



The Ten Parts of “Illegal” in “Illegal Immigration” That I Do Not Understand

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Many who support immigration enforcement measures will justify their position by asking “What part of ‘illegal’ in illegal immigration do you not understand?”¹ This essay provides ten answers to that question.

The term “illegal immigrant” is without legal meaning, sweeping in both undocumented immigrants and legal immigrants who commit violations, including violations which may be minor or unintentional. The presumption that some immigrants are worthy of status while others are not distorts us from appreciating that our enforcement-only immigration policies are irrational, expensive, and detrimental to our long-term interests. For over twenty years, ever since President Clinton signed the Illegal Immigration Reform and Immigrant Responsibility Act

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¹ See Nicholas Kulish et al., *Immigration Agents Discover New Freedom to Deport Under Trump*, N.Y. TIMES (Feb. 25, 2017), <https://www.nytimes.com/2017/02/25/us/ice-immigrant-deportations-trump.html>.

of 1996 (IIRIRA),² we have pursued immigration enforcement at the expense of legalizing the status of those who are contributing to our society. We have done so by demonizing immigrants in general and those whom we call “illegal immigrants” in particular. But who is illegal and who is legal is not a matter of character or an ability to follow the rules — it is a matter of pure luck, based on what the current law is.³ Immigrants have not changed, but our laws most certainly have. Instead of following common sense rules that allow parents of citizen children, tax payers, veterans, and those who add to our communities to remain and continue to contribute to society — which is what the old immigration law provided — we have been pursuing policies that harm both our short-term and long-term economic interests, as well as the very fabric of society. The test of character is not for those who can or cannot follow these new arbitrary rules, but for a society that elects to enact irrational and costly policies.

First, the term “illegal immigrant” does not exist in immigration law because legal status is fluid and subject to change.

Someone with legal status can violate the terms of their visa in both intentional and unintentional ways, for example by volunteering with certain types of student or tourist visa, not updating their address — a requirement that is present until citizenship — not carrying their green card, or for the more serious violations, committing certain criminal offenses.⁴ On the other hand, someone without status is not necessarily without options. There are multiple ways by which a person may be eligible to gain or regain status, such as marrying a citizen, being hired by a U.S. employer, or being at risk for harm in her native country.⁵

² Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104–208, div. C, 110 Stat. 3009–546 (1996).

³ See Jennifer Lee Koh, *Rethinking Removability*, 65 FLA. L. REV. 1803, 1852 (2013) (“Like a steam valve moving pressure from one end of the system to another, the absence of formal substantive relief from removal appears to have driven the growing complexity of removability.”).

⁴ See Immigration and Nationality Act § 237(a)(3)(A), 8 U.S.C. § 1227(a)(3)(A) (2012) (change of address); *id.* § 237(a)(2), 8 U.S.C. § 1227(a)(2) (criminal offenses); *id.* § 212(a)(7), 8 U.S.C. § 1182(a)(7) (2012) (documentation requirements). See generally Finbar O’Mallon, *Australian Man Arrested in US for Overstaying Visa by 90 Minutes*, CANBERRA TIMES (May 2, 2017), <http://www.canberratimes.com.au/act-news/australian-man-arrested-in-us-for-overstaying-visa-by-one-hour-20170501-gvw3yh.html> (reporting on how a man with a valid visa was charged with being deportable for failing to have it valid 90 minutes after it expired).

⁵ See *id.* § 203(a), 8 U.S.C. § 1153(a) (2012) (family-based petitions); *id.*

Instead of calling someone an “illegal immigrant,” a more accurate term is “pre-legal immigrant.” This is not glib. Currently half of the people who get a hearing receive legal status.⁶

Second, the term obscures the irrational obstacles that are part of contemporary law.

In 1996, when the law changed to focus on enforcement-only measures, Congress cut off a number of legalization paths that had been available.⁷ For instance, if you cross the border, you are no longer allowed to go from one status to another (under the old law, you simply paid a \$1,000 fine).⁸ If your life is in danger in your home country, you will be denied asylum unless you filed the necessary form within one year.⁹

If you committed a serious crime, you no longer have an immigration judge determine if you made a mistake from which you learned or if you are a hardened recidivist for whom there is no

§ 203(b), 8 U.S.C. § 1153(b) (employment-based petitions); *id.* § 208, 8 U.S.C. § 1158 (2012) (asylum).

⁶ Esther Yu Hsi Lee, *Immigrants Are Winning Half of All Deportation Cases So Far This Year*, THINKPROGRESS (Feb. 18, 2014), <https://thinkprogress.org/immigrants-are-winning-half-of-all-deportation-cases-so-far-this-year-fe5a58dbd78e>.

