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THE UNDOCUMENTED CLOSET*

ROSE CUISON VILLAZOR**

The phrase "coming out of the closet" traditionally refers to moments when lesbian, gay, bisexual, transgender, and queer ("LGBTQ") individuals decide to reveal their sexual orientation or gender identity to their families, friends, and communities. In the last few years, many immigrants, particularly those who were brought to the United States illegally when they were very young, have invoked the narrative of "coming out." Specifically, they have publicly "outed" themselves by disclosing their unauthorized immigration status despite the threat of deportation laws. In so doing, they have revealed their own closet—"the undocumented closet"—in which they have been forced to hide their identity as "undocumented Americans." Notably, by choosing to become visible, these undocumented Americans are slowly yet powerfully reforming immigration policy by demanding that they are recognized as lawful members of the American polity.

This Article explores the roles that the closet metaphor and the act of coming out play in the immigration justice movement. Drawing on scholarship examining the "closet" as the symbol for the oppression of LGBTQ persons, this Article theorizes the undocumented closet and argues that this analytical framework facilitates a deeper understanding of the lived experiences of undocumented immigrants in the United States. First, the "undocumented closet" reveals the extent to which immigration and other laws are designed to exclude unauthorized immigrants,

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both literally and figuratively, from the United States and have compelled them to become invisible in society. Second, the framework of the undocumented closet underscores that public disclosures about one's undocumented status, despite the risk of deportation, constitute acts of resistance against legal subordination and claims for legal membership in the American polity. Finally, the undocumented closet facilitates a critical lens for reviewing immigration reform. Importantly, it calls for a rethinking of immigration law that would prevent the further "closeting" and subordination of immigrants and their families.

INTRODUCTION 3
I. THE CLOSET AND THE LAW 9
  A. *The Closet Metaphor* 10
  B. *The Legal Construction of the Closet* 13
  C. *Legal Efforts to Dismantle the Closet* 19
  D. *The Enduring Power of the Closet* 24
II. THE CLOSETING OF UNDOCUMENTED IMMIGRANTS 28
  A. *The Legal Construction of the Undocumented Closet* 31
    1. Federal Laws 31
    2. State and Local Anti-Immigration Laws 35
  B. *Living in the Undocumented Closet* 42
III. COMING OUT OF THE UNDOCUMENTED CLOSET: THE IMPORTANCE OF BECOMING VISIBLE 49
  A. *Undocumented Americans: Hidden Identity* 51
    1. Citizenship as Legal Status of Membership 55
    2. Citizenship as Enjoyment of Rights 56
    3. Citizenship as Active Engagement 59
    4. Citizenship as Identity 60
  B. *Visibility and DACA* 61
IV. COMPREHENSIVE IMMIGRATION REFORM: FURTHER CLOSETING? 65
  A. *Border Security, Economic Opportunity, and Immigration Modernization Act* 67
  B. *The SAFE Act* 69
CONCLUSION AND IMPLICATIONS 72

INTRODUCTION

Pulitzer Prize-winning journalist Jose Antonio Vargas had a deep secret.[1] Since immigrating to the United States when he was twelve years old, he has been living in the United States without lawful immigration status.[2] His secret consumed him and affected many of his choices, including his educational and employment opportunities.[3] Vargas was exhausted from hiding his status.[4] Thus, on June 22, 2011, in a now infamous *New York Times* essay, he decided to "come out" as an undocumented immigrant.[5] Days later, in a television interview on *The Colbert Report*, Vargas explained his reasons for disclosing his status. At first, Vargas simply laughed when Stephen Colbert called him "a border gay"[6] (Colbert was referring to the fact that Vargas is both a gay man and an undocumented immigrant).[7] But when Colbert asked him, "[s]o why did you finally come out of the closet as an illegal alien?," Vargas not only became serious but he also had no trouble responding.[8] He "came out of the closet" because, among other things, he wanted to change the way that people see undocumented immigrants and talk about immigration law.[9]

The *New York Times* subsequently invited Vargas to answer a related question posed in its online forum, *Room for Debate*: "Should illegal immigrants ... be encouraged to come out about their status?"[10] This time, Vargas's answer was clearer and more personal: "I came out not just to liberate myself from the closet in my mind and in my heart, but also for other people, to add my voice to the chorus demanding that we be seen as full human beings."[11] Since Vargas disclosed his immigration status, more than 2,000 people have

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1. Jose Antonio Vargas, *My Life as an Undocumented Immigrant*, N.Y. TIMES MAG. (June 22, 2011), http://www.nytimes.com/2011/06/26/magazine/my-life-as-an-undocumented-immigrant.html?_r=0&pagewanted=print.
2. *See id.*
3. *See id.*
4. *See id.*
5. *See id.*
6. *The Colbert Report: Jose Antonio Vargas* (Comedy Central television broadcast July 14, 2011) [hereinafter *The Colbert Report*], *available at* http://www.colbertnation.com/the-colbert-report-videos/391991/july-14-2011/jose-antonio-vargas.
7. *See* Vargas, *supra* note 1 (stating that he came out as a gay man when he was in high school).
8. *See The Colbert Report*, *supra* note 6.
9. *See id.*
10. Jose Antonio Vargas, Op-Ed., *Adding a Voice to the Chorus*, N.Y. TIMES (Aug. 1, 2012), http://www.nytimes.com/roomfordebate/2012/08/01/is-getting-on-the-undocubus-a-good-idea/coming-out-adds-a-voice-to-the-chorus [hereinafter Vargas, *Adding a Voice to the Chorus*].
11. *Id.*

contacted him to let him know that they too have come out of immigration law's closet.[12] Like him, many of these immigrants who have "outed" themselves arrived in the United States when they were minors and have grown up in this country.[13] Many of them have been referred to in the media as "DREAMers" because they would have benefitted under a proposed congressional bill, the Development, Relief, and Education for Alien Minors Act ("DREAM Act").[14] The DREAM Act would have offered DREAMers[15] a path to legal residency, which could have led to citizenship.[16]

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12. *See* Jose Antonio Vargas, *Not Legal, Not Leaving*, TIME (June 25, 2012), http://www.time.com/time/magazine/article/0,9171,2117243-2,00.html (stating that "[a]t least 2,000 undocumented immigrants—most of them under 30—have contacted me and outed themselves in the past year").

13. Other notable immigrants brought into the United States as children who have since revealed their undocumented status include Sergio Garcia (entered at seventeen months with parents from Mexico and currently seeking admission to the California State Bar), Cesar Vargas (entered at five years old from Mexico and currently seeking admission to the New York State Bar), Jose Godinez-Samperio (entered at age nine with parents from Mexico and overstayed his tourist visa), Lorella Praeli (entered at age two from Peru and currently the director of advocacy for *United We Dream*, a non-profit), Gaby Pacheco (entered as a child from Ecuador and now a prominent member of the DREAM activist network), and Yelky Perez (entered illegally at age thirteen from the Dominican Republic to reunite with her family and now a college graduate studying towards medical school). *See, e.g.*, Richard Fausset, *Illegal Immigrant, Already a Law Grad, Seeks Florida Bar Entrance*, L.A. TIMES (Apr. 16, 2012), http://articles.latimes.com/2012/apr/16/nation/la-na-nn-illegal-immigrant-florida-bar-20120416 (discussing Jose Godinez-Samperio); Alan Gomez, *Qualified Illegal Immigrants Seek Rights to Practice Law*, USA TODAY NEWS (July 2, 2012), http://usatoday30.usatoday.com/news/nation/story/2012-07-01/illegal-immigrants-want-to-practice-law/55943734/1 (discussing Sergio Garcia); Miranda Leitsinger, *Chasing a 'Dream': Immigrant Youth Seek Legal Status*, NBC NEWS (Aug. 14, 2012), http://usnews.nbcnews.com/_news/2012/08/14/13279363-chasing-a-dream-immigrant-youth-seek-legal-status?lite (discussing Yelky Perez); Bryan Llenas, *Undocumented Youth with Work Permits Seek Professional Licenses*, FOX NEWS LATINO (Jan. 22, 2013), http://latino.foxnews.com/latino/politics/2013/01/22/undocumented-youth-with-work-permits-seek-professional-licenses/ (discussing Jose Godinez-Samperio); Julia Preston, *Young Immigrants Say It's Obama's Time to Act*, N.Y. TIMES (Nov. 30, 2012), http://www.nytimes.com/2012/12/01/us/dream-act-gives-young-immigrants-a-political-voice.html?pagewanted=all (discussing Lorella Praeli and Gaby Pacheco).

14. *See* S. 1291, 107th Cong. (2001); H.R. 1918, 107th Cong. (2001). Introduced in 2001 and introduced every year thereafter, the DREAM Act failed to muster enough votes in the Senate in December 2010. *See* David M. Herszenhorn, *Senate Blocks Bill for Young Illegal Immigrants*, N.Y. TIMES (Dec. 18, 2010), http://www.nytimes.com/2010/12/19/us/politics/19immig.html (reporting that the Senate, by a vote of 55 to 41, failed to get the 60 votes needed to end a filibuster on the DREAM Act and allow it to be voted on the floor).

15. This Article uses the terms "DREAMers," "young unauthorized immigrants," and "unauthorized immigrant youths" interchangeably to refer to currently undocumented immigrants who were brought to the United States as minors.

16. *See* S. 1291 §§ 3–4. The proposed comprehensive immigration reform bill that passed the Senate in 2013, S. 744, includes a provision that incorporates the DREAM Act.

The phrase "coming out of the closet" traditionally refers to a moment when a lesbian, gay, bisexual, transgender, or queer ("LGBTQ")[17] individual decides to reveal her sexual orientation or gender identity to family, friends, co-workers, or other members of the community. Risking a host of potential consequences, including rejection by family and friends, loss of employment, and other forms of discriminatory treatment, many LGBTQ persons have chosen to leave the closet and disclose their sexual preferences or gender identity as an expression of self-acceptance and political action.[18] In the past few years, undocumented immigrants have used these tropes from the gay rights movement to reveal their unauthorized immigration status. Notably, by borrowing language from the LGBTQ movement and deploying it in the immigration justice movement,[19] unauthorized immigrants who have outed themselves have drawn attention to a lesser-known closet—"the undocumented closet."[20]

This Article explores the extent to which undocumented immigrants have deployed both the closet metaphor and the act of

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See Border Security, Economic Opportunity, and Immigration Modernization Act, S. 744, 113th Cong. § 2103 (2013) ("The DREAM Act"). Under S. 744's DREAM Act, a person must have entered the United States before the age of sixteen in order to be eligible for a status adjustment to lawful permanent resident, provided that all other requirements have been met. *Id.* § 2103(b).

17. In this Article, I use "LGBTQ persons" and "gay" to refer collectively to people who identify themselves as lesbian, gay, bisexual, transgender, or queer. I refer to each particular group when addressing issues relevant for that specific group only.

18. *See infra* Part I.D (discussing the extent to which LGBTQ persons reveal their sexual orientation or gender identity despite the potential emotional, physical, and other social harms that such "outing" may cause).

19. This Article uses the terms "immigrants' rights movement" and "immigration justice movement" interchangeably to refer to the political, social, and cultural advocacy on behalf of immigrants in general, especially with respect to arguments in favor of granting unauthorized immigrants not only lawful immigration status but also a path to citizenship.

20. It is uncertain when the term "undocumented closet" began to be used to describe a "place" in which undocumented immigrants hide. The earliest reported specific deployment of the term by an undocumented immigrant occurred four years ago in a public rally. Adrian Ramirez, an undocumented college student, publicly revealed his unauthorized immigration status and called his revelation "coming out of the undocumented closet." Ray Jayadev, *Don't Call Me Criminal*, METROACTIVE NEWS, http://www.metroactive.com/metro/12.12.07/news-0750.html (last visited Oct. 6, 2013). Other commentators have also used the term "undocumented closet." *See* Joanna Slater, *Undocumented Immigrants Are Coming Out of America's Closet*, N.Y. ST. YOUTH LEADERSHIP COUNCIL (June 25, 2011), http://www.nysylc.org/2011/06/angyglobe/; Verónica, *On National Coming Out Day, Undocuqueers Remind Us of Collective Liberation*, NAT'L LATINA INST. FOR REPRODUCTIVE HEALTH (Oct. 11, 2012), http://latinainstitute.wordpress.com/2012/10/11/on-national-coming-out-day-undocuqueers-remind-us-of-collective-liberation/

coming out within the immigration justice movement.[21] In particular, it invokes the undocumented closet as a theoretical framework to examine undocumented immigrants' demands for reforms in immigration law that would provide them lawful immigration status. From a broad perspective, it contends that the undocumented closet facilitates a deeper appreciation of the relationships between law, visibility, political mobilization, and legal change. In doing so, it aims to show some of the parallels between the experiences of LGBTQ persons living in the closet and undocumented immigrants inhabiting immigration law's closet. Notably, this exploration is part of a larger project examining the links between visibility, identity, and the law.

More narrowly, it argues that the undocumented closet enables a deeper interrogation of undocumented immigrants' claims to legal membership in the American polity. First, the undocumented closet underscores law's critical role in the structural construction of an environment in which immigrants and their families are forced to conceal their unauthorized immigration status. In particular, federal, state, and local laws have created a state of fear among undocumented immigrants that they could be deported from the United States at any time, necessitating that they constantly hide information about their status and avoid the purview of authorities. That is, as these undocumented immigrants openly reside, study, or work amongst documented citizens, they also have to be "closeted" and pass for people who have the right to remain in the United States. In other words, law compels undocumented immigrants to be invisible, which makes them vulnerable to legal and social subordination in various forms. The symbol of the undocumented closet therefore appropriately sheds light on the vulnerability and

21. There has been virtually no exploration in legal scholarship of the ways in which "coming out" and the "closet" have been used in the immigration justice movement. A recently published eight-page student comment has provided a helpful discussion of how the borrowing of these narratives from the gay rights movement in immigration advocacy offers a nuanced perspective on contemporary efforts for marriage equality. *See generally* Natasha Rivera-Silber, Comment, *"Coming Out Undocumented" in the Age of* Perry, 37 N.Y.U. REV. L. & SOC. CHANGE 71, 72 (2013). This Article is part of a larger project examining the relationship between visibility and the law through the experiences of LGBTQ persons and undocumented immigrants. I emphasize here that I do not mean to suggest that LGBTQ persons and their issues should always be considered distinct from undocumented immigrants and their issues. As I highlight in this Article, these two groups have parallel (although not entirely similar) experiences. Importantly, there are many undocumented immigrants who are also LGBTQ—"undocuqueer[s]"—whose stories reveal the critical intersection of sexuality and immigration law. *See id.* at 75–76 (highlighting stories of gay undocumented immigrants who have had to "come out" twice in their lives). I aim to continue exploring the legal and social experiences of undocuqueers in a future project.

subordination of nearly eleven million people[22] and their families, revealing law's part in the creation of a significant democratic deficit in today's society.

Second, the undocumented closet metaphor illuminates the underlying basis for coming out about one's unauthorized immigration status. Specifically, coming out draws direct attention to immigrants' desires to be "seen" and be accepted as members of the polity. Such demands for recognition of their existence and membership are particularly evident among DREAMers, who identify themselves as "American[s] without papers."[23] By professing their identity as "undocumented Americans," DREAMers are resisting official policies and practices designed to exclude them from the country they call home.[24] Importantly, by asserting their right to belong in the United States despite their lack of authorization, DREAMers are challenging conventional notions of membership and belonging. The undocumented closet thus reveals a push toward changing the meaning of citizenship.

Third, the undocumented closet provides a useful framework for analyzing current efforts to restructure immigration law. Various federal immigration laws, policies, and practices, combined with state and local anti-immigration laws, helped to construct the undocumented closet.[25] As Congress contemplates redesigning immigration law by enacting comprehensive reform, the undocumented closet could operate as a reminder of the need for legislation that would welcome undocumented Americans into the polity and avoid the further closeting of immigrants and their families.

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22. *Study: Number Of Illegal Immigrants Living In US Rises To 11.7 Million*, CBS DC (Sept. 25, 2013, 11:44 AM), http://washington.cbslocal.com/2013/09/25/study-number-of-illegal-immigrants-living-in-us-rises-to-11-7-million/.

23. *See* Dulce Paloma Baltazar Pedraza, *Alumna Works to Pass the DREAM Act*, ST. PRESS (Sept. 26, 2012, 8:14 PM), http://www.statepress.com/2012/09/26/alumna-works-to-pass-the-dream-act/; Jose Antonio Vargas, *What Would You Ask an Undocumented Immigrant?*, HUFFINGTON POST (Apr. 2, 2013, 7:10 AM), http://www.huffingtonpost.com /jose-antonio-vargas/jose-antonio-vargas-facebook-chat_b_2997232.html.

24. It should be noted that although many undocumented immigrants who publicly revealed their immigration status were DREAMers, in the last year, undocumented immigrants who moved to the United States as adults and have worked in the country for many years have also been "coming out." *See* Miranda Leitsinger, *'No Papers, No Fear,' Undocumented Immigrants Declare Themselves on Bus Tour*, NBC NEWS (Aug. 17, 2012, 8:36 AM), http://usnews.nbcnews.com/_news/2012/08/17/13333450-no-papers-no-fear-undocumented-immigrants-declare-themselves-on-bus-tour?lite (reporting on undocumented housekeepers, day laborers, and other workers who are revealing their undocumented status).

25. *See infra* Part II.A.

The Article proceeds in four parts. Part I explains the conventional employment of the closet. Examining the legal and cultural understanding of this term provides the necessary foundation for appreciating the use of the term in the immigration law context. Notably, this Part emphasizes the central role that law played (and continues to play) in forcing LGBTQ persons to conceal their identity and sexual orientation. Although there have been important civil rights achievements for gays, many legal and social factors remain and facilitate the enduring appeal of being closeted.

Part II explores the undocumented closet. Similar to Part I, this Part also centers its analysis on the law's dominance in constructing the immigration law closet. The appeal of the undocumented closet, like the gay closet, is its ability to render unauthorized immigrants invisible. The power to conceal its inhabitants, however, has the dual function of also encouraging their political invisibility, powerlessness, and vulnerability. In other words, the undocumented closet serves as an ongoing reminder of exclusion and non-membership.

Part III examines the role that visibility plays in the immigration justice movement. Evoking the "[w]e're here, we're queer, get used to it!" slogan from the gay rights movement,[26] DREAMers and other unauthorized immigrants have come out of the undocumented closet in significant numbers.[27] Risking the possibility of being deported, they have chanted "undocumented and unafraid."[28] Their visibility has led to some success. Specifically, their political mobilization helped lead to the Deferred Action for Childhood Arrivals ("DACA") program,[29] which has enabled over 567,000

26. *See, e.g.*, Richard F. Duncan, *Wigstock and the Kulturkampf: Supreme Court Storytelling, the Culture War, and* Romer v. Evans, 72 NOTRE DAME L. REV. 345, 368 (1997); Erika George, *Words as Sticks and Stones: Naming the Harm of Racist Speech*, 11 HARV. BLACKLETTER L.J. 221, 230 (1994) (discussing the use of the phrase by the LGBTQ community).

27. *See* Esther Yu-Hsi Lee, *Each Day, Over 2,600 Young Undocumented Immigrants Come Out of the Shadows*, THINK PROGRESS (June 17, 2013, 1:43 PM), http://thinkprogress.org/immigration/2013/06/17/2167591/daca-recipients-daily/ (stating that 2,614 young undocumented immigrants are coming out each day).

28. *See, e.g.*, Rebecca Leber, *DREAMers Target GOP, Chant 'Undocumented and Unafraid' at Immigration Hearing*, THINK PROGRESS (Feb. 5, 2013, 2:01 PM), http://thinkprogress.org/politics/2013/02/05/1543951/dreamers-target-gop-chant-undocumented-and-unafraid-at-immigration-hearing/?mobile=nc; Albert Sabaté, *Undocumented and Unafraid: Immigrants Share Their Stories*, ABC NEWS (Mar. 14, 2013), http://abcnews.go.com/ABC_Univision/undocumented-unafraid-immigrants-share-stories/story?id=18728377#.UVE0fxecd30.

29. *See* Memorandum from Janet Napolitano, Sec'y of Homeland Sec., to David V. Aguilar, Alejandro Mayorkas & John Morton (June 15, 2012), *available at*

undocumented youths to obtain not only discretionary relief from deportation but also work authorization.[30] Moreover, their activism has provided support for contemporary immigration reform.

Part IV argues that the undocumented closet offers an important lens through which we can examine proposed immigration reforms. As noted previously, Congress is currently considering enacting comprehensive immigration reform,[31] which includes proposals to confer lawful immigration status to the estimated eleven million undocumented immigrants in the country.[32] Critically, through the prism of the undocumented closet, this Part contends that some provisions of bills proposed in Congress, if passed, may result in the further "closeting" of immigrants. The Conclusion provides a summary and raises a few doctrinal implications of the arguments presented here that will be explored in future legal scholarship.

I. THE CLOSET AND THE LAW

To understand the undocumented closet as a theoretical framework in immigration law, it is necessary to examine the primary and more prevalent use of the closet metaphor. Section A explains some of the work that has been done to theorize the symbol of the closet. Accepting the concept of the closet as an appropriate metaphor for describing the lived experiences of LGBTQ persons,[33] Section B analyzes the legal construction of the closet, Section C considers the legal developments designed to deconstruct it, and Section D underscores the harms of living closeted lives.

Collectively, this Part demonstrates the extent to which the (gay) closet oppresses LGBTQ persons and forces many of them to become invisible. It also highlights why many LGBTQ persons choose to

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http://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf.

30. To date, over 580,000 immigrants have applied for DACA. *See* JEANNE BATALOVA ET AL., DEFERRED ACTION FOR CHILDHOOD ARRIVALS AT THE ONE-YEAR MARK 4 (2013), *available at* http://www.migrationpolicy.org/pubs/CIRbrief-DACAatOneYear.pdf (noting that more than half a million immigrants have applied for the DACA program between August 2012 and June 2013).

31. The last time that Congress enacted comprehensive immigration reform was in 1952. *See* Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163 (codified as amended in scattered sections of 8 U.S.C.).

32. *See* Border Security, Economic Opportunity, and Immigration Modernization Act, S. 744, 113th Cong. §§ 2101-11 (2013).

33. Not all scholars agree that the closet is an appropriate metaphor to describe the experiences of LGBTQ persons. *See* Gavin Brown et al., *Sedgwick's Geographies: Touching Space*, 35 PROGRESS OF HUM. GEOGRAPHY 121, 122 (2011) (noting that geographers have questioned the use of the concept).

come out and how their visibility relates to demands for full equality and membership in the United States. This extensive discussion is critical to showing the parallels between the experiences of LGBTQ persons and undocumented immigrants. Importantly, the recognition of the similarities between the two groups helps to explain the deployment of the closet metaphor in the immigration context. As Kenji Yoshino commented, "[t]he closet may be a metaphor for many different kinds of oppression, but the deployment of that metaphor becomes intelligible only when funneled back through the oppression suffered by homosexuals."[34]

A. *The Closet Metaphor*

Almost twenty-five years ago, Eve Sedgwick contended in her critically acclaimed book, *The Epistemology of the Closet*, that "[t]he closet is the defining structure for gay oppression in this century."[35] Sedgwick was not the first to use the closet to describe the legal and cultural experience of LGBTQ individuals,[36] but her work has been credited as the seminal exploration of the relationship between LGBTQ persons and the closet.[37] As such, this Article draws much of its conceptual framework from her work and the work of other legal scholars who have theorized the closet.

34. Kenji Yoshino, *Suspect Symbols: The Literary Argument for Heightened Scrutiny for Gays*, 96 COLUM. L. REV. 1753, 1795 n.184 (1996) (commenting on Eve Sedgwick's assertion that the metaphorical closet of oppression has a special significance for homosexuals and noting its use in other contexts).

35. EVE K. SEDGWICK, EPISTEMOLOGY OF THE CLOSET 71 (1990). To be sure, Sedgwick notes that the "gay closet is not a feature only of the lives of gay people." *Id.* at 68. Yet, as she asserts, for many gays, the closet has operated as an important "shaping presence." *Id.*

36. *See* William N. Eskridge, Jr., *Privacy Jurisprudence and the Apartheid of the Closet, 1946–1961*, 24 FLA. ST. U. L. REV. 703, 705–06 (1997) [hereinafter Eskridge, Jr., *Privacy Jurisprudence*] (explaining that one of the earliest uses of the closet metaphor was in 1949).

