found it to be neutral.\textsuperscript{284} I cannot, of course, claim
to have surveyed every credible economic study of immigration; the
works cited here are necessarily selective. They suffice, however, to
show that consensus on both the fiscal and labor market effects of
illegal immigration is lacking and that assumptions of serious net
adverse economic impact lend correspondingly shaky support for
harsh policy responses.

Undocumented immigrants, of course, have an impact far beyond
the tangible effects described to this point. The social, cultural,
religious, linguistic, and political implications of illegal immigration
are even harder to quantify than their impact on crime rates, the
labor market, or public finances.

In sharp contrast to the looming uncertainties as to
undocumented immigrants’ collective impact, the effects of specific
solutions on the lives of individual undocumented immigrants and
their families are generally easy to classify as clearly positive or
clearly negative. There is no need for extended discussion of
whether undocumented immigrants would gain or lose from such
policy responses as border fortification, home or workplace raids,
enlistment of state and local police to assist in arresting or reporting
suspected undocumented immigrants, expansion of the grounds for
discretionary relief from removal, restrictions on the de facto
department of the U.S. citizen children of undocumented
immigrants, legalization, or attrition by making daily lives and
transactions more difficult.

Undocumented immigrants are perpetually at risk of
apprehension, arrest, detention, and deportation.\textsuperscript{285} That reality
affects not only their daily movements, activities, and associations,

\textsuperscript{284} Id. at 4.

\textsuperscript{285} See, e.g., DANIEL KANSTROOM, DEPORTATION NATION: OUTSIDERS IN AMERICAN HISTORY 246 (2007) ("[T]he history of deportation law shows us how integral the removal impulse has been to our nation of immigrants."); NGAI, supra note 86, at 58 ("The illegal immigrant cannot be constituted without deportation—the possibility or threat of deportation . . . ."). Undocumented immigrants are also likely to retain close family and other ties to their countries of origin, but in that respect they resemble many other U.S. residents, especially the lawfully present foreign-born.
but also their psyches; they live in a state of “permanent anxiety.” The fear of raids or other means of capture, combined with the fears of the consequences of their undocumented status—detention and deportation—cause obvious stress, which the recent spike in workplace and home raids have only heightened. Beyond these inherent fears, many worry about being separated from their spouses and children or being unable to earn the incomes on which their families depend. After the Postville, Iowa raids, one observer described these separations and fears of separations, noting that many children stopped going to school as a result. The same fears leave undocumented immigrants vulnerable to “unsafe working conditions, . . . arbitrary detention, forced labor, harassment, working for less than minimum wage, and violence.”

The above paragraph is not meant to suggest that workplace raids, apprehensions, arrests, detentions, and deportations are always bad policy. The personal damage those actions cause must, of course, be weighed against the legitimate objective of enforcing the immigration laws.

More generally, however, these individualized hardships further illustrate the inadequacy of an approach that turns solely on the collective impact of illegal immigration on the larger society. As this discussion has shown, conclusions concerning collective impact are tenuous to start with. Illegal immigration has negative effects, but it also has positive effects, and the sum of the empirical data leaves considerable doubt as to which set of effects predominates. To be sure, future empirical research might well resolve some of the current uncertainties. If so, then the conclusions reached in this Article will have to be revisited. Even in that event, however, a balancing of the positive and negative effects of illegal immigration will continue to require the application of value judgments that cannot be tested scientifically. Perhaps more important still, the

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286 Orner, supra note 243, at 9.
287 See, e.g., id. at 10–11 (stating these fears frequently override any wish to go to authorities); Thronson, supra note 25, at 403–06 (discussing impact of immigration raids on families and specifically children).
288 See Camayd-Freixas, supra note 61, at 3 (discussing decrease in attendance among Latino students after raid).
289 Orner, supra note 243, at 10–11; see also Gordon, supra note 143, at 2 (documenting examples of exploitation in sweatshops).
collective impact on society at large must be balanced against the impact of proposed solutions on the undocumented immigrants themselves. Tangible individual effects aside, the social science literature discussed above highlights the severe psychological impact of some of the enforcement operations on the individual targets and their families.

IV. Conclusion

Intense public debate over illegal immigration has been ongoing since at least the 1970s, but in recent years the temperatures seem to have reached new highs. The most heated discourse has revolved around the perceived impact of illegal immigration and the preferred policy responses.

Empirical studies of illegal immigration and its effects have been plentiful. There have, however, been surprisingly few attempts to create a conceptual photograph of the undocumented immigrant. As the dialogue in Part II of this Article illustrates, the mini-debates over specific issues tend to take a remarkably predictable shape. The fictional moderator in Part II identified the common elements in those debates.

In the debate over impact, one of those patterns relates to aggregation versus individualizing. While Professor Stern visualizes undocumented immigrants en masse (and, along with other proponents of restrictive positions, advances arguments that emphasize the collective effects of illegal immigration on society), Professor Clement envisions individuals and families (and, along with other advocates of lenient policies, offers arguments that emphasize the consequences of immigration enforcement for the undocumented immigrants themselves). In the debate over policy responses, the moderator identified the correlation of stricter positions with emphasis on undocumented immigrants as lawbreakers, and the additional correlation of more lenient positions with emphasis on undocumented immigrants as community residents. On every issue, the degree of emphasis placed on one of those depictions vis-à-vis the other was a necessary premise for the argument and virtually predetermined the advocate’s ultimate outcome.
The opposing camps in the never-ending debate over illegal immigration do not have to be ships passing in the night. As one author has put it, undocumented immigrants are “neither uniformly saints nor sinners.” To use the terminology of this Article, undocumented immigrants are both lawbreakers and residents. They are, as well, both individuals and members of a larger group. Correspondingly, the policies proposed in the various quarters have consequences for both the immigrants themselves and the larger society. Like Professors Clement and Stern, the opposing camps would do better to engage one another in reasoned dialogue that takes fair account of all these competing conceptualizations and interests.

As usual, the question is one of emphasis. Because the relative emphases on lawbreakers and residents formed such critical logical predicates for the argumentation, Part III drew on the abundant social science literature to determine which of those portrayals can claim greater empirical support. The verdict is clear. The relevant data reveal few similarities between undocumented immigrants and other lawbreakers, and few differences between undocumented immigrants and other residents. In their daily lives, undocumented immigrants behave more like other residents than like other lawbreakers. That result supplies a normative argument for generally lenient treatment of the undocumented immigrant.

A willingness to consider not only the collective impact of illegal immigration, but also the effects of various enforcement measures on the immigrants themselves, fortifies that argument. While the social science literature reveals the overall impact of illegal immigration on the interests of the larger society to be mixed and uncertain, the effects of proposed solutions on the interests of the individual undocumented immigrants and their families are typically clear-cut. That contrast reinforces the case for placing greater weight on the latter and, therefore, giving undocumented immigrants the benefit of the doubt when the policy questions are close.

ORNER, supra note 243, at 13.
But these patterns do more. They remind us that, whichever policy responses ultimately emerge, we are dealing with a population of neighbors and friends.