⁷ “The prospect of discretionary relief from removal has long been a fixture of immigration jurisprudence. 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).” *Jaghoori v. Holder*, 772 F.3d 764, 766 (4th Cir. 2014).

⁸ *See* Immigration and Nationality Act § 245(a), 8 U.S.C. § 1255(a) (2012); *id.* § 245(i), 8 U.S.C. § 1255(i) (8 U.S.C. § 1153(a) waiver for inadmissibility available to those who meet all requirements before Dec. 21, 2000).

⁹ *See id.* § 208(a)(2)(B), 8 U.S.C. § 1158(a)(2)(B) (2012). Those who are not eligible for asylum may pursue protections under withholding of removal or the Convention Against Torture (“CAT”). However, a person facing persecution receives asylum upon a showing of a 10% likelihood of harm versus a 51% showing of harm to receive withholding or CAT. In 1987, the Supreme Court interpreted the INA to create these differing evidentiary standards, which has been used by all agencies and federal courts since. *See INS v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987); *see also* INA § 241(b)(3)(A), 8 U.S.C. § 1231(b)(3)(A) (2012); 8 C.F.R. § 208.16(b)(1)(i), (b)(2) (2016); *Sael v. Ashcroft*, 386 F.3d 922, 925 (9th Cir. 2004) (“Even a ten percent chance that the applicant will be persecuted in the future is enough to establish a well-founded fear [for asylum].”); *Khup v. Ashcroft*, 376 F.3d 898, 905 (9th Cir. 2004) (commenting that the burden of proof to receive withholding of removal and deferral of removal under CAT is “at least a 51% chance” of persecution).

rehabilitation in your future.¹⁰ And this does not target people who are newly committing crimes. The reach of criminal bars is retroactive, which means that people who have been in the country for decades without committing additional crimes are suddenly deportable based on convictions that occurred years ago. One of my own clients, who was a lawful permanent resident for twenty-seven years, was charged with being deportable at the age of fifty-three for a crime she committed in her twenties. To add insult to injury, at the time the crime was committed, it did not have immigration consequences. But after 1996, it was deemed an aggravated felony.¹¹

Third, the term erroneously suggests that people are willfully failing to secure status.

Even for those people who still have remedies available to them, the next question is why are they not applying for status? There is a two-fold answer. As explained above, the law has cut off legalization paths for many. But even for those who still do have remedies, we have made it hard for them to get a hearing.

Everyone in this country, including the undocumented, is entitled to due process, which in most cases, means a hearing.¹² But the

¹⁰ For lawful permanent residents, if the crime is not classified as aggravated felony, they remain eligible for cancellation of removal, which does allow an immigration judge to weigh the person's equities against the seriousness of the crime and any showing of rehabilitation. See Immigration and Nationality Act § 240A(a), 8 U.S.C. § 1229b(a) (2012). But in contrast, under the old law, Section 212(c) let judges perform that calculus for the majority of crimes, even serious ones. Beginning in 1988, this remedy began to be curtailed by Congress designating certain crimes to render someone ineligible for this remedy. Ultimately in 1996, Section 212(c) was repealed for all crimes that occurred after 1996. See *I.N.S. v. St. Cyr*, 533 U.S. 289, 296 n.5 (2001) (permitting section 212(c) to remain available for certain individuals). Section 212(c) cases were granted at a national rate of at least 51.5%. See *id.*

¹¹ See *Tyson v. Holder*, 670 F.3d 1015, 1016-18 (9th Cir. 2012).

¹² See, e.g., *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001) (“[O]nce an alien enters the country, the legal circumstance changes, for the Due Process Clause applies to all ‘persons’ within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent.” (citing *inter alia* *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886)); *Wong Wing v. United States*, 163 U.S. 228, 238 (1896) (affording due process to those ordered deported). After 1996, IIRIRA took pains to carve out classes of people from receiving a hearing through expedited removal and reinstatement processes. Although they have withstood due process challenges, critics are concerned that they lack the needed constitutional protections. In February 2017, Judge Harry Pregerson wrote a forceful dissent arguing “It is apparent that the expedited removal system is flawed in many ways. The chance to consult with a lawyer, which is the subject of this appeal, is just one way to make the process fair. I would find that such a due process right is mandated under the Constitution.” United

current wait time for a hearing is at least two years.¹³ In some cities, it is as long as five years.¹⁴ This is based on a docket of 500,000 cases.¹⁵ Just imagine how long that will be when the numbers increase to the millions that President Trump wants to round up.

