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## How To End “Illegal Immigration”

KARI HONG<sup>†</sup>

Donald Trump, first as a candidate and now as a president, has unleashed a relentless and ruthless campaign against immigrants and immigration. From rhetoric that calls migrants “rapists” and “criminals,”<sup>1</sup> to executive orders that stop Muslims from entering our country,<sup>2</sup> and to policies that speed up deportation, increase detention, downgrade due process, promise a big and beautiful wall, and seek to curb legal immigration,<sup>3</sup> the attack on immigration in the past year has been loud and clear.

What is strange is that this attack runs counter to our economic prosperity and national security interests. Economists overwhelmingly agree that we need immigrants—both skilled and unskilled—to make our economy function.<sup>4</sup> Skilled laborers, and the programs such as the H-1B visa, fill our rural hospitals with foreign-born doctors.<sup>5</sup> In the

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<sup>†</sup> Assistant Professor, Boston College Law School. I wish to express enormous gratitude to Caleb Gurujal, Rebeca García Gil, and those from the Maryland Journal of International Law who organized a compelling symposium. I also wish to thank the panelists from the symposium who started an important conversation from whom I learned an enormous amount.

1. Katie Reilly, *Here Are All the Times Donald Trump Insulted Mexico*, TIME (Aug 31, 2016), <http://time.com/4473972/donald-trump-mexico-meeting-insult/>.

2. *US Supreme Court Allows Trump Travel Ban to Take Effect*, AL JAZEERA (Dec. 4, 2017), <http://www.aljazeera.com/topics/spotlight/trump-muslims-ban.html>.

3. Kari Hong, *The Costs of Trumped-Up Immigration Enforcement Measures*, 2017 CARDOZO L. REV DE NOVO 119, 124–48 (2017); see also Steve Cortes, *End Chain Migration, as Trump Wants, and Switch to Merit-Based Immigration*, FOX NEWS (Dec. 20, 2017), <http://www.foxnews.com/opinion/2017/12/20/end-chain-migration-as-trump-wants-and-switch-to-merit-based-immigration.html> (articulating an attack on legal immigration through the false notion that family unification is not of value).

4. Heather Long, *Over 200 Economists Say Trump Is Wrong on Immigration*, CNN (Mar. 6, 2017, 7:58 AM), <http://money.cnn.com/2017/03/06/news/economy/donald-trump-immigration/index.html>.

5. Parija Kavilanz, *Visa Ban Could Make Doctor Shortage in Rural America Even Worse*, CNN (Feb. 2, 2017, 3:48 PM),

past year, tech companies are opting to open new offices in Canada rather than in the United States to permit their foreign workers to live and work there.<sup>6</sup> Unskilled laborers, including many undocumented individuals, are responsible for our food getting from the ground to our tables.<sup>7</sup> And noted by Senator Jeff Flake (R-AZ), working hard is a skill, which is something that new immigrants do in a variety of sectors.<sup>8</sup>

The rhetoric that immigrants are taking jobs is more myth than fact.<sup>9</sup> Immigrants are the engine of creating and sustaining jobs. Small businesses—which are responsible for the growth of our economy—are opened up twice as often by immigrants than their American counterparts.<sup>10</sup> Immigrants—both legal and undocumented—account for billions of dollars in tax revenue each year.<sup>11</sup> The numbers should not be surprising given their large footprint: one in four of all current Americans are immigrants or the children of immigrants.<sup>12</sup>

Moreover, we now are seeing proof that losing immigrants has numerous costs for businesses and communities. The immigration crackdown is having unintended consequences that are adversely impacting numerous sectors. Colleges and universities are cutting staff

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<http://money.cnn.com/2017/02/02/news/economy/trump-visa-ban-doctor-shortage/>.

6. Rani Molla, *Trump's Election Really Has Sent U.S. Tech Workers to Canada*, RECODE (Nov. 22, 2017, 10:07 AM), <https://www.recode.net/2017/11/22/16687056/donald-trump-us-tech-jobs-canada-2016-election>.

7. Esther Yu His Lee, *More Than 4 Out of 10 Farmworkers in These Three States Are Undocumented*, THINK PROGRESS (Mar. 27, 2015, 7:05 PM), <https://thinkprogress.org/more-than-4-out-of-10-farmworkers-in-these-three-states-are-undocumented-71b4fc4b7c3c/>.

8. Jeff Flake, *We Need Immigrants with Skills. But Working Hard is a Skill*, N.Y. TIMES (Aug. 18, 2017), [https://www.nytimes.com/2017/08/18/opinion/jeff-flake-we-need-immigrants-with-skills-but-working-hard-is-a-skill.html?\\_r=0](https://www.nytimes.com/2017/08/18/opinion/jeff-flake-we-need-immigrants-with-skills-but-working-hard-is-a-skill.html?_r=0).

9. Julia Present, *Immigrants Aren't Taking Americans' Jobs, New Study Finds*, N.Y. TIMES (Sep. 21, 2016), <https://www.nytimes.com/2016/09/22/us/immigrants-arent-taking-americans-jobs-new-study-finds.html>.

10. *Immigrants and Small Business*, N.Y. TIMES (June 30, 2012), <http://www.nytimes.com/2012/07/01/opinion/sunday/immigrants-and-small-business.html>.

11. Stephen Goss, et al., *Effects of Unauthorized Immigration on the Actuarial Status of the Social Security Trust Funds*, SOC. SEC. ADMIN. ACTUARIAL NOTE 151, 2 (2013); Alexia Fernández Campbell, *The Truth About Undocumented Immigrants and Taxes*, ATLANTIC (Sept. 12, 2016),

<https://www.theatlantic.com/business/archive/2016/09/undocumented-immigrants-and-taxes/499604/>; Eric Pianin, *Study Finds Illegal Immigrants Pay \$11.8B in Taxes*, FISCAL TIMES (Apr. 16, 2015), <http://www.thefiscaltimes.com/2015/04/16/Study-Finds-Illegal-Immigrants-Pay-118B-Taxes>.

12. Matt Rocheleau, *1 in 4 Americans Are Immigrants or Children of Immigrants*, BOS. GLOB. (Jan. 30, 2017), <https://www.bostonglobe.com/metro/2017/01/30/americans-are-either-children-immigrants-immigrants-themselves/veKA9SM9H9onyBS6TiCUwI/story.html>.

and programs to offset the drop in foreign student enrollment.<sup>13</sup> Tourist towns are being hurt, with family-owned businesses not even opening for business in 2017 when H2-A unskilled workers were not provided.<sup>14</sup> Racetracks are being strained as trainers without documents are afraid to travel.<sup>15</sup> Idaho's dairy industry, once heralded as a made in America success story, produces 8,100 jobs on dairies and another 27,600 in supporting businesses.<sup>16</sup> The immigration crackdown is threatening to "choke" the industry and state economy.<sup>17</sup> In California, 70 percent of the farm worker population is estimated to be undocumented, which threatens not only the viability of the \$35 billion agricultural industry but the numerous other sectors—such as the insurance industry—that support it.<sup>18</sup> Of import, when the immigration crackdown in 2017 resulted in job openings, none were filled by American workers who did not wish to apply or work in these jobs.<sup>19</sup> The crackdown simply impacted the operation of numerous industries that resulted in job losses to American workers and lost profits to American businesses.

As for national security, the Travel Ban harms our safety. In an amicus brief, forty-three former national security officials, including former Secretaries of State, U.S. Ambassadors, Senators, and senior government officials at the defense department, argued that the Travel Ban "serves no persuasive national security or foreign policy purpose."<sup>20</sup> What is now its third iteration, the Travel Ban is now recognized as a poorly drafted policy that is more concerned in hiding

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13. Stephanie Saul, *As Flow of Foreign Students Wanes, U.S. Universities Feel the Sting*, N.Y. TIMES (Jan. 2, 2018), <https://www.nytimes.com/2018/01/02/us/international-enrollment-drop.html>.

14. Taylor Blatchford, *NC Businesses Feel the Pain of Cuts to Seasonal Worker Visas*, CHARLOTTE OBSERVER (July 7, 2017, 9:32 AM), <http://www.charlotteobserver.com/news/business/article159412859.html>.

