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## Citizenship Matters: Conceptualizing Belonging in an Era of Fragile Inclusions

Jennifer M. Chacón\*

*The history of the United States is a long history of excluded peoples making arguments — sometimes more successfully than others — not only about their fitness to hold formal legal citizenship or to exercise the rights of “full citizens,” but also contesting the meanings of citizenship and nation. Theoretical accounts of citizenship have reckoned with how the efforts of outsiders have reconfigured the meaning of citizenship as a social and political institution, altering the boundaries of citizenship’s formal exclusions and inclusions. Today, citizenship is being reconstituted in the same way. Immigrants are changing collective understandings of citizenship through their own accounts, their stories, the very fact of their*

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\* Copyright © 2018 Jennifer M. Chacón. Professor of Law, University of California, Los Angeles School of Law. This article is based on the author’s remarks at the UC Davis Law Review’s Volume 51 Symposium “Immigration Law & Resistance: Ensuring a Nation of Immigrants.” This article is co-authored with other members of my research team: Susan Bibler Coutin, Professor of Criminology, Law and Society and Anthropology, University of California, Irvine, Stephen Lee, Professor of Law, University of California, Irvine School of Law, and Sameer Ashar, Professor of Law and Vice Dean for Experiential Learning, University of California, Los Angeles School of Law, Edolina Burciaga, Assistant Professor of Sociology, University of Colorado, Denver, and Alma Nidia Garza, PhD Student, Department of Sociology, University of California, Irvine.

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long-time residence, and the stories told about them. This article seeks to cast light on the ways that immigrant communities may be conceptualizing and reshaping collective understandings of citizenship in the present moment.

Using information gathered in original interviews conducted in Southern California over a four-year period ending in January 2018, this article describes how harsh and uncertain immigration laws, significant swings in executive policies toward immigrant communities, and blocked access to citizenship have generated new understandings of citizenship and belonging in those communities. In this contemporary context, citizenship is broadly understood both inside and outside immigrant communities as a pragmatic means to certain important, practical ends: freedom to unite with family members and to travel, a legal right to work, and a guaranteed right to remain in this country. But the practical benefits of citizenship are also understood to be circumscribed, particularly when it comes to accessing social welfare benefits and participating in social and political life.

Moreover, restrictionist immigration policies ironically have fueled a degree of skepticism toward the loftier ideals of citizenship. When it comes to political participation, some immigrants view citizenship as an important guarantee of participation through voting, but many immigrants already view themselves as politically engaged actors, even as they view the formal political process with skepticism. When it comes to welfare benefits, many immigrants seem to have a deeply internalized sense that discussing citizenship as a means of accessing benefits actually endangers potential access not only to benefits but to citizenship itself. And while some view citizenship as a way to achieve social belonging, few immigrants view citizenship as a guarantee of equal treatment. Many view race and class as salient aspects of difference that will continue to generate unequal outcomes regardless of citizenship.

This article contextualizes conversations with immigrant residents against the backdrop of broader immigration enforcement efforts and the ongoing (albeit sidelined) public debate over whether or not to grant “earned citizenship” to certain long-time immigrant residents. What emerges is a picture of immigrant communities highly attuned to the practical benefits of citizenship status but acutely aware of the limits of its power and highly sensitive to the costs that citizenship imposes. Immigrants recognize the importance of citizenship’s legal protections, but some long-term residents who have been systematically excluded from citizenship also express a desire for forms of belonging more capacious, more generous, and less exclusionary than U.S. citizenship seems to be. These cautious and critical assessments point to the shortcomings of U.S. citizenship — shortcomings that have become more pronounced in recent

*decades as citizens increasingly wield citizenship as a punitive tool of exclusion.*

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INTRODUCTION

Citizenship is an indeterminate and shifting concept. Theorists who have wrestled with the meaning of citizenship fundamentally disagree about its core components and acknowledge that citizenship’s essential meaning shifts over time.<sup>1</sup> On a practical level, the term

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<sup>1</sup> See, e.g., ELIZABETH F. COHEN, SEMI-CITIZENSHIP IN DEMOCRATIC POLITICS 13, 14 (2014) (“[C]itizenship is both essential and essentially contested” and is “described in many terms that are associated, variously, with statuses, actions, institutions, and rights.”); PATRICK WEIL, THE SOVEREIGN CITIZEN: DENATURALIZATION AND THE ORIGINS

citizenship has been used to describe a number of different concepts. It often signifies legally-bestowed nationality; that is, a rights-bearing status guaranteeing a particular bundle of state-sponsored rights, protections, and benefits. But it also refers to a performative status associated with certain social, political or economic behaviors, and an affective relationship to the state and its members.<sup>2</sup>

Discussions of citizenship in the realm of immigration law and policy often and understandably focus on citizenship as formal legal nationality. Immigration law is concerned with determining who can enter and remain within the national boundaries. Citizenship law is partially contingent on immigration law choices insofar as citizenship law prescribes which immigrants can lay claim (perhaps immediately and perhaps over time) to full juridical citizenship — thinly understood here as legally-bestowed nationality.<sup>3</sup> But debates over the criteria of formal legal admission and formal juridical citizenship are heavily driven by broader normative assumptions about and understandings of citizenship.<sup>4</sup> Choices about whom to admit to citizenship and on what terms depend upon underlying and often competing assumptions about the bundles of rights that inhere in citizenship, the normatively desirable performative features of a citizen, and the sufficiency of affective ties between a nation's members and those seeking membership.

Consequently, when citizens in the United States debate whether there ought to be a “path to citizenship” for long-time U.S. residents who currently lack legal status, they draw on their understandings of the rights and privileges that actually flow from citizenship and of the characteristics that make any one person deserving of such rights and privileges. They rely on their assessments of whether certain

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OF THE AMERICAN REPUBLIC 6 (2013). *See generally* JAMES H. KETTNER, *THE DEVELOPMENT OF AMERICAN CITIZENSHIP, 1608-870* (1978) (discussing shifting conceptions over time); KAREN ORREN & STEPHEN SKOWRONEK, *THE SEARCH FOR AMERICAN POLITICAL DEVELOPMENT* 13-17 (2004) (same); JUDITH N. SHKLAR, *AMERICAN CITIZENSHIP: THE QUEST FOR INCLUSION* 8-9 (1991) (same); ROGERS M. SMITH, *CIVIC IDEALS: CONFLICTING VISIONS OF CITIZENSHIP IN U.S. HISTORY* 14-16 (1997) (same).

<sup>2</sup> *See, e.g.*, COHEN, *supra* note 1, at 17-18, 36, 56.

<sup>3</sup> The contingency is only partial insofar as citizenship law also determines access to citizenship for individuals who never immigrate and who have no immediate, relevant relationship to an immigrant. In the U.S., obvious examples are the children of citizens who are granted *jus sanguinis* citizenship.

<sup>4</sup> *See generally*, RUUD KOOPMANS, *CONTESTED CITIZENSHIP* (2005); GERSHON SHAFIR, *THE CITIZENSHIP DEBATES* (2014); *DEBATING IMMIGRATION* (C. Swain ed., 2007). As these collections make clear, different people give different emphases to particular factors, and they can come to widely divergent policy conclusions concerning citizenship even when analyzing similar factors.

individuals are capable of forming the requisite bonds with the national community, and, relatedly, on whether existing members of the imagined national community are capable of forming the requisite bond with those seeking membership. Myths about the nation's composition and character, and about the meaning of citizenship within this framework, do important work in shaping the practicalities of debates over immigration and citizenship.

Throughout, citizens are usually depicted as the “deciders” of citizenship — the gatekeepers of admission to citizenship in democratic societies. Michael Walzer, for example, famously suggested that:

[a]ffluent and free countries are, like elite universities, besieged by applicants. They have to decide on their own size and character. More precisely, as citizens of such a country, we have to decide: Whom should we admit? Ought we to have open admissions? Can we choose among applicants? What are the appropriate criteria for distributing membership?<sup>5</sup>

Notwithstanding robust theoretical criticisms, Walzer's understanding of the citizenry as the decider of admissions and (more constrainedly)<sup>6</sup> of naturalization criteria undergirds contemporary discussions over immigration and naturalization policy. The implicit assumption is that citizens ultimately will decide the criteria upon which future citizens will be admitted.<sup>7</sup> Insofar as one views citizenship as formal legal nationality, and citizens as the authors of the law that grants such nationality, this is true.

But this truth is also far more complicated than Walzer's analogy suggests. First, as Linda Bosniak has persuasively demonstrated, the

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<sup>5</sup> See, e.g., MICHAEL WALZER, SPHERES OF JUSTICE 32 (1983).

<sup>6</sup> I say more constrainedly because Walzer explains that once an immigrant has been admitted, that person should, in time, acquire a right to citizenship in a properly functioning democracy. See *id.* at 60-62.

<sup>7</sup> Walzer goes on to suggest that the citizenry has control over immigration questions — that is, the questions about who gets to enter the nation's territorial bounds. That decision is a political choice subject to thin moral constraints. *Id.* at 62. Once that decision has been made, in his view, choices about naturalization — that is, about immigrants' access to citizenship — are completely constrained in a just and democratic society. “[E]very new immigrant, every refugee taken in, every resident and worker must be offered the opportunities of citizenship.” *Id.* In fact, formal democratic control over immigrant admission has been imperfect. To use Hiroshi Motomura's term, some immigration to the U.S. in recent decades has occurred “outside the law.” Cf. HIROSHI MOTOMURA, IMMIGRATION OUTSIDE THE LAW 4 (2014). The fact that immigrants have arrived without formal admission to permanent residence complicates Walzer's descriptive account of the relationship between immigration and citizenship policy.

rights associated with citizenship often are not limited to citizens.<sup>8</sup> Individuals can and do hold many citizen-like rights without being legally admitted to the country, let alone being naturalized.<sup>9</sup> Furthermore, cross-cutting and competing federal immigration restrictions and rights protections, the interplay of laws in the U.S. federalist system, and a host of “paralegal” practices significantly complicate the legal lines and social status distinctions between and among citizen and noncitizen.<sup>10</sup>

Individuals and collectives of individuals who are not citizens, including individuals making claims to citizenship, also play an important role in shaping the meaning of citizenship. Like any applicant for admission, a person seeking citizenship can try to tell her own story in a way that she thinks will best appeal to the relevant admissions officer. She can also use her voice to try to reshape the admissions criteria by influencing the opinions of individuals who have the power to craft the rules of admission.<sup>11</sup> These are the ways that scholars usually conceptualize of the role of outsiders contesting the bounds of citizenship.

But “outsider” influence is more complicated and far-reaching, again belying the simplistic admissions analogy. Individuals seeking citizenship are often fully integrated into the national social fabric, and sometimes have deep and lengthy community ties that make it difficult to think about them as “outsiders” at all. The stories they tell about the meaning of citizenship — individually and collectively — change what “insiders” think about citizenship. At the same time, “insiders” tell their own stories to justify exclusions or incomplete inclusions of long-time community members. Those stories reshape the meaning of citizenship, too.

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<sup>8</sup> See generally LINDA BOSNIAK, *THE CITIZEN AND THE ALIEN: DILEMMAS OF CONTEMPORARY MEMBERSHIP* (2006).

<sup>9</sup> *Id.* at 94-95; see also COHEN, *supra* note 1, at 36.

<sup>10</sup> See generally Jennifer M. Chacón, *Producing Liminal Legality*, 92 *DENV. U. L. REV.* 709 (2015) (exploring the vulnerabilities of liminal legal subjects and noting their imperfect overlap with formal citizenship categories). On paralegality in immigration law, see generally Inés Valdez et al., *Missing in Action: Practice, Paralegality, and the Nature of Immigration Enforcement*, 21 *CITIZENSHIP STUD.* 547 (2017). Valdez and her coauthors define paralegality as “the practices and operations that constitute a dynamic system of actions and relationships that are not simply linear applications of legislation or judicial decisions but may in fact extend or counter these texts.” *Id.* at 547.

<sup>11</sup> Indeed, Walzer does not foreclose this possibility himself, as is clear from his discussion of the moral claims made by refugees, for example. See WALZER, *supra* note 5, at 49.

The history of the United States is a long history of excluded peoples making arguments — sometimes more successfully than others — not only about their fitness to hold formal legal nationality or to exercise the rights of “full citizens,” but also contesting the very meaning of citizenship and the nation.<sup>12</sup> Scholarly accounts of citizenship reckon with how the efforts of outsiders have reconfigured the meaning of citizenship as a social and political institution, and have altered the boundaries of citizenship’s formal exclusions and inclusion.<sup>13</sup> Immigration law’s contemporary outsiders also are playing

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<sup>12</sup> Rogers Smith among others has observed the ways in which citizenship rules are “crafted by elites, but elites acting in relation to pressure — sometimes violent, sometimes economic, sometimes political and ideological — exerted by a wide range of constituent and rival groups inside and outside the country.” SMITH, *supra* note 1, at 35.

The historical record on this point is robust. Individuals who were excluded from citizenship entirely or who were nominally citizens but were barred by law from exercising what they saw as important rights of citizenship have been deeply influential in advocating for legal change. Many African Americans advocated for their own citizenship long before it became a formal legal reality, and for their full membership long after the passage of the Fourteenth Amendment gave them formal legal citizenship. Many women advocated for their right to “full citizenship” through formal political participation. Many gay men and lesbians contested their exclusion from military service and from the state-controlled institution of marriage.

The stories of their efforts illustrate the cynical tradeoffs often involved in the process of claiming citizenship rights. Outsider groups sometimes have made their claims to citizenship in ways that have pitted their own interests against those of other excluded groups. For example, in order to gain access to the vote, white women frequently traded on the potential rights of other groups. *See generally* Elsa Barkley Brown, *To Catch the Vision of Freedom*, in *UNEQUAL SISTERS*, (Vicki Ruiz & Ellen Carol DuBois eds., 4th ed. 2007); LORI D. GINZBERG, *ELIZABETH CADY STANTON: AN AMERICAN LIFE* (2009) (documenting Stanton’s racism and willingness to trade off the rights of African American citizens to gain support for White women’s rights); ROSALYN TERBORG-PENN, *AFRICAN AMERICAN WOMEN IN THE STRUGGLE FOR THE VOTE, 1850–1920* (1998) (documenting the ways white women suffragettes traded on the rights of African Americans to secure their own political victories). Some have argued that advocates for LGBT marriage equality have similarly traded off the rights of individuals uninterested in marriage. Yvonne Pitts, *Disability, Scientific Authority, and Women’s Political Participation at the Turn of the Twentieth Century United States*, 24 *J. WOMEN’S HIST.* 37, 49 (2012) (noting how women used the mentally disabled as a foil for the arguments in favor of their own enfranchisement); *see, e.g.*, Katherine M. Franke, *The Politics of Same-Sex Marriage Politics*, 15 *COLUM. J. GENDER & L.* 236, 240 (2006) (arguing that the gay marriage movement has had liberty-depriving consequences for those who do not order their relationships in ways analogous to heterosexual marriage); Melissa Murray, *Marriage as Punishment*, 112 *COLUM. L. REV.* 1, 59 (2012) (same).

<sup>13</sup> Indeed, most theoretical accounts of U.S. citizenship focus on the dynamics created by outsiders seeking entry to citizenship or access to the purported benefits of citizenship. *See* T.H. MARSHALL, *CLASS, CITIZENSHIP AND SOCIAL DEVELOPMENT* 78 (1965). *See generally* SHKLAR, *supra* note 1; SMITH, *supra* note 1.

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a role in remaking contemporary citizenship. Through their own accounts, their stories, the very fact of their existence, as well as through the stories told about them, they are changing collective understandings of citizenship. Contemporary theoretical accounts of citizenship need to grapple expressly with the question of how the presence of a large, relatively stable and integrated unauthorized population in the U.S. has reshaped and continues to reshape the collective social meaning of citizenship.

Scholars previously have focused on the relationship between immigration and citizenship to illuminating effect. Linda Bosniak does so in her discussion of alien citizenship.<sup>14</sup> Luis Plascencia does so in *Disenchanted Citizenship*, his account of Mexicans going through the naturalization process.<sup>15</sup> Christian Joppke engages in a far-reaching effort to theorize the relationship between citizenship and immigration on a more global scale, looking to examples in both the United States and Europe.<sup>16</sup> Joppke boldly concludes that “citizenship’s internally inclusive core has softened its externally exclusive edges. This is a key development of the past half-century, in Europe and North America alike.”<sup>17</sup>

But an analysis that centers the experiences and empirical beliefs about citizenship and immigration held by residents currently ineligible for citizenship illustrates the important corollary to the claim that inclusive citizenship regimes have softened the exclusionary edge of immigration laws. The experiences of long-term residents outside of citizenship’s protections challenge us to think about how immigration law’s increasingly exclusive external edge can decrease the desirability and the protective capacities of the institution of citizenship, even as it generates and hardens internal stratifications of citizenship.<sup>18</sup> The perspectives and experiences of noncitizen residents illuminate the contingency of citizenship.

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<sup>14</sup> See generally BOSNIAK, *supra* note 8, at 34-35.

<sup>15</sup> See generally LUIS F. B. PLASCENCIA, *DISENCHANTING CITIZENSHIP: MEXICAN MIGRANTS AND THE BOUNDARIES OF BELONGING* (2012).

<sup>16</sup> See generally CHRISTIAN JOPPKE, *CITIZENSHIP AND IMMIGRATION* (2010).

<sup>17</sup> *Id.* at 31. Joppke notes the countertrend of restrictions on naturalization driven by Islamophobia and by the (intertwined) re-ethnicization of citizenship, but he sees these developments as anomalies in what he projects to be a long march to more open, more fluid and perhaps less significant citizenship. *Id.* at 32.

<sup>18</sup> Linda Bosniak previously theorized the U.S. legal regime as “hard outside, soft inside,” arguing that although the law made it difficult to enter, once a person made it through the tough external borders, citizenship and immigration status did not impose hard barriers on legal and social integration. BOSNIAK, *supra* note 8, at 124-25. The experiences of our respondents in the era that post-dates Bosniak’s analysis



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This article draws on original research to offer two contributions to ongoing research on immigration and citizenship. First, the article uses data collected from interviews with immigrants to explore the practical reasons that citizenship matters in the U.S. today. The article describes the self-identified harms and vulnerabilities that unauthorized residents attribute to their lack of legal immigration status and assesses how various policy proposals to improve their legal standing would bear on these hardships. The discussion explores temporary, liminal immigration statuses like Deferred Action for Childhood Arrivals (“DACA”) as well as more protective categories like legal permanent residence. This discussion reveals the ways that various forms of legal status can ameliorate some of the critical problems that unauthorized immigrant residents identify as persistent in their lives. At the same time, it highlights critical gaps between legal status and citizenship — gaps that undermine the protective capabilities of any legal status short of citizenship.

Second, this article uses immigrants’ descriptions of their own lives in the United States, along with evidence from other academic studies of immigrant communities, media coverage, and texts from ongoing litigation and policy advocacy, to illustrate how unauthorized immigrant residents in the U.S. are transforming collective understandings of citizenship. Recent policy debates around citizenship have cast citizenship denial as an appropriate and proportional response to the perceived past wrongdoing of immigrants who violated immigration law.<sup>19</sup> Citizenship is withheld punitively, and the extension of citizenship is held out, if at all, as an incentivizing possibility for some subset of “deserving” immigrants. Our interviews with immigrants and the organizations that work with them suggest that this framing of the citizenship question shapes how immigrants think about citizenship and how they couch their claims to citizenship. As the expulsion of immigrants is both normalized and prioritized, the protective power of citizenship is weakened. These weaknesses are also internalized in our interviewees’ understandings of citizenship.

In unpacking these arguments, this article proceeds in two main parts. Part I uses information gathered in original interviews

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suggests that as border controls move inward, this hardening of interior border functions also impedes the integration of noncitizens into the social fabric and does so in ways that affect the legal rights and social standing of citizens, too.

<sup>19</sup> For a detailed discussion of this development in citizenship discourse, which the author characterizes as a neoliberal turn, see Muneer I. Ahmad, *Beyond Earned Citizenship*, 52 HARV. C.R.-C.L. L. REV. 257, 258-60 (2017).

conducted in Southern California over a four-year period ending in January 2018 to better understand the vulnerabilities experienced by unauthorized immigrants in the region and the likely impact of immigration reform proposals on these individuals. Unsurprisingly, this discussion demonstrates that temporary measures like deferred action are helpful but highly imperfect means to redress migrant vulnerabilities. The discussion also explains why formal legal status without citizenship, while more secure in many ways, has some of the same shortcomings in protection as do more liminal protections like deferred action status and Temporary Protected Status (“TPS”). To a notable extent, access to citizenship is essential to stable inclusion. As the protective benefits of permanent residency have declined, the unique benefits of citizenship in this regard have only become more pronounced.

But if citizenship is necessary to address the core legal vulnerabilities experienced by immigrant communities, it is also imperfect. And immigrants have a very clear sense of the limits of citizenship. Part II explores how our interviews, in addition to shedding light on the promises and shortcomings of various legalization measures, also provide insights into the shifting meaning and declining protective force of citizenship itself. Section A discusses the rise of a new round of “citizenship worthiness” discourse that is both embraced and resisted by immigrants and immigrant-serving organizations in their self-presentation and activism. This discourse is the natural product of a punitive citizenship policy that decouples the material benefits of citizenship from the obligations and performance of citizenship. Section B explores how these emerging notions of citizenship worthiness interact with immigration enforcement policies to fundamentally reshape collective understandings of citizenship, fueling predictably striated hierarchies of privilege not just between citizens and noncitizens but also among citizens. Section C discusses the broader theoretical implications of these findings, suggesting that in the U.S., exclusionary immigration policies and blocked paths to citizenship do not act to uniformly increase the value of citizenship, but rather, to make citizenship less valuable. Immigration law’s exclusionary edges decrease the capacity of the institution of citizenship to bring with it either material benefits or an affective sense of belonging.