Fourth, blaming non-citizens for their lack of status ignores the twenty-year effort to make it harder to obtain a hearing in the hopes that people will give up rather than wait for their day in court.

It is telling that despite the recognition of the backlog problem in his executive order, President Trump’s solution is not to hire more immigration judges but to build more detention centers and expand who may not be eligible for a hearing.¹⁶

In 1996, Congress created expedited removal and reinstatement of removal — truncated administrative procedures by which certain individuals are no longer entitled to hearings.¹⁷ Expedited removal originally applied to those caught at the border who had entered

States v. Peralta-Sanchez, 847 F.3d 1124, 1142-43 (9th Cir. 2017) (Pregerson, J., dissenting).

¹³ See Memorandum from John Kelly, Sec’y, Dep’t of Homeland Sec., to Kevin McAleenan et al., Acting Comm’r, U.S. Customs & Border Prot., Implementing the President’s Border Security and Immigration Enforcement Improvement Policies, at 6-7 (Feb. 20, 2017), https://www.dhs.gov/sites/default/files/publications/17_0220_S1_Implementing-the-Presidents-Border-Security-Immigration-Enforcement-Improvement-Policies.pdf [hereinafter Enforcement Improvement Memo] (noting that the average wait time is more than two years and for some immigration courts as long as five years).

¹⁴ See Julia Preston, *Deluged Immigration Courts, Where Cases Stall for Years, Begin to Buckle*, N.Y. TIMES (Dec. 1, 2016), <https://www.nytimes.com/2016/12/01/us/deluged-immigration-courts-where-cases-stall-for-years-begin-to-buckle.html> (noting Denver’s wait time is more than five years); see also Dana Leigh Marks, *Immigration Judge: Death Penalty Cases in a Traffic Court Setting*, CNN (June 26, 2014, 9:29 AM), <http://www.cnn.com/2014/06/26/opinion/immigration-judge-broken-system/>.

¹⁵ Kelly, Enforcement Improvement Memo, *supra* note 13, at 6; Preston, *supra* note 14.

¹⁶ See Kelly, Enforcement Improvement Memo, *supra* note 13, at 9. In the budget agreement reached on May 1, 2017, Congress set aside money to hire just 10 new immigration judges to handle the backlog. See Kelsey Snell and Ed O’Keefe, *What’s In the Spending Agreement? We Read It So You Don’t Have To*, WASH. POST (May 1, 2017, 2:53 PM), <https://www.washingtonpost.com/news/powerpost/wp/2017/05/01/whats-in-the-spending-agreement-we-read-it-so-you-dont-have-to> (reporting that Congress will fund 10 new immigration judge positions). Currently there are approximately 250 immigration judges that sit in 58 different cities. See *Office of the Chief Immigration Judge*, U.S. DEP’T JUST., <https://www.justice.gov/eoir/office-of-the-chief-immigration-judge> (last visited May 3, 2017).

¹⁷ Jennifer Lee Koh, *Removal in the Shadows of Immigration Court*, 90 S. CAL. L. REV. 181, 194-203 (2017) [hereinafter *Removal in the Shadows*].

within the last 14 days and who lacked proof that they had been living in the country for at least 2 years.¹⁸ Under President Bush, the zone expanded from the port of entry to within 100 air miles of *any* border, including the northern border, southern border, and the oceans.¹⁹ This means that 197 million people, which is 66% of the U.S. population, lives in this geographic zone that is within the reach of expedited removal procedures.²⁰ In announcing the Trump administration's new enforcement efforts, Secretary Kelly signals that they may further "depart" from those limitations on expedited removal, now and even more in future actions.²¹

For over thirty years, immigration judges have been begging for more colleagues and resources to help them manage a workload that is just under three times as high as their federal district court counterparts.²² Some commentators, including Professor Andrew

¹⁸ See Designated Aliens for Expedited Removal, 69 Fed. Reg. 48877 (Aug. 11, 2004).

¹⁹ *Id.*

²⁰ See Todd Miller, *66 Percent of Americans Now Live in a Constitution-Free Zone*, THE NATION (July 15, 2014), <https://www.thenation.com/article/66-percent-americans-now-live-constitution-free-zone/> (describing population of 197.4 million people or 66% of the country's population living within the 100-mile zone of the 2004 expansion notice); see also Immigration and Nationality Act § 235(b), 8 U.S.C. § 1225 (2012); *United States v. Peralta-Sanchez*, 847 F.3d 1124 (9th Cir. 2017) (upholding lack of counsel provided to expedited removal proceedings).