15. Kate Morrissey, *Lack of Immigrant Workers Could Hobble Racing Industry*, SAN DIEGO UNION TRIB. (Nov. 7, 2017, 4:40 PM), <http://www.sandiegouniontribune.com/news/immigration/sd-me-horsereading-workers-20171106-story.html>.

16. Susan Ferriss, *How Trump's Immigration Crackdown Threatens to Choke Idaho's Dairy Industry*, POLITICO (Sept. 16, 2017), <https://www.politico.com/magazine/story/2017/09/16/trump-immigration-crackdown-idaho-dairy-industry-215608>.

17. *Id.*

18. Caitlin Dickerson & Jennifer Medina, *California Farmers Backed Trump, but Now Fear Losing Field Workers*, N.Y. TIMES (Feb. 9, 2017), <https://www.nytimes.com/2017/02/09/us/california-farmers-backed-trump-but-now-fear-losing-field-workers.html>.

19. *See supra* notes 14–18.

20. Brief of Former National Security Officials As Amici Curiae in Support of Plaintiff-Appellees, *State of Hawaii v. Trump*, No. 17-15589 (9th Cir. Apr. 20, 2017).

its anti-Muslim animus than protecting our citizenry from harm.<sup>21</sup> Indeed, among the litigation of its various iterations, the parties were focused on quibbling over whether just grandparents or also relatives such as cousins could visit their citizen family members.<sup>22</sup> The end result is that the Travel Ban successfully cracks down only on tourism and large weddings rather than any terrorist threat or act.<sup>23</sup>

So, given that ebbing immigration hurts our economy, security, and core identity, why does the public not demand that our leaders support immigration reform, using common sense and fairness to welcome those who are and would continue to contribute to our well-being, neighborhoods, and families?

A notable culprit in preventing common sense immigration reform is simply the term “illegal immigrant.” The term is used widely to denote merit to “legal immigrants” and recast wrongdoing to “illegal immigrants.”<sup>24</sup> This rhetoric is grossly misleading. The term “illegal” miscasts certain non-citizens as wrongdoers based on their moment of entry akin to the way that criminal law casts felons as wrongdoers at their moment of conviction. But immigration law is fundamentally different from criminal law. People who break laws are “felons” and have lasting and even permanent disadvantages, starting with the deprivation of liberty in a prison sentence and possibly spawning up to 50,000 collateral consequences that impair a person’s ability to obtain employment, live in certain places, receive student loans, and vote.<sup>25</sup>

There is no analogous “immigration violator” because immigration law is fluid, permitting people with eligible family members, jobs, or a fear of harm to receive legal status.<sup>26</sup> This fluidity

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21. Amy Davidson Sorkin, *Trump’s Travel Ban “Drips with Intolerance” on Its Way to the Supreme Court*, NEW YORKER (May 26, 2017), <https://www.newyorker.com/news/amy-davidson/trumps-travel-ban-drips-with-intolerance-on-its-way-to-the-supreme-court>.

22. Adam Liptak, *Appeals Court Appears Inclined to Exempt Relatives from Travel Ban*, N.Y. TIMES (Aug. 28, 2017), <https://www.nytimes.com/2017/08/28/us/politics/trump-travel-ban-appeals-court.html>.

23. Julia Horowitz, *Trump Is Hurting American Tourism*, CNN MONEY (June 7, 2017, 12:01 AM), <http://money.cnn.com/2017/06/07/news/economy/trump-travel-ban-paris-global-tourism/index.html>.

24. Kari Hong, *The Ten Parts of “Illegal” in “Illegal Immigration” That I Do Not Understand*, 50 U.C. DAVIS L. REV. ONLINE 43, 46–48 (2017).

25. *United States v. Nesbeth*, 188 F. Supp. 3d 179, 184 (E.D.N.Y. 2016), appeal withdrawn (Sept. 9, 2016) (“Remarkably, there are nationwide nearly 50,000 federal and state statutes and regulations that impose penalties, disabilities, or disadvantages on convicted felons.”).

26. See generally 8 U.S.C. § 1151 (2013) (family and employment); 8 U.S.C. § 1158 (2013) (asylum); 8 U.S.C. § 1229b (2013) (cancellation of removal for non-lawful permanent residents).

not only erases immigration violations but voids orders of deportation when circumstances arise.<sup>27</sup>

Thus, there are no “illegal immigrants” in immigration law—that is a fictitious term that has no meaning in any immigration court or office.<sup>28</sup> Rather, the more apt term is “pre-legal immigrants,” those who become eligible for legal status and receive it when circumstances afford. “Pre-legal” is not simply normative, but a descriptive term. Of the millions of people who are called “illegal immigrants”—those who entered at the border or have a final order of deportation—at least half will obtain a green card or asylum once given an immigration hearing.<sup>29</sup> For those with attorneys, that number is even higher. In 2017, in a New York immigration court that found a lawyer for every detained non-citizen, the grant rate arose from 4 percent to 24 percent, and when all cases are finished, it is predicated to be 77 percent.<sup>30</sup> In a national study of 1.2 million cases, for those non-citizens who were not detained, the grant rate went from 13 percent to 63 percent for those non-citizens with a lawyer.<sup>31</sup>

Besides that being wholly inaccurate as a way to capture the operation of immigration law, there is another lasting harm from this term. Casting blame onto immigrants supports policies that arrest, detain, and deport people using unfair and inhumane methods. ICE agents are now stationed at state courthouses arresting victims of crimes,<sup>32</sup> in front of schools arresting parents who drop off their

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27. Motions to reopen exist to vacate final orders of removal when “changed circumstances” render someone eligible “[t]o apply *or reapply*” for asylum, 8 C.F.R. § 1003.2(c)(3)(ii) (emphasis added); when the government agrees to reopen the proceedings in its discretion, 8 C.F.R. § 1003.2(c)(3)(iii); or when the Board of Immigration Appeals elects to reopen “any case” “at any time.” 8 C.F.R. § 1003.2(a).

28. Jose Antonio Vargas, *Immigration Debate: The Problem with the Word “Illegal”*, TIME (Sep. 21, 2012), <http://ideas.time.com/2012/09/21/immigration-debate-the-problem-with-the-word-illegal/>.

29. Esther Yu Hsi Lee, *Immigrants Are Winning Half of All Deportation Cases so Far This Year*, THINK PROGRESS (Feb. 18, 2014, 8:51 PM), <https://thinkprogress.org/immigrants-are-winning-half-of-all-deportation-cases-so-far-this-year-fe5a58dbd78e/>; see Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. PENN. L. REV. 1 (2015) (in analyzing data from 1.2 million removal cases decided between 2007 and 2012, 49 percent of detained immigrants with counsel won their relief application and 23 percent without).

30. Dara Lind, *A New York Courtroom Gave Every Detained Immigrant a Lawyer. The Results Were Staggering*, VOX (Nov. 9, 2017, 9:10 AM), <https://www.vox.com/policy-and-politics/2017/11/9/16623906/immigration-court-lawyer>.

31. See Eagly & Shafer, *supra* note 29.

32. James Queally, *ICE Agents Make Arrests at Courthouses, Sparking Backlash from Attorneys and State Supreme Court*, L.A. TIMES (Mar. 16, 2017, 10:40 AM), <http://www.latimes.com/local/lanow/la-me-ln-ice-courthouse-arrests-20170315-story.html>.

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children<sup>33</sup>, at checkpoints, screening those evacuating from hurricanes,<sup>34</sup> and in hospitals arresting those awaiting treatment—including the parents of a two-month-old citizen baby who needed immediate surgery.<sup>35</sup>

For-profit companies are handsomely profiting from the excess of \$2 billion in taxpayer money that is spent on detaining not criminals, but those seeking legal status.<sup>36</sup> The Trump administration is using detention as a weapon to separate minor children from their parents,<sup>37</sup> with the express intent to force parents to choose between their safety or their children’s.<sup>38</sup>

Worse still, the term “illegal immigrant” obscures problems and actual solutions. A very different response is in order if the issue is framed as 800,000 young adults who entered the country as children as “illegal immigrants” versus 800,000 young adults with jobs and education who have made millions of dollars in contributions to our country for whom Congress is not granting status. Likewise, different solutions are contemplated for 10,000 asylum seekers fleeing persecution or an impending invasion of “illegal immigrants” who are at our border. As Lawrence Downes observed, government would have a much harder time enacting traffic laws or improving roads if the opponents decried reforms as amnesty for illegal drivers.<sup>39</sup> But that rapid and irrational rhetoric has stopped common-sense immigration

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33. Andrea Castillo, *Immigrant Arrested by ICE After Dropping Daughter off at School, Sending Shockwaves Through Neighborhood*, L.A. TIMES (Mar. 03, 2017, 4:10 PM), <http://www.latimes.com/local/lanow/la-me-immigration-school-20170303-story.html>

34. Joel Rose, *Border Patrol Says Checkpoints Will Remain Open During Hurricane Harvey*, NPR NEWS (Aug. 25, 2017, 3:54 PM), <https://www.npr.org/2017/08/25/546109886/border-patrol-says-checkpoints-will-remain-open-during-hurricane-harvey>.

