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# Immigrant Passing

Andrew Tae-Hyun Kim  
*Syracuse University, College of Law*

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# Immigrant Passing

Andrew Tae-Hyun Kim<sup>1</sup>

## ABSTRACT

*The metaphor of America as a “melting-pot” is as old as this country’s founding. In its aspirational reach and inclusive vision, this storied narrative is alluring. This assimilationist norm is deeply woven into our culture and laws. But the demand to assimilate can easily cross the line into unlawful discrimination and exact untold harms on an individual’s identity. For over eleven million undocumented immigrants in the United States, many of whom have lived here for generations, the story of inclusion smacks of fiction. To remedy their daily fear of deportation and obviate the need to hide, the Obama Administration enacted, through executive action, two landmark programs to defer deportation for specific parents of undocumented children and youths who came to the United States as children. While legal and interdisciplinary scholars have debated the merits of these executive actions within legislative, jurisprudential, and political contexts, this Article does something very different: it exposes an emergent link between assimilation and discrimination by examining undocumented status as a stigma. It argues that the current legal and cultural norms pose passing demands on the lives of undocumented immigrants that drive them into a life of hiding. It theorizes the Obama Administration’s deferred action programs as an anti-passing measure that seeks to challenge what is a de facto passing regime in immigration enforcement. This Article situates undocumented status within the broader antidiscrimination and civil rights discourse and thereby sheds new light on an unexamined aspect of the deferred action programs.*

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<sup>1</sup> Associate Professor of Law, Syracuse University, College of Law. J.D. Harvard Law School; B.A. Duke University. For helpful conversations and insightful comments, I thank Rakesh Anand, Roxana Bacon, Keith Bybee, Margaret Harding, Lee Ann Lockridge, Nina Kohn, and Corrinne Zoli. I also thank John Carroll (Class of 2015), Kattie Chmielowiec (Class of 2016), and Ashley Monette (Class of 2016) for their excellent research assistance.

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## INTRODUCTION

We all hide some aspects of ourselves from others. We also inhabit an identity that is multi-dimensional. Some dimensions of our identities, like our race, are more visible to others. Others, like certain disabilities, are not. They remain hidden, safe from the gaze and judgment of others. The choice to share these invisible parts of ourselves is often a private and personal choice, informed by the extent to which we recognize, accept, and understand these parts of ourselves and trust others to do the same. When we express certain identities that can seem to us, at times, to be vulnerabilities, some may applaud us for the courage, embrace us with empathy, or even celebrate us for the choice to live a life of authenticity. The law both safeguards and enables to varying degrees the admission, expression, and amplification of certain identities defined by race, gender, disability, religious affiliation, and sexual orientation—identities that were often stigmatized. The same cannot be said for other identities that remain discredited, even disgraced. Their disclosure is met with sanction, not approbation, and may mean permanent exile from, not integration with, existing families and communities.

Such is the plight of over eleven million people in this country who, as undocumented immigrants, lack a formal, legal existence according to the United States government. Many came to the United States as children, without the agency to be complicit in the unauthorized border crossing or the overstaying of their visa. Many of these children have become a part of our communities long enough to have their own children. Yet, they live each day under the threat of deportation. That threat is triggered by cultural and legal norms that stigmatize undocumented status and its related attributes, which in turn discourages disclosure and drives undocumented immigrants further underground.

To lift such immigrants out of “the shadow of deportation,”<sup>1</sup> the Obama Administration, in November 2014, announced two landmark immigration policy programs: Deferred Action for Parents of Americans and Lawful Permanent Residents (“DAPA”) and the expansion of Deferred Action for Childhood Arrivals (“DACA”).<sup>2</sup> Under these programs, the U.S. Department of Homeland Security

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<sup>1</sup> President Obama used this language in his introduction of the original DACA policy. Julia Preston & John H. Cushman Jr., *Obama to Permit Young Migrants to Remain in U.S.*, N.Y. TIMES (June 15, 2012), <http://www.nytimes.com/2012/06/16/us/us-to-stop-deporting-some-illegal-immigrants.html>.

<sup>2</sup> Barack Obama, President of the U.S., Address to the Nation on Redressing U.S. Immigration Policy (Nov. 20, 2014) (transcript available at <http://www.americanrhetoric.com/speeches/barackobama/barackobaimmigrationnationalpolicy.htm>); *You May Be Able to Request DAPA. Want to Learn More?*, U.S. CITIZENSHIP AND IMMIGR. SERVS., (Jan. 30, 2015), [https://www.uscis.gov/sites/default/files/USCIS/ExecutiveActions/EAFlier\\_DAPA.pdf](https://www.uscis.gov/sites/default/files/USCIS/ExecutiveActions/EAFlier_DAPA.pdf); *You May Be Able to Request Expanded DACA. Want to Learn More?*, U.S. CITIZENSHIP AND IMMIGR. SERVS., (Jan. 30, 2015), [https://www.uscis.gov/sites/default/files/USCIS/ExecutiveActions/ExecActionFlier\\_Full\\_En.pdf](https://www.uscis.gov/sites/default/files/USCIS/ExecutiveActions/ExecActionFlier_Full_En.pdf).

(“DHS”) would not pursue enforcement action against specific parents of undocumented children and youths who came to the United States as children. In promulgating these programs, the Obama Administration relied on the executive branch’s authority to exercise discretion in prosecuting unlawfully present noncitizens. The programs were an attempt to move forward in a more productive direction years of policy stalemate and contention over immigration that had virtually ground to a halt legislative and other processes. Nevertheless, twenty-six states challenged the President’s authority to defer deportations as unlawful under both the U.S. Constitution and the Administrative Procedure Act.<sup>3</sup> A federal district court issued a preliminary injunction,<sup>4</sup> which the U.S. Court of Appeals for the Fifth Circuit affirmed.<sup>5</sup> The U.S. Supreme Court, in a 4-4 decision, affirmed the Fifth Circuit, leaving in place the district court’s order.<sup>6</sup> The U.S. Supreme Court’s one-sentence decision pointed out that the ruling set no precedent and that the case may well reach the Court again after the district court has held a trial.<sup>7</sup>

The judicial and scholarly debate surrounding DAPA and DACA has mostly concerned the legality of implementing immigration reform through executive action. But at the heart of that debate belies a more important—and, indeed, thornier—question concerning the kind of polity we aspire to and the right immigration policy that would best achieve it. This Article prioritizes and engages that unexamined aspect of the deferred action programs: whether and how they might incentivize those who are in the “undocumented closet”<sup>8</sup> to come out. It approaches DAPA and DACA as legal instruments that attempt to intervene in and challenge existing legal regimes that incentivize what I term “immigrant passing.” Whether unwittingly or not, such traditional immigration regimes—much like “don’t ask, don’t tell”—have promoted a link between assimilation and discrimination in ways that have stymied the otherwise potential positive effects of the law. This link is new in that, as I explore and theorize, it encourages viewing undocumented status as an immutable identity, a stigma, and an over-determining attribute which may possibly overwrite all other identity dimensions, all of which in turn, share many similarities with other stigmatized identities. Much like ethnicity or gender, undocumented status is perceived as functionally immutable, even while we know that such identity categories are socially constructed, imbued with differential social, historical, and cultural meaning systems, and often evolving and changing. Much like sexual orientation, undocumented status is often perceived socially as central to one’s identity, even over-determining of all other identity

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<sup>3</sup> See, e.g., *Texas v. United States*, 86 F. Supp. 3d 591, 604 (S.D. Tex. 2015), *aff’d*, *Texas v. United States*, 809 F.3d 134, 146 (5th Cir. 2015); 5 U.S.C. §§ 551, 559 (2006).

<sup>4</sup> *Texas v. United States*, 86 F. Supp. 3d at 677.

<sup>5</sup> *Texas v. United States*, 809 F.3d at 146.

<sup>6</sup> *United States v. Texas*, No. 15-674, slip op. at 1 (U.S. June 23, 2016) (per curiam).

<sup>7</sup> *Id.*

<sup>8</sup> Rose Cuison Villazor, *The Undocumented Closet*, 92 N.C. L. REV. 1, 1-13 (2013) (developing the metaphor of the undocumented closet in the context of immigration).

attributes and characteristics. Even while, like certain disabilities, undocumented status may be invisible to others, its public acknowledgement bringing opprobrium.

Despite such important similarities, what defines and distinguishes undocumented status from other stigmatized identities is its current unlawfulness. Intentionally or unintentionally, the current legal system creates harmful and stigmatizing effects for individuals without materially improving immigration law and policy outcomes. Indeed, the current system, insofar as it articulates certain social and cultural norms associated with undocumented immigrants, encourages clandestine passing. As this Article ultimately shows, the deferred action programs of DAPA and DACA are alternative legal and policy mechanisms that, despite other flaws and limitations, enable a reprieve for immigrants of the demand that they hide who they are, including their unlawful presence.

This Article proceeds in five parts. Part I argues that undocumented status increasingly functions under the rules of stigma, much like other stigmatized identity attributes, thus sharing both similarities and differences with other identity characteristics that have been historically and culturally subject to stigma, like race, sex, sexual orientation, and disability. It does so by situating undocumented status within the broader antidiscrimination framework. Part II describes the evidence of that stigma in both our legal and cultural discourse. Drawing on the insights of social psychologists and other legal scholars, Part III conceptualizes a theoretical framework for ways stigmatized identities engage in individual mobilizing strategies and identity performance to cope with the particular stigma. Engaging the intersecting social, psychological, and legal frameworks, it develops a lens through which one may more clearly articulate the continuum between assimilation and discrimination. Part IV applies this framework to undocumented immigrants specifically and shows the ways in which undocumented immigrants manage their identities in light of the stigma. Relying on intersectionality theory, it posits that undocumented immigrants experience stigma that is multi-dimensional and more oppressive because they are stigmatized on account of not only undocumented status, but also other stigmatizing conditions such as race and national origin. Part V argues that the current immigration law and policy regime is a *de facto* passing regime that not only condones, but also encourages undocumented immigrants to pass. It considers the Obama Administration's deferred action programs as an anti-passing policy mechanism that, despite their limitations, by incentivizing immigrants to eschew unlawful hiding, not only helps reduce discrimination, but also provides a first step toward a lawful pathway to a more sustainable integration into American communities.

## I. THEORIZING UNDOCUMENTED STATUS AS STIGMA

### *A. Definition of Stigma*

In his seminal study on stigma, social psychologist Erving Goffman traced the origins of the term “stigma” to the Greeks, who burned or cut signs into a person to

show that the person was a criminal, slave, or traitor.<sup>9</sup> Throughout history and cultures, the use of a bodily sign to brand someone's inferior status or punish them for their transgressions has been all too common. The ancient Romans branded runaway slaves with the letter FVG for *fugitivus*.<sup>10</sup> European and African colonialists similarly branded millions of slaves during the trans-Atlantic enslavement period.<sup>11</sup> Criminals were often branded as a method of punishment that combined physical punishment and public humiliation, and left an indelible mark of their criminal history.<sup>12</sup> Hester Prynne in Nathaniel Hawthorne's *The Scarlet Letter* is a well-known fictional example from seventeenth-century American history of persons who were publicly shamed with the letter "A" upon being sentenced for adultery.<sup>13</sup>

The term stigma as used in this Article refers to a characteristic, trait, or part of one's identity, which brands someone as less than equal, undesirable, and disgraced in the society to which the individual belongs.<sup>14</sup> That trait or characteristic is disfavored according to societal or cultural norms and forms that person's social identity, whereby the society around the individual has categorized that person based on that particular trait. Goffman describes three types of stigma. The first is what he calls "blemishes" of the body or physical deformities.<sup>15</sup> Second are "blemishes of the character," such as mental disorders, "weak will," "domineering or unnatural passions," and "homosexuality."<sup>16</sup> Third is the "tribal stigma of race, nation, and religion . . ."<sup>17</sup> What they all have in common are characteristics perceived by those around the individual to be abnormal, undesirable, and not entirely human. And on that perception, the person is discriminated against on account of the particular characteristic.<sup>18</sup>

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<sup>9</sup> ERVING GOFFMAN, *STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY* 1 (1963).

<sup>10</sup> Tracey Bryant, *Slaves Lives Emerge from Ancient Ruins: A Groundbreaking New Approach Brings the Forgotten Into Focus*, U. OF DEL. ONLINE MAG. RES. (Oct. 12, 2015), <http://research.udel.edu/2015/10/12/ud-authors/>.

<sup>11</sup> See A. LEON HIGGINBOTHAM, JR., *IN THE MATTER OF COLOR: RACE AND THE AMERICAN LEGAL PROCESS: THE COLONIAL PERIOD 176-79* (1978); TOM MONAGHAN, *THE SLAVE TRADE* 22 (2002).

<sup>12</sup> See MICHAEL IGNATIEFF, *A JUST MEASURE OF PAIN: THE PENITENTIARY IN THE INDUSTRIAL REVOLUTION, 1750-1850* 12 (1978); J. M. BEATTIE, *CRIME AND THE COURTS IN ENGLAND, 1660-1800* 619-20 (1986).

<sup>13</sup> See NATHANIEL HAWTHORNE, *THE SCARLETT LETTER* (Brian Harding ed., Oxford Univ. Press 2007) (1850). The concept of branding does not necessarily denote or have to signify a negative social identity. Some religious communities, like the Vaishnava sects in India, participate in ceremonial branding to signify religious initiation. See SIR MONIER MONIER-WILLIAMS, *K.C.I.E., BRAHMANISM AND HINDUISM* 67 (4th ed., London 1961) (1891).

<sup>14</sup> GOFFMAN, *supra* note 9, at 5-10.

<sup>15</sup> *Id.* at 4.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at 5.

Among Goffman's three categories, the first and third kinds are characteristics that are usually visible to the outsider. President Franklin D. Roosevelt's physical condition illustrates Goffman's first type of stigma. For much of his presidency, President Roosevelt dealt with the effects of polio that affected his physical body and posture—something he tried to hide in his effort to appear more presidential.<sup>19</sup> But, despite his efforts, it is a characteristic that was visible to the American public. Likewise, one's race and gender, examples of Goffman's third type of stigma, are traits of the person that are, in most cases, visible to the outsider. A woman might try to downplay her manifestations of gender, such as making a conscious effort to not appear too feminine by refusing to wear makeup or jewelry. Likewise, a member of a racial minority might downplay his or her race by changing the color and texture of his or her hair. But, nevertheless, the particular trait of being a woman or a racial minority is largely visible<sup>20</sup> and cannot completely be erased by the signifier. The second type of stigma, or what Goffman terms "blemishes of character," are conditions that are largely invisible to the outsider. A gay person may be able to pass as straight, thereby hiding his or her sexual orientation from outsiders.

Since Goffman's theoretical contribution into the research on stigma, numerous social scientists and legal scholars alike have amplified Goffman's definition and applied it to analyze numerous and wide-ranging circumstances, including sexual orientation,<sup>21</sup> physical disabilities,<sup>22</sup> mental illness,<sup>23</sup> cancer,<sup>24</sup> exotic dancing,<sup>25</sup> unemployment,<sup>26</sup> step-parenthood,<sup>27</sup> and urinary incontinence,<sup>28</sup> to show the harms

<sup>19</sup> Christopher Clausen, *The President and the Wheelchair*, WILSON Q., Summer 2005, at 24–25.

<sup>20</sup> I say largely here because there are instances where, for example, an African-American can pass as white if sufficiently fair-skinned. Likewise, a transgender person may be able to pass as a cisgender person by attempting to hide their true self.

<sup>21</sup> Kenji Yoshino, *Covering*, 111 YALE L. J. 769, 772 (2002) (developing the idea of covering in the context of sexual orientation, among others).

<sup>22</sup> Spencer E. Cahill & Robin Eggleston, *Reconsidering the Stigma of Physical Disability: Wheelchair Use and Public Kindness*, 36 SOC. Q. 681, 681–83 (1995) (examining stigma of physical disability through the public's perception of wheelchair use).

<sup>23</sup> M.C. Angermeyer & H. Matschinger, *Lay Beliefs About Schizophrenic Disorder: The Results of a Population Survey in Germany*, 89 ACTA PSYCHIATR. SCAND. 39, 39–44 (Supp. No. 382 1994) (showing the difference between lay beliefs and psychiatric teaching concerning schizophrenia).

<sup>24</sup> Betsy L. Fife & Eric R. Wright, *The Dimensionality of Stigma: A Comparison of its Impact on the Self of Persons with HIV/AIDS and Cancer*, 41 J. HEALTH & SOC. BEHAV. 50, 51–63 (2000) (showing the differences among illnesses concerning the impact of stigma).

<sup>25</sup> Jacqueline Lewis, *Learning to Strip: The Socialization Experiences of Exotic Dancers*, 7 CAN. J. HUM. SEXUALITY 51, 56–69 (1998) (discussing the stigma associated with exotic dancing and the socialization process to overcome it).

<sup>26</sup> Derek Walsgrove, *Policing Yourself: Social Closure and the Internalization of Stigma*, in THE MANUFACTURE OF DISADVANTAGE: STIGMA AND SOCIAL CLOSURE 45–46 (Gloria Lee & Ray Loveridge eds., 1987).

<sup>27</sup> Marilyn Coleman et al., *Perceptions of Stepparents: An Examination of the Incomplete Institutionalization and Social Stigma Hypotheses*, J. DIVORCE & REMARRIAGE, no. 1/2 1996, at 25, 25–30 (examining the social stigma hypothesis in light of public perceptions of stepparents).



to identity caused by stigma on the lives of the stigmatized. Since Goffman, the definition of what constitutes stigma has varied and has been inconsistent. Some have simply assumed the dictionary definition of stigma, as a “mark of disgrace,”<sup>29</sup> or used Goffman’s characterization of an attribute that is discrediting or a disgrace. Although many scholars since Goffman have elucidated and redefined stigma in productive ways, it is Bruce B. Link and Jo C. Phelan’s work on the concept of stigma that represents the most serious study of the definition of stigma since Goffman. In their article, *Conceptualizing Stigma*, Link and Phelan identify five components of stigma and argue that when these converge, stigma exists.<sup>30</sup> According to them, the first component of stigma is the distinguishing and labeling of differences, ranging from the routine, like a person’s shoe size, to the more socially significant, such as a person’s skin color.<sup>31</sup> Once that difference is noted and labeled as, say, “black” or “white,” the categorization often becomes taken as fact, despite the over-generalizations and simplifications required to create clear demarcations and groups.<sup>32</sup> The second component of stigma is the connection between the identification of difference with negative attributes.<sup>33</sup> That connection to the negative attributes often forms the basis for stereotypes. Psychologists have done much research on this component of stigma to clarify the processes that enable the categorizations of differences that often become stereotypes.<sup>34</sup> According to their research, categories and stereotypes facilitate what is known as “cognitive efficiency,” which enables a person to make shorthand decisions that allow the person to move on and attend to other matters.<sup>35</sup>

The third component of stigma involves the othering of certain groups in an attempt to separate “us” from “them.”<sup>36</sup> The evidence of such processes has been well documented for certain ethnic groups, gay men and lesbians, and persons with disabilities. Often the evidence of such designations of difference is the labeling itself. For example, in the context of mental illness, persons who have epilepsy are often referred to as “epileptics” and labeled as *being* the disease rather than having the disease.<sup>37</sup> But persons who have diseases that do not have negative associations like mental illnesses are not treated the same. Instead, the person *has* cancer or diabetes. That person is included as one of us, and the rhetoric reflects this inclusion. But where there is “othering,” a person experiences status loss and

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<sup>28</sup> Kathleen Sheldon & Linda Caldwell, *Urinary Incontinence in Women: Implications for Therapeutic Recreation*, 28 THERAPEUTIC RECREATION J. 203, 206 (1994).

<sup>29</sup> Bruce G. Link & Jo C. Phelan, *Conceptualizing Stigma*, 27 ANN. REV. OF SOC. 363, 364 (2001).

<sup>30</sup> *Id.* at 367.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 368–69.

<sup>34</sup> *Id.* at 369.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at 370.

<sup>37</sup> *Id.*

discrimination, the fourth component of stigma.<sup>38</sup> Like Goffman's definition of stigma as discrediting, the person is devalued, rejected, and excluded from society, which leads to a disadvantage in life's chances such as health, income level, social status, education, and housing.<sup>39</sup> The final component of status is the dependence of stigma on power, be it social, economic, or political.<sup>40</sup> Link and Phelan illustrate this component with the following example in the context of a psychological ward. Suppose a group of psychiatric patients in the ward distinguish the psychologists who treat them as different and label them with an undesirable trait. They describe the psychologists as "cold" and "indifferent."<sup>41</sup> They even stereotype all psychologists as "pill-pushers" and "nerds" and choose to discriminate against all psychologists in the ward, regardless of whether they have had personal experiences with them.<sup>42</sup> In so doing, the patients have engaged in all four components of stigma. Yet, in this situation it is difficult to say that the psychologists are stigmatized or that stigma exists because the patients lack power over the psychologists.<sup>43</sup>

### *B. Undocumented Status as Stigma*

Under Goffman's theoretical framework, undocumented immigrant status would be considered the second type of stigma.<sup>44</sup> Like a person's sexual orientation, a person's undocumented status is a trait that is not necessarily socially visible. It can remain completely hidden from the outsider. We might classify undocumented status under the third category since its manifestations are related to race. Race, particularly for Hispanics in the United States, can and has served as a proxy for undocumented status.<sup>45</sup> Further, as Part II of this Article shows, undocumented status is congruous with Goffman's sociological definition of stigma as a trait or

<sup>38</sup> *Id.* at 370–71.