#### I. IMMIGRANT VULNERABILITIES AND REFORMS WITHOUT CITIZENSHIP

The Pew Hispanic Center estimates that about 11.2 million unauthorized immigrants are living in the United States — a number

that has been stable for the past six years.<sup>20</sup> Many of these immigrants have been here for a very long time. The median length of residence of the unauthorized population is over thirteen years.<sup>21</sup>

Despite the presence of a substantial and entrenched unauthorized population, over the past twenty years, Congress has generated only a tiny handful of legislative enactments that have created new pathways to citizenship for these residents.<sup>22</sup> Indeed, many paths to citizenship were narrowed in a 1996 legislative frenzy. Laws passed at that time significantly reduced the number of noncitizens who can gain citizenship status through cancellation of removal<sup>23</sup> even as they

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<sup>20</sup> JEFFREY S. PASSEL ET AL., AS GROWTH STALLS, UNAUTHORIZED IMMIGRANT POPULATION BECOMES MORE SETTLED, PEW RESEARCH CENTER. 4 (2014). That population peaked at 12.2 million in 2007 and has since declined to about 11.3 million, where it has held steady for the last few years. *Id.* The population of unauthorized migrants declined in response to a combination of factors including a weakening U.S. economy, a growing Mexican economy, a substantial demographic shift in Mexico, and increased immigration enforcement at the border, in the interior and overseas. DORIS MEISSNER ET AL., MIGRATION POLICY INSTITUTE, IMMIGRATION ENFORCEMENT IN THE UNITED STATES: THE RISE OF A FORMIDABLE MACHINERY 12 (2013). Because over half of unauthorized migrants are from Mexico, it is significant that net migration from Mexico has been negative.

<sup>21</sup> See Jens Manuel Krogstad et al., *5 Facts About Illegal Immigration in the U.S.*, PEW RES. CTR. (Apr. 27, 2017), <http://www.pewresearch.org/fact-tank/2017/04/27/5-facts-about-illegal-immigration-in-the-u-s/> (“In 2014, unauthorized immigrant adults had lived in the U.S. for a median of 13.6 years, meaning that half had been in the country at least that long.”).

<sup>22</sup> Examples of the rare exceptions include the Nicaraguan Adjustment and Central American Relief Act (“NACARA”), which created a pathway to legalization and citizenship for a subset of Central American migrants, the Trafficking Victims Protection Act of 2000, which created a path to legalization and citizenship for qualifying victims of crime and trafficking, and the Violence Against Women Act’s self-petitioner provisions, which provided a path to citizenship for family members who might otherwise be at the mercy of an abusive relative who fails to file the requisite paperwork. Nicaraguan Adjustment and Central American Relief Act, Pub. L. No. 105-110, 1997 U.S.C.C.A.N. (111 Stat.) 2193; Trafficking Victims Protection, 22 U.S.C. §§ 7101-7112 (2018); 8 U.S.C. § 1154 (2018).

<sup>23</sup> Cancellation of removal is a form of relief from deportation that is available either to individuals who have at least five years of lawful residence and seven total years of total residence (a form of relief known as cancellation part A) or at least ten years of continuous physical presence (known as cancellation part B), provided the noncitizen meets certain other qualifying requirements. Cancellation part B is available to only 10,000 noncitizens a year and even then, only to those whose removal would cause “exceptional and extremely unusual hardship” for a qualifying U.S. citizen relative. This is a much narrower form of relief than the broader and more broadly available “suspension of deportation,” which was removed from the immigration statute in 1996 and replaced with cancellation. *Compare* Immigration and Nationality Act, 8 U.S.C. § 1254(a) (repealed 1996) *with* contemporary 8 U.S.C. § 1229b (2018).

rendered deportable and ineligible for citizenship a substantial number of lawful permanent residents with minor or old criminal convictions.<sup>24</sup> Some existing legal paths to citizenship were closed completely.<sup>25</sup>

Federal legislative immigration reform proposals aimed at addressing the plight of the unauthorized population and more effectively managing future migration flows have stalled again and again.<sup>26</sup> One consequence has been an increased focus on half-measures to deal with the issue. These have taken the form of proposals that envision a path to legalization with no citizenship, as well as a host of interim measures that extend and even create forms of liminal legal status for foreign nationals. These legislative and policy developments are discussed in section A. Section B explores the effects and projected effects of these policy proposals on unauthorized immigrant residents.<sup>27</sup> After a brief methodological overview, subsection one identifies some of the vulnerabilities that immigrant residents in Southern California attribute to their lack of legal immigration status and describes their perceptions of how legal status

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<sup>24</sup> See, e.g., Kevin R. Johnson, *The Antiterrorism Act, the Immigration Reform Act, and Ideological Regulation in the Immigration Laws: Important Lessons for Citizens and Noncitizens*, 28 ST. MARY'S L.J. 833, 838-43 (1997); Daniel Kanstroom, *Deportation, Social Control, and Punishment: Some Thoughts About Why Hard Laws Make Bad Cases*, 113 HARV. L. REV. 1889, 1890-91 (2000) (explaining and criticizing the 1996 expansion of deportability and excludability); Nancy Morawetz, *Rethinking Retroactive Deportation Laws and the Due Process Clause*, 73 N.Y.U. L. REV. 97, 99-100 (1998) (contesting the constitutionality of the 1996 laws' retroactive applications).

<sup>25</sup> See, e.g., 8 U.S.C. § 1255 (2018). That section once allowed people in the country without authorization to normalize their status if a visa became available for them. Congress allowed that provision to lapse, and efforts to renew it have failed. See also 8 U.S.C. § 1182(a)(9)(B)(i)(II) (2018) (imposing a ten-year bar on anyone present without authorization for a year or more, thus closing off the possibility of previously common out-of-country adjustment of status for individuals who marry U.S. citizens or otherwise become eligible for lawful immigration status).

<sup>26</sup> Seemingly viable legislation to achieve comprehensive immigration reform in the middle of the last decade included the Immigration Reform Act of 2004, the S.O.L.V.E. Act in 2004, and the Secure America and Orderly Immigration Act in 2005. S. 2010, 108th Cong. (2004); S. 2381, 108th Cong. (2004); S. 1033, 109th Cong. (2005). More recently, S. 744 passed the Senate in the summer of 2013, but the House of Representatives took no action on the bill. S. 744, 113th Cong. (2013).

<sup>27</sup> A complete evaluation of immigration and citizenship policies would also take into greater account the effects of the policies on people who are already citizens. One of the limitations of the data set for this project is that it focuses primarily on the experiences of unauthorized residents. Nevertheless, the experiences of citizens are captured directly, in comments from the citizen advocates and attorneys who were interviewed for the project, as well as indirectly, in the comments of the unauthorized residents who speak about the experiences of citizens in their communities.

could ameliorate their vulnerabilities. Subsection two maps these identified vulnerabilities against the legal protections offered by various immigration reform efforts and proposals. Unsurprisingly, this section demonstrates that temporary measures like deferred action are helpful but highly imperfect means to redress immigrant residents' legally created vulnerabilities. Formal legal status without citizenship, while more secure, shares many of the defects of liminal statuses like deferred action.

#### A. Without Citizenship — The Rise of Liminal Legal Status

A majority of U.S. citizens appear to support federal legislative reform that would provide unauthorized resident immigrants with a means of normalizing their status and eventually becoming citizens.<sup>28</sup>

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<sup>28</sup> Regardless of wording, proposals to grant citizenship to unauthorized migrants in the country generally attract broad support. One CNN/ORC International poll taken in February 2014 found that about eighty percent of polled citizens believed that unauthorized immigrants who have been in the country for years and are employed, speak English, and would pay back taxes should be allowed to become citizens. Interestingly, that same poll showed that nearly two-thirds would oppose a bill that “only granted legal status but no way to achieve citizenship.” See Philip E. Wolgin & Evelyn Galvan, *Immigration Polling Roundup: Americans of All Political Stripes Want Congress to Pass Immigration Reform*, CTR. FOR AM. PROGRESS (Mar. 4, 2014, 9:37 AM), <https://www.americanprogress.org/issues/immigration/news/2014/03/04/85102/immigration-polling-roundup-americans-of-all-political-stripes-want-congress-to-pass-immigration-reform/>; see also Tamar Jacoby, *Immigration Nation*, FOREIGN AFF. (Nov./Dec. 2006), <http://www.foreignaffairs.com/articles/62090/tamar-jacoby/immigration-nation> (“[A]n overwhelming majority [of Americans] — between two-thirds and three-quarters in every major poll — would like to see Congress address the problem [of illegal immigration] with a combination of tougher enforcement and earned citizenship for the estimated twelve million illegal immigrants already living and working here.”). Even after months in which heated anti-immigrant rhetoric formed the primary axis of the presidential campaign strategy of Donald J. Trump, a majority of U.S. voters polled still favor immigration and a path to citizenship for the nation’s unauthorized immigrant residents. Tal Kopan & Jennifer Agiesta, *CNN/ORC Poll: Americans Break with Trump on Immigration Policy*, CNN POL. (Mar. 17, 2017), <http://www.cnn.com/2017/03/17/politics/poll-oppose-trump-deportation-immigration-policy/> (“60% say the government’s top priority in dealing with illegal immigration should be developing a plan to allow those in the US illegally who have jobs to become legal residents. In contrast, 26% say developing a plan to stop illegal border crossings should be the top priority and 13% say deportation of those in the US illegally should be the first priority.”). These numbers appear to have held true into 2017, notwithstanding a heightened wave of anti-immigrant rhetoric. In a 2017 CNN/ORC poll, ninety percent of respondents answered “yes” when asked: “Now, thinking about how the U.S. government should treat illegal immigrants who have been in this country for a number of years, hold a job, speak English and are willing to pay any back taxes that they owe. Would you favor or oppose a bill that allowed those immigrants to stay in this country rather than being deported and eventually allow them to apply for U.S. citizenship?” CNN/ORC INT’L POLL 3 (Mar. 17, 2017, 6:00 AM), <http://i2.cdn.turner.com/cnn/2017/images/03/17/rel4g->

The Senate actually passed a bill in 2013 that would have achieved this goal for some immigrants.<sup>29</sup> Interest groups and political leaders that had advocated for this path to citizenship agreed to a significant expansion in immigration enforcement in exchange for it.<sup>30</sup> The

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.immigration.pdf.

A strange-bedfellow coalition — of business associations, labor unions, and the Catholic Church, among others — has endorsed this position. See, e.g., Jennifer Ludden, *Strange Bedfellows Join Forces on Immigration Bill*, NPR (Jan. 19, 2006, 7:22 PM), <https://www.npr.org/templates/story/story.php?storyId=5163862> (discussing the alliance of unions and chambers of commerce). In Washington, support for immigration reform that includes citizenship for long-time residents has spanned party lines to include former Republican President George W. Bush and the late Democratic Senator Edward Kennedy (D-Mass.); indeed they were seen as partners in immigration reform efforts during the Bush presidency. See Donna Smith, *Senate Kills Bush Immigration Reform Bill*, REUTERS (June 28, 2007, 5:55 PM), <https://www.reuters.com/article/us-usa-immigration/senate-kills-bush-immigration-reform-bill-idUSN2742643820070629>. On the Republican side of the aisle, support for such reform proposals have come from party mavericks like Senator John McCain (R-Ariz.) and more mainstream Republican politicians like former Senator Bill Frist (R-Tenn.) with support from all but a handful of congressional Democrats. See, e.g., Massimo Calabresi, *Why the Immigration Deal Flopped*, TIME (Apr. 7, 2006), <http://content.time.com/time/nation/article/0,8599,1181547,00.html> (discussing the cross-party political coalitions built around immigration reform issues), Caroline Kelley, *Immigration Debate Brings Strange Bedfellows—And New Hope—to Washington*, TIME (Jul. 31, 2013), <http://swampland.time.com/2013/07/31/immigration-debate-brings-strange-bedfellows-and-new-hope-to-washington/> (same). Currently, there is a deep political divide among Republicans about whether and how to reform immigration, which helps to explain why the Republican Congressional leadership has not brought a viable immigration reform bill to the floor for a vote in either chamber since the Senate voted on one such measure in 2013. Ashley Parker & Jonathan Martin, *Senate, 68 to 32, Passes Overhaul for Immigration*, N.Y. TIMES (June 27, 2013), <https://www.nytimes.com/2013/06/28/us/politics/immigration-bill-clears-final-hurdle-to-senate-approval.html>; Deirdre Shesgreen & Eliza Collins, *Immigration: GOP Divide over Issue Could Have Far-reaching Implications for Ryan, 2018 Midterms*, USA TODAY (May 22, 2018, 2:52 PM), <https://www.usatoday.com/story/news/politics/2018/05/22/gop-divided-immigration-midterm-election/632467002/>.

<sup>29</sup> Border Security, Economic Opportunity, and Immigration Modernization Act, S. 744, 113th Cong. (2013). The bill died in the House. See Philip E. Wolgin, *2 Years Later, Immigrants Are Still Waiting on Immigration Reform*, CTR. FOR AM. PROGRESS (June 24, 2015, 9:05 AM), <https://www.americanprogress.org/issues/immigration/news/2015/06/24/115835/2-years-later-immigrants-are-still-waiting-on-immigration-reform/>.

<sup>30</sup> See Brad Plumer, *READ: Senators Release Bipartisan Plan for Immigration Reform*, WASH. POST: WONKBLOG (Jan. 28, 2013), [https://www.washingtonpost.com/news/wonk/wp/2013/01/28/read-senators-release-their-plan-for-immigration-reform/?utm\\_term=.d4515477af0f](https://www.washingtonpost.com/news/wonk/wp/2013/01/28/read-senators-release-their-plan-for-immigration-reform/?utm_term=.d4515477af0f); Wolgin, *supra* note 29. The 2013 bill included a near doubling of immigration enforcement spending, to be used for increased border surveillance technologies, physical fencing and detention structures, and more ICE and CBP officers to carry out the expanded enforcement mission. See MIGRATION POLICY

resulting compromises would have required the satisfaction of enforcement goals prior to the initiation of any legalization efforts.<sup>31</sup> Such concessions are a routine part of negotiations around immigration reform; any future immigration reform efforts are likely to include significant enforcement expenditures and programs.<sup>32</sup>

Notwithstanding the significant concessions made around enforcement, the 2013 negotiations and compromises did not lead to law reform. Throughout the 2016 presidential race, the idea of a wall “paid for by Mexico”<sup>33</sup> received significantly more attention than did

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INSTITUTE, SIDE-BY-SIDE COMPARISON OF THE 2013 SENATE IMMIGRATION BILL WITH 2006 AND 2007 SENATE LEGISLATION (2013), <https://www.migrationpolicy.org/sites/default/files/publications/CIRbrief-2013SenateBill-Side-by-Side.pdf>. Many immigrants’ rights organizations supported the compromise. For criticisms of these compromises see generally Angélica Cházaro, *Beyond Respectability: Dismantling the Harms of “Illegality,”* 52 HARV. J. ON LEGIS. 355 (2015).

<sup>31</sup> Border Security, Economic Opportunity, and Immigration Modernization Act, S. 744, 113th Cong. § 3 (2013) (making the trigger for the Act’s legalization measures contingent on the achievement of particular border security metrics). Or, as succinctly summarized in the New York Times, “[t]he Senate bill provides a 13-year path to citizenship for the 11 million unauthorized immigrants in the country, as well as tough border security provisions that must be in place before the immigrants can gain legal status.” Parker & Martin, *supra* note 28.

<sup>32</sup> Recent debates around the DREAM Act highlight the point. DREAM Act legislation would provide legal status and a path to citizenship for certain young immigrants who arrived in the U.S. as children and who have met certain conditions. See, e.g., S. 1615, 115th Cong. (2017). Support for such a measure is widespread. See Chris Nichols, *Do Three-Quarters of Americans Support the DREAM Act? Nancy Pelosi Says So*, POLITIFACT CAL. (Sept. 19, 2017, 5:36 PM), <http://www.politifact.com/california/statements/2017/sep/19/nancy-pelosi/nancy-pelosi-claims-three-quarters-americans-suppo/> (reviewing polling data and finding high levels of support). Immigrant justice advocates have therefore argued that such a measure should be passed without accompanying enforcement measures — a “clean DREAM Act.” See, e.g., *Support a Clean Dream Act*, NAT’L IMMIGR. L. CTR. (Oct. 20, 2017), <https://www.nilc.org/issues/immigration-reform-and-executive-actions/dreamact/support-clean-dream-act/>. To date, such efforts have stalled.

<sup>33</sup> President Donald J. Trump’s immigration proposals on the campaign trail include imposing a ban on all Muslims and building a wall with Mexico, paid for by Mexico. Rebekah Metzler, *Trump: Mexico Will Pay for Wall Because I Say So*, CNN POL. (Aug. 5, 2015, 5:12 PM), <http://www.cnn.com/2015/08/04/politics/donald-trump-mexico-wall-pay/>; Ed Pilkington, *Donald Trump: Ban All Muslims Entering the U.S.*, THE GUARDIAN (Dec. 7, 2015, 7:27 PM), <https://www.theguardian.com/us-news/2015/dec/07/donald-trump-ban-all-muslims-entering-us-san-bernardino-shooting>. The fact that more Mexicans are now emigrating from the United States than immigrating to it has done nothing to dampen the political demands for the ever-elusive migrant-proof wall. See Ana Gonzalez-Barrera, *More Mexicans Leaving Than Coming to the U.S.*, PEW RES. CTR. (Nov. 19, 2015), <http://www.pewhispanic.org/2015/11/19/more-mexicans-leaving-than-coming-to-the-u-s/>. On the political appeal of walls, see generally Prathepan Gulasekaram, *Why a Wall?*, 2 UC IRVINE L. REV. 147 (2012).

mundane discussions over comprehensive immigration reform. Ultimately, the candidate that espoused a position of mass expulsion and extreme exclusions won the presidency, defeating the candidate that espoused an immigration reform compromise. Although President Trump's campaign rhetoric would seem to take any possibility of compromise off the table, the continuing significance of the tradeoffs came to the fore again with the Trump administration's rescission of DACA,<sup>34</sup> and President Trump's suggestion that any relief for DACA recipients would have to be accompanied by substantial increases in immigration enforcement spending.<sup>35</sup>

As political compromises on large-scale immigration reform have stalled, one political proposal has gained some traction among those who oppose conditional grants of citizenship for certain unauthorized immigrants — something they call “amnesty.”<sup>36</sup> Opponents of “amnesty” sometimes support reform packages that offer “legalization without citizenship.”<sup>37</sup> In exchange for heightened enforcement of immigration law, some subset of the current population of unauthorized migrants would be granted some form of legal status,<sup>38</sup>

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<sup>34</sup> See Carrie Johnson, *Trump Rescinds DACA, Calls on Congress to Replace It* (Nat'l Pub. Radio Morning Edition radio broadcast Sept. 6, 2017). For a discussion of the DACA program, see *infra* notes 56–70.

<sup>35</sup> The messaging from the Trump administration has been inconsistent on this point. See, e.g., Tara Golshan & Alexia Fernández Campbell, *Did Trump Strike a Deal with Democrats on DACA? This Is What We Know*, VOX (Sept. 14, 2017, 12:30 PM), <https://www.vox.com/2017/9/13/16305690/top-democrats-announced-daca-deal-trump>.

<sup>36</sup> For a discussion of the problematic underpinnings, evolving meaning and increasing political disfavor toward notions of amnesty, see generally Ahmad, *supra* note 19.

<sup>37</sup> This policy was supported by Republican presidential hopeful and former Florida governor Jeb Bush in a book he co-authored on the subject several years ago. See JEB BUSH & CLINT BOLICK, *IMMIGRATION WARS* 42–44 (2013); see also HOOVER INST., *FACTS ON IMMIGRATION* (2014), [http://www.hoover.org/sites/default/files/hoover\\_immigration\\_fact\\_sheet.pdf](http://www.hoover.org/sites/default/files/hoover_immigration_fact_sheet.pdf) (concluding that immigration reform is needed, but not a new pathway to citizenship); Peter Skerry, *Splitting the Difference*, NAT'L AFF. (Winter 2013), <http://www.nationalaffairs.com/publications/detail/splitting-the-difference-on-illegal-immigration> (same). Peter Skerry proposes “normalization without citizenship” as an appropriate compromise position, citing low naturalization rates among noncitizens regularized by the 1986 Immigration Reform and Control Act (“IRCA”) as evidence that long-term residents do not even want citizenship. *Id.* Of course, national policies on integration have a significant effect on naturalization rates, so one could just as easily conclude that more welcoming policies toward immigrants — including a path to citizenship — could boost naturalization. See IRENE BLOEMRAAD, *BECOMING A CITIZEN* 141–43 (2006).