35. John Burnett, *Border Patrol Arrests Parents While Infant Awaits Serious Operation*, NPR NEWS (Sept. 20, 2017, 7:06 PM), <https://www.npr.org/2017/09/20/552339976/border-patrol-arrests-parents-while-infant-awaits-serious-operation>.

36. Hong, *supra* note 3, at 124–148.

37. Caitlin Dickerson & Ron Nixon, *Trump Administration Considers Separating Families to Combat Illegal Immigration*, N.Y. TIMES (Dec. 21, 2017), <https://www.nytimes.com/2017/12/21/us/trump-immigrant-families-separate.html>; Caitlin Dickerson, *Hundreds of Immigrant Children Have Been Taken from Parents at U.S. Border*, N.Y. TIMES (Apr. 20, 2018), <https://www.nytimes.com/2018/04/20/us/immigrant-children-separation-ice.html> (reporting that more than 700 children have been separated from their parents).

38. Lomi Kriel, *Her Husband Murdered, Her Son Taken Away, A Mother Seeking Asylum Tells a Judge, ‘I Have Lost Everything’*, HOUS. CHRON. (Dec. 29, 2017), <http://www.houstonchronicle.com/news/houston-texas/houston/article/Her-husband-murdered-her-son-taken-away-a-12462658.php>.

39. Lawrence Downes, *What Part of “Illegal” Don’t You Understand?*, N.Y. TIMES (Oct. 28, 2007), <http://www.nytimes.com/2007/10/28/opinion/28sun4.html>.

reform that has been needed for over 20 years and is supported by the majority of Americans, including those who supported Trump.<sup>40</sup>

Since President Trump has taken office, it is clearer than ever that there are two ways to end “illegal immigration.” The first route—started by President Obama and ratcheted up by President Trump with relentless cruelty—is an actual effort to deport millions and exclude millions more.<sup>41</sup> The second is to legalize those without status who have been, are, and will continue to contribute to America’s families, communities, and future.

This essay argues that the latter choice, restoring the paths to legalization that once were part of our nation’s laws, is the only realistic way forward to restore common sense to immigration law. This choice will stop excessive, wasteful, and expensive enforcement measures and invest in people who are making current and future contributions to families, work places, and communities.

Developing legal solutions, however, will not come until it is recognized how the term “illegal immigration” originated in popular culture and influenced immigration law with distortions over who merits protection and who does not. Part I then examines the operation of existing immigration law, surveys the origins and misuse of the term “illegal immigrant,” and offers that the term “pre-legal immigrant” is the more accurate descriptor of how people are given legal status. Once the false presumption of criminality in the term “illegal immigrant” is exposed, Part II ends with a call to restore needed paths to legalization, which benefit immigrant communities, the citizen family members and employers who rely on their contributions, and the U.S. economy as a whole. Once presumptions are replaced with facts, paths to common sense reform are found for both the short- and long-term.

#### I. HOW THE TERM “ILLEGAL IMMIGRATION” OBSCURES THE OPERATION OF IMMIGRATION LAW

A starting point is: how did we get the terms “illegal immigration” and “illegal immigrants” and what impact has that had on immigration policy? In answering the first question, Professor Edwin Ackerman has persuasively argued that the term “illegal immigrants” began to be

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40. *Id.*

41. Mirren Gidda, *Obama vs. Trump: Who has Deported More Immigrants?*, NEWSWEEK (Apr. 18, 2017, 2:35 PM), <http://www.newsweek.com/illegal-immigration-undocumented-migrants-obama-trump-585726>.

widely used in the 1970s.<sup>42</sup> The legal descriptor of “alien”—a technical term in immigration law—morphed into “illegal alien,”<sup>43</sup> “illegal immigrant,” and simply “illegal” used as a noun to describe immigrants in a pejorative manner. “The shift towards illegality that took place at the beginning of the 1970s was enabled by the uncoordinated but co-existing intervention of bureaucrats, trade unions, and organizations targeting a Mexican American constituency.”<sup>44</sup> The INS and Border Patrol wanted increased prestige and funding and obtained both by publicly decrying the unending flow of border crossings.<sup>45</sup> Conservative groups, now described as “right-wing” groups, used the term to target immigrants with racist animus and xenophobia.<sup>46</sup>

But also, as an important note, left-leaning unions and civil rights groups used both the term to distance themselves from arriving immigrants to serve their populations. Cesar Chavez “condemned undocumented immigration” and criticized growers who hired undocumented immigrants to hurt organized labor or stop unionization.<sup>47</sup> The unions also disparaged undocumented immigrants as a means to contend that “legal farm workers” are more deserving of the protections of labor law based on their immigration status alone.<sup>48</sup> And also, even some Latino civil rights organizations made clear that the advancement for Latino Americans was deserved, unlike undocumented immigrants.<sup>49</sup> For instance, in a 1970 letter to the Editor of Los Angeles Times, a member of the Chicano Law Student Association at UCLA law school criticized the use of the term “wetback” as a pejorative term to describe Mexican-Americans but made clear that the terms “illegal aliens” or “illegal entrants” are not pejorative to describe this population.<sup>50</sup>

In the rise and acceptance of the term “illegal immigrant”

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42. Edwin Ackerman, *‘What Part of Illegal Don’t You Understand?’: Bureaucracy and Civil Society in the Shaping of Illegality*, 37:2 ETHNIC & RACIAL STUD. 181, 183, 186 (2014).

43. Although the term “alien” was a technical part of immigration law for years, the 1950s’ fascination with space and science fiction tainted the term to be indelibly foreign or otherworldly. Francie Diep, *Why Did We Ever Call Undocumented Immigrants ‘Aliens’?*, PAC. STANDARD (Aug. 12, 2015), <https://psmag.com/news/the-world-outside-of-america-is-basically-outer-space-right>.

44. Ackerman, *supra* note 42, at 190.

45. *Id.* at 193.

46. *Id.* at 192.

47. *Id.* at 193–94.

48. *Id.* at 194.

49. *Id.* at 198–99.

50. *Id.* at 199.

however, was a failing to realize that it was without meaning in immigration law. The term “illegal immigrant” itself is not a technical descriptor of any person or status. Rather, it is a colloquial term, originating with bureaucrats who wanted more funding for immigration enforcement and adopted widely by grassroots groups (both left- and right-leaning) to express animus towards certain immigrants.<sup>51</sup> In this respect, the otherworldly status of the science fiction space alien merged seamlessly with animus towards non-citizens.

But as much as the origins of the terms are not from immigration law, the term has been incredibly effective in shaping the popular narrative used to understand that immigration benefits are conferred based on who is worthy of protection and who is not.<sup>52</sup> This understanding of immigration law has led to a contemporary immigration enforcement system that is costly and unnecessary.

Of great significance, the term “illegal immigrant” itself is meaningless in immigration law—in that it has no bearing on who ultimately has the ability or means to obtain legal status.<sup>53</sup> The term implies, however, that the “illegal immigrant” has done something wrong.<sup>54</sup> This implication is misplaced because someone who commits an immigration violation is differently situated from someone who commits a criminal offense in two notable ways.

At the beginning of a criminal case, the government serves a defendant with charging papers, identifying allegations of the crime that was committed.<sup>55</sup> If the allegations are proven true, the defendant is convicted and punished.<sup>56</sup> At the start of an immigration hearing, the government also serves on a non-citizen allegations of immigration

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51. Lauren Gambino, *'No Human Being Is Illegal': Linguists Argue Against Mislabeling of Immigrants*, GUARDIAN (Dec. 6, 2015, 8:13 AM), <https://www.theguardian.com/us-news/2015/dec/06/illegal-immigrant-label-offensive-wrong-activists-say>.