<sup>39</sup> *Id.* at 371.

<sup>40</sup> Bruce G. Link & Jo. C. Phelan, *Labeling and Stigma*, in HANDBOOK OF THE SOCIOLOGY OF MENTAL HEALTH 525, 530 (C.S. Aneshensel et al. eds., 2013).

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at 531.

<sup>44</sup> Although some may argue that the law should stigmatize undocumented status in order to deter and disincentivize unlawful behavior, this Article claims that the stigma and discrimination experienced by undocumented immigrants is disproportionate to the civil offense of unlawful presence.

<sup>45</sup> Some legal scholars and lawyers have voiced strong opposition to Arizona's law that would authorize state police officers to check a person's immigrant status as potentially unconstitutionally discriminatory in application precisely because undocumented status alone is invisible to the outsider and race would serve as the predominate proxy to determine undocumented status. See, e.g., Ingrid V. Eagly, *Local Immigration Prosecution: A Study of Arizona Before SB 1070*, 58 UCLA L. REV. 1749, 1752 (2011); Kevin R. Johnson, *A Case Study of Color-Blindness: The Racially Disparate Impacts of Arizona's S.B. 1070 and the Failure of Comprehensive Immigration Reform*, 2 U.C. IRVINE L. REV. 313, 333 (2012); Orde F. Kittrie, *Federalism, Deportation, and Crime Victims Afraid to Call the Police*, 91 IOWA L. REV. 1449, 1487 (2006).

characteristic that is disfavored according to societal or cultural norms and which forms that person's social identity, whereby the society around the person has categorized that person based on that particular trait.<sup>46</sup>

But in an important way, undocumented status seems like an outlier. The other traits or characteristics classified in Goffman's typology are conditions that are innately immutable and not easily changeable, or, if changeable, should not have to be changed because they are fundamental to one's identity. But undocumented status, unlike physical disability, sexual orientation, race, or sex, is not innately immutable. It is not a status one is born with, but one that is acquired. Likewise, undocumented status is a condition that can be lost through the attainment of lawful immigrant status.<sup>47</sup> Moreover, even if we could classify undocumented status as a condition that is not easily changeable, it is not a condition so fundamental to one's identity that one should not have to change it. Most would agree that race, sex, and sexual orientation are characteristics that are so fundamental to the formation and maintenance of one's identity that they should not have to be changed, or cannot be. Not so with undocumented status. It is well documented that most Americans have a negative perception of undocumented status.<sup>48</sup> These Americans equate undocumented status with illegality and criminality, even though a violation of immigration laws is a civil, not criminal, offense.<sup>49</sup> It is also fair to say that those who are undocumented share a negative perception of their status. Though some may equate the loss of undocumented status with the loss of an immigrant identity, and, therefore, constitutive of a person's identity that he or she should not have to change, if given the choice to acquire lawful status, most undocumented persons would not object to the loss of that status and the acquisition of a lawful immigrant status for the benefits that accompany that status.

Similarly, undocumented status operates under the rules of stigma under Phelan and Link's conceptualization. It is a mark of difference that is distinguished and labeled as different. An important difference from a trait like race is that undocumented status is invisible and a person who distinguishes relies on proxies that are imperfect, such as race, ethnicity, and English language proficiency, among others. As Part II of this Article more fully shows, in both the legal and cultural landscapes, undocumented status is a difference that carries with it negative attributes and stereotypes about the person's competence and trustworthiness.

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<sup>46</sup> See GOFFMAN, *supra* note 9, at 3–4.

<sup>47</sup> See 8 U.S.C. § 1101 (a)(15) (2012).

<sup>48</sup> See *infra* Part II.

<sup>49</sup> See, e.g., 8 U.S.C. § 1325(b) (2012) (specifying civil penalties for unauthorized entry).

They<sup>50</sup> are labeled as criminals,<sup>51</sup> even though many of them came to the United States as children and did not possess the agency to break U.S. immigration law, the violation of which is a civil offense. They are considered perpetual foreigners,<sup>52</sup> even though a majority are long-term residents. They are judged as wards of the state, even though several studies have shown that they collectively pay billions of dollars in state and local taxes and contribute more to payroll tax than they consume in public benefits.<sup>53</sup> Further, both the public and legal rhetoric used to describe undocumented persons—and not their legal status—as “illegal” exemplifies an effort to “other,” to separate “us” from “them,” which illustrates Link and Phelan’s example of labeling a person with epilepsy as “epileptic.” As a result, undocumented immigrants<sup>54</sup> experience status loss and discrimination.<sup>55</sup> Finally, persons with undocumented status lack power relative to the stigmatizer, whether they are members of the public, employers, or government officials. Their

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<sup>50</sup> This Article acknowledges that undocumented immigrants do not represent or form one uniform, monolithic entity, instead constituting a class of persons that is diverse in race, ethnicity, socioeconomic background, and other similar identity dimensions. Nonetheless, and subject to exceptions, there are demographic characteristics shared by a majority of the undocumented immigrant population, which include lower education and income levels relative to other immigrants or U.S. born Americans, Mexico and Central America as the country of origin, and household arrangements that had either married or cohabitating couples with children. JEFFREY S. PASSEL & D’VERA COHN, PEW HISPANIC CTR, A PORTRAIT OF UNAUTHORIZED IMMIGRANTS IN THE UNITED STATES, 5, 16, 21 (2009), <http://www.pewhispanic.org/files/reports/107.pdf>. Relatedly, as Parts II and IV of this Article show more clearly, undocumented immigrants are subordinated not only on account of their undocumented status, but also on account of race, national origin, gender, sexual orientation, and similar identity dimensions and experience, what Leticia Saucedo calls an “intersecting/interlocking systems of discrimination.” Leticia M. Saucedo, *Intersectionality, Multidimensionality, Latino Immigrant Workers, and Title VII*, 67 SMUL. REV. 257, 262 (2014). The Article focuses on that class of persons, who constitute the majority of the undocumented population in the United States.

<sup>51</sup> Malia Zimmerman, *Elusive Crime Wave Data Shows Frightening Toll of Illegal Immigrant Criminals*, FOX NEWS (Sept. 16, 2015), <http://www.foxnews.com/us/2015/09/16/crime-wave-elusive-data-shows-frightening-toll-illegal-immigrant-criminals.html>; W. Gardner Selby, *Ted Cruz: Obama Administration Released 104,000 ‘Criminal Illegal Aliens’ Including 196 Murderers*, POLITIFACT (Aug. 28, 2015),

<http://www.politifact.com/texas/statements/2015/aug/28/ted-cruz/ted-cruz-obama-administration-released-104000-crim/>.

<sup>52</sup> See Que-Lam Huynh et al., *Perpetual Foreigner in One’s Own Land: Potential Implications for Identity and Psychological Adjustment*, 30 J. SOC. CLINICAL PSYCHOL. 133 (2011); Jean-Paul R. deGuzman, *Immigration Reform and Control Act of 1986*, in 1 THE MAKING OF MODERN IMMIGRATION: AN ENCYCLOPEDIA OF PEOPLE AND IDEAS 409, 420 (Patrick J. Hayes ed., 2012) (citing Angelo N. Ancheta, RACE, RIGHTS, AND THE ASIAN AMERICAN EXPERIENCE 79 (2d ed. 2006)).

<sup>53</sup> David Becerra, et al., *Fear v. Facts: Examining the Economic Impact of Undocumented Immigrants in the U.S.*, J. OF SOC. & SOC. WELFARE, Dec. 2012, at 111, 121–25; LISA CHRISTENSEN GEE ET AL., INST. ON TAX’N AND ECON. POLY, UNDOCUMENTED IMMIGRANTS’ STATE & LOCAL TAX CONTRIBUTIONS 1–5 (2016).

<sup>54</sup> Undocumented immigrants may experience stigma not just on account of undocumented status, but related to other traits and attributes such as race and English language proficiency. Part IV of this Article develops this idea further by applying the insights from intersectionality theory.

<sup>55</sup> See *infra* Part II.

undocumented status is an unlawful legal status that makes them deportable from the United States at any given moment, which means that any neighbor, employer, or government official holds tremendous power and control over the fact of their existence in this country. In addition to the power imbalance at the micro-level of personal interactions, undocumented status confers no power advantage at the more macro-level of our society. The consequence of living under the constant threat of deportation is that undocumented immigrants live a life of hiding. They must disengage from social and economic institutions of power for fear of being discovered.<sup>56</sup> They are cut off from the process necessary for political self-determination, as they do not possess the right to vote.<sup>57</sup> In significant respects, undocumented status is congruous with both Goffman's and Link & Phelan's conceptions of stigma. The next part of this Article provides the evidence of the perpetuation of that stigma in both law and culture.

## II. EVIDENCE OF UNDOCUMENTED STATUS AS STIGMA IN LAW AND CULTURE

This Part of this Article analyzes the restrictionist laws and enforcement measures against undocumented immigrants and the cultural discourse surrounding "illegal aliens" as evidence of undocumented status as stigma.

### *A. Norms Against Undocumented Immigrants in the Law*

#### i. Enforcement Legislation

Though claims of disproportionate, harsh, and selective enforcement against undocumented immigrants are not new, there has been a new proliferation of immigrant enforcement measures taken, particularly after 9/11.<sup>58</sup> Frustrated by Congressional inaction on meaningful immigration reform, local governments began passing criminal ordinances that had a disproportionate impact on the lives and livelihood of undocumented immigrants. An example of such a measure is a 2006 anti-loitering bill proposed by legislators in Suffolk County, New York ("IR

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<sup>56</sup> Stephen H. Legomsky, *Portraits of the Undocumented Immigrant: A Dialogue*, 44 GA. L. REV. 65, 101 (2009) (making the argument for legalization of undocumented immigrants as a way to encourage them to come out of a life of hiding).

<sup>57</sup> Cf. Gerald M. Rosberg, *Aliens and Equal Protection: Why Not the Right to Vote?*, 75 MICH. L. REV. 1092, 1125-33 (1977) (exploring the similarity between U.S. citizens and resident noncitizens concerning voting).

<sup>58</sup> Kevin R. Johnson, *The Intersection of Race and Class in U.S. Immigration Law and Enforcement*, 72 L. & CONTEMP. PROBS. 1, 17 (2009) [hereinafter Johnson, *The Intersection of Race and Class*]; see, e.g., *United States v. Lara-Garcia*, 478 F.3d 1231, 1233-36 (10th Cir. 2007) (defendant claiming traffic stop was unlawful racial profiling); *Hodgers-Durgin v. de la Vina*, 199 F.3d 1037, 1038-40 (9th Cir. 1999) (*en banc*) (reviewing claim for injunctive relief against border patrol agents for routinely stopping persons of Hispanic appearance in Arizona); *Ramirez v. Webb*, No. 85-1102, 1986 WL 16752, at \*1-3 (6th Cir. Mar. 3, 1986) (unpublished table decision) (enjoining immigration offers from stopping cars solely because of Hispanic appearance of driver).

1022”), which made standing alongside county roads a misdemeanor offense.<sup>59</sup> The bill was written to target day laborers, the majority of whom were undocumented immigrants, who stood along roads to solicit work.<sup>60</sup> That same year, legislators in San Bernardino County, California introduced an ordinance to allow police to seize vehicles used to pick up undocumented immigrants.<sup>61</sup> In Prince William County, Virginia, the legislature adopted a bill that authorized the police to check the immigration status of anyone believed to have broken the law if the officer had a reasonable belief that the person lacked the status to be in the United States.<sup>62</sup> In Waukegan County, Illinois, the legislature increased fines for driving without a license.<sup>63</sup> Because undocumented immigrants lack valid social security numbers, a requirement for a driver’s license in the state of Illinois, many of them lost their cars and their ability to drive.<sup>64</sup> In 2007, the city also entered into an agreement with Immigration and Customs Enforcement (“ICE”) to train local police officers to initiate deportations for persons convicted of certain felonies.<sup>65</sup> Although the agreement contemplated initiating deportations of those already imprisoned, many in the immigrant community believed that the agreement authorized local police to check the immigration status of anyone that they stopped.<sup>66</sup> In Escondido, California, the city tried to enact a number of aggressive enforcement measures, including making it a crime to rent homes to undocumented immigrants and authorizing broad immigration sweeps by setting up traffic checkpoints to target unlicensed drivers, a disproportionate number of whom are undocumented.<sup>67</sup> Indeed, these are only a few examples of over ninety localities throughout the United States that have proposed similar ordinances, thirty-five of which have passed.<sup>68</sup> Although some of the concerns that drove legislatures to pass these measures are legitimate, others are premised on fear and false assumptions about the impact of undocumented immigrants on schools, jobs, and safety.

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<sup>59</sup> *Proliferation of Local Anti-Immigrant Ordinances in the United States*, N.Y. C.L.S. UNION (Feb. 15, 2016), <http://www.nyclu.org/content/proliferation-of-local-anti-immigrant-ordinances-united-states> (testimony of Udi Ofer, Legislative Counsel, New York Civil Liberties Union, before Jorge Bustamante, United Nations Special Rapporteur On The Human Rights of Migrants Regarding the Proliferation of Local Anti-Immigrant Ordinances in the United States).

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> Nick Miroff, *Fear Seizes Pr. William Immigrants—Legal and Not*, WASH. POST (July 15, 2007), <http://www.washingtonpost.com/wp-dyn/content/article/2007/07/14/AR2007071401104.html>.

<sup>63</sup> Julia Preston, *Facing Deportation But Clinging to Life in U.S.*, N.Y. TIMES (Jan. 18, 2008), [http://www.nytimes.com/2008/01/18/us/18hide.html?\\_r=0](http://www.nytimes.com/2008/01/18/us/18hide.html?_r=0).

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> Anna Gorman, *Undocumented? Unwelcome*, L.A. TIMES (July 13, 2008), <http://articles.latimes.com/2008/jul/13/local/me-escondido13>. The ordinance was eventually enjoined on preemption grounds. Order Re: Stipulated Final Judgment and Permanent Injunction at 2, *Garrett v. City of Escondido*, (S.D. Cal. Dec. 15, 2006) (No. 06-CV-2434-JAH (NLS)).

<sup>68</sup> N.Y. C.L.S. UNION, *supra* note 59.

A similar frustration over Congressional inaction was brewing at the state level, with many state legislatures contemplating tougher enforcement measures against undocumented immigrants. Perhaps the bill that gained the most national—and international—attention<sup>69</sup> was Arizona's Senate Bill 1070 ("S.B. 1070"), also known as the Support Our Law Enforcement and Safe Neighborhoods Act.<sup>70</sup> The most controversial enforcement provisions made it a state crime to not have paperwork showing an individual's valid immigration status. S.B. 1070 also required state officers to ascertain the immigration status of an individual during an arrest or detention upon a reasonable suspicion that the individual was in the United States unlawfully.<sup>71</sup> S.B. 1070 too prohibited undocumented immigrants from applying for and performing work, and authorized warrantless searches of individuals on reasonable suspicion that they had committed a removable offense.<sup>72</sup>

The reaction to the law was deeply divided. Proponents of S.B. 1070 defended it on security-related grounds. They argued that the purpose of the law was not animus against immigrants, but that it was necessary to increase security in neighborhoods and communities in a border state heavily affected by unauthorized migration, drug smuggling and related violence, and human smuggling.<sup>73</sup> With the federal government unable or unwilling to enforce federal immigration laws and to reach a political compromise on immigration reform, some saw S.B. 1070 as a necessary step to propel the federal government to act.<sup>74</sup>

Opponents of the law argued that the law was motivated by and reflected animus toward undocumented immigrants. They saw it as a potential assault on the civil rights of not only noncitizens, but also citizens since it would be difficult to discern whether an individual is in the United States unlawfully without relying on that person's race or language ability. Many, including President Obama, warned of the potential for unlawful profiling and harassment of U.S. citizens and of individuals with lawful immigration status in the law's application.<sup>75</sup>

The United States Government's position was clear and swift, as it sued for a preliminary injunction on the legal theory that the key enforcement procedures

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<sup>69</sup> See, e.g., Randal C. Archibold, *Arizona Enacts Stringent Law on Immigration*, N.Y. TIMES (Apr. 23, 2010), <http://www.nytimes.com/2010/04/24/us/politics/24immig.html>; Jane Little, *Arizona Migrant Law: Tough Law Gets Sympathetic Hearing*, BBC NEWS (Apr. 25, 2012), <http://www.bbc.com/news/world-us-canada-17849646>.

<sup>70</sup> S.B. 1070, 49th Leg., 2d Reg. Sess. (Ariz. 2010) (amended by H.B. 2162, 49th Leg., 2d Reg. Sess. (Ariz. 2010)).

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> See, e.g., Kris W. Kobach, *Why Arizona Drew a Line*, N.Y. TIMES (Apr. 28, 2010), <http://www.nytimes.com/2010/04/29/opinion/29kobach.html>; Kevin R. Johnson, *The Immigration Ruling in Arizona is Constitutional*, N.Y. TIMES (July 8, 2015), <http://www.nytimes.com/roomfordebate/2010/07/28/whats-next-on-arizonas-immigration-law/the-immigration-ruling-in-arizona-is-constitutional>.

<sup>74</sup> See Kobach, *supra* note 73.

<sup>75</sup> See Peter Nicholas, *Obama Criticizes Arizona Immigration Law*, L.A. TIMES (Apr. 28, 2010), <http://articles.latimes.com/2010/apr/28/nation/la-na-obama-midwest-20100429>.

were preempted by federal law and violated the Supremacy Clause of the U.S. Constitution.<sup>76</sup> U.S. District Judge Susan Bolton ordered a preliminary injunction of the most controversial enforcement provisions, including the requirement that state officers would have to enforce federal law by verifying the immigrant status of individuals suspected of being without authority to be in the United States.<sup>77</sup> A split panel of the U.S. Court of Appeals for the Ninth Circuit affirmed that decision,<sup>78</sup> which eventually reached the Supreme Court. In 2012, the U.S. Supreme Court struck down three sections of S.B. 1070 as being preempted by federal law.<sup>79</sup> However, it left intact the enforcement provision of the law that permitted state officers to detain and arrest an individual upon a reasonable suspicion that the individual is in the country unlawfully, thereby overruling the Ninth Circuit in part.<sup>80</sup>

Arizona's S.B. 1070 was the first legislation of its kind in attempting to regulate immigration enforcement by a state, but it was not the last. Since S.B. 1070, several states have followed Arizona's lead and enacted equally expansive immigration enforcement measures. Upon the passage of S.B. 1070, similar legislation was introduced in numerous states.<sup>81</sup> Such "copycat" bills passed in Utah, Georgia, Indiana, and Alabama, with more limited laws already having passed in Colorado, Florida, Oklahoma, Missouri, Utah, and South Carolina.<sup>82</sup> All had similar "show me your papers" type enforcement provisions, though each state added other conditions that made the lives of undocumented immigrants even more difficult. For example, the law in Georgia criminalized persons who, while acting in violation of another offense, gave rides to or lived with individuals who lack the legal status to be in the United States.<sup>83</sup> Indiana's law also restricted the use of foreign documents for both public and private purposes.<sup>84</sup>

Perhaps the most restrictive of these laws was passed in Alabama, as its reach extended beyond the "show me your papers" enforcement type provision and into almost all facets of an individual's life. Alabama H.B. 56 prohibited undocumented immigrants from receiving state or local benefits.<sup>85</sup> It required primary and secondary public schools to inquire into the immigration status of its students.<sup>86</sup>

<sup>76</sup> Complaint at 1, *United States v. Arizona*, 703 F. Supp. 2d 980 (D. Ariz. Jul. 6, 2010) (No. 2:10-CV-01413-NVM).

<sup>77</sup> *United States v. Arizona*, 703 F. Supp. 2d 980, 1008 (D. Ariz. 2010).

<sup>78</sup> See *United States v. Arizona*, 641 F.3d 339, 339 (9th Cir. 2011).

<sup>79</sup> *Arizona v. United States*, 132 S. Ct. 2492 (2012) (striking down sections 3, 5C, and 6).

<sup>80</sup> *Id.* at 2509.

<sup>81</sup> Gabriel J. Chin & Marc L. Miller, *The Unconstitutionality of State Regulation of Immigration Through Criminal Law*, 61 DUKE L.J. 251, 253–55 (2011).