²¹ Kelly, Enforcement Improvement Memo, *supra* note 13, at 7; see also *Peralta-Sanchez*, 847 F.3d at 1142-43 (Pregerson, J., dissenting) (noting that the use of expedited removal to speed up removals was also executed under President Obama: "Hundreds of thousands of people are expeditiously removed from this country each year. In 2013, the Department of Homeland Security removed approximately 438,000 noncitizens from the U.S. Expedited removals comprised 44% of all removals. An additional 39% of removals were conducted through Reinstatement of Removal, another fast track procedure established by IIRIRA with similarly nonexistent procedural safeguards. That means that 363,540 people — a staggering 83% of the people removed from the U.S. in 2013 — were removed without a hearing, without a judge, without legal representation, and without the opportunity to apply for most forms of relief from removal." (footnotes omitted)); Koh, *Removal in the Shadows*, *supra* note 17, at 194-209 (discussing and critiquing the fast-track procedures).

²² As of 2009, each immigration judge heard approximately 1,200 cases each year, which requires him or her to hear and decide, on average, one hundred cases each month at a rate of five cases each day of the week. Such a degree of efficiency is unusual for courts. A federal district judge, by contrast, considers and decides 480 cases each year, at a rate of forty cases each month and just over one case per day. In addition to the fewer number of cases, federal district courts have the benefit of at least two law clerks that assist each judge. In the immigration court system, about four immigration judges share one law clerk. The immigration judges have a larger caseload

Shoenholtz, have suggested that this continued disconnect in focusing on detaining and deporting over legalization is not accidental. Rather, Congressional indifference to the “overburdened and under-resourced system” may be due to the fact that Congress does not want “a fair process for immigrants who are placed into removal proceedings to at least have a day in court.”²³

Stated another way, a deliberate effort to greatly expand the backlog for a hearing (instead of devoting resources to reducing it) is simply designed “to make life so unrelentingly difficult for immigrants” that they will choose self-deportation over waiting in detention for a hearing that could be years in the future.²⁴

Fifth, committing a crime is not the same as violating an immigration law.

When someone breaks the law, a jury finds them guilty, and a judge imposes a punishment. But imagine that after you are arrested by the police and taken to court, a judge decides not to impose any punishment. Rather, the judge congratulates you for doing a good job and asks you to keep doing what you are doing. That would never happen because criminal laws are punished with convictions, sentences, and even prison time. But immigration laws are not.

Along with the dozens of violations — such as crossing the border or overstaying a visa — immigration law provides numerous waivers and remedies that forgive the violations and award legal status in the form of lawful permanent residency, citizenship, or asylum.²⁵ Instead

with less help than federal judges. [In 2006,] Chief Judge John Walker, Jr. told Congress that immigration judges suffer from a “severe lack of resources and manpower.”

Kari E. Hong, *Removing Citizens: Parenthood, Immigration Courts, and Derivative Citizenship*, 28 GEO. IMMIGR. L.J. 277, 332 & nn. 240–45 (2014).

²³ Transcript of Judicial Issues Forum, Immigration and the Courts, Roundtable Discussion at the Brookings Institution, at 17, 19 (Feb. 2, 2009), https://www.brookings.edu/wp-content/uploads/2012/04/20080220_immigration.pdf (statement of Prof. Andrew Schoenholtz, Georgetown University Law Center).

²⁴ Jonathan Blitzer, *Trump’s Ideas Man for Hard-line Immigration Policy*, NEW YORKER, (Nov. 22, 2016), <http://www.newyorker.com/news/news-desk/trumps-ideas-man-for-hard-line-immigration-policy>.

²⁵ See Immigration and Nationality Act § 208, 8 U.S.C. § 1158 (2012) (asylum); *id.* § 212, 8 U.S.C. § 1182 (2012) (inadmissibility grounds applying to those without admission); *id.* § 212(h), 8 U.S.C. § 1182(h) (waiver for certain crimes and conduct); INA § 237, 8 U.S.C. § 1227 (2012) (deportability grounds applying to those who have been admitted); *id.* § 237(a)(H), 8 U.S.C. § 1227(a)(H) (waiver for certain misrepresentations); *id.* § 240A, 8 U.S.C. § 1229b (2012) (cancellation of removal); *id.* § 301, 8 U.S.C. § 1401 (2012) (derivative citizenship); *id.* § 316, 8 U.S.C. § 1427

of being punished for an immigration violation, if a remedy exists, it is immediately forgiven.

And unlike a felon, whose criminal conviction remains on his or her record unless and until it is expunged, an immigration violation is gone once the remedy — a green card, asylum status, work visa, or citizenship — is granted.