52. *Id.*

53. Derek Hawkins, *The Long Struggle over What to Call 'Undocumented Immigrants,' or, as Trump Said in his Order, 'Illegal Aliens'*, WASH. POST (Feb. 9, 2017), [https://www.washingtonpost.com/news/morning-mix/wp/2017/02/09/when-trump-says-illegals-immigrant-advocates-recoil-he-would-have-been-all-right-in-1970/?utm\\_term=.07f5349089b6](https://www.washingtonpost.com/news/morning-mix/wp/2017/02/09/when-trump-says-illegals-immigrant-advocates-recoil-he-would-have-been-all-right-in-1970/?utm_term=.07f5349089b6).

54. *Id.*

55. 1 Crim. Prac. Manual § 1.1, Westlaw (database updated Nov. 2017).

56. See Wayne R. LaFave et al., Crim. Proc. § 1.5(c), Westlaw (database updated Dec. 2017) (“Each party is expected to present the facts and interpret the law in a light most favorable to its side. The judge and jury are then to adjudicate impartially the issues presented by the opposing presentations.”).

violations.<sup>57</sup> These violations apply to those with legal status (deportability grounds) and those without legal status (inadmissibility grounds). They are numerous and include minor and unintentional acts, such as not carrying one’s green card, not notifying the government of your address change, or volunteering with the wrong visa.<sup>58</sup> For those without status, a commonly charged immigration violation is being in the country without a visa.<sup>59</sup>

But unlike a criminal trial, the focus in immigration proceedings is not merely on whether a violation occurred. Rather, even if a violation is found to be true, the critical question is whether the non-citizen is eligible for a remedy to obtain status (if they did not have it) or be restored to status (if their violations lost it).<sup>60</sup> The Immigration and Nationality Act is replete with waivers and remedies that are available for immigration violations.<sup>61</sup> The entire immigration law and hearing then contemplates that an immigration violation can be easily remedied and forgiven.

A second notable distinction from criminal law is the lasting consequences of having committed an immigration violation. In criminal law, once the prosecutor has alleged that someone has committed a crime, if that allegation is found true, that defendant is convicted, punished, and has a status of being a felon or petty offender.<sup>62</sup> States and federal governments have imposed up to 50,000 collateral consequences to this status, depriving those convicted of certain crimes from voting, vocations, educational loans, housing, and numerous other disadvantages.<sup>63</sup>

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57. 8 U.S.C. § 1182 (inadmissibility grounds); 8 U.S.C. § 1227 (deportability grounds).

58. 8 U.S.C. § 1227(a)(3)(A) (change of address); 8 U.S.C. § 1182(a)(7) (documentation requirements).

59. 8 U.S.C. § 1182(6)(A)(i) (An alien present in the United States without being admitted or paroled, or who arrives in the United States at any time or place other than as designated by the Attorney General, is inadmissible.”).

60. See *Immigration Court Practice Manual § 4.1: Hearings Before the Immigration Court*, <https://www.justice.gov/sites/default/files/eoir/legacy/2012/11/08/Chap%204.pdf> (“Immigration Judges preside over courtroom proceedings in removal, deportation, exclusion, and other kinds of proceedings.”).

61. 8 U.S.C. § 1158 (asylum); 8 U.S.C. § 1229b (cancellation of removal); 8 U.S.C. § 1182 (waiver for certain crimes and conduct); 8 U.S.C. § 1227 (waiver for certain misrepresentations); 8 U.S.C. § 1401 (derivative citizenship); 8 U.S.C. § 1427 (naturalization).

62. See *Conviction*, Black’s Law Dictionary (10th ed. 2014) (“A conviction is the act or process of judicially finding someone guilty of a crime; the state of having been proved guilty or the judgment (as by a jury verdict) that a person is guilty of a crime.”).

63. *United States v. Nesbeth*, 188 F. Supp. 3d 179, 184 (E.D.N.Y. 2016), appeal withdrawn (Sept. 9, 2016) (“Remarkably, there are nationwide nearly 50,000 federal and state statutes and regulations that impose penalties, disabilities, or disadvantages on convicted

By contrast, there is no “immigrant violator.” Immigration law is designed to forgive the immigration violation when certain remedies—based on family, employment, or future harm in a foreign country—are present.<sup>64</sup> As noted by the Fourth Circuit, “[t]he prospect of discretionary relief from removal has long been a fixture of immigration jurisprudence.”<sup>65</sup>

This is true not only at the original immigration hearing, when a remedy can be conferred in the form of lawful permanent residence or asylum. But also, even final deportation orders can be vacated and are so on a routine basis when changed circumstances exist. The regulations define changed circumstances to include factual changes—such as marriage to a citizen or dangerous conditions emerging in one’s country of origins—and legal ones—such as the discovery that one’s former attorney was ineffective or remedies become newly available.<sup>66</sup>

The incredible disservice of the term “illegal immigrant” is that it presumes that a non-citizen is stuck without legal status and deserves punishment. The term further wrongfully implies that the lack of status arises from her own doing, such as not filing paperwork or getting in the “proverbial line,” a commonly used metaphor that does not exist in reality.

As an important aside, there is no singular line or means to obtain legal status. Rather, a better metaphor would be a Rubik’s cube. Some people are presented the solved cube based on random lucky factors such as falling in love with the right citizen, being from a country with a strained relationship with the United States, or having a needed skill. Some are presented with a partially solved cube, missing only a couple of turns that can be activated when time or circumstances arise. (When DACA was first made available, those who would qualify for this new remedy would fall into this group). And others are presented with a Rubik’s cube without any stickers, being told that they will gain entry when Congress fills in the colors, something it has not done in over 20 years. Those who fall in this group are the majority of the 11 million without status and now the former DACA recipients whose program

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felons.”).

64. See generally 8 U.S.C. § 1151 (family and employment), 8 U.S.C. § 1158 (asylum), and 8 U.S.C. § 1229b (cancellation of removal for non-lawful permanent residents).

65. *Jaghoori v. Holder*, 772 F.3d 764, 766 (4th Cir. 2014).

66. Motions to reopen exist to vacate final orders of removal when “changed circumstances” render someone eligible “[t]o apply *or reapply*” for asylum, 8 C.F.R. § 1003.2(c)(3)(ii) (emphasis added); when the government agrees to reopen the proceedings in its discretion, 8 C.F.R. § 1003.2(c)(3)(iii); or when the Board of Immigration Appeals elects to reopen “any case” “at any time.” 8 C.F.R. § 1003.2(a).

was rescinded by the Attorney General and not renewed by Congress.

The term “illegal immigrant” then obscures that the reason that millions of people—husbands, wives, veterans, doctors, nurses, agricultural workers, tax payers, teachers, and others—are without status. It is not because they have failed to follow any law. Rather, Congress has imposed a random set of rules that prevents millions from obtaining legal status. For instance, if a hypothetical person named Tourist A falls in love with a citizen and married, the citizen spouse could petition for Tourist A to remain in the country with a green card.<sup>67</sup> But if a hypothetical person named Tourist B enters the country by crossing the border without a visa and falls in love with a citizen and marries, the citizen spouse is not allowed to petition for Tourist B to remain in the country with a green card.<sup>68</sup> The reason for the disqualification? Only the person’s method of entry into the United States.<sup>69</sup>

The import on how someone enters is given contemporary import that did not previously exist. Up until 2001, Tourist B simply used to pay a \$1,000 fine and would receive the green card based on a marriage to a citizen (or job offer from qualifying employer).<sup>70</sup> But now, under the current law, Tourist A who has committed the immigration violation of overstaying a visa can still remedy her status, but Tourist B cannot.<sup>71</sup>

In addition, Tourist B cannot leave the country without significant detriment to her citizen family members. If she leaves the country, even in an attempt to legalize status, Tourist B will be penalized by not being permitted to return for 3 years, 10 years, or forever simply because she resided without status.<sup>72</sup> Tourist B now cannot stay and cannot leave. She is stuck, which is how 11 million people are without

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67. 8 U.S.C. § 1151 (family petition); 8 U.S.C. § 1255 (lawful permanent residence).