<sup>82</sup> *Id.* at 254–55.

<sup>83</sup> GA. CODE ANN. §§ 16-11-200(b), 16-11-201(b) (2016), *preempted by* Ga. Latino All. for Human Rights v. Governor of Ga., 691 F.3d 1250 (11th Cir. 2012)).

<sup>84</sup> IND. CODE § 34-28-8.2-2(b) (2016), *enjoined by* Buquer v. City of Indianapolis, No. 1:11-cv-00708-SEB-MJD, 2013 WL 1332158 (S.D. Ind. Mar. 28, 2013).

<sup>85</sup> ALA. CODE § 31-13-7 (2016).

<sup>86</sup> *Id.* § 31-13-27, *preempted by* *United States v. Alabama*, 691 F.3d 1269 (11th Cir. 2012)).



Though students without legal immigration status could not be barred from receiving a primary and secondary education under the law, it did prohibit students without immigration status from attending public colleges and universities.<sup>87</sup> The law criminalized the falsification of identification documents, voided contracts between undocumented immigrants and others who knew that the other party lacked valid immigration status, prohibited renting houses to undocumented immigrants, and barred employers from hiring undocumented immigrants.<sup>88</sup>

Civil rights groups have challenged the implementation of these laws with some success. Since the Supreme Court's opinion in *Arizona v. United States*, most of these provisions have been enjoined. Nevertheless, numerous states, including Arizona, have enacted new enforcement legislation concerning unlawful immigration, from building a border-securing fence "as close as practicable" to the border,<sup>89</sup> to criminalizing persons who knowingly harbor or transport undocumented immigrants,<sup>90</sup> and to imposing additional restrictions and verification requirements preventing persons and entities from employing undocumented immigrants.<sup>91</sup>

## ii. Benefits and Rights Regulating Legislation

This year marked the twenty-second anniversary of Proposition 187 ("Prop. 87"),<sup>92</sup> a watershed law that passed in the the state of California. When Prop. 87 was passed, it was considered one of the toughest anti-immigrant laws in the country. Although wide in scope, Prop. 87 specifically targeted the receipt of public benefits by undocumented immigrants.<sup>93</sup> The law required not only government officials, but schools, teachers, and even health care professionals to verify the immigrant status of everyone, including children.<sup>94</sup> It denied access to elementary and secondary schools for undocumented children.<sup>95</sup> Though a federal court

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* § 31-13-14, § 31-13-26, preempted by *United States v. Alabama*, 691 F.3d at 1269, § 31-13-33, preempted by *United States v. Alabama*, No. 2:11-CV-2746-SLB, 2013 WL 10799535, at \*1 (N.D. Ala. 2013), § 31-13-15.

<sup>89</sup> ARIZ. REV. STAT. ANN. § 41-113(A) (2016).

<sup>90</sup> IND. CODE ANN. §§ 35-44.1-5-3, 35-44.1-5-4 (West 2016).

<sup>91</sup> *Id.* § 22-5-5-1.7-12(1); GA. CODE ANN. §§ 13-10-91(a), 36-60-6(a) (2016); N.H. REV. STAT. ANN. § 275-A:4-a (2016).

<sup>92</sup> 1994 Cal. Legis. Serv. Prop. 187 (West).

<sup>93</sup> For scholarly treatment of Proposition 187, see, e.g., Linda S. Bosniak, *Opposing Prop. 187: Undocumented Immigrants and the National Imagination*, 28 CONN. L. REV. 555, 555-60 (1996) (analyzing the opposition to Proposition 187); Kevin R. Johnson, *An Essay on Immigration Politics, Popular Democracy, and California's Proposition 187: The Political Relevance and Legal Irrelevance of Race*, 70 WASH. L. REV. 629, 665, 668 (1995) (describing the anti-Mexican animus that motivated the bill); Gerald L. Neuman, *Aliens as Outlaws: Government Services, Proposition 187, and the Structure of Equal Protection Doctrine*, 42 UCLA L. REV. 1425, 1440-52 (1995) (exploring the equal protection implications raised by Proposition 187).

<sup>94</sup> 1994 Cal. Legis. Serv. Prop. 187, *supra* note 92.

<sup>95</sup> *Id.*

enjoined the implementation of Prop. 87 on constitutional grounds,<sup>96</sup> it spawned new legislation in other states with similar fears about undocumented immigrants taking scarce public benefits and resources from its own citizens.<sup>97</sup>

More recently, Arizona's S.B. 1070 had a similar effect, prompting several states to enact benefits-regulating legislation that touched on almost all aspects of the life of an undocumented immigrant. Such legislation include prohibitions or limitations of public benefits,<sup>98</sup> certain work benefits eligibility,<sup>99</sup> unemployment compensation,<sup>100</sup> financial aid benefits for education,<sup>101</sup> the right to contract,<sup>102</sup> driver's licenses,<sup>103</sup> licenses to carry guns,<sup>104</sup> licenses for certain vocations,<sup>105</sup> and lower tuition rates at universities.<sup>106</sup> The restrictive legislation is not limited to states like Arizona, which are subject to a disproportionate amount of unlawful immigration. Rather, the restrictions come from every region in the United States.<sup>107</sup>

Most recently, the State Senate of Pennsylvania passed a bill that would deny public benefits such as welfare, Medicaid, and unemployment compensation to undocumented immigrants living in the Commonwealth of Pennsylvania.<sup>108</sup> Senate Bill No. 9 would require anyone receiving public benefits in the state to provide identification to prove legal residency and subjects those who provide false

<sup>96</sup> See *League of United Latin Am. Citizens v. Wilson*, 997 F. Supp. 1244 (C.D. Cal. 1997).

<sup>97</sup> See, e.g., Bill Ong Hing, *Don't Give Me Your Tired, Your Poor: Conflicted Immigrant Stories and Welfare Reform*, 33 HARV. C.R.-C.L. L. REV. 159, 1668–70 (1998) (exposing the myth that elderly Asian immigrants abused welfare).

<sup>98</sup> IOWA CODE ANN. §7E.3 (West 2016); S.C. CODE ANN. §17-13-170(E)(1) (2014).

<sup>99</sup> N.J. STAT. ANN. §§ 44:10-48(a), (b)(3) (West 2016).

<sup>100</sup> N.M. STAT. ANN. § 51-1-5(F)(1)-(2) (2015).

<sup>101</sup> W. VA. CODE ANN. § 18-22D-2(c)(1) (LexisNexis 2016).

<sup>102</sup> ARIZ. STAT. ANN. § 23-212(A) (2016).

<sup>103</sup> DEL. CODE ANN. 21 § 2711(c) (2016); IND. CODE ANN. § 9-24-2-3(a)(9) (West 2016); VA. CODE ANN. § 46.2-328.1(D) (2016).

<sup>104</sup> IDAHO CODE §18-3302(11)(j) (2016); N.Y. PENAL LAW § 400.00 (McKinney 2016).

<sup>105</sup> KY. REV. STAT. ANN. §§ 198B.658(1)(b), (2)(b) (West 2016); NEB. REV. STAT. § 38-129(2) (2008).

<sup>106</sup> N.H. REV. STAT ANN. § 187-A:16(XXIII) (2016).

<sup>107</sup> During this same period, some states have introduced legislation that expanded the scope of rights for undocumented immigrants. For example, in California, undocumented immigrants who would normally be ineligible for driver's licenses without a valid social security number can sign an affidavit to obtain drivers licenses. CAL. VEH. CODE § 12801.9 (West 2016). In New York, the legislature introduced a bill entitled New York Is Home Act in 2014, which would grant state citizenship to noncitizens who can provide three years of tax payments and residency in the state. New York Is Home Act, S.B. 7879, 237th Leg. Sess. (N.Y. 2014). A grant of state citizenship would ease "passing" pressures by providing a state-issued identification and a driver's license, and access to government benefits, such as medical care and educational opportunities. Peter L. Markowitz, *Undocumented No More: The Power of State Citizenship*, 67 STAN. L. REV. 869, 905-09 (2015) (arguing for the benefits of state citizenship).

<sup>108</sup> Press Release, Pat Stefano, Senator, State Senate Approves Stefano Bill to Deny Public Benefits to Illegal Immigrants in PA (Feb. 24, 2015), <http://www.senatorstefano.com/2015/02/24/state-senate-approves-stefano-bill-to-deny-public-benefits-to-illegal-immigrants-in-pa/>.

identification to a misdemeanor charge and arrest.<sup>109</sup> Senator Pat Stefano, the bill's sponsor, stated, "In these tough economic times, when revenues are scarce, it's important to ensure that our state's resources are dedicated to those who pay taxes and are here in this state legally."<sup>110</sup> He continued, "Pennsylvania citizens, including legal immigrants, who are struggling to make ends meet, should not have their hard-earned dollars go toward benefits for illegal immigrants."<sup>111</sup>

Similar restrictions have been passed at the local level. The first one of significance was adopted by the City of Farmers Branch, Texas, which required proof of citizenship or eligible immigration status for lessors of rental property.<sup>112</sup> From 2006 to 2007, the City of Hazelton, Pennsylvania adopted a series of ordinances that increased difficulties for undocumented immigrants to live and work. Like the Farmers Branch ordinance, the Hazelton ordinance impeded the ability of undocumented immigrants to find rental housing by requiring proof of U.S. citizenship or lawful residence to obtain occupancy permits.<sup>113</sup> Moreover, the ordinance outlawed the employment and "harboring" of undocumented immigrants.<sup>114</sup> Although both ordinances were eventually enjoined on preemption grounds,<sup>115</sup> these local and state measures send a clear message to undocumented immigrants that they are not welcome in the communities in which they live.

### iii. Coercive Linguistic Assimilation Pressures

In addition to heightened enforcement efforts and benefits-restricting legislation, several states have recently introduced a series of proposals to make English the official language, which has imposed another dimension of coercive assimilation pressures on undocumented immigrants. Although such efforts have been targeted at immigrants generally, that target includes the undocumented. Efforts to make English the only and official language in the United States began with a proposed Constitutional Amendment.<sup>116</sup> In 1981, a bill was introduced proposing a Constitutional amendment to make English the official language of the United States.<sup>117</sup> If passed, the amendment would have prohibited federal, state, and local governments from "mak[ing] or enforc[ing] any law which requires the

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<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> *Villas at Parkside Partners v. City of Farmers Branch*, 496 F. Supp. 2d 757, 762, 777 (N.D. Tex. 2007) (granting preliminary injunction on preemption grounds).

<sup>113</sup> *Lozano v. City of Hazelton*, 496 F. Supp. 2d 477, 484 (M.D. Pa. 2007).

<sup>114</sup> *Id.*

<sup>115</sup> *Id.* at 520; *Farmers Branch*, 495 F. Supp. 2d at 777.

<sup>116</sup> States have also proposed laws to make English their official language. *See, e.g.* S.B. 69, 217th Leg., 2016 Sess. (N.J. 2015); S.B. 522, 55th Leg., 1st Reg. Sess. (Okla. 2015); S.B. 1582, 238th Leg. Sess., 2015–2016 Reg. Sess. (N.Y. 2015); H.B. 2573, 83rd Leg., 2016 Reg. Sess. (W. Va. 2016); H.B. 1506, 199th Gen. Assem., 1st Reg. Sess. (Pa. 2015); H.B. 4243, 98th Leg., 1st Reg. Sess. (Mich. 2015).

<sup>117</sup> *See* S.J. Res. 72, 97th Cong., 1st Sess. (1981).

use of any language other than English.”<sup>118</sup> The legislation failed to come to a vote.<sup>119</sup> The next stage of the English-only movement abandoned the constitutional amendment approach and focused its efforts on enacting new federal legislation—an easier feat than a Constitutional amendment, which would have required a two-thirds majority in Congress instead of a simple majority.<sup>120</sup> Several proposed bills were introduced in Congress, and one passed the House of Representatives in 1996.<sup>121</sup> Entitled “Bill Emerson English Language Empowerment Act of 1996,” it, while recognizing the value of ethnic and cultural diversity, sought to “preserve unity in diversity” by proposing that English be the only language used to conduct official business of the federal government.<sup>122</sup> It defined official business as all “government actions, documents, or policies,” including “publications, income tax forms, and informational materials.”<sup>123</sup> The Bill did make certain exceptions, including for the teaching of languages and national security.<sup>124</sup> Notably, it sought to repeal the bilingual voting requirements under the Voting Rights Act of 1965 and to reform naturalization ceremonies to be conducted only in English.<sup>125</sup> The Bill failed to pass the Senate, although similar bills have been introduced in Congress since H.R. 123.<sup>126</sup> The latest iteration, entitled “English Language Unity Act 2015,” was introduced in the House in February 2015 and seeks to declare English as the official language of the United States and to establish uniform English language rules for naturalization, among others.<sup>127</sup>

There have been similar efforts in state legislatures to make English the official language. During the 1980s, and particularly during the 1990s when conflicts over languages were at their zenith, numerous states enacted English-only legislation and/or constitutional amendments to specify English as the official language.<sup>128</sup>

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<sup>118</sup> *Id.* This proposal applied to ordinances, regulations, orders, programs, and policies. *Id.*

<sup>119</sup> See *S.J.Res.72*, CONGRESS.GOV, <https://www.congress.gov/bill/97th-congress/senate-joint-resolution/72/actions> (last visited Feb. 15, 2016).

<sup>120</sup> See, e.g., H.R. 123, 104th Cong., 2d Sess. (1996).

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> See also English Language Unity Act of 2013, S. 464, 113th Cong. (2013); English Language Unity Act of 2013, H.R. 997, 113th Cong. (2013); English Language Unity Act of 2015, S. 678, 114th Cong. (2015); English Language Unity Act of 2015, H.R. 997, 114th Cong. (2015).

<sup>127</sup> H.R. 997 (2015).

<sup>128</sup> See Edward B. Fiske, *The Controversy Over Bilingual Education In America's Schools: One Language or Two?*, N.Y. TIMES (Nov. 10, 1985), <http://www.nytimes.com/1985/11/10/education/controversy-over-bilingual-education-america-s-schools-one-language-two.html?pagewanted=1>.

More recently, numerous states have introduced legislation aimed at making English the official language or otherwise discouraging bilingualism.<sup>129</sup>

My claim is not that English-only laws necessarily reflect bias or animus against undocumented immigrants. Indeed, some may find efforts to recognize one language necessary amidst a growing diversity that is not only linguistic, but also racial, ethnic, religious, and cultural. From an institutional perspective, encouraging one language with which to communicate is helpful for political and civic interaction with the government. It is less costly and administratively more efficient for the government to speak in one tongue. Without bearing the administrative burden to accommodate the numerous languages spoken in the United States through translation services and the like, however, certain individuals would be cut off from participation in civic and political life. In addition to limiting communication with the government, another feature of a multilingual society is that various language groups would be unable to communicate, thus interact, with each other. This would discourage participation in political and social life that is essential for a democracy.<sup>130</sup>

But English-only laws impinge on an individual's autonomy to choose his or her method of expression. And as language is so closely tied to and a reflection of one's own culture, English-only laws may also encroach on the individual's ability to choose for herself her own cultural destiny. They come with the harms associated with the coercive pressures to assimilate, which limit the full expression of one's individual identity.<sup>131</sup> Further, as Cristina Rodríguez has shown, linguistic pluralism does not necessarily imperil political and civic participation among groups who do not speak English. It can actually enable this participation by increasing social investment by minority language groups to engage politically and socially, particularly in what she calls "mid-level social institutions—workplaces, schools, and the scenes of everyday politics and government, or the arenas through which most citizens live their daily lives—rather than on national political institutions."<sup>132</sup>

The pressures of linguistic assimilation are not manifested only through national measures to declare English the official language, but also at the state and local levels.<sup>133</sup> There, instances of language conflicts are no less common. In Texas, a man who had been in the United States for twenty-three years testified in the

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<sup>129</sup> See, e.g., H.B. 4372, 96th Leg., Reg. Sess. (Mich. 2013); S.B. 115, 216th Leg., 2014 Sess. (N.J. 2014); S.B. 1902, 2013 Leg., Reg. Sess. (N.Y. 2013); H.B. 2132, 2014 Gen. Assemb., 2014 Sess. (Pa. 2014); S.B. 78, 80th Leg., Reg. Sess. (W. Va. 2014); A.B. 340, 2013 Leg., Reg. Sess. (Wis. 2013); S.B. 590, 2011 Gen. Assemb., 2011 Sess. (Ind. 2011); H.F. 64, 87th Leg., Reg. Sess. (Minn. 2011); H.B. 1769, 62nd Leg., Reg. Sess. (Wash. 2011). *But see* S.B. 1174, 2013 Leg., Gen. Sess. (Cal. 2013) (giving parents a choice to enroll their children in bilingual schools.).

<sup>130</sup> Cf. Cristina M. Rodríguez, *Language and Participation*, 94 CAL. L. REV. 687, 693–97 (2006) [hereinafter Rodríguez, *Language and Participation*].

<sup>131</sup> KENJI YOSHINO, COVERING: THE HIDDEN ASSAULT ON OUR CIVIL RIGHTS xii (2006).

<sup>132</sup> Rodríguez, *Language and Participation*, *supra* note 130, at 694–95.

<sup>133</sup> *Id.* at 689.

state senate against a proposed immigration bill.<sup>134</sup> He testified in Spanish and used an interpreter.<sup>135</sup> State Senator Chris Harris asked, “Did I understand him correctly that he had been here since 1988? Why aren’t you speaking in English then?”<sup>136</sup> When the man replied that Spanish was his first language, with which he felt more comfortable, the senator stated, “It is insulting to us. It is very insulting. And if he knows English, he needs to be speaking English.”<sup>137</sup> In Tennessee, a mother received a citation from the Department of Child Services for neglecting her eleven-year-old child.<sup>138</sup> The judge told the mother that the inability to speak English at the fourth-grade level could result in the termination of her parental rights.<sup>139</sup> According to the court order from the hearing, “[t]he court specifically inform[ed] the mother that if she does not make the effort to learn English, she is running the risk of losing any connection—legally, morally, physically—with her daughter forever.”<sup>140</sup>

Such conflicts have also extended into the more private spheres, into the social institutions of work and school. During a high school baseball game in New Mexico, an umpire reprimanded the first baseman for speaking Spanish during the game.<sup>141</sup> When questioned by the coach, the umpire allegedly stated that he would eject from the game any player or coach who speaks Spanish during play.<sup>142</sup> The school, located near the U.S.–Mexican border, has a student population that is 97% Latino.<sup>143</sup> After the incident, the umpire resigned.<sup>144</sup> Similarly, during a soccer match in Florida, two umpires ejected a coach for giving instructions in Spanish.<sup>145</sup> In Massachusetts, two Hispanic clothes sorters at a Salvation Army were fired for their inability to speak English and for speaking Spanish at work.<sup>146</sup> According to court documents, the employer gave the employees one year to learn the language

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<sup>134</sup> Daily Mail Reporter, “*Speak English,*” *Texas Senator Tells Mexican During Heated Immigration Debate*, DAILY MAIL (Jun. 17, 2011), <http://www.dailymail.co.uk/news/article-2004805/Speak-English-Texas-senator-tells-Mexican-heated-immigration-debate.html>.

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> Ellen Barry, *Learn English, Judge Tells Mothers*, L.A. TIMES (Feb. 14, 2005), <http://articles.latimes.com/2005/feb/14/nation/na-english14>.

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> John Rosman, *New Mexico Umpire Resigns After English-Only Call*, FRONTERAS (Apr. 18, 2013), <http://m.fronterasdesk.org/content/new-mexico-umpire-resigns-after-english-only-call>.

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> Aurelio Moreno, *Youth Soccer Coach Booted for Speaking Spanish to Players*, SUN-SENTINEL (Dec. 20, 2012), [http://articles.sun-sentinel.com/2012-12-20/news/fl-coaches-spanish-20121220-10\\_1\\_soccer-coach-referees-head-coach](http://articles.sun-sentinel.com/2012-12-20/news/fl-coaches-spanish-20121220-10_1_soccer-coach-referees-head-coach).

<sup>146</sup> Kelley Holland, *When English Is the Rule At Work*, N.Y. TIMES (Jan. 27, 2008), <http://www.nytimes.com/2008/01/27/jobs/27mgmt.html>; Erin Fuchs, *Salvation Army, EEOC Settle English-Only Suit*, LAW360 (Nov. 6, 2008), <http://www.law360.com/articles/75789/salvation-army-ecoc-settle-english-only-suit>.

before firing them.<sup>147</sup> The U.S. Equal Employment and Opportunity Commission (“EEOC”) sued the Salvation Army for enforcing its English-only rule against the two workers, alleging that such a rule not only deprived the workers their employment opportunity, but also “inflict[ed] emotional pain, suffering, loss of enjoyment of life, embarrassment, humiliation, and inconvenience.”<sup>148</sup> Such examples reveal that the conflict over language rights is not contested only in the national corridors of power, but also in the intimate spaces of the quotidian, which has an effect on the daily life of undocumented immigrants.