This is not simply explained away by saying immigration law is a civil, instead of a criminal, matter. Rather, it shows that most immigration violations — such as entering the country the wrong way, remaining after a visitor's visa expired, or working without permission — are not meant to define a person's status or prevent them from entry into legal status. Immigration law's design is to forgive and forget any violation when remedies are available. For criminal law, by contrast, collateral consequences arising from a felony status can last for the rest of the person's life through denying voting rights, jobs, privileges, licenses, and up to 50,000 other rights that those who have not committed crimes enjoy.²⁶

Sixth, scapegoating immigrants for mythical law-breaking justifies enforcement measures that cost tax payers billions of dollars.

The Trump administration is now focused on enforcement-only measures, starting with the hiring of 15,000 more immigration agents.²⁷ The DHS estimates this cost to be over \$1.3 billion each year.²⁸ The wall starts at \$21.6 billion.²⁹ And Trump's new plan is to target between 6

(2012) (naturalization).

²⁶ United States v. Nesbeth, 188 F. Supp. 3d 179, 184-85 (E.D.N.Y. 2016) (departing downward from the United States sentencing guidelines' recommended prison term of 33–41 months and granting a one-year probationary sentence to avoid, in the words of U.S. District Court Judge Frederic Block, a "civil death" arising from the myriad collateral consequences that attach to a felony drug conviction); Gabriel J. Chin, Symposium, *The New Civil Death: Rethinking Punishment in the Era of Mass Incarceration*, 160 U. PA. L. REV. 1789, 1790-93, 1831 (2012) (providing normative reasons against the current number and degree of collateral consequences imposed on criminal convictions).

²⁷ Kelly, Enforcement Improvement Memo, *supra* note 13, at 3-4 (5,000 Customs and Border Protection officers); Memorandum from John Kelly, Sec'y, Dep't of Homeland Sec., to Kevin McAleenan et al., Acting Comm'r, U.S. Customs & Border Prot., Enforcement of the Immigration Laws to Serve the National Interest, at 4 (Feb. 20, 2017), https://www.dhs.gov/sites/default/files/publications/17_0220_S1_Enforcement-of-the-Immigration-Laws-to-Serve-the-National-Interest.pdf (10,000 ICE officers).

²⁸ Daniel Gonzalez, *Trump Plan to Hire 15K Immigration, Border Agents Could Cost Billions, Take Years*, ARIZ. REPUBLIC (Mar. 7, 2017 6:02 AM MT), <http://www.azcentral.com/story/news/2017/03/07/98651772/>.

²⁹ Julia Edwards Ainsley, *Exclusive – Trump Border "Wall" to Cost \$21.6 Billion, Take*

and 8 million for deportation.³⁰ All of those millions of people will be housed in detention facilities that will be run by for-profit companies.³¹ The current costs of detaining 400,000 immigrants each year before their hearing run taxpayers \$2 billion.³² For each new million we detain, our detention costs will be \$5 billion more each year.

Only a cruel or rich country would pursue enforcement with such vigor. The costs do not add up when we have many crumbling bridges, public schools, homeless individuals, and veterans that would benefit with an infusion of billions of dollars each year. In 2012, before President Trump’s enhanced efforts, nearly \$18 billion was spent on immigration enforcement.³³ What is astonishing is that the combined costs of the FBI, DEA, Secret Service, U.S Marshall Service, and ATF for the same year was \$14.4 billion.³⁴

Seventh, the term obscures that — just as IIRIRA created 11 million people who are stuck without status — Congress can fix this.

In keeping with the new directives, ICE officers are openly patrolling streets, airports, and hospital rooms. There is no longer any attempt to use compassion in deportation practices. Instead, the policies are increasingly heartless as ICE deports mothers of citizen children, domestic violence victims who were at court to seek protection, and plan to separate babies from their mothers.

3.5 Years to Build: Homeland Security Internal Report, REUTERS (Feb. 10, 2017, 10:51 PM IST), <http://in.reuters.com/article/usa-trump-immigration-wall-idINKBN15O2ZZ>.

³⁰ Brian Bennett, *Not Just “Bad Hombres”: Trump is Targeting Up to 8 Million People for Deportation*, L.A. TIMES (Feb. 4, 2017, 12:00 PM), <http://www.latimes.com/politics/la-na-pol-trump-deportations-20170204-story.html>.

³¹ See Hanna Kozłowska, *The American Private Prison Industry Has Scored Another Big Win with the US Government*, QUARTZ (Dec. 1, 2016), <https://qz.com/850810/the-department-of-homeland-security-wants-to-keep-using-private-prisons-for-immigration-detention/>.