68. 8 U.S.C. § 1255 (lawful permanent residence).

69. See *Entry Without Inspection (EWI) and Family Unity Waiver in a Nutshell*, NAT’L IMMIGR. F. (Apr. 6, 2012), <http://immigrationforum.org/blog/entry-without-inspection-ewi-and-family-unity-waiver-in-a-nutshell/> (“Persons who unlawfully enter the U.S. without inspection or parole (entry without a visa issued at a consular post abroad or inspection at an authorized port of entry) are considered to be ‘inadmissible’ under the Immigration and Nationality Act (INA). To be admissible, the law requires a lawful entry into the U.S. after inspection and authorization by an immigration officer.”).

70. 8 U.S.C. § 1255(a); 8 U.S.C. § 1255(i) (108 U.S.C. § 1153(a): waiver for inadmissibility available to those who meet all requirements before Dec. 21, 2000).

71. See 8 U.S.C. § 1182 (aliens present without admission or parole are inadmissible and not able to adjust status because of their inadmissibility, whereas aliens who overstayed a visa were properly admitted and can adjust status).

72. 8 U.S.C. § 1182 (reentry bars).

legal immigration status. This person is not an “illegal immigrant,” the victim of her own wrongdoing. She is the victim of an irrational law that ended paths of legalization.

For years, attempts at immigration reform were—and continue to be—thwarted by opponents, accusing that common-sense reforms were providing amnesty to law breakers.<sup>73</sup> Legalization—a process that requires a tie to a citizen family member, business, or community contribution—was wrongly conflated with amnesty.<sup>74</sup> Even the concept of amnesty suggested that the non-citizen had done something wrong. The term “illegal immigrant” helped advance that false narrative that permitting people to earn status was somehow a break from how immigration law operated.

#### A. How The Term “Illegal Immigration” Led To Billions Of Dollars Spent On Immigration Enforcement.

As our Native American friends can attest, we have had “illegal immigrants” in America even before we had a country. The British, French, Dutch, and other European countries set up colonies in a land fully inhabited with Native Americans, without ever seeking their permission to enter, work, and live here.<sup>75</sup> The Trump administration’s pursuit of closed borders towards others arises from a country founded on and benefiting from open immigration.

But putting aside the irony of that fact, in the past 200 years, we have had a number of significant acts that have informed our modern notion of immigration law.

In 1790, in the first year of the new country, Congress passed a citizenship law, which gave citizenship to “free white people.”<sup>76</sup> This law excluded African-Americans, Native Americans, former slaves, and indentured servants.<sup>77</sup> However, the Act conferred citizenship to all others who were simply in the country at the time of the law’s

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73. See Matthew Nussbaum, *Trump Denies Agreeing to ‘Amnesty’ but Embraces Immigration Reform*, POLITICO (Sept. 14, 2017, 4:11 PM), <https://www.politico.com/story/2017/09/14/white-house-amnesty-undocumented-immigrants-242722> (“Allowing people who came to the U.S. without documentation to stay is precisely what many conservatives commonly mean when they say ‘amnesty.’”).

74. *Id.*

75. See *Did My Family Come Here Legally? Today’s Immigration Laws Created a New Reality*, AMERICAN IMMIGR. COUNCIL (Aug. 10, 2016) (“Until the late 19th century, there was very little federal regulation of immigration—there were virtually no laws to break.”).

76. 1790 Naturalization Act, 1 Stat. 103 (repealed 1795).

77. *Id.*

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enactment.<sup>78</sup>

There has always been tension between welcoming immigrants as new Americans entitled to membership in the United States and excluding immigrants as unwanted foreigners in targeted ways or through large swaths of xenophobia.<sup>79</sup> As early examples of exclusions—there are the 1798 Alien and Sedition Acts,<sup>80</sup> the 1882 Chinese Exclusion Act,<sup>81</sup> and laws excluding people from Italy and Japan.<sup>82</sup>

The Alien and Sedition Act contemplated expulsion for dangerous “aliens,” but the Alien Act expired in 1800.<sup>83</sup>

The concept of inadmissibility—barring certain non-citizens from entering the country—was first introduced in the 1882 Chinese Exclusion Act.<sup>84</sup> In 1882, those who were inadmissible were targeted based on their nationality, arising from what is now recognized as racist and sexist reasons.<sup>85</sup> The motivation for inadmissibility, based on irrational animus, was revived again in President Trump’s Travel Ban.<sup>86</sup> But the notion that a nation can exclude certain undesirable non-

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78. *Id.*

79. *Did My Family Come Here Legally?*, *supra* note 75 (“A growing, increasingly industrialized nation needed workers, and immigration was ‘encouraged and virtually unfettered.’ Potential immigrants did not have to obtain visas at U.S. consulates before entering the country. Rather, immigrants would simply arrive at ports of entry (such as Ellis Island), where they were inspected and allowed into the country . . .”).

80. Gregory Fehlings, *Storm on the Constitution: The First Deportation Law*, 10 TULSA J. COMP. & INT’L L. 63, 65 (2002) (The Alien and Sedition Act refers to four separate laws Congress enacted.).

81. Chinese Exclusion Act of 1882, 22 Stat. 58 (repealed 1943).

82. Shotaro Oshima, *Why the 1920s U.S. Ban on Japanese Immigrants Matters Today*, HUFF. POST (Dec. 22, 2015), [https://www.huffingtonpost.com/shotaro-oshima/1920s-us-ban-japanese\\_b\\_8858260.html](https://www.huffingtonpost.com/shotaro-oshima/1920s-us-ban-japanese_b_8858260.html); Helene Stapinski, *When American Barred Italians*, N.Y. TIMES (Jun. 2, 2017), <https://www.nytimes.com/2017/06/02/opinion/illegal-immigration-italian-americans.html>.

83. Fehlings, *supra* note 80, at 110.

84. *See generally* INA § 212 (listing modern grounds of inadmissibility); *In re Hong Yen Chang*, 84 CAL. 163, 164 (1890) (affirming order to deny a man the right to practice law on the basis that as a Chinese national, his naturalization certificate was rendered void by the Chinese Exclusion Act).

85. Chinese Exclusion Act of 1882, *supra* note 81.

86. Although not as explicit as the Chinese Exclusion Act, implicit racism was part of the creation of 1965 Act’s diversity lottery system, which was intended to bring in more European immigrants, deemed desirable based on their race or cultural status. Despite the original intent, the program later served to permit more non-European citizens to obtain status in the United States. In addition, scholars have argued that racism animated if not influenced the creation of certain inadmissibility grounds, most notably crime-based deportability and inadmissibility grounds. *See* Alina Das, *Inclusive Immigrant Justice: Racial Animus and the Origins of Crime-Based Deportation*, 52 U.C. DAVIS L. REV. (forthcoming 2018) (N.Y.U.

citizens from entering or obtaining legal status remained a feature of immigration law until the 1965 Immigration and Nationality Act abolished country-based quotas.<sup>87</sup>

The concept of deportation—the act of removing someone with legal status from the United States—was introduced in the Immigration Act of 1917.<sup>88</sup> As Professor Juliet Stumpf has noted, despite the creation of this concept, it was not until the 1940s and 1950s with the rise of a funded and operational bureaucracy that legal deportations first routinely and consistently occurred.<sup>89</sup>

In 1965, the modern immigration scheme was enacted, in which the goals of the framework consisted of reuniting families, attracting needed skilled and unskilled workers, and providing protections to those fleeing persecution.<sup>90</sup> Indeed, although a dramatic shift in immigration enforcement began in 1996—which will be discussed below—that shift still did not alter the goals of the 1965 modern immigration scheme in which legal status is given to family members of citizens (currently accounting for 2/3 of our legal immigrants),<sup>91</sup> employees or employers of citizens (currently accounting for around 20 percent of legal immigrants),<sup>92</sup> and those facing persecution (currently accounting for around 13 percent of legal immigrants, broken down by asylum seekers accounting for 3 percent and refugees accounting for 10 percent).<sup>93</sup>

What did change in 1996 was Congress's embrace of the term "illegal immigration." In 1996, Congress enacted a dramatic overhaul of immigration law by focusing on enforcement measures and ending

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School of Law, Working Paper No. 17-40, 2017).