There is good reason to believe that such conflicts will continue to grow. According to an EEOC study conducted in 2000, about forty-five million people, which translates to 17.5% of the U.S. population, spoke a language other than English.<sup>149</sup> Of the forty-five million, 10.3 million spoke very little to no English.<sup>150</sup> That number is growing. By all credible estimates, the United States is becoming more racially and ethnically diverse, and that trend is expected to continue in the future.<sup>151</sup> According to the U.S. Census, the growth rate among the foreign born population is increasing at a faster rate than that among the native born population.<sup>152</sup> Currently, the white population constitutes the majority group in the United States.<sup>153</sup> The U.S. Census, however, projects that by 2060, the white population will have a 44% share of the population, losing its current majority by 2044.<sup>154</sup> By 2060, no group will have a majority share of the population; instead, the United States will have a plurality consisting of many racial and ethnic groups.<sup>155</sup> Among them will be a “Two or More Races population,” which the U.S. Census projects will be the fastest growing population, with Asians and Hispanics constituting the second and third fastest growing populations, respectively.<sup>156</sup>

In this new reality, adherents of the English-only movement will see a more urgent need for one unifying language as a necessity for communication across various ethnic and linguistic groups. Linguistic assimilation pressures may be greater on non-English speakers. Further, apart from the normative question of whether minority groups should assimilate and adopt the English language, is the question of whether they can. One study that examined acculturation patterns of

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<sup>147</sup> Fuchs, *supra* note 146.

<sup>148</sup> *Id.*

<sup>149</sup> David E. Gevertz & Ana C. Dowell, *Are English-Only Policies in the Workplace Discriminatory of National Origin?*, A.B.A. (Mar. 13, 2014) <http://apps.americanbar.org/litigation/committees/civil/articles/spring2014-0514-are-english-only-policies-workplace-discriminatory-national-origin.html>.

<sup>150</sup> *Id.*

<sup>151</sup> Sandra L. Colby & Jennifer M. Ortman, *Projections of the Size and Composition of the U.S. Population: 2014 to 2060*, U.S. CENSUS BUREAU (Mar. 2015), <https://www.census.gov/content/dam/Census/library/publications/2015/demo/p25-1143.pdf>.

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

Asian Americans found the persistence of cultural practices, which would include the continuous use and survival of the mother tongue.<sup>157</sup> If the U.S. Census projections come true, then there will always be a sizable population in the United States that constitutes the linguistic minority who feel the pressure to assimilate.

Currently, protections are available for linguistic minorities in the form of antidiscrimination laws. There is no explicit prohibition against national language discrimination in Title VII of the Civil Rights Act of 1964.<sup>158</sup> National origin, however, is a protected characteristic under Title VII,<sup>159</sup> and unlawful discrimination based on national origin includes discrimination based on a person's language.<sup>160</sup> In the workplace, the EEOC has taken the position that English-only policies are presumptively discriminatory on the basis of national origin under Title VII,<sup>161</sup> unless the employer can justify a valid business necessity for the policy.<sup>162</sup> Similarly, Title VII protects discrimination based on accent.<sup>163</sup> Again, there is a business necessity exception for jobs that require "effective oral communication" in English, such as for teaching or serving English-speaking clients.<sup>164</sup> For other jobs, if an employee speaks English and can communicate effectively, an employer cannot discriminate against the employee based on an accent.<sup>165</sup>

Similar protections exist in schools for language minorities. In 1974, Chinese students attending public schools in San Francisco, California claimed that the schools violated their rights under Title VI of the Civil Rights Act of 1964<sup>166</sup> because they were not receiving the help they required through Limited English

<sup>157</sup> RICHARD ALBA & VICTOR NEE, *REMAKING THE AMERICAN MAINSTREAM: ASSIMILATION AND CONTEMPORARY IMMIGRATION* 35–59 (2003).

<sup>158</sup> See 42 U.S.C. §§ 2000e-16 (2006).

<sup>159</sup> *Id.*

<sup>160</sup> *Employment Rights of Immigrants Under Federal Anti-Discrimination Laws*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, <http://www.eeoc.gov/eeoc/publications/immigrants-facts.cfm> (last visited Feb. 15, 2016) [hereinafter *Employment Rights of Immigrants*].

<sup>161</sup> 29 C.F.R. § 1606.7 (2012); Gevertz & Dowell, *supra* note 149.

<sup>162</sup> *Employment Rights of Immigrants*, *supra* note 160. There are several limitations to the business necessity exception. An English-only policy should be limited to situations where concerns of safety or efficiency necessitate such a policy. *Id.* For example, if coworkers or customers only speak English, that may constitute both a safety and efficiency rationale to justify the English-only rule. See *id.* Certain employment situations where emergency situations are more common and communication in the English language is essential for the promotion of safety is another example that justifies an English-only policy. See *id.* And work assignments that require cooperation among numerous employees would fall under the efficiency rationale of a business necessity. See *id.* However, a policy that requires employees to speak English at all times and during all situations, including during lunch and during breaks, is unlawful. *Id.*

<sup>163</sup> *Id.*

<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

<sup>166</sup> Title VI of the Civil Rights Act states, "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal assistance." 42 U.S.C. § 2000d (2012). It also prohibits discrimination in student admissions, student policies and their application, and student access to programs. See *id.* § 2000d-6.



Proficiency (“LEP”) Programs to help them learn English.<sup>167</sup> The U.S. Supreme Court held in *Lau v. Nichols*, similar to the EEOC’s position regarding language discrimination in the workplace, that due to the close link between language and national origin, unlawful language discrimination is tantamount to unlawful national origin discrimination.<sup>168</sup> After *Lau*, schools must provide all students reasonable access to English language instruction, though *Lau* did not prescribe specified steps that school districts must take.<sup>169</sup> Those steps and guidelines came with the passage of the Equal Educational Opportunity Act (“EEOA”).<sup>170</sup> The EEOA reiterated the obligation to provide equal educational opportunity to any student regardless of race, color, sex, or national origin.<sup>171</sup> It defined as a denial of equal educational opportunity the “failure by an educational agency to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs.”<sup>172</sup> Many states have implemented similar laws,<sup>173</sup> but those that do not have laws specific to LEP programs are nonetheless governed by federal laws and policies.<sup>174</sup>

In both the work and school settings, then, legal protections exist for non-native speakers, which would include many undocumented immigrants, concerning the accommodation of language ability. But, particularly in the school setting, the law works not to preserve students’ right to speak in their native tongue, but treats the lack of English language ability as a characteristic to overcome.<sup>175</sup> The goal of the LEP programs is the acquisition of the English language, not the preservation

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<sup>167</sup> *Lau v. Nichols*, 414 U.S. 563, 564–65 (1974).

<sup>168</sup> *Id.* at 567–69.

<sup>169</sup> *See id.* at 568.

<sup>170</sup> *See* 20 U.S.C. § 1703 (2012).

<sup>171</sup> *Id.* The federal court decisions that have interpreted the EEOA have emphasized the following obligations to students who lack English fluency: offer special language development programs that will teach these students enough English so that they can learn and achieve in English-only instruction along with their English-speaking peers, see, for example, *Casteneda v. Pickard*, 648 F.2d 989, 1015 (5th Cir. 1981), and ensure that these students are given equal access to the same substantive knowledge as provided to their English-speaking peers and that such students do not suffer academically.

<sup>172</sup> 20 U.S.C. § 1703(f) (2012).

<sup>173</sup> For example, in the state of Vermont, Vermont Public Accommodation Act and Vermont State Board Manual of Rules and Practices articulate a nondiscrimination principle in the provision of services and the promotion of equal educational opportunity. *See Legal Requirements for Serving Students with Limited English Proficiency*, ST. OF VT. AGENCY OF EDUC., [http://education.vermont.gov/documents/guide\\_94\\_01.pdf](http://education.vermont.gov/documents/guide_94_01.pdf) (last visited Feb. 15, 2016). *See also* CAL. EDUC. CODE § 220 (West 2011); COLO. REV. STAT. ANN. § 22-24-104 (2016); IND. CODE ANN. § 20-33-1-5 (West 2016).

<sup>174</sup> *Legal Requirements for Serving Students with Limited English Proficiency*, *supra* note 173.

<sup>175</sup> Cristina M. Rodríguez, *Accommodating Linguistic Differences: Toward a Comprehensive Theory of Language Rights in the United States*, 36 HARV. C.R.-C.L. L. REV. 133, 134–35, 209–16 (2001) [hereinafter Rodríguez, *Accommodating Linguistic Differences*]. In the workplace setting, the law works, to a limited extent, to preserve workers’ right to speak in their native tongue. Only in the case of a business necessity may the employer ban a worker’s right to speak in his native language, and an employee is free to choose to speak his native language during breaks and lunch. *See Employment Rights of Immigrants*, *supra* note 160.

of the mother tongue. Courts have consistently interpreted the federal mandate of “equal educational opportunity” not as a right to a bilingual education, but only to enable the attainment of sufficient English-language skills.<sup>176</sup> There has only been one exception when a court imposed bilingual education to meet this federal mandate.<sup>177</sup> Indeed, several states, including California, Arizona, and Massachusetts, passed legislation that banned the use of a students’ native language to teach them English and other subjects.<sup>178</sup>

In neither the workplace nor school does the law seek the long-term preservation, retention, and practice of an immigrant’s native tongue. Instead, the goal is assimilation. Such assimilation efforts are more than just about language.<sup>179</sup> It is the assimilation of culture, too.<sup>180</sup> Cognitive psychologists have identified the ways in which language influences the way we think and the ways in which we relate to the world around us, such as our perception of space and time.<sup>181</sup> Language also shapes cultural values. Cognitive psychologists have developed research that suggests that bilingual people think differently depending on the language that they are speaking.<sup>182</sup> Moreover, speaking one’s native language is not only an embodiment and practice of one’s own culture, but enables one to learn various aspects of one’s own culture,<sup>183</sup> as culture is primarily transmitted through

<sup>176</sup> *Lau v. Nichols*, 414 U.S. 563, 568 (1974).

<sup>177</sup> *See, e.g., United States v. Texas*, 506 F. Supp. 405, 439 (E.D. Tex. 1981).

<sup>178</sup> *Rodríguez, Language and Participation*, *supra* note 130, at 759–60. The federal government’s policies on standardized testing similarly disfavor bilingualism, and thus, threaten the retention and practice of a student’s native language. For example, the Elementary and Secondary Education Act requires students to take standardized tests in English within three years of entering school in the United States. *See* 20 U.S.C. §§ 6301–6311 (2012). Some have argued this does not allow enough time to gain English proficiency, which, in turn, puts pressure on schools with bilingual programs to abandon them in exchange for English-only instruction. Some civil rights and children’s rights advocates have likened the assault on bilingual education to the federal government’s prohibition of Native-American children from being taught in their native languages in 1864. *See* Thomas Kleven, *The Democratic Right to Full Bilingual Education*, 7 NEV. L.J. 933, 933–35 (2007).

<sup>179</sup> *Rodríguez, Language and Participation*, *supra* note 130, at 759; *Rodríguez, Accommodating Linguistic Differences*, *supra* note 175, at 137.

<sup>180</sup> The connection between language and cultural identity is well documented and goes back centuries. As early as the ninth century, Charlemagne is credited with stating, “To have a second language is to have a second soul.” Lera Boroditsky, *Lost in Translation*, WALL ST. J., Jul. 24, 2010, at W3.

<sup>181</sup> For example, cultural psychologist Lera Boroditsky has identified that members of a certain Aboriginal community in Pormpuraaw, Australia do not use the words “left” or “right.” *Id.* Instead, they use cardinal directions of North, South, East, and West. *Id.* According to Boroditsky, that affects the way people perceive time, for example. *Id.* When she showed her research subjects photos that depicted a temporal progression, such as a person aging, and asked them to place them into correct order, English speakers arranged the pictures from left to right. *Id.* Hebrew speakers ordered the pictures from right to left. *Id.* Speakers from the Aboriginal community in Pormpuraaw arranged the photos from left to right, when seated facing south. *Id.* When facing north, right to left. *Id.* When facing east, the arrangement was towards the body. *Id.*

<sup>182</sup> *Id.*

<sup>183</sup> *See* Felicity de Zulueta, *Bilingualism, Culture and Identity*, 28 J. GROUP ANALYTIC PSYCHOTHERAPY 179, 188 (1995).

language. The lack of commitment to bilingual education, then, has important implications for the practice and ultimate survival of one's native culture. Without a commitment to bilingual education in schools, children will be less able to retain their mother tongue. This means that children lose the practice of their own culture,<sup>184</sup> and the opportunity to transmit that culture decreases with each generation. The assumption behind laws governing language rights is towards assimilation. The law privileges the acquisition of the English language, but not the retention of the native tongue.<sup>185</sup>

For undocumented immigrants, the assimilation pressures are even greater than for other non-native English speakers. This is because existing legal protections are immaterial if undocumented immigrants cannot report the unlawful violations of law due to the fear of disclosing their undocumented status to immigration authorities. Functionally, undocumented immigrants cannot benefit from the benefits to which they may be entitled for fear of outing themselves to law enforcement authorities.<sup>186</sup>

### *B. Norms Against Undocumented Immigrants in the Culture*

According to a recent Gallop Poll, 60% of Americans surveyed were dissatisfied with the level of immigration into the United States.<sup>187</sup> Of those who expressed dissatisfaction with the level of immigration into the country, the majority expressed a preference for a decrease in immigration into the United States.<sup>188</sup> Although this particular poll did not specify between authorized and unauthorized immigration, other polls indicate that most Americans think that immigrants

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<sup>184</sup> The loss of a child's native language also has a profound effect on the child's relationship to their parents. Rodriguez, *Language and Participation*, *supra* note 130, at 760–61. The child's loss of their native language means that it becomes more difficult for the parent to communicate with the child, as the acquisition of English language skills is usually more difficult for the parent. *Id.* This effect on communication has an impact on the relationship between parent and child, an intimate relationship of family that is protected by the substantive due process clause of the Constitution. *Id.*

<sup>185</sup> *Id.* at 760.

<sup>186</sup> Keith Cunningham-Parmeter, *Fear of Discovery: Immigrant Workers and the Fifth Amendment*, 41 CORNELL INT'L L.J. 27, 42–43 (2008). The underreporting of discrimination due to a fear of authority and retaliation is not limited to undocumented immigrants. A study has found that such underreporting exists among Asian Americans and women. See Andrew Tac-Hyun Kim, *Culture Matters: Cultural Differences in the Reporting of Employment Discrimination Claims*, 20 WM. & MARY BILL RTS. J. 405, 407–08 (2011).

<sup>187</sup> Andrew Dugan, *In U.S., Six in 10 Dissatisfied with Immigration Levels*, GALLUP (Jan. 29, 2015), <http://www.gallup.com/poll/181313/dissatisfied-immigration-levels.aspx>. But see Bradley Jones, *Americans' Views of Immigrants Marked by Widening Partisan, Generational Divides*, PEW RES. CTR. (Apr. 15, 2016), <http://www.pewresearch.org/fact-tank/2016/04/15/americans-views-of-immigrants-marked-by-widening-partisan-generational-divides/> (finding significant generational differences on views about immigration, with a majority of the Millennials and Generation X surveyed holding favorable views of immigrants while a majority of Baby Boomers and Silent Generation surveyed holding negative views about immigrants).

<sup>188</sup> 39% of those polled expressed a preference for a decrease. Dugan, *supra* note 187.

without legal status in the United States should be deported.<sup>189</sup> According to one Rasmussen survey, 62% of likely U.S. voters opposed President Obama's executive action, which they saw as unlawful amnesty for millions of "illegal" immigrants.<sup>190</sup>

Such numbers are unsurprising given both the current cultural and legal discourse around immigration and immigration reform. The words "illegal alien" and "illegal immigrant" have become commonplace to describe the more than eleven million undocumented persons living in the United States.<sup>191</sup> The concept of immigrant illegality is not new, as Mae Ngai has shown.<sup>192</sup> She argues that the concept was produced during the early twentieth century with restrictive laws that created a "*new legal and political subject*," whose inclusion in American society was both a social reality and a legal impossibility.<sup>193</sup> The most recent election season saw a leading political candidate equate Mexican immigrants, which presumably would include undocumented immigrants of Mexican origin, to rapists and persons involved with drugs and crime.<sup>194</sup> According to Leo R. Chavez, such false characterization of Latinos, particularly those of Mexican origin, fits into a broader narrative of Latinos as a threat to American society.<sup>195</sup> According to cognitive linguists, metaphoric language that, for example, describes immigrants as alien or associates immigrants with the concept of illegality not only reflects our cultural understanding of immigrant status, but also shapes and constrains our legal understanding and discourse.<sup>196</sup> How a person speaks about an idea influences the

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<sup>189</sup> Rachele Younglai, *Majority of Americans Believe Illegal Immigrants Should Be Deported*, NBC NEWS (Feb. 20, 2013), [http://usnews.nbcnews.com/\\_news/2013/02/20/17035190-majority-of-americans-believe-illegal-immigrants-should-be-deported?lite](http://usnews.nbcnews.com/_news/2013/02/20/17035190-majority-of-americans-believe-illegal-immigrants-should-be-deported?lite).

<sup>190</sup> *Voters Strongly Oppose Obama's Amnesty Plan for Illegal Immigrants*, RASMUSSEN REP. (Aug. 30, 2014), [http://www.rasmussenreports.com/public\\_content/politics/current\\_events/immigration/august\\_2014/voters\\_strongly\\_oppose\\_obama\\_s\\_amnesty\\_plan\\_for\\_illegal\\_immigrants](http://www.rasmussenreports.com/public_content/politics/current_events/immigration/august_2014/voters_strongly_oppose_obama_s_amnesty_plan_for_illegal_immigrants).

<sup>191</sup> Numerous scholars from fields ranging from law, sociology, political science, and anthropology have shown that the concept of immigrant illegality is a legal, cultural, social, and political construction and have shifted the focus away from individuals to the laws and the sociopolitical contexts that have created the concept of immigrant illegality. Cecilia Menjivar and Daniel Kanstroom, *Introduction – Immigrant "Illegality": Construction and Critiques*, in CONSTRUCTING IMMIGRANT "ILLEGALITY": CRITIQUES, EXPERIENCES, AND RESPONSES 1, 4-6 (Cecilia Menjivar & Daniel Kanstroom ed., 2014).

<sup>192</sup> MAE M. NGAI, IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA 3-4 (2004) (examining the historical origins of the concept of the "illegal alien").

<sup>193</sup> *Id.* at 4.

<sup>194</sup> *Full Text: Donald Trump Announces a Presidential Bid*, WASH. POST (Jun. 16, 2015), <https://www.washingtonpost.com/news/post-politics/wp/2015/06/16/full-text-donald-trump-announces-a-presidential-bid/>.

<sup>195</sup> LEO R. CHAVEZ, THE LATINO THREAT: CONSTRUCTING IMMIGRANTS, CITIZENS, AND THE NATION 40-43 (2008).

<sup>196</sup> Keith Cunningham-Parmeter, *Alien Language: Immigration Metaphors and the Jurisprudence of Otherness*, 79 *FORDHAM L. REV.* 1545, 1556-59 (2011); Mark Johnson, *Law Incarnate*, 67 *BROOK. L. REV.* 949, 952-53 (2002) (describing legal concepts as "grow[ing] out of our problematic, historically and culturally situated communal practices . . .").

way that person thinks about an idea, and vice versa.<sup>197</sup> Cognitive linguists George Lakoff and Mark Johnson have shown that certain metaphors have been embedded into the English language, and those metaphors have come to shape the way we think about the concepts represented by the metaphor. For example, they contend that the metaphor of “argument is war”—claims being “indefensible,” “attacking” weak points of an argument, “shooting down” bad arguments—has shaped the way we think of arguments generally where there are only winners or losers, points that are attacked or defended.<sup>198</sup> The more such metaphoric language gets repeated, the more that concept of argument becomes entrenched into the cultural landscape, where there are only winners or losers, ideas that are attacked or defended, instead of a concept of argument that leads to productive discourse.

In the immigration context, similar metaphoric language that describes undocumented and documented immigrants alike as aliens and illegal has long been a part of not only the cultural, but also the legal landscape. This fact may not be all that surprising since discrimination on the basis of race and national origin was lawful until the passage of the Civil Rights Act of 1964. But even since 1965, when the Immigration Nationality Act (“INA”) was amended to eliminate discrimination on the basis of national origin, the INA has maintained use of the term “alien.” According to its definition, the word means “any person not a citizen or national of the United States.”<sup>199</sup> In U.S. law, the first use of the word can be traced back to the Alien Act of 1798, which was part of the Alien and Sedition Laws that permitted the President to expel from the United States any person deemed to pose a danger to the state.<sup>200</sup> The word’s roots can be further traced back to medieval England and to British nationality laws, which distinguished between subjects of the monarch and aliens.<sup>201</sup> According to William Blackstone, aliens could not own land and were taxed differently from subjects of the monarch.<sup>202</sup> Even though England and Scotland were united in 1603, the Alien Act of 1705, for example, was passed by the English parliament to give Scottish nationals the

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<sup>197</sup> See generally GEORGE LAKOFF & MARK JOHNSON, *METAPHORS WE LIVE BY* (1980) (showing how metaphors structure and shape understanding, perceptions, and actions almost unknowingly).