<sup>38</sup> Existing proposals are vague about the precise legal contours of this status. For purposes of the discussion in this subsection, we assume that it would resemble lawful permanent resident status, but that assumption might be optimistic.



but would not be provided with any new means of acquiring citizenship.<sup>39</sup> Advocates of legalization without citizenship argue that this compromise would give unauthorized residents what they most want — the ability to remain and earn a living — in a way that is more politically viable than offering a path to citizenship.<sup>40</sup>

These proposals rest on a vision of citizenship as a reward for exemplary behavior, and the denial of citizenship as a logical punishment for outsiders<sup>41</sup> because of perceived wrongdoing, no matter how slight.<sup>42</sup> Legalization without citizenship is a punitive compromise: it achieves the goal of moving a large class of residents — most of whom are constructed as racial outsiders — into a legal status. But it does so in a way that penalizes the recipients of that legalization with permanent political exclusion. Such compromises sometimes envision the possibility of citizenship for childhood arrivals

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<sup>39</sup> See BUSH & BOLICK, *supra* note 37, at 42-43; Skerry, *supra* note 37, at 19-20. See generally President Donald J. Trump, Remarks at Joint Address to Congress (Mar. 1, 2017), <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-joint-address-congress/>.

<sup>40</sup> It is not intuitively clear why this is more politically viable than citizenship, and supporters of normalization without legalization do not explain why, beyond intuition, we might conclude that this would be true. See generally Skerry, *supra* note 37. At least some polling data cuts the other way. See, e.g., Wolgin & Galvan, *supra* note 28; CNN/ORC POLL, *supra* note 28, at 3. One might theorize that some sub-set of political elites or politically influential groups might find more palatable a solution that is less likely to create new voters who do not support them or their policy preferences, but no systematic efforts have been made to figure out how significant a voting group shares this view. The economic benefits of providing legalization without citizenship also do not appear to be systematically evaluated. Again, the relative economic superiority of that proposal is not intuitive.

<sup>41</sup> The children of “insiders” — U.S. citizens — obtain citizenship automatically. But for those who are not citizens at birth, different standards apply. See, e.g., Ahmad, *supra* note 19, at 259. Because U.S. citizenship was initially conceived as something available only to whites, and because the gradual expansion of the concept has been marred at many points by racist exclusions, non-whites are often constructed as “outsiders” to citizenship regardless of formal citizenship status. See generally IAN HANEY-LÓPEZ, *WHITE BY LAW* 42, 61 (2006).

<sup>42</sup> A search of websites reveals a mass of opinion pieces staking out the position that “illegal immigrants” should not be “rewarded” with citizenship in light of their lawbreaking. See, e.g., Peter K. Nunez, Opinion, *Why Rewarding Illegal Immigration Is Wrong*, THE SAN DIEGO UNION TRIB. (Nov. 29, 2017, 3:15 PM), <http://www.sandiegouniontribune.com/opinion/commentary/sd-utbg-daca-illegal-immigration-20171129-story.html>. Indeed, the argument is often extended to birthright citizenship. See, e.g., Don Tonty, Letter to the Editor, *Birthright Citizenship: A Reward for Breaking Immigration Law*, L.A. TIMES (Oct. 31, 2014, 4:30 PM), <http://www.latimes.com/opinion/readersreact/la-le-1101-saturday-birthright-citizenship-20141101-story.html> (“The solution [to the problem of unauthorized migration] is to . . . stop rewarding the children of illegal immigrants with citizenship . . .”).

whose initial immigration “transgression” is viewed as one for which they are not culpable. But recently, even high-achieving childhood arrivals have been included on the list of potential recipients of legalization programs that provide no path to citizenship.<sup>43</sup> Forfeiting citizenship is the price that immigrants would have to pay for their immigration violations.

To date, Congress has not enacted any of these reform programs. Without legislative reform, unauthorized immigrant residents remain vulnerable to deportation, and generally unable to normalize their status. Contrary to popular rhetoric about “standing in line” and waiting their turn,<sup>44</sup> for most foreign nationals, there is no line to stand in, and no legal status available.<sup>45</sup> While this has not prompted large waves of noncitizens to “self-deport” as restrictionists may have hoped,<sup>46</sup> it has generated persistent hardships and uncertainties for those who remain.<sup>47</sup>

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<sup>43</sup> For example, the libertarian Cato Institute estimates that eighty-two percent of DACA recipients would not qualify for citizenship under H.R. 6136, a proposed House of Representatives immigration reform bill. David Bier & Stuart Anderson, *82% of Dreamers Won't Benefit from House Bill's Citizenship Path*, CATO LIBERTY (June 19, 2018, 4:39 PM), <https://www.cato.org/blog/82-dreamers-wont-benefit-house-bills-citizenship-path>. Even that number is optimistically high, since their eligibility would only be triggered by defined border security measures that seem unlikely to be satisfied. *Id.*

<sup>44</sup> See, e.g., President George W. Bush, Third Bush-Kerry Presidential Debate (Oct. 13, 2004) (transcript available at npr.org), <https://www.npr.org/templates/story/story.php?storyId=4108590> (“I don’t believe we ought to have amnesty. I don’t think we ought to reward illegal behavior. There are plenty of people standing in line to become a citizen. If they want to become a citizen, they can stand in line, too.”).

<sup>45</sup> *Why Don't They Just Get in Line? There Is No Line for Many Unauthorized Immigrants*, AM. IMMIGR. COUNCIL (Aug. 12, 2016), <https://www.americanimmigrationcouncil.org/research/why-don%E2%80%99t-they-just-get-line>.

<sup>46</sup> Kris Kobach is one “issue entrepreneur” who initially popularized this term, which gained more widespread prominence when used by presidential hopeful Mitt Romney in his 2012 presidential campaign. See, e.g., Lucy Madison, *Romney on Immigration: I'm For "Self-Deportation,"* CBS NEWS (Jan. 24, 2012, 12:44 AM), <http://www.cbsnews.com/news/romney-on-immigration-im-for-self-deportation> (“The answer is self-deportation, which is people decide they can do better by going home because they can’t find work here because they don’t have legal documentation to allow them to work here,” he said. ‘And so we’re not going to round people up.’”). For a discussion of the significant role of issue entrepreneurs in channeling general concerns about economic and social precarity into an anti-immigrant agenda, see generally PRATHEEPAN GULASEKARAM & KARTHICK RAMACHANDRA, *THE NEW IMMIGRATION FEDERALISM* (2014). For a fascinating overview of the long history of “self-deportation” policies as a settler colonial imperial strategy, see generally Teresa K-Sue Park, *Self-Deportation Nation*, HARV. L. REV. (forthcoming 2019).

<sup>47</sup> Advocates of self-deportation strategies underestimate the compelling nature of

Congress has allocated far fewer resources to federal immigration enforcement agencies than would be necessary to effectuate the deportation of the entire deportable population.<sup>48</sup> To balance the prerogatives of the nation's immigration laws with the realities of limited enforcement dollars and humanitarian exigencies, the executive branch, particularly under President Obama, increasingly relied on a number of discretionary mechanisms short of legalization to normalize the status of migrants who might otherwise face long-term exclusion because of their periods of unauthorized residence.<sup>49</sup> The result has been the proliferation of liminal<sup>50</sup> and twilight statuses<sup>51</sup> that have been extended by the government to long-term residents lacking legal immigration status. Immigrants unable to qualify for a visa or otherwise subject to exclusion grounds have been allowed to remain in the country by executive designation. Sometimes this exercise of executive discretion has been made pursuant to specific statutory provisions, as when thousands of Salvadorans were granted — and then periodically renewed for — Temporary Protected Status (“TPS”) from the period following a major earthquake in 2001

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the forces that drive migrants to move. To many migrants, immigrating to the U.S. does not feel like a choice, and self-deporting to their home countries is not a real option. See, e.g., SETH M. HOLMES, *FRESH FRUIT, BROKEN BODIES* 17 (2013) (“The ‘push’ and ‘pull’ factor school of migration studies tends to assume that labor migration is entirely chosen, voluntary, and economic. However, my Triqui companions experience their labor migration as anything but voluntary.”).

<sup>48</sup> One study estimates the direct cost of such deportation to be over \$100 billion. See Ryan Edwards & Francesco Ortega, *The Economic Impacts of Removing Unauthorized Immigrant Workers*, CTR. FOR AM. PROGRESS (Sept. 21, 2016, 3:00 AM), <https://www.americanprogress.org/issues/immigration/reports/2016/09/21/144363/the-economic-impacts-of-removing-unauthorized-immigrant-workers/>. Others place the figure even higher. See BEN GITIS, *THE PERSONNEL AND INFRASTRUCTURE NEEDED TO REMOVE ALL UNDOCUMENTED IMMIGRANTS IN TWO YEARS 1* (2016), [https://www.americanactionforum.org/wp-content/uploads/2016/03/2016\\_Immigration\\_Update.pdf](https://www.americanactionforum.org/wp-content/uploads/2016/03/2016_Immigration_Update.pdf) (estimating a direct cost of \$400 to \$600 billion to deport all unauthorized residents and prevent future unlawful entries).

<sup>49</sup> See SHOBHA SIVAPRASAD WADHIA, *BEYOND DEPORTATION: THE ROLE OF PROSECUTORIAL DISCRETION IN IMMIGRATION CASES* 33-53 (2015) (discussing the long history and wide range of discretionary executive relief in immigration law). See generally STEVEN H. LEGOMSKY & CRISTINA RODRIGUEZ, *IMMIGRATION AND REFUGEE LAW AND POLICY* 443-53 (2014) (analyzing administrative remediation of various immigration exclusion grounds).

<sup>50</sup> On the rise and significance of liminal legal status both in and outside of the immigration context, see generally Chacón, *supra* note 10, at 702.

<sup>51</sup> David A. Martin, *Twilight Statuses: A Closer Examination of the Unauthorized Population*, 2 POL’Y BRIEF 1, 2 (2005) (defining and cataloguing these twilight statuses); see also MOTOMURA, *supra* note 7, at 25-31 (same).

through 2018.<sup>52</sup> At other times, such discretion is exercised on a more individualized basis, as when an individual is granted humanitarian parole pursuant to the immigration statute.<sup>53</sup> And at other times, the decision made by the executive branch is not explicitly authorized by statute and instead represents an exercise of discretion based on individual equities, as in some instances when an immigration judge administratively closes a case.<sup>54</sup>

President Obama presided over a significant expansion in these liminal categories. His administration first aggressively expanded immigration enforcement efforts,<sup>55</sup> but then attempted to mitigate the harsh effects on long-term residents without legal status through a variety of measures, including two executive programs designed to offer a temporary reprieve for some of those individuals. The first of these programs, successfully initiated in the summer of 2012, was

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<sup>52</sup> The criteria for TPS protection is contained at Immigration and Nationality Act, 8 U.S.C. § 1254a(c)(1)-(2) (2018); see also *Temporary Protected Status Designated Country: El Salvador*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/humanitarian/temporary-protected-status/temporary-protected-status-designated-country-el-salvador> (last visited Sept. 19, 2018) (outlining criteria for renewal). For a discussion of the impact of the Trump administration's recent decision to end TPS for Salvadorans, see, e.g., Jesse Acevedo, *What Will Happen to El Salvador When the U.S. Ends the Protected Status of Salvadoran Immigrants?*, WASH. POST (Feb. 22, 2018), <https://www.washingtonpost.com/news/monkey-cage/wp/2018/02/22/salvadorans-will-lose-tps-status-heres-how-this-may-impact-the-countrys-march-elections/>. A federal district court judge recently enjoined the Trump administration's decision to end TPS for Salvadorans as well as Haitians, Sudanese nationals and Nicaraguans, finding that the administration's decision reflected impermissible racial animus toward these groups in violation of the Constitution. Order Granting Plaintiffs' Motion for Preliminary Injunction, *Ramos v. Nielson*, No. 18-cv-01554-EMC (N.D.C.A. Oct. 10, 2018). For a detailed analysis of immigrants' experience living as TPS designees, see generally Cecilia Menjivar, *Liminal Legality: Salvadoran and Guatemalan Immigrants' Lives in the United States*, 111 AM. J. SOC. 999 (2006).

<sup>53</sup> Humanitarian parole is statutorily authorized under Immigration and Nationality Act, 8 U.S.C. § 1182 (2018). For a discussion of the application process, see *Humanitarian Parole*, U.S. CITIZENSHIP & IMMIGR. SERVS., [https://my.uscis.gov/exploremyoptions/humanitarian\\_parole/](https://my.uscis.gov/exploremyoptions/humanitarian_parole/) (last visited Sept. 19, 2018).

<sup>54</sup> Attorney General Sessions has indicated his opposition to, and plans to limit, this discretionary use of case closures. Terry Carter, *Sessions to Challenge Immigration Judges Over Closure of Cases*, ABA J. (Jan. 5, 2018), [http://www.abajournal.com/news/article/sessions\\_to\\_challenge\\_immigration\\_judges\\_over\\_closure\\_of\\_cases](http://www.abajournal.com/news/article/sessions_to_challenge_immigration_judges_over_closure_of_cases) (discussing Attorney General Sessions' review of administrative closure and noting that there are approximately 350,000 administratively closed cases potentially affected by this review).

<sup>55</sup> MEISSNER ET AL., *supra* note 20, at 16-22 (describing and quantifying enforcement expansion); see also Jennifer M. Chacón, *Immigration and the Bully Pulpit*, 130 HARV. L. REV. F. 243, 245-54 (2017) (providing a brief overview of Obama-era enforcement efforts).

DACA.<sup>56</sup> DACA de-prioritized for removal certain qualifying noncitizens unlawfully present in the United States since childhood. Their designation as recipients of “deferred action” also triggered the statutory and regulatory authorization of work permits<sup>57</sup> and driver’s licenses.<sup>58</sup> More than 800,000 individuals received deferred action under the program.<sup>59</sup> President Trump announced the rescission of the program on September 5, 2017, only giving recipients whose deferred action was set to expire by March 6, 2018, one additional month to apply for a two-year DACA renewal.<sup>60</sup> But two federal district courts then enjoined this rescission, requiring the Trump administration to continue to accept applications for renewal;<sup>61</sup> another court went even further, issuing a decision that could eventually require the administration to accept new applications.<sup>62</sup> Thus, as of this writing, the program remains tenuously in effect by judicial order.<sup>63</sup>

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<sup>56</sup> Memorandum from Janet Napolitano, Sec’y of Homeland Security, for David V. Aguilar et al., *Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children* (June 15, 2012), <http://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf> [hereinafter Napolitano, DACA Memorandum].

<sup>57</sup> 8 U.S.C. § 1324a(h)(3) (2018); 8 C.F.R. § 274a.12(c)(14) (2014). *See generally* Paul Wickham Schmidt, *Employment Authorization for Aliens: Part I*, 89 IMMIGR. BRIEFINGS 1 (May 1989). DACA applicants were required to submit simultaneous applications to DHS for work authorization, and indeed, the work authorization application constituted the bulk of the DACA fee, accounting for \$395 of the \$465 price tag. This must be paid with each application for renewal, currently required once every two years.

<sup>58</sup> The availability of driver’s licenses for individuals who receive deferred action is governed by the REAL ID Act of 2005, Pub. L. No. 109-13, div. B, tit. 2, § 202, 119 Stat. 231, 312-13 (2005). Most states have structured their driver’s license laws to track these federal categories of individuals eligible to receive a driver’s license.

<sup>59</sup> *Number of Form I-821D, Consideration of Deferred Action for Childhood Arrivals, by Fiscal Year, Quarter, Intake, Biometrics and Case Status*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Sept. 30, 2017), [https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/All%20Form%20Types/DACA/daca\\_performancedata\\_fy2017\\_qtr4.pdf](https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/All%20Form%20Types/DACA/daca_performancedata_fy2017_qtr4.pdf).

<sup>60</sup> *See, e.g.*, Mike Lillis et al., *Trump Rescinding DACA Program*, HILL (Sept. 5, 2017, 11:12 AM), <http://thehill.com/latino/348848-sessions-says-DACA-to-end-in-six-months>.

<sup>61</sup> *New York v. Trump*, No. 1:17-CV-5228-NGG-JO, at 6 (E.D.N.Y. Feb. 13, 2018), <https://static.reuters.com/resources/media/editorial/20180213/nyvtrump—dacaP1opinion.pdf>; *Regents of the University of California v. Dep’t of Homeland Sec.*, No. 3:C 17-cv-05211-WHA, at 48 (N.D.C.A. Jan. 9, 2018), <https://assets.documentcloud.org/documents/4345906/1-9-18-DACA-Opinion.pdf>.

<sup>62</sup> *NAACP v. Trump*, No. 1:17cv-02325-JDB, at 49 (D.D.C. Apr. 24, 2018), <https://assets.documentcloud.org/documents/4446318/Microsoft-Princeton-Daca-20180424.pdf>.

<sup>63</sup> Texas and several other states filed a suit in the Southern District of Texas, before Judge Hanen, seeking an injunction of the DACA program. *Texas v. United*

The second Obama-era deferred action program, which never went into effect, included both the expanded DACA (“DACA+”) and the Deferred Action for Parents of U.S. Citizens and Lawful Permanent Residents (“DAPA”)<sup>64</sup> programs. DACA+ would have expanded the age range of eligible DACA recipients and DAPA would have extended deferred action to qualifying parents of U.S. Citizens and lawful permanent residents (“LPRs”).<sup>65</sup> In February 2015, U.S. District Court Judge Andrew Hanen ruled that the DAPA and DACA+ violated the Administrative Procedure Act and enjoined them.<sup>66</sup> (The order did not affect the initial DACA program, except in a limited and technical way relating to renewals.) In May 2015, the Fifth Circuit denied the government’s motion to stay that decision,<sup>67</sup> and in November 2015, went on to affirm District Court Judge Hanen’s ruling on the merits.<sup>68</sup> That decision was affirmed by an equally divided Supreme Court on

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States, No. 1:18-cv-00068 (S.D. Tex. May 1, 2018), [https://www.scribd.com/document/377929932/TX-v-USA-Re-DACA-Complaint-050118#from\\_embed](https://www.scribd.com/document/377929932/TX-v-USA-Re-DACA-Complaint-050118#from_embed). Because Judge Hanen previously enjoined the DAPA program, it was widely believed that he would be receptive to the states’ claims, setting up a split among courts. See Laura Brubaker Calkins, *Texas’s DACA Challenge Sets Up Supreme Court Showdown*, BLOOMBERG (May 2, 2018, 2:17 PM) <https://www.bloomberg.com/news/articles/2018-05-02/texas-s-daca-challenge-sets-up-supreme-court-dreamer-showdown>. But Judge Hanen declined the states’ request for an injunction, while signaling his doubts about its legality. *Texas v. United States*, No. 1:18-CV-00068, 2018 WL 4178970 (S.D. Tex. Aug. 31, 2018).

<sup>64</sup> The program was originally known as “Deferred Action for Parental Accountability,” which is why it is abbreviated as DAPA. The abbreviation has survived even as the program name has morphed.

<sup>65</sup> Memorandum from Jeh Charles Johnson, Sec’y of Homeland Sec., to Leon Rodriguez et al., *Exercising Prosecutorial Discretion With Respect to Individuals Who Came to the United States as Children and With Respect to Certain Individuals Who Are the Parents of U.S. Citizens or Permanent Residents* (Nov. 20, 2014), [https://www.dhs.gov/sites/default/files/publications/14\\_1120\\_memo\\_deferred\\_action.pdf](https://www.dhs.gov/sites/default/files/publications/14_1120_memo_deferred_action.pdf) [hereinafter Johnson, DAPA Memorandum].

<sup>66</sup> *Texas v. United States (Texas I)*, 86 F. Supp. 3d 591, 643-44 (S.D. Tex. 2015); see also *Texas v. United States (Texas II)*, No. B-14-cv-254, 2015 WL 1540022, at \*8 (S.D. Tex. Apr. 7, 2015) (denying motion for stay pending appeal). Judge Hanen also issued an unusual “supplemental order” without any request for such by the parties. Supplemental Order, *Texas v. United States (Texas III)*, No. B-14-cv-254 (S.D. Tex. May 8, 2015), <http://klhn.co/Texas-v-US-SDTex-ECF-248>. For a critical analysis of these orders, see Anil Kalhan, *Deferred Action, Supervised Enforcement Discretion, and the Rule of Law Basis for Executive Action on Immigration*, 63 UCLA L. REV. DISC. 58, 63-65 (2015). For a favorable assessment of Judge Hanen’s decision, see Michael W. McConnell, *Why Obama’s Immigration Order Was Blocked*, WALL ST. J. (Feb. 17, 2015), <https://www.wsj.com/articles/michael-mcconnell-why-obamas-immigration-order-was-blocked-1424219904?mg=com-wsj>.

<sup>67</sup> *Texas v. United States (Texas IV)*, 787 F.3d 733 (5th Cir. 2015).

<sup>68</sup> *Texas v. United States*, 809 F.3d 134 (5th Cir. 2015).

June 23, 2016, in a one-line per curium opinion.<sup>69</sup> Before the district court ruled on the merits of the case, the Department of Homeland Security rescinded the program.<sup>70</sup>

The Obama administration's announcement of these programs changed the lives of DACA recipients significantly.<sup>71</sup> This broad use of executive discretion also offered a tantalizing but unfulfilled promise to do the same for DAPA-eligible noncitizens. Consequently, the period of time beginning with the announcement of DAPA and ending with the Trump administration's efforts to rescind DACA provided a unique moment in which to explore how unauthorized immigrant residents perceive the differences between temporary relief from deportation, various forms of legal residency, and citizenship.