87. See note 82 (citing laws excluding nationals from Japan and Italy); Tom Gjelten, *The Immigration Act That Inadvertently Changed America*, ATLANTIC (Oct. 2, 2015), <https://www.theatlantic.com/politics/archive/2015/10/immigration-act-1965/408409/>.

88. Immigration Act of 1917, 39 Stat. 874 (amended 1952).

89. Juliet Stumpf, *Fitting Punishment*, 66 WASH. & LEE L. REV. 1683, 1718 (2009).

90. Immigration and Nationality Act of 1965, amendments, 79 Stat. 911 (current version at 8 U.S.C. § 12 (2012)).

91. See D'Vera Cohn, *5 Key Facts About U.S. Lawful Immigrants*, PEW RES. CTR. (Aug. 3, 2017), <http://www.pewresearch.org/fact-tank/2017/08/03/5-key-facts-about-u-s-lawful-immigrants/> ("Among 1,051,031 people granted green cards . . . in fiscal 2015, 65% were relatives of a U.S. citizen or a lawful permanent resident.").

92. Jie Zong, et al., *Frequently Requested Statistics on Immigrants and Immigration in the United States*, MIGRATION POL'Y INST. (Mar. 8, 2017), <https://www.migrationpolicy.org/article/frequently-requested-statistics-immigrants-and-immigration-united-states#Workforce> ("Immigrants accounted for nearly 17 percent (26.7 million) of the 160.6 million workers in the civilian labor force in 2015").

93. U.S. DEP'T OF HOMELAND SECURITY, 2016 YEARBOOK OF IMMIGRATION STATISTICS tbl.16 (2017), <https://www.dhs.gov/immigration-statistics/yearbook/2016/table16>.

paths to legalization. In doing so, it codified the term into the very name of the transformative law, the Illegal Immigration Reform and Immigration Responsibility Act of 1996 (IIRIRA).<sup>94</sup>

Again, although the law did not change the nature of immigration law’s forgiveness of immigration violations, it reified the notion that some immigrants are illegal—based on their own shortcomings—and others are legal, based on their merit. This is how the public and policymakers routinely mischaracterize immigration and immigrants in the United States.

As a starting point, IIRIRA is an irrational law that endorses numerous irrational policies. It ended a number of means that millions of people had to legalize status—which had been available to family members and long-term residents of the country—and significantly increased those who could be deported, both by increasing the number of immigration violations and eliminating remedies previously available to those who showed that their contributions to the country overrode any debit.<sup>95</sup>

IIRIRA is the reason why we have 11 million people stuck in the shadows. Prior to 1996, immigration debates were over whether to educate the children of non-citizens.<sup>96</sup> Now, we are keeping a sizeable population stuck without a means to stay with family members or employers.

IIRIRA was also never devised to respond to a real problem. It was a radical overhaul done to meet a deadline to maximize the parties’ political electoral advantages, leaving typographical errors and confusing clauses that have resulted in decades of litigation.<sup>97</sup> When

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94. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, 110 Stat. 3009 (current version at 8 U.S.C. § 12 (2012)).

95. *Id.*

96. Eric Schmitt, *Milestones and Missteps on Immigration*, N.Y. TIMES (Oct. 26, 1996), <http://www.nytimes.com/1996/10/26/us/milestones-and-missteps-on-immigration.html> (“The issue arose in the campaign when Bob Dole . . . threw his support behind a provision that would have allowed states to deny public education to illegal immigrant children.”).

97. A number of IIRIRA’s clauses are described by judges as “confusing.” See *Edoo v. Kaplinger*, 47 F. Supp. 2d 769, 770 (W.D. La. 1999) (“IIRIRA included detailed, if confusing, instructions on the application of its provisions.”); *Zadvydas v. Underdown*, 185 F.3d 279, 287 n. 7 (5th Cir. 1999) (noting that the different use of the words “in” and “before” created confusion over when and over which cases IIRIRA applied). Commenters note that some substantive changes may have been unintentional. See Ellen G. Yost, *Immigration and Nationality Law*, 31 INT’L LAW. 589, 596 (1997) (“Because of the haste with which the IIRIRA was passed, Congress may not have been fully aware of its far-reaching consequences. When its draconian effects become known, Congress should amend the legislation.”); Kari E. Hong, *Removing Citizens: Parenthood, Immigration Courts, and*

President Clinton signed the bill in August 1996—the same month he signed the Defense Against Marriage Act and ended welfare reform—his advisors noted that some of the provisions were irrational.<sup>98</sup> But they were part of a political calculation for the Democratic Party to appear “Tough on Crime” in the hopes of securing a reelection bid in November 1996.<sup>99</sup> Although President Clinton did succeed on the political gamble for his own fortunes, it has come at a considerable cost of enacting an irrational and needless immigration law.

Of note, everything President Trump has been doing in terms of cruel and ruthless immigration enforcement measures has been because IIRIRA lets him. If Trump were to leave office tomorrow—which is no longer a rhetorical point—we have to remember that President Trump is neither the source nor cause of his irrational immigration enforcement policies.

This law started building a wall along the southern border—a senseless and expensive measure that exploits fear rather than realizes

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*Derivative Citizenship*, 28 GEO. IMMIGR. L.J. 277, 354 n. 130 (2014) (explaining how misdemeanors are included in the term “aggravated felony” because IIRIRA provides “that certain crimes for which a sentence of “at least one year” may constitute an aggravated felony. See e.g., 8 U.S.C. § 1101(a)(43)(F), (G). This means that the overlap of one day in a misdemeanor sentence will turn a minor offense under state law into the worst of the worst under immigration law. If Congress changed the wording of an aggravated sentence to “more than one year” or states amended their misdemeanor sentences to 364 days, the overlap would not occur.”) (citations omitted).

98. Dara Lind, *The Disastrous, Forgotten Law That Created Today's Immigration Problem*, VOX (Apr. 28, 2016), <http://www.vox.com/2016/4/28/11515132/iirira-clinton-immigration> (“If IIRIRA was as terrible a bill as Meissner claims, why did Panetta celebrate signing it? For that matter, why did President Clinton sign the bill at all? The answer is, essentially, that on some level the Clinton administration really did want to look tough on immigration. And that was more important than vetoing a bill because some in the administration didn’t like its policy provisions.”); Steve Kornacki, *Why Bill Clinton Really Signed DOMA*, MSNBC (Oct. 27, 2015), <http://www.msnbc.com/msnbc/why-bill-clinton-really-signed-doma> (“A profile in courage moment? Hardly. But a coldly rational judgment from a politician who had gotten too far ahead of the public on gay rights and paid dearly for it?”); Margaret O’Mara, *Welfare as We Knew It*, BLACKPAST.ORG, <http://www.blackpast.org/perspectives/welfare-we-knew-it-1996-personal-responsibility-and-work-opportunity-act> (discussing political calculations that went into the formulation and enactment of the bill: “By 1996, Clinton was running for reelection and comprehensive welfare reform legislation was moving through in Congress. Named the ‘Personal Responsibility and Work Opportunity Act,’ the bill truly ended welfare as we knew it. Although Gingrich’s orphanages were nowhere to be seen, the legislation ended the welfare entitlement, a heretofore sixty-year federal guarantee that all poor people who qualified would receive the benefit.”).

99. Aviva Stahl, *How a Clinton-Era Law Is Still Criminalizing Immigrants Today*, VICE (Oct. 17, 2016, 12:00 AM), [https://www.vice.com/en\\_us/article/7bmxye/how-a-20-year-policy-is-still-criminalizing-immigrants-today](https://www.vice.com/en_us/article/7bmxye/how-a-20-year-policy-is-still-criminalizing-immigrants-today).

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solutions.<sup>100</sup>

This law targeted Mexican nationals for disadvantage, preventing them from getting green cards because they were Mexican. The law was more sophisticated than Trump’s racist denunciations of Mexican nationals by hiding this disadvantage in preventing those who cross the border (those mostly from Mexico) to get a green card but letting those who overstay a visa to do so.<sup>101</sup> This means that even though most undocumented people come in from Canada, only those from Mexico cannot fix their status.