37. *See* Yoshino, *supra* note 34, at 1795 (stating that "[t]he landmark work on the closet as a symbol in gay culture is Sedgwick's *Epistemology of the Closet*"). As noted, although Sedgwick's work on the closet should be acknowledged, it is important to note that many scholars have also conducted important work in theorizing the closet. *See, e.g.*, WILLIAM N. ESKRIDGE, JR., GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET 13 (1999); William N. Eskridge, Jr., *Law and the Construction of the Closet: An American Regulation of Same-Sex Intimacy, 1880–1946*, 82 IOWA L. REV. 1007, 1105–06 (1997) (examining the ways in which the regulation of same-sex intimacy drove gays and lesbians into the closet); Darren Lenard Hutchinson, *Accommodating Outness:* Hurley, *Free Speech, and Gay & Lesbian Equality*, 1 U. PA. J. CONST. L. 85, 120 (1998) (analyzing the relationship of the closet to gay invisibility); Yoshino, *supra* note 34, at 1797–1816 (exploring the links between the closet, the body, and the law).

There is, of course, no *literal* closet. The closet, as Sedgwick explained, is a figurative space that allows LGBTQ persons to conceal their sexual orientation or gender identity to avoid the varied legal, social, and political consequences that might result from one's same-sex preference or identity being discovered.[38] In this sense, the closet provides sanctuary to LGBTQ persons and offers them the option to "remain in or to reenter the closet in some or all segments of their life."[39]

At the same time, however, the closet harms by enabling the erasure of LGBTQ people's existence. For instance, after suffering the loss of a long-term partner due to death, LGBTQ individuals who hid their relationship from the outside world felt that they were not allowed to openly express their grief because no one knew of their relationship; by keeping their relationship in the closet, the relationship was effectively erased once one partner left.[40] One author even argues that the extremely high suicide rate among gay teenagers can be attributed to the collective LGBTQ community remaining in the closet, thus preventing the development of positive LGBTQ role models that these adolescents can look up to without feeling ashamed.[41] Seen in this way, the closet is more than a space in which to hide from oppression. Instead, the closet's silencing of sexual identity *is* oppression.[42]

Other scholars have explored the paradox of the closet, examining its inherent conflicting defensive and oppressive features.

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38. *See* SEDGWICK, *supra* note 35, at 68; *see also infra* Part I.B (examining the various laws that led to the legal construction of the closet and forced many LGBTQ persons to keep their sexual orientation or sexual identity a secret). It should be noted that the closet, as William Eskridge, Jr., explained, was not always connected with the LGBTQ population, although it has always been associated with secrets. William N. Eskridge, Jr., *A Jurisprudence of "Coming Out": Religion, Homosexuality, and Collisions of Liberty and Equality in American Public Law*, 106 YALE L.J. 2411, 2438 (1997) [hereinafter Eskridge, Jr., *A Jurisprudence of "Coming Out"*] (noting that the closet was not always associated with LGBTQ individuals). However, by the 1950s and 1960s, the connection between sexual deviance and gayness linked homosexuality with the closet. *Id.* at 2439 ("By the 1960s, homosexuals who were completely secretive about their sexual preferences or experiences were known as 'closet queens' (men) and 'lace curtains' (women).").

39. SEDGWICK, *supra* note 35, at 68.

40. *See* Marc A. Fajer, *Can Two Real Men Eat Quiche Together? Storytelling, Gender-Role Stereotypes, and Legal Protection for Lesbians and Gay Men*, 46 U. MIAMI L. REV. 511, 597 (1992) ("One man reported having to sit alone in the back of the church at his lover's funeral because he couldn't explain his relationship to the family.").

41. *See id.* at 600–02.

42. *See* SEDGWICK, *supra* note 35, at 71; *see also* Sonia K. Katyal, *Sexuality and Sovereignty: The Global Limits and Possibilities of* Lawrence, 14 WM. & MARY BILL RTS. J. 1429, 1441 (2006) (discussing Eve Sedgwick's argument that remaining silent within the closet constitutes oppression).

William Eskridge, Jr., for example, notes that the "closet can be either *protective or threatening*,"[43] and that "the closet was always a confinement—really a badge of inferiority—as well as a refuge."[44] Yoshino similarly underscores the closet's dual functions.[45] On the one hand, the closet enables LGBTQ persons to hide and become unreachable from laws and social norms that are intended to exclude, reject, or at least before *Lawrence v. Texas*,[46] criminalize them.[47] Yoshino referred to this aspect of the closet—its ability to conceal identity—as the "protective closet."[48] On the other hand, the closet simultaneously isolates its LGBTQ inhabitants and renders them invisible. Yoshino called this the "confining closet."[49]

Critically, the closet as a metaphor for gay oppression cannot be fully appreciated without understanding how the closet relates to its counterpart—the act of coming out.[50] To the extent that the closet represents concealment of and being secretive about one's sexual orientation or identity, coming out signifies openness about one's same-sex preference or gender identity. To be sure, there is no *one* coming out moment for LGBTQ persons. That is, the decision to be open about one's sexual orientation or sexual identity to family, friends, co-workers, acquaintances, and strangers may occur at different points, places, and contexts in a gay person's life. This suggests the presence of more than one closet. Indeed, because the legal and social framework of society is steeped along hetero-normative lines—or what Sedgwick eloquently refers to as the "elasticity of heterosexist presumption"[51]—LGBTQ persons may find new closets emerge[52] even after one has been "out."

43. Eskridge, Jr., *Privacy Jurisprudence*, *supra* note 36, at 705–06 (emphasis added) (commenting on the dual roles of the closet).

44. *Id.* at 707.

45. *See* Yoshino, *supra* note 34, at 1796.

46. 539 U.S. 558 (2003).

47. *See infra* Part I.B (discussing the various laws that have led LGBTQ persons to conceal their sexual orientation or gender identity); *see also* Eskridge, Jr., *A Jurisprudence of "Coming Out," supra* note 38, at 2439 (discussing the ways that "the closet had become a metonym for ... the absolute necessity for secrecy from the majority (which, immediately, included your family and the police, but also all other heterosexuals) regarding the truth of your sexuality").

48. Yoshino, *supra* note 34, at 1796 (emphasis omitted).

49. *Id.* (emphasis omitted).

50. SEDGWICK, *supra* note 35, at 71 ("The image of the coming out regularly interfaces the image of the closet.").

51. *See id.* at 68.

52. *See id.* ("[P]eople find new walls springing up around them as they drowse: every encounter [with others] ... erects new closets whose fraught and characteristic laws of

The closet's dual feature of being protective and confining at the same time, as Yoshino theorized, has implications for one's decision to "come out." On the one hand, coming out of the confining closet may be deemed to be a liberatory or celebratory act.[53] Such an act may be viewed as a first step towards acceptance and freedom to *be* gay. On the other hand, being open about one's sexual orientation or gender identity leads to vulnerability.[54] Disclosing one's same-sex preference or gender identity opens one to potential rejection from family and friends, possible loss of a job, or physical harm.

Notably, the closet is further complicated by the convergence of different vectors of discrimination and prejudices. Yoshino uses, for example, the "double closet" to refer to "a person [who] is a member of two minority groups for which the closet is a shaping influence."[55] Using an intersectionality approach when analyzing the closet, as Darren Hutchinson reminds us, facilitates a deeper appreciation of the vulnerability and invisibility of LGBTQ persons who are also of color and/or poor.[56]

In brief, the closet metaphor is complex and contextual. Its ability to both shelter and harm its occupants reflects the daily and ongoing struggles of LGBTQ persons to live in a society organized along hetero-normative lines. Importantly, as the next Section discusses, law played a critical role in constructing the closet as the essential structure or framework defining gay subordination.[57]

B. *The Legal Construction of the Closet*

Historically, a combination of laws led to the construction of the closet. Law, however, is only one part of a larger structural

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optics and physics exact from at least gay people new surveys, new calculations, new draughts and requisitions of secrecy and disclosure.").

53. *See* Yoshino, *supra* note 34, at 1796 (explaining the link between the celebratory act of coming out and the confining closet).

54. *See id.* (noting the relationship between becoming more visible by "coming out" and vulnerability).

55. *Id.* at 1795.

56. *See* Darren L. Hutchinson, *Ignoring the Sexualization of Race: Heteronormativity, Critical Race Theory and Anti-Racist Politics*, 47 BUFF. L. REV. 1, 71–72 (1999) (commenting that many people of color "may face greater difficulties than whites in coming out of the closet").

57. *See* Margaret Bichler, Note, *Suspicious Closets: Strengthening the Claim to Suspect Classification and Same-Sex Marriage Rights*, 28 B.C. THIRD WORLD L.J. 167, 189 (2008) ("Arguably, laws that discriminate against gays are the most effective means by which the appeal of the closet is maintained.").

framework that affects the way we operate and behave in society.[58] Yet, without a doubt, law played and continues to play a significant shaping presence in the lives of LGBTQ people and their relationship to the closet. By understanding law's role in facilitating the legal subordination of LGBTQ persons, we gain a deeper appreciation of law's power and ability to create other structures, such as the undocumented closet, that have caused parallel forms of oppression.

One crucial starting point for analyzing the legal construction of the closet is sodomy laws.[59] As this Section underscores, however, laws that criminalized sodomy were only part of a larger body of law that helped to build, and continues to reinforce, the closet. For much of the sixteenth century and until the twenty-first century, various laws criminalized sodomy.[60] Early enforcement of sodomy laws focused on "deviant" sexual acts,[61] and both heterosexuals and homosexuals could be found guilty.[62] By the twentieth century, however, sodomy became culturally synonymous with homosexuality.[63] State and local governments spent considerable resources enforcing sodomy laws against gays, treating them as "legal criminals."[64] Against the fear of prosecution (as well as actual prosecution) for sodomy, gays concealed their sexual identities.

Accordingly, many advocates believed that "[t]he key to obtaining gay rights was the repeal of consensual sodomy laws."[65] That opportunity came in the case of *Bowers v. Hardwick*,[66] which

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58. *See, e.g.*, Joao Claudio Todorov, *Laws and the Complex Control of Behavior*, 14 BEHAV. & SOC. ISSUES 86, 90 (2005) (noting that laws and the judicial system are part of a broader cultural system that affects behavior).

59. For a comprehensive examination of how law, particularly sodomy laws, and social norms affected the legal, cultural, and social experiences of LGBTQ persons, see WILLIAM N. ESKRIDGE, JR., DISHONORABLE PASSIONS: SODOMY LAWS IN AMERICA 1861–2003, at 19–20 (2008) [hereinafter ESKRIDGE, JR., DISHONORABLE PASSIONS]. Although cultural, religious, and moral factors were influential as well, Eskridge explains throughout his book how the law, particularly sodomy law, played an important role in the closeting of gays. *See id.* at 73–108. Notably, many of the laws that punished persons for engaging in sodomy did not specifically define the elements of sodomy, which was also referred to as "buggery" or "the infamous crime against nature." *Id.* at 19–20.

60. *Id.* at 16.

61. *Id.*

62. Many courts during this period interpreted the term "sodomy" to refer to the "penetration of a man's penis inside the rectum of an animal, of a woman or girl, or of another man or boy." *Id.* at 20. Sodomy laws later also prohibited other sexual acts such as fellatio, cunnilingus, and masturbation. *Id.* at 50–55. Moreover, sexual acts involving children also fell within sodomy law prohibitions. *Id.*

63. *Id.* at 6.

64. *Id.* at 7.

65. *Id.* at 50–55.

66. 478 U.S. 186 (1986).

challenged a Georgia criminal statute proscribing sodomy.[67] Unfortunately, in *Bowers*, the Supreme Court upheld the state's right to prohibit private consensual activities within the home.[68] In so doing, *Bowers* enhanced the prominence of the closet, even in the most private physical space a person could have—her own bedroom.

Although sodomy laws played a crucial role in driving LGBTQ persons to hide in the closet, other laws also compelled gays to conceal their sexual orientation. State and local laws barred gays from employment in public schools and from obtaining professional licenses.[69] Many LGBTQ persons risked being separated from their families, especially their children, if their sexual identities were found out.[70] Many state and local governments failed to provide protection for gays against hate crimes, violence, and harassment.[71] Additionally,

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67. *Id.* at 186.

68. *See id.* at 190.

69. *See* ESKRIDGE, JR., DISHONORABLE PASSIONS, *supra* note 59, at 102–04. Indeed, today, several states continue to allow disparate treatment of LGBTQ persons in the workplace. *See* Todd A. DeMitchell, Suzanne Eckes & Richard Fossey, *Sexual Orientation and the Public School Teacher*, 19 B.U. PUB. INT. L.J. 65, 65–66 (2009) (discussing the discrimination faced by LGBTQ educators in public schools); Eva DuBuisson, Comment, *Teaching from the Closet: Freedom of Expression and Out-Speech by Public School Teachers*, 85 N.C. L. REV. 301, 304 (2006) (discussing the discrimination faced by LGBTQ educators and arguing that the First Amendment should prevent states from pressuring educators to remain closeted); *see also* Weaver v. Nebo Sch. Dist., 29 F. Supp. 2d 1279, 1280 (D. Utah 1998) (discussing a volleyball coach's challenge to her removal as a coach because of her sexual orientation); Glover v. Williamsburg Local Sch. Dist., 20 F. Supp. 2d 1160, 1164 (S.D. Ohio 1998) (discussing an Ohio School Board's decision not to renew the teaching contract of an elementary school teacher after an unidentified caller reported to school administrators that the teacher was seen holding hands with his male partner at a school holiday party).

70. *See, e.g.*, S. v. S., 608 S.W.2d 64, 66 (Ky. Ct. App. 1980) (stating that the child might "have difficulties in achieving a fulfilling heterosexual identity" and therefore denying custody to the lesbian mother); N. K. M. v. L. E. M., 606 S.W.2d 179, 183, 186 (Mo. Ct. App. 1980) (granting custody to a lesbian mother only on condition that she end her relationship with her lover, reasoning that the environment might harm the child by making the child "inclined toward [homosexuality]"); *In re* Jane B., 380 N.Y.S.2d 848, 860 (N.Y. App. Div. 1976) (removing custody from a mother because of her lesbian relationship and holding that "the child is emotionally disturbed by virtue of this environment"); *see also* Shaista-Parveen Ali, Note, *Homosexual Parenting: Child Custody and Adoption*, 22 U.C. DAVIS L. REV. 1009, 1012–21 (1989) (discussing how courts' broad discretion in child custody cases led some courts to apply a personal morality standard and thus denied LGBTQ individuals custody of their children based on erroneous preconceptions); Steve Susoeff, Note, *Assessing Children's Best Interests When a Parent Is Gay or Lesbian: Toward a Rational Custody Standard*, 32 UCLA L. REV. 852, 867–68 (1985) (noting that a parent with custody of a child may lose custody once that parent comes out of the closet because of the presumed ill effects of the child's exposure to a same-sex relationship).

71. *See* Anthony S. Winer, *Hate Crimes, Homosexuals, and the Constitution*, 29 HARV. C.R.-C.L. L. REV. 387, 388 (1994) (noting that state "legislatures frequently

few laws provided protection for LGBTQ persons against discrimination in housing.[72]

Moreover, the federal government also participated in the legal construction and maintenance of the closet. Similar to state and local governments, the federal government banned gays and lesbians from public employment.[73] In the military, the federal government implemented executive policies that allowed gays to be discharged from the armed forces.[74] These policies paved the way for the enactment of "Don't Ask, Don't Tell" ("DADT")[75] in 1993.[76] Under DADT, LGBTQ persons who were open about their sexual orientation and identities were excluded or discharged from serving in the military.[77] DADT encouraged the closeting of LGBTQ persons

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exclude lesbians and gay men from the protection of hate crime statutes"); *see also* Sally Kohn, *Greasing the Wheel: How the Criminal Justice System Hurts Gay, Lesbian, Bisexual and Transgendered People and Why Hate Crime Laws Won't Save Them*, 27 N.Y.U. REV. L. & SOC. CHANGE 257, 259–60 (2002) (arguing that hate crime legislation reinforces discrimination against LGBTQ individuals). *See generally* Yvonne Zylan, *Passions We Like... And Those We Don't: Anti-Gay Hate Crime Laws and the Discursive Construction of Sex, Gender and the Body*, 16 MICH. J. GENDER & L. 1 (2009) (discussing violence against LBGTQ individuals and state legislation from around the country passed to address this issue).

72. *See* Julie M. Ruhlin, *Beyond "Compelling": Tenants' Rights in the Conflict Between Religious Freedom and Laws that Prohibit Discrimination Based on Sexual Orientation*, 6 S. CAL. REV. L. & WOMEN'S STUD. 613, 621–22 (1997) (discussing housing discrimination faced by LGBT individuals and the lack of anti-discrimination laws); Thomas Weathers, *Gay Civil Rights: Are Homosexuals Adequately Protected from Discrimination in Housing and Employment?*, 24 PAC. L.J. 541, 542 (1993) (noting that there was "enough empirical data to demonstrate that discrimination against homosexuals in housing ... [was] sufficient to warrant legislation to protect homosexuals" in California). *See generally* Marie A. Failinger, *Remembering Mrs. Murphy: A Remedies Approach to the Conflict Between Gay/Lesbian Renters and Religious Landlords*, 29 CAP. U. L. REV. 383 (2001) (suggesting remedies to the discrimination faced by gays and lesbians when looking for housing).

73. *See* ESKRIDGE, JR., DISHONORABLE PASSIONS, *supra* note 59, at 100–02.

74. *See id.*

75. National Defense Authorization Act for Fiscal Year 1994, Pub. L. No. 103-160, § 571, 107 Stat. 1547, 1670–73 (1993), *repealed by* Don't Ask, Don't Tell Repeal Act of 2010, Pub. L. No. 111-321, 124 Stat. 3515 (codified at 10 U.S.C. § 654 note (2012)).

76. For a brief examination of the history of "Don't Ask, Don't Tell," see generally Fred L. Borch III, *The History of "Don't Ask, Don't Tell" in the Army: How We Got to It and Why It Is What It Is*, 203 MIL. L. REV. 189 (2010) (providing a brief historical overview of the Army's treatment of LGBTQ individuals and the legislation that led to "Don't Ask, Don't Tell"). For a more comprehensive treatment, see generally William A. Woodruff, *Homosexuality and Military Service: Homosexuality, Implementation, and Litigation*, 64 UMKC L. REV. 121 (1995) (providing in-depth analysis of the various military policies excluding gays and lesbians from military service before and after DADT).

77. National Defense Authorization Act for Fiscal Year 1994 § 571, 107 Stat. at 1670–73 (excluding persons whose "presence in the armed forces would create an unacceptable risk to the armed forces' high standards of morale, good order and discipline" and aiming

because, under the law, the armed forces would not inquire about the sexual orientation of military personnel.[78] At the same time, the policy dissuaded military personnel from disclosing their sexual orientation or gender identity—effectively nailing shut the closet door.[79] Indeed, once the military discovered that a service member was LGBTQ, the program required that he or she be dishonorably discharged from the armed forces.[80]

Furthermore, under federal immigration law, being an LGBTQ person constituted both an inadmissible barrier as well as a basis for deportation.[81] Although federal immigration law did not explicitly bar LGBTQ persons from gaining entry to the United States until 1965,[82] immigration courts interpreted provisions of Section 212 of the Immigration and Nationality Act ("INA") of 1952,[83] which govern the admission of foreigners to the United States, to deny entry to noncitizen gays and lesbians.[84] For example, courts upheld the use of Section 212's bar against noncitizens who were "mentally defective," persons who were convicted of "crimes of moral turpitude," or "persons of constitutional inferiority" as grounds for excluding gays from the border.[85] Additionally, Section 212 barred "[a]liens afflicted with psychopathic personality, epilepsy, or a mental defect" from entering the United States.[86] The legislative history of this provision shows that Congress aimed to include "homosexuals and sex perverts" in this inadmissible category.[87] Indeed, courts interpreted this provision of the 1952 Act to hold that Congress intended to bar

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to discharge those persons in the armed forces "who demonstrate a propensity or intent to engage in homosexual acts").

78. *See* Bailey W. Brown III, *Don't Ask, Do Tell: The Implications of 2008 Circuit Court Decisions for the Standard of Constitutional Review Applicable to the Military Homosexual Conduct Policy*, 201 MIL. L. REV. 184, 193 (2009) (addressing the requirements for discharge under DADT).

79. *See id.*

80. *See id.*

81. *See* Robert J. Foss, *The Demise of the Homosexual Exclusion: New Possibilities for Gay and Lesbian Immigration*, 29 HARV. C.R.-C.L. L. REV. 439, 439, 455 (1994).

82. *See* Immigration and Nationality Act of 1965, Pub. L. No. 89-236, § 15(b), 79 Stat. 911, 919 (codified as amended in scattered sections of 8 U.S.C.), *superseded by* Immigration and Nationality Act of 1990, Pub. L. No. 101-649, § 601, 104 Stat. 4978, 5067–77 (codified as amended in scattered sections of 8 U.S.C.).

83. Immigration and Nationality Act of 1952, Pub. L. No. 82-414, § 212, 66 Stat. 163, 182–88 (codified as amended in scattered sections of 8 U.S.C.).

84. *See* MARC STEIN, SEXUAL INJUSTICE, SUPREME COURT DECISIONS FROM *GRISWOLD* TO *ROE* 59 (2010) (discussing the inadmissibility of gays at the border based on INA provisions that did not on their face but in practice led to the exclusion of gays).

85. *See id.*

86. *See* Immigration and Nationality Act of 1952 § 212, 66 Stat. at 182.

87. *See* S. REP. NO. 1137, at 9 (1952).

gays from entering the United States.[88] For instance, the Supreme Court addressed the application of this provision to the deportation of a noncitizen in *Boutelier v. INS*.[89] Boutelier, a gay man who entered the United States in 1955, applied for U.S. citizenship, but his application was rejected after the federal government classified him as a person "afflicted with psychopathic personality" at the time of entry.[90] The Immigration and Nationality Service ("INS") instituted deportation proceedings against him, which he appealed, and the case ultimately reached the Supreme Court.[91] Citing the legislative history of the term "afflicted with psychopathic personality," the Supreme Court found it was "sufficiently broad to provide for the exclusion of homosexuals and sex perverts."[92] Critically, the Court upheld Boutelier's removal from the United States.[93] Congress ultimately made the bar against gays unambiguous in 1965 when it amended the INA to explicitly include persons engaged in "sexual deviation" to the list of inadmissible aliens.[94] Congress would not lift the ban on admitting LGBTQ persons to the United States until 1990.[95]

Thus, at different points in history, federal and state laws have operated to construct the closet, forcing many LGBTQ persons to conceal their sexual orientation and identities. In so doing, many in the gay community were compelled to conceal their sexual or gender identity—to be closeted—in order to avoid criminal prosecution, the threat of criminal prosecution, exclusion, or deportation from the United States, and other negative consequences that could result from being outed as a gay person. In other words, these laws

88. *See* Quiroz v. Neelly, 291 F.2d 906, 906 (5th Cir. 1961). In *Rosenberg v. Flueti*, 374 U.S. 449 (1963), a noncitizen gay man entered the United States and became a lawful permanent resident before the 1952 Act went into effect. *See Rosenberg*, 374 U.S. at 450. He briefly left the United States in 1956 and, upon his return, became subject to deportation. *Id.* In particular, the government charged him with violating the INA because he entered the United States with a "psychopathic personality" as a gay man. *Id.* at 450–51. Flueti eventually prevailed in the Supreme Court on other grounds. *See id.* at 462–63 (holding that Flueti was not subject to an "entry" because he was a lawful permanent resident and his trip abroad was "innocent, casual, and brief").

89. 387 U.S. 118 (1967). For a thorough discussion of the *Boutelier* case, see STEIN, *supra* note 84, at 61–93.

90. *Boutelier*, 387 U.S. at 120.

91. *Id.* at 118–20.

92. *See id.* at 121–22.

93. *See id.* at 125.