<sup>198</sup> *Id.* at 4–5.

<sup>199</sup> 8 U.S.C. § 1101(a)(3) (2012); see also Kevin R. Johnson, “*Aliens*” and the U.S. Immigration Laws: The Social and Legal Construction of Nonpersons, 28 U. MIAMI INTER-AM. L. REV. 263, 272–73 (1996–97) (explaining the term “alien” and its use in immigration laws) [hereinafter Johnson, *Aliens and the U.S. Immigration Laws*].

<sup>200</sup> CHARLES GORDON ET AL., IMMIGRATION LAW AND PROCEDURE §§ 2.02–2.04, LexisNexis (database updated 2016).

<sup>201</sup> Johnson, *Aliens and the U.S. Immigration Laws*, *supra* note 199, at 265–66; WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 354–63 (1765).

<sup>202</sup> Allison Brownell Tirres, *Ownership Without Citizenship: The Creation of Noncitizen Property Rights*, 19 MICH. J. RACE & L. 1, 10–12 (2013).

status of alien in its land.<sup>203</sup> Going back even further, the word “alien” comes from Old French, which has its roots in the Latin words “alienus,” meaning “belonging to another,” and “alius,” meaning “other.”<sup>204</sup>

It may be argued that the way “alien” is used, particularly in the statutory context, is not pejorative. Alien simply means foreign, and does not necessarily come with the derogatory associations of foreignness.<sup>205</sup> The INA defines the term simply to differentiate between citizens and noncitizens. It is a legal distinction. But legal terms do not exist in a vacuum; they exist as a part of the cultural context in which they are used. Numerous legal scholars have noted that the concepts commonly associated with the term “alien” include dehumanizing notions of strangeness and extraterritoriality.<sup>206</sup> Indeed, more recently, the word has come to mean “from another planet.” What was once a legal term used to differentiate between citizen and noncitizen has been transformed to trigger associations that ultimately dehumanize, devalue, and exclude.

Moreover, the word often paired with “alien” is “illegal.” According to Cunningham-Parmeter’s empirical study of federal court decisions issued after 1965,<sup>207</sup> the nouns used most by federal judges to describe individuals in the United States without lawful immigration status were “alien,” “immigrant,” and “noncitizen,” with “alien” accounting for 88% of the opinions studied (3706, total) and “immigrant” a distant second, used only in 12% of opinions studied (494, total).<sup>208</sup> Though the use of the word “alien” is legally accurate under the INA, so too is the use of “immigrant” to describe such individuals. The INA divides all noncitizens into one of two categories: immigrant and nonimmigrant. This distinction is arguably the most fundamental distinction the statute makes. The

<sup>203</sup> Alastair Mann, *Parliaments, Princes, and Presses: Voices of Tradition and Protest in Early Modern Scotland*, in *SITES OF DISCOURSE—PUBLIC AND PRIVATE SPHERES—LEGAL CULTURE: PAPERS FROM A CONFERENCE HELD AT THE TECHNICAL UNIVERSITY OF DRESDEN, DECEMBER 2001* 79, 88 (Uwe Böker & Julie A. Hibbard, eds., 2002).

<sup>204</sup> *Alien*, THE OXFORD ENGLISH DICTIONARY (2d ed. 1989).

<sup>205</sup> *Id.*

<sup>206</sup> See Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 *YALE L.J.* 545, 547 n.4 (1990) (noting the pejorative connotations); Neuman, *supra* note 93, at 1428 (arguing that the term “alien” is xenophobic); Victor C. Romero, *The Congruence Principle Applied: Rethinking Equal Protection Review of Federal Alienage Classifications After Adarand Constructors, Inc. v. Peña*, 76 *OR. L. REV.* 425, 426 n.4 (1997) (describing the use of “alien” as pejorative that underscores the foreignness); Johnson, *Aliens and the U.S. Immigration Laws*, *supra* note 199, at 267; D. Carolina Núñez, *War of the Words: Aliens, Immigrants, Citizens, and the Language of Exclusion*, 2013 *BYU L. REV.* 1517, 1519–20 (examining language in the aggregate to show that “alien” is associated with concepts of criminality, invasion, and otherness).

<sup>207</sup> 1965 represents a logical point, as it is the date many acknowledge as the birth of modern immigration law, after the revision of the Immigration and Nationality Act, which eliminated discrimination based on national origin. Gabriel J. Chin, *The Civil Rights Revolution Comes to Immigration Law: A New Look at the Immigration and Nationality Act of 1965*, 75 *N.C. L. REV.* 273, 275 (1996).

<sup>208</sup> Cunningham-Parmeter, *supra* note 196, at 1573.

INA defines “immigrant” as “every alien except an alien who is within one of [several] following classes of nonimmigrant aliens.”<sup>209</sup> The classes of nonimmigrants are defined within one provision of the INA, which includes tourists, students, and business visitors, among numerous other categories.<sup>210</sup> Unlike immigrants, nonimmigrants are admitted for a specified, and usually short, duration for a particular purpose. U.S. immigration law generally presumes immigrant status, which subjects the person to higher admission criteria; therefore, nonimmigrants may overcome that presumption by fitting into one of the specified categories of nonimmigrant status.<sup>211</sup> Under U.S. law, then, the term immigrant technically encompasses those individuals who lack status in the United States, as such individuals do not fit within one of the categories specified in INA § 101(a)(15) and have the intent of staying indefinitely.<sup>212</sup>

Of the adjectives used to describe “alien” or “immigrant,” the same study of federal court opinions found that the most frequently used terms were “illegal,” “undocumented,” and “unauthorized,” with the adjective “illegal” appearing in 69% of the cases studied (2905, total), and “undocumented” appearing in only 16% of the cases (670, total).<sup>213</sup> Indeed, the recent Fifth Circuit majority opinion affirming the injunction of DAPA and DACA dedicated a footnote specifically to defend the court’s intentional use of the term “illegal alien” as legally accurate and preferable to “undocumented immigrant.”<sup>214</sup> According to the majority, the term “illegal” is correct because one’s entry into the United States without lawful immigrant status is itself an illegal act and in contravention of our immigration laws.<sup>215</sup> The panel opinion also noted that illegality does not equate to criminality, as some illegal acts do not necessarily constitute a crime.<sup>216</sup>

This last point was a response to the prevailing argument against the use of “illegal” in favor of “undocumented” because of the view that the adjective “illegal” used to describe persons living in the United States without valid immigration status unfairly characterizes such persons as criminals.<sup>217</sup> But calling persons whose legality or rights have yet to be adjudicated “illegal” is akin to calling defendants awaiting trial as convicted criminals.<sup>218</sup> It is true that individuals without valid immigration status violated the law through surreptitious entry, entry with false documents, or by overstaying their visas.<sup>219</sup> However, under U.S. immigration law,

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<sup>209</sup> 8 U.S.C. § 1101(a)(15) (2012).

<sup>210</sup> *Id.*

<sup>211</sup> *Id.* § 1184(b).

<sup>212</sup> *Id.*

<sup>213</sup> Cunningham-Parmeter, *supra* note, 196 at 1573.

<sup>214</sup> Texas v. United States, 787 F.3d 733, 745 n.15 (5th Cir. 2015).

<sup>215</sup> *Id.*

<sup>216</sup> *Id.*

<sup>217</sup> Johnson, *Aliens and the U.S. Immigration Laws*, *supra* note 199, at 276.

<sup>218</sup> Beth Lyon, *When More “Security” Equals Less Workplace Safety: Reconsidering U.S. Laws that Disadvantage Unauthorized Workers*, 6 U. PA. J. LAB. & EMP. L. 571, 576 (2004).

<sup>219</sup> Johnson, *Aliens and the U.S. Immigration Laws*, *supra* note 199, at 277.

various procedures exist to provide lasting forms of relief from removal, including paths to permanent residence and eventual citizenship.<sup>220</sup> Although the following forms of lasting relief are difficult to obtain due to particularly onerous requirements, regularizing to a lawful immigrant status is theoretically possible. Cancellation of removal is one such discretionary form of relief available to individuals who meet certain requirements of continuous presence, good moral character, and hardship, even though the individual is removable for being in violation of immigration law.<sup>221</sup> Asylum and withholding of removal is another form of relief for individuals who claim a fear of persecution on account of a protected characteristic, even if they have violated immigration laws.<sup>222</sup> So is adjustment of status for certain immigrants who were once admitted.<sup>223</sup> The protection is usually permanent, and like cancellation of removal, provides an eventual path to citizenship by meeting additional criteria.<sup>224</sup> In these circumstances, the individual is removable after having committed an “illegal” offense, yet after adjudication, can qualify for lasting forms of relief that entitle the person to reside permanently in the country, rendering the adjective “illegal” ultimately inaccurate.<sup>225</sup>

Furthermore, the adjective “illegal” may describe an act, but as used to modify the terms “alien” or “immigrant,” the adjective depicts a state of being.<sup>226</sup> We would not label a U.S. citizen who commits a civil or criminal act as being an illegal citizen or an illegal permanent resident. Yet courts, lawmakers, and the public alike continue to ascribe a status of illegality to a population of more than eleven million individuals<sup>227</sup> for having committed an unlawful act—an act that can be as comparatively innocent as overstaying a valid visa, which is a civil offense.<sup>228</sup> And when the term “illegal” is used in conjunction with the noun “alien,” the dehumanizing effect is compounded.<sup>229</sup> This has prompted Justice Sotomayor to break from tradition and intentionally use the words “undocumented immigrant” in her opinions to describe persons in the United States who lack valid immigration

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<sup>220</sup> See, e.g., 8 U.S.C. § 1229b (2012).

<sup>221</sup> *Id.* §§ 1229a, 1229b.

<sup>222</sup> *Id.* §§ 1101(a)(42), 1158(b)(1)(A). The United States offers asylum to foreign nationals who can show that they meet the definition of a refugee—someone who has “a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.” *Id.* § 1101(a)(42).

<sup>223</sup> *Id.* § 1255(i).

<sup>224</sup> *Id.*; *id.* §§ 1101(a)(42), 1158(b)(1)(A).

<sup>225</sup> *Id.* § 1158(a)(1).

<sup>226</sup> See Johnson, *Aliens and the U.S. Immigration Laws*, *supra* note 199, at 276.

<sup>227</sup> Bryan Baker & Nancy Rytina, U.S. OFF. OF IMMIGR. STAT., *Estimates of the Unauthorized Immigrant Population Residing in the United States: January 2012* (Mar. 2013), [https://www.dhs.gov/sites/default/files/publications/ois\\_ill\\_pe\\_2012\\_2.pdf](https://www.dhs.gov/sites/default/files/publications/ois_ill_pe_2012_2.pdf).

<sup>228</sup> 8 U.S.C. § 1182(a)(6) (2012).

<sup>229</sup> See Johnson, *Aliens and the U.S. Immigration Laws*, *supra* note 199, at 276.



status.<sup>230</sup> As she described the situation, “We all break laws ... I can’t say consciously, unconsciously, because most laws require intent ... yet we don’t think of ourselves as criminal.”<sup>231</sup> She continues, “It’s the label, and labels lead to impressions about criminality, which often is so negative that we’ve stopped thinking about the reason.”<sup>232</sup> As cognitive linguists have noted, the use of such language can lead to conflation of the concepts of immigrants and immigration with otherness and criminality.<sup>233</sup> According to Cunningham-Parmeter, the concept of immigrant, when used with words like “alien” or “illegal,” has the function of distorting reality, as the concept of immigrant or immigration actually becomes “alien,” which becomes “illegal,” and which may become “Mexican.”<sup>234</sup>

### III. CONSEQUENCE OF STIGMA: MANAGEMENT OF STIGMATIZED IDENTITIES AND IDENTITY PERFORMANCE THEORY

Part I of this Article analyzed undocumented status as a stigma. Part II of this Article showed the evidence for it in both our legal and cultural norms. Next, Parts III and IV of this Article examine the consequence of stigma on the individual. Applying the insights of identity performance theory, Part III of this Article conceptualizes a theoretical framework for ways stigmatized identities engage in individual mobilizing strategies and identity performance to cope with the particular stigma. Part IV of this Article applies the framework developed in Part III to undocumented status. It considers the specific ways in which undocumented immigrants manage their identities in light of the stigma.

Both legal scholars and social psychologists have identified the various ways in which individuals manage their stigmatized identities.<sup>235</sup> Social psychologists Branscombe and Ellemers found that when faced with stigma, members of “low status” groups will undertake identity mobilizing strategies to join “higher status”

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<sup>230</sup> *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 103 (2009); see Alisa Wiersema, *Why Justice Sotomayor Chooses Her Words Carefully*, ABC NEWS (Jul. 22, 2014), <http://abcnews.go.com/Politics/why-justice-sotomayor-chooses-her-words-carefully/blogEntry?id=24252873&from=related>.

<sup>231</sup> Wiersema, *supra* note 230.

<sup>232</sup> *Id.*

<sup>233</sup> Cunningham-Paramater, *supra* note 196, at 1556–59. Some elected officials have explicitly equated undocumented immigrants from Mexico with drug smugglers, stating, for every valedictorian undocumented immigrant, “there’s another 100 out there that weigh 130 pounds and they’ve got calves the size of cantaloupes because they’re hauling 75 pounds of marijuana across the desert.” Jake Miller, *Rep. Steve King Stands by Divisive Immigration Comments*, CBS NEWS (Aug. 11, 2013), <http://www.cbsnews.com/news/rep-steve-king-stands-by-divisive-immigration-comments/>.

<sup>234</sup> Cunningham-Parmeter, *supra* note 196, at 1568–80.

<sup>235</sup> See Kay Deaux & Kathleen A. Ethier, *Negotiating Social Identity*, in PREJUDICE: THE TARGET’S PERSPECTIVE, 301, 302–23 (Janet K. Swim & Charles Stangor eds., 1998).

groups by negating characteristics associated with the “low status” group.<sup>236</sup> Known as a process of identity negation,<sup>237</sup> members of “low status” groups who experience stigma will try to change their own self-definition to eliminate or underplay a negative characteristic associated with their identity.<sup>238</sup> They engage in assimilation. In his seminal work on stigma, social psychologist Erving Goffman identified three modes of identity negating strategies as a response to the effects of stigma: conversion, passing and covering.<sup>239</sup> Kenji Yoshino has applied and amplified Goffman’s concepts in his work on antidiscrimination, particularly concerning sexual orientation, but also race, gender, and disability.<sup>240</sup> He has identified specific norms in both the law and culture that function as assimilation demands that trigger the three modes of assimilation: conversion, passing, and covering.<sup>241</sup> For example, conversion demands require the individual to change his or her identity or stigmatized characteristic.<sup>242</sup> Passing demands expect the individual to hide his or her identity or stigmatized characteristic.<sup>243</sup> Covering demands require the individual to downplay his or her identity or stigmatized characteristic.<sup>244</sup> As this Part of this Article will show, the assimilation demand on the individual’s identity is most coercive with conversion, and it is comparatively less coercive with passing and covering demands.

### A. Conversion

For a person who experiences stigma and discrimination on account of a characteristic that constitutes his or her being, one option is to convert or change that characteristic or status.<sup>245</sup> Here, a person’s identity is literally altered to blend into the mainstream.<sup>246</sup> For example, a person may undergo cosmetic surgery to “correct” what he or she perceives to be a physical deformity.<sup>247</sup> Other conditions that are visible to the outside world are less alterable, though advances in science

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<sup>236</sup> Nyla R. Branscombe & Naomi Ellemers, *Coping with Group-Based Discrimination: Individualistic Versus Group-Level Strategies*, in PREJUDICE: THE TARGET’S PERSPECTIVE 243, 246–47 (Janet K. Swim & Charles Stangor eds., 1998).

<sup>237</sup> Deaux & Ethier, *supra* note 235, at 307.

<sup>238</sup> See Branscombe & Ellemers, *supra* note 236, at 246; see also Sahar F. Aziz, *Coercive Assimilationism: The Perils of Muslim Women’s Identity Performance in the Workplace*, 20 MICH. J. RACE & L. 1, 25–26 (2014) (discussing identity performance strategies of Muslim women); Devon W. Carbado & Mitu Gulati, *Working Identity*, 85 CORNELL L. REV. 1259, 1263–67 (2000) (discussing identity performance in the workplace).

<sup>239</sup> GOFFMAN, *supra* note 9, at 9, 73, 102.

<sup>240</sup> Yoshino, *supra* note 21, at 771–72.

<sup>241</sup> *Id.* at 772.

<sup>242</sup> *Id.*

<sup>243</sup> GOFFMAN, *supra* note 9, at 73; Yoshino, *supra* note 21, at 772.

<sup>244</sup> GOFFMAN, *supra* note 9, at 102; Yoshino, *supra* note 21, at 772.

<sup>245</sup> GOFFMAN, *supra* note 9, at 9.

<sup>246</sup> Yoshino, *supra* note 21, at 772.

<sup>247</sup> GOFFMAN, *supra* note 9, at 9.

make this more possible for those with adequate funds. Race, for example, physically manifests, but those physical manifestations, such as skin color, can be chemically lightened or darkened. Sex is another characteristic that is genetically determined. With a growing acceptance of transgender persons and advances in medical technology,<sup>248</sup> sex reassignment therapy and “sex change” procedures are becoming a more viable option for transgender and intersex persons.<sup>249</sup>

Like race and sex, sexual orientation is also an immutable characteristic, although the consensus for biological immutability of homosexuality has been relatively recent.<sup>250</sup> Historically, homosexuality was subject to surgical “cures” of the body, including hysterectomy, ovariectomy, clitoridectomy, castration, and lobotomy,<sup>251</sup> as well as “cures” of the mind, such as various forms of aversion therapy, electroshock treatment, hypnosis, and psychoanalysis.<sup>252</sup> In the immigration context, homosexuality was included in the category of “sexual deviation,” which was a ground for inadmissibility and exclusion under the INA.<sup>253</sup> Until 1979, the U.S. Public Health Service classified homosexuality as a disease, which made it a health-related ground of inadmissibility and exclusion for immigration purposes.<sup>254</sup> The 1990 amendment to the INA removed homosexuality from the list of health-related grounds for inadmissibility and exclusion.<sup>255</sup>

<sup>248</sup> See, e.g., Ravi Somaiya, *Caitlyn Jenner, Formerly Bruce, Introduces Herself in Vanity Fair*, N.Y. TIMES (Jun. 1, 2015), [http://www.nytimes.com/2015/06/02/business/media/jenner-reveals-new-name-in-vanity-fair-article.html?\\_r=0](http://www.nytimes.com/2015/06/02/business/media/jenner-reveals-new-name-in-vanity-fair-article.html?_r=0).

<sup>249</sup> See Friedemann Pfäfflin & Astrid Junge, *Sex Reassignment. Thirty Years of International Follow-Up Studies After Sex Reassignment Surgery: A Comprehensive Review, 1961–1991*, 16 INT’L J. TRANSGENDERISM SYMPOSIUM (2003), <http://web.archive.org/web/20070520063824/http://www.symposium.com/ijt/pfaefflin/1000.htm>.

According to some medical scholars, the term “sex change” is factually inaccurate. *Id.* A person’s sex is determined by four factors: chromosomes, gonads, hormones, and primary sex characteristics. *Id.* While the latter two can be therapeutically changed, the first two cannot, as chromosomes cannot be changed and gonads, while removable, cannot be replaced. *Id.*

<sup>250</sup> *Homosexuality and Adolescence*, 92 AM. ACAD. OF PEDIATRICS 631, 631 (1993); Terri R. Day & Danielle Weatherby, *The Case For LGBT Equality*, 81 BROOK. L. REV. 1015, 1049–50 (2016). *But see* Janet E. Halley, *Sexual Orientation and the Politics of Biology: A Critique of the Argument from Immutability*, 46 STAN. L. REV. 503, 515–16 (1993) (critiquing immutability).

<sup>251</sup> JONATHAN KATZ, *GAY AMERICAN HISTORY: LESBIANS AND GAY MEN IN THE U.S.A.* 129 (1976).

<sup>252</sup> Yoshino, *supra* note 21, at 787–88.

<sup>253</sup> Marc Bogatin, *The Immigration and Nationality Act and the Exclusion of Homosexuals: Boutillier v. INS Revisited*, 5 IMMIGR. & NAT’LITY L. REV. 95, 95–96 (1981).