This law introduced the use of detention facilities to house non-citizens.<sup>102</sup> This endeavor enriches private prisons at taxpayers’ expense and also is ineffectual.<sup>103</sup> By the testimony of ICE’s personnel, community-based programs or voluntary reporting is cheaper and as effective as locking up those who did not commit any crimes.<sup>104</sup>

And President Obama also used IIRIRA to effectuate over 2.5 million deportations over his eight years in office.<sup>105</sup> This number of the mass removal of humanity should shock the conscience. The numbers of deported persons are more than all of the combined deportations that occurred under all presidents from 1900 to 2000.<sup>106</sup> Worse still, over 80 percent were without hearings and appeals based on expedited procedures introduced under this law.<sup>107</sup>

President Obama claimed he was targeting only serious felons by using administrative procedures that waived hearings, impartial

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100. MICHAEL JOHN GARCIA, CONG. RESEARCH SERV., R43975, BARRIERS ALONG THE U.S. BORDERS: KEY AUTHORITIES AND REQUIREMENTS (2016) (“The primary statute authorizing DHS to deploy barriers along the international borders is Section 102 of IIRIRA of 1996 . . .”).

101. 8 U.S.C. § 1182, *supra* note 69.

102. Stahl, *supra* note 99 (“IIRIRA and AEDPA also made detention and deportation mandatory . . .”).

103. Ali Noorani, *Focusing U.S. Immigration Detention Costs*, REUTERS (Mar. 4, 2013), <http://blogs.reuters.com/great-debate/2013/03/04/focusing-u-s-immigration-detention-costs/>.

104. *Alternatives to Immigration Detention: Less Costly and More Humane than Federal Lock-up*, ACLU, [https://www.aclu.org/sites/default/files/assets/aclu\\_atd\\_fact\\_sheet\\_final\\_v.2.pdf](https://www.aclu.org/sites/default/files/assets/aclu_atd_fact_sheet_final_v.2.pdf) (last visited Apr. 1, 2018).

105. Serena Marshall, *Obama Has Deported More People than Any Other President*, ABC NEWS (Aug. 29, 2016, 2:05 PM), <http://abcnews.go.com/Politics/obamas-deportation-policy-numbers/story?id=41715661>.

106. *Id.*

107. See Catherine E. Shoichet, *Can Immigrants Be Deported Without a Court Hearing?*, CNN (Mar. 3, 2017, 7:15 PM), <https://www.cnn.com/2017/03/03/politics/deportations-without-court-hearings/index.html> (“Only about 15% of the roughly 400,000 people who are removed from the United States each year ever go before a judge . . .”).

factfinders, and appeals in an effort to more efficiently deport people.<sup>108</sup> But in fact, fewer than 20 percent of those deported by the Obama administration had criminal records.<sup>109</sup> Among this supposed group of dangerous immigrants are those who commit “aggravated felonies.” Despite the name, a non-citizen who is deported for an aggravated felony—most often a green card holder—does not need to have a conviction that is aggravated or even a felony.<sup>110</sup> The category includes misdemeanors and infractions that state courts did not punish with more than a fine or were later expunged.<sup>111</sup> And felonies—especially in the age of mass incarceration—included the conduct of stealing a \$2 can of beer. This is the story of one of my clinic’s clients, who was one of the 2.5 million deported under Obama but for whom a federal appeal restored his status. Although the federal appeal was successful on technical reasons, it was not the result of challenging Congress’s decision to irrationally sweep in minor, old, or misdemeanor offenses into the most serious offenses. The presumption that prior criminality equated with bad character led to the deportation of people whose crimes were from decades ago, military and combat veterans who served our country, and the heroes in our community who rise up and help in times of crisis, including the man who rushed to save 9/11 victims.<sup>112</sup>

The old law did not do this. Rather, it looked carefully at what exactly was the crime—was it serious or minor and who was the offender—was he depraved and unrepentant or rehabilitated with documented contributions.<sup>113</sup> Criminal judges always look at these factors when deciding what punishment is appropriate for a conviction.<sup>114</sup> It makes no sense for our immigration judges to no longer evaluate the fact-specific circumstances of a crime and characteristics of the offender to determine who forfeited their right to remain and who earned a second

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108. Christie Thompson & Ana Flagg, *Obama’s Promise to Focus Deportation Policy on ‘Felons not Families’ Has Fallen Short*, BUS. INSIDER (Sep. 29, 2016, 8:28 PM), <http://www.businessinsider.com/obama-immigration-policy-deportation-2016-9>.

109. *Id.*

110. *Aggravated Felonies: An Overview*, AMERICAN IMMIGR. COUNCIL (Dec. 16, 2016), <https://www.americanimmigrationcouncil.org/research/aggravated-felonies-overview> (“Despite what the ominous-sounding name may suggest, an ‘aggravated felony’ does not require the crime to be ‘aggravated’ or a ‘felony’ to qualify. Instead, an ‘aggravated felony’ is simply an offense that Congress sees fit to label as such, and today includes many nonviolent and seemingly minor offenses.”).

111. *Id.*

112. Barbara Demick, *They Helped Clean Up the Wreckage of 9/11. Now They Face Deportation*, L.A. TIMES (Sep. 11, 2017, 4:45 PM), <http://www.latimes.com/nation/la-na-911-immigrants-20170911-story.html>.

113. Dawn Marie Johnson, *AEDPA and the IIRIRA: Treating Misdemeanors as Felonies for Immigration Purposes*, *The Legislative Reform*, 27 J. LEGIS. 477, 480 (2001).

114. *Id.* at 488.

chance.

This is why our 20-year-old immigration policy that claims to focus just on the criminals is irrational. This statement assumes that a criminal conviction can effectively sort out the “illegal immigrants” from those who “deserve” to be here. The problem is that crimes that have consequences include offenses that the state judges did not feel warranted much punishment, such as misdemeanors, offenses with probation, and convictions that are eliminated by expungement, pardons, or post-conviction relief. And, Congress also makes the consequences automatic, without regard to the offender. As in the example of the Polish doctor with a green card,<sup>115</sup> remote convictions and those accompanied by decades of proven rehabilitation still compel deportation. The justification to deport “felons, not families” rings hollow because such a narrative elides the fact that felons are also husbands, wives, sons, daughters, veterans, teachers, and doctors who are integral members of families and our communities.<sup>116</sup> Without an individualized assessment of the offender and offense, the current reliance on crimes to deport people is simply bad policy. The better description of our immigration policy would be lasting deportation for non-serious crimes, rehabilitated offenders, and old offenses that did not have any immigration consequence at the time of conviction and is made without regard for the impact that deportation has on the law-abiding and citizen family members. Even when evaluating those with criminal convictions, IIRIRA’s harsh and unforgiving framework is without value.

What IIRIRA has done well, though, is to justify the expenditure of billions of dollars in apprehending, detaining, and deporting non-citizens. Before Trump, \$18 billion each year was spent on immigration enforcement, \$4 billion more than the budget of five federal agencies targeting federal criminal matters.<sup>117</sup> Think about that. That means more money was spent on finding those who overstayed their visa but may get a green card based on their family relationship than those who were harming citizens by committing violent crimes,

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115. Samantha Smith, *ICE Detains a Polish Doctor and Green-card Holder Who Has Lived in the U.S. for Nearly 40 Years*, WASH. POST (Jan. 22, 2018), [https://www.washingtonpost.com/news/morning-mix/wp/2018/01/22/ice-detains-a-polish-doctor-and-green-card-holder-who-has-lived-in-the-u-s-for-nearly-40-years/?utm\\_term=.ccea1b76fe46](https://www.washingtonpost.com/news/morning-mix/wp/2018/01/22/ice-detains-a-polish-doctor-and-green-card-holder-who-has-lived-in-the-u-s-for-nearly-40-years/?utm_term=.ccea1b76fe46).

116. Adrian Florido, *Immigration Advocates Challenge Obama’s ‘Felons Not Families’ Policy*, NPR (Nov. 1, 2016), <https://www.npr.org/2016/11/01/500264042/immigration-advocates-challenge-obamas-felons-not-families-policy>.

117. Julia Preston, *Huge Amounts Spent on Immigration, Study Finds*, N.Y. TIMES (Jan. 7, 2013), <http://www.nytimes.com/2013/01/08/us/huge-amounts-spent-on-immigration-study-finds.html>.

engaging in human trafficking, polluting our air and water, and posing a threat to our national security.