³² See *id.* (reporting October 2016 statistics); Sharita Gruberg, *How For-Profit Companies Are Driving Detention Policies*, CTR. FOR AM. PROGRESS (Dec. 18, 2015, 9:29 AM), <https://www.americanprogress.org/issues/immigration/report/2015/12/18/127769/how-for-profit-companies-are-driving-immigration-detention-policies> (“The increase in detention bed space coincided with an increase in spending on immigration detention from \$700 million in FY 2005 to more than \$2 billion today. Not surprisingly, this spending increased revenues for CCA and the Geo Group.”)

³³ DORIS MEISSNER ET AL., MIGRATION POLICY INST., IMMIGRATION ENFORCEMENT IN THE UNITED STATES: THE RISE OF A FORMIDABLE MACHINERY 9 (Jan. 2013), <http://www.migrationpolicy.org/research/immigration-enforcement-united-states-rise-formidable-machinery>.

³⁴ *Id.*

The only possible silver lining from this crescendo of cruelty is that the public might call for an end to the misguided enforcement-only immigration policies we have had for the past twenty years. It started in 1996 when IIRIRA was enacted and ended numerous paths of legalization.³⁵ President Obama relied on IIRIRA to deport 2.5 million people — more than all deportations that occurred from 1900 to 2000, combined.³⁶ Despite Obama's claim to target only felons, fewer than twenty percent had a serious criminal conviction.³⁷ Just as we have abandoned Tough on Crime policies for being ineffectual and wasteful, policies that are Tough on Immigration are irrational, expensive, and hurting us all.

*Eighth, the irony is that the Trump administration's new enforcement measures will devote billions to take out skilled and unskilled workers that economists have identified are critical to our country's short-term and long-term growth.*³⁸

We could spend \$400 to \$600 billion to remove the very workers and entrepreneurs whose removal will “reduce the gross domestic product by \$1 trillion.”³⁹ Immigrants are twice as likely as citizens to start small businesses, accounting for 30% of the growth in that sector from 1990 to 2010.⁴⁰ A visa program targeting foreign-born doctors “has done more to recruit physicians to underserved areas in this

³⁵ Dara Lind, *The Disastrous, Forgotten Law that Created Today's Immigration Problem*, VOX (Apr. 28, 2016, 8:40 AM EDT), <http://www.vox.com/2016/4/28/11515132/iirira-clinton-immigration>.

³⁶ Serena Marshall, *Obama Has Deported More Than Any Other President*, ABC NEWS (Aug. 29, 2016, 2:05 PM ET), <http://abcnews.go.com/Politics/obamas-deportation-policy-numbers/story?id=41715661> (“According to governmental data, the Obama administration has deported more people than any other president's administration in history. In fact, they have deported more than the sum of all the presidents of the 20th century.” (referencing DEP'T OF HOMELAND SEC., YEARBOOK OF IMMIGRATION STATISTICS (Dec. 2016), <https://www.dhs.gov/immigration-statistics/yearbook>)).

³⁷ Elliot Young, *The Hard Truths About Obama's Deportation Policies*, HUFFINGTON POST (Feb. 27, 2017, 2:08 AM ET), http://www.huffingtonpost.com/entry/hard-truths-about-obamas-deportation-priorities_us_58b3c9e7e4b0658fc20f979e.

³⁸ See Dylan Matthews, *What Economists Know about Immigration*, WASH. POST (Jan. 29, 2013), <https://www.washingtonpost.com/news/wonk/wp/2013/01/29/five-things-economists-know-about-immigration/>; Editorial, *The Immigration Facts Donald Trump Doesn't Like*, N.Y. TIMES (Feb. 25, 2017) [hereinafter *Immigration Facts*], <https://www.nytimes.com/2017/02/25/opinion/the-costs-of-mr-trumps-dragnet.html>.

³⁹ *Immigration Facts*, *supra* note 38.

⁴⁰ Editorial, *Immigrants and Small Businesses*, N.Y. TIMES (June 30, 2012), <http://www.nytimes.com/2012/07/01/opinion/sunday/immigrants-and-small-business.html>.

country than even the National Health Services Corps.”⁴¹ In 2012, when Georgia passed a law to scare away undocumented immigrants, farmers experienced a 40% workforce shortage. “Despite high unemployment in the state, most Georgians don’t want such back-breaking jobs, nor do they have the necessary skills.”⁴² In California, 70% of agricultural workforce is estimated to be workers without status; “The consequences of a smaller immigrant work force would ripple not just through the orchards and dairies, but also to locally owned businesses, restaurants, schools and even seemingly unrelated industries, like the insurance market.”⁴³

Without immigrants, we will not be able to sustain our aging population. Even undocumented workers pay taxes. In 2013, undocumented individuals paid \$12 billion in federal taxes.⁴⁴ The deportation of even undocumented individuals will then adversely impact the amount of federal taxes collected and used to support the aging population.