<sup>254</sup> James R. Edwards, Jr., *Homosexuals and Immigration: Developments in the United States and Abroad*, CTR. FOR IMMIGR. STUD. (May 1999), <http://cis.org/Immigration%2526Homosexuals-PolicyTowardHomosexuals>.

<sup>255</sup> Jordan Cummings, *Nonserious Marijuana Offenses and Noncitizens: Uncounseled Pleas and Disproportionate Consequences*, 62 UCLA L. REV. 510, 563 (2015); Edwards, *supra* note 254.

### B. Passing

On June 7, 1892, Homer Plessy purchased a first-class ticket and boarded a “white” car of a train of the East Railroad Company in New Orleans, Louisiana.<sup>256</sup> He was 7/8 European and 1/8 African, and he was born a free man.<sup>257</sup> But under Louisiana’s “one drop rule,”<sup>258</sup> he was classified as black and required to sit in the “colored” car.<sup>259</sup> Nevertheless, he was able to board and remain in the “white” car because of the light color of his skin.<sup>260</sup> He could have remained there had he not intentionally revealed to the train conductor that he was indeed African-American.<sup>261</sup> He boarded the train with the purpose of testing the constitutionality of Louisiana’s law.<sup>262</sup> That effort led to the legitimization of racial segregation laws and the doctrine of “separate but equal,” which remained for more than half a century until its repudiation in 1954 with *Brown v. Board of Education*.<sup>263</sup>

Mr. Plessy’s story is just one historical example, among many, of racial passing. Racial passing is a sociological term used to describe a situation where a member of one racial group poses and is accepted as a member of a different racial group.<sup>264</sup> In the United States, racial passing, particularly among African-Americans, has been used as a tool to assimilate into the white majority to escape racial discrimination, subjugation, and even death during slavery.<sup>265</sup> If conversion means the change or alteration of the stigmatized trait or facet of identity, passing is the hiding of that trait or identity. Thus, passing is not limited to a race-based form.<sup>266</sup> A sex-based form of passing might occur when a transgender person passes as a cisgender person and society accepts them as a cisgender person. In the context of disability, a deaf person might pass as a hearing person. In the context of sexual orientation, passing occurs when a gay person presents herself to the outside world as straight and the outside world believes her to be so.

In each instance, the impulse to hide or pass one’s identity as something else is usually motivated by cultural or legal demands that stigmatize that particular trait

<sup>256</sup> Rebecca J. Scott, *Public Rights, Social Equality, and the Conceptual Roots of the Plessy Challenge*, 106 MICH. L. REV. 777, 798 (2008).

<sup>257</sup> *Plessy v. Ferguson*, 163 U.S. 537, 541 (1896).

<sup>258</sup> Christine B. Hickman, *The Devil and the One Drop Rule: Racial Categories, African Americans, and the U.S. Census*, 95 MICH. L. REV. 1161, 1187 (1997).

<sup>259</sup> Scott, *supra* note 256, at 798.

<sup>260</sup> Cuison Villazor, *supra* note 8, at 49.

<sup>261</sup> *Id.*

<sup>262</sup> *Id.*

<sup>263</sup> *Brown v. Bd. of Educ.*, 347 U.S. 483, 495–96 (1954).

<sup>264</sup> Randall Kennedy, *Racial Passing*, 62 OHIO ST. L.J. 1145, 1145–46 (2001).

<sup>265</sup> *Id.* at 1146–48.

<sup>266</sup> Forms of race-based passing are not limited to the “perceived polarity of Black and White.” Kevin Noble Maillard & Janice L. McDonald, *The Anatomy of Grey: A Theory of Interracial Convergence*, 26 L. AND INEQ. 305, 307 (2008) (highlighting the complexity of race-based passing in the context of transracial adoption).

or identity.<sup>267</sup> For black slaves, to say that laws stigmatized their racial identity would be an understatement. For those who could pass as white, the choice was between being treated as a person, rather than as property, and between freedom and enslavement, abuse, and even death. For others who experience stigmatized identities in the present day, the legal demand to pass may be less stark, but coercive nonetheless. An example of a more recent law that imposed a passing demand was the Department of Defense Directive 1304.26, in effect from February 28, 1994 to September 20, 2011.<sup>268</sup> Prior to this directive, the military was governed by another directive, which stated that homosexuality was “incompatible with military service.”<sup>269</sup> That regime is an example of a conversion demand.<sup>270</sup> If a gay man or lesbian wanted to serve in the military, he or she was required convert to being straight, which is, of course, impossible. The “don’t ask, don’t tell” directive, however, is an example of a passing demand. It acknowledges the presence of gay persons in the military, as homosexuality alone is not a ground for exclusion under the directive. Yet, the admission that one is gay—or the failure to hide one’s homosexual orientation—is an exclusion ground.<sup>271</sup>

### C. Covering

At the age of twenty-nine, Franklin D. Roosevelt was diagnosed with polio, which eventually paralyzed him from the waist down.<sup>272</sup> He had been active in political life up to this point, but due to the public’s negative perception of disabilities at that time—persons with disabilities were often put into asylums and banished from the family—he withdrew from public life.<sup>273</sup> Refusing to believe that he was permanently paralyzed, Roosevelt began a series of therapies to improve his physical condition and taught himself to walk short distances under the belief that such measures were necessary if he wanted his life in politics back.<sup>274</sup> Roosevelt indeed reentered public life, first as governor of New York in 1929, then as a presidential candidate in 1932, and eventually as president from 1933 to 1945. During that time, he took great care to not highlight his disability. He did not use his wheelchair in public, so much so that there are only two photographs of him in a wheelchair.<sup>275</sup> The wheelchair he used was not a regular wheelchair, which he found attracted too much attention to itself.<sup>276</sup> Instead, he fashioned a smaller one

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<sup>267</sup> GOFFMAN, *supra* note 9, at 25.

<sup>268</sup> U.S. DEP’T OF DEF., DIR., 1304.26, E1.2.8 (Feb. 28, 1994).

<sup>269</sup> Enlisted Administrative Separations, 32 C.F.R. § 41, Appendix A (1982).

<sup>270</sup> YOSHINO, *supra* note 131, at 69.

<sup>271</sup> *Id.* at 69–70.

<sup>272</sup> See generally JEAN EDWARD SMITH, FDR (2007) (documenting FDR’s suffering from and treatment of polio).

<sup>273</sup> *Id.* at 195.

<sup>274</sup> *Id.* at 194–95, 208.

<sup>275</sup> *Id.* at 305.

<sup>276</sup> HUGH GREGORY GALLAGHER, FDR’S SPLENDID DECEPTION 91–92 (1985).

out of dining chairs with wheels attached so as to remind people of the very chairs in their own dining rooms.<sup>277</sup> Prominent newspapers have recently reported that during the time of his presidency, Roosevelt had a “gentleman’s agreement” between him and the press corps for the press to not report on the extent of his disability,<sup>278</sup> which was enforced by the Secret Service if the press ever tried to photograph him in a “weak” or “disabled” state.<sup>279</sup>

The actions Roosevelt took concerning his physical disability illustrate what Goffman calls covering.<sup>280</sup> Covering occurs when a person with a stigmatized condition or trait downplays that condition or a trait.<sup>281</sup> It differs from conversion because the person is not changing or altering that condition.<sup>282</sup> Covering differs from passing because the person is not hiding the condition or trait, but merely underplaying it.<sup>283</sup> The line between covering and passing, particularly, is not absolute, as one can be considered a continuum of the other; we could describe Roosevelt’s efforts to quell the press’s efforts to write about his disability or his refusal to be photographed in his wheelchair as a form of passing since such actions are an effort to hide his disability. But ultimately he is not presenting himself as a person without a disability, since the public knew that he was in a wheelchair. Instead, he is downplaying his disability, which would be a form of covering. Goffman distinguishes between passing and covering by defining passing as primarily concerned with the “visibility” of the stigmatized characteristic, while covering is concerned with its “obtrusiveness.”<sup>284</sup>

Yoshino has more recently brought to the fore and deepened Goffman’s insights on covering. For example, he has developed a framework for thinking about the different dimension of covering, particularly as it applies to sexual orientation-based covering. He writes that covering can be appearance-based, such as a “gay men who outjock the jocks or lipstick lesbians who outfemme the femmes.”<sup>285</sup> Covering can also be affiliation- or association-based, such as a gay person not affiliating herself or himself with other gay people or with organizations devoted to gay causes.<sup>286</sup> Similarly, activism-based covering occurs when a person limits her participation in gay causes.<sup>287</sup>

Yoshino’s framework for the various dimensions of covering in the sexual orientation context applies to other stigmas. In the context of race-based covering, an African-American woman altering her hair color or texture or wearing a wig to

<sup>277</sup> *Id.*

<sup>278</sup> *Id.* at 93–94.

<sup>279</sup> *Id.*

<sup>280</sup> See GOFFMAN, *supra* note 9, at 102; YOSHINO, *supra* note 131, at x.

<sup>281</sup> Yoshino, *supra* note 21, at 772.

<sup>282</sup> *Id.*

<sup>283</sup> *Id.*

<sup>284</sup> *Id.*; GOFFMAN, *supra* note 9, at 102.

<sup>285</sup> YOSHINO, *supra* note 131, at 80.

<sup>286</sup> *Id.* at 82–85, 89–91.

<sup>287</sup> *Id.* at 85–89.

conceal her natural hair can be a form of appearance-based covering. An untenured Mexican-American professor who is interested in civil rights issues pertaining to Mexican-Americans but does not write about or affiliate himself with relevant causes or issues provides an example of affiliation-, association-, and activism-based covering.<sup>288</sup> In the sex-based covering context, a woman in a male dominated workplace who desires to, but does not, wear skirts to work due to her fear of being perceived as too feminine is an example of appearance-based covering. Conversely, a woman who wears makeup for fear of being perceived as too masculine is another form of appearance-based covering.<sup>289</sup> A woman who tries to limit her affiliation with and identity as a mother would be an example of affiliation-based covering.<sup>290</sup>

All such examples are commonplace in our culture, and there are many more examples of covering and societal demands to cover. Indeed, the demand to cover is a less coercive form of an assimilation demand when compared to conversion and passing. When we are speaking of covering demands, we are considering the need to underplay or downplay who we are, not change who we are or not acknowledge and/or hide who we are. Thus, the harm to the individual's identity is a matter of the extent to which we can or cannot be who we are, making the personal costs less significant. And the demand to cover is not experienced only by those with protected stigmatized characteristics such as race, sex, sexual orientation, religion, or disability. To some extent, we all cover, and for good reason.<sup>291</sup> Downplaying the full extent of ourselves is necessary for social interaction as well as co-existing within and building communities, particularly for diverse societies such as ours.

#### IV. CONSEQUENCE OF STIGMA ON UNDOCUMENTED IMMIGRANTS: IDENTITY PERFORMANCE THEORY APPLIED

Part IV of this Article applies the theoretical framework developed in Part III to undocumented immigrants specifically. It analyzes the specific ways in which undocumented immigrants manage their identities in light of stigma and situates undocumented status into a broader civil rights context. Part II of this Article developed the specific cultural and legal norms that stigmatize undocumented status and undocumented immigrants generally. Such norms serve to both intentionally and unintentionally exclude undocumented immigrants from their communities and stoke their fear of deportation—both of which drive them further into hiding. This Part of this Article construes such cultural and legal norms as coercive assimilation demands and analyzes the specific ways undocumented immigrants engage in the three modes of individual mobilizing strategies and identity performance to cope with the particular stigma: conversion, passing, and covering. But for undocumented immigrants, the relationship between

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<sup>288</sup> See *id.* at 82, 85, 89.

<sup>289</sup> See Yoshino, *supra* note 21, at 780–81.

<sup>290</sup> YOSHINO, *supra* note 131, at 150.

<sup>291</sup> See, *e.g.*, *id.* at 150–51.

discrimination and assimilation is more complex than that for other stigmatized identities. Applying the insights from intersectionality theory, this Article argues that assimilation demands are comparatively more onerous on undocumented immigrants as they are stigmatized not only on account of their undocumented status, but also on account of their other stigmatized identities such as race, class, gender, and sexual orientation.

### *A. Immigrant Conversion*

Under Goffman's typology, conversion is the most coercive of the identity management strategies. To manage the stigma, a person must change who he or she is.<sup>292</sup> For race, sex, sexual orientation, and other immutable conditions, conversion is not possible as a way to cope with the particular stigma. Undocumented status differs from these other forms of stigma since undocumented status is not immutable. Theoretically, an undocumented person can obtain valid immigrant status, thus converting his or her undocumented status. But under current U.S. immigration law, those without familial or employment connections have little to no option of staying lawfully in this country on a more permanent basis. Even those undocumented immigrants with family or employers willing to sponsor them will likely have to be removed to their home country. After removal, the person can face a wait of up to twenty years for certain deportability grounds before being allowed to reenter the United States.<sup>293</sup>

The wait can be even longer for others. Congress imposes a limit on the total number of immigrant visas available each year, and within that limit is what is known as a per-country ceiling that regulates the number of immigrants from one country to 226,000 per year.<sup>294</sup> Although this ceiling is facially neutral, in operation it disfavors certain countries that, due to historical and geographical ties to the United States, have sent more of their nationals to the United States, such as Mexico. For citizens of these countries who have more family ties in the United States as a result, the demand to immigrate far exceeds the 226,000 visas available

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<sup>292</sup> YOSHINO, *supra* note 131, at 49.

<sup>293</sup> *See generally* 8 U.S.C. § 1227 (2012) (deportability grounds).

<sup>294</sup> *Id.* § 1153(a)(3).



each year.<sup>295</sup> The consequence is a growing backlog that can last years, even decades, for nationals of these countries.<sup>296</sup> For example, a U.S. citizen who would like to sponsor her adult children who are Mexican nationals to immigrate to the United States would have to wait over twenty years from the date the family-sponsored immigrant visa petition is filed.<sup>297</sup> However, if the same U.S. citizen has an adult child who is a national of any other country in the Western Hemisphere, there would be no wait.<sup>298</sup> The same is true for Mexican married sons and daughters of U.S. citizens and for Mexican siblings of U.S. citizens, who must wait over twenty years from the date the visa petition is filed, while there is no wait for nationals of the Western Hemisphere. The lengthy waits are reserved only for nationals of Mexico, China, India, and the Philippines, which has prompted some scholars to point out the disproportionate racial impacts that such per-country ceiling have on Asian and Hispanic immigrants.<sup>299</sup> Removal on account of some grounds can mean the person loses the ability to reenter the United States permanently.<sup>300</sup>

Options for lasting forms of relief for undocumented immigrants without family or employer sponsorship, while theoretically possible, are realistically very limited. One is cancellation of removal, but only for those already in removal proceedings. The statutory requirements for cancellation relief are high. Section 240A(a) cancellation relief, available for certain permanent residents, requires lawful admission as a permanent resident for at least five years and continuous residence for seven years.<sup>301</sup> Section 240A(b) cancellation relief, which is available to both permanent and non-permanent residents, has even more onerous conditions, requiring a physical presence of at least ten years, good moral character,

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<sup>295</sup> Of the three categories of immigrant visas subject to the general quota, the greatest number of visas are allocated for family-sponsored immigrants, followed by employment-based immigrants and diversity immigrants. In the 2013 fiscal year, family-sponsored immigrants received 210,303 visas, compared to 161,110 employment-based immigrant visas and 45,618 diversity immigrant visas. See DANIEL C. MARTIN AND JAMES E. YANKAY, DEP'T OF HOMELAND SECURITY, ANNUAL FLOW REPORT: REFUGEES AND ASYLEES: 2013 3 (Aug. 2014). This does not take into account "immediate relatives," which the INA defines as spouses, parents, and children of United States citizens, who are exempt from the yearly general quota and represent the largest group of immigrants admitted into the United States each year. 8 U.S.C. § 1151(b) (2012); see also Kerry Abrams, *What Makes the Family Special?*, 80 UNIV. OF CHI. L. REV. 7, 16–18, 24 (2013) (explaining the reasons why the largest number of visas are allocated for family).

<sup>296</sup> See U.S. DEP'T OF ST., BUREAU OF CONSULAR AFF., VISA BULLETIN: IMMIGRANT NUMBERS FOR FEBRUARY 2016 (2016).

<sup>297</sup> For example, according to the February 2016 Visa Bulletin, the wait time for unmarried adult sons and daughters of U.S. citizens from Mexico is 22 years. *Id.* Other family-sponsored categories from Mexico have similarly long waits. See *id.*

<sup>298</sup> See *id.*

<sup>299</sup> Johnson, *The Intersection of Race and Class*, *supra* note 58, at 12; Jennifer M. Chacón, *Loving Across Borders: Immigration Law and the Limits of Loving*, 2007 WIS. L. REV. 345, 359 (2007) (discussing disproportionate impacts); Stephen H. Legomsky, *Immigration, Equality and Diversity*, 31 COLUM. J. OF TRANSNATIONAL L. 319, 321 (1993) (pointing out racial impacts).

<sup>300</sup> See 8 U.S.C. § 1182(a)(3) (2012) (security-related inadmissibility ground); *Id.* § 1227(a) (security-related deportability ground).

<sup>301</sup> *Id.* § 1229b(a).

and that the removal would cause exceptional and extremely unusual hardship to a U.S. citizen or permanent resident's spouse, parent, or child.<sup>302</sup> Both forms of cancellation relief are unavailable for an immigrant with a conviction for certain crimes, such as an aggravated felony,<sup>303</sup> and cancellation relief too is subject to numerical caps, with no more than four thousand cancellation relief grants available each year.<sup>304</sup> Another option is asylum and withholding of removal, but this form of relief requires the individual to show a fear of persecution on account of narrowly specified grounds.<sup>305</sup> There are several forms of relief that are time-limited, such as temporary protected status, which allow a maximum of eighteen months in the United States for citizens of countries facing civil wars, natural or environmental disasters, or other catastrophes that make return to the particular country difficult.<sup>306</sup>

What this means is that functionally, undocumented status is immutable for many. Given the difficulty of adjusting to a lawful immigrant status, the option is to either stay undocumented, turn oneself into immigration authorities in hopes of attaining a form of relief, or leave the country. The latter two options often mean leaving one's family and community behind, without the realistic chance of seeing them again. Most undocumented immigrants are long-term residents in this country and have established significant familial and community ties in the United States.<sup>307</sup> According to DHS estimates, 41% of undocumented immigrants came to the United States as early as in the 1990s, and 18% arrived in the 1980s.<sup>308</sup> Nearly half of the adults live in homes with children under the age of eighteen.<sup>309</sup> About 4.5 million children who were born in the United States, thus U.S. citizens, have at least one parent who is undocumented.<sup>310</sup> For them, remaining undocumented is the most viable option, as their status is effectively unchangeable. In this respect, undocumented status is a form of stigma that is functionally similar to the other immutable stigmatized traits of gender, race, and sexual orientation.

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<sup>302</sup> *Id.* § 1229b(b).

<sup>303</sup> *Id.* §§ 1229b(a)(3), (b)(1)(C).

<sup>304</sup> *Id.* § 1229b(e)(1).

<sup>305</sup> *Id.* §§ 1158(b)(1)(A), 1101(a)(42)(A). There are other forms of lasting relief such as registry, which confers discretionary authority on the Attorney General to give certain undocumented long-term residents who entered before a specified date lawful permanent resident status, broad scale legalization programs, and adjustment of status. *Id.* § 1259. But the viability of registry as a form of relief decreases with the passage of each year, a new legalization program is politically infeasible, and adjustment of status is subject to categorical exclusions and onerous requirements.

<sup>306</sup> *Id.* § 1254a(b).

<sup>307</sup> Legomsky, *supra* note 56, at 83.

<sup>308</sup> *Unauthorized Immigrants Today: A Demographic Profile*, AM. IMMIGR. COUNCIL (Aug. 19, 2014), <http://www.immigrationpolicy.org/just-facts/unauthorized-immigrants-today-demographic-profile>.