94. *See* Immigration and Nationality Act of 1965, Pub. L. No. 89-236, § 15(b), 79 Stat. 911, 919, *superseded by* Immigration and Nationality Act of 1990, Pub. L. No. 101-649, § 601, 104 Stat. 4978, 5067–77 (codified as amended in scattered sections of 8 U.S.C.).

95. *See* Immigration and Nationality Act of 1990 § 601, 104 Stat. at 5067–77.

collectively created the framework of the closet that many LGBTQ persons occupied.

C. *Legal Efforts to Dismantle the Closet*

Closets are built and they can be destroyed. Deconstructing the gay closet has not been easy and may perhaps be best described as a work-in-progress. Certainly, there have been important civil rights victories. However, as this Section explains, equality for gays has yet to be fully achieved.

At the beginning of the twenty-first century, a number of legal changes, both judicial and legislative, occurred that sought to dismantle the closet's framework. In *Romer v. Evans*,[96] the Supreme Court struck down a voter-passed referendum that discriminated against gays and lesbians.[97] The referendum, "Amendment 2," would have prevented state and local public officials from recognizing gays and lesbians as a special class.[98] In invalidating the referendum, the Court explained that the law would have "nullif[ied] specific legal protections" for gays and lesbians in a broad spectrum of spheres.[99] It also would have repealed "general laws and policies that prohibit arbitrary discrimination in governmental and private settings."[100] Recognizing that Amendment 2 raised the inference that it was passed as a result of "animosity toward the class of persons affected," the Court struck down Amendment 2 as not rationally related to further a legitimate governmental purpose.[101]

Years later, the Supreme Court decided *Lawrence v. Texas*,[102] which caused a monumental shift in LGBTQ rights. *Lawrence* addressed the constitutionality of a sodomy prohibition seventeen years after *Bowers*.[103] Recognizing that *Lawrence* raised the same issue that the Court addressed in *Bowers*, the Court revisited *Bowers* in its analysis.[104] Notably, the Court held that *Bowers* previously misunderstood the liberty at stake and the historical justification for upholding the prohibition of sodomy.[105] Ultimately, the Court overruled *Bowers*, stating that, "*Bowers* was not correct when it was

96. 517 U.S. 620 (1996).
97. *See id.* at 635–36.
98. *See id.* at 624.
99. *Id.* at 629.
100. *Id.* at 630.
101. *See id.* at 634–35.
102. 539 U.S. 558 (2003).
103. *See id.*
104. *Id.* at 567–71.
105. *See id.*

decided, and it is not correct today."[106] The Court held that persons are "entitled to respect for their private lives" and that states "cannot demean their existence or control their destiny by making their private sexual conduct a crime."[107]

Lawrence and the decriminalization of private, consensual sexual conduct subsequently played an important role in other legal changes that aimed to weaken the closet's frame. For instance, advocates relied on *Lawrence* to seek DADT's invalidation.[108] Prior to *Lawrence*, parties repeatedly challenged the constitutionality of DADT in federal courts and were largely unsuccessful.[109] *Lawrence*, however, played a pivotal role in changing views regarding the constitutionality of DADT. In particular, circuit courts in *Witt v. Department of the Air Force*[110] and *Cook v. Gates*[111] acknowledged that *Lawrence* recognized a protected liberty interest,[112] signaling the demise of DADT. Importantly, the Obama administration decided not to defend DADT before the Supreme Court.[113] Political forces called for the repeal of DADT and, in 2010, Congress did so.[114] *Lawrence* and the repeal of DADT thus reflected a changing legal and social culture that recognizes that LGBTQ persons should be afforded equal treatment under the law.

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106. *Id.* at 578.

107. *Id.*

108. *See* Brief for Plaintiffs-Appellants at 18–19, Cook v. Gates, 528 F.3d 42 (1st Cir. 2008) (Nos. 06-2313, 06-2381) (asserting that, following *Lawrence*, strict scrutiny should be triggered in evaluating DADT, and it should therefore be struck down); Brief of Appellant at 17, Witt v. Dep't of the Air Force, 527 F.3d 806 (9th Cir. 2008) (No. 06-35644) (arguing that *Lawrence* held that the right to form intimate romantic relationships with a person of the same sex is protected by substantive due process, and DADT should therefore be invalidated under strict scrutiny).

109. *See* Able v. United States, 155 F.3d 628, 636 (2d Cir. 1998) (holding that DADT is constitutional); Holmes v. Cal. Army Nat'l Guard, 124 F.3d 1126, 1127–28 (9th Cir. 1997) (same); Richenberg v. Perry, 97 F.3d 256, 258 (8th Cir. 1996) (same); Thomasson v. Perry, 80 F.3d 915, 919 (4th Cir. 1996) (en banc) (same); Able v. United States, 88 F.3d 1280, 1300 (2d Cir. 1996) (reversing a finding of unconstitutionality on the district court's reasoning but remanding for further consideration).

110. 527 F.3d 806 (9th Cir. 2008).

111. 528 F.3d 42 (1st Cir. 2008).

112. *Id.* at 52; *see Witt*, 527 F.3d at 816 (finding that "the Supreme Court applied a heightened level of scrutiny in *Lawrence*").

113. *See* Jess Bravin & Laura Meckler, *Obama Avoids Test on Gays in Military*, WALL ST. J. (May 19, 2009), http://online.wsj.com/article/SB124268952606832391.html.

114. *See* Don't Ask, Don't Tell Repeal Act of 2010, Pub. L. No. 111-321, 124 Stat. 3515 (codified at 10 U.S.C. § 654 note (2012)). The repeal went into effect in 2011. *See* Jim Garamone, *DOD Set for 'Don't Ask, Don't Tell' Repeal*, AM. FORCES PRESS SERV., U.S. DEP'T. OF DEF. (Sept. 19, 2011), http://www.defense.gov/news/newsarticle.aspx?id=65372.

The progress towards equality for LGBTQ individuals is perhaps best reflected today by advances in the legal struggles over same-sex marriage.[115] In this area, both federal and state laws have influenced the rights of LGBTQ persons and their relationship to the closet. In particular, in 1996, Congress enacted the Defense of Marriage Act ("DOMA"),[116] which contained two sections that sought to limit same-sex marriage. Section 2 of DOMA established that a state would not be required to recognize an out-of-state same-sex marriage.[117] Section 3 defined marriage as "a legal union between one man and one woman" for purposes of federal laws.[118]

Recently, the Supreme Court struck down Section 3 of DOMA in *Windsor v. United States*.[119] In *Windsor*, the Supreme Court held that DOMA is unconstitutional under the Due Process Clause of the Fifth Amendment.[120] The Court found that the principal purpose of DOMA was to demean people who were in a lawful same-sex marriage.[121] As a result of DOMA's demise, same-sex married couples now have access to hundreds of federal rights, benefits, and programs that had previously been available exclusively to different-

115. It should be noted that not all scholars agree that removing barriers to marriage for same-sex couples constitutes progress towards equality. As some legal scholars have pointed out, focusing efforts on marriage equality ignores a host of social and political problems attendant to the institution of marriage. *See, e.g.*, NANCY D. POLIKOFF, BEYOND (STRAIGHT AND GAY) MARRIAGE: VALUING ALL FAMILIES UNDER THE LAW 3 (2008) (arguing that marriage as a family form is not more important or valuable than other forms of family, so the law should not give it more value); Katherine M. Franke, *Longing for* Loving, 76 FORDHAM L. REV. 2685, 2689 (2008) (explaining that promoting marriage equality risks reinforcing the illegitimacy of nonmarital sexual conduct); Angela P. Harris, *From Stonewall to the Suburbs? Toward a Political Economy of Sexuality*, 14 WM. & MARY BILL RTS. J. 1539, 1569 (2006) (commenting that the fight for same-sex marriage threatens the feminist and queer critiques of marriage); Melissa Murray, *Marriage as Punishment*, 112 COLUM. L. REV. 1, 39–51 (2012) (arguing that the institution of marriage serves to discipline and regulate sexual behavior).

116. Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996), *invalidated by* Windsor v. United States, 133 S. Ct. 2675 (2013).

117. *Id.* § 2, 110 Stat. at 2419.

118. *Id.* § 3, 110 Stat. at 2419–20. Notably, Congress enacted DOMA as a response to *Baehr v. Mike*, 852 P.2d 44, 68 (Haw. 1993) (holding that the state's denial of marriage licenses to same-sex couples was subject to "strict scrutiny" under the equal protection clause of the state's constitution). *See* Kerry Abrams, *Peaceful Penetration: Proxy Marriage, Same-Sex Marriage, and Recognition*, 2011 MICH. ST. L. REV. 141, 172 (noting that *Baehr* inspired the passage of DOMA).

119. 133 S. Ct. 2675 (2013).

120. *See id.* at 2695–96.

121. *Id.* at 2695.

sex couples.[122] Without doubt, *Windsor* signaled yet another progressive move towards equality for LGBTQ persons.

On the state level, the majority of states ban marriages between people of the same sex. Only sixteen states[123] and the District of

122. *See* Adam Liptak, *Supreme Court Bolsters Gay Marriage with Two Major Rulings*, N.Y. TIMES (June 26, 2013), http://www.nytimes.com/2013/06/27/us/politics/supreme-court-gay-marriage.html?pagewanted=all&_r=0; *see also* Courtney G. Joslin, Windsor, *Federalism, and Family Equality*, 113 COLUM. L. REV. SIDEBAR 156, 170–71 (2013) (noting that same-sex married couples who live in states that recognize their marriage will be able to access all federal marital benefits while same-sex married couples in states that do not recognize their marriage will be eligible for some, but not all, federal marital benefits).

123. The following states recognize same-sex marriage: California, Connecticut, Delaware, Iowa, Maine, Maryland, Massachusetts, Minnesota, New Hampshire, New Jersey, New York, Rhode Island, Vermont, and Washington. *See* An Act to Amend Title 13 of the Delaware Code Relating to Domestic Relations to Provide for Same-Gender Civil Marriage and to Convert Existing Civil Unions to Civil Marriages, 79 DEL. LAWS ch. 19 (2013) (amending Title 13 of the Delaware Code to allow for same-sex marriages and converting civil unions to civil marriages within one year of the effective date of the Act); MD. CODE ANN., FAM. LAW §§ 2-201–2-202 (LexisNexis 2012); An Act Relating to Marriage; Providing for Civil Marriage Between Two Persons; Providing for Exemptions and Protections Based on Religious Association, 2013 MINN. LAWS ch. 74 (amending MINN STAT. § 517.01 to define marriage as a civil contract between two persons and removing marriage between persons of the same sex from the list of marriages prohibited in the state); N.H. REV. STAT. ANN. § 457:1-a (Supp. 2012); N.Y. DOM. REL. LAW § 10-a (McKinney Supp. 2013); An Act Relating to Domestic Relations-Persons Eligible to Marry, 2013 R.I. PUB. LAWS ch. 4 (granting same-sex couples the right to marriage and defining marriage as "the legally recognized union of two people"); VT. STAT. ANN. tit. 15, § 8 (2010); WASH. REV. CODE § 26.04.010 (2012); Hollingsworth v. Perry, 133 S. Ct. 2652, 2668 (2013) (holding that proponent of California's same sex marriage ban did not have standing to appeal the district court's order declaring Proposition 8 unconstitutional and thus leaving the district court order intact and allowing same-sex marriage in California); Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407, 412 (Conn. 2008) (holding state statutory prohibition against same-sex marriage impermissibly discriminated against gay people on account of their sexual orientation in violation of Connecticut's constitution); Varnum v. Brien, 763 N.W.2d 862, 872 (Iowa 2009) (holding that an Iowa statute limiting civil marriage for opposite-sex couples violated the Equal Protection Clause); Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 969 (Mass. 2003) (invalidating Massachusetts law prohibiting same-sex couples from "the protections, benefits, and obligations of civil marriage"); Garden State Equal. v. Dow, No. L-1729-11, 2013 WL 5397372, at *24 (N.J. Super. Ct. Law Div. Sept. 27, 2013); Citizen Initiative, Same-Sex Marriage, Question 1 (Me. 2012), *available at* http://www.maine.gov/sos/cec/elec/2012/tab-ref-2012.html (last visited Oct. 6, 2013). New Jersey is the fourteenth and most recent state to allow same-sex couples to marry as a result of a superior court ruling that New Jersey's civil union scheme violated *Windsor*. *Garden State Equal.*, 2013 WL 5397372, at *24. On October 21, 2013, New Jersey Governor Chris Christie announced that the State would not be appealing the ruling and thus, effectively allowed same-sex marriages to take place in New Jersey. *See* Kate Zernike & Marc Santora, *As Gays Wed in New Jersey, Christie Ends Court Fight*, N.Y. TIMES (Oct. 21, 2013), http://www.nytimes.com/2013/10/22/nyregion/christie-withdraws-appeal-of-same-sex-marriage-ruling-in-new-jersey.html?_r=0. Illinois and Hawaii are slated to become the fifteenth and sixteenth states, respectively, to allow same-sex marriage. *See* Alan Duke, *Hawaii to Become 16th State to Legalize Same-Sex Marriage*,

Columbia[124] currently allow gay and lesbian individuals to legally marry. Notably, lawsuits have been filed to overturn these laws and restructure a legal and social environment in which LGBTQ persons can marry their partners of choice. One of the most recent successful efforts toward that endeavor was the legal challenge to California's Proposition 8 ("Prop 8"), which provided that "[o]nly marriage between a man and a woman is valid or recognized" in the state.[125] In *Perry v. Schwarzenegger*,[126] plaintiffs argued that Prop 8 is unconstitutional, and, importantly, both the district court and Court of Appeals for the Ninth Circuit held in their favor.[127] The case, renamed *Hollingsworth v. Perry*,[128] went up to the Supreme Court. Although the Supreme Court did not address the merits of the case and instead addressed it on procedural grounds, it effectively upheld the lower courts' invalidation of Prop 8.[129] As a result, same-sex couples may legally marry in California. Since *Hollingsworth v. Perry*, new lawsuits have been filed in Kentucky and Pennsylvania, challenging those states' bans against same-sex marriage.[130]

As the foregoing discussed, important achievements have been gained on both the federal and state level to undermine the legal and social framework that constructed and continues to facilitate the ongoing unequal treatment of LGBTQ persons. The legal trend demonstrates advancement toward LGBTQ rights and legal and social norms that encourage more gays to come out of the closet. However, as the next Section explains, full equality for LGBTQ

CNN (Nov. 13, 2013, 12:30 PM), http://www.cnn.com/2013/11/12/us/hawaii-same-sex-marriage/.

124. D.C. CODE § 46-401 (Supp. 2012).

125. *Hollingsworth*, 133 S. Ct. at 2659. For a historical discussion of Prop 8, see Melissa Murray, *Marriage Rights and Parental Rights: Parents, the State, and Proposition 8*, 5 STAN. J. C.R. & C.L. 357, 357–85 (2009).

126. 704 F. Supp. 2d 921 (N.D. Cal. 2010), *aff'd sub nom.*, Perry v. Brown, 671 F.3d 1052, 1096 (9th Cir. 2012).

127. *See* Perry v. Schwarzenegger, 704 F. Supp. 2d at 938; Perry v. Brown, 671 F.3d at 1096.

128. 133 S. Ct. 2652 (2013).

129. *See id.* at 2668. In determining that the petitioners lacked standing, the Court noted that it has "never before upheld the standing of a private party to defend the constitutionality of a state statute when state officials have chosen not to." *Id.*

130. *See* Complaint for Declaratory Judgment and Injunctive Relief at 9, Ky. Equal. Fed'n v. Beshear, No. 13-CI-1074 (Ky. Cir. Ct. Sept. 10, 2013); Complaint for Declaratory and Injunctive Relief at 10–11, Bourke v. Breshear, No. 3:13-cv-750-JGH (W.D. Ky. July 26, 2013), 2013 WL 3859038; Complaint for Declaratory and Injunctive Relief at 39, Whitewood v. Corbett, No. 1:13-cv-01861 (M.D. Pa. July 9, 2013), 2013 WL 3456582. As previously stated, in New Jersey, plaintiffs successfully challenged New Jersey's civil union scheme. *See supra* note 123.

persons has yet to be attained, and the appeal to remain hidden in the closet remains strong.

D. The Enduring Power of the Closet

Despite the improvement of the rights of LGBTQ persons, discrimination against them remains. Gays continue to experience legal discriminatory treatment in various aspects of life, including the denial of marriage equality in most states,[131] failure to recognize parental rights,[132] and lack of protection for equal treatment in the workplace.[133] Additionally, hate crimes against LGBTQ persons persist, which underscores the point that despite the legal achievements attained, there remain settings that are hostile to

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131. *See supra* notes 123–24 and accompanying text.

132. *See* Janice M. v. Margaret K., 948 A.2d 73, 75 (Md. 2008) (holding that unless there are exceptional circumstances present, visitation and custody rights of a non-legal parent that raised the child with her same-sex partner would be denied); Debra H. v. Janice R., 930 N.E.2d 184, 191 (N.Y. 2010) (reaffirming the bright-line rule in New York that an individual, in this case one member of a same-sex couple, who lacks biological or adoptive links to the child does not have standing to assert parental rights); Carlos A. Ball, *Rendering Children Illegitimate in Former Partner Parenting Cases: Hiding Behind the Façade of Certainty*, 20 AM. U. J. GENDER SOC. POL'Y & L. 623, 624–25 (2012) (discussing the loss of parental status by an individual, typically a member of a same-sex relationship, who lacks biological or adoptive links to the child); Joanna L. Grossman, *The New Illegitimacy: Tying Parentage to Marital Status for Lesbian Co-Parents*, 20 AM. U. J. GENDER SOC. POL'Y & L. 671, 671 (2012) (noting that, unlike the situation with a heterosexual couple, a lesbian mother can lose parental rights if the lesbian couple failed to marry or enter into a civil union while the lesbian mother participated in raising the child); Courtney G. Joslin, *Travel Insurance: Protecting Lesbian and Gay Parent Families Across State Lines*, 4 HARV. L. & POL'Y REV. 31, 31–34 (2010) (discussing the potential loss of parental rights by one member of a same-sex couple when they cross state lines).

133. *See* Zachary A. Kramer, *After Work*, 95 CAL. L. REV. 627, 649–52 (2007) (analyzing workplace discrimination against gays and lesbians); Jennifer C. Pizer et al., *Evidence of Persistent and Pervasive Workplace Discrimination Against LGBT People: The Need for Federal Legislation Prohibiting Discrimination and Providing for Equal Employment Benefits*, 45 LOY. L.A. L. REV. 715, 719–20 (2012) (noting that despite four decades of state legislation designed to protect LGBT individuals in the workplace, there is still a need for federal law prohibiting sexual-orientation and gender-identity discrimination in the workplace). To be sure, discrimination in the workplace, similar to other spheres of public and private spaces, takes varied forms. *See, e.g.*, Elizabeth M. Glazer, *Sexual Reorientation*, 100 GEO. L.J. 997, 1035 (2012) (discussing discrimination in the workplace against bisexuals); Elizabeth M. Glazer & Zachary A. Kramer, *Transitional Discrimination*, 18 TEMP. POL. & CIV. RTS. L. REV. 651, 655–57 (2009) (examining workplace discrimination against transgender persons); *see also* Brad Sears & Christy Mallory, *Documented Evidence of Employment Discrimination & Its Effects on LGBT People*, WILLIAMS INST. 2 (July 2011), http://williamsinstitute.law.ucla.edu/wp-content/uploads/Sears-Mallory-Discrimination-July-20111.pdf (providing in-depth data on the continuing discrimination faced by LGBT individuals in the workplace).

gays.[134] The continuing maltreatment of LGBTQ individuals reinforces the appeal and safety of the closet. That is, the negative, if not dangerous, consequences of disclosing one's sexual orientation or identity understandably discourage many LGBTQ persons from "coming out."[135]

Yet, as pointed out earlier, the closet has binary features. Although the closet offers security in sites in which an LGBTQ person would not feel comfortable divulging her sexual identity or orientation, the closet also harms. Being closeted, as a myriad of studies and news articles have shown, imposes significant personal, social, and political costs.[136] As William Eskridge, Jr., remarked, "[t]he harms of the closet . . . are often extraordinary: death and life-shattering experiences."[137] Indeed, the string of reported and

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134. *See* Patricio G. Balona, *Daytona Beach Man Charged with Hate Crime in Shores*, DAYTONA BEACH NEWS J. (Jan. 25, 2013, 11:06 AM), http://www.news-journalonline.com/article/20130125/NEWS/130129836/0/search (discussing the harassment and attack of a woman who was called a "dyke and faggot" while being pushed to the ground); Maira Garcia, *Killing of Gay Man Spurs Rally*, N.Y. TIMES (May 21, 2013), http://cityroom.blogs.nytimes.com/2013/05/21/killing-of-gay-man-spurs-rally/?_r=0 (discussing public outcry after the killing of a gay man); Levi Pulkkinen, *Prosecutors: West Seattle Attack an Anti-Gay Hate Crime*, SEATTLE POST-INTELLIGENCER (Nov. 4, 2012), http://www.seattlepi.com/default/article/Prosecutors-West-Seattle-attack-an-anti-gay-hate-4004623.php (discussing the attack of a gay man who was hit repeatedly by a bat while anti-gay slurs were thrown at him).

135. *See* William N. Eskridge, Jr., *No Promo Homo: The Sedimentation of Anti-Gay Discourse and the Channeling Effect of Judicial Review*, 75 N.Y.U. L. REV. 1327, 1373 (2000) (stating that discriminatory laws "will discourage GLBT people from coming out of the sexual closet and will encourage them to pass as straight—even to the point of marrying someone of the opposite sex").

136. *See* Karen M. Jordan & Robert H. Deluty, *Coming Out for Lesbian Women: Its Relation to Anxiety, Positive Affectivity, Self-Esteem, and Social Support*, 35 J. HOMOSEXUALITY 41, 55–59 (1998); Nicole Legate, Richard M. Ryan & Netta Weinstein, *Is Coming Out Always a "Good Thing"? Exploring the Relations of Autonomy, Support, Outness, and Wellness for Lesbians, Gay, and Bisexual Individuals*, 3 SOC. PSYCHOL. & PERSONALITY SCI. 145, 149–50 (2011); Paul D. Murray & Karen McClintock, *Children of the Closet: A Measurement of the Anxiety and Self-Esteem of Children Raised by a Non-Disclosed Homosexual or Bisexual Parent*, 49 J. HOMOSEXUALITY 77, 79–83 (2005) (discussing the higher level of anxiety, stigma, and lower self-esteem that bisexual and gay parents experience as a result of concealing their sexual orientation from their children); Eric W. Schrimshaw et al., *Disclosure and Concealment of Sexual Orientation and Mental Health of Non-Gay-Identified, Behaviorally Bisexual Men*, 81 J. CONSULTING & CLINICAL PSYCHOL. 141, 149 (2013) (discussing a study showing that bisexual men experience depression and high anxiety as a result of concealing their sexual orientation). Note that several studies comparing the differences between "out" and "closeted" gays, lesbians, and bisexuals are discussed in the foregoing journals as well.