More pointedly, in the future, without immigration, there will be no young workers to pay into the social security system: “Seventy years ago, there were 150 workers per 20 seniors; 10 years ago, there were 100 workers per 20 seniors. By 2050, there will be only 56 workers for every 20 seniors.”⁴⁵ If immigration were to ebb and young workers no

⁴¹ Parija Kavilanz, *Visa Ban Could Make Doctor Shortage in Rural America Even Worse*, CNN (Feb. 2, 2017, 3:48 PM ET), <http://money.cnn.com/2017/02/02/news/economy/trump-visa-ban-doctor-shortage/>.

⁴² Benjamin Powell, *The Law of Unintended Consequences: Georgia’s Immigration Law Backfires*, FORBES (May 17, 2012, 10:05 AM), <https://www.forbes.com/sites/realspin/2012/05/17/the-law-of-unintended-consequences-georgias-immigration-law-backfires/>.

⁴³ Caitlin Dickerson and 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>.

⁴⁴ SOC. SEC. ADMIN., EFFECTS OF UNAUTHORIZED IMMIGRATION ON THE ACTUARIAL STATUS OF THE SOCIAL SECURITY TRUST FUNDS (Apr. 2013), https://www.ssa.gov/oact/NOTES/pdf_notes/note151.pdf; 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>.

⁴⁵ Americas Society & Council of the Americas, *Get the Facts: Immigrants and the Economy — Five Reasons Why the U.S. Economy Needs Immigrants*, AS/COA (Feb. 12, 2013), <http://www.as-coa.org/articles/get-facts-immigrants-and-economy-five-reasons-why-us-economy-needs-immigrants>; see also Heather Long, *Over 200 Economists Say Trump Is Wrong on Immigration*, CNN (Mar. 6, 2017, 7:58 AM ET), <http://money.cnn.com/2017/03/06/news/economy/donald-trump-immigration>; Liz Alderman, *Danish Companies*

longer came to the United States, the size of the Social Security deficit would increase “by 31 percent over 50 years.”⁴⁶ Stated another way, the current birth rates will not produce enough workers for those who wish to retire. Immigration is essential to supporting retirees.

Ninth, the term presumes that “legal immigrants” are somehow more deserving than “illegal immigrants.” But this distinction is false.

The speakers of such sentiments fail to appreciate that we — as a society who passed IIRIRA — have taken away any line to legal status that most could have waited in. Part of becoming American means forgetting how those who immigrated in the past were able to do so based on laws that were infinitely more forgiving than they are today.

On a personal note, my great-grandmother was a sixteen-year-old teenager who arrived from Norway, penniless. She overstayed her visa and worked in this country as a house cleaner. My great-grandfather was a Norwegian sailor who simply walked off the boat and wandered into the crowds of Chicago. Under today’s laws, my great-grandmother would be derided as an “economic migrant” and “illegal immigrant,” placed in detention, and scheduled for deportation. My great-grandfather would be deported immediately, permanently barred from getting any legal status because he jumped ship. Fortunately, at the time they arrived, the laws let them stay, get green cards, and eventually become citizens.

Professor Hiroshi Motomura observed that Americans used to view immigrants as “Americans in waiting.”⁴⁷ My great-grandparents benefited from this presumption. Their failure to enter the country the right way, their existing poverty, their lack of formal education, and their limited English language skills did not disqualify them from obtaining legal status. Instead, law and our American society bet on the fact that their hopes, dreams, and work ethic would overcome these flaws. Society bet right. My mother recalls her grandparents as being kind and decent people, who suffered humiliation and endured hardship to provide opportunities to my grandmother, mother, and now me (and my children). My great-grandparents were presumed to be able to — and did — contribute to this country. They were frugal and bought a house.

Seek to Hire, but Everyone’s Already Working, N.Y. TIMES (Feb. 28, 2017), <https://www.nytimes.com/2017/02/28/business/economy/denmark-jobs-full-employment.html>.

⁴⁶ Marshall Fitz, Phillip Wolgin, & Patrick Oakford, *Immigrants are Makers, Not Takers*, CENTER FOR AMERICAN PROGRESS (Feb. 8, 2013, 10:01 AM), <https://www.americanprogress.org/issues/immigration/news/2013/02/08/52377/immigrants-are-makers-not-takers/>.