### B. Immigrant Vulnerabilities

In developing the account of legal status and citizenship that follows, we draw on interviews that we conducted in Southern California over the course of four years, between January 2014 and January 2018. Our original plan, which now seems naively optimistic, was to follow noncitizens and immigrant-serving organizations during the implementation of comprehensive immigration reform ("CIR"). When CIR failed to make its way through Congress, we hoped to pivot toward the study of Obama's expanded deferred action policies (DAPA and DACA+), which we had anticipated could occur as early as the summer of 2014. In fact, the period of our study coincided not with the roll-out of these programs, but with the delayed announcement

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<sup>69</sup> United States v. Texas, 136 S. Ct. 2271 (2016) (per curiam).

<sup>70</sup> On June 15, 2017, the Department of Homeland Security rescinded DAPA. Press Release, Dep't of Homeland Sec., Rescission of Memorandum Providing for Deferred Action for Parents of Americans and Lawful Permanent Residents ("DAPA") (June 15, 2017), <https://www.aila.org/infonet/dhs-rescission-of-memorandum-for-dapa>.

<sup>71</sup> Roberto G. Gonzales & Veronica Terriquez, *How DACA Is Impacting the Lives of Those Who Are Now DACAmented: Preliminary Findings from the National UnDACAmented Research Project*, IMMIGR. POL. CTR. (Aug. 2013), [https://www.americanimmigrationcouncil.org/sites/default/files/research/daca\\_final\\_ipc\\_csii\\_1.pdf](https://www.americanimmigrationcouncil.org/sites/default/files/research/daca_final_ipc_csii_1.pdf); Caitlin Patler & Jorge Cabrera, *From Undocumented to DACAmented: Benefits and Limitations of the Deferred Action for Childhood Arrivals (DACA) Program, Three Years Following its Announcement*, 27 UCLA INST. FOR RES. ON LABOR & EMP. 5 (May 2015), [http://www.irle.ucla.edu/publications/documents/ResearchBrief27Patler\\_000.pdf](http://www.irle.ucla.edu/publications/documents/ResearchBrief27Patler_000.pdf); Tom K. Wong et al., *Undocumented No More: A Nationwide Analysis of Deferred Action for Childhood Arrivals, or DACA*, CTR. FOR AM. PROG. 10 (Sept. 2013), <https://cdn.americanprogress.org/wp-content/uploads/2013/09/DACAReportCC-2-1.pdf>; Tom K. Wong & Carolina Valdivia, *In Their Own Words: A Nationwide Survey of Undocumented Millennials* (Ctr. Comp. Immigr. Stud., Working Paper No. 191, 2014), <https://cloudfront.escholarship.org/dist/prd/content/qt1db6n1m2/qt1db6n1m2.pdf>.

and ultimately, the injunction of these programs.<sup>72</sup> As a result, the period of the study was characterized by unexpectedly high levels of legal uncertainty over the potential availability and scope of DACA+ and DAPA, as well as heightened concern among DACA recipients and their allied community members about the stability of the DACA program. This uncertainty, in turn, unfolded against the backdrop of significant legislative change at the state level in California,<sup>73</sup> continued legislative gridlock at the federal Congressional level<sup>74</sup> and exceptionally vitriolic debate about “illegal immigration” at the national level, with the ultimately victorious presidential candidate promising to build a wall on the southern border (paid for by Mexico),<sup>75</sup> to “immediately terminate” the DACA program,<sup>76</sup> and to deport everyone currently present in the country without authorization.<sup>77</sup>

We initially selected Los Angeles County and Orange County as sites for our research because while both counties have sizable immigrant and unauthorized immigrant populations, they also present important variations in their histories as immigrant destinations, the size and composition of their immigrant populations, the attitudes of

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<sup>72</sup> See discussion of Texas litigation, *supra* Part I.A.

<sup>73</sup> Legislative reform in California included the passage of SB 1310 (creating CAL. PENAL CODE § 18.5 (2018), which made 364 days the maximum sentence for a misdemeanor, ensuring that many California misdemeanors will not meet the 365-day sentence required for many crimes to be “aggravated felonies” for purposes of the immigration statute); A.B. 60, 2013 State Assemb., 2013-2014 Reg. Sess. (Cal. 2013) (authorizing the issuance of driver’s licenses to qualified unauthorized immigrant residents); and A.B. 4, 2013 State Assemb., 2013-2014 Reg. Sess. (Cal. 2013), known as the TRUST Act (restricting state and county officials to cooperate with ICE beyond the requirements of federal law).

<sup>74</sup> See Will Dunham, *U.S. House Speaker Ryan Rules Out Work with Obama on Immigration*, REUTERS (Nov. 1, 2015, 5:16 AM), <http://www.reuters.com/article/us-usa-congress-ryan-immigration-idUSKCN0SQ1V920151101>.

<sup>75</sup> See Time Staff, *Here’s Donald Trump’s Presidential Announcement Speech*, TIME (June 16, 2015), <http://time.com/3923128/donald-trump-announcement-speech/>.

<sup>76</sup> See Anu Joshi, *Donald Trump and DACA: A Confusing History*, HUFFINGTON POST (Mar. 7, 2017, 3:52 PM), [https://www.huffingtonpost.com/entry/donald-trump-and-daca-a-confusing-history\\_us\\_58b9960be4b0fa65b844b24a](https://www.huffingtonpost.com/entry/donald-trump-and-daca-a-confusing-history_us_58b9960be4b0fa65b844b24a) (noting Trump’s pledge to end DACA and his later apparent about-face).

<sup>77</sup> See David A. Graham, *Has Trump Kept His Campaign Promises?*, ATLANTIC (Apr. 28, 2017), <https://www.theatlantic.com/politics/archive/2017/04/trump-promises-cheat-sheet/507347/#Table%20of%20contents> (“Trump’s specific ideas about deportations fluctuated at points during the campaign. At the bare minimum, he said he would deport two million undocumented immigrants who are criminals who are in the country now (experts say that figure is exaggerated). He has at other times said he would mount a mass-deportation effort to expel all unauthorized immigrants.”).



their law enforcement officials, and the availability of resources for immigrants.<sup>78</sup> We selected organizations in each of these jurisdictions that provided services and support to immigrant communities. We started with six organizations — three in each county — but our research ultimately led us to interview staff from fifteen different non-governmental organizations (including several that were offshoots of organizations that we had targeted at the outset). Five of these organizations are primarily legal services providers, four offer legal services along with social services and community organizing support, and the remaining six focus primarily on social services and community organizing support. About half are membership-focused; the remaining organizations provide fee-based and pro bono services to all who seek assistance.<sup>79</sup> Ultimately, our research team conducted in-depth interviews during this period with forty-two advocates and staff members of these immigrant-serving organizations (most of whom were themselves immigrants and six of whom were interviewed two or more times) as well as with two lawyers from area public defenders offices. Using our respondent organizations as nodes, we reached out to the clients and constituents of these organizations.<sup>80</sup> In addition to the staff interviews, we conducted wide-ranging, semi-structured interviews with seventy-three immigrants in the Los Angeles and Orange County areas who were either out of status or covered by the initial DACA program. We interviewed twenty of these individuals two or more times over the course of the period discussed in this paper.<sup>81</sup>

We sought to broadly understand how legal uncertainty affects immigrants and the organizations that work for and with them and how various intermediaries (including state and local government

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<sup>78</sup> For further discussion on Los Angeles County and Orange County as contrasting jurisdictions for the purposes of this research, see SAMEER M. ASHAR ET AL., *NAVIGATING LIMINAL LEGALITIES ALONG PATHWAYS TO CITIZENSHIP: IMMIGRANT VULNERABILITIES AND THE ROLE OF MEDIATING INSTITUTIONS* 11-12 (2015), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2733860](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2733860).

<sup>79</sup> We have kept the names of our focus organizations confidential to ensure candid conversations with leadership and staff members.

<sup>80</sup> All of our respondents were identified through their contacts with one of six of our respondent organizations, three of which were in Los Angeles, two in Orange County, and one in both. Because the central motivation for our initial research project was to provide a full account of how organizations help noncitizens navigate periods of legal uncertainty, our sample only includes noncitizens who have some contact with an immigrant-serving organization in Southern California, either directly, or at one degree of separation.

<sup>81</sup> Ultimately, this and other research papers from the project will be woven together into a book manuscript that analyzes the data from the entire period of study.

bureaucracies and employees, legal service providers, and nongovernmental organizations) shape the experiences of immigrant residents. Many of the questions we asked were intended to provide information about whether and how respondents had been or might be affected by the kinds of temporary and contingent legal reprieves offered by DACA, DACA+, and DAPA, but with attention to the legal and social context in which they were situated. About a quarter of our immigrant respondents<sup>82</sup> were DACA recipients. Another quarter likely would have been eligible for relief under the DACA+ and DAPA programs announced by Secretary of Homeland Security Jeh Johnson in November 2014. The remainder seemed to be ineligible for relief under either existing programs or the proposed DAPA program. We intentionally structured our questions in ways that would allow respondents to speak to a range of discretionary executive actions around immigration, including increased enforcement, as well as other forms of discretionary immigration relief like the U visas,<sup>83</sup> asylum relief, and family-based petitions.

Our interview questions were designed to provide information on a variety of substantive issues.<sup>84</sup> Only at the very end of our first-round

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<sup>82</sup> Many members of the organizational staff that we interviewed were also immigrants, but here we are focusing on individuals who were not paid staff members of organizations.

<sup>83</sup> U visas provide legal nonimmigrant status to qualifying crime victims who cooperate with law enforcement efforts. *See* Immigration and Nationality Act, 8 U.S.C. § 1101 (2018). U visa applicants are eligible for a nonimmigrant visa and are ultimately eligible to adjust to lawful permanent resident status if they meet the statutory requirements. *See* Immigration and Nationality Act, 8 U.S.C. § 1255 (2018). Ultimately, as LPRs, they can naturalize as citizens. *See* Immigration and Nationality Act, 8 U.S.C. § 1445 (2018). In one of the handful of statutory mentions of deferred action in federal immigration law, the Immigration and Nationality Act provides that U visa applicants are entitled to deferred action while they await adjudication of their U visa application, even if their applications for a stay of removal pending the U visa process is denied. *See* Immigration and Nationality Act, 8 U.S.C. § 1227 (2018) (providing that DHS may grant stay of removal to applicants for T or U visas but that denial of a stay request “shall not preclude the alien from applying for . . . deferred action”).

One of our respondents was pursuing a U visa, and others were potentially eligible. One organizational legal service provider noted that the number of individuals in Los Angeles who technically met the U visa eligibility requirements was extraordinarily high. Interview with Gerarda, Legal Services Provider, in Los Angeles, Cal. (Sept. 25, 2014) (transcript on file with author) (“[I]t just seems like everyone in LA qualifies for the forms of relief that I manage [U visas].”).

<sup>84</sup> Our questions sought responses on a number of inter-related themes, including the impact of local law enforcement practices on the operations and efficacy of immigrant-serving organizations and on the lives of their clients and constituents; the challenges posed by legal uncertainty for organizations that both organize and provide

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interviews did we explicitly ask the respondents whether they desired U.S. citizenship and invited them to explore the reasons for their responses. That portion of the interview generated some additional insights that are explored further in Part II. Here, we focus on the question of which vulnerabilities were most salient to our interview participants and how they thought law reform could ameliorate those vulnerabilities.

Although our respondents are reasonably representative of the unauthorized population in terms of their age, national origin and length of time in the U.S., even the most precisely selected sample of this small size and limited geographic range could not be truly representative of the national unauthorized immigrant population. Accordingly, the discussion that follows is not intended to represent the views of “unauthorized immigrants in the U.S.” in general. In making general claims, this section triangulates the information gathered from our respondents with the growing literature focused on the U.S. immigrant population. Standing on their own, our interviews illustrate how in-depth conversations with immigrants living without formal legal status in the U.S. can provide a better understanding of the likely effects that law reform proposals will have on affected populations.

### 1. Assessing the Vulnerabilities of Unauthorized Status

Many unauthorized residents have had a great deal of time to reflect on how their lack of lawful status has affected them and to imagine what life would be like if they were granted legal status or citizenship. They also are able to compare their status to that of friends and relatives who have been able to acquire status.<sup>85</sup> Moreover, they have lived through periods of heightened excitement and uncertainty, which in itself has encouraged reflection.

When asked to identify the most salient challenges that legal status created for our interviewees, the most frequently recurring answers included: impediments and threats to family unity; restrictions on freedom of movement; limitations on work and educational opportunities; constant fear of deportation; and harm to social standing. Several older respondents also mentioned access to health care. This section discusses each of these vulnerabilities in turn. On

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direct services associated with executive relief; and the racial identity formation that occurs around immigration enforcement in periods of legal instability.

<sup>85</sup> SUSAN COUTIN, *LEGALIZING MOVES: SALVADORAN IMMIGRANTS' STRUGGLE FOR U.S. RESIDENCY* 68 (2000).

the topic of how the lack of legal status affects them, the substantial similarity in answers given by respondents regardless of age, national origin, education level and length of time in the county is striking. Their answers are also consistent with information obtained in interviews by other scholars doing research in immigrant communities, including by those doing large-scale empirical surveys.<sup>86</sup>

*a. Impediments and Threats to Family Unity*

Without exception, every single noncitizen respondent interviewed mentioned separation or fear of separation from family members as an effect of their lack of legal status, and for almost all respondents, it was an enduring and significant hardship.

Many mentioned their inability to be present at or after the death of a loved one. Beatriz, a sixty-three-year-old Peruvian woman who overstayed her tourist visa nearly eight years earlier, told us “My mom passed away not too long ago. This situation of being in the country ‘informally’ is very emotional. And my mom, through Skype, she wait[ed] to hear my voice in order to close her eyes. I would have gone if I could.”<sup>87</sup> Like Beatriz, Oralia told the story of being unable to be with her father in Guatemala when he died.<sup>88</sup> Alondra described her sorrow at being unable to attend relatives’ funerals: “My father died of cancer and my husband’s mother also died of cancer in Peru. In both cases we could not go see them. The impotence of knowing that they were struggling and not being near them, the inability to say goodbye

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<sup>86</sup> See, e.g., Leisy J. Abrego & Sarah M. Lakhani, *Incomplete Inclusion: Legal Violence and Immigrants in Liminal Legal Statuses*, 37 L. & POL’Y 265, 266 (2015); Leisy J. Abrego & Cecilia Menjivar, *Immigrant Latina Mothers as Targets of Legal Violence*, 37 INT’L J. SOC. FAM. 9, 11-14 (2011); Gonzales & Terriquez, *supra* note 71, at 2; Patler & Cabrera, *supra* note 71, at 4-5; Wong et al., *supra* note 71, at 10.

<sup>87</sup> Interview with Beatriz, in Los Angeles, Cal. (Nov. 19, 2014) (transcript on file with author). Later, she returned to this theme, noting that “being undocumented is emotionally traumatic because I could not go and bury my mother.” *Id.*

<sup>88</sup> Interview with Oralia, in Los Angeles, Cal. (Jan. 8, 2015) (transcript on file with author) (“A: Does your mother still live? O: She does, and that makes me want to return. I don’t want the same thing to happen as with my dad. I didn’t see him, I wasn’t there. It’s very sad, because he also didn’t want to die, and he fell in a coma and my brother — it was like he was waiting, because when the call went through, my brother put the phone on for him, and I said, ‘Dad it’s me, get up from there.’ It’s a very hard thing. I said, ‘Forgive me dad, I love you very much.’ And then my dad died. My brother took the phone away and my father smiled and my brother said, ‘Dad just wanted to hear your voice’ And I said, yes, that’s it . . . . He died the 5th of January, this 5th of January has been two years since he died. I still think why did I come to this country? It has not left me anything. You come and you don’t know what’s going to happen. You are so far. I think, why?”).

to them for the last time, are very painful feelings.”<sup>89</sup> This was a recurring theme.<sup>90</sup>

Many mentioned hardships generated by their ongoing separation from children or parents. Tomás was proud that he had supported his children in Mexico when they were young since he made it possible for them to go to school there. But he lamented never seeing them.<sup>91</sup> Notwithstanding the many other social and economic hardships she discussed with us, Oralia, whose children remained behind in Guatemala said simply, “I would be the happiest woman in the world if my children were here with me.”<sup>92</sup>

The desire for a legal status that would allow individuals to visit children and grandchildren and to petition for them to come to the United States was a frequently recurring theme. Beatriz, for example, mentioned that she has a daughter and two grandchildren in Peru whom she is unable to visit.<sup>93</sup> She explained that if she had legal residency, she would use it to “bring my daughter here so that my grandchildren can have a better future here . . . .”<sup>94</sup>

*b. Impediments to Freedom of Movement*

Another theme that dominated the discussion of hardships and vulnerabilities was the restrictions that unauthorized status placed on the respondents’ freedom of movement. Restrictions on freedom of movement manifested in at least three distinct ways and were frequently interrelated with family separation concerns. The first was the impossibility of crossing international boundaries. Many respondents suggested that one of the most troubling dimensions of their unauthorized status was their inability to travel to their country of origin to visit family members or dying loved ones.<sup>95</sup>

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<sup>89</sup> Interview with Alondra, in Los Angeles, Cal. (Nov. 19, 2014) (transcript on file with author).

<sup>90</sup> Even Patricio, a single man with an almost unbelievably optimistic philosophy and persistent refusal to admit to hardships or vulnerabilities, thought that deferred action or legalization would be helpful, “[b]ecause you could visit your family in Mexico. That’s an opportunity you have when you have residency or when you have papers.” Interview with Patricio, in Los Angeles, Cal. (Feb. 1, 2015) (transcript on file with author).

<sup>91</sup> Interview with Tomás, in Los Angeles, Cal. (Apr. 8, 2013) (transcript on file with author). Tomás did have one son who was with him in the U.S. *Id.*

<sup>92</sup> Interview with Oralia, *supra* note 88.

<sup>93</sup> Interview with Beatriz, *supra* note 87.

<sup>94</sup> *Id.*

<sup>95</sup> Interview with Beatriz, *supra* note 87; Interview with Oralia, *supra* note 88. Some respondents also expressed frustration with their inability to travel by air. *See,*

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A second commonly experienced limitation on mobility was that imposed by respondents' inability to obtain driver's licenses and insurance because of their legal status. Numerous respondents provided anecdotes of fearful encounters with police or other drivers when involved in accidents or other incidents on the road, with several describing the police in Los Angeles as deliberately targeting undocumented drivers in order to assess fines and fees.<sup>96</sup> Alondra put into words the experience that many of our respondents had — living in fear that they would be profiled and stopped by the police and that their cars would be impounded for lack of a license:

The immigrants have benefitted a lot from Governor Brown because before, an immigrant who was driving and was stopped due to a broken headlight, the police could stop them and impound the car. The police got a lot of money from the cars of immigrants. They know they can take them away. And then these people have to go before a judge, they have to pay a fine for driving without a license. For a normal person, it should cost around \$500 or \$400. But for someone who doesn't have documents, it is \$2,500. The jails are full, full of undocumented people, who have to be there for 3 months because the jails are a business. It is a private business.<sup>97</sup>

Alondra's reference to Governor Brown refers to the fact that on October 3, 2013, he signed into law California A.B. 60, which went into effect in January 2015 and which allows qualifying unauthorized migrant residents to obtain California driver's licenses.<sup>98</sup> Although we had designed our questions prior to the passage of A.B. 60 and did not ask about it directly, a number of immigrants we interviewed made references to California A.B. 60, noting that it had changed their lives for the better.<sup>99</sup> The importance of A.B. 60 in the lives of unauthorized

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*e.g.*, Interview with Mauricio, in Los Angeles, Cal. (Jan. 25, 2015) (transcript on file with author) ("When you travel, there is always a risk. I'd like to travel, to visit Alaska and Colorado, but now I can't.").

<sup>96</sup> See Interview with Alondra, *supra* note 89; Interview with Margarita, in Los Angeles, Cal. (Dec. 15, 2014) (transcript on file with author); Interview with Coni, in Los Angeles, Cal. (May 7, 2016) (transcript on file with author); Interview with Mario, in Los Angeles, Cal., (May 9, 2016) (transcript on file with author).

<sup>97</sup> Interview with Alondra, *supra* note 89; see also Interview with Fatima, in Los Angeles, Cal. (Aug. 16, 2016) (transcript on file with author) ("[T]here are lots of people that couldn't get licenses and [the police] continue benefitting in that — in taking cars away.")

<sup>98</sup> A.B. 60, 2013 State Assemb., 2013-2014 Reg. Sess. (Cal. 2013).

<sup>99</sup> See, *e.g.*, Interview with Tomás, *supra* note 91; Interview with Dean, in Orange

migrants provides further evidence — if more was needed — of the significance of sub-federal immigration regulation in determining the quality of life of immigrants in general and unauthorized immigrant residents in particular.<sup>100</sup>

The legislature enacted other immigrant protective laws during this time period as well.<sup>101</sup> On January 2, 2014, The California TRUST Act went into effect.<sup>102</sup> The TRUST Act limits information sharing between state and local police and federal immigration enforcement officials to the extent permitted by federal law, and which outlines strict limitations on when state, county, and local officials can comply with ICE detainer requests. On July 21, 2014, Governor Brown signed a revision to the California Penal Code limiting misdemeanor sentences to 364 days, thereby avoiding triggering the numerous negative consequences associated with an “aggravated felony” in immigration law.<sup>103</sup> Perhaps because of the nature of our sample population —

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County, Cal. (Apr. 7, 2015) (transcript on file with author) (discussing his undocumented father); Interview with Fatima, in Los Angeles, Cal. (Mar. 16, 2015) (transcript on file with author).