137. Eskridge, Jr., *supra* note 135, at 1375.

attempted suicides committed by LGBTQ persons underscores the incredible difficulties of being closeted.[138]

Overall, studies on the process of coming out in the LGBTQ context have documented the negative impact of staying in the closet. LGBTQ people who come out are less angry, less depressed, and develop higher self-esteem.[139] Being closeted or concealing "significant aspects of the self . . . can be painful."[140] Constant hiding creates a negative impact on self-esteem and makes it difficult to feel one's actual achievements.[141] Indeed, closeted people report increased job-related stress, feelings of isolation, and are more likely to leave their jobs.[142] These studies demonstrate the toll that the closet imposes on one's emotional and psychological well-being.[143]

Being closeted causes more than merely personal harms. By remaining invisible, the LGBTQ community as a group is rendered powerless. Kenji Yoshino aptly stated that "the closet captures the invisibility and isolation that hinder gays in their political mobilization."[144] Darren Hutchinson similarly noted that "[t]he closet harms gay communities because it hinders the ability of gays and lesbians to engage in collective political action to achieve equality."[145] Hutchinson also underscores how the closet divides communities of

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138. *See* David Badash, *Breaking: ELEVENTH September Anti-Gay Hate-Related Teen Suicide*, NEW CIV. RIGHTS MOVEMENT (Oct. 11, 2010), http://thenewcivilrightsmovement.com/breaking-eleventh-september-anti-gay-hate-related-teen-suicide/bigotry-watch/2010/10/11/13606; David Badash, *UPDATED: September's Anti-Gay Bullying Suicides – There Were a Lot More Than 5*, NEW CIV. RIGHTS MOVEMENT (Oct. 1, 2010), http://thenewcivilrightsmovement.com/septembers-anti-gay-bullying-suicides-there-were-a-lot-more-than-5/discrimination/2010/10/01/13297; Jack Flanagan, *Closeted Gay Soldiers More Likely to Attempt Suicide*, GAY STAR NEWS (March 1, 2013), http://www.gaystarnews.com/article/closeted-gay-soldiers-more-likely-commit-suicide010313; Jeremy Hubbard, *Fifth Gay Teen Suicide in Three Weeks Sparks Debate*, ABC NEWS (Oct. 3, 2010), http://abcnews.go.com/US/gay-teen-suicide-sparks-debate/story?id=11788128; Jesse McKinley, *Suicides Put Light on Pressure of Gay Teenagers*, N.Y. TIMES (Oct. 3, 2010), http://www.nytimes.com/2010/10/04/us/04suicide.html.

139. Legate, Ryan & Weinstein, *supra* note 136, at 150.

140. Jack Drescher, *The Psychology of the Closeted Individual and Coming Out*, PARADIGM, Fall 2007, at 17, *available at* http://www.sequeltsi.com/files/library/Closeted_and_Coming_Out.pdf.

141. *See id.*

142. Alex Blaze, *Two Studies on Coming Out . . . or Not*, HUFFINGTON POST (June 22, 2011, 12:25 PM), http://www.huffingtonpost.com/alex-blaze/two-studies-on-gays-comin_b_882046.html.

143. Hutchinson, *supra* note 37, at 121.

144. Yoshino, *supra* note 34, at 1756.

145. Hutchinson, *supra* note 37, at 121.

color by operating at the intersection of homophobia, class, and race.[146]

Because of these social, personal, and political costs, advocates have long encouraged LGBTQ persons to "out" themselves.[147] As Harvey Milk famously said, "every gay person must come out."[148] Indeed, those who are "out" have reported that they are less anxious and less likely to engage in anonymous forms of social interactions.[149] Research has shown that LGBTQ persons more often disclose their sexual orientation if they anticipate acceptance by the audience.[150] Family support and acceptance of openly LGBTQ adolescents is correlated with decreases in depression, substance abuse, and suicide

146. *See id.* at 121–22.

147. *See* Eskridge, Jr., *A Jurisprudence of "Coming Out," supra* note 38, at 2442–43 (noting that coming out of the closet is a positive move because hiding in the closet forecloses psychological, social, and political opportunities); Fajer, *supra* note 40, at 591–602 (discussing how coming out the closet can be liberating and emotionally helpful).

148. *See* Jonathan Caperhard, *From Harvey Milk to 58 Percent*, WASH. POST (March 18, 2013), http://www.washingtonpost.com/blogs/post-partisan/wp/2013/03/18/from-harvey-milk-to-58-percent/ (offering a transcript of Mayor Harvey Milk's original 1978 speech celebrating the defeat of California's Proposition 6, which aimed to ban LGBTQ individuals from teaching in public schools). In the last year, many famous people have come out. *See, e.g.*, Patrick Kevin Day, *'Big Bang Theory's' Jim Parsons Comes Out as Gay*, L.A. TIMES (May 23, 2012), http://latimesblogs.latimes.com/showtracker/2012/05/big-bang-theory-jim-parsons-comes-out-gay.html (noting that actor Jim Parsons of *The Big Bang Theory* is gay and has been in a relationship for the past ten years); Josh Eells, *The Secret Life of Transgender Rocker Tom Gabel*, ROLLING STONE (May 31, 2012, 11:05 AM), http://www.rollingstone.com/music/news/the-secret-life-of-transgender-rocker-tom-gabel-20120531 (reporting on the coming out story of Tommy Gabel, lead singer of the band, *Anger Me!*, as transgender and transitioning to a woman); Stephanie Fairyington, *Anderson Cooper: Gay Role Model?*, CNN (July 5, 2012, 2:39 PM), http://edition.cnn.com/2012/07/03/living/anderson-cooper-gay-role-model (discussing the "coming out" of CNN's Anderson Cooper); Aaron Hicklin, *The Double Life of Gillian Anderson*, OUT MAG. (Mar. 13, 2012), http://www.out.com/entertainment/television/2012/03/13/gillian-anderson-lesbian-love-xfiles (featuring an interview in which Gillian Anderson of *The X-Files* discusses being "in a relationship with a girl for a long time . . . in high school"); *Matt Bomer Comes Out as Gay: 'White Collar' Actor Thanks Partner Simon Halls, Kids at Awards Ceremony*, HUFFINGTON POST (Feb. 13, 2012, 9:54 AM), http://www.huffingtonpost.com/2012/02/13/matt-bomer-comes-out-gay-thanks-partner_n_1272997.html (discussing the coming out of Matt Bomer of *White Collar*); Anne Powers, *A Close Look at Frank Ocean's Coming Out Letter*, NPR: THE RECORD (July 2, 2012, 2:00 PM), http://www.npr.org/blogs/therecord/2012/07/04/156261612/a-close-look-at-frank-oceans-coming-out-letter (reporting on Grammy nominee and hip-hop artist Frank Ocean's discussion on his website that several songs on his new album were addressed to a male love object and reflected his first romance at age 19 with a male friend).

149. *See* Jordan & Deluty, *supra* note 136, at 55–59.

150. Amanda Gardner, *Mental Health of LGB Individuals Varies With Their Support*, HEALTH (June 20, 2011), http://news.health.com/2011/06/20/support-lgbt-coming-out/.

attempts.[151] Without the confines of the closet, one not only feels liberated, but is able to begin the process of becoming queer.[152]

Coming out is liberating not only because one has decided to leave the confines of the closet but also because, for many, it marks the beginning of becoming queer.[153] That is, one can initiate the process of identifying as a lesbian, gay, or bisexual individual by openly expressing one's identity in various settings.[154] Such expressions of "outness" could pose challenges in legal and cultural sites inhospitable to LGBTQ persons.[155] Yet, that is part of the point of visibility—its role in helping to restructure legal and social terrains.

Against the hetero-normative framework in which we live, it is understandable that many LGBTQ persons have chosen to be closeted about their sexual preferences or gender identity. At the same time, the closet's mixed role in both comforting and harming LGBTQ persons and the gains that may be achieved from coming out help to explain why gays have chosen to come out. Notably, the previous discussion about the closet's relationship to the legal and social rights of LGBTQ persons provides an important, foundational context for understanding how other marginalized populations such as undocumented immigrants have deployed tropes from the gay rights movement as they seek acceptance and membership in the United States.

II. THE CLOSETING OF UNDOCUMENTED IMMIGRANTS

Three years before Jose Antonio Vargas famously revealed his unauthorized immigration status, twenty-two-year-old Adrian Ramirez did the same thing.[156] Standing in front of 1,000 people attending a rally, Ramirez outed himself as an undocumented

151. Caitlyn Ryan et. al., *Family Acceptance in Adolescence and the Health of LGBT Young Adults*, 23 J. CHILD & ADOLESCENT PSYCHOL. NURSING 205, 208 (2010).

152. *See* Eskridge, Jr., *Jurisprudence of "Coming Out," supra* note 38, at 2440–41 (explaining that coming out about one's sexual orientation or gender identity is not "understood merely as a discrete personal discovery and expression of one's sexuality, but is now seen as a process of continual discovery and exploration made possible through liberation from the clichés of 'compulsory heterosexuality' ").

153. *See id.* at 2440.

154. *See* Hutchinson, *supra* note 37, at 122 (commenting that "[p]ublic self-identification plays an important role in the formation of complex social identities").

155. See Marc R. Poirier, *Microperformances of Identity: Visible Same-Sex Couples and the Marriage Controversy*, 15 WASH. & LEE J. CIVIL RTS. & SOC. JUST. 3, 4 (2008) (stating that "[w]hen same-sex couples choose to become visible, their presence challenges a number of social norms").

156. Jayadev, *supra* note 20.

immigrant.[157] By coming out, Ramirez became part of a movement of immigrants like him—noncitizens who were brought to the United States at a very young age and have grown up in the country without lawful immigration status and are now seeking recognition of their existence and demanding legal acceptance of their membership.[158] As Ramirez aptly announced, he and others are "coming out of the undocumented closet."[159]

Scholars and immigrants' rights advocates have long referred to immigration law's "shadow" to describe the extent to which undocumented immigrants have had to live, work, study, or function in society in hidden ways.[160] That is, immigration law holds such a strong and dreadful presence in their daily lives that they live in constant fear of the possibility of being removed from the United States. Almost every decision they make is shaped by whether that decision will somehow place their undocumented status in the open. To lessen the chances of deportation, they live in society in largely unnoticed ways and avoid calling attention to their very existence, despite the burdens of living concealed lives.[161]

The presence of undocumented immigrants in the United States has not been overlooked, and, importantly, the Supreme Court has expressed serious concerns with the fact that undocumented immigrants live in the twilight of immigration law. In particular, in *Plyler v. Doe*,[162] the Supreme Court recognized not only the existence

157. *Id.*

158. *See* Maggie Jones, *Coming Out Illegal*, N.Y. TIMES (Oct. 21, 2010), http://www.nytimes.com/2010/10/24/magazine/24DreamTeam-t.html?pagewanted=all&_r=0 (discussing an undocumented UCLA student named Leslie and explaining that undocumented students have "[b]orrow[ed] tactics from the civil rights and gay rights movements").

159. Jayadev, *supra* note 20.

160. *See, e.g.*, Laura Corrunker, *"Coming out of the Shadows": DREAM Act Activism in the Context of Global Anti-Deportation Activism*, 19 IND. J. GLOBAL LEGAL STUD. 143, 158–62 (2012) (discussing the various ways that undocumented immigrants in the United States feel the need to live in the "shadows" and the numerous rights and necessities that they give up as a result); Susan B. Coutin, *Law on the Ground: Jurisdiction, Affiliation, and Transnational Law-Making Within Unauthorized Migration from El Salvador to the United States*, 51 WAYNE L. REV. 1147, 1149–50 (2005) (discussing how immigration policies in the United States cause immigrants to feel as if they are living in the "shadows").

161. *See* Julia Preston, *Risks Seen for Children of Illegal Immigrants*, N.Y. TIMES (Sept. 20, 2011), http://www.nytimes.com/2011/09/21/us/illegal-immigrant-parents-pass-a-burden-study-says.html?_r=2&ref=us& (discussing a comprehensive study that shows that unauthorized status casts a far-reaching shadow in the lives of undocumented immigrants and their children).

162. 457 U.S. 202 (1982). A more in-depth discussion of *Plyler* is conducted *infra* Part III.A.

of a "shadow population"[163] in the United States, but also the disconcerting democratic implications that living hidden lives presents, noting that:

> This situation raises the specter of a permanent caste of undocumented resident aliens, encouraged by some to remain here as a source of cheap labor, but nevertheless denied the benefits that our society makes available to citizens and lawful residents. The existence of such an underclass presents most difficult problems for a Nation that prides itself on adherence to principles of equality under the law.[164]

Without doubt, the image of the shadow depicts a powerful picture of the oppression of undocumented immigrants. Yet, the image fails to provide a complete depiction of the lived experiences of many immigrants. At the outset, many of these immigrants, such as DREAMers, are actually not living hidden lives, but are instead openly participating in various aspects of society. Additionally, the shadow image does not fully reflect DREAMers' and other undocumented immigrants' decisions to leave the closet and publicly reveal their immigration status. Indeed, they are clearly demanding recognition of their existence and claiming membership.[165] Finally, the shadow metaphor seems almost "naturalistic" in that a shadow is simply *there*—created by the shining of the sun or some other light, which in this case would be immigration law.

This Part contends that the undocumented closet provides an equally compelling and arguably more accurate metaphor for describing the oppression of immigrants, particularly DREAMers and other undocumented immigrants who are publicly "outing" themselves. First, the closet metaphor reflects the lived experiences of immigrants who have had to withhold information about their status and either "pass" for documented immigrants or U.S. citizens or "cover" their undocumented status out of fear of deportation.[166] Second, the image of the closet—as a structure that has a door or an opening—reflects the extent to which undocumented immigrants

163. *Plyer*, 457 U.S. at 218–19.

164. *Id.* at 219.

165. *See infra* Part III.

166. By "passing," I am referring to the ways in which undocumented immigrants act in ways that make others believe them to be documented immigrants or U.S. citizens. Passing is different from the concept of "covering," in which one might attempt to downplay his or her undocumented status. For a robust discussion of the differences between passing and covering, see KENJI YOSHINO, COVERING: THE HIDDEN ASSAULT ON OUR CIVIL RIGHTS 18 (2006).

have chosen to abandon a sequestered site and opted to become visible for others to see and recognize. Third, the closet metaphor underscores the fact that the undocumented closet was legally constructed. As such, the undocumented closet's frame may be deconstructed, if not destroyed. That is, laws that pushed people to hide in the closet (like the gay closet) may be struck down or changed.

To fully appreciate the deployment of the closet metaphor in the immigration context, this Part explains the legal construction of the "undocumented closet." Section A argues that, just like the gay closet, the undocumented closet was the result of a combination of federal and state laws designed to exclude and penalize people from the community and polity. Section B examines the paradox of the undocumented closet: It provides "protection" because it encourages secrecy about one's immigration status and identity, but it simultaneously facilitates the denial of undocumented immigrants' existence, rendering them invisible and politically powerless.

A. *The Legal Construction of the Undocumented Closet*

1. Federal Laws

Amalgamations of federal immigration law and state and local anti-immigration laws have worked together to construct the undocumented closet. On the federal level, the law that arguably plays the most crucial role in the establishment of the undocumented closet is the law of deportation.[167] Deportation, after all, as the Supreme Court acknowledged, is "the equivalent of banishment or exile."[168] Indeed, the Court noted that deportation could result not only in the "loss of both property and life" but also "of all that makes life worth living."[169] Not only the fact of deportation, but also the "possibility or threat"[170] of it has led to the construction of the closet. That is, the fear of being removed is ever-present in the daily lives of immigrants. Such anxieties about deportation are not unreasonable in light of the probability of being separated from family, friends, and community. Fears of removal are understandable because, as

167. *See* 8 U.S.C. § 1227 (2012).

168. Padilla v. Kentucky, 130 S. Ct. 1473, 1486 (2010) (quoting Delgadillo v. Carmichael, 332 U.S. 388, 390–91 (1947)).

169. Ng Fung Ho v. White, 259 U.S. 276, 284 (1922).

170. Mae M. Ngai, *The Strange Career of the Illegal Alien: Immigration Restriction and Deportation Policy in the United States, 1921–1965*, 21 L. & HIST. REV. 69, 72 (2003) (exploring the ways in which deportation law constructed the "illegal immigrant").

historian Mae Ngai commented, the fears "derive[ ] from the actual existence of state machinery to apprehend and deport illegal aliens."[171] Thus, "actual deportation" works in tandem with the "threat of deportation" to construct a space that compels undocumented immigrants to be closeted about their immigration status and identity.

The anxiety about being deported or removed[172] is especially understandable today in light of the record-setting number of deportations that have occurred in the past few years. The Department of Homeland Security reported that between October 1, 2011, and August 30, 2012, of the fiscal year 2012, the government deported 409,849 people.[173] For the fiscal year 2013, unofficial studies report that the number of deportations had decreased, although the reports are inconsistent. According to an Immigration and Customs Enforcement ("ICE") official, the government deported 246,333 people between October 1, 2012, and June 1, 2013.[174] Another report notes that between October 1, 2012, and August 30, 2013, 345,756 people were deported.[175] Both studies reflect a slight drop in deportations.[176] Notwithstanding these studies, the fact remains that President Obama deported 1.6 million people from the United States during his first four years in office.[177] This number is more than any

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171. *Id.*

172. For years, the Immigration and Nationality Act ("INA") used the word "deport" to refer to the removal of a noncitizen from the United States. Today, the INA uses the term "remove." *See* 8 U.S.C. § 1227(a) (2012).

173. *See Removal Statistics*, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT (2013), http://www.ice.gov/removal-statistics (reporting that 409,849 people were deported in 2012).

174. *See* Francis Wilkinson, *Obama Keeps Up Torrid Pace of Deportations*, BLOOMBERG (June 11, 2013, 4:50 PM), http://www.bloomberg.com/news/2013-07-11/obama-keeps-up-torrid-pace-of-deportations.html (quoting an Immigration and Customs Enforcement spokeswoman that the government deported 246,333 people between October 1, 2012, and June 1, 2013).

175. *See U.S. Deportation Outcomes by Charge*, SYRACUSE TRAC IMMIGRATION, http://trac.syr.edu/phptools/immigration/court_backlog/deport_outcome_charge.php (last visited Oct. 6, 2013).

176. For example, assuming the TRAC study is accurate, then there was indeed a drop in deportation when you compare the number of people deported in October 1, 2012, to August 30, 2013 (345,756), to the number of people deported between October 1, 2011, to August 30, 2012 (409,849). *Id.*

177. Ted Hesson, *Republican Senator: "Virtually No One is Being Deported,"* ABC NEWS (June 7, 2013), http://abcnews.go.com/ABC_Univision/Politics/republican-senator-jeff-sessions-virtually-deported/story?id=19350067.

other president and close to the equivalent of all people deported from the United States between 1892 and 1997.[178]

Immigration law includes a provision that could theoretically enable an undocumented immigrant subject to deportation to obtain relief from removal. In particular, lawful permanent residents ("LPRs") and other noncitizens can apply for removal relief.[179] Both groups must meet physical residency requirements (seven years for LPRs and ten years for other noncitizens) and must not have been convicted of particular crimes.[180] In addition, noncitizens who are not LPRs must also be able to establish good moral character.[181] Moreover, noncitizens who are not LPRs must be able to meet the standard for obtaining relief of "exceptional and extremely unusual hardship" to a qualifying family member.[182] The qualifying member must either be a U.S. citizen or lawful permanent resident.[183]

Significantly, the standard for obtaining relief from removal is extremely difficult to meet.[184] The difficulty of obtaining relief is reflected in the number of deportations that involved families with U.S. citizen members. There are approximately 8.8 million people who come from a "mixed-status family" or live in families that include

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178. Michael D. Shear, *Seeing Citizenship Path Near, Activists Push Obama to Slow Deportations*, N.Y. TIMES (Feb. 22, 2013), http://www.nytimes.com/2013/02/23/us/advocates-push-obama-to-halt-aggressive-deportation-efforts.html?pagewanted=all.

179. *See* 8 U.S.C. § 1229b(a) (2012) (detailing that cancellation of removal that is available for legal permanent residents); *id.* § 1229b(b) (detailing that cancellation of removal is available for other noncitizens).

180. *See id.* §§ 1229b(a)(1)–(3), 1229b(b)(1)(A)–(C).

181. *Id.* § 1229b(b)(1)(B).

182. *Id.* § 1229b(b)(1)(D).

183. *Id.*

184. *See, e.g.*, *In re* Martha Andazola-Rivas, 23 I. & N. Dec. 319, 324 (B.I.A. 2002) (finding the "exceptional and extremely unusual hardship" standard not met); *In re* Francisco Javier Monreal-Aguinaga, 23 I. & N. Dec. 56, 65 (B.I.A. 2001) (same). *But see In re* Ariadna Angelica Gonzalez Recinas, 23 I. & N. Dec. 467, 473 (B.I.A. 2002) (finding the "exceptional and extremely unusual hardship" standard met). For scholarship on the difficulties of meeting the "exceptional and extremely unusual hardship," see Jennifer Lindsley, *All Relevant Factors: Gender in the Analysis of Exceptional and Extremely Unusual Hardship*, 19 WIS. WOMEN'S L.J. 337, 343 (2004) (discussing the difficulty in meeting the "exceptional and extremely unusual hardship" standard and noting that the standard can disfavor women); Molly H. Sutter, *Mixed-Status Families and Broken Homes: The Clash Between the U.S. Hardship Standard in Cancellation of Removal Proceedings and International Law*, 15 TRANSNAT'L L. & CONTEMP. PROBS. 783, 786–87 (2006) (discussing how the "exceptional and extremely unusual hardship" standard creates a nearly impossible hurdle to overcome); David B. Thronson, *Thinking Small: The Need For Big Changes in Immigration Law's Treatment of Children*, 14 U.C. DAVIS J. JUV. L. & POL'Y 239, 255–56 (2010) (noting that the "exceptional and extremely unusual hardship" standard is "remarkably difficult to meet").

undocumented, documented, and/or U.S. citizens.[185] Between July 1, 2010, and September 31, 2012, there were 204,810 deportations issued to immigrant parents of U.S. citizens.[186] This figure represents twenty-three percent of all deportations during the same period.[187] Thus, despite the impact that deportation would have on a qualifying family member, these immigrants were unable to get removal relief. The trend is consistent with previous statistics. Between January 1, 2011, and June 30, 2011, ICE deported 46,486 immigrants who have U.S. citizen children.[188] The Department of Homeland Security reported that, between 1998 and 2007, it deported 100,000 parents of U.S. citizen children.[189]

Not only is relief from removal largely unattainable at an administrative level, but it is also virtually impossible to obtain judicial review of orders of removal.[190] In 1996, Congress amended the INA and repealed its provisions that previously gave federal courts jurisdiction over orders of removal.[191] Instead, any appeals involving orders of removal may be filed with the Board of Immigration Appeals ("BIA").[192] Administratively, BIA reviews of removal decisions constitute final removal orders.[193] Appeals of BIA decisions may be filed with a federal court of appeal.[194] The scope of

185. Jeffrey Passel & D'Vera Cohn, *A Portrait of Unauthorized Immigrants in the United States*, PEW RES. HISP. TRENDS PROJECT (Apr. 14, 2009), http://www.pewhispanic.org/files/reports/107.pdf.

186. Seth F. Wessler, *Nearly 205K Deportations of Parents of U.S. Citizens in Just Over Two Years*, COLORLINES (Dec. 17, 2012, 9:45 AM), http://colorlines.com/archives/2012/12/us_deports_more_than_200k_parents.html#obtained.

187. *Id.*

188. U.S. DEP'T. OF HOMELAND SEC., DEPORTATION OF PARENTS OF U.S.-BORN CITIZENS: FISCAL YEAR 2011, at 4, *available at* http://www.scribd.com/doc/87388663/ICE-Deport-of-Parents-of-US-Cit-FY-2011-2nd-Half.

189. *Id.* at 1.

190. 8 U.S.C. § 1252 (2012) (detailing the limitations on judicial review of "orders of removal").

191. *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. 104-208, § 242(a), 110 Stat. 3009-546, 3009-607 (codified as amended in scattered sections of 8, 18, and 28 U.S.C.).

192. 8 C.F.R. § 1003.1(b) (2013) (providing that orders of removal may be appealed to the BIA).

193. 8 U.S.C. § 1101(a)(47)(A)-(B) (providing that an order of deportation becomes final once the BIA affirms such order or the period in which the alien is permitted to seek review by the BIA expires); 8 C.F.R. § 1003.1(d)(7) (BIA decisions are considered final unless they are referred to the Attorney General for review).

194. 8 U.S.C. § 1252(a)(5) (providing that the sole and exclusive means for judicial review of an order of removal is a petition filed with an appropriate court of appeals).

what a court of appeals may review, however, is limited.[195] Notably, a court of appeals is prohibited from reviewing discretionary decisions, including the denial of relief from deportation.[196]

In brief, deportation law has played a fundamental role in creating a legal framework that is designed to make an undocumented immigrant's removal from the country a relatively easy task. It should be emphasized, however, that deportation law is only one part of a large body of law that gives force to the undocumented closet.[197]

2. State and Local Anti-Immigration Laws

On the state level, the emergence of anti-immigration laws contributes to the appeal of being closeted about one's status and identity. Like the gay closet, the undocumented closet is constructed by the coalescence of federal, state, and local laws. While federal deportation law is concerned with removing noncitizens from the United States generally, state anti-immigration laws seek to expel undocumented immigrants residing within their state borders. Some of these laws primarily target the employment and provision of housing for undocumented immigrants. Other laws are broader in scope and aim to include state criminal law enforcement of

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195. *Id.* § 1252(a)(2)(B) (detailing that the court of appeals does not have jurisdiction to review discretionary judgments made by the Attorney General or the Secretary of Homeland Security).