⁴⁷ HIROSHI MOTOMURA, AMERICANS IN WAITING: THE LOST STORY OF IMMIGRATION AND CITIZENSHIP IN THE UNITED STATES 8-9 (2006).

During WWII, one son served in the army and the other one was a fighter pilot who was captured as a POW. Later in life, they proudly watched their granddaughter — my mother — be the first in their family to attend college. Their story is the quintessential example of the American Dream. But also, their story illustrates that who is illegal and who is legal is not a matter of character or an ability to follow the rules — it is a matter of pure luck, based on what the current law is.

The most damaging impact of the term “illegal immigrant” then is that it implies that somehow there is a population of people who are either dangerous to society, taking from it, or at a minimum, not providing value. Holocaust survivor and Nobel Peace Prize recipient Elie Wiesel famously entered the immigration debate by declaring “No human being is illegal” when denouncing the use of this term.⁴⁸ He said “[h]uman beings can be beautiful or more beautiful, they can be fat or skinny, they can be right or wrong, but illegal? How can a human being be illegal?”⁴⁹

Tainting a population in this manner “implies that a person’s existence is criminal.”⁵⁰ A jay walker is not an illegal pedestrian. A shoplifter is not an illegal shopper. It has been profound that the term “illegal immigrant” has been accepted as a term that describes anyone. As set forth above, it is not legally accurate, but it does serve to justify costly and extreme enforcement measures that seem to only increase with each passing year.

It also has erased Professor Motomura’s notion of “Americans in waiting,” a term that much more accurately captures the grit, drive, and contributions that non-citizens do and wish to continue to make to this country.

Tenth, the problem with “illegal immigration” then is not the immigrants who are without status but with a law that will not let them become a part of the country that they are building.

After a twenty-year failed experiment that has resulted in eleven million people forced into the shadows, we now know enforcement is never enough. By repealing IIRIRA, we can return to the old common sense rules that let those who contribute to our country — parents of

⁴⁸ John Rosove, “No Human Being Is Illegal!” *Elie Wiesel*, JEWISH J. (Mar. 8, 2017), <http://jewishjournal.com/blogs/216216/no-human-illegal-elie-wiesel/>.

⁴⁹ Quoted by the immigration attorney Shahid Haque-Hausrath on his webpage. BORDER CROSSING LAW FIRM P.C., <http://nohumanbeingillegal.com> (last visited Apr. 29, 2017).

⁵⁰ *Id.*

citizens, good neighbors, good workers, tax payers, and veterans — earn a way to remain and deport only those whose contributions do not outweigh any harm they cause.

There is tremendous public support for this. For those concerned over security, getting people out of the shadows, getting addresses, fingerprints, and locations makes a country safer. For those concerned about costs, the USCIS is one of the few federal agencies that runs on the fees it generates. That means immigrants cover the majority of costs to legalize their status.⁵¹ For those concerned about the economy, legalization lets people continue to work and pay taxes. For those concerned with keeping the social security system solvent for their retirement, immigration provides the future young, productive workforce that keeps social security afloat.

It is then probably no surprise that as of March 2017, ninety percent of Americans support a path to legalization.⁵² Instead of eliminating “illegal immigrants” through deportation, we can end “illegal immigration” by restoring people’s ability to earn a means to stay.

Why we do not do that, is something that I do not understand.

⁵¹ WILLIAM A KANDEL & CHAD C. HADDAL, CONG. RESEARCH SERV., U.S. CITIZENSHIP AND IMMIGRATION SERVICES’ IMMIGRATION FEES AND ADJUDICATION COSTS: PROPOSED ADJUSTMENTS AND HISTORICAL CONTEXTS, at Summary (2010) <https://www.ilw.com/immigrationdaily/news/2011,0421-crs.pdf> (“USCIS obtains over 80% of its funding from fee revenue”); Vipul Naik, *US Immigrant Processing: Funded By User Fees Since 1882*, OPEN BORDERS (Jan 22, 2015), <https://openborders.info/blog/us-immigrant-processing-funded-by-user-fees-since-1882/>.

⁵² *Poll Finds 90 Percent of Americans Are Open To Path To Citizenship for Undocumented Workers*, THE WEEK (Mar. 17, 2017), <http://theweek.com/speedreads/686631/poll-finds-90-percent-americans-are-open-path-citizenship-undocumented-immigrants> (“A notable 90 percent of Americans support offering undocumented immigrants who ‘hold a job, speak English, and are willing to pay back taxes’ a path to legal citizenship, CNN reported. The idea garnered almost equal support from both sides of the aisle, with 96 percent of Democrats, 89 percent of Independents, and 87 percent of Republicans backing it.”).