<sup>100</sup> For more on this theme see, e.g., Ingrid V. Eagly, *Criminal Justice for Noncitizens: An Analysis of Variation in Local Enforcement*, 88 N.Y.U. L. REV. 1126, 1030-35 (2013); Stella Burch Elias, *The New Immigration Federalism*, 74 OHIO ST. L.J. 703, 705-06 (2013) (discussing state level integration measures); Angela S. García, *Pressure from the Inside: The Subnational Politics of Immigration*, in RECESSION WITHOUT BORDERS: MEXICAN MIGRANTS CONFRONT THE ECONOMIC DOWNTURN 43 (David S. FitzGerald ed., 2011). See generally Hiroshi Motomura, *The Discretion that Matters: Federal Immigration Enforcement, State and Local Arrests, and the Civil-Criminal Line*, 58 UCLA L. REV. 1819 (2011) (discussing the important discretionary role of local law enforcement in shaping immigration outcomes); Cristina M. Rodriguez, *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. 567 (2008) (discussing integrationist efforts); Rick Su, *Police Discretion and Local Immigration Policymaking*, 79 UMKC L. REV. 901 (2011) (reexamining the need for local immigration policymaking in light of the changing nature of federal immigration law and explaining the difficulties in adopting these policies).

<sup>101</sup> For a description and analysis of recent immigrant-protective policies in California, see generally Ingrid V. Eagly, *Criminal Justice in an Era of Mass Deportation: Reforms from California*, 20 NEW CRIM. L. REV. 12 (2017) (detailing California’s adjustments to processes such as plea agreements). Since the election of Donald J. Trump as president, the California legislature has enacted several more immigrant-protective laws, prompting a lawsuit by the federal government claiming that the recent legislation exceeds the state’s constitutional power. Complaint at 2-3, *U.S. v. Sessions*, No. 18-264 (E.D. Cal. Mar. 6, 2018) (alleging that California’s A.B. 450, limiting federal enforcement access to private workplaces, California’s A.B. 103, imposing conditions on immigration detention facilities, and S.B. 54, limiting state officials’ compliance with immigration enforcement actions, all exceed the state’s constitutional authority).

<sup>102</sup> TRUST Act, A.B. 4, 2013 State Assemb., 2013-2014 Reg. Sess. (Cal. 2013).

<sup>103</sup> S.B. 1310, 2013 State Assemb., 2013-2014 Reg. Sess. (Cal. 2014) (codified as

none of our respondents have had prolonged encounters with the criminal justice system — these criminal justice-related laws did not come up in our discussions, whereas A.B. 60 did. But this does not mean that the reforms are insignificant.<sup>104</sup> Unlike their clients and constituents, the staff at immigrant-serving organizations, particularly those who worked with detained client populations, mentioned these criminal enforcement and misdemeanor sentencing reforms as significant immigrant-protective developments.<sup>105</sup>

A third common limitation on mobility was the limitation imposed by the respondent's fear of being apprehended for immigration violations in the ordinary course of the day. One Los Angeles-based respondent lamented, for example, that she could not take her children to SeaWorld because of the fixed border checkpoint in San Clemente, California.<sup>106</sup> Many others expressed concerns about their fear of detection (or their fear of a family member's detection) on the way to work or in the course of daily life, although sub-federal differences seemed to matter. Orange County respondents were more likely than Los Angeles County respondents to express concerns that police encounters could lead to deportation,<sup>107</sup> which is consistent

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CAL. PENAL CODE § 18.5). For a discussion of the full immigration consequences of committing an “aggravated felony,” see DANIEL KANSTROOM, *DEPORTATION NATION: OUTSIDERS IN AMERICAN HISTORY* 227-28 (2007); Teresa Miller, *Blurring the Boundaries Between Immigration and Crime Control After September 11th*, 25 B.C. THIRD WORLD L.J. 81, 83-85 (2005); Nancy Morawetz, *Rethinking Retroactive Deportation Laws and the Due Process Clause*, 73 N.Y.U. L. REV. 97, 99 (1998).

<sup>104</sup> It is possible that these reforms were viewed as important, but the respondents did not wish to dwell on past or potential contact that they or their loved ones may have with the criminal justice system.

<sup>105</sup> See, e.g., Interview with Josue, in Los Angeles, Cal. (Sept. 19, 2014) (transcript on file with author); Interview with Julie, Staff Member at an Immigrant-Serving Organization, in Los Angeles, Cal. (Sept. 19, 2014) (transcript on file with author).

<sup>106</sup> Interview with Margarita, *supra* note 96.

<sup>107</sup> For typical attitudes in Los Angeles, see Interview with Oralia, *supra* note 88 (“I: [On] the route that you take to do your errands, go to the market, to the clinic, do you worry that at some point somebody is going to ask you for a document? O: No.”). Oralia also discussed two incidents where her husband's car was stolen and the police helped them. But there were exceptions. *Id.* Margarita said that she avoided a certain metro station out of fear of detection, for example. Interview with Margarita, *supra* note 96. In contrast, many Orange County respondents expressed fears about immigration enforcement as a part of their daily life. See, e.g., Interview with Mireya, in Orange County, Cal. (Aug. 3, 2016) (transcript on file with author) (discussing fear for her undocumented father whenever he visited her on her college campus in Orange County); see also Interview with Raul, Orange County advocate (Nov. 22, 2016) (noting that because of the City of Santa Ana's contract with, with ICE, “I don't know if folks are going to feel safe to, to be in Santa Ana, you know, you get picked up by the police for a traffic violation and, um, you get taken into an ICE detention cell.”)



with Orange County officials' reputations as home to law enforcement agencies more likely to engage in county-level immigration enforcement efforts than those in Los Angeles. In Los Angeles, immigrant residents also routinely expressed concern that they would be stopped on the basis of race. Unlike Orange County residents, however, they were less concerned that this would lead to deportation, and more concerned that the stops would result in license checks, fines, fees, and auto impoundment.<sup>108</sup> Within counties, immigrant residents identified areas in which they felt more and less safe.<sup>109</sup> And respondents of various nationalities expressed the sentiment that immigrants from Latin America who fit into stereotypical depictions of undocumented Mexicans were more likely to be racially profiled than were respondents from Asian countries.<sup>110</sup>

*c. Impediments to Work and Education*

Unsurprisingly, individuals who lack legal authorization to work face many challenges in the workplace.<sup>111</sup> These challenges take

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The contract that Raul referenced here ended a year later due to advocacy efforts.

<sup>108</sup> See, e.g., Interview with Coni, *supra* note 96; Interview with Fatima, in Los Angeles, Cal. (Dec. 6, 2014) (transcript on file with the author); Interview with Alondra, in Los Angeles, Cal. (Nov. 19, 2014) (transcript on file with the author); Interview with Herminia, in Los Angeles, Cal. (Dec. 9, 2014) (transcript on file with the author).

<sup>109</sup> See, e.g., Interview with Samuel, in Orange County, Cal. (May 7, 2015) (“I think Anaheim is worst than Santa Ana . . . [b]ecause [there] . . . you get stopped by the cops and they have immigration . . . at the jails [and one] can get deported at that time . . . right away, . . . when you don't know your rights.”); see also Interview with Mireya, in Orange County, Cal. (May 19, 2015) (discussing feeling safer on campus than in other parts of the city and county).

<sup>110</sup> See, e.g., Interview with Ms. Choi, in Orange County, Cal. (Nov. 11, 2017) (“I guess even though we are all undocumented, Mexicans have more disadvantage sometimes. For example, if we get stopped by the police, they're more likely to get detained than us [Korean immigrants.]”); see also *infra* notes 148–49.

<sup>111</sup> Median household income of unauthorized immigrants was \$36,000 in 2007, compared to \$50,000 for their U.S.-resident counterparts. See Jeffrey S. Passel et al., *A Portrait of Unauthorized Immigrants in the United States*, PEW HISP. CTR. 4 (2009), <http://www.pewhispanic.org/files/reports/107.pdf> [<http://perma.cc/RG82-2XBA>]. But lower wages are not the only disadvantages that unauthorized migrants experience in the workplace. For additional discussion see, e.g., MARY BAUER & MÓNICA RAMÍREZ, *INJUSTICE ON OUR PLATES: IMMIGRANT WOMEN IN THE U.S. FOOD INDUSTRY* 45-48 (Booth Gunter ed., 2010); SHANNON GLEESON, *PRECARIOUS CLAIMS: THE PROMISE AND FAILURE OF WORKPLACE PROTECTIONS IN THE UNITED STATES* (2016); JENNIFER GORDON, *SUBURBAN SWEATSHOPS: THE FIGHT FOR IMMIGRANT RIGHTS* (2005); Eunice Hyunhye Cho et al., *A New Understanding of Substantial Abuse: Evaluating Harm in U Visa Petitions for Immigrant Victims of Workplace Crimes*, 29 GEO. IMMIGR. L.J. 1, 23 (2014); Kati Griffith & Shannon Gleeson, *The Precarity of Temporality: How Law Inhibits Immigrant Worker*

different forms. Many of our respondents talked about their inability to secure work commensurate with experience. Herminia, who had almost completed a college degree in biology, said, “It makes me sad that I went to school so many years, and, if I can find a job cleaning, I’ll be lucky.”<sup>112</sup> Others described abusive workplace conditions.<sup>113</sup>

Several respondents also noted that they had experienced situations where they were underpaid or not paid at all for work that they had completed. Erasmo told us that “there are companies that employ you and won’t pay vacation time, and holidays are also unpaid, and so there are many disparities when compared to people who work and who are documented. That speaks to some of the ways in which they abuse us. That’s what we know about, but you also see it in your wages.”<sup>114</sup> In his experience, unauthorized workers were visibly treated worse than other workers and, less visibly, compensated at less favorable rates.

Tomás, a day laborer who worked as a painter, said that there were many times when an employer would refuse outright to pay him and other unauthorized workers for completed work.<sup>115</sup> He stressed that some employers were good and some were bad in this regard. One community organizer who was himself an immigrant argued, “[W]e

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*Claims*, 39 COMP. LAB. L. & POL. J. 111, 123 (2017); Kevin R. Johnson, *A Case Study of Color-Blindness: The Racially Disparate Impacts of Arizona’s S.B. 1070 and the Failure of Immigration Reform*, 2 UC IRVINE L. REV. 313, 352 (2012); Stephen Lee, *Policing Wage Theft in the Day Labor Market*, 4 UC IRVINE L. REV. 655, 656 (2014); Maria L. Ontiveros, *Lessons from the Fields: Female Farmworkers and the Law*, 55 ME. L. REV. 157, 162 (2003); Amanda Clark, Note, *A Hometown Dilemma: Addressing the Sexual Harassment of Undocumented Women in Meatpacking Plants in Iowa and Nebraska*, 16 HASTINGS WOMEN’S L.J. 139, 143-44 (2004).

<sup>112</sup> Interview with Herminia, *supra* note 108; *see also* Interview with Dean, *supra* note 99 (discussing the low wage and “shady” jobs available to his college-educated sister prior to DACA). Our findings that unauthorized immigrants generally do not find work and pay commensurate with their education and work experience are consistent with Gonzalez & Terriquez, *supra* note 71, at 1-2; Patler & Cabrera, *supra* note 71, at 4; Wong & Valdivia *supra* note 71 (finding that DACA recipients were better able to secure jobs and higher wages than they were before they were DACAmented).

<sup>113</sup> *See, e.g.*, Interview with Michaela, in Los Angeles, Cal. (Aug. 27, 2016) (“[T]hey can take advantage of us at work. For instance, we are not paid overtime when we work extra hours. And we have to withstand (*aguantar*) moral abuses, and verbal, and physical abuses at work, like when the owner yells at us in his language, which is Korean and I can’t understand it, but I don’t like being yelled at.”).

<sup>114</sup> Interview with Erasmo, Undocumented Immigrant, in Santa Monica, Cal. (Dec. 6, 2014) (transcript on file with author).

<sup>115</sup> Interview with Tomás, *supra* note 91; *see also* Interview with Oralia, *supra* note 88 (discussing the lower wages received by employees without papers).

need the right to work. We deal with it every day. You are working under low salaries, exploitation, bad working conditions. You have to deal with it every day.”<sup>116</sup> Wage theft and workplace exploitation are well-documented phenomena among workers who lack legal authorization to work.<sup>117</sup>

*d. Fear of Deportation*

Respondents lived in fear of deportation.<sup>118</sup> This fear is interrelated with, and reifies, many of their other vulnerabilities. It affects their sense of family security because many live with the constant background fear of their own possible deportation, the deportation of a loved one or both.<sup>119</sup> This fear prevents parents from speaking with school officials when they have concerns about their children.<sup>120</sup> This fear limits mobility, preventing unauthorized migrants from traveling freely.<sup>121</sup> It stops people from seeking redress when they suffer harms in the workplace.<sup>122</sup> Simply put, this fear affects all aspects of life. As

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<sup>116</sup> Interview with Yupanqui, Organizer, in Los Angeles, Cal. (Oct. 2, 2014) (transcript on file with author). Some respondents framed the issue not as a lack of rights, but as a lack of knowledge of rights. For example, Alondra tells this story about someone she encountered at an event sponsored by one organization: “They can break their leg. They don’t have anyone to support them. The other day, there was someone working moving furniture, who broke a tooth. And they don’t even ask for the person who hired them to help them. No, they just leave. Because the day laborers know that if they are doing this work, they are exposed to this, and that no one will pay them. They do not know their rights. They don’t demand [them].” Interview with Alondra, *supra* note 89.

<sup>117</sup> See, e.g., Llezlie Green Coleman, *Procedural Hurdles and Thwarted Efficiency: Immigration Relief in Wage and Hour Collective Action*, 16 HARV. LATINO L. REV. 1, 7 (2013) (finding that undocumented immigrant workers are the victims of the most severe wage theft). See generally Griffith & Gleeson, *supra* note 111 (analyzing the shortcomings of workplace protection laws in protecting undocumented workers).

<sup>118</sup> These findings accord with other studies of unauthorized immigrants. See, e.g., JOANNA DREBY, EVERYDAY ILLEGAL: WHEN POLICIES UNDERMINE IMMIGRANT FAMILIES 20-21 (2015); Abrego & Menjívar, *supra* note 86, at 15; Menjívar, *supra* note 52, at 1023. DACA does not eliminate this worry.

<sup>119</sup> Interview with Beatriz, *supra* note 87 (“[T]here’s also a fear. I know my son but I don’t know the people that are on the streets. He bought his bicycle but I’m afraid when I see the police or the firefighters. When he’s in the house, I don’t worry.”); see also DREBY, *supra* note 118, at 22.

<sup>120</sup> Interview with Cora, Los Angeles organizer (Sept. 3, 2014) (transcript on file with author).

<sup>121</sup> See discussion *supra* section I.B.1.b.

<sup>122</sup> See, e.g., Interview with Oralia, *supra* note 88 (discussing her inability to gain full redress when her employer’s pit bull attacked her while she was cleaning); see also Interview with Tomás, *supra* note 91 (describing instances of wage theft).

Beatriz put it, “We’re a bit traumatized. Maybe the police show up unannounced. It’s just the fear. And that’s part of being [without formal legal status]. It’s a fear. You have to be on the lookout towards everything and everyone.”<sup>123</sup> Beatriz expressed her fears in 2014, making clear that the fear was palpable and significant long before President Trump assumed office.

Respondents identified lawful status as a means to “free” them from this crippling fear. Patricio, for example, explained, “I support . . . that everyone can obtain the residency or something like that. That will give us the opportunity *so that we can be free*. Many people live in fear in the United States, because of paper or residency status. To have the residency means to live freely. They have the opportunity to live free, to feel liberated from something[.]”<sup>124</sup>

*e. Harm to Social Standing*

Harms to social standing<sup>125</sup> described by immigrant residents took many forms, including a feeling of being disrespected by other community members in casual encounters,<sup>126</sup> a feeling of being treated as lesser by police, judges and other public officials,<sup>127</sup> a perceived lack

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<sup>123</sup> Interview with Beatriz, *supra* note 87. Beatriz uses the Spanish term *informal* to describe her status. *Id.* On the trauma associated with unauthorized status, see, e.g., Cárola Suarez-Orozco et al., *Growing Up in the Shadows: The Developmental Implications of Unauthorized Status*, 81 HARV. EDUC. REV. 459, 461-62 (2011).

<sup>124</sup> Interview with Patricio, *supra* note 90 (emphasis added). Patricio explained that even though he was not DAPA eligible — he had no children — he supported the reform for others. *Id.*

<sup>125</sup> In this paper, we follow Judith Shklar in focusing on social “standing” rather than “status.” SHKLAR, *supra* note 1. We do so not only to avoid what Shklar describes as the negative connotations of “status,” see SHKLAR at 2; but also to distinguish social standing from legal status, as these are two separate and central concerns in our project.

<sup>126</sup> Interview with Oralia, *supra* note 88 (“Here, there are people who humiliate you, who yell at you, who treat you very lowly. When my kid was little, I would get on the buses and he couldn’t speak, he would just yell. They threw me off the bus two times . . . I couldn’t find the ways by which to explain to the driver, she was black, I told her, you are not going to kick me off because he’s a little kid and he can’t speak. No. She started yelling at me and a friend told me, ‘let’s get down.’”); see also Mireya, *supra* note 109 (discussing an encounter where she and her mother were disrespected at an Orange County restaurant).

<sup>127</sup> See, e.g., Interview with Tomás, *supra* note 91 (“The police profile you on the basis of your color. If they see that you are *guerro*, a *gabacho*, they leave you alone. All of the enforcement of the law they use against Latinos. And they don’t help people who don’t have documents.”); see also Interview with Fatima, *supra* note 99 (describing an encounter with the Los Angeles police which she experienced as discriminatory). For a more detailed analysis of Fatima’s interaction, see Jennifer M.

of social acceptance,<sup>128</sup> and an inability to find work commensurate with experience.<sup>129</sup> As we discuss further below, the harms that respondents attributed to immigration status were interrelated in complex ways with discrimination they experienced on account of race, national origin, and limited English proficiency.

## 2. Mapping Vulnerabilities onto Immigration Law

What do noncitizens need to mitigate these vulnerabilities? Many respondents focused on a permanent grant of legal status as a solution to their problems. A typical example was Oralia. When asked near the end of her interview if she wanted to be a citizen, she replied:

O: Wow! Well, I would be satisfied even with being a resident.

A: Why?

O: If I were a resident I could go back to my country, and I could visit my family. If there's an emergency, I could get on a flight and go. I could get a better job. I could — there are more advantages for those that have papers than for those that don't. So I don't ask for much, I just ask to be a resident. Even though, citizens when they retire they have a lot of benefits, because *trabajan sus papeles*<sup>130</sup> [they work their papers]. But in

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Chacon & Susan Bibler Coutin, *Racialization Through Enforcement* in RACE, CRIMINAL JUSTICE, AND MIGRATION CONTROL (Mary Bosworth, Alpa Parmer & Yolanda Vazquez eds., 2018).

<sup>128</sup> Interview with Dean, *supra* note 99 (“[T]his is where I call home, and for people not to say, ‘this is not your home; you’re just a foreigner.’ That’s very detrimental . . . Since DACA is temporary, I still have to reapply, pay money, still live in fear of not being granted status. So if I am a U.S. citizen, I no longer have to live in fear and the same goes for my family. I don’t have to be in fear for them and they don’t have to be in fear for themselves.”).

<sup>129</sup> See, e.g., Interview with Oralia, *supra* note 88; Mireya, *supra* note 109; Alondra, *supra* note 108 (discussing being demeaned in public).

<sup>130</sup> We could translate this as “their documents work” or, more loosely, they work using their papers. The “papers” of citizens and authorized workers allow for the accumulation of earned benefits. See, e.g., Interview with Oralia, *supra* note 88. In this vein, one of our research team members has heard at least one DACA recipient seeking renewal ask if it would be a problem for renewal “that I haven’t worked my social,” meaning that they had not been employed even though they had a social security number.

Oralia’s phrasing also recalls another way that citizens “work their documents,” by sharing them with unauthorized workers for financial gain in the informal economy, although there is no suggestion in our interviews of any such exchanges. On this possible meaning, see Sarah Horton, *Identity Loan: The Moral Economy of Migrant Document Exchange in California’s Central Valley*, 42 AM. ETHNOLOGIST 1, 55 (2015).

the cases that one doesn't have them, they comfort themselves with a little bit.<sup>131</sup>

The evidence that we gathered through these interviews might suggest that for many respondents, and particularly older respondents, there is either a relative indifference between citizenship and a lesser form of lawful residence, or perhaps more precisely, as in the case of Oralia, an outright recognition that citizenship is better, but that they would be content with less.<sup>132</sup> Several respondents suggested that citizenship is important for obtaining government benefits (particularly health benefits and social security), but that they view such benefits as a privilege they would be willing to live without.<sup>133</sup> Does this mean that organizations that work with and on behalf of immigrants should back an immigration reform package that would stop short of full citizenship for long-time unauthorized residents? And if so, what sort of legal status will suffice to mitigate the worst harms generated by a lack of legal status?