196. *See id.*

197. Deportation law is not the only part of federal immigration law responsible for constructing the closet. An exhaustive discussion of all federal immigration laws that facilitate in the legal construction of the undocumented closet is beyond the scope of this Article. A few provisions are noteworthy, however. For instance, other enforcement provisions in the INA such as apprehension and mandatory detention laws, *see id.* § 1226, could lead undocumented immigrants to conceal their identities in order to avoid being detained for an extended period of time. Additionally, cooperation policies, such as § 287(g) of the INA, allow state and local law enforcement officials to obtain information from the Federal Bureau of Investigation about persons that they booked or arrested and then share that information with the Department of Homeland Security, thus contributing to the construction of the closet by instilling fear of being removed from the United States. *See id.* § 1357(g); *Secure Communities*, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, http://www.ice.gov/secure_communities/ (last visited Oct. 6, 2013). Moreover, employment verification policies, such as E-Verify, require employers to authenticate the immigration status of their workers. 8 U.S.C. § 1324a(b). This further adds to the closet's power. Finally, barriers to re-entry after deportation induce undocumented immigrants into concealing their immigration status because of the difficulties of overcoming statutory restrictions to gaining admission after having been removed. *See id.* §§ 1182(a)(9), 1182(a)(9)(B)(i) (imposing significant barriers to returning to the country after being unlawfully present in the country for more than 180 days but less than one year).

immigration law violations. Collectively, these state and local laws have sought to create a structural framework designed to explicitly and implicitly exclude undocumented immigrants and their families from their domains.[198]

For example, in 2006, the City of Hazleton, Pennsylvania, enacted the Illegal Immigration Relief Act Ordinance ("IIRAO")[199] and the Rental Registration Ordinance ("RRO").[200] The IIRAO sought to regulate the employment of unauthorized noncitizens by making it unlawful to employ, continue to employ, or recruit any person who lacked valid authorization to work "in whole or part within the City."[201] Moreover, the IIRAO prohibited undocumented immigrants from renting property by making it unlawful for any person or business that owned a dwelling unit to lease or rent the unit to undocumented persons.[202] The RRO worked in tandem with the IIRAO to prohibit undocumented immigrants from residing in Hazleton by requiring occupants over the age of eighteen to obtain an occupancy permit.[203] In particular, to obtain an occupancy permit, one needed to show proof of "legal citizenship and/or residency."[204] Other jurisdictions, such as Farmers Branch, Texas,[205] and Fremont, Nebraska,[206] have passed similar ordinances aimed at prohibiting

198. *But see* Christopher N. Lasch, *Rendition Resistance*, 92 N.C. L. REV. 149 (2013) (discussing states' and local governments' resistance to federal detainer law). I have previously written about the extent to which states and other localities have enacted sanctuary and non-cooperation policies to demonstrate the ways in which sub-federal jurisdictions have resisted federal immigration laws and policies. *See* Pratheenan Gulasekaram & Rose Cuison Villazor, *Sanctuary Policies & Immigration Federalism: A Dialectic Analysis*, 55 WAYNE L. REV. 1683, 1691–707 (2009) (examining sanctuary policies and their validity under the Constitution); Rose Cuison Villazor, *"Sanctuary Cities" and Local Citizenship*, 37 FORDHAM URB. L.J. 573, 576–79 (2010) (examining the relationship between sanctuary policies and citizenship).

199. *See* Hazleton, Pa., Illegal Immigration Relief Act Ordinance 2006-18 (2006) & Illegal Immigration Relief Act Implementation Amendment 2006-40 (2006) [hereinafter collectively IIRAO], *available at* https://www.aclu.org/files/pdfs/immigrants/hazleton_secondordinance.pdf.

200. *See* Hazleton, Pa., Ordinance 2006-13 (2006) [hereinafter RRO], *available at* https://www.aclu.org/files/pdfs/immigrants/hazleton_firstordinance.pdf.

201. *See* IIRAO § 4. As discussed *infra*, the U.S. Court of Appeals for the Third Circuit held that both the IIRAO and RRO are preempted by federal immigration law. *See* Lozano v. City of Hazleton, 724 F.3d 297, 323 (3d Cir. 2013).

202. *See* IIRAO § 7.

203. *See* RRO §§ 1m, 6a, 7b.

204. *See id.* § 7b(1)(g).

205. *See* Villas at Parkside Partners v. City of Farmers Branch, 726 F.3d 524, 526 (5th Cir. 2013) (invalidating Farmers Branch Ordinance 2952).

206. *See* Keller v. Fremont, 719 F.3d 931, 937 (8th Cir. 2013) (upholding Fremont Ordinance 5165, which prohibits the provision of leases to undocumented immigrants).

undocumented immigrants from acquiring leases, which would enable them to reside in those cities.[207]

In contrast to the foregoing ordinances that focused on denying jobs and leases to undocumented immigrants, other jurisdictions have passed more comprehensive measures designed to enforce immigration law. For example, in 2010, Arizona enacted what became "perhaps the most controversial state immigration regulation measure" of its kind,[208] S.B. 1070.[209] Articulating a policy of "attrition through enforcement,"[210] it included a number of provisions expressly designed to "deter the unlawful entry and presence of aliens."[211] Like the previously noted ordinances, S.B. 1070 included provisions that authorized the suspension, if not revocation, of business licenses of employers that hired undocumented workers[212] and required businesses to use E-Verify to determine whether workers are authorized to work in the United States.[213] Yet, it sought to do more by criminalizing certain acts. For example, S.B. 1070 made a noncitizen's failure to carry an alien registration card a misdemeanor[214] and made it a state misdemeanor for an unauthorized noncitizen to apply for work.[215]

Additionally, S.B. 1070 also sought to provide state law enforcement officials with authority to engage in actions that are reserved mainly for federal officers. For example, S.B. 1070 accorded state officers the power to, without a warrant, arrest a person if the officer has probable cause to believe that the person is removable from the United States.[216] It also required state police officers to make a reasonable attempt to determine a person's immigration status if there is reasonable suspicion that the person is in the United States without authorization.[217] In enacting these provisions, Arizona aimed to confer to its state officers the broad powers that immigration

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207. *See* Farmers Branch, Tex., Ordinance 2952 (Jan. 22, 2008); Fremont, Neb., Ordinance 5165 (June 21, 2010).

208. Kevin R. Johnson, *Immigration and Civil Rights: State and Local Efforts to Regulation Immigration*, 46 GA. L. REV. 609, 612–13 (2012).

209. *See* S.B. 1070, 49th Leg., Reg. Sess. (Ariz. 2010) (codified at ARIZ. REV. STAT. ANN. § 11-1051 (2012)).

210. *See id.*

211. *See id.*

212. ARIZ. REV. STAT. ANN. § 23-212 (2012).

213. *Id.* § 23-214.

214. *Id.* § 11-1059(A), *invalidated by* Arizona v. United States, 132 S. Ct. 2492, 2501–03 (2012).

215. *Id.* § 13-2928(C) (Supp. 2012), *invalidated by Arizona*, 132 S. Ct. at 2503–05.

216. *Id.* § 13-3883(A)(5), *invalidated by Arizona*, 132 S. Ct. at 2505–07.

217. *Id.* § 11-1051(B) (2012), *upheld by Arizona*, 132 S. Ct. at 2507–10.

officers currently have under 8 U.S.C. § 1357. Such powers include the ability to, "without a warrant," interrogate any "alien or person believed to be an alien as to his right to be or remain in the United States"[218] as well as "arrest any alien in the United States if he has reason to believe that the alien so arrested is in the United States" in violation of immigration law.[219]

In the wake of S.B. 1070, other states passed similar anti-immigrant laws.[220] Alabama, for example, passed anti-immigrant legislation when it enacted H.B. 56.[221] Declaring that it is a "compelling government interest to discourage illegal immigration,"[222] H.B. 56 included the core provisions of S.B. 1070, such as criminalizing the failure to carry an alien registration card,[223] prohibiting the employment of undocumented workers,[224] and granting officers the power to make a reasonable attempt to determine a person's immigration status.[225]

However, H.B. 56 is more expansive in scope than S.B. 1070 and the local ordinances passed in Hazleton, Pennsylvania, Farmers Branch, Texas, or Fremont, Nebraska. With respect to restricting housing, H.B. 56 prohibited persons from concealing, shielding, and harboring undocumented immigrants.[226] In so doing, Alabama sought to implement at the state level current federal restrictions against harboring undocumented noncitizens.[227] Even broader, H.B. 56 barred courts from enforcing certain contracts that were entered into by undocumented immigrants.[228] Additionally, H.B. 56 required state officers to investigate a person's immigration status when she is

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218. 8 U.S.C. § 1357(a)(1) (2012).

219. *See id.* § 1357(a)(2).

220. *See Anti-Illegal Immigration Laws in States*, N.Y. TIMES (Apr. 22, 2012), http://www.nytimes.com/interactive/2012/04/22/us/anti-illegal-immigration-laws-in-states.html (reporting that in addition to Arizona, other states that have passed anti-immigration laws include Utah, Georgia, Indiana, Alabama, and South Carolina).

221. H.B. 56, 2011 Leg., Reg. Sess. (Ala. 2011).

222. *Id.* § 2.

223. ALA. CODE § 31-9C-10 (LexisNexis Supp. 2011) (stating it is a Class C criminal misdemeanor for failure to carry an alien registration card), *invalidated by* United States v. Alabama, 691 F.3d 1269, 1301 (11th Cir. 2012).

224. *Id.* § 31-9C-11 (stating it is a unlawful to seek employment in the state without lawful immigration status), *invalidated by Alabama*, 691 F.3d at 1301.

225. *Id.* § 31-9C-12 (granting allowance for law enforcement to make a reasonable attempt to determine a person's immigration status when reasonable suspicion exists), *upheld by Alabama*, 691 F.3d at 1301.

226. *Id.* § 31-9C-13, *invalidated by Alabama*, 691 F.3d at 1301.

227. *See* 8 U.S.C. § 1324(a)(1)(A)(iii) (2012).

228. ALA. CODE § 31-9C-26(a), *invalidated by Alabama*, 691 F.3d at 1301.

caught driving without a driver's license.[229] Indeed, the very act of applying for various licenses, including driver's licenses, business licenses, and professional licenses, constituted a crime.[230] Further, H.B. 56 required schools to determine if students enrolled in K-12 public schools were born outside of the United States or if their parents are undocumented.[231] As these provisions demonstrate, H.B. 56 was sweeping in its desire to rid the state of undocumented immigrants.

The varied state and local efforts to remove undocumented immigrants from their jurisdictions have not gone unchallenged. Not only do the attempts to create state and local authority over which the federal government has dominant control raise preemption issues, but they also have serious racial implications. The strong connection between the purposes and the effects of the laws that drive out Latinos/as[232] has led commentators to compare these state and local laws to Jim Crow laws.[233] Claims grounded on civil rights laws, however, have been unsuccessful in invalidating the state and local anti-immigration laws.[234]

Additionally, some of the provisions of the foregoing laws have been upheld based on preemption arguments,[235] which will enable some state governments the ability to participate in immigration

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229. *Id.* § 32-6-9, *upheld by Alabama*, 691 F.3d at 1301.

230. *Id.* § 31-13-29(d), *upheld by Alabama*, 691 F.3d at 1301.

231. *Id.* § 31-9C-27, *invalidated by* Hispanic Interest Coal. of Ala. v. Governor of Ala., 691 F.3d 1236, 1249 (11th Cir. 2012) ("We therefore conclude that section 28 violates the Equal Protection Clause.").

232. *See* Kevin R. Johnson, *Immigration and Civil Rights: Is the "New" Birmingham the Same as the "Old" Birmingham?*, 21 WM. & MARY BILL RTS. J. 367, 369 (2012); Johnson, *supra* note 208, at 618–19 (noting the racial and civil rights implications of S.B. 1070 and other state anti-immigration laws); Karla M. McKanders, *Immigration Enforcement and the Fugitive Slave Acts: Exploring the Similarities*, 61 CATH. U. L. REV. 921, 939–52 (2012) (examining the parallels between contemporary anti-immigration laws and the Fugitive Slave Acts).

233. *See* Johnson, *supra* note 208, at 633 (identifying parallels between current immigration enforcement statutory schemes and Jim Crow statutory schemes).

234. *See* Lozano v. City of Hazelton, 496 F. Supp. 2d 477, 540–42 (M.D. Pa. 2007) (concluding that the plaintiffs could not prove that the city engaged in intentional discrimination when it passed the city's anti-immigrants housing ordinance); Hiroshi Motomura, *The Rights of Others: Legal Claims and Immigration Outside the Law*, 59 DUKE L.J. 1723, 1742–44 (2010) ("Plaintiffs will likely lose an equal protection argument because of the law's requirement of discriminatory intent and its presumption against finding it.").

235. *See* Johnson, *supra* note 208, at 619–22 (examining the preemption challenges to S.B. 1070).

regulation. In *Chamber v. Whiting*,[236] the Supreme Court upheld the provisions of S.B. 1070 dealing with suspension or revocation of business licenses on the grounds that federal immigration law does not preempt those employment-related provisions.[237] In *Arizona v. United States*,[238] the Supreme Court similarly upheld the provision of S.B. 1070 that allows officers to determine a person's immigration status if there is reasonable suspicion to do so.[239] Commenting that "Congress has done nothing to suggest it is inappropriate" for officers to communicate with immigration officials, the Court stated that "[t]he federal scheme thus leaves room for [this] policy" and is therefore, not facially preempted.[240] Such sub-federal regulation of immigration law leaves open the possibility that states and localities may engage in racially discriminatory conduct and could further heighten the race-based concerns animating S.B. 1070.[241]

To be sure, other provisions of S.B. 1070 have been struck down. For example, the Supreme Court held that federal immigration law preempted the sections of S.B. 1070 that criminalized the failure to carry an alien registration card.[242] Moreover, it invalidated the provision that criminalized the act of applying for employment.[243] Additionally, the Court invalidated the provision that permitted state officers to arrest a person based on probable cause that the person is undocumented.[244] At least two other provisions of S.B. 1070 have posed legal concerns: a section that makes it a crime for an occupant of a motor vehicle to solicit or hire a day laborer if doing so impedes traffic[245] and another section that makes it a crime for a day laborer to enter a motor vehicle to work elsewhere if doing so impedes traffic.[246] Groups have successfully challenged these on First Amendment grounds.[247]

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236. 131 S. Ct. 1968 (2011), *aff'g* Chicanos Por La Causa, Inc. v. Napolitano, 558 F.3d 856, 863 (9th Cir. 2009).

237. *Id.* at 1973.

238. 132 S. Ct. 2492 (2012).

239. *See id.* at 2507–10.

240. *Id.* at 2508–09.

241. *See* Johnson, *supra* note 208, at 621–22.

242. *See Arizona*, 132 S. Ct. at 2501–03.

243. *See id.* at 2503–05.

244. *See id.* at 2500–08.

245. ARIZ. REV. STAT. ANN. § 13-2928(A) (Supp. 2012), *invalidated by* Valle Del Sol, Inc. v. Whiting, 703 F.3d 808, 829 (9th Cir. 2013).

246. *Id.* § 13-2928(B), *invalidated by Valle Del Sol, Inc.*, 703 F.3d at 829.

247. *See* Friendly House v. Whiting, 846 F. Supp. 2d 1053, 1062 (D. Ariz. 2012), *aff'd sub nom. Valle Del Sol, Inc.*, 709 F.3d. at 829 (holding that these provisions of the S.B. 1070 are an unconstitutional restriction on commercial speech).

Challenges to H.B. 56 have similarly obtained mixed results. In *United States v. Alabama*,[248] the Court of Appeals for the Eleventh Circuit invalidated some of provisions of H.B. 56 but upheld others.[249] Specifically, the court held that the provisions that prohibited the harboring of undocumented immigrants, barred courts from enforcing contracts involving undocumented immigrants, and required schools to determine the birthplace of school children, were preempted by federal immigration law.[250] It also struck down the provisions borrowed from S.B. 1070 that the Supreme Court had invalidated in *Arizona*.[251] Yet, the court upheld a number of critical provisions: the right of officers to inquire about a person's immigration status where there is reasonable suspicion that a person is undocumented[252] and to investigate a person's immigration status after that person is caught driving without a driver's license.[253] Strikingly, it also upheld the provision that makes it a state felony for undocumented immigrants to apply for a driver's license.[254] By creating a space in which states may participate in the enforcement of immigration law, this case could force undocumented immigrants living in that state to either leave or to continue to be closeted about their immigration status.

Indeed, recent federal court decisions regarding local housing ordinances prohibiting leases for undocumented immigrants further complicate the fraught issue of the extent to which state and local governments may engage in sub-federal immigration regulation. In *Lozano v. City of Hazleton*,[255] the Third Circuit held that both the IRROA and RRO are preempted by federal immigration law.[256] In particular, the court emphasized that the housing ordinance infringed upon the federal government's domain in regulating immigration law.[257] Similarly, in *Villas at Parkside v. City of Farmers Branch*,[258] the Fifth Circuit struck down the Farmers Branch ordinance.[259] Like the Third Circuit, the Fifth Circuit underscored that the ordinance, which in this case criminalized the leasing of property to undocumented

248. 691 F.3d 1269 (11th Cir. 2012), *cert. denied*, 133 S. Ct. 2022 (2013).
249. *See id.* at 1301.
250. *Id.* at 1285, 1292–93, 1297, 1301.
251. *Id.* at 1282–83.
252. *Id.* at 1283–85.
253. *Id.* at 1291.
254. *Id.* at 1297–1301.
255. 724 F.3d 297 (3d Cir. 2013).
256. *See id.* at 323.
257. *See id.*
258. 726 F.3d 524 (5th Cir. 2013).
259. *See id.* at 526.

immigrants, directly conflicted with the federal immigration regulatory scheme.[260] By contrast, the Eighth Circuit upheld Fremont's ordinance.[261] In so doing, the Eight Circuit highlighted the ordinance's validity because it was a law that applied to all residents, not only noncitizens.[262] The division in the circuits regarding the appropriate role of localities in regulating the ability of undocumented immigrants to reside within their borders creates uncertainty for undocumented immigrants residing in those states. Arguably, these decisions have the effect of strengthening the need of undocumented immigrants to live hidden lives.

In sum, a combination of federal, state, and local laws have worked together to produce a social and legal environment in which undocumented immigrants are made to believe that they do not belong. In so doing, these laws collectively produce an environment in which undocumented immigrants must conceal their status and identity in order to avoid attracting attention to themselves, which could subject them to removal from the United States.

B. Living in the Undocumented Closet

Having explored the federal and state laws that have led to the construction of the closet, this Section deploys the undocumented closet framework to examine the lived experiences of those immigrants who have had to withhold information about their immigration status. Through this critical lens, this Section illustrates that, like the gay closet, the undocumented closet also has double features. On the one hand, the closet offers "protection" against actual deportation and the threat of deportation. Specifically, the stories of undocumented immigrants who have come out show that the essential feature of the "closeted" lives of undocumented immigrants is awareness of the ever-present threat of being deported, either as a result of federal deportation laws or sub-federal immigration laws. On the other hand, the closet imposes harms. The enduring legal reminders that they could be removed from the United States at virtually any time affects their day-to-day lives, as they navigate what it means to live in a country they consider home, but, in their view, does not consider them as one of its own.[263]

260. *See id.* at 549.
261. Keller v. Fremont, 719 F.3d 931, 951 (8th Cir. 2013).
262. *See id.* at 943–45.
263. *See The Colbert Report*, *supra* note 6 (stating that, despite living in the United States since he was twelve, he felt that the United States did not consider him as one of its own).

Like the gay closet's protective features, the undocumented closet offers shelter against exclusion in the form of deportation from the United States and separation from families. That is, by concealing one's immigration status, undocumented immigrants avoid actual deportation and the possibility of being separated from family and other loved ones. Indeed, for some immigrant youths, the fear of deportation is a reminder of the time when they themselves were separated from their parents before being reunited in the United States, albeit by entering the country without authorization. Juan Pedro Garcia Machado, for example, was thirteen years old when he "crossed the border without documents" to rejoin his mother, whom he had not seen in "more than eight years."[264] Machado, pretending to be asleep, posed as someone else's child.[265] He feared being put in a detention facility but "also didn't want to be away from [his mother] any longer."[266] Their almost decade-long separation highlights the ways in which immigration law's expressed policy of family unification is not a reality for many immigrants and explains why many immigrants choose to enter the United States without authorization. Seen from Machado's perspective, the undocumented closet functions in a protective manner.

Additionally, the decision to conceal one's immigration status has enabled undocumented immigrants to participate in various aspects of society. In the educational context, for example, many unauthorized immigrant children succeed in school and other activities. Eric Balderas, a prominent (current) undocumented student, is a biology student at Harvard University who gained media attention in 2010 after he was detained and arrested when he used his Harvard student identification card and a Mexican consular card.[267] Balderas, whose parents brought him to the United States when he was four years old, grew up in San Antonio, Texas, and graduated valedictorian of his high school.[268]

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264. Juan Pedro Garcia Machado, Op-Ed, *Coming Out As Gay And Undocumented*, ADVOCATE (Oct. 12, 2012, 4:00 AM), http://www.advocate.com/commentary/2012/10/12/op-ed-coming-out-gay-and-undocumented?page=0,0.

265. *Id.*

266. *Id.*

267. Maria Sacchetti, *Harvard Student Won't Face Deportation*, BOS. GLOBE (June 19, 2010), http://www.boston.com/news/local/massachusetts/articles/2010/06/19/harvard_student_wont_face_deportation/.

268. *Id.* Balderas's story is reminiscent of the story of another successful immigrant whose unauthorized immigration status also raised issues in another Ivy League school, Princeton University. Harold Fernandez was thirteen years old when he and his brother were smuggled into the country by boat to rejoin his parents whom they had not seen for a few years. Joseph Berger, *An Undocumented Princetonian*, N.Y. TIMES (Dec. 29, 2009),

Gaby Pacheco was only seven years old when she and her parents left Ecuador and moved to Florida.[269] Pacheco excelled in school and was involved in many extracurricular activities.[270] She discovered before high school that she is undocumented. She nevertheless continued to engage in various activities, although at some point in tenth grade, Pacheco announced to her teachers and classmates that she is "an undocumented immigrant."[271] Although Pacheco was out of the undocumented closet by that time, the point here is to highlight that she, like Balderas, was previously able to participate in various activities while keeping her unauthorized immigration status a secret. Pacheco faced difficulty getting into college because of her unauthorized status, but ultimately gained admission to and matriculated to Miami-Dade College.[272] Deciding to participate in scholarly and extracurricular endeavors like she did prior to disclosing her unauthorized status, Pacheco became President of the Student Government Association.[273] Pacheco eventually became an important leader in *United We Dream Network*, one of the largest immigrants' rights organizations advocating for the passage of the DREAM Act.[274]

The foregoing stories show the ways in which the undocumented closet offers a sense of security and opens up opportunities for undocumented immigrants to engage in various social contexts, without law enforcement authorities seeking to deport them. Yet, the undocumented closet does not truly provide a safe space. Indeed, living in the undocumented closet presents various negative

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http://www.nytimes.com/2010/01/03/education/edlife/03alien-t.html?pagewanted=all. As a young child in Colombia, Fernandez twice witnessed young men being shot to death. *Id.* Growing up in West New York, New Jersey, Fernandez worked, graduated as the valedictorian of his high school, and gained admission to Princeton University. *Id.* He used a fake green card in his admission forms. *Id.* Eventually, he confessed his immigration status to university officials after it became clear to him that his status would be discovered. *Id.* Notably, Princeton University officials assisted him in obtaining scholarships and lawful immigration status. *Id.* Fernandez graduated Phi Beta Kappa, went to Harvard Medical School, and is now a cardiac surgeon. *Id.*

269. Daniel Altschuler, *DREAMing of Citizenship: An Interview with Gaby Pacheco*, HUFFINGTON POST (Dec. 15, 2010, 5:56 PM), http://www.huffingtonpost.com/daniel-altschuler/dreaming-of-citizenship-a_b_797391.html.