<sup>309</sup> *Id.*

<sup>310</sup> *Id.*

*B. Immigrant Passing*

In June 2011, a man named Jose Antonio Vargas garnered much public attention for publishing an article for the *New York Times Magazine* entitled “My Life as an Undocumented Immigrant.”<sup>311</sup> Born in the Philippines, but having lived in the United States since the age of twelve, Mr. Vargas said that he was living the “American dream.”<sup>312</sup> Indeed, his trajectory fits that narrative. He was raised in humble circumstances in the United States by immigrant grandparents—one a security guard, the other a food server.<sup>313</sup> His mother sent him to the United States in order to give him a life better than her own.<sup>314</sup> He committed himself to his education, graduated high school, then college, and built a distinguished career as a Pulitzer Prize winning journalist, writing for newspapers such as *The Washington Post*, *The San Francisco Chronicle*, and *The Philadelphia Daily News*.<sup>315</sup> Yet, he could not obtain a driver’s license because he lacked lawful immigration status.<sup>316</sup> To work, he showed a photocopy of a fake social security card, and on the federal I-9 employment eligibility form, he checked the box of “citizen,” because to claim permanent residence status required an alien registration number, which would have required a second lie.<sup>317</sup> He wrote that he lived a life of constant fear that he would be “found out.”<sup>318</sup> To guard his secret, he did not talk about his family; instead, he hid all photographs of his family in a shoebox, away from others’ sight. He rarely gave his trust to others.<sup>319</sup>

Mr. Vargas’s story is typical of many undocumented immigrants who live a life of hiding. Hiding his identity as an undocumented immigrant is an act of passing because it is a public denial of a facet of one’s identity.<sup>320</sup> It is akin to Mr. Plessy who presented himself as white to ride in a different section of the train. It is akin to gay men and lesbians the military under the “don’t ask, don’t tell” policy who had to hide their sexual orientation to serve. Rose Cuison Villazor has explicitly drawn the comparison between undocumented immigrants living “in the shadows” with gay men and lesbians living “in the closet,” describing the spaces inhabited by undocumented immigrants as an “undocumented closet.”<sup>321</sup>

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<sup>311</sup> See Jose Antonio Vargas, *My Life as an Undocumented Immigrant*, N.Y. TIMES (Jun. 22, 2011), [http://www.nytimes.com/2011/06/26/magazine/my-life-as-an-undocumented-immigrant.html?\\_r=0](http://www.nytimes.com/2011/06/26/magazine/my-life-as-an-undocumented-immigrant.html?_r=0).

<sup>312</sup> *Id.*

<sup>313</sup> *Id.*

<sup>314</sup> *Id.*

<sup>315</sup> *Id.*

<sup>316</sup> *Id.*

<sup>317</sup> *Id.*

<sup>318</sup> *Id.*

<sup>319</sup> *Id.*

<sup>320</sup> GOFFMAN, *supra* note 9, at 102.

<sup>321</sup> Cuison Villazor, *supra* note 8, at 1–2.

The harmful effects of passing on an individual's health and well-being have been well documented.<sup>322</sup> Due to the stigma associated with undocumented status and the severe consequence of discovery, many undocumented immigrants experience exclusion on multiple levels—be it legal, social, cultural, political, or economic.<sup>323</sup> They face barriers related to their health, relationships, and educational and employment opportunities. They also experience of discrimination.<sup>324</sup> The harmful effects go beyond the individual, as they have an effect on the community.<sup>325</sup> The lives of undocumented immigrants' families, friends, and coworkers are affected.<sup>326</sup> Due to their fear of removal, undocumented immigrants are likely to avoid government employees, particularly law enforcement, which limits adequate police measures.<sup>327</sup> The underutilization of government services by undocumented immigrants not only adversely affects the individual, but also presents an issue of public health. A study has found that more than 20% of the uninsured or underinsured population is undocumented, a disproportionately high percentage.<sup>328</sup> The underutilization of medical services in an attempt to hide one's undocumented status means the postponement of routine examinations and preventative care, which likely leads to hospitalization for more catastrophic conditions for which the person cannot pay—a cost that the community of insured individuals, hospitals, and the government ultimately bears. There are other costs to the community. The fear of being found out also means that undocumented parents are less likely to accompany their children to school and less likely to engage in their communities.<sup>329</sup>

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<sup>322</sup> See, e.g., María Pabón López, *Reflections on Educating Latino and Latina Undocumented Children: Beyond Plyer v. Doe*, 35 SETON HALL L. REV. 1373, 1380–84 (2005) (describing the emotional harm experienced by Latino students who live in fear of deportation); Leisy J. Abrego, *Latino Immigrants' Diverse Experiences of "Illegality"*, in CONSTRUCTING IMMIGRANT "ILLEGALITY": CRITIQUES, EXPERIENCES, AND RESPONSES 139, 147 (Cecilia Menjivar & Daniel Kanstroom eds., 2014).

<sup>323</sup> See Abrego, *supra* note 322, at 142–47. Although this experience of exclusion is a shared trait among the various groups that constitute the undocumented immigrant population, the particular experience of being undocumented varies based on race, gender, geographical location, immigrant generation, and other demographic contexts. *Id.* at 150, 154, 157, 158 (advocating for an intersectional approach to the varied ways immigrants experience "illegality").

<sup>324</sup> SAMEER M. ASHAR ET AL., NAVIGATING LIMINAL LEGALITIES ALONG PATHWAYS TO CITIZENSHIP: IMMIGRANT VULNERABILITY AND THE ROLE OF MEDIATING INSTITUTIONS 14 (2015).

<sup>325</sup> Angela S. García & David G. Keyes, *Life as an Undocumented Immigrant: How Restrictive Local Policies Affect Daily Life*, CTR. FOR AM. PROGRESS (March 26, 2012), <https://www.americanprogress.org/issues/immigration/report/2012/03/26/11210/life-as-an-undocumented-immigrant/>.

<sup>326</sup> Abrego, *supra* note, 322, at 157.

<sup>327</sup> *Id.*

<sup>328</sup> See STEPHEN P. WALLACE, ET AL., UCLA CTR. FOR HEALTH POLICY RES., UNDOCUMENTED AND UNINSURED: BARRIERS TO AFFORDABLE CARE FOR IMMIGRANT POPULATIONS 12 (2013).

<sup>329</sup> García & Keyes, *supra* note 325, at 3–4.

That fear is largely driven by the desire to remain and to continue their lives in the United States. Compared to the passing demands imposed on other stigmatized conditions, the passing demand for undocumented immigrants is arguably more onerous, as the consequence is deportation. This means the separation of families and a return to a country now foreign to the deported individual, who has spent a majority of his or her life in the United States, and to difficult conditions that the person may have risked his or her life to avoid and leave in the first place.<sup>330</sup>

### *C. Immigrant Covering*

If passing is the hiding of one's identity, covering is the downplaying of that identity. According to Goffman, even "persons who are ready to admit possession of a stigma . . . may nonetheless make a great effort to keep the stigma from looming large."<sup>331</sup> Thus, a person with a stigmatized condition that is usually visible, like race, or one that may not be visible but is acknowledged by both the person and the outsider may still cover by downplaying the condition.<sup>332</sup> The line between passing and covering is not clearly demarcated. Attempts to pass can also include aspects of covering. Randall Kennedy, writing about the modes of passing for African-Americans, gives an example of his mother who would modulate her voice on the phone to sound "white" when speaking to figures of authority on important matters, such as employment issues, police issues, or the voicing of consumer complaints.<sup>333</sup> This example is congruous with Goffman's definition of passing, since the speaker in the example is not visible to the listener. Had this interaction occurred in person, where both persons in the exchange understood and acknowledged Mrs. Kennedy as African-American, and Mrs. Kennedy nonetheless modulated her speech to sound "white," then that would illustrate the concept of covering.

In an important respect, the concept of covering is less applicable to undocumented status itself. Even for Mr. Vargas and others like him who have publicly acknowledged their undocumented status, they must continue to pass to avoid the possibility of enforcement and removal.<sup>334</sup> In this way, undocumented status differs from other stigmatized conditions for which the law both acknowledges and protects that status. Discrimination on account of race, sex, disability, and sexual orientation is prohibited in numerous legal contexts.<sup>335</sup> This is

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<sup>330</sup> *Sec id.* at 22.

<sup>331</sup> GOFFMAN, *supra* note 9, at 102.

<sup>332</sup> *Id.* at 102-10.

<sup>333</sup> Kennedy, *supra* note 264, at 1150-51.

<sup>334</sup> Recipients of a deferred action program, such as DAPA and DACA, and others who benefit from the favorable exercise of prosecutorial discretion, would have less passing pressure. In such instances the concept of covering may be more directly relevant, but the temporary nature of these protections means that while passing pressure may be reduced, it is not completely eliminated.

<sup>335</sup> *Sec, e.g.*, Civil Rights Act, 42 U.S.C. § 2000e (2012); Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101 (2012); CONN. GEN. STAT. § 46a-81c (2007).

not so with undocumented status, which remains an unlawful condition. Thus, a person who has publicly acknowledged a stigmatized condition like race, sex, or sexual orientation is less likely to succumb to passing demands under the protection of the law; whereas the demand to pass is much greater for a person with undocumented status who lacks the same protections under the law and must continue to pass to avoid the possibility of deportation.

Though the concept of covering is less directly related to undocumented status itself, immigrants with undocumented status may cover nonetheless because other conditions of stigma overlap with undocumented status. Because undocumented status itself is not a visible characteristic, unlike sex, race, and disability to a certain extent, other characteristics of an individual's identity often serve as a proxy—albeit imperfectly—for undocumented status. Race, national origin, and English-language proficiency have often become substitutions for undocumented status. This was precisely the argument that opponents of Arizona's S.B. 1070 made concerning the “show me your papers” provision of the law, which authorized state law enforcement officers to stop persons believed to be undocumented immigrants to ask for proof of lawful residence.<sup>336</sup> In effect, officers would have to rely mostly on race and national origin to enforce the provision, which could have an over-inclusive effect by unlawfully targeting non-white U.S. citizens and lawful permanent residents.

While the focus on the impact that Arizona's immigration enforcement strategies would have had on lawful immigrants is important and one of the reasons given for why the legislation was heavily criticized,<sup>337</sup> it ignores the role that race, gender, English-language proficiency, and other “low status” characteristics and stigmas play in the lives of undocumented immigrants. Intersectionality theory posits that categories such as race, gender, and class synergistically affect the lives of those who experience discrimination and stigma.<sup>338</sup> Its key insight is that examining discrimination solely through the lens of race, gender, or class exclusively misses the complex interaction among these categories that work together to create a system of disadvantage that is multidimensional.<sup>339</sup> For example, Kimberle Crenshaw has shown that for lives of black women, race, gender, and class work together to create a system of subordination that is more complex and pronounced than the subordination on account of each category individually.<sup>340</sup> Other scholars have

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<sup>336</sup> Support Our Law Enforcement and Safe Neighborhoods Act, S.B. 1070, 49th Leg., 2d Reg. Sess. (Ariz. 2010) (amended by H.B. 2162, 49th Leg., 2d Sess. (Ariz. 2010)); Nicholas, *supra* note 75.

<sup>337</sup> See, e.g., Jennifer R. Phillips, *Arizona's S.B. 1070 and Federal Preemption of State and Local Immigration Laws: A Case for More Cooperative and Streamlined Approach to Judicial Review of Subnational Immigration Laws*, 85 S. CAL. L. REV. 955, 996–97 (2012) (showing the danger of racial profiling and enforcement based mostly on race and national origin).

<sup>338</sup> Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1245–47 (1991); Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 587 (1990).

<sup>339</sup> Crenshaw, *supra* note 338, at 1241–45.

<sup>340</sup> *Id.*

applied intersectionality theory for other identities.<sup>341</sup> Undocumented immigrants, then, may face subordination on account of their race, national origin, English-language proficiency, gender, and sexual orientation, in addition to their undocumented status.<sup>342</sup>

As related to the mode of covering, this intersection between undocumented status and race, national origin, English-language proficiency, gender, and sexual orientation also means that undocumented immigrants who may have disclosed their status may still downplay aspects of their race, national origin, English-language proficiency, gender, and sexual orientation to blend in to the mainstream.<sup>343</sup> Stated differently, because an immigrant with undocumented status may still possess other stigmatized conditions related to race, national origin, English-language proficiency, gender, and sexual orientation, the concept of covering is still relevant to him or her. Mr. Vargas and others like him who have publicly declared their undocumented status may still engage in appearance-based, affiliation-, association-, and activism-based covering.<sup>344</sup> Mr. Vargas may choose to downplay his Filipino culture by refusing to speak his native language and by speaking English around government officials. He may limit his employment opportunities with other Filipinos or with Hispanics for fear that he may be targeted. He may limit his participation in immigrant rights work to draw less political attention to himself. Each of these examples would illustrate covering attempts by an undocumented immigrant that both relate to and go beyond his undocumented status. And in such a way, the covering (and passing) demands experienced by undocumented immigrants are arguably more complex and onerous than other stigmatized conditions since undocumented status includes and is related to other stigmatized conditions—something that cannot necessarily be said with as much force for the other stigmatized conditions, which tend to be more mutually exclusive.<sup>345</sup>

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<sup>341</sup> See Aziz, *supra* note 238, at 15–17 (arguing that Muslim women of color experience subjugation on account of their gender, race, and religion).

<sup>342</sup> See Johnson, *The Intersection of Race and Class*, *supra* note 58, at 4–22 (analyzing the ways class and race interact in immigration enforcement); Saucedo, *supra* note 50, at 262–63.

<sup>343</sup> See YOSHINO, *supra* note 131, at 79.

<sup>344</sup> *Id.* at 82, 85, 89; Vargas, *supra* note 311.

<sup>345</sup> To be sure, undocumented status is not the only condition where one might experience stigma on account of other conditions. Minority women, for example, often experience stigma on account of at least two—and perhaps more—conditions. See Johnson, *The Intersection of Race and Class*, *supra* note 58, at 4; Saucedo, *supra* note 50, at 262–63. Undocumented immigrants who are gay are another example. Indeed, the latter circumstance describes Mr. Vargas, who also came out as gay. Vargas, *supra* note 311. He writes, however, that coming out of what some have called the “undocumented closet” has been much more difficult for him than coming out with regard to his sexual orientation. *Id.*

## V. OBAMA ADMINISTRATION'S DEFERRED ACTION PROGRAMS AS AN INSTRUMENT FOR CHALLENGING A DE FACTO PASSING REGIME

Parts I and II of this Article have shown that undocumented status functions under the rules of stigma and that legal and cultural norms evidence this view. Parts III and IV have shown the consequence of such stigma by considering the three modes of identity modification to manage their stigmatized identities. Unlike other stigmas for which the law provides protection, undocumented status remains unlawful. This means that undocumented immigrants must hide who they are to avoid social and legal consequences. Part V of this Article considers the Obama Administration's deferred action programs as a possible solution to this problem by theorizing the deferred action programs as an anti-passing mechanism that incentivizes immigrants to eschew unlawful hiding. First, this Part contends that the current laws and the federal government's immigration enforcement priorities have created what can be described as a de facto passing regime. Second, within the constraints of the current congressional stalemate on immigration reform, it considers Deferred Action for Childhood Arrivals ("DACA") and Deferred Action for Parental Accountability ("DAPA") as a more systematic attempt to address passing pressures for some undocumented immigrants.

### A. Plan and Purpose of DACA and DAPA

In August 2012, President Obama announced a program entitled Deferred Action for Childhood Arrivals that gave undocumented immigrant children reprieve from deportation for two years.<sup>346</sup> The program also allowed certain immigration benefits, like the issuance of work authorization.<sup>347</sup> As its name suggests, the purpose of DACA was to defer deportation in what is known as an act of prosecutorial discretion.<sup>348</sup> Simply put, executive officials would exercise their discretion to not prosecute. The reprieve from deportation would be temporary as recipients of DACA do not attain lawful status under immigration law,<sup>349</sup> and theoretically, such recipients could be deported once their status under DACA expired.

On November 20, 2014, President Obama announced more initiatives by executive action.<sup>350</sup> The initiatives included both new enforcement and benefits

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<sup>346</sup> JEANNE BATALOVA, ET AL., *DACA AT THE TWO-YEAR MARK: A NATIONAL AND STATE PROFILE OF YOUTH ELIGIBLE AND APPLYING FOR DEFERRED ACTION 3* (2014).

<sup>347</sup> *Id.*

<sup>348</sup> *Deferred Action for Childhood Arrivals*, DEPT OF HOMELAND SECURITY (July 17, 2015), <http://www.dhs.gov/deferred-action-childhood-arrivals#0>.

<sup>349</sup> *See id.*

<sup>350</sup> Barack Obama, President of the United States, Remarks by the President in Address to the Nation on Immigration (Nov. 20, 2014), <https://www.whitehouse.gov/the-press-office/2014/11/20/remarks-president-address-nation-immigration>.



measures.<sup>351</sup> On the enforcement front was a new department-wide directive for greater attention placed on immigrants with national security threats and criminal convictions.<sup>352</sup> In a similar vein, the new directive emphasized a new model of enforcement, in lieu of the Secured Communities Program, which would coordinate federal, state, and local efforts focused on removing those with criminal convictions instead of all undocumented immigrants.<sup>353</sup> On the benefits side were efforts to streamline and make more efficient the way visas were processed and efforts to better protect immigrant workers rights by improving coordination among the Department of Labor and the immigration agencies.<sup>354</sup> President Obama also announced the expansion of waivers of unlawful presence<sup>355</sup> and efforts to promote the values of citizenship and encourage naturalization.<sup>356</sup>

Perhaps the most controversial part of the benefits measure was the expansion of DACA and a new deferred action program called Deferred Action for Parental Accountability (“DAPA”).<sup>357</sup> Like DACA from two years before, both the expanded DACA and DAPA are an exercise of prosecutorial discretion that would focus enforcement efforts on those with criminal convictions and those who posed a national security threat.<sup>358</sup> Both programs would provide undocumented immigrants who came to the United States as children—also known as

<sup>351</sup> *See id.*

<sup>352</sup> *Executive Actions on Immigration*, U.S. CITIZENSHIP AND IMMIGR. SERVS., <http://www.uscis.gov/immigrationaction> (last updated Apr. 15, 2105).

<sup>353</sup> *Id.*

<sup>354</sup> *Id.*; see *Fact Sheet: Establishment of Interagency Working Group for the Consistent Enforcement of Federal Labor Employment and Immigration Laws*, U.S. DEP’T OF LAB., <https://www.dol.gov/general/immigration/interagency-working-group> (last visited Feb. 15, 2016).

<sup>355</sup> Unlawful presence is a ground of inadmissibility and describes someone who has resided unlawfully in the United States for 180 days or more. *Executive Actions on Immigration*, *supra* note 352. This program would expand the category of persons who merit the waiver to include sons and daughters of U.S. citizens and spouse, sons, and daughters of lawful permanent residents. *Id.*

<sup>356</sup> *Id.*

<sup>357</sup> *See id.*

<sup>358</sup> Indeed, DHS has issued memoranda emphasizing that its enforcement and removal policies should prioritize those who are a security risk to the United States. See, e.g., Memorandum from Jeh Johnson, Sec’y, U.S. Dep’t of Homeland Sec., to Leon Rodriguez, Dir., U.S. Citizenship & Immigration Serv., et. al. (Nov. 20, 2014), [http://www.dhs.gov/sites/default/files/publications/14\\_1120\\_memo\\_deferred\\_action.pdf](http://www.dhs.gov/sites/default/files/publications/14_1120_memo_deferred_action.pdf); Memorandum from John Morton, Director, U.S. Dep’t of Homeland Sec., to Field Dirs., Special Agents, & Chief Counsel, U.S. Dep’t of Homeland Sec. (June 17, 2011), <https://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf>. The highest priority individuals are those who pose a threat to national security, border security, and public safety. Memorandum from Jeh Johnson, *supra* note 358, at 3. They include persons suspected of terrorism, those apprehended at the border, and persons convicted of gang-related crimes and certain felonies. *Id.* The next level priority includes persons convicted of three or more misdemeanors, persons convicted of “significant” misdemeanors, and those apprehended within the United States and who cannot establish their continuous residence in the United States since January 1, 2014. *Id.* at 4. All others fall into the third priority category. *Id.* Persons who would qualify for DACA and DAPA would fall into the third category, but would need to meet additional requirements to attain favorable discretion.

DREAMers—a temporary relief from removal.<sup>359</sup> The DACA program announced in November 2014 is an expansion of the prior DACA program in the sense that it eliminates the age requirement, thereby opening up the program to more individuals.<sup>360</sup> The prior DACA program required one to be under the age of thirty-one at the time of the program's announcement.<sup>361</sup> Under the new program, as long as the person arrived before the age of sixteen and continuously resided in the United States since January 1, 2010, he or she is eligible to apply.<sup>362</sup>

Like DACA and the expanded DACA programs, DAPA offers temporary relief from removal in an exercise of prosecutorial discretion and provides those who qualify with work authorization.<sup>363</sup> Unlike DACA, which focused on undocumented children, DAPA gives relief to parents of U.S. citizens and lawful permanent residents who qualify.<sup>364</sup> To qualify for DAPA relief, the individual must have a citizen or lawful permanent resident son or daughter as of November 20, 2014, have continuously resided in the United States from before January 1, 2010, and be physically present in the United States on November 20, 2014 and at the time of application.<sup>365</sup> As with DACA, there are characteristics that would disqualify an individual from DAPA relief, such as a conviction for certain crimes, suspected involvement in terrorist activities and other national security concerns, and certain other immigration violations.<sup>366</sup>

According to the White House's estimates, the expanded DACA and DAPA programs would have accounted for approximately five million undocumented immigrants.<sup>367</sup> This number is consistent with recent studies. The Migration Policy Institute estimated the number of DAPA eligible at 3.7 million and forecasted the expansion of DACA to include 290,000 more individuals to add to the approximately 580,000 children who already obtained relief and others eligible for relief to bring the total number of DACA eligible to approximately 1.5 million.<sup>368</sup> According to this study, then, DACA and DAPA programs combined could benefit more than 5.2 million individuals.<sup>369</sup>

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<sup>359</sup> Memorandum from Jeh Johnson, *supra* note 358, at 1–3.