The answer to that question is complex. At one level, noncitizens would benefit from *any* compromise that addresses their sources of legal and social vulnerabilities. Almost any such a compromise could improve the current situation of some of our respondents. But when the particular vulnerabilities that noncitizens focus upon in the accounts of their lives are mapped against the rights afforded by legal immigration statuses and citizenship, the resulting picture reveals deep vulnerability in any lawful status short of citizenship (and also highlights some of the problems of contemporary citizenship). This does not mean that a political compromise resulting in immigration reform without citizenship would never be desirable — it is certainly an improvement over the *status quo*. But it does suggest that the price of such compromise may be higher than is generally acknowledged.

The extent to which incomplete inclusion will improve the lives of currently unauthorized immigrant residents will turn on how robust their legal protections are (both formally and on the ground) and how

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<sup>131</sup> Interview with Oralia, *supra* note 88.

<sup>132</sup> See *infra* section III.

<sup>133</sup> See, e.g., Interview with Oralia, *supra* note 88. Note that the relative youth of our respondents might be driving this response. Two respondents — both older — talked about health problems and their difficulty in accessing paying for health services. As the unauthorized population ages, health benefits and other forms of social support will inevitably become more important to them. See, e.g., *id*; Interview with Alondra, *supra* note 89. But the rising tide of citizenship worthiness discourse likely encourages a self-imposed politics of rugged individualism and rejection of perceived dependence on government programs. See discussion *infra* at Part II.A.

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ongoing immigration enforcement efforts and other law enforcement measures jeopardize the stability of that status. Most policy discussions fail to take into account the interrelated and dynamic nature of legal immigration status and law enforcement initiatives. Additionally, the very malleability of lawful status creates long-term risks for a population that would be systematically denied access to the federal ballot box because they lack citizenship. Simply put, in the U.S. legal system, legal status can be revised, and legal protections for “aliens” can be lost as a consequence of executive branch changes to regulations and Congressional changes to legislation. All of this has happened before.<sup>134</sup> And the discrimination that immigrants experience as a result of perceived status could undercut the benefits of any incomplete form of legal inclusion. This section explores how temporary relief from removal, and even more permanent forms of lawful immigration status, fall short as a remedy for many of the harms and vulnerabilities identified in our conversations with unauthorized migrants.

*a. What Lawful Status Can and Cannot Do*

Research on DACA recipients has shown that the lawful presence bestowed by DACA only imperfectly alleviated the legal impediments that unauthorized respondents experience with regard to family unity, free mobility, access to work and freedom from fear of deportation. Those gaps in protection, which also exist for other individuals with temporary lawful status such as TPS, are discussed below. It is often assumed that more permanent and complete legal status — one more akin to LPR status — would fill in the most critical remaining gaps of protection. Indeed, many advocates of legalization without citizenship policies assume that such legalization will address the core concerns of unauthorized migrants seeking legal status. It is certainly true that a permanent resident status would be more protective than DACA or TPS, and would leave immigrant residents feeling more secure in their status. But to a notable degree, lawful permanent residence would fail in important ways to alleviate immigrants’ vulnerabilities. This section illustrates the shortcomings of lawful permanent residency without access to citizenship as an incorporative status.

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<sup>134</sup> This statement could be attributed to anyone from J.M. Barrie to the 2004 *Battlestar Galactica* series. For an account of the stripping down of LPR protections in recent history, see HIROSHI MOTOMURA, *AMERICANS IN WAITING: THE LOST STORY OF IMMIGRATION AND CITIZENSHIP IN THE UNITED STATES* 24 (2006).

Immigration law scholars have tended to favor access to citizenship as the appropriate means of regularizing the status of long-term immigrant residents. They often allude to the marginalization and exploitation of immigrants that accompanied previous immigration policies that offered residency without citizenship.<sup>135</sup> Established immigrants' rights organizations<sup>136</sup> also have argued that legalization without citizenship will create a permanent caste of disenfranchised, second-class residents.<sup>137</sup> For many of these scholars and activists, any turn to legalization methods that preclude or decrease support for citizenship are suspect.

But some supporters of legalization without citizenship believe that advocates are confusing their own policy preferences with those of unauthorized migrants. They argue that immigrants support — or at least would support — a policy of legalization even if it does not include citizenship.<sup>138</sup> And in the absence of legislative reform, even the staunchest advocates of a path to citizenship for unauthorized residents have often determined that anything is better than nothing. Thus, immigrant justice organizations around the country came to support, advocate for, and provide legal services to promote access to President Obama's DACA program, notwithstanding the fact that it did

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<sup>135</sup> See generally Cristina M. Rodriguez, *Guest Workers and Integration: Toward a Theory of What Immigrants and Americans Owe One Another*, 9 U. CHI. LEGAL F. 219 (2007) (discussing the inadequacies of a large-scale guest worker program).

<sup>136</sup> Organizations like the National Immigrant Law Center, the Immigrant Legal Resource Center, the Mexican American Legal Defense and Education Fund, Public Counsel, the American Civil Liberties Union and others have long supported comprehensive immigration reform with a path to citizenship.

<sup>137</sup> Significantly, some immigrants' justice groups are no longer advocating primarily for a path to citizenship and are instead focusing on law reform that would achieve greater dignity for all immigrants, regardless of citizenship. United We Dream, for example, advocates protection from deportation for all immigrants with their "Here to Stay" campaign. See *About #HereToStay*, HERE TO STAY, <http://weareheretostay.org/about-the-here-to-stay-network/> (last visited Jul. 7, 2018). Activists are also organizing with calls for "Not One More" deportation. See *About, #NOT1MORE*, <http://www.notonemoredeportation.com/about/> (last visited Jul. 7, 2018).

<sup>138</sup> Skerry, *supra* note 37. Others do not even purport to consider what unauthorized migrants want out of law reform, simply arguing instead that, while legalization is a sensible policy outcome, unauthorized migrants do not deserve citizenship because they broke the law. See Ross K. Baker, *Legalization, Yes. Citizenship, No: Column*, USA TODAY (June 10, 2013 6:18 PM), <http://www.usatoday.com/story/opinion/2013/06/10/ross-baker-on-legalization-not-citizenship/2409939/> (arguing that citizenship should not be available for "people who did not play by the rules"); BUSH & BOLICK, *supra* note 37 at 43-44 (arguing that citizenship should be off the table for individuals "who entered the country illegally as adults" because to grant citizenship undermines the "integrity" of the immigration system and the notion that "actions have consequences").



not offer citizenship nor legal status, just temporary prosecutorial restraint and work authorization.

Notably, however, in an era in which noncitizens have been active proponents of immigration and labor reform in the political sphere, and in which their voices have played a critical role in contesting the appropriate framing of reform efforts,<sup>139</sup> few scholars have incorporated those voices into their analyses of the policy design questions currently at the heart of immigration reform.<sup>140</sup>

Understanding what the purported beneficiaries of immigration reform actually want and need from that reform requires more than simply asking noncitizens whether they would be satisfied by a law that offers them something less than citizenship. Almost all certainly would (and do) because it would improve their material conditions. But mapping the formal legal benefits and protections actually offered by various proposed legal statuses against what immigrants say they hope to gain through immigration law reform reveals important gaps in “legalization without citizenship” plans, even as the resulting insights highlight the pitfalls of the weaker liminal statuses that involve neither legalization nor citizenship.

To be clear, the point here is not that half-measures are unacceptable political compromises. Many immigrants would benefit (and have benefitted) from such half-measures and would support them. The point is that the costs of half-measures are both higher and more diffuse than their proponents suggest.

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<sup>139</sup> For a discussion of the critical political role played by young undocumented residents in shaping the terms of the debate, see, e.g., Kathryn Abrams, *Performative Citizenship in the Civil Rights and Immigrant Rights Movements*, in *A NATION OF WIDENING OPPORTUNITIES: THE CIVIL RIGHTS ACT AT 50*, at 9 (Ellen D. Katz & Samuel R. Bagenstos eds., 2015); Leisy Abrego, *Legitimacy, Social Identity, and the Mobilization of Law: The Effects of Assembly Bill 540 on Undocumented Students in California*, 33 *L. & SOC. INQUIRY* 709, 714-15 (2008); Rose Cuison Villazor, *The Undocumented Closet*, 92 *N.C. L. REV.* 1, 6 (2013); see also Elizabeth Keyes, *Race and Immigration, Then and Now: How the Shift to “Worthiness” Undermines the 1965 Immigration Law’s Civil Rights Goals*, 57 *HOW. L.J.* 899, 920 (2014).

<sup>140</sup> Emily Ryo is a notable exception. See generally Emily Ryo, *Less Enforcement, More Compliance: Rethinking Unauthorized Migration*, 62 *UCLA L. REV.* 622 (2015) (relying on interviews with unauthorized migrants to assess how they understand and characterize their noncompliance with U.S. immigration law). And, of course, many immigration scholars draw on their work with noncitizen clients or on the fieldwork of other scholars to inform their research.

i. Family and Free Movement

DACA recipients and other recipients of deferred action status could travel much more freely within the United States than undocumented migrants, and even travel internationally at times. But serious limitations on family unification and related travel persisted. DACA recipients had to request advanced parole to leave the country and remained vulnerable to being excluded even if they had it.<sup>141</sup> They were frequently discouraged from traveling internationally since parole (like DACA itself) could be revoked at the pleasure of the executive branch.<sup>142</sup> Because they themselves lack legal status, DACA recipients could not petition on behalf of family members who might want to enter the United States.<sup>143</sup> Moreover fear of family separation persisted since most DACA recipients have close family members who were out of status and not covered by deferred action programs.<sup>144</sup>

Domestically, DACA recipients were able to move more freely — particularly in states in which they would have been unable to access driver's licenses without DACA<sup>145</sup> — but they were also aware that

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<sup>141</sup> *I-131, Application for Travel Document*, USCIS, <https://www.uscis.gov/i-131> (last visited Jul. 8, 2018); see Prerna Lal, *Trip Tips: Traveling with Advance Parole Through DACA*, UNDOCUMENTED STUDENT PROGRAM UC BERKELEY, <http://undocu.berkeley.edu/faq/travelling-with-advance-parole-daca/> (last visited Jul. 7, 2018) (describing the process for traveling with advanced parole with DACA).

<sup>142</sup> Even during the height of DACA protections, one of our respondent organizations told a member of our research team that they advise DACA recipients to be wary of applying for advanced parole. Even though advanced parole could be seen as legally advantageous because it allows people to gain “admission” upon return to the country as parolees, thus ultimately making them eligible for adjustment of status in cases where they are the beneficiaries of a visa petition filed by a qualified family member, that benefit may well be outweighed by the possibility that they can be denied reentry even with advanced parole. The legal uncertainty over the entire DACA program generated by the DAPA litigation and the 2016 election results only aggravates the legal tenuousness of advanced parole. In short, advanced parole is a “license” to reenter that can be denied at the time of attempted reentry in much the same way that Chae Chan Ping and other long-term residents of the U.S. were denied reentry upon passage of the Chinese Exclusion Act. See *Chae Chan Ping v. United States (Chinese Exclusion Case)*, 130 U.S. 581, 606-07 (1889).

<sup>143</sup> Such petitions are limited to lawful permanent residents and citizens. See *Immigration and Nationality Act*, 8 U.S.C. § 1153 (2018).

<sup>144</sup> Interview with Julie, *supra* note 105; Interview with Karina, in Orange County, Cal. (Aug. 1, 2016) (discussing her concern for family members without status); see also Joanna Dreby, *The Burden of Deportation on Children of Mexican Immigrant Families*, 74 J. MARRIAGE & FAM. 829, 829 (2012).

<sup>145</sup> Many states refuse driver's licenses to unauthorized migrants. Even after the announcement of DACA, Arizona and Nevada expressed their intention to deny licenses to DACA recipients, but after litigation, all states now provide driver's licenses

driving raises the likelihood of contact with the police, and that any such contact posed an immediate threat to their tenuous reprieve.<sup>146</sup> Several respondents hypothesized that Latinos were vulnerable to profiling that increased the likelihood of such interactions.<sup>147</sup> One respondent indicated that, as a Chinese woman, she did not fear that she would be profiled, but she did not view her experience as representative of the experience of all immigrants.<sup>148</sup> Furthermore, because driver's licenses in most states clearly indicate the bearer's tenuous legal status,<sup>149</sup> law enforcement officials interested in prioritizing immigration enforcement goals could still readily identify DACA recipients as foreign nationals.

Even before the attempted rescission of the program, the immigration enforcement efforts of the Trump administration highlighted the fragility of DACA. DACA protections proved somewhat “sticky” in ways that its supporters hoped it would — President Trump promised throughout his campaign that he would “immediately terminate” the program, but took months to attempt to end it, and even then, his Department of Homeland Security announced a planned phase-out over six months.<sup>150</sup> Federal district

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to DACA recipients. See NAT'L IMMIGR. L. CTR., *Access to Driver's Licenses for Immigrant Youth Granted DACA* (May 31, 2015), <https://www.nilc.org/wp-content/uploads/2015/11/Access-to-DLs-for-immigrant-youth-with-DACA-2015-05-31.pdf>.

<sup>146</sup> Interview with Reese, in Orange County, Cal. (Feb. 24, 2015) (transcript on file with author) (“I actually don't drive when I'm here . . . I only drive when I'm back at home [in Los Angeles County] and then . . . I guess I do kind of worry about getting pulled over sometimes, so I just try to drive like a normal person or drive really carefully . . .”); Interview with Mireya, *supra* note 107; Interview with Ms. Park, in Orange County, Cal. (transcript on file with author) (“[D]eportation is linked to encountering police. I'm always self-conscious of what I do. A police can stop me and accuse me of something, then ask for my license, which might lead the officer to discover of my undocumented status.”).

<sup>147</sup> Interview with Alondra, *supra* note 89; Interview with Erasmo, *supra* note 114; Interview with Mario, *supra* note 96; Interview with Tomás, *supra* note 91.

<sup>148</sup> Interview with Reese, *supra* note 146 (“I don't fear racial profiling. Yeah, that's not something I have to worry about.”); *see also* Interview with Ms. Choi, *supra* note 110 (noting that Mexicans are at greater risk for racial profiling in the immigration context).

<sup>149</sup> States have developed these distinctions in their licenses order to comply with the federal REAL ID law, which creates certain requirements for driver's licenses that will be used as a federal identification document. See DEP'T OF HOMELAND SEC., REAL ID FREQUENCY ASKED QUESTIONS FOR PUBLIC (Oct. 2, 2018), <https://www.dhs.gov/real-id-public-faqs>.

<sup>150</sup> Priscilla Alvarez, *Trump's Quiet Reversal on Deporting Young Undocumented Immigrants*, ATLANTIC (Apr. 27, 2017), <https://www.theatlantic.com/politics/archive/2017/04/trumps-quiet-reversal-on-deporting-young-undocumented-immigrants/524367/> (noting Trump's failure to enact his promised DACA rescission in the early months of his

courts then enjoined the phase-out, leaving the program on a grim life support system, and allowing for renewals.<sup>151</sup> Individuals filed for and received renewals from USCIS during Trump's first two years in office, although some did encounter some difficulties.<sup>152</sup>

But any illusions that DACA is a truly secure status were shattered even before the rescission. Several DACA recipients were arrested in the months leading up to the program's announced end. Daniel Ramirez Medina was arrested during ICE's execution of an arrest warrant for his father, and ICE attempted to justify this seizure with unsubstantiated claims that Ramirez is a gang member.<sup>153</sup> Josue Romero was arrested in San Antonio, Texas because he allegedly possessed a small amount of marijuana.<sup>154</sup> Daniela Vargas was arrested after giving a speech protesting the ICE detention of her father and brother.<sup>155</sup> Her DACA status had lapsed because she had been unable to pay the renewal.<sup>156</sup> Because she has an outstanding deportation

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presidency); Michael D. Shear & Julie Hirschfeld Davis, *Trump Moves to End DACA and Calls on Congress to Act*, N.Y. TIMES (Sept. 5, 2017) <https://www.nytimes.com/2017/09/05/us/politics/trump-daca-dreamers-immigration.html> (discussing the planned phase-out of DACA announced on September 5, 2017).

<sup>151</sup> NAACP v. Trump, 315 F. Supp. 3d 457, 473 (D.D.C. 2018) (rejecting government request to vacate prior order staying DACA rescission). Even Judge Hanen, who famously enjoined the DAPA program and raised questions about the constitutionality of DACA, declined the request of 10 states to enjoin the ongoing DACA program. Texas v. United States, No. 1:18-CV-00068, 2018 U.S. Dist. LEXIS 149373, at \*180-83 (S.D. Tex. Aug. 31, 2018).

<sup>152</sup> See Dara Lind, *New Statistics Show the Government Is Sitting on Tens of Thousands of DACA Applications*, VOX (Mar. 1, 2018, 12:00 PM), <https://www.vox.com/policy-and-politics/2018/3/1/17066606/daca-apply-statistics-backlog> (reporting that "[t]he administration has sent out tens of thousands of new two-year work permits to DACA recipients who applied for renewals, either before the September 5 announcement or before October 5," but also observing that new applicants were not receiving timely grants).

<sup>153</sup> See Lawyer for Detained "Dreamer" Says ICE Documents Were Doctored, CBS NEWS (Feb. 17, 2017, 7:16 AM), <https://www.cbsnews.com/news/lawyer-for-detained-dreamer-daniel-ramirez-medina-says-ice-documents-were-doctored/>.

<sup>154</sup> See Bill Barajas, *San Antonio DACA Student Detained by ICE Agents*, ABC KSAT 12 (Feb. 16, 2017, 10:04 PM), <https://www.ksat.com/news/san-antonio-daca-student-detained-by-ice-agents>.

<sup>155</sup> DREAMer Arrested in Miss. After Speaking About Immigration Issues, CBS NEWS (Mar. 1, 2017), <https://www.cbsnews.com/news/dreamer-arrested-after-speaking-about-immigration-issues/>.

<sup>156</sup> Jennie Jarvey, *Mississippi 'Dreamer' Daniela Vargas Released from Detention but Deportation Order Stands*, L.A. TIMES (Mar. 10, 2017, 2:55 PM), <http://www.latimes.com/nation/la-na-mississippi-dreamer-20170310-story.html> (although her DACA status expired in November 2016 while she says she was trying to save up the \$495 needed to renew it, her attorneys filed a renewal application in February). On the

order, she can be removed administratively, without a hearing before an immigration judge, although ICE, under public pressure, has allowed her to remain in the country pending the outcome of her claims for immigration relief.<sup>157</sup> Despite the fact that the Trump administration initially abandoned Trump's campaign promise to end the DACA program on day one, the spate of arrests early in the Trump term sent a powerful reminder that DACA offered no ironclad protection from arrest or even removal. The fragility of DACA's purported protections was on full display well before the program phase-out was announced. That fragility is only more obvious now.

Legislative immigration reform packages generally hold out something more substantive than a mere assurance that individuals are not targets for deportation, and legislation that offered legal status would theoretically be more protective than DACA. If it were akin to contemporary LPR status, a more robust lawful resident status would carry with it both the ability to travel abroad (enabling residents to see family members outside the county) and the ability to petition for immigration benefits on behalf of noncitizen family members.<sup>158</sup> Notably, however, lawful permanent residents from Mexico and the Philippines would still face continued barriers to reunification due to extraordinary wait times generated by per-country caps on immigrant visas.<sup>159</sup> Indeed, to the extent reform proposals trade off family immigration for purportedly "merit-based" systems,<sup>160</sup> wait times are

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problem of the pay-to-stay structure of DACA, see generally Chacón, *supra* note 10, at 727, 746-48.

<sup>157</sup> Jarvey, *supra* note 156 ("The deportation order against her has not been rescinded, however, and she is required to check in with her local ICE office in April, her attorneys said. 'One of the worries is they could enforce it at any point,' Peterson said, noting that the decision to release her seemed to be the result of prosecutorial discretion, based largely on community pressure and media attention.").

<sup>158</sup> LEGOMSKY & RODRIGUEZ, *supra* note 49, at 257.

<sup>159</sup> Jennifer M. Chacón, *Loving Across Borders: Immigration Law and the Limits of Loving*, 2007 WIS. L. REV. 345, 359-60 (discussing the racial impacts of "neutral" per-country caps); see Immigration and Nationality Act, 8 U.S.C. § 1151 (2018) (describing limits on immigrant visas and special provisions for immigrants from Mexico and the Philippines); DEP'T OF STATE, *Visa Bulletin for September 2018* (2018), <https://travel.state.gov/content/travel/en/legal/visa-law0/visa-bulletin/2018/visa-bulletin-for-september-2018.html> (applying per-country caps on immigrant visas to "oversubscribed chargeability areas," including Mexico and the Philippines).