270. *See id.*

271. *DREAM Now Letters to Barack Obama: Gaby Pacheco*, CITIZEN ORANGE (Sept. 13, 2010, 12:33 PM), http://www.citizenorange.com/orange/2010/09/dream-now-letters-to-barack-ob-8.html.

272. *See id.*

273. *See id.*

274. Julia Preston, *Students Press for Action on Immigration*, N.Y. TIMES (May 30, 2012), http://www.nytimes.com/2012/05/31/us/students-press-for-action-on-immigration.html?_r=0 (describing Gaby Pacheco as a leader of *United We Dream Network*).

consequences. Consider Emmanuel Cordova's story. Cordova was four years old when his mother brought him with her from Mexico to the United States.[275] Cordova's mother was a victim of domestic abuse, and, as an undocumented immigrant, she initially had difficulty finding a job.[276] When she eventually found a job, she ended up working twelve-hour shifts.[277] Cordova stated, "[a]t night, I would often cry, fearing that my mother would not make it home, that the immigration authorities might raid her workplace and take her away."[278] Many undocumented students share Cordova's distress. Many report their "early lives as molded by fear," stating that they have "nightmares about immigration agents showing up at the front door."[279] Many of them have "watched parents or older siblings be deported."[280] Noted DREAMer Gaby Pacheco once commented, "[e]very time someone comes knocking on the door, even if it's a friendly knock, my heart starts beating really fast. It's just the fear from being removed from the place I call home."[281]

The fear of being found out means that, at a very young age, undocumented immigrants have had to keep their immigration status a secret. Raul Rodriguez's parents "warned [him] not to disclose [his] immigration status to anyone."[282] Adrian Ramirez explained that, "[g]rowing up, I never told anyone about not having my papers,"[283] and Leslie, a UCLA senior and undocumented immigrant, reported that she kept her immigration status a secret from "even [her] close friends."[284] Julio, a high school student in a rural Wisconsin, said that, before "coming out," he had only told his guidance counselor and a

275. Emmanuel Cordova, *Coming Out of the Shadows*, DAILY PENNSYLVANIAN (Oct. 26, 2012), http://www.thedp.com/article/2012/10/emmanuel-cordova-coming-out-of-the-shadows.

276. *Id.*

277. *Id.*

278. *Id.*

279. Jones, *supra* note 158.

280. *Id.*

281. Will Perez, *Risking Deportation, Undocumented Students Publicly Disclose Their Status to Advocate for the Dream Act*, HUFFINGTON POST (Mar. 15, 2010, 5:55 PM), http://www.huffingtonpost.com/will-perez-phd/risking-deportation-undoc_b_499815.html.

282. Raul Rodriguez, *It's Easier to be Gay than Undocumented*, NEW AM. MEDIA (Dec. 29, 2011), http://newamericamedia.org/2011/12/its-easier-to-be-gay-than-undocumented.php.

283. Jayadev, *supra* note 20.

284. Jones, *supra* note 158. The *New York Times* interviewed an undocumented student named Leslie, who asked that her last name not be included. At the time of the interview in October 2010, Leslie was a UCLA student. *See id.*

handful of other people about his immigration status.[285] He kept his status from his teachers and other friends for years.[286] As an athlete, Julio explained that when his friends made jokes about "illegal aliens in practice or on the bus ride to a game, he bit his lip."[287] He commented that "[t]hey don't know you're actually in that position, and you can't tell them ... so you have to laugh it off ... but it hurts."[288]

Beyond the psychological management of one's secret identity, undocumented immigrants also contend with the physical limits of the threat of deportation. Angy Rivera highlights these limitations.[289] Rivera was only three years old when her mother used a fake passport to leave Colombia and bring herself and Rivera to the United States.[290] Growing up in Queens, New York, Rivera knew that she "didn't have papers."[291] Her mother told her to never go to "an airport, or the department of motor vehicles or even a hospital" out of fear that Rivera's immigration status would be discovered.[292] Leslie, the undocumented UCLA senior discussed above, understood that some "rites of passage were out of her reach: visiting her grandparents in Mexico; voting; [and] getting a driver's license."[293]

Problematically for many immigrant youths, living in the undocumented closet presents an ongoing reminder of not belonging and being denied from basic experiences enjoyed by people who are considered to be members of society. For example, the inability to get a driver's license seems to be a common story among undocumented immigrants. Julio, the high school student from rural Wisconsin noted earlier, explained that although he has known about his undocumented status for years, it did not really hit him until his junior year.[294] That year, his friends began getting their driver's licenses and also started talking about college plans more seriously.[295]

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285. *See* Myles Dannhausen, Jr., *An Undocumented Student Running out of Options*, DOOR CNTY. PENINSULA PULSE (Aug. 17, 2012), http://www.ppulse.com/Articles-Features-c-2012-08-16-103557.114136-An-undocumented-student-running-out-of-options.html.

286. *Id.*

287. *Id.*

288. *Id.*

289. *A Young Immigrant Looks to the Future*, FOX NEWS LATINO (Nov. 3, 2012), http://latino.foxnews.com/latino/politics/2012/11/03/young-immigrant-looks-to-future/.

290. *Id.*

291. *Id.*

292. *Id.*

293. Jones, *supra* note 158.

294. *See* Dannhausen, Jr., *supra* note 285.

295. *See id.*

Julian Gomez, a summa cum laude graduate of his high school and current honors student at Miami-Dade College, stated that he did not have identification, could not get a job, and did not have a driver's license.[296] He stated that he "suffered in silence with [his] secret."[297] That undocumented youths would be frustrated about the inability to get a driver's license is understandable given that obtaining a driver's license is typically considered an important American rite of passage. For those who are able to obtain a license, the driver's license makes "normal life possible."[298] Those who are unable to get a license are forced to explain to their peers why they cannot get one or come up with excuses.[299] Thus, the lack of a driver's license functions as a stark reminder that they do not fully belong in the United States.[300]As sociologist Roberto Gonzales explained, "[b]eing undocumented only [becomes] salient when matched with experiences of exclusion."[301] That is, unlike them, their friends are "getting part-time jobs, drivers' licenses, and all the normal things American kids do as they grow up."[302]

Undocumented youths who live in the closet eventually realize that their immigration status makes pursuing a college education a challenge. Some like Jose Antonio Vargas received assistance from high school counselors;[303] others, like UCLA student Leslie, were told by their counselor that not only would they not be able to enroll in college but that, had the counselor known about their immigration status, the counselor would not have placed them in advanced placement courses.[304] Although many students do end up attending public universities, particularly in states that allow undocumented students to pay in-state tuition, as well as private universities,[305] other

296. Andrea Torres, *Young, Undocumented, but No Longer Hiding*, MIAMI HERALD (Oct. 5, 2012), http://www.miamiherald.com/2012/10/05/v-print/3036128/young-undocumented-but-no-longer.html.

297. *Id.*

298. Albert Sabaté, *Undocumented Immigrants in Oregon Walk for Driver's Licenses*, ABC NEWS (Oct. 26, 2012), http://abcnews.go.com/ABC_Univision/News/undocumented-immigrants-oregon-walk-drivers-licenses/story?id=17573882#.UU5_P6UQhUQ (quoting Jose Antonio Vargas explaining the importance of his Oregon driver's license to him).

299. *See* Dannhausen, Jr., *supra* note 285 (explaining that many undocumented immigrants make excuses for why they have to take the bus).

300. *See* Sabaté, *supra* note 298.

301. Dannhausen, Jr., *supra* note 285.

302. *Id.*

303. Vargas, *supra* note 1.

304. Jones, *supra* note 158.

305. *See* Michael A. Olivas, *Dreams Deferred: Deferred Action, Prosecutorial Discretion, and the Vexing Case(s) of DREAM Act Students*, 21 WM. & MARY BILL RTS. J.

undocumented youths graduate from high school and consider a college education unattainable.[306]

These experiences of fear, exclusion, disappointment, and an overall sense of not belonging collectively underscore the lives of DREAMers and other unauthorized immigrant youths who grow up in the undocumented closet. In many ways, they parallel the lives of LGBTQ persons who hide in the closet. Vargas's essay reveals this shared connection. Prior to coming out in the *New York Times*, he said that he was "exhausted" from living a lie that began at the age of sixteen years old when he found out that he is an undocumented immigrant.[307] Although he considered himself an American, Vargas believed that the country he calls home would not consider him "one of its own."[308] Thus, for years, he took pains to hide his immigration status and identity from his friends, co-workers, and employers.[309] Despite being able to blend in, however, Vargas consistently worried that he would get caught.[310] Most important to Vargas was that he felt that he was an "impostor."[311] As he explained, his deception had distorted his "sense of self."[312] Thus, after years of hiding his immigration secret, Vargas decided to come out.[313]

In sum, the undocumented closet is a useful framing device for explaining the ways in which federal and state laws have driven undocumented immigrants, old and young alike, to hide their status and identity. Notably, living in the "undocumented closet," which may offer temporary protection, causes various harms. Much like LGBTQ persons living in fear of discovery under harsh anti-gay legislation, undocumented youths have had to learn to live with their own immigration secret and their own fear of discovery and subsequent removal.

463, 467–68 (2012) (discussing states whose public colleges admit undocumented students and offer them in-state tuition rates).

306. *See* Marcia Yablon-Zug, *Not Very Collegial: Exploring Bans on Undocumented Immigrant Admissions to State Colleges and Universities*, 3 CHARLESTON L. REV. 421, 425–27 (2009) (discussing the exclusion of undocumented immigrants from public universities).

307. Vargas, *supra* note 1.

308. *Id.*

309. *Id.*

310. *Id.*

311. *Id.*

312. *Id.*

313. *Id.*

III. COMING OUT OF THE UNDOCUMENTED CLOSET: THE IMPORTANCE OF BECOMING VISIBLE

Although Homer Plessy was one-eighth black and seven-eighths white, under the "one-drop rule" in place in Louisiana and many other parts of the country in the late 1890s,[314] Plessy was considered black.[315] Phenotypically, however, Plessy looked white.[316] The fact that he looked white was critical because it enabled him to board the "white only" portion of the train.[317] Plessy's decision to board the portion of the train that was deemed off-limits to him was intentional.[318] Plessy, as well as the railroad company, planned to file a test case that would challenge the Louisiana law that prohibited African Americans from sitting in the same train car as whites.[319] It is unclear how long Plessy was in the car train that was reserved for whites. Yet, at some point, according to at least one scholar, Plessy outed himself to the conductor as an African American man.[320] The conductor then told Plessy to leave the car and go to the "non-white" part of the train.[321] When Plessy refused, he was fined and sent to jail.[322] Plessy lost the case at trial and later in the Supreme Court, which constitutionalized the doctrine of separate but equal under the Equal Protection Clause.[323] It would take almost sixty years, until

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314. *See generally* Christine B. Hickman, *The Devil and the One Drop Rule: Racial Categories, African Americans, and the U.S. Census*, 95 MICH. L. REV. 1161, 1183–87 (1997) (discussing the development and history of the "one-drop" rule).

315. *See* Rodney A. Smolla, *The Ghosts of Homer Plessy*, 12 GA. ST. U. L. REV. 1037, 1039 (1996) (noting that the "one-drop" rule means that a single drop of African-American blood made the individual black).

316. *See* Plessy v. Ferguson, 163 U.S. 537, 541 (1896) ("[T]he mixture of colored blood was not discernible in [Plessy].").

317. *See generally* Mark Golub, Plessy *as "Passing": Judicial Responses to Ambiguously Raced Bodies in* Plessy v. Ferguson, 39 L. & SOC'Y REV. 563, 564 (2005) (noting that Plessy looked white and if he had not told the conductor otherwise, he would not have been arrested).

318. *See* Rebecca J. Scott, *Public Rights, Social Equality, and the Conceptual Roots of the* Plessy *Challenge*, 106 MICH. L. REV. 777, 798 (2008) (explaining that Plessy pre-arranged his travels on the train).

319. *See id.*

320. *See* Golub, *supra* note 317, at 564 (explaining that Plessy told the conductor he was a colored man when the conductor asked). For a more thorough discussion and analysis of the facts of *Plessy v. Ferguson*, see Cheryl Harris, *The Story of* Plessy v. Ferguson: *The Death and Resurrection of Racial Formalism*, *in* CONSTITUTIONAL LAW STORIES 187, 212–13 (2009).

321. *Plessy*, 163 U.S. at 538.

322. *Id.* at 538–39.

323. *See id.* at 540. Notably, in *Plessy*, the Supreme Court held that a law that segregated on the basis of race did not violate the Equal Protection Clause so long as the separate conditions were equal. *See id.* at 548.

Brown v. Board of Education,[324] for the Supreme Court to rule that separate can never be equal.[325]

Although Plessy lost, this Part uses the facts of his case to show the connection between disclosure and the law. In particular, recasting the facts of *Plessy v. Ferguson*[326] as a coming out case provides a helpful framework for examining the relationship between concealment and disclosure and the important role that coming out plays in revealing identity as a strategy for creating legal and social change. Plessy was able to "pass" for white and, arguably, might have been able to stay on the "white only" train the entire time had he not said anything. His skin color masked his prescribed race and enabled him to be "closeted" about his race even for the time that he was in the white-only train.[327] His "outing" led to his exclusion from the train. To be sure, Plessy's racial revelation was intended because, as already noted, this was a test case,[328] which means that he knew that the conductor would require him to leave the train. Yet, it could be argued that he wanted to be *seen* by the conductor and all others who witnessed his exclusion from the train for what he truly was in order to underscore the unfairness of the law that treated him differently because of his race.

This Part explores the relationship between visibility, identity, and claims to membership. To the extent that the previous Part focused on what it is like to live in the undocumented closet, this Part focuses on the decisions of undocumented immigrants to come out of it. I argue that the narrative of coming out has been valuable in revealing a hidden identity: "undocumented American." This identity might seem contradictory, but, as Section A contends, it is consistent with the contemporary understanding of what it means to be a person who belongs in the United States. Importantly, by showing their existence, "undocumented Americans" have pushed lawmakers to

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324. 347 U.S. 483 (1954).

325. *See id.* at 495 ("We conclude that in the field of public education the doctrine of 'separate but equal' has no place.").

326. 163 U.S. 537 (1896).

327. Note that Sedgwick suggests that using the "closet" metaphor in the context of racism may be inapt because, in general, one's race is visible. *See* SEDGWICK, *supra* note 35, at 75. In contrast, one's "gayness" is invisible, as a result of the closet. Here, the "closet" is applicable because Plessy's phenotype as a white person "closets" his blackness.

328. Jules Lobel, *Losers, Fools & Prophets: Justice as Struggle*, 80 CORNELL L. REV. 1331, 1332 (1995) (noting that "*Plessy v. Ferguson* was a test case brought by several civil rights lawyers"). Because the case was a test case, it is likely that the conductor knew that Plessy was Black despite the fact that he was phenotypically white. Nevertheless, Plessy's light skin "masked" his racial ascription, which enabled him to board the train in the first instance.

recognize their identity and claims to membership. As Section B demonstrates, the strategy of becoming visible has led to some important changes in immigration law.

A. *Undocumented Americans: Hidden Identity*

Addressing the Democratic National Convention, Benita Veliz said, "I was brought here as a child. I've been here ever since . . . . I feel just as *American* as any of my friends or neighbors."[329] Believed to be the first known undocumented immigrant to address the Democratic National Convention,[330] Veliz described herself the way that many other undocumented immigrants who were brought to the country at a young age and have grown up here also describe themselves: as an American.[331]

To be more precise, they identify themselves as "undocumented Americans."[332] When Jose Antonio Vargas testified before Congress on February 13, 2013, he explained that it took him twelve years to "come out as an undocumented American."[333] The experiences of Veliz and Vargas are consistent with the statements of other young undocumented immigrants. Tania Chairez was five when her mother brought her from Mexico to the United States and, ultimately, Arizona.[334] Inspired by other undocumented youths who disclosed their immigration status, Chairez decided to do the same through a guest column that she wrote for the University of Pennsylvania newspaper.[335] Chairez provocatively began her column by stating: "I am undocumented, unafraid, and unapologetic."[336] She wrote that she feels that she is an "American."[337] She grew up in Arizona, did well in school, and ultimately enrolled in an Ivy League school.[338] Chairez

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329. Mahwish Khan, *DREAMer Benita Veliz Speaks to the Democratic National Convention*, AMERICA'S VOICE (Sept. 6, 2012, 10:59 AM), http://americasvoiceonline.org/blog/dreamer-benita-veliz-speaks-to-the-democratic-national-convention/ (emphasis added).

330. *See* Elise Foley, *Benita Veliz Speech Marks First Remarks from DREAMer at Democratic National Convention*, HUFFINGTON POST (Sept. 5, 2012, 9:41 PM), http://www.huffingtonpost.com/2012/09/05/benita-veliz-speech-dream-act_n_1859733.html.

331. *See id.*

332. *See* Mónica Novoa, *Jose's Testimony*, DEFINE AM. (Feb. 13, 2013), http://www.defineamerican.com/blog/post/joses-testimony (see video).

333. *Id.*

334. Tania Chairez, *Undocumented and Unapologetic*, DAILY PENNSYLVANIAN (Oct. 11, 2011), http://www.thedp.com/index.php/article/2011/10/tania_chairez_undocumented_and_unapologetic.

335. *Id.*

336. *Id.*

337. *Id.*

338. *See id.*

explained that her immigration status made her feel "alone, ostracized by the very country [she] called [her] own."[339] By revealing her undocumented status, Chairez stated that she is fighting for her rights as a "human being and as an unrecognized American."[340]

By identifying themselves as "undocumented Americans," Vargas, Veliz, Chairez, and other undocumented immigrants like them have taken an important step in the coming out process. Leaving behind the sense of fear and shame that has engulfed them because of their closeted lives, these undocumented Americans are demonstrating their readiness to live more openly. As DREAMer activist Gaby Pacheco, a key leader in the DREAMers' movement, stated, "[w]e wanted the freedom to be everyday Americans."[341] The act of coming out as an "undocumented American" is therefore a powerful and important assertion and acceptance of one's identity.

Yet, by becoming visible, undocumented immigrants have sought to do more than gain personal acceptance of their identity; they also seek to acquire recognition of their existence from society. That is, they are forcing others to *see* them. Disclosing their status, DREAMers and other unauthorized immigrants are emphasizing an essential point about their presence in the United States. For years, they have been living hidden lives in plain sight—among relatives, friends, co-workers, and others—and importantly, they have been part of the fabric of their communities. These undocumented immigrants are therefore asking others who are not inhabiting the undocumented closet to acknowledge that the DREAMers do exist. In other words, DREAMers do not want others to be blind to their existence and their very being.[342] Importantly, gaining public recognition of their existence is intertwined with their normative claim that law and society should accept them as valid members of society.

The act of coming out is also significant not only because it draws attention to their hidden identity but because it also prompts broader

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339. *Id.*

340. *Id.*

341. Miriam Jordan, *Anatomy of a Deferred-Action Dream*, WALL ST. J. (Oct. 14, 2012), http://online.wsj.com/news/articles/SB1000087239639044398290457804695191698616 8.

342. Sedgwick discusses the extent to which "coming out" of the closet reveals a "powerful unknowing *as* unknowing" and allows one to see the truth and no longer be "blind" to another person's identity. *See* SEDGWICK, *supra* note 35, at 77–78 (using the Biblical story about Esther's revelation to her husband, King Assuerus, that she is a Jew, which enabled him to see who she truly is and convinced him to spare her life and the lives of other Jews).

discussion about the meaning of this identity. Little is known about the term "undocumented Americans." At the outset, the term reads like a contradiction. It suggests opposing concepts: one who belongs ("American") and one who does not belong ("undocumented"). How can one simultaneously feel that she belongs and does not belong?[343] Yet, that is precisely how Vargas, Veliz, Chairez, and other undocumented youths see themselves. On the one hand, they consider themselves Americans. They grew up in the United States. They have family and friends here. They have done well in American schools. These ties to the United States help ground their identity as Americans. On the other hand, they recognize that they lack the documents to prove that they do, in fact, belong in the United States. Thus, the concepts may seem diametrically distinct. The unauthorized immigrants' decisions to become visible are thus providing us with the opportunity to better understand their hidden identity and its link to membership.

There is, of course, no one precise, agreed-upon, or correct interpretation of what it means to be an American.[344] As Bill Ong Hing commented, "the concept [of what it means to be an American] signifies different things to different people."[345] For the DREAMers, their sense of belonging in the United States as Americans is not tethered to their immigration status. One can be both undocumented and still be considered an American. At the same time, they fully recognize that their American identity is incomplete because they need documentary proof to validate their membership. The undocumented closet has kept DREAMers and other unauthorized immigrants hidden. By coming out, these undocumented immigrants are changing the meaning of citizenship. In many ways, their acts of

343. It should be noted that the concept of being considered an American, and thus one who belongs, and, at the same time, be considered a noncitizen who does not belong, seems to be the mirror image of U.S. citizens in the U.S. territories who are viewed as "foreign" in a domestic sense. *See* Christina D. Burnett & Burke Marshall, *Between the Foreign and the Domestic: The Doctrine of Territorial Incorporation, Invented and Reinvented, in* FOREIGN IN A DOMESTIC SENSE: PUERTO RICO, AMERICAN EXPANSION, AND THE CONSTITUTION 9-13 (2001) (explaining that the Supreme Court's opinions in the *Insular Cases* held that not all constitutional rights apply in the U.S. territories, and thus are "foreign" in a "domestic" sense).

344. *See* Michael Walzer, *What Does It Mean To Be an "American"?*, 71 SOC. RES. 633, 633 (2004) (stating that the term "American" "provides no reliable information about the origins, histories, connections, or cultures of those whom it designates").

345. Bill O. Hing, *Beyond the Rhetoric of Assimilation and Cultural Pluralism: Addressing the Tension of Separatism and Conflict in an Immigration-Driven Multiracial Society*, 81 CALIF. L. REV. 863, 905 (1993) (commenting that "[a]fter surveying scores of individuals on the meaning of becoming an American, it is clear to me that the concept signifies different things to different people").

visibility—the desire to be seen and recognized—is also a call for society to open its eyes and see them.[346]

To more deeply understand the DREAMers' claim as Americans, this Section situates the identity "undocumented American" within the larger concept of citizenship. Specifically, using Linda Bosniak's theoretical framework of citizenship as denoting membership,[347] this Article conducts an initial interrogation of the ways in which being an "undocumented American" refers to someone who belongs in the United States. As Bosniak explained, citizenship is a "concept that designates some form of community membership," either in the political community or common society.[348] The concept of citizenship as membership can be further understood in four ways.[349] First, citizenship, as a formal matter, refers to a person who "possess[es] the legal status of citizenship, one that brings with it certain privileges and obligations."[350] This view of citizenship, therefore, refers to legal membership in an "organized political community."[351] Second, citizenship can be understood to refer to the enjoyment of rights and privileges.[352] That is, one is considered a citizen—a member—because she has rights (civil, political, and social) and is thus able to enjoy citizenship.[353] Third, citizenship refers to active citizenship,[354] which constitutes "the practice of active engagement in the life of the political community."[355] Fourth, citizenship addresses the "sense of psychological membership."[356] This meaning of citizenship addresses "affective elements of identification and solidarity that people maintain with others in the wider world."[357]

Using these four theoretical frameworks, this Section deconstructs the identity "undocumented American" to gain a broader understanding of DREAMers' claim of membership in the American community. This framework reveals the extent to which

346. *See* SEDGWICK, *supra* note 35, at 77 (explaining that one's decision to come out and be visible may also lead others to see what has not been seen before).

347. LINDA BOSNIAK, THE CITIZEN AND THE ALIEN, DILEMMAS OF CONTEMPORARY MEMBERSHIP 45 (2006).

348. *Id.*

349. *Id.* at 19–20.

350. *Id.* at 19.