<sup>360</sup> *Id.* at 3.

<sup>361</sup> *Id.*

<sup>362</sup> *Executive Actions on Immigration*, *supra* note 352.

<sup>363</sup> *Id.*

<sup>364</sup> *Id.*

<sup>365</sup> *Id.*

<sup>366</sup> *See id.*

<sup>367</sup> *Id.*

<sup>368</sup> Press Release, Migration Policy Inst., As Many as 37 Million Unauthorized Immigrants Could Get Relief from Deportation Under Anticipated New Deferred Action Program (Nov. 19, 2014), <http://migrationpolicy.org/news/mpi-many-37-million-unauthorized-immigrants-could-get-relief-deportation-under-anticipated-new>.

<sup>369</sup> *Id.*

*B. DAPA and DACA as a Challenge to the Passing Regime*

When President Obama spoke to the American public on November 20, 2014, about the need for DACA, he emphasized the following three purposes for the change: fairness, administrative efficiency, and a way to bring undocumented immigrants “out of the shadows.”<sup>370</sup> In another speech, he stated, “Effective immediately, the Department of Homeland Security is taking steps to lift the shadow of deportation from these young people.”<sup>371</sup> The DAPA memorandum written two years later emphasizes this very point. It underscores the “reality . . . that most individuals [who would qualify for deferred action] . . . are hard-working people who have become integrated members of American society.”<sup>372</sup> It states that the programs “encourage . . . people to come out of the shadows, submit to background checks, pay fees, apply for work authorization . . . and be counted.”<sup>373</sup>

The often-cited reason for bringing undocumented immigrants out of the “shadow of deportation” is security-related.<sup>374</sup> According to the latest DHS study, current estimates show there are over eleven million residents in the country that the government knows little to nothing about.<sup>375</sup> Either the person effected unauthorized or surreptitious entry or the person overstayed his or her visa. In either situation, the Department of Homeland Security (“DHS”) lacks either the ability or will to formally keep track of such persons. Without the ability to document who they are and why they are in the country, the government lacks the ability to identify those who pose a security risk to our communities and a threat to the United States.

But an unexamined aspect of the deferred action programs is that the programs represent a significant step for easing the passing pressures developed in Part II of this Article by challenging, albeit in a limited, temporary way for some, what is a de facto passing regime. In addition to the coercive assimilation demands in both the cultural and legal landscape that explain why undocumented immigrants pass, an important reason for why undocumented immigrants live a life of hiding is that the current legal regime arguably condones passing. The latest DHS study estimates that there are over eleven million immigrants in the United States without valid immigrant status.<sup>376</sup> It would be unrealistic for Immigration and Customs Enforcement (“ICE”), the agency within DHS charged with removals, to be able to remove all undocumented persons in the United States, even if there were the political will to deport every one of these individuals due to diminished resources at

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<sup>370</sup> Obama, *supra* note 350.

<sup>371</sup> Barack Obama, President of the United States, Remarks by the President on Immigration (June 15, 2012), <https://www.whitehouse.gov/the-press-office/2012/06/15/remarks-president-immigration>.

<sup>372</sup> Memorandum from Jeh Johnson, *supra* note 358, at 3.

<sup>373</sup> *Id.*

<sup>374</sup> Memorandum from John Morton, *supra* note 358, at 2, 4.

<sup>375</sup> Baker & Rytina, *supra* note 227.

<sup>376</sup> *Id.*

the agency.<sup>377</sup> The diminishing resource problems at the agency have been well documented.<sup>378</sup> Simply put, the Executive Office for Immigration Review (“EOIR”), the agency that oversees the immigration courts, is underfunded and the workload of the immigration judges is enormous.<sup>379</sup> During the 2014 fiscal year, immigration judges received a total of 306,045 immigration matters, of which 248,078 were completed.<sup>380</sup> With the number of immigration judges at around 250,<sup>381</sup> and assuming that cases are divided evenly among the all judges, and that each case takes the same amount of time to complete, each a judge would have had to complete around 1,224 cases.<sup>382</sup> This means that on average an immigration judge was required to complete about 4.7 removal cases each day.<sup>383</sup>

When the completion rate of immigration courts is compared to other adjudications that occur at other agencies, the differences are telling. For example, at the Social Security Administration, an agency that does comparable high-volume adjudications, the average number of dispositive hearings handled by an Administrative Law Judge for the agency in the 2007 fiscal year was 544.<sup>384</sup> At the Board of Veterans Appeals, each Veterans Law Judge handled an average of 819 matters per year in the 2010 fiscal year.<sup>385</sup> When compared to the workload of a federal district court judge, the comparison is even harsher, with a typical federal district court judge completing an average of 566 cases during the 2011 fiscal year.<sup>386</sup> Comparisons to the district court, in particular, must be drawn with an

<sup>377</sup> See Andrew Tae-Hyun Kim, *Rethinking Review Standards in Asylum*, 55 WM. & MARY L. REV. 581, 610–11 (2013) (discussing agency under-resourcing issue). ICE’s budget for the next fiscal year is \$6 billion dollars. U.S. DEP’T OF HOMELAND SEC., BUDGET-IN-BRIEF: FISCAL YEAR 2016 (2016). The cost to apprehend, detain, and remove 11.3 million persons would require a budget of \$114 billion. Philip E. Wolgin, *What Would it Cost to Deport 11.3 Million Unauthorized Immigrants?*, CTR. FOR AM. PROGRESS (Aug. 18, 2015), <https://www.americanprogress.org/issues/immigration/news/2015/08/18/119474/what-would-it-cost-to-deport-11-3-million-unauthorized-immigrants/>.

<sup>378</sup> Kim, *supra* note 377, at 608–10.

<sup>379</sup> COMM’N ON IMMIGRATION, ABA, REFORMING THE IMMIGRATION SYSTEM: EXECUTIVE SUMMARY ES-19, ES-28 (2010).

<sup>380</sup> EXEC. OFFICE FOR IMMIGRATION REVIEW, U.S. DEP’T OF JUSTICE, FY 2014 STATISTICS YEARBOOK A2 (2015).

<sup>381</sup> Office of the Chief Immigration Judge, U.S. DEP’T OF JUST., <https://www.justice.gov/eoir/office-of-the-chief-immigration-judge> (last visited Feb. 15, 2016).

<sup>382</sup> This figure is a rough estimate and does not take into account a range of other factors, such as the number of cases that are on backlog.

<sup>383</sup> This average daily caseload is reached by dividing an annual caseload of approximately 1,224 by the average number of workdays in a year, 260. Stephen Legomsky has noted that others have estimated the average caseload at four per day, while others have estimated even six per day. Stephen H. Legomsky, *Restructuring Immigration Adjudication*, 59 DUKE L.J. 1635, 1652 (2010); see also Sydenham B. Alexander III, *A Political Response to Crisis in the Immigration Courts*, 21 GEO. IMMIGR. L.J. 1, 19–21 (2006).

<sup>384</sup> LENNI B. BENSON & RUSSELL R. WHEELER, ENHANCING QUALITY AND TIMELINESS IN IMMIGRATION REMOVAL ADJUDICATION 27 (2012).

<sup>385</sup> *Id.*

<sup>386</sup> *Id.*

understanding that the disposition of a typical district court case may be more time and resource intensive. Not only is each district court matter arguably more complex, but also the varied nature of the subject matters handled by the district court may slow down the completion rate.<sup>387</sup>

Operating in an environment of limited resources, ICE would necessarily have to exercise its discretion in prioritizing its enforcement decisions. In her 2011 letter to the Senate, then-Secretary of the Department of Homeland Security Janet Napolitano explained that ICE would prioritize “removing criminal aliens, those who posed a threat to public safety and national security, [and] repeat immigration law violators . . . .”<sup>388</sup> As a result, others, including children who would come under the DACA program, and eligible parents of U.S. citizen children under the DAPA program, would attain reprieve from deportation. The twenty-six states that have opposed DAPA and expanded DACA have argued that the Obama Administration’s exercise of discretion amounts to non-enforcement of the laws.<sup>389</sup> However, an agency’s determination not to bring an enforcement action is a decision “generally committed to an agency’s absolute discretion.”<sup>390</sup> Much like the discretion that a prosecutor has in pursuing an indictment, DHS has the discretion to choose to pursue an enforcement action against an undocumented immigrant.<sup>391</sup> Judicial review of such decisions is quite limited.<sup>392</sup> The executive agency enjoys such latitude from court’s interference because the agency is in the best position to know how best to prioritize its mandate.

Though some scholars have argued that the discretion exercised by immigration officials during President Obama’s administration amounts to a non-enforcement of the immigration laws that violates the Take Care Clause of the Constitution,<sup>393</sup> according to DHS, ICE conducted a record number of removals from 2009 to

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<sup>387</sup> Comparisons of completion rates across agencies do not take into account the percentage of cases completed which take the most judicial work, both during and outside of the hearing. For example, the immigration completion rate encompasses some hearings, like master calendar hearings, which are not as resource and time intensive as individual merit hearings. Nevertheless, individual merit hearings have comprised the majority of the immigration docket. During the individual merit hearings, immigration judges take and evaluate evidence and do work similar to what a trial judge does in an Article III hearing in a highly complex area of the law. *Id.* at 25.

<sup>388</sup> Letter from Janet Napolitano, Sec’y, U.S. Dep’t of Homeland Sec., to Senator Dick Durban (Aug. 18, 2011), [https://cliniclegal.org/sites/default/files/Napolitano Letter to Durban August 18, 2011.pdf](https://cliniclegal.org/sites/default/files/Napolitano%20Letter%20to%20Durban%20August%2018,%202011.pdf).

<sup>389</sup> Elise Foley, *Over Half the States are Suing Obama for Immigration Actions*, HUFFINGTON POST (Jan. 27, 2015), [http://www.huffingtonpost.com/2015/01/26/states-lawsuit-immigration\\_n\\_6550840.html](http://www.huffingtonpost.com/2015/01/26/states-lawsuit-immigration_n_6550840.html).

<sup>390</sup> *Heckler v. Chaney*, 470 U.S. 821, 831 (1985).

<sup>391</sup> *Id.* at 832.

<sup>392</sup> *See id.*

<sup>393</sup> See Robert J. Delahunty & John C. Yoo, *Dream On: The Obama Administration’s Nonenforcement of Immigration Laws, the DREAM Act, and the Take Care Clause*, 91 TEX. L. REV. 781, 784 (2013).

2014.<sup>394</sup> Indeed, immigration enforcement has increased under President Obama,<sup>395</sup> but the reality is that a vast majority of removal cases will go unenforced due, in part, to an agency that is under-resourced and lacks the institutional capacity to handle such enforcement measures.<sup>396</sup>

This under-enforcement of the undocumented population in the United States is not new and describes over a hundred years of U.S. immigration policy.<sup>397</sup> According to Hiroshi Motomura, during the turn of the century, the need for seasonal agricultural labor in the Southwestern United States, combined with restrictions on Asian immigration, forced employers to turn to Mexican laborers.<sup>398</sup> To meet the needs of employers, the government applied the exclusion grounds selectively—and favorably—for Mexicans, and the minimal enforcement efforts at that time did not target Mexicans, but the Chinese.<sup>399</sup> The government acceded to the needs of employers who favored hiring a temporary, disposable, and an unauthorized workforce who were not subject to labor law protections<sup>400</sup> and consumers who want lower prices. Such tolerance reflects the government's ambivalent view of undocumented immigrants as both lawbreakers who should be deported and invited and necessary contributors to the U.S. economy, and continues to characterize U.S. immigration policy to this day. What this has created is a population of undocumented immigrants many of whom have lived in the United States without status for decades.<sup>401</sup>

While the likelihood of enforcement may be low in a given case, the threat of deportation always remains because it can come anytime, without warning, and its impact is devastating. Unlike certain offenses where statutes of limitations shield the defendant from liability after a reasonable passage of time, or an equitable defense such as laches, which forecloses a plaintiff from bringing an otherwise valid claim due to unreasonable delay, no such time-limited protections exist in the immigration context. DHS can bring a removal case years, even decades, after the initial unlawful act. The result is that families and communities that took years to

<sup>394</sup> According to DHS, ICE removed 2.4 million noncitizens during this time. *Texas v. United States*, 809 F.3d 134, 188, n.1 (5th Cir. 2015) (King, J., dissenting).

<sup>395</sup> Ana Gonzalez-Barrera, *U.S. Deportations of Immigrants Reach Record High in 2013*, PEW RES. CTR. (Oct. 2, 2014), <http://www.pewresearch.org/fact-tank/2014/10/02/u-s-deportations-of-immigrants-reach-record-high-in-2013>.

<sup>396</sup> See Kim, *supra* note 377, at 608–10.

<sup>397</sup> Hiroshi Motomura, *Immigration Outside the Law*, 108 COLUM. L. REV. 2037, 2050 (2008).

<sup>398</sup> HIROSHI MOTOMURA, *AMERICANS IN WAITING: THE LOST STORY OF IMMIGRATION AND CITIZENSHIP IN THE UNITED STATES* 129–30 (2006).

<sup>399</sup> Motomura, *supra* note 397, at 2050.

<sup>400</sup> *Id.* at 2052.

<sup>401</sup> This phenomenon is not new. Over three decades ago, Justice Brennan in *Plyler v. Doe* observed, “Sheer incapability or lax enforcement of the laws barring entry into this country, coupled with the failure to establish an effective bar to the employment of undocumented aliens, has resulted in the creation of a substantial ‘shadow population’ of illegal migrants—numbering in the millions—within our borders.” *Plyler v. Doe*, 457 U.S. 202, 218 (1982).

build can be ripped apart unexpectedly,<sup>402</sup> leaving more children in the foster care system and creating more single-parent households.

What this describes is a de facto passing regime, much like the “don’t ask, don’t tell” policy in the military context, where the government, through its lack of enforcement, was condoning, and arguably encouraging, passing. The Obama Administration’s deferred action programs represent a more systematic attempt to challenge what is a de facto passing regime in the immigration context.<sup>403</sup> To be sure, the idea of prosecutorial discretion that underpins DACA and DAPA is not new.<sup>404</sup> Deferred action was recognized as early as the 1970s by the INS with the category called “non-priority status.”<sup>405</sup> Persons within that category were not an enforcement priority. Since then, both courts and Congress have routinely recognized the Secretary’s authority to exercise discretion in enforcement decisions.<sup>406</sup> The Secretary has exercised that decision in deferring removal for humanitarian reasons.<sup>407</sup> Immigration law is replete with other examples of discretionary decisions by the Secretary, who can stay or cancel removal by giving more limited forms of relief, such as granting extended voluntary departure,<sup>408</sup> or more lasting forms of relief, such as the granting of special visas for victims of trafficking or domestic violence.<sup>409</sup> There are other examples of both statutorily designated and non-statutorily designated forms of relief that are temporary, such as temporary protected status,<sup>410</sup> parol-in-place,<sup>411</sup> and deferred enforced departure.<sup>412</sup> Like the deferred action programs, these latter forms of temporary

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<sup>402</sup> See generally DANIEL KANSTROOM, *DEPORTATION NATION: OUTSIDERS IN AMERICAN HISTORY* (2007) (examining the nature, history, and impact of the deportation system in the United States).

<sup>403</sup> See *supra* Part IV.

<sup>404</sup> See 8 U.S.C. § 1252(g) (2012) (limiting judicial review of decision to commence removal proceedings and the decision to execute removal orders). For an extensive scholarly treatment of prosecutorial discretion, including deferred action, in immigration cases, see SHOBA SIVAPRASAD WADHIA, *BEYOND DEPORTATION: THE ROLE OF PROSECUTORIAL DISCRETION IN IMMIGRATION CASES* (2015).

<sup>405</sup> Memorandum Opinion from Karl R. Thompson, Principal Deputy Assistant Attorney Gen., Office of Legal Counsel, to the Sec’y of Homeland Sec. & Counsel to the President 13 (Nov. 19, 2014), <http://www.justice.gov/sites/default/files/olc/opinions/attachments/2014/11/20/2014-11-19-auth-prioritize-removal.pdf> (internal quotations omitted).

<sup>406</sup> See *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 484–85 (1999).

<sup>407</sup> *Id.* at 483–84.

<sup>408</sup> *Hotel & Rest. Emps. Union, Local 25 v. Attorney Gen.*, 804 F.2d 1256, 1261 (D.C. Cir. 1986), *vacated on other grounds*, 846 F.2d 1499 (D.C. Cir. 1988) (*en banc*).

<sup>409</sup> See 8 U.S.C. § 1101(a)(15)(T) (2012).

<sup>410</sup> *Id.* § 1254(a).

<sup>411</sup> *Id.* U.S.C. § 1182(d)(5)(A).

<sup>412</sup> See Jennifer M. Chacon, *Producing Legal Liminality*, 92 *DENV. U. L. REV.* 709, 722 (2015).

relief do not offer legal status and produce an experience of prolonged legal uncertainty, what Cecilia Menjivar calls “legal liminality.”<sup>413</sup>

But while this discretion has existed to potentially give undocumented immigrants relief from removal, it has never been exercised as systematically, transparently, or as evenly across various decision-makers.<sup>414</sup> Without a clear standard that would guide the prospective immigrant regarding the chances of success, an immigrant who was undocumented would have less incentive to come forward. Moreover, the combination of years of under-enforcement, lack of clear priority about how the discretion would be exercised, and under-resourcing issues at the agency have pushed what is a sizeable and growing undocumented immigrant population even further underground.<sup>415</sup> In short, it has incentivized passing.

DACA and DAPA represent a shift from that regime, where the law acknowledges a person’s undocumented status and formally shields them from deportation. To be sure, there are limitations with DACA and DAPA. The protections are temporary, lasting only three years with a chance for renewal<sup>416</sup> The programs do not provide a permanent pathway to integration into American communities. The programs, along with other exercises of prosecutorial discretion, while relieving passing pressures, formally condone and perpetuate the liminal status of a class of individuals and the attendant harms to identity that accompany prolonged uncertainty. Nevertheless, DACA and DAPA represent a start—the first significant step towards providing a clearer, more structured form of removal relief for a significant portion of the undocumented immigrant population in the United States. By reducing passing pressures and incentivizing millions of undocumented immigrants to step out from a life of fear and hiding, the deferred action programs would help reduce the current barriers that prevent the integration of the undocumented immigrant population into U.S. society.

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<sup>413</sup> *Id.* at 723. The concept of legal liminality has been associated with the work of Cecilia Menjivar, who used the concept to describe a kind of legal instability of Salvadoran and Guatemalan immigrants who move between lawful and unlawful statuses. Cecilia Menjivar, *Liminal Legality: Salvadoran and Guatemalan Immigrants’ Lives in the United States*, 111 AM. J. SOC. 999, 1002-3 (2006).

<sup>414</sup> See generally Anil Kalhan, *Deferred Action, Supervised Enforcement Discretion, and the Rule of Law Basis for Executive Action on Immigration*, 63 UCLA LAW REV. DISCOURSE, 58, 58–62 (2015) (analyzing Obama Administration’s deferred action programs as promoting rule of law values).

<sup>415</sup> Though most undocumented immigrants avoid media attention, several individuals have exposed their undocumented status recently to bring public attention to the plight of other undocumented immigrants and the need for sensible immigration reform. Mr. Vargas, commenting on the large number of undocumented immigrants in the United States stated that he, like many others, are “hiding in plain sight.” Jose Antonio Vargas, *Undocumented and Hiding in Plain Sight*, CNN (Jun. 30, 2014), <http://www.cnn.com/2014/06/26/living/vargas-documented-immigration-essay/>.

<sup>416</sup> *Executive Actions on Immigration*, *supra* note 352.



## CONCLUSION

The question of how we integrate not only the more than eleven million undocumented immigrants in the United States, but also the growing lawful immigrant population here generally will be a central challenge facing this country in the coming years. In a country as ethnically diverse as ours, the fears of a nation fracturing into separate, indivisible spaces defined mainly along ethnic and religious lines are real and reasonable. But the formation of social solidarity does not have to mean the stark choice between coercive assimilation and balkanization. This Article has exposed the high costs exacted by the legal and cultural norms that have imposed passing demands on the lives of undocumented immigrants in this country. In our continued search for shared values around which we can unite, our immigration laws and policy should validate and encourage the expression of our authentic selves. Despite their limitations, and within the constraints of the current congressional stalemate on immigration reform, the Obama Administration's deferred action programs represent a first step in the direction of providing a lawful pathway for sustainable integration into American communities for millions of undocumented immigrants.