<sup>160</sup> The Senate's 2013 immigration reform bill contained some of these compromises, and Donald Trump signaled in his March 1, 2017 State of the Union address that he favored this approach. The recently introduced RAISE Act and the Perdue-Cotton legislation also promote this approach. In truth, family-based immigration, which "promotes the stability, health and productivity of family members," has long complemented employment-based immigration as a source of

likely to lengthen for some families, even as whole family reunification categories may be eliminated. It also unclear whether individuals granted permanent resident status pursuant to an immigration reform package would be granted the broad ability to petition for relatives that current LPRs have.<sup>161</sup> Some proponents of legalization-without-citizenship proposals might see such proposals as a vehicle to minimize related family unification migration.<sup>162</sup>

Lawful status without citizenship would also continue to limit the mobility of its recipients. While a recognized legal status would reduce barriers to domestic, local and international mobility, the mobility benefits that lawful status bestows are surprisingly fragile and contingent. Currently, LPRs generally can travel freely across national borders, and only individuals who leave the country for periods of time in excess of a year risk losing their LPR status.<sup>163</sup> But those travel benefits remain a privilege, not a right, under the law. The fragility of this privilege was recently highlighted when Trump enacted a travel ban that purported to bar all travelers from seven countries from

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economic strength, even if its contribution is seldom recognized as such. See, e.g., Role of Family-Based Immigration in the U.S. *Immigration System: Hearing Before the Subcomm. on Immigration, Citizenship, Refugees, Border Security and International Law of the H. Comm. on the Judiciary*, 110th Cong. 23, 24 (2007) (statement and prepared remarks of Bill Ong Hing, Professor, UC Davis) [hereinafter *Hing Statement*]. It is not certain that a restrictive merit-based system would actually help the economy. See, e.g., Priscilla Alvarez, *Is a Merit-Based Immigration System a Good Idea?*, THE ATLANTIC, (Mar. 11, 2017), <https://www.theatlantic.com/politics/archive/2017/03/trump-cotton-perdue-merit-based-immigration-system/518985/> (highlighting arguments of the possible negative economic consequences of the “merit-based” system).

<sup>161</sup> See, e.g., James Pethokoukis, *Legalization Without Citizenship Wouldn't Be Amnesty — and Might Jump Start Immigration Reform*, AEI IDEAS (Nov. 21, 2013), <http://www.aei.org/publication/legalization-without-citizenship-wouldnt-be-amnesty-and-might-jump-start-immigration-reform/> (noting that the rights of individuals granted legal status under such plans would be negotiable).

<sup>162</sup> “Chain migration” is a term used by academics to explain how migrants rely on social networks to structure their migration decisions and processes, but the term has recently been politicized, with restrictionists deploying the term in ways that suggest the concept is unsavory and dangerous. For a discussion of the concept and its politicization, see, e.g., Arissa H. Oh & Ellen Wu, *Why Immigration Advocates Must Take Back the Term ‘Chain Migration,’* WASH. POST (Feb. 1, 2018), [https://www.washingtonpost.com/news/made-by-history/wp/2018/02/01/why-immigration-advocates-must-take-back-the-term-chain-migration/?noredirect=on&utm\\_term=.bf8706d5b209](https://www.washingtonpost.com/news/made-by-history/wp/2018/02/01/why-immigration-advocates-must-take-back-the-term-chain-migration/?noredirect=on&utm_term=.bf8706d5b209); Linda Qiu, *‘Chain Migration’ Has Become a Weaponized Phrase. Here are the Facts Behind It.*, N.Y. TIMES (Jan. 26, 2018), <https://www.nytimes.com/2018/01/26/us/politics/the-facts-behind-the-weaponized-phrase-chain-migration.html>. For a response to earlier attacks on “chain migration,” see *Hing Statement*, *supra* note 160.

<sup>163</sup> See 8 C.F.R. § 211.1(a)(2) (2018) (creating rebuttable presumption of abandonment of LPR status after absences of more than a year).

entering the U.S. The ban was applied not just to incoming non-immigrant visa holders, but to LPRs. And although the ban on LPRs was reversed in the early days of the ban, first through DHS waivers and then through a general DHS policy exempting LPRs, the early tumultuous days of the ban illustrated that foreign nationals of every status remain vulnerable in the immigration system. LPRs who spend a short time abroad are entitled to greater process than other intending immigrants, but they can still be excluded through administrative proceedings, and the constitutional case law suggests that they can be excluded administratively (and even on secret evidence) after periods of prolonged absence.<sup>164</sup>

Thus, even if individuals were granted a robust legal status akin to LPR status, their ability to travel freely would remain a privilege, not a right. Moreover, individuals granted legalization-without-citizenship could be subject to more stringent conditions and restrictions on travel than current LPRs. At present, there is no evident constitutional guarantee of any baseline international travel freedom for individuals with legal status in the U.S. In short, lawful status almost certainly would allow more transnational travel, including to see family members. But there would be no guarantee of family reunification in the U.S., and restrictions on travel outside of the U.S. could be imposed at any time. Legal status without citizenship thus falls far short of the protections of citizenship, which include the ability to petition for reunification with a defined class of qualified family members in the U.S. and to travel (and stay away as long as desired) without losing the right to return to the U.S.

## ii. Work and Education

Respondents who assume that legal status would improve their employment situation are right.<sup>165</sup> DACA recipients, even with their very thin form of temporarily tolerated presence and resulting work authorization, appear to have had greater access to better working conditions and work commensurate with experience.<sup>166</sup> With documents that allowed them to work legally, they had been given access to a much wider range of job opportunities, and because they

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<sup>164</sup> See *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 226-27 (1953) (Jackson, J., dissenting).

<sup>165</sup> See, e.g., Interview with Oralia, *supra* note 88 (“Not having papers is very damaging. In the first place, we can’t find a good job, because if you have papers you get a job that is OK, but if not, nothing.”).

<sup>166</sup> See, e.g., Wong & Valdivia, *supra* note 71, at 3.

no longer had to work off the books, they were less vulnerable to wage theft and more likely to be paid competitive wages. As one of our respondents put it in describing his sister's post-DACA experience:

And post-DACA it helped a lot because my sister was able to now work towards her area — her major. And so — and she can now apply to jobs she wanted instead of . . . taking jobs that even though she didn't want to she had to, and same goes for me I guess. I was able to work at a place where I wanted to and I was able to actually choose where I wanted to work instead of the other way around where they basically choose me and say "You do whatever we want you to do and we'll hire you."<sup>167</sup>

On the other hand, many individuals with temporary work authorizations contingent on DACA, Temporary Protected Status ("TPS"), withholding of removal and other liminal legal status (pending asylum application, U visas, etc.) continue to experience discrimination from employers who do not understand or are deliberately indifferent to their work authorization.<sup>168</sup> The very complexity of immigration law, particularly as it interacts with underlying biases against those perceived to be "illegal," undercuts the protections that authorization to work under IRCA was supposed to provide.<sup>169</sup>

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<sup>167</sup> Interview with Dean, *supra* note 99.

<sup>168</sup> See, e.g., *Juarez v. Nw. Mutual Life Ins. Co.*, 69 F. Supp. 3d 364, 365-66, 374 (S.D.N.Y. 2014) (demonstrating the difficulties of getting some employers to accept DACA EADs when plaintiff successfully challenged Northwestern Mutual's refusal to hire DACA recipients on the grounds of their immigration status). See generally Abrego & Lakhani, *supra* note 86; Jason Dzubow, *Immigration Rant*, GREEN CARD 4 (Winter 2016) ("Frankly, I think that most IJs and DHS attorneys underestimate the difficulty of living in the U.S. with Withholding of Removal. And these difficulties are not limited to practical problems related to jobs and driver's licenses, attending and paying for school, and the indefinite separation from family members. For my clients at least, Withholding of Removal does not alleviate the stress of their situation. They have fled uncertainty only to find more uncertainty. Will they be deported to a third country? Will they lose their job if the EAD [employment authorization] renewal is delayed? If their driver's license expires and they must drive anyway, will they be arrested? Can their children afford college? If they buy property and invest in life here, will they ultimately lose it all? Such uncertainty would be bad enough for the average person, but we are talking here about people who have already had to flee their homelands. Asylum is a balm to this wound; Withholding of Removal, in many cases, is an aggravating factor.").

<sup>169</sup> Abrego & Lakhani, *supra* note 86, at 286-88.



The temporary nature of these protections also leaves recipients particularly vulnerable to bureaucratic error. For example, some DACA recipients experienced delays in their DACA renewal process through no fault of their own.<sup>170</sup> As a consequence, they had their work authorizations lapse before the renewed authorizations were issued even during the height of DACA.<sup>171</sup> Some DACA recipients lost jobs and many lost wages as a consequence of these renewal gaps.<sup>172</sup>

Even when there are no bureaucratic errors in the authorization process, individuals with temporary employment authorizations sometimes feel stigmatized because they have to show their work authorization documents periodically instead of simply being able to provide one time the sorts of documentation that their U.S. citizen co-workers have.<sup>173</sup> These examples also illustrate the fragility of temporary forms of immigration authorization, and the vulnerabilities experienced by their bearers.

In contrast to temporary work authorization recipients, LPRs are “authorized workers” for the purposes of immigration law, on par with citizens in many respects. A work authorization combined with stable, long-term residence like LPR status would substantially improve wage and working conditions for unauthorized migrants. The long-term nature of their status may give them much greater access to jobs commensurate with their abilities and discourage employer abuses associated with more transient immigration statuses.<sup>174</sup> Open-

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<sup>170</sup> See Tatiana Sanchez, *Immigration Anxiety: Dreamers Lose Legal Status and Jobs in Renewal Delay*, MERCURY NEWS (Oct. 28, 2016, 7:00 AM), <https://www.mercurynews.com/2016/10/28/immigration-anxiety-dreamers-lose-legal-status-and-jobs-in-renewal-delay/>.

<sup>171</sup> David Noriega, *Thousands of Dreamers Are Losing Their Work Permits*, BUZZFEED (Apr. 22, 2015, 11:37 AM), <http://www.buzzfeed.com/davidnoriega/thousands-shielded-from-deportation-losing-work-permits#.rdrVpVKA0>.

<sup>172</sup> See, e.g., *id.*

<sup>173</sup> SUSAN BIBLER COUTIN, EXILED HOME: SALVADORAN TRANSNATIONAL YOUTH IN THE AFTERMATH OF VIOLENCE 176 (2016) (“William Martinez, who had TPS, told me, ‘I feel uncomfortable showing my TPS, my work permit’ . . . The very documents — a green card, a work permit — that provided status were simultaneously markers of not being citizens.”).

<sup>174</sup> On the workplace vulnerability of short-term visa holders, see, e.g., Kit Johnson, *The Wonderful World of Disney Visas*, 63 FLA. L. REV. 915, 917-18 (2011) (discussing the use of J and Q visa workers by Disney that lies far outside the statute’s intent to promote cultural exchange); David Bacon, *Be Our Guests*, NATION (Sept. 9, 2004), <https://www.thenation.com/article/be-our-guests/> (discussing the vulnerability of temporary agricultural workers); Mica Rosenberg & Megan Twohey, *Former Circus Owner Emerges as Powerful Figure In Pipeline of Workers from Mexico*, REUTERS (Dec. 23, 2015, 2:00 PM), <https://www.reuters.com/investigates/special-report/workers-carnival/> (discussing the vulnerability of H-2B workers).

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ended, long-term status that is not tied to particular employers is critical if the goal is to mitigate exploitative wages and working conditions.<sup>175</sup>

Even with their relatively robust work authorizations, however, LPRs can still be subject to exclusions from some governmental workplaces due to their lack of citizenship.<sup>176</sup> Additionally, employers can lawfully hire any qualified citizen over a lawful resident (even a more qualified one) without running afoul of anti-discrimination protections.<sup>177</sup> In short, the protections offered by legal immigration status and work authorization are not as protective as citizenship. Finally, LPR status cannot prevent discrimination that workers experience on account of their race and national origin or their limited English proficiency when employers can use immigration and citizenship status as a legitimating mask for such discrimination.<sup>178</sup> Impermissible forms of discrimination can often be masked behind legally permissible citizenship discrimination. Indeed, this is one of the reasons that legalization-without-citizenship is understood by its proponents as, and would be experienced as, punitive.

### iii. Fear and Standing

Legal immigration status without citizenship also cannot fully resolve noncitizens' concerns either about their removability or about their standing and belonging within their local and national communities. Temporary legal presence has certainly fallen short in

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<sup>175</sup> See, e.g., Bacon, *supra* note 174; Johnson, *supra* note 174; Rosenberg & Twohey, *supra* note 174.

<sup>176</sup> The Supreme Court has upheld several state laws that bar LPRs from certain kinds of work. See, e.g., *Ambach v. Norwick*, 441 U.S. 68, 71-81 (1979) (holding that the function of school teacher goes to the heart of representative government and therefore can be limited to citizens); *Foley v. Connelie*, 435 U.S. 291 (1978) (same for police officers). *But see*, e.g., *Bernal v. Fainter*, 467 U.S. 216, 220-22 (1984) (striking down state prohibition on noncitizens' serving as notaries public); *In re Griffiths*, 413 U.S. 717, 722-29 (1973) (overturning on equal protection grounds a Connecticut prohibition on noncitizens' admission to the bar). There are also alienage restrictions on federal employment. Under Executive Order 11935, only United States citizens and nationals may be appointed to competitive service Federal jobs. Exec. Order No. 11,935, 41 C.F.R. 37,301 (1976), *reprinted as amended* in 5 C.F.R. § 7 (2018).

<sup>177</sup> Immigration and Nationality Act, 8 U.S.C. § 1324(b)(4) (2018).

<sup>178</sup> One might conclude that race and limited English proficiency ("LEP") discrimination would be completely unaffected by a change in immigration or citizenship status because they are independent of status. However, we hypothesize that some of these harms will be at least partially mitigated because employers and co-workers will no longer be able to mask forms of impermissible animus behind the racially neutral and legally relevant immigration status distinctions.

this regard. Deferred action for a time provided recipients with temporary protection from certain forms of arbitrary state action, and in so doing offered a measure of psychological relief from the fear of constant removal.<sup>179</sup> But respondents with DACA accurately perceived that the legal relief of DACA was thin in its protection against arbitrary enforcement actions.<sup>180</sup> With a new administration less committed to shielding DACA recipients from removal, those vulnerabilities were ever more keenly felt.<sup>181</sup> But even under the Obama administration, respondents were sharply attuned to DACA's tenuous and contingent nature.<sup>182</sup> While certainly more protective than mere reliance on individual ICE agents' discretionary decision as to whether or not to comply with enforcement priorities, formal deferred action assessments ultimately offer no guarantee of any kind.<sup>183</sup> Immigrants are attuned to the risks inherent in this

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<sup>179</sup> Interview with Julie, *supra* note 105 (“I guess that’s what a lot of . . . undocumented immigrants . . . uh . . . fear every day is whether they were gonna get a call from ICE . . . like a minute later saying that ‘Oh your parents are under custody and they’re gonna be deported.’ I guess that’s the biggest fear that I’ve felt daily and that’s what I’ve been hearing from other friends who are in the same situation as me that they feel — that they fear they — is not knowing when . . . ICE is gonna get — when they’re gonna get a call from ICE saying that their parents are being deported or they’re in the deporting procedures.”); see also GONZALEZ & TERRIQUEZ, *supra* note 71, at 1; WONG & VALDIVIA, *supra* note 71, at 3 (discussing the increased sense of belonging reported by DACA recipients).

<sup>180</sup> For stories of DACA recipients being detained and even placed in removal proceedings — and the anxiety that such actions created among DACA recipients, see, e.g., Elise Foley, *DACA Recipients Detained at Border Region Checkpoint*, *Attorney Says*, HUFFINGTON POST (Sept. 12, 2017, 7:11 PM), [https://www.huffingtonpost.com/entry/border-checkpoints-daca\\_us\\_59b701a4e4b09be4165765e8](https://www.huffingtonpost.com/entry/border-checkpoints-daca_us_59b701a4e4b09be4165765e8); Emily Goldberg, *What Immigration Raids Mean for Students*, ATLANTIC (Feb. 17, 2017), <https://www.theatlantic.com/education/archive/2017/02/why-was-a-daca-recipient-detained-by-ice/517134/>; see also *supra* notes 155–59 and accompanying text.

<sup>181</sup> See Katherine Mangan, *Undocumented Students’ Fears Escalate After a DACA Recipient’s Arrest*, CHRON. HIGHER EDUC. (Feb. 16, 2017), <http://www.chronicle.com/article/Undocumented-Students-Fears/239214>.

<sup>182</sup> See, e.g., Interview with Julie, *supra* note 105 (“I think programs like DACA and [DACA+ and DAPA], they’re good and needed in the immediate sense. But they’re Band-Aids, they are not the solution. I fear and think a lot of people fear that these Band-Aids will just keep popping off . . . it’s not permanent. It’s like stuck in this limbo. But you get to work during this limbo, so that’s something that a lot of people have worked really hard for. But with the understanding that it wasn’t going to be the permanent solution.”); see also Interview with Mireya, *supra* note 109 (discussing the fragility of DACA).

<sup>183</sup> In fact, the Johnson memo expressly disclaimed this. Johnson, DAPA Memorandum, *supra* note 65, at 2.

situation.<sup>184</sup> Survey respondents expressed their surprise and concern over the fragile nature of deferred action relief<sup>185</sup> and sometimes did so in overtly partisan ways.<sup>186</sup> The injunction of the DAPA program also contributed to the feeling of instability, highlighting for many immigrants the tenuous nature of relief programs implemented by the executive branch.<sup>187</sup>

A more stable legal immigration status would certainly offer some benefits as compared with temporary deferrals of removal. A sufficiently robust lawful status could facilitate family unity, travel, and work opportunities, and thereby do much more than DACA (or DAPA) in remedying the standing harms experienced by currently unauthorized migrant residents.<sup>188</sup> On the other hand, recent changes in the law have substantially decreased even current LPRs' sense of stability and belonging.<sup>189</sup> LPRs are more vulnerable to arbitrary state action than at any point in recent history,<sup>190</sup> and this insecurity reverberates in daily life.<sup>191</sup> Additionally, the relatively recent

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<sup>184</sup> Interview with Beatriz, *supra* note 87 (saying of the proposed DAPA relief, prior to the injunction, "We need to take it, risk it. Even though [my] oldest son is disappointed. He says relief is not law.").

<sup>185</sup> Several of our interviewees expressed their concern about the tenuous nature of the deferred action programs in the wake of Judge Hanen's order and the ensuing Fifth Circuit litigation. *See, e.g.*, Interview with Herminia, *supra* note 108 ("I was surprised that a single judge in Texas could suspend an order that had been issued by the president.").

<sup>186</sup> *See, e.g.*, Interview with Margarita, *supra* note 96; Interview with Tomás, *supra* note 91. *But cf.* Interview with Alondra (July 19, 2016) (transcript on file with author) (expressing the view that the failure of DAPA was Obama's fault because he failed to "negotiate" with the Supreme Court to ensure its success — something that she sees him as having been able to do with regard to the ACA).

<sup>187</sup> *See, e.g.*, Interview with Yupanqui, Organizer, in Los Angeles, Cal. (July 26, 2016) (transcripts on file with author).

<sup>188</sup> This is the assumption of most scholarship on LPR status, anyway. Interestingly there is not a lot of empirical data on the point, and it probably warrants further research. *Cf.* Kara Cebulko, *Documented, Undocumented and Liminality Legal: Legal Status During the Transition to Adulthood for 1.5-Generation Brazilian Immigrants*, 55 *SOC. Q.* 143, 144 (2014).

<sup>189</sup> MOTOMURA, *supra* note 134, at 112-22; *see* Geoffrey Heeren, *Persons Who Are Not the People: The Changing Rights of Immigrants in the United States*, 44 *COLUM. HUM. RTS. L. REV.* 367, 374 (2013) ("[N]on-citizens are balkanized into a host of hierarchical categories, and even the Lawful Permanent Residents (LPRs) at the top cannot lay claim to many of the rights of membership that 'declarant aliens' enjoyed during an earlier era.").

<sup>190</sup> MOTOMURA, *supra* note 134, at 186-87.

<sup>191</sup> Contemporary case law provides numerous examples of the susceptibility of long-time lawful permanent residents to immigration detention and deportation, even on old and minor charges, and even after incredibly lengthy stays in the U.S. *See, e.g.*,

legislative moves to make LPR status less “permanent,” offer an important reminder that the legal bundle of rights associated with LPR status itself can fluctuate in significant ways with little political fanfare. Trump’s briefly implemented travel ban on lawful permanent residents from seven banned countries highlights the point very clearly. LPR status is itself a liminal legal category.<sup>192</sup> One should not assume that lawful permanent resident status is fixed in terms of the rights and benefits that it encompasses. The bundle of rights associated with legalization-without-citizenship proposals would be less rights-protective than LPR status as it exists now. Like LPR status today, it would also be unstable in its rights-protective content. And at any time, citizen voters and their representatives in Congress and the White House can retract the protections and benefits associated with permanent resident status without formal input from foreign nationals and with little interference from courts.