351. *Id.*

352. *See id.* (regarding the Roman legalist conception of citizenship).

353. *See id.*

354. *See id.*

355. *Id.*

356. *Id.* at 20.

357. *Id.*

undocumented immigrants are blurring the lines between those who belong and do not belong. In so doing, they are transforming the boundaries of citizenship.

1. Citizenship as Legal Status of Membership

As a technical matter, "undocumented Americans" lack lawful or legal standing that is essential to the meaning of citizenship in its formal sense. That is, DREAMers and other unauthorized immigrants who grew up in the United States do not have lawful authorization to stay in the country and thus cannot be technically referred to as citizens. Accordingly, they are without the legal status that would confer to them the privileges of citizenship. Among these privileges is the right of a citizen to stay in the United States and not be deported.[358]

Despite this, DREAMers have grounded their claim to citizenship in the formal sense to the ways in which they have complied with the obligations of (formal) citizenship. For example, although "undocumented Americans" are not formally citizens and cannot enjoy citizenship's privileges, they are subjected to the duty to pay taxes. Many undocumented immigrants file their tax returns[359] to underscore that they have been contributing economically to the United States.[360] They also contribute to Social Security payroll taxes through the use of an Individual Tax Identification Number ("ITIN") or Social Security Number.[361] Notably, many are not eligible for the government benefits that their tax contributions support.[362] Their compliance with the obligations of citizenship stands in stark contrast

358. *See* Batista v. Ashcroft, 270 F.3d 8, 14 (1st Cir. 2001) (stating that "American citizenship—is one of the most precious [rights] imaginable"). *But see generally* Jacqueline Stevens, *U.S. Government Unlawfully Detaining and Deporting U.S. Citizens as Aliens*, 18 VA. J. SOC. POL'Y & L. 606 (2011) (examining cases of naturalized U.S. citizens who were deported from the United States).

359. Roxana A. Soto, *Undocumented Immigrants Pay Billions in Taxes, Ineligible for Benefits*, DENVER POST (Mar. 22, 2012), http://www.vivacolorado.com/ci_20223117/immigrants-taxed-but-denied (stating that undocumented immigrants file tax returns because "if they think they have even the slightest chance of legalizing their immigration status, it will most probably help them 'to prove that they've been paying taxes' ").

360. *See* Jason Margolis, *Young, Undocumented Immigrants Coming Out of the Shadows*, PUBLIC RADIO INT'L (Aug. 15, 2012, 9:00 AM), http://pri.org/stories/2012-08-15/young-undocumented-immigrants-coming-out-shadows ("I make no apologies for my family being here, we've contributed economically, we've contributed to taxes. Morally, we've never gotten in trouble with the law. We've been here for 13 years."); Vargas, *supra* note 23 (noting that he, along with other undocumented workers, have collectively paid billions of dollars in taxes).

361. *See* Soto, *supra* note 359.

362. *See id.*

to their exclusion from citizenship's benefits. Emphasizing the inherent unfairness in formal citizenship, undocumented immigrants' fulfillment of the obligations of citizenship may be considered a normative justification for transforming their current non-formal-member status to formal-member-status.

2. Citizenship as Enjoyment of Rights

As persons who are residing in the United States, undocumented immigrants are protected by the Constitution in various ways, and, accordingly, they have the ability to enjoy certain rights despite their lack of authorized status.[363] Among the important rights conferred to DREAMers is the right to not be barred from attending primary and secondary schools on the basis of their immigration status, which the Supreme Court established in *Plyler v. Doe*.[364]

As previously noted, *Plyler* highlighted the democratic problem of allowing undocumented immigrants to live in the shadow of immigration law. It should be underscored, however, that *Plyler*'s particular facts involved the denial of rights to undocumented children. Specifically, the Supreme Court addressed the constitutionality of a Texas law that prohibited local public schools from using state funds for the education of children who were not "legally admitted into the United States."[365] A class-action lawsuit was filed on behalf of the children on the grounds that the law violated the Equal Protection Clause of the Fourteenth Amendment.[366] The State argued that the Equal Protection Clause did not apply to the children because they were undocumented aliens and thus, not "persons" within the state's jurisdiction.[367] The Court, however, rejected that argument and held that the Equal Protection Clause applies to "persons" and that "[a]liens, even aliens whose presence in this country is unlawful, have long been recognized as 'persons' guaranteed due process of law by the Fifth and Fourteenth Amendments."[368]

363. *See* BOSNIAK, *supra* note 347, at 145 (examining the ways in which the Constitution provides protection for noncitizens, even for those who lack authorized immigration status).

364. 457 U.S. 202, 230 (1982).

365. *Id.* at 205.

366. *See* Doe v. Plyler, 458 F. Supp. 569, 572 (E.D. Tex. 1978), *aff'd*, Plyer v. Doe, 457 U.S. 202 (1982).

367. *See Plyler*, 457 U.S. at 210.

368. *Id.* (citations omitted).

Importantly, the Court distinguished between undocumented immigrant children and undocumented adult immigrants.[369] Unlike their undocumented parents whose presence in the country is the "product of their own unlawful conduct," undocumented children have little control over their presence in the United States.[370] Stating that undocumented immigrants are not a suspect class[371] and education is not a fundamental right,[372] the Court nevertheless commented that the Texas statute "imposes a lifetime hardship on a discrete class of children not accountable for their disabling status."[373] The Court stated that the statute could not be "rational unless it furthers some substantial goal of the state."[374] Using this heightened form of rational basis scrutiny, the Court struck down the statute because the State was unable to demonstrate a substantial interest.[375]

Plyler was thus crucial in conferring to undocumented immigrant youths a constitutional right that made their lack of formal status irrelevant. As a result of *Plyler*, undocumented children have been able to attend public schools like U.S. born and documented noncitizen children. Indeed, each year, 65,000 undocumented youths graduate from high school.[376] The ability to attend primary and secondary schools is constitutive of their claim to citizenship.[377] That is, the enjoyment of a right delinked from formal citizenship has made them feel American.

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369. *See id.* at 220.

370. *Id.* at 219–20.

371. *See id.* at 223. Indeed, the Court rejected the claim that undocumented immigrants are a suspect class because, unlike the other categories that have been treated as suspect classes, undocumented immigrants entered the country unlawfully. *See id.* at 219 n.19.

372. *See id.* at 223 (citing San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 37 (1973) (holding that there is not a fundamental right to obtain a public education)).

373. *Id.*

374. *Id.* at 224.

375. *See id.* at 228–30 (rejecting the state's argument because the State failed to show that (1) the law was a necessary or effective manner of reducing the influx of undocumented immigrants, or that such immigrants imposed a significant economic burden on the state, (2) the law would have improved education in the state, or (3) the undocumented children were less likely than others to stay in the state).

376. Roberto G. Gonzales, *Wasted Talent and Broken Dreams: The Lost Potential of Undocumented Students*, IMMIGR. POL'Y: IN FOCUS, Oct. 2007, at 1, *available at* http://www.immigrationpolicy.org/special-reports/wasted-talent-and-broken-dreams-lost-potential-undocumented-students.

377. Patrick R. Hugg, *Federalism's Full Circle: Relief for Education Discrimination*, 35 LOY. L. REV. 13, 17 (1989) (noting that basic education is a necessary prerequisite to successful participation in society, especially with regards to exercising political rights); William B. Senhauser, Note, *Education and The Court: The Supreme Court's Educational Ideology*, 40 VAND. L. REV. 939, 942 (1987) (discussing the importance of public education in developing productive members of society).

Nonetheless, for many DREAMers, the sense of feeling excluded and "un-American" emerges before graduating high school when many of them realize that they are unable to pursue higher education.[378] Of course, the cost of going to college is a significant barrier for many high school students.[379] For undocumented youths, however, the lack of valid immigration status further imposes two barriers. First, some state schools charge undocumented students out-of-state tuition.[380] Second, because of their immigration status, undocumented students do not qualify for financial aid.[381] Thus, while in high school, undocumented Americans realize that their constitutional ability to attend school—a right that has made them feel that they belong—ends at graduation. Unlike other Americans, they are unable to pursue higher education.

Critically, the DREAMers' identity as undocumented Americans, when examined under this view of citizenship—that one is a member based on the enjoyment of rights—shows that membership under this framework has limits. The DREAMers, while growing up in the United States, are considered members of the polity. However, upon graduation, they lose the enjoyment of rights and, accordingly, lose their membership.[382]

378. *See* discussion *supra* Part II.B.

379. *See, e.g.*, *Are Cost Barriers Keeping Qualified Students from College?*, ILL. STUDENT ASSISTANCE COMM'N, https://www.isac.org/dotAsset/9ae84440-c140-4ddc-9293-9ef53d25a9f5.pdf (last visited Oct. 6, 2013) (identifying a lack of financial resources as a substantial barrier for otherwise college-ready students); *STAFF REPORT: Barriers to Higher Education*, MIDDLE CLASS TASK FORCE, http://www.whitehouse.gov/assets/documents/MCTF_staff_report_barriers_to_college_FINAL.pdf (last visited Oct. 6, 2013) (finding that "[f]amily income is a major determinant of college enrollment and especially of college completion").

380. *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996, 8 U.S.C. § 1623(a) (2012) (a federal law prohibiting undocumented immigrants from receiving in-state tuition rates at public institutions of higher education). However, it is worth noting that several states, including "Texas, California, New York, Utah, Illinois, Washington, Nebraska, New Mexico, Maryland (community colleges), Oklahoma, Wisconsin and Kansas, have passed state laws providing in-state tuition benefits to illegal [immigrants] who have attended high school in the state for three or more years." *See Financial Aid and Scholarships for Undocumented Students*, FINAID.ORG, http://www.finaid.org/otheraid/undocumented.phtml (last visited Oct. 6, 2013).

381. *See Advising Undocumented Students*, COLLEGEBOARD.COM, http://professionals.collegeboard.com/guidance/financial-aid/undocumented-students (last visited Oct. 6, 2013) (stating that undocumented students are not eligible for state financial aid in most states).

382. Note that, in some states, undocumented youths are able to attend college and are treated as residents for educational purposes. For a comprehensive treatment of undocumented immigrants' struggles for post-secondary education, see generally MICHAEL A. OLIVAS, NO UNDOCUMENTED CHILD LEFT BEHIND: *PLYLER V. DOE* AND THE EDUCATION OF UNDOCUMENTED SCHOOL CHILDREN (2012).

3. Citizenship as Active Engagement

Bosniak's articulation of the republican meaning of citizenship in which one is considered a member based on participation in the political process provides perhaps the best representation of the DREAMers' claim to membership. In the last several years, these "undocumented Americans" have been engaged in numerous political activities intended to further different agendas: from pushing for the passage of the DREAM Act that would provide them with lawful immigration status[383] to calling for comprehensive immigration reform that would apply to all unauthorized immigrants.[384] Indeed, as discussed below, the DREAMers' activism and visibility were instrumental in the establishment of DACA.[385]

In addition to working towards the passage of the DREAM Act and later DACA, DREAMers have also been involved in other forms of political activism. For example, DREAMers participated in a voter-registration drive called "Adios Arpaio!"[386] This voter-registration drive was intended to register as many new voters in Arizona as possible and encourage them to vote against Sheriff Joe Arpaio.[387] Additionally, they have been lobbying against detention and deportation policies. Indeed, when the mother of Erika Andiola, a DREAMer and co-founder of the Arizona DREAM Act Coalition, was detained, DREAMers protested outside the Department of

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383. *See* Amanda P. Beadle, *DREAMers Push For A Path To Citizenship*, IMMIGRATION IMPACT (July 11, 2013), http://immigrationimpact.com/2013/07/11/dreamers-push-for-a-path-to-citizenship/ (reporting on the *United We Dream* rally where DREAMers pushed for the passage of the DREAM Act); Marisela Siqueiros, *Recent DREAMers Protest for Push in Passing Dream Act*, DAILY WILDCAT (July 30, 2013, 11:12 PM), http://www.wildcat.arizona.edu/article/2013/07/recent-dreamers-protest-for-push-passing-dream-act-073113 (describing a protest by a group of DREAMers in Arizona advocating for the passage of the DREAM Act); Andy Verderosa, *Undocumented Students Advocate Passage of DREAM Act*, CAL. AGGIE (May 20, 2010), http://www.theaggie.org/2010/05/20/undocumented-students-advocate-passage-of-dream-act/ (describing an event put on by an immigration awareness group that revolved around the DREAM Act).

384. *See* Linda Hartke, *Immigration Reform: Jose Aguiluz DREAMs of Equality for All*, LUTHERAN IMMIGR. & REFUGEE SERV. (Mar. 21, 2013), http://blog.lirs.org/immigration-reform-luis-aguiluz-dreams-of-equality-for-all/.

385. *See infra* Part III.B.

386. Press Release, L.A. Cnty. Fed'n of Labor, 50 Los Angeles Students and DREAMers Head to Phoenix for "Adios Arpaio" Voter Registration Drive (Sept. 28, 2012), *available at* http://launionaflcio.org/2012/13267/50-los-angeles-students-and-dreamers-travel-to-phoenix-for-adios-arpaio-voter-registration-drive.html.

387. *See id. See generally 500,000 Ballots Still Not Counted*, CAMPAIGN FOR ARIZONA'S FUTURE, http://www.adiosarpaio.com/2012/11/500000-ballots-still-not-counted/ (last visited Sept. 3, 2013) (explaining the demonstrators' desire for transparency in the voting process).

Homeland Security's office and marshaled media and community support using technology and social networks.[388]

4. Citizenship as Identity

From the lens of citizenship as a sense of identity, we gain yet another means of exploring the meaning of undocumented American. This view of citizenship emphasizes the effective ties that one has to a group.[389] From this perspective of citizenship as membership, undocumented Americans' sense of solidarity attaches to two different groups: American (however they interpret who falls within that group) and undocumented.

As part of the American group, DREAMers believe that they are members arguably because of traits that they share in common with those persons who were born in the United States. In claiming that they identify with other Americans, DREAMers engage in "passing" through the performance of traits that are associated with being an American.[390] That is, having grown up in the United States, DREAMers learned to speak English fluently, they were educated in U.S. schools, and they formed personal and social networks with people who were born in the United States. An ongoing understanding of being American continues to tie formal citizenship to whiteness.[391] Seen from this context, those who appear white may easily pass as American. Indeed, some unauthorized immigrants have

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388. *See* Elise Foley, *Erika Andiola, Undocumented Immigrant Activist, Urges ICE To Free Her Detained Family*, HUFFINGTON POST (Jan. 11, 2013, 12:05 PM), http://www.huffingtonpost.com/2013/01/11/erika-andiola-undocumented-immigrant_n_2456792.html; Julianne Hing, *Release of DREAMer Erika Andiola's Family Highlights Youth Movement's Power*, COLORLINES (Jan. 11, 2013, 2:30 PM), http://colorlines.com/archives/2013/01/release_of_dreamer_erika_andiolas_family_highlights_youth_movements_power.html.

389. *See* BOSNIAK, *supra* note 347, at 20.

390. *See* Ariela J. Gross, *Litigating Whiteness: Trials of Racial Determination in the Nineteenth-Century South*, 108 YALE L.J. 109, 156 (1998) (discussing ways in which whiteness was proven by "performing white womanhood or manhood"); John Tehranian, *Performing Whiteness: Naturalization Litigation and the Construction of Racial Identity in America*, 109 YALE L.J. 817, 820–21 (2000) (contending that immigration cases after *Ozawa v. United States* and *United States v. Thind* reveal that immigrants attempted to prove their eligibility for naturalization on the grounds of being white by performing whiteness).

391. *See generally* J. Allen Douglas, *The "Priceless Possession" of Citizenship: Race, Nation and Naturalization in American Law, 1880–1930*, 43 DUQ. L. REV. 369, 394–413 (2005) (discussing historical use of "whiteness" in rulings on citizenship requests); George A. Martinez, *Immigration and the Meaning of United States Citizenship: Whiteness and Assimilation*, 46 WASHBURN L.J. 335, 336 (2007) ("For much of our nation's history, immigration law required that one be a white person in order to become an American citizen.").

reported that they have been able to pass for Americans because they are white.[392] Unauthorized immigrants of color who are not racially ambiguous do not have the option of racially passing.

In identifying with their other group—undocumented immigrants—DREAMers highlight the shared sense of marginalization and forced invisibility that other unauthorized immigrants experience. Part of the problem with hiding in the undocumented closet is the inability to know for certain who else is in it. Thus, discovering that others are out there with similar experiences provides DREAMers with the support that they need as members of the group.

In brief, Bosniak's citizenship framework offers a means of explaining the dual identity of DREAMers as undocumented Americans. Through the formal, rights-based, civic engagement, and identity forms of citizenship, DREAMers are in every sense members of the American polity. Notably, by pushing for visibility of their identity, DREAMers have successfully helped to transform immigration policy.

B. *Visibility and DACA*

It remains to be seen whether the visibility of DREAMers and other undocumented immigrants will ultimately result in their successful, permanent inclusion in the American polity through the passage of law that grants them a path to U.S. citizenship. However, without doubt, the DREAMers' coming out movement has helped to transform immigration policy, demonstrating the link between visibility and legal change.

On June 15, 2012, President Barack Obama announced that his administration was instituting the DACA program.[393] Under DACA, unauthorized immigrants who were brought to the United States before the age of sixteen years old and meet other requirements are eligible for deferred action from the federal government.[394] That means that those who qualify for DACA might be able to avoid deportation.[395] Additionally, they will be able to apply for employment authorization.[396]

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392. *See* Yvette Cabrera, *Light Skinned, British and Undocumented*, ORANGE CNTY. REG. (Mar. 3, 2010), http://www.ocregister.com/articles/burns-237401-immigrants-immigration.html.

393. *See* Memorandum from Janet Napolitano, *supra* note 29.

394. *See id.*

395. *See id.*

396. *See id.*

DACA constitutes a critical step towards gaining recognition for the identity of DREAMers and other unauthorized immigrants as unauthorized Americans. Indeed, in announcing this executive policy benefitting undocumented youths, President Obama explained:

> They are Americans in their heart, in their minds, in every single way but one: on paper. They were brought to this country by their parents—sometimes even as infants—and often have no idea that they're undocumented until they apply for a job or a driver's license, or a college scholarship.[397]

Crucially, the Obama administration's implementation of DACA can be traced to the activism and strategies of the DREAMers to come out of the undocumented closet and push for legal recognition of their identity.[398] In other words, these undocumented Americans have demonstrated, similar to their LGBTQ counterparts a few decades before them, the power of becoming visible. In both contexts, coming out is not only about self-identification; it is also about abandoning a closet that has rendered its inhabitants invisible and powerless.[399] In this way, visibility functions as a form of resistance to harsh deportation laws and policies that seek to exclude immigrants from American society. Thus, coming out is about political empowerment.[400] Critically, visibility functions as an important tool for getting those in power to *see* them and create legal change.

To be sure, coming out of the undocumented closet is not without costs. Indeed, when undocumented immigrants began publicly coming out, especially in huge numbers, their public disclosures generated mixed reactions. Many have praised the DREAMers and contended that, by coming out, DREAMers are engaging in a form of civil disobedience.[401] Some have likened the work that DREAMers are doing to civil rights activism in the 1960s.[402]

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397. *Remarks by the President on Immigration*, THE WHITE HOUSE (June 15, 2012, 2:09 PM), http://www.whitehouse.gov/the-press-office/2012/06/15/remarks-president-immigration.

398. *See* Jordan, *supra* note 341; Preston, *supra* note 13.

399. *See* Eskridge, Jr., *A Jurisprudence of "Coming Out," supra* note 38, at 2445–46 (discussing how state suppression of groups creates "a *nomos* of fear and hiding").

400. *See id.* ("When a state seeks to destroy a *nomos*, its legacy can be anger or a hardening of identity or a politicizing of a previously unorganized group.").

401. Adam Goodman, *Ruben Navarette Against the DREAMers*, JACOBIN MAG. (Dec. 21, 2012), http://jacobinmag.com/2012/12/ruben-navarrette-against-the-dreamers/ (positing that the "[DREAMers'] sit-ins, marches, rallies, and acts of civil disobedience kept immigration reform in the news, spurred executive action, and may soon result in legislative action").

402. Ros Wynne-Jones, *Dream on, DREAMers*, NEW STATESMAN (Feb. 28, 2013), http://www.newstatesman.com/politics/politics/2013/02/dream-dreamers (analogizing the

Others have been more critical of the DREAMers for coming out because of the accompanying risk of deportation.[403] Immigration legal scholar Michael Olivas, for example, recognized "self-disclosure [as] a courageous and longstanding tradition," but has warned students to "stay out of the public glare" in order to protect themselves and their families from immigration authorities.[404]

Despite the risks of deportation, DREAMers pushed to become visible, initially to demonstrate the necessity of the DREAM Act, but eventually to push for reform. On January 1, 2010, Gaby Pacheco and three other DREAMers began a 1,500 mile walk from Miami to Washington, D.C.[405] Calling their walk the "Trail of Dreams," Pacheco demanded an "end to the deportation of undocumented minors and passage of the DREAM Act."[406] Their walk generated 40,000 online petitions to support their cause.[407] When they arrived in Washington in May to meet with White House officials, they delivered those petitions.[408]

The "Trail of Dreams" inspired rallies in different parts of the country and also encouraged DREAMers to engage in civil disobedience. On July 20, 2010, DREAMers participated in a sit-in at the Hart Senate Building in Washington, D.C.[409] Wearing commencement regalia, the DREAMers stood under a banner that read "Undocumented and Unafraid."[410] Twenty-one people were

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DREAMers' actions as "like those of the civil rights movement . . . grounded in engaging personal stories, civil disobedience and carefully timed political pressure," and asserting that the DREAMers' leaders "have shown great courage in 'coming out' all over the country under the slogan 'Undocumented and Unafraid' ").

403. *See, e.g.*, *DREAMers – Don't Come Out Now*, LEXPEAK IMMIGR., http://lexpeakimmig.blogspot.com/2012/06/dreamers-dont-come-out-now.html (last visited Sept. 3, 2013) (suggesting to DREAMers that they "not come out now . . . because 'Deferred Action' is nothing new in [the] American [i]mmigration law system [and] does not provide any sort of protection against deportation"); *see also* Raisa Camargo, *Dreamers Risk Deportation at Convention, Several Arrested*, VOXXI (Sept. 4, 2012), http://www.voxxi.com/dreamers-risk-deportation-democratic-national-convention-several-arrested/ (discussing that DREAMers who were part of the "No Papers No Fear" riders campaign and attended the immigration rights rally near the 2012 Democratic National Convention were arrested and risked deportation).

404. Michael A. Olivas, Op-Ed., *The Dangers of Riding the Bus*, N.Y. TIMES (Aug. 1, 2012), http://www.nytimes.com/roomfordebate/2012/08/01/is-getting-on-the-undocubus-a-good-idea/advice-to-immigrants-dont-get-on-the-undocubus.

405. Jordan, *supra* note 341.

406. *Id.*

407. *Id.*

408. *Id.*

409. *Id.*

410. *Id.*

arrested, although no one was deported.[411] Following mid-term elections in 2010, Senate Majority Leader Harry Reid attempted to put the DREAM Act up for a vote in the Senate[412] but failed to get the sixty votes it needed to defeat a filibuster.[413]

DREAMers continued to come out and advocate for the DREAM Act. On May 11, 2011, Senator Durbin yet again introduced the DREAM Act[414] but there was still not enough political support for the bill.[415] Undeterred, DREAMers continued to push for passage of the DREAM Act but also began to research alternatives, including deferred action.[416] They enlisted law professors, including Hiroshi Motomura, to draft a memo delivered to the White House on May 29, 2012.[417]

Two weeks later, on June 15, 2012, the administration introduced DACA.[418] To be eligible to apply for DACA, one needs to be under the age of thirty-one as of June 15, 2012;[419] have entered the United States before the age of sixteen;[420] have continuously resided in the United States for at least five years (since June 15, 2007);[421] be physically present in the United States on June 15, 2012, and at the time of applying for deferred action;[422] have entered without

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411. *Id.*

412. *See id.*; Jim Hermes, *DREAM Denied in the Senate*, AM. ASS'N OF CMTY. COLLEGES (Sept. 20, 2010), http://www.aacc.nche.edu/newsevents/News/articles/Pages/091620101.aspx (noting that Senator Reid hoped to add the DREAM Act as an amendment to the 2011 National Defense Authorization Act). *See generally* Bill O. Hing, *The Failure of Prosecutorial Discretion and the Deportation of Oscar Martinez*, 15 SCHOLAR 437 (2013) (providing a history of the re-introduction of the DREAM Act).