IIRIRA started the criminalization of immigration enforcement, and Trump is proposing to increase it further by hiring more ICE officers, authorizing more arrests, building more detention centers, and, of course, building more wall.<sup>118</sup>

IIRIRA then, in its codification of the term “illegal immigration” has been effective in using criminal enforcement measures to apprehend immigrants in increasingly cruel and inhumane ways and spending billions of dollars towards immigration enforcement. But the tragic failing is that the term “illegal immigration” obscures that immigration law more accurately sorts out immigrants based on who is “pre-legal” and in need of status rather than those who are “illegal” and in need of punishment.

## II. ENDING POLICIES PREDICATED ON “ILLEGAL IMMIGRATION”

If immigration law is understood to be how it operates—that there are citizens, lawful permanent residents, and pre-legal immigrants—those eligible for status based on family, work, community contributions, or a well-founded fear of harms—very different solutions to the “immigration problem” emerge.

The solutions start with spending significantly fewer resources on immigration enforcement and rewarding those who are making contributions to this country with legal status.

The easiest way to do this is to repeal IIRIRA. Short of that, common sense legal reforms can re-introduce the old paths of legalization that were taken away in 1996. Those paths permitted those with a qualifying family relationship or job to pay a \$1,000 fine if they had overstayed a visa or entered without one.<sup>119</sup> Also, for those who prefer to process green card applications oversees to not be punished with 3-year, 10-year, or permanent-bars based on living without

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118. Brian Naylor, *Trump's Plan to Hire 15,000 Border Patrol and ICE Agents Won't Be Easy*, NPR (Feb. 23, 2017, 5:12 AM), <https://www.npr.org/2017/02/23/516712980/trumps-plan-to-hire-15-000-border-patrol-and-ice-agents-wont-be-easy-to-fulfill>.

119. “Prior to the passage of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), potential avenues for relief included a waiver of deportation pursuant to section 212(c) of the Immigration and Nationality Act, 8 U.S.C. § 1182(c) (1994) (repealed 1996), and suspension of deportation pursuant to 8 U.S.C. § 1254(a)(1) (1994) (repealed 1996).” *Jaghooori v. Holder*, 772 F.3d 764, 766 (4th Cir. 2014).

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status.<sup>120</sup>

For those who are seeking asylum, repealing the arbitrary deadline to file within one year of entry<sup>121</sup> will let those with meritorious claims present them for individualized consideration.

But also, it is time to excise the term “illegal immigrant” from our vocabulary. The term wrongly implies that someone lacks the character of a “legal immigrant,” when it is in fact Congress that has chosen a policy that prohibits the legalization of millions. And repealed paths towards legalization are those that our relatives (and “our” means anyone without Native American ancestry) had received when they immigrated. This presumption of character or permanence is important to rebut. As an anecdote, I have a friend who is a doctor. He told me that his hospital wanted to deny a transplant to someone whom they called an “illegal immigrant” because the medical team was concerned he could not stay in the country.

But I asked: how did the doctors make that determination, given that the colloquial “illegal immigrant” term applies to a green card holder who has lived in the country for 50 years and whose immigration violation may be minor or ultimately proven untrue, a college student who does not yet have a job offer, someone who crossed the border 20 years ago and raised citizen children who are college educated and professional members of the community, someone who has been without status for decades but whose home country is erupting in political crisis, or someone who entered last week. The distinctions are important because the majority of these situations may lead to the restoration or receipt of legal status.

Trump and other immigration restrictionists insist that immigrants are taking jobs and depressing wages, which are assertions that are contrary to facts. The reality is that immigrants are making contributions, both in terms of paying taxes, starting small businesses, raising citizen children who excel, performing labor that certain industries—such as agriculture (unskilled) and medicine (skilled)—rely upon, serving in the military, and being responsible for \$1 trillion in our country’s GDP.<sup>122</sup>

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120. 8 U.S.C. § 1182 (The statute imposes re-entry bars on immigrants who accrue “unlawful presence” in the United States, leave the country, and want to re-enter lawfully.).

121. 8 U.S.C. § 1158 (asylum).

122. Russell Berman, *The Conservative Case Against Enforcing Immigration Law*, ATLANTIC (Mar. 6, 2015), <https://www.theatlantic.com/politics/archive/2015/03/the-conservative-case-against-enforcing-immigration-laws/387004/> (“The impact on the economy

President Trump's immigration crackdown is bringing down more than the illusory bad hombres. In only one year, colleges are cutting staff and services with the decrease in foreign student enrollment.<sup>123</sup> Medical doctors, including an award-winning humanitarian—are choosing to use their talents in Canada.<sup>124</sup> Tech companies are opting to open offices in Canada instead of the United States.<sup>125</sup> This is the fallout from the Trump administration's first year. Our demographics cannot sustain social security without immigrants. In 1950, there were 150 workers for 20 seniors.<sup>126</sup> In 2000, that number dropped to 100 workers for every 20 seniors.<sup>127</sup> In 2050, based on pre-Trump estimates, without immigration, there will be only 56 workers for 20 seniors.<sup>128</sup>

Or, put another way, there are two ways to end illegal immigration. The first, which Obama started, and Trump is bringing to a new level, is to try to deport all of the 11 million people without status and keep out the millions more. But the second is to provide paths to legalization so those who contribute stay. As DACA showed, when given status, those who can make contributions do so. Of the nearly 800,000 young adults with DACA, 95 percent had jobs or were in school when Attorney Sessions ended the program.<sup>129</sup>

There is every reason to believe that the experience of DACA is the expected outcome if the law can return to the common-sense legalization paths that existed prior to IIRIRA's enactment. Giving people legal status will only improve their ability to care for their family, pay taxes, enroll in the military, and maintain work. Indeed, for

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[if all undocumented immigrants are deported] would be even larger: real GDP would drop by nearly 1.6 trillion . . .”).

123. Saul, *supra* note 13.

124. Ashifa Kassam, *Syrian Doctor Hit by Trump Travel Ban Takes Up Studies in Canada Instead*, GUARDIAN (Jun. 29, 2017), <https://www.theguardian.com/us-news/2017/jun/29/syrian-doctor-hit-by-trump-travel-ban-takes-up-studies-in-canada-instead> (discussing a Syrian doctor for whom Brown University had provided a full tuition scholarship who moved to Canada after the Travel Ban barred his reentry to the United States. “Months after he was barred from re-entering the [United States], Almilaji was recognised by Canada’s head of state, alongside the two other founders of the Canadian International Medical Relief Organization. Canada’s governor general, who represents the Queen in Canada, awarded them the Meritorious Service Medal for exceptional individuals.”).

125. Molla, *supra* note 6.

126. *Get the Facts: Immigrants and the Economy—Five Reasons Why the U.S. Economy Needs Immigration*, AMERICA’S SOC’Y & COUNCIL OF THE AMERICAS (Feb. 12, 2013), <http://www.as-coa.org/articles/get-facts-immigrants-and-economy-five-reasons-why-us-economy-needs-immigrants>.

127. *Id.*

128. *Id.*

129. *Id.*

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those concerned that “illegal immigrants” provide an incentive for employers to pay them less than what they are owed, if they are legalized, the employers no longer have a vulnerable population to prey upon but must comply with federal and state laws to employ anyone.

### III. CONCLUSION

The experiment in ratcheting up immigration enforcement was not a thoughtful, considered proposal to an existing problem. In the same way that we have realized Tough on Crime has been a waste of money and human resources, so too has Tough on Immigration.

Ending “illegal immigration” is simple. The starting point is to recognize that IIRIRA has created a caste without legal possibilities and that the term “illegal immigrant” perpetuates the myth that who is illegal is a matter of character or an inability to follow the rules. But the reality is that immigration law is filled with choices that have erected arbitrary categories that disadvantage millions without justification. It is now obvious we should neither spend the money nor exercise the cruelty needed to remove 11 million long-term residents from our country. We should not erect walls and create bans that keep out people we need to make our country thrive.

The reality is that IIRIRA is irrational, not the immigrants who cannot obtain status because of arbitrary reasons. When people realize illegal immigrants are in fact pre-legal ones who are making current and future contributions, we can get back to the project of keeping those who are contributing by giving them legal status.