413. Jordan, *supra* note 341; *See* Mariela Olivares, *Renewing the Dream: DREAM Act Redux and Immigration Reform*, 16 HARV. LATINO L. REV. 79, 84–90 (2013) (discussing the legislative history of the DREAM Act); Igor Volsky, *With Just 40 Votes, Republicans Block Debate Over Defense Authorization Bill*, THINK PROGRESS (Sept. 21, 2010, 3:18 PM), http://thinkprogress.org/politics/2010/09/21/120124/defense-cloture-dadt/ (noting that the Act was just three votes shy of the sixty votes needed).

414. S. 952, 122th Cong. (2011); Jordan, *supra* note 341.

415. Jordan, *supra* note 341.

416. *Id.*

417. *Id.*

418. *See* Memorandum from Janet Napolitano, *supra* note 29.

419. U.S. CITIZENSHIP & IMMIGR. SERVS., *Frequently Asked Questions*, DEP'T OF HOMELAND SEC. (Jan. 18, 2013), http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextchannel=3a4dbc4b04499310VgnVCM100000082ca60aRCRD&vgnextoid=3a4dbc4b04499310VgnVCM100000082ca60aRCRD [hereinafter USCIS FAQs] (providing answers to frequently asked questions about DACA).

420. *Id.*

421. *Id.* For a compelling article about an example of the federal government not granting deferred action to a noncitizen who has lived in the United States for more than twenty years, see Hing, *supra* note 412.

422. USCIS FAQs, *supra* note 419.

inspection before June 15, 2012, or have lawful immigration status which expired as of June 15, 2012;[423] be currently in school, have graduated or obtained a certificate of completion from high school, have obtained a general education development ("GED") certificate, or be an honorably discharged veteran of the Coast Guard or Armed Forces of the United States;[424] and have not been convicted of a felony, significant misdemeanor, three or more misdemeanors, and not otherwise been deemed to pose a threat to national security or public safety.[425]

DACA constituted an important culmination of months of activism and lobbying. The foregoing narrative demonstrates that the DREAMers' strategy of coming out and demanding recognition of their presence and desire to stay in the United States helped in the implementation of the program. That is, its passage would not have been possible without the courageous acts of DREAMers to become visible. As President Obama commented when he announced DACA, "[i]t makes no sense to expel talented young people, who, for all intents and purposes, are Americans."[426] Importantly, through DACA, thousands of DREAMers have finally been able to come out of the closet. Although DACA is a temporary solution and does not offer a path to citizenship, it has severely minimized the threat of deportation and has enabled "DACAmented" immigrants to work legally in this country.[427]

IV. COMPREHENSIVE IMMIGRATION REFORM: FURTHER CLOSETING?

Before Jose Antonio Vargas finished his testimony in Congress on February 13, 2013, he asked members of the Judiciary Committee: "What do you want to do with me? For all the undocumented immigrants who are actually sitting here at this hearing, for the people watching online, and for the eleven million of us . . . what do you want to do with us?"[428] In posing these questions, Vargas highlighted the stark reality that faces the United States today: thousands of immigrant children, brought here without permission

423. *Id.*
424. *Id.*
425. *Id.*
426. *Remarks by the President on Immigration*, *supra* note 397.
427. *See* Roberto G. Gonzales & Veronica Terriquez, *How DACA Is Impacting the Lives of Those Who Are DACAmented*, IMMIGR. POL'Y CTR. (Aug. 15, 2013), http://www.immigrationpolicy.org/just-facts/how-daca-impacting-lives-those-who-are-now-dacamented.
428. Novoa, *supra* note 332.

from the federal government, have grown up in the United States and consider themselves American.[429] Additionally, millions of other undocumented immigrants reside in the United States.[430] All are hidden in the undocumented closet. Many are coming out in significant numbers to show their presence in the United States. They want not only legal recognition but also legal membership.

Congress is presently engaged in considering the enactment of comprehensive immigration reform and has the opportunity to deconstruct the undocumented closet. It can do so by passing legislation that would not only formally accept the undocumented population as members of the polity but also ensure that changes in immigration law would not lead other immigrants to conceal their identities in ways that would make them vulnerable to exploitation or subordination. In June 2013, the U.S. Senate passed the Border Security, Economic Opportunity, and Immigration Modernization Act ("S. 744").[431] In the U.S. House of Representatives, a number of immigration reform bills have been voted on in the Judiciary and Homeland Security Committees.[432] One of these is the Strengthen and Fortify Enforcement Act ("SAFE Act").[433] Presumably, the SAFE Act and the other bills will be debated in the spring of 2014 and may be part of a broader comprehensive immigration reform bill in the House, assuming that such immigration reform occurs. Using the undocumented closet as a frame of reference, this Part analyzes some of the provisions of S. 744 and one of the bills in the House, the

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429. *See id.*

430. *See id.*

431. *See* S. 744, 113th Cong. (2013); *U.S. Senate Roll Call Votes 113th Congress – 1st Session*, U.S. SENATE, http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=113&session=1&vote=00168 (last visited Sept. 3, 2013). The Act was introduced by Senator Chuck Schumer. *See id.* Notably, S. 744 was written by a bipartisan group of senators that has been referred to in the media as the "Gang of Eight." *See, e.g.*, Rachel Weiner, *Immigration's Gang of 8: Who are They?*, WASH. POST (Jan. 28, 2013), http://www.washingtonpost.com/blogs/the-fix/wp/2013/01/28/immigrations-gang-of-8-who-are-they/. In addition to Senator Schumer, the other members are: Michael Bennet (D-CO), Dick Durbin (D-IL), Jeff Flake (R-AZ), Lindsey Graham (R-SC), John McCain (R-AZ), Robert Menendez (D-NJ), and Marco Rubio (R-FL). *Id.*

432. *See* Strengthen and Fortify Enforcement Act (SAFE Act), H.R. 2278, 113th Cong. (2013); Supplying Knowledge-based Immigrants and Lifting Levels of STEM Visas Act (SKILLS Visa Act), H.R. 2131, 113th Cong. (2013); Border Security Results Act of 2013, H.R. 1417, 113th Cong. (2013); Agricultural Guestworker Act (AG Act), H.R. 1773, 113th Cong. (2013).

433. SAFE Act, H.R. 2278. For a brief summary of the differences between S. 744 and the proposed immigration bills in the House of Representatives, see MIGRATION POLICY INST., ISSUE BRIEF, SIDE-BY-SIDE COMPARISON OF 2013 SENATE IMMIGRATION BILL WITH INDIVIDUAL 2013 HOUSE BILLS (Aug. 2013), *available at* http://www.migrationpolicy.org/pubs/CIRbrief-2013House-SenateBills-Side-by-Side.pdf.

SAFE Act. In comparing the two proposed pieces of legislation, this Part argues that S. 744, although not a perfect bill, is a more inclusionary bill that has the potential to provide a path to legalization that would lead to citizenship and, importantly, encourage undocumented immigrants to come out of the closet. By contrast, the SAFE Act does the opposite: not only does it not include a meaningful path to legalization but, worse, some of its provisions could further the "closeting" of immigrants and their families.

A. *Border Security, Economic Opportunity, and Immigration Modernization Act*

On April 17, 2013, a group of eight bipartisan senators—Senator Chuck Schumer (D-NY), Michael Bennet (D-CO), Dick Durbin (D-IL), Jeff Flake (R-AZ), Lindsey Graham (R-SC), John McCain (R-AZ), Robert Menendez (D-NJ), and Marco Rubio (R-FL), who became known as the "Gang of Eight,"[434] introduced S. 744.[435] Intended to comprehensively reform current immigration law, S. 744 passed the Senate on June 27, 2013.[436]

S. 744 is an extensive piece of legislation that contains many provisions that would have both immediate and long-term effects on unauthorized immigrants and their families. One of the immediate changes that S. 744 would cause is the creation of the registered provisional immigration ("RPI") status.[437] Six months after the enactment of the law, unauthorized immigrants who have been continuously residing in the United States since December 31, 2011, who do not have a felony conviction or three or more misdemeanors, and who pay a fee may apply for RPI status.[438] The RPI status is valid for six years and may be renewed for another six years.[439] Importantly, this provision could potentially enable the eleven million undocumented immigrants who currently reside in the United States to come out of the undocumented closet. That is because those who are given RPI status would be able to work lawfully in the United States.[440] They would also be able to travel in and out of the

434. Weiner, *supra* note 431.

435. SAFE Act, H.R. 2278 (as introduced, Apr. 17, 2013).

436. *See id.* (as passed by Senate, June 27, 2013).

437. *Id.* § 2101 (seeking to amend the INA to add § 245B, which allows for RPI status).

438. *Id.* (seeking to add § 245B(b)(2), (b)(3)(A), and (c)(10)(A) to the INA).

439. *Id.* (seeking to add § 245B(c)(9)(A) to the INA).

440. *Id.* (seeking to add § 245B(c)(12)(B)(iii) to the INA, stating that evidence of RPI status "may be accepted during the period of its validity by an employer as evidence of employment authorization"; seeking to add § 245B(c)(12)(B)(iv) to the INA, stating that

country.[441] To be sure, they would be ineligible for most federal benefits, such as welfare and health care.[442] However, the RPI status would confer to them a measure of lawful status that would enable them to live more openly in the United States.[443]

Most significantly, after satisfying several requirements, noncitizens with RPI status would be able to apply for lawful permanent resident ("LPR") status,[444] which could lead to U.S. citizenship.[445] To obtain LPR status, noncitizens with RPI status need to have had continuous residency in the United States,[446] be current on taxes,[447] be proficient in the English language,[448] and pay a fee.[449] The ability of those with RPI status to adjust to LPR status constitutes an important step towards both encouraging unauthorized persons to come out of the undocumented closet and integrating them to the polity by giving them the opportunity to eventually become full members of the polity.

S. 744, however, includes provisions that make the process of inclusion not only complex but also lengthy. Specifically, the Department of Homeland Security would not be allowed to grant lawful permanent residence to persons on RPI status until enforcement triggers have been met and legal immigration backlogs

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evidence of registered provisional immigration status "shall indicate that the alien is authorized to work in the United States for up to 3 years"; and seeking to add § 245B(d)(1)(A) to the INA, stating that "a registered provisional immigrant shall be authorized to be employed in the United States while in such status").

441. *Id.* (seeking to add § 245B(c)(12)(B)(ii) to the INA, stating that evidence of registered provisional immigrant status "shall, during the alien's authorized period of admission, and any extension of such authorized admission, serve as a valid travel and entry document for the purpose of applying for admissions to the United States" and § 245B(d)(1)(B) stating that "[a] registered provisional immigrant may travel outside of the United States and may be admitted ... upon returning to the United States").

442. *Id.* (seeking to add § 245B(d)(3)(A) to the INA, stating that "[a]n alien who has been granted RPI status under this section is not eligible for any Federal means-tested public benefit").

443. *See id.* (seeking to add § 245B(d)(1)(C) to the INA, stating that "[a]n alien granted registered provisional immigrant status under this section shall be considered to have been admitted and lawfully present in the United States in such status on the date on which the alien's application was filed").

444. *Id.* § 2102 (seeking to add § 245C(a) to the INA, stating that "the Secretary may adjust the status of a registered provisional immigrant to that of an alien lawfully admitted for permanent residence if the registered provisional immigrant satisfies the eligibility requirements set forth in subsection (b)").

445. Lawful permanent residents eventually become eligible to apply for citizenship. *See* 8 U.S.C. § 1445(b) (2012).

446. S. 744, § 2102 (seeking to add § 245C(b)(1)(B) to the INA).

447. *Id.* (seeking to add § 245C(b)(2) to the INA).

448. *Id.* (seeking to add § 245C(b)(4) to the INA).

449. *Id.* (seeking to add § 245C(c)(5)(A) to the INA).

have been cleared.[450] First, S. 744 includes a "border security provision" that has to be met prior to the approval of LPR status applications.[451] Under the border security provision, the federal government must first achieve an effectiveness rate of ninety percent or higher with the Comprehensive Southern Border Security Strategy.[452] Second, the federal government must have built 700 miles of fencing in satisfaction of the Southern Border Fencing Strategy.[453] Third, a mandatory employer verification system must have been implemented in the United States.[454] Fourth, an electronic exit system must be operational.[455] Finally, there must be no fewer than 38,405 Border Patrol agents on the southern border.[456]

These provisions linking border security to the political integration of the undocumented immigrant population is problematic for they could lead to the lengthy delay of their full inclusion in the American polity. Although obtaining RPI status is valuable for it would enable undocumented immigrants to work and travel, it does not have attendant political rights. It is entirely possible that a different class of noncitizens, albeit authorized, would be created that would not have a meaningful opportunity to formally participate in the political process. S. 744 is thus not an ideal piece of legislation, although, at a minimum, it does have the potential to create a more inclusive society.

B. The SAFE Act

The SAFE Act[457] differs significantly from S. 744 in a number of critical ways. Specifically, it does not include measures that would enable unauthorized immigrants to become members of the U.S. polity. Indeed, it includes provisions that would have the effect of further entrenching undocumented immigrants to remain "closeted" about their immigration status. Unlike S. 744, the SAFE Act does not contain a legalization program. Indeed, none of the House immigration bills that are currently being considered include provisions that would enable undocumented immigrants to apply for lawful, albeit, temporary immigration status like the RPI status under

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450. *See id.* §§ 3(c)(2), 2102(a).
451. *Id.* § 3(c)(1).
452. *Id.* § 3(c)(2)(A)(i).
453. *Id.* § 3(c)(2)(A)(ii).
454. *Id.* § 3(c)(2)(A)(iii).
455. *Id.* § 3(c)(2)(A)(iv).
456. *Id.* § 3(c)(2)(A)(v).
457. H.R. 2278, 113th Cong. (2013).

S. 744.[458] To be sure, one of the other proposed bills—the Agricultural Guestworker Act ("Ag Act")[459]—would allow unauthorized workers currently residing in the United States to apply for authorized status under a temporary worker program.[460] However, unlike noncitizens who are granted RPI status, temporary workers under the Ag Act would not have a path to lawful permanent residence.[461]

The absence of a legalization program in the SAFE Act and other House bills constitutes a serious problem for the undocumented immigrants and their families who are currently closeted about their immigration status. Without the possibility of becoming recognized and integrated members of the U.S. polity, undocumented Americans and their families will continue to reside in this country in constant fear of being removed from their homes and separated from their loved ones.

Problematically, the SAFE Act includes measures that are designed to encourage the removal of unauthorized noncitizens from the United States. At the outset, it makes "illegal presence" in the United States a federal misdemeanor crime.[462] This constitutes a significant change in immigration law, which currently treats unauthorized presence in the United States as only a civil violation.[463] More troubling, the SAFE Act expands the enforcement role of state and local governments in immigration law. In particular, the SAFE

458. *See* S. 744, 113th Cong. § 2101 (2013).

459. H.R. 1773, 113th Cong. (2013).

460. *Id.* § 3(a) (proposing the addition of § 218A(p) to the INA stating that "an alien who is unlawfully present in the United States on April 25, 2013, is eligible to adjust status to that of an H-2C worker").

461. *Id.* § 3(a) (proposing the addition of § 218A(l) to the INA stating that an H-2C worker shall not be admitted for a period exceeding eighteen months and that an H-2C worker who does not depart within that period shall be subject to removal).

462. Amendment to H.R. 2278, at 3 (June 14, 2013), *available at* http://www.gpo.gov/fdsys/pkg/BILLS-113hr2278ih/pdf/BILLS-113hr2278ih.pdf (adding presence to § 315 of H.R. 2278 to modify the section from "Penalties for Illegal Entry" to "Penalties for Illegal Entry or Presence"). The original version of the SAFE Act did not include a provision that made unlawful presence a criminal offense. In June 2013, however, the House of Representatives approved an amendment to the SAFE Act that would treat unlawful presence in the United States as a criminal offense. *See* Jim Avila, *House Committee Would Criminalize Being Undocumented*, ABC NEWS (June 19, 2013, 8:21 AM), http://abcnews.go.com/blogs/politics/2013/06/house-committee-would-criminalize-being-undocumented/. The SAFE Act also expands the list of noncitizens who would be inadmissible from the border. For example, the SAFE Act would make drunk drivers and members of gangs inadmissible. *See* H.R. 2278, §§ 309, 311.

463. *See* 8 U.S.C. § 1182(a)(9)(B)(i)–(ii) (2012) (providing that a noncitizen who is present in the United States unlawfully is inadmissible). A person who is deemed inadmissible to the United States is removable under immigration law. *See id.* § 1227(a)(1).

Act would confer to state and local enforcement agencies broad authorization to enforce federal immigration law.[464] For example, it would give state and local enforcement agencies the power to "investigate, identify, apprehend, arrest, detain, or transfer aliens to Federal custody."[465] They would also have access to federal programs and technology in order to identify those noncitizens that are removable.[466] No doubt, these measures would be welcomed by states and localities that have enacted laws designed to encourage undocumented immigrants to "self-deport."[467]

Not only would the SAFE Act enhance and thus legitimize state and local enforcement of immigration law, it would also seek to undermine the efforts of state and local governments that have been more inclusive and protective of undocumented immigrants. For example, the SAFE Act would require state and local governments to report detailed information to the federal government about apprehended noncitizens that they believe to be deportable.[468] Importantly, the SAFE Act would effectively prohibit state and local governments from adopting non-cooperation or sanctuary policies.[469]

As I have written elsewhere, states and localities have enacted a number of inclusionary measures designed to integrate undocumented immigrants within their jurisdictions.[470] Indeed, recently, states such as California have adopted several proposals that would confer rights to noncitizens, including the right to serve on a jury and to practice law.[471] This trend reflects the changing meaning of

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464. H.R. 2278, § 102(b) ("Law enforcement personnel of a State, or of a political subdivision of a State, may investigate, identify, apprehend, arrest, detain, or transfer to Federal custody aliens for the purposes of enforcing the immigration laws of the United States to the same extent as Federal law enforcement personnel.").

465. *Id.*

466. *See id.* § 104 ("States shall have access to Federal programs or technology directed broadly at identifying inadmissible or deportable aliens.").

467. *See Anti-Illegal Immigration Laws in States*, *supra* note 220.

468. H.R. 2278, § 105 (requiring each state to provide information to the Secretary of Homeland Security with respect to each alien apprehended in the jurisdiction of the state who is believed to be inadmissible or deportable).

469. *See id.* § 114(a) (providing that a state with "a statute, policy, or practice that prohibits law enforcement officers of the State ... from assisting or cooperating with Federal immigration law enforcement" is not eligible for any law enforcement or Department of Homeland Security grant).

470. *See* Gulasekaram & Villazor, *supra* note 198, at 1691–707; Villazor, *supra* note 198, at 576–79.

471. *See* Jennifer Medina, *California Gives Expanded Rights to Noncitizens*, N.Y. TIMES (Sept. 20, 2013), http://www.nytimes.com/2013/09/21/us/california-leads-in-expanding-noncitizens-rights.html?_r=0 (reporting on proposed bills in the California legislature that would confer rights to noncitizens and undocumented immigrants that were previously not accorded to them).

membership in the United States made possible by recognition of the reality that undocumented immigrants and their families live among us and that laws and policies that perpetuate their exclusion from society are problematic.

CONCLUSION AND IMPLICATIONS

Eve Sedgwick wrote twenty-five years ago that the closet metaphor "transcends homosexuality."[472] Today, by borrowing tropes from the gay rights movement, DREAMers and other undocumented immigrants have demonstrated how their pattern of exclusion and subordination is similar to that experienced by LGBTQ persons for years in the (gay) closet. In the same way that anti-gay laws have closeted gays at different points in history, deportation law, along with state and local anti-immigration laws, have operated to force undocumented Americans into hiding.

Overall, this Article has argued that the closet metaphor and coming out narrative provide useful templates for undocumented immigrants who seek to raise consciousness about their existence and demand for lawful membership. Through the lens of the undocumented closet, this Article aimed to show that the closet metaphor offers vivid language for illuminating the subordinated lives of undocumented immigrants. By coming out of the undocumented closet, DREAMers and other undocumented immigrants have made themselves visible and sought to have their existence recognized and accepted. Finally, the undocumented closet serves as a stark reminder of the need to enact legislation that would formally recognize DREAMers and the entire undocumented population as members of society. Eve Sedgwick discussed the ways in which coming out not only has the effect of making someone visible but also causes one to see the "unseen."[473] The hope is that by becoming visible in the immigration context, undocumented immigrants can be recognized and seen as equal members of society.

Notably, this theoretical exploration about the roles that strategies and vernacular from the gay rights movement have been playing in immigration law raises doctrinal implications that may be examined in future legal scholarship. This includes conducting a deeper exploration of the analogy being drawn between the two groups. Indeed, there have been strong reactions against the borrowing of the coming out narrative and analogy to the gay rights

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472. *See* SEDGWICK, *supra* note 35, at 72.
473. *See id.*

movement. Consider the following responses to an online discussion hosted by the *New York Times* on whether undocumented immigrants should be encouraged to reveal their immigration status[474]:

> As a gay person, I'm so disgusted and outraged that *multiple* entries in this shabby "Room for Debate" blog would co-opt the language of the queer rights movement . . . .[475]
>
> There is no parallel between I am gay and I am an illegal immigrant. Any more than there is a parallel between I am gay and I also rob banks. Or I am gay and I am a drug addict. You have a right to practice sexuality any way you wish. You do not have a right to enter my country and take away my jobs, or take away my health care benefits.[476]
>
> Jose Vargas needs to know that being gay is not the equivalent of being an illegal alien invader.[477]

Although these comments were written by readers using pseudonyms, they reflect the perceived disjuncture between the rights of LGBTQ persons and undocumented immigrants.[478] Indeed, there are arguably two lines of inquiries that animate the view that LGBTQ and "undocumented Americans" are distinguishable, which I aim to explore in further research. First, what are the consequences of coming out for each group? Undocumented persons fear deportation. How do fears of revealing one's sexual orientation or gender identity differ? Second, what is the relationship between the identity claim and the law? Unlike LGBTQ persons whose identity is grounded on

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474. *See* Vargas, *Adding a Voice to the Chorus*, *supra* note 10.

475. KT, reader comment to Vargas, *Adding a Voice to the Chorus*, *supra* note 10.

476. Jake Wagner, reader comment to Vargas, *Adding a Voice to the Chorus*, *supra* note 10.

477. 67Dutchman, reader comment to Vargas, *Adding a Voice to the Chorus*, *supra* note 10; *see also* Michel R. Triplett, *The Undocumented Closet*, RE:ACT (July 1, 2011), http://nlgjareact.wordpress.com/2011/07/01/the-undocumented-closet/ (implying skepticism regarding that analogy between being "in the closet" about one's immigration status and being a closeted gay).

478. This is not the first time that a group has been criticized for using language that is generally associated with another group. *See, e.g.*, DONNA VICTORIA & CORNELL BELCHER, ARCUS OPERATING FOUND., LGBT RIGHTS AND ADVOCACY: MESSAGING TO AFRICAN AMERICAN COMMUNITIES 1-7 (2009) (discussing the debate by African Americans over gay communities' use of civil rights language). For example, African Americans have criticized the ways in which LGBTQ groups have borrowed the language of civil rights. *Id.* at 4 ("[T]he research also shows that roughly a third of African Americans express very firm opposition or offense to use of the term 'civil rights' by LGBT advocates.").

immutability, undocumented immigrants have a mutable identity. That is, LGBTQ persons want to be recognized and legally accepted *as* LGBTQ individuals. By contrast, undocumented immigrants identify as undocumented Americans but want to become *documented* Americans.

Exploring the answers to these questions is critical. At the very least, they raise the question of whether the deployment of coming out and the closet in immigration law is appropriate. More broadly, they highlight the issue of whether the normative force that helped to open the gay closet and provide protection for LGBTQ persons should also be available for undocumented Americans.