### C. Conclusions

In political discourse, citizenship is often framed as a legal status that bestows political voice. For reasons that will be explored in greater detail below, the link between citizenship and political voice is actually quite complex. But it is certainly the case that individuals who are legally entitled to participate in the political process are generally

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Moncrieffe v. Holder, 569 U.S. 184, 188 (2013) (discussing deportation proceedings for LPR with decades of U.S. residency that began when Moncrieffe was a toddler); Padilla v. Kentucky, 559 U.S. 356, 359 (2010) (depicting deportation proceedings for LPR veteran with forty years of U.S. residency); Demore v. Kim, 538 U.S. 510, 513 (2003) (stating that Kim had been an LPR since the age of six but was subject to deportation due to convictions for prior criminal acts); Zadvydas v. Davis, 533 U.S. 678, 684-686 (2001) (stating that both Zadvydas and Ma from the consolidated case had spent almost their entire lives in the U.S.); Harisiades v. Shaughnessy, 342 U.S. 580, 581 (1952) (demonstrating this is not a new phenomenon, but a recurring motif in U.S. history). The lower court and immigration court cases documenting the expulsion of long-time lawful residents are legion. See also TANYA MARIA GOLASH-BOZA, DEPORTED: POLICING IMMIGRANTS, DISPOSABLE LABOR AND GLOBAL CAPITALISM 143-44 (2015) (providing data on contemporary removals of LPRs).

<sup>192</sup> Chacón, *supra* note 10, at 731 (2015); see Susan Bibler Coutin, *The Rights of Noncitizens in the United States*, 7 ANN. REV. L. SOC. SCI. 289, 296 (2011) (“Previously, there was a sharp distinction between the rights of legal permanent residents, who could remain in the United States and naturalize, and unauthorized residents, who were potentially subject to deportation. The adoption of more restrictive immigration measures has moved this line, such that increasingly, the most significant legal distinction is between citizens, who cannot be deported legally, and noncitizens, who are ineligible for particular rights and services and who can be deported if convicted of any of a broad range of criminal offenses.”).

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better able to defend their privileges than those without a formal voice in the process. Foreign nationals who are denied formal political participation have a harder time defending their rights and privileges in our political system.<sup>193</sup> The travel, work, education, familial and status benefits associated with permanent residency are all contingent on the political process, and residents are formally excluded from some aspects of that process. Their rights are highly dependent on the will of a majority of whom they can form no part.

Thus, while immigrant residents would undoubtedly experience permanent resident status as more secure and desirable than temporary legal reprieves like DACA<sup>194</sup> or a complete lack of legal protection, such a status would not definitively resolve many of the vulnerabilities and status harms experienced by immigrants. Those with lawful status but no citizenship still experience legal barriers to family unification, travel, and work opportunities. The legal disabilities they experience could be enhanced without their formal political input. Finally, given the malleability of lawful permanent resident status itself, even a “permanent” lawful status cannot provide the stability and certainty associated with citizenship.

In light of this fact, it is interesting to note that a good number of our respondents did not insist upon citizenship as the necessary goal of immigration reform, viewing it instead as a possible bonus, but not a crucial component of reform. Their neutrality — and even, at times, ambivalence<sup>195</sup> — toward citizenship might seem puzzling. But in a nation that has, for the past thirty years, withheld the extension of citizenship to long-term residents and increasingly targeted these residents for immigration enforcement, perceptions of citizenship itself have been transformed in important ways.

## II. WHO NEEDS CITIZENSHIP?

The foregoing section suggests that immigration reform packages that stop short of offering a path to citizenship would be of significant practical benefit to unauthorized immigrants. It also suggests that these forms of incomplete incorporation will, in some ways,

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<sup>193</sup> *Graham v. Richardson*, 403 U.S. 365, 371-72 (1971).

<sup>194</sup> See *Gonzalez & Terriquez*, *supra* note 71, at 2; *Wong et al.*, *supra* note 71, at 1.

<sup>195</sup> See, e.g., Interview with Mireya, *supra* note 107 (“Citizenship . . . I don’t know. That’s kind of tricky for me because I’ve come to resent the country itself. So I don’t know if I would appreciate being called a citizen, mainly because of all the struggle. But then I also understand that what I want to do, I want to do here. So, I don’t want to go to another country to do . . . to practice anything. And so I guess that’s really difficult for me. I don’t know. Maybe I would want it.”).

perpetuate legal and social vulnerabilities. This is not necessarily surprising, but the interviews allow us to map with greater precision the limitations of incomplete incorporation.

What is more striking about the interviews is the extent to which they highlight the intersectional vulnerabilities that immigrants experience.<sup>196</sup> They experience discrimination and exclusionary practices as a result of their legal status, of course. But these vulnerabilities intersect with and are exacerbated by vulnerabilities that they experience on the basis of race, limited English proficiency, socioeconomic status, and gender.

When the vulnerabilities identified by unauthorized migrants as their most significant challenges are evaluated against the protective effects of citizenship, it becomes clear that even citizenship would not resolve some of the important vulnerabilities immigrants identify in their everyday life. This is in part because the institution of citizenship itself is not just a legal status, but also a social institution. And the social aspects of citizenship directly affect an individual's ability to access the formal legal rights and protections of citizenship. Historically, this has given rise to systems of second-class citizenship in the U.S., where certain groups have been excluded by virtue of race and gender from equal citizenship.<sup>197</sup> These interviews clarify the fact that as citizenship denial is increasingly wielded as a punitive weapon and citizenship itself increasingly treated as a measure of merit, the social meaning of citizenship is again morphing in ways that undermine the legal protections purportedly offered by citizenship.

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<sup>196</sup> See Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 140 U. CHI. LEGAL F. 139, 141-67 (1989) (defining and discussing intersectionality, and offering it as a critique of U.S. antidiscrimination law). For discussions of immigration status that deploy intersectional analyses, see, e.g. Kevin R. Johnson, *The Intersection of Race and Class in U.S. Immigration Law and Enforcement*, 72 LAW & CONTEMP. PROBS. 1, 4-22 (2009) (discussing immigrant interviews that illustrate the concept of intersectionality and the role it plays with U.S. immigration law and enforcement); Mariela Olivares, *Intersectionality at the Intersection of Profiteering and Immigration Detention*, 94 NEB. L. REV. 963, 991-1015 (2016) (discussing how the subordinated migrant identity makes it an easy target for legislation designed to put more people in prison); Leticia M. Saucedo, *Intersectionality, Multidimensionality, Latino Immigrant Workers, and Title VII*, 67 SMU L. REV. 257, 264-70 (2014) (discussing the intersection between immigrant status and exploitative workplaces); Jessica H. Stein, *Coalition, Cross-Cultural Lawyering, and Intersectionality: Immigrant Identity as a Barrier to Effective Legal Counseling for Domestic Violence Victims*, 11 CONN. PUB. INT. L.J. 133, 146-54 (2011) (discussing intersectionality of immigrant domestic violence victims).

<sup>197</sup> See, e.g., COHEN, *supra* note 1; SHKLAR, *supra* note 1; SMITH, *supra* note 1.

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Legalization with a path to citizenship is, of course, a more protective and beneficial form of legalization than legalization in the absence of citizenship, let alone the bestowal of liminal status protections. This discussion is not intended to call into question that basic point, which is clearly articulated in the earlier sections of this article. On the other hand, this discussion does illustrate the incomplete nature of formal citizenship's protective effects. More crucially, it reveals how some of the policy tradeoffs that have become unquestioned prerequisites to legalization with a path to citizenship — namely, substantially increased interior enforcement coupled with restrictive notions of citizenship worthiness — will further undermine citizenship's protective effects.

Using the same typology of vulnerabilities set forth in Part I, section II.A draws on our interview data to assess what noncitizens perceive as the potential benefits of citizenship, and then maps these perceptions against the reality reflected in the experiences of immigrants. This analysis illustrates the ways in which citizenship itself sometimes suffices and sometimes falls short as a means of assuaging some of the principle hardships attributed by noncitizens to their immigration and citizenship status. Part B discusses in three parts the broader theoretical implications of these findings for understandings of citizenship. The first subsection explores how our interview participants' experiences illustrate the contingent nature of citizenship. The second subsection frames these findings in the context of ongoing discussions around comprehensive immigration reform. The final subsection draws more general theoretical conclusions about the ways in which citizenship benefits are constrained by immigration law's exclusions. These exclusions structure both the protections offered by formal juridical citizenship and the shared social meaning of citizenship.

#### A. *The Promise and Limits of Citizenship*

As a practical matter, citizenship would provide a much stronger means of addressing the vulnerabilities of greatest concern to the immigrants that we interviewed than would lawful residence. At the same time, our discussions of these vulnerabilities with interview respondents highlight the shortcomings of citizenship as a guarantor of equality. The ways that citizenship would and would not address particular vulnerabilities are explored below.



### 1. Status and Belonging

When asked explicitly about whether they desired U.S. citizenship, respondents reacted in different ways. Some were quite enthusiastic about the possibility.<sup>198</sup> These respondents' enthusiasm appeared to stem primarily from their perceptions that citizenship would facilitate reunification with family and improve their social standing and sense of belonging.

One young Korean DACA recipient said that citizenship was important to him first for "being accepted. I guess the main thing." He continued, "I guess — well there's lots of reasons why [citizenship] would be the ultimate goal and personally for me, it would be, being accepted. The second would be, this is where I call home, and to — and for people to — say that 'this is not your home; you're just a foreigner,' that's very detrimental . . . . [S]ince DACA is temporary I still have to reapply, pay money, still live in fear of not being accepted, not being granted status. So if I am a U.S. citizen I no longer have to live in fear and the same goes for my family."<sup>199</sup> This young man, whose nuclear family lives in the U.S. with him and who has no children of his own, valued citizenship primarily because it would offer him a greater sense of belonging, stability in the workplace, and freedom from the fear of his own and his family members' potential deportation.<sup>200</sup>

Although they hoped citizenship might enhance their status and belonging, respondents did not view citizenship as a necessary condition for political participation. This was not because they were indifferent to political participation — quite the contrary. Many respondents are already actively engaged in community organizing and other political mobilization efforts, particularly with regard to immigration issues.<sup>201</sup> But they viewed robust political participation

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<sup>198</sup> See, e.g., Interview with Alondra, *supra* note 89.

<sup>199</sup> Interview with Dean, *supra* note 99.

<sup>200</sup> *Id.*; see also Interview with Bryce, in Orange County, Cal. (May 13, 2015) (transcript on file with author) (discussing citizenship as a means of aligning legal status with his own identity).

<sup>201</sup> See, e.g., Interview with Karina, *supra* note 144; Interview with Samuel, DACA ineligible (July 26, 2016) (transcript on file with author); Interview with Joaquin, Guatemalan DACA recipient (July 28, 2016) (transcript on file with author); see also Interview with Cora, *supra* note 120 (discussing the political mobilization of undocumented parents in public school governance); Interview with Yupanqui, *supra* note 187 (discussing the political mobilization of undocumented residents of Los Angeles through his organization). In this regard, our respondents may not be representative of their levels of political engagements. We identified these individuals because of their contact with immigrant-serving organizations, and most of the

not only as a possibility but as a necessity, even in the absence of formal legal status.<sup>202</sup> While a number of respondents expressly referenced voting as a benefit of citizenship,<sup>203</sup> few viewed political participation as confined to voting, and many were actively engaged politically from outside of the voting system.

A few immigrants mentioned greater access to state or federal welfare benefits or income security programs as a desired benefit of either lawful status or citizenship.<sup>204</sup> Health and retirement benefits and access to workers compensation came up in several interviews. Although many respondents mentioned struggles with their health — often precipitated by their physically demanding and dangerous work

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respondents we interviewed had worked with or received services from the organizations in our survey most focused upon mobilizing noncitizens in support of legal change. But it is striking to see the high levels of civic engagement among these undocumented residents.

<sup>202</sup> On this point, see, for example, the promotional materials designed by the immigrant justice organization “United We Dream” which encourages youth to apply for DACA status so that they can become politically involved. They are not suggesting voting — they are simply making the obvious point that people who are less fearful about deportation can more overtly engage in community organizing and mobilization. *Our Work*, UNITED WE DREAM, <https://unitedwedream.org/our-work/>. And many DACA-mented youth are very politically active. See, e.g., discussion of Daniela Vargas’s activism, *supra* note 155. So are some individuals who do not qualify for DACA but who have persuasive claims of belonging. See generally JOSE ANTONIO VARGAS, DEAR AMERICA: NOTES OF AN UNDOCUMENTED CITIZEN (2018) (describing his life as an undocumented immigrant).

<sup>203</sup> See, e.g., Interview with Herminia, *supra* note 108 (discussing voting as something that would be nice).

<sup>204</sup> Several respondents mentioned the “benefit” of opportunities for their children, although it is not clear whether they were referencing access to public education or the relatively broad array of educational and employment opportunities available in the U.S. as compared to their home countries. Others noted that citizenship carried with it certain government welfare benefits, but expressed no strong interest in securing those benefits for themselves. See, e.g., Interview with Oralia, *supra* note 88 (noting the earned benefits that citizens accrue prior to retirement, but also indicating her willingness to make do without them). The age of immigrant residents might influence their views on the relative importance of welfare benefits. The unauthorized population skews young relative to the general population. It could be that younger people are less focused on the health and welfare concerns that will actually be more important to them as they grow old. Older respondents were more likely to discuss health care and retirement benefits as an important advantage of citizenships. See, e.g., Interview with Alondra, *supra* note 89 (discussing the fears accompanying a lack of medical insurance); Interview with Oralia, *supra* note 88 (discussing the lack of care during Oralia’s hospital visit). Some young respondents noted their parents’ struggles with getting good healthcare. See Interview with Mireya, *supra* note 107 (discussing her mother’s struggles to access and pay for quality healthcare).

in the U.S.<sup>205</sup> — they did not frame health benefits as an entitlement, but as a desired privilege that they recognized would only come with citizenship.<sup>206</sup> The mismatch between their needs and their expressed desires about citizenship suggest that their reticence on this point may be less a reflection of their practical needs and preferences and more an indicia of the powerful containing force of citizenship-worthiness discourse.<sup>207</sup>

Whether intentionally or not, respondents avoided triggering stereotypes about immigrants coming to the country to take advantage of welfare benefits. Indeed, some respondents engaged this topic preemptively and articulated the neoliberal argument that they wanted the opportunity to work, not to access benefits.<sup>208</sup> And immigrants are already fighting for basic status, making other benefits less important in the hierarchy of their needs.<sup>209</sup> In this political moment, it is dangerous for almost anyone to lay claim to state welfare (such as it is); for immigrants, such claims are heavily discouraged.<sup>210</sup> Perhaps this is why even those who articulated the desire for benefits carefully framed them as earned.<sup>211</sup> Thus, ironically, some immigrants

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<sup>205</sup> See, e.g., Interview with Fatima, *supra* note 97 (discussing workplace injury); Interview with Enrique, in Los Angeles, Cal. (Aug. 29, 2016) (transcript on file with author) (stating “I am ready to retire because I have problems with my waist. Yes, I got hurt when I was working for the maintenance company,” and noting that he accepted a lowball settlement for the injury because of his lack of status).

<sup>206</sup> See, e.g., Interview with Alondra, *supra* note 89. The single exception to this general pattern was Samuel, who talked about health care as a human right, not as a narrow privilege of citizenship. Interview with Samuel, *supra* note 109.

<sup>207</sup> See discussion *infra* notes 256–69 and accompanying text.

<sup>208</sup> See, e.g., Interview with Oralia, *supra* note 88; Interview with Herminia, *supra* note 108 (expressing her desire for citizenship so that she can work with authorization).

<sup>209</sup> See, e.g., Interview with Pascuala, Immigrant Advocate, in Los Angeles, Cal. (Sept. 18, 2014) (transcript on file with author) (“It is very difficult in the immigrant community to get people to demand a service or a public program that they don’t feel they ought to have because they’re still fighting for basic, fundamental needs, which could be status.”).

<sup>210</sup> The Trump administration’s recently proposed rule increasing the scope of the “public charge” exclusion for intending immigrants to encompass any avilment of a vast array of public benefits neatly illustrates the point. See generally *Inadmissibility on Public Charge Grounds*, 83 Fed. Reg. 196 (proposed Oct. 10, 2018) (to be codified at 8 C.F.R. pts. 103, 212-14, 245, 248) (proposing a new federal rule for evaluating the “public charge” grounds so as to exclude immigrants who rely on a vast array of benefits), <https://www.gpo.gov/fdsys/pkg/FR-2018-10-10/pdf/2018-21106.pdf>.

<sup>211</sup> Interview with Enrique, *supra* note 205 (“I want to be a citizen because there are possibilities for me of getting more health benefits, and because, well, I think I’ve earned them because of the time I’ve been working here. I don’t think that they owe me anything or that I owe them anything, but at the same time if needs be I have to

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effectively thin out their expectations as to the contents of citizenship status in order to preserve their ability to make a claim to citizenship.

Not surprisingly, respondents who gave the greatest weight to concerns about belonging and status were also more likely to express their desire for U.S. citizenship as opposed to mere lawful residence.<sup>212</sup> But while many of these respondents seemed to view citizenship as the legal mechanism most capable of remediating their lack of belonging and devalued status,<sup>213</sup> they generally made claims for a version of citizenship that was devoid of clearly articulated economic rights and acknowledged the inequalities that persist within the category of citizen.

## 2. Family and Free Movement

Asked whether he would like to become a citizen one day, Nestor, a young man who recently came from Guatemala and who is not eligible for any of the current or pending deferred action programs, replied, “[y]es, because being a citizen then you can bring your family over.”<sup>214</sup> Beatriz stated, “I would like to be a citizen so I can bring my daughter and family. That they are able to work, get a home, and that my children can become professionals. That they can be a source of pride among Latinos. That I can die in peace.”<sup>215</sup>

When it comes to traveling to see family members or reuniting with them in-country, citizens have significant advantages over all lawful residents, including LPRs. Citizens can petition on behalf of spouses and children, with wait times that are limited to processing time, since there are no numeric caps on these relatives, and therefore no visa backlogs aside from processing time.<sup>216</sup> They can petition for their married sons and daughters and their siblings; lawful permanent residents cannot.<sup>217</sup>

On the other hand, certain citizens are statutorily barred from petitioning for close relatives. For example, individuals who acquire

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resort to using their institutions when it is necessary. That is why I want to become a citizen, first a resident and then a citizen.”).

<sup>212</sup> See *supra* text accompanying notes 202–05.

<sup>213</sup> Even the organization staff member cited above noted that citizenship would allow him and his family to visit long-lost relatives in Korea. Interview with Dean, *supra* note 99.

<sup>214</sup> Interview with Nestor, Undocumented Immigrant (Jan. 8, 2015) (transcript on file with author).

<sup>215</sup> Interview with Beatriz, *supra* note 87.

<sup>216</sup> Immigration and Nationality Act, 8 U.S.C. § 1153(a) (2018).

<sup>217</sup> *Id.*

citizenship by way of a finding of Special Immigration Juvenile (“SIJ”) status cannot later petition for their parents.<sup>218</sup> And some immigration law reform proposals would expand bars on citizen petitions.<sup>219</sup>

Even with no changes to the current petitioning process, citizenship offers an imperfect guarantee of family unification. Citizens are routinely separated from noncitizen spouses. The noncitizen spouses of citizens can be denied entry with virtually no justification.<sup>220</sup> Those lacking status are frequently separated from their families, removed from the U.S. and barred from reentering for ten years for the sole reason of their unlawful presence.<sup>221</sup> And citizens have almost no judicial recourse when a noncitizen family member is denied entry into the U.S.<sup>222</sup> These exclusions — often undertaken without any meaningful explanation — are routinely justified in the name of national security.<sup>223</sup>

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<sup>218</sup> See, e.g., Immigration and Nationality Act, 8 U.S.C. § 1101(a)(27)(J) (2018).

<sup>219</sup> See, e.g., Border Security, Economic Opportunity, and Immigration Modernization Act, S. 744, 113th Cong. (2013) (discussing bars on petitions for registered provisional immigrant status (“RPI”); see also RAISE Act, S. 354, 115th Cong (2017). This is only one of the many ways that the rights of new citizens will be altered by legalization packages. See also discussion *infra* section III.B.2.

<sup>220</sup> See, e.g., *Kerry v. Din*, 135 S. Ct. 2128, 2132-38 (2015) (finding that the government’s citation of the statutory provision under which a citizen’s husband was excluded satisfied the process due the citizen in the deprivation of her right to reunify with her husband in the U.S.).

<sup>221</sup> See Immigration and Nationality Act, 8 U.S.C. § 1182(a)(9)(A)(II) (2018); see also Jane Lilly López, *Redefining American Families: The Disparate Effects of IIRIRA’s Automatic Bars to Reentry and Sponsorship Requirements on Mixed-Citizenship Couples*, 5(2) J. ON MIGRATION & HUM. SEC. 236, 237 (2017) (interviewing and documenting the experience of 50 of these families); BETH C. CALDWELL, *DEPORTED AMERICANS: LIFE AFTER DEPORTATION TO MEXICO* (forthcoming Apr. 2019) (describing the author’s long-term interview project with deported long-term U.S. residents, including those who have been separated from family).

<sup>222</sup> See, e.g., *Kerry*, 135 S. Ct. at 2131 (discussing lack of judicial recourse for wife whose spouse’s visa was denied); *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 219-21 (1953); *Knauff v. Shaughnessy*, 338 U.S. 537, 545-47 (1950) (discussing restrictions on entry of an immigrant under the War Brides Act). The recent litigation over the travel ban has potentially created an opening for “close” family members to contest certain exclusions. See *Trump v. Int’l Refugee Assistance Project*, 137 S. Ct. 2080, 2084-88 (2017) (generally staying an injunction of President Trump’s ban on entry for nationals of six predominantly Muslim countries, but upholding the injunction as to banned entrants with bona fide relationships in the U.S.). *But cf.* *Trump v. Hawaii*, 13 S. Ct. 2392, 2407-16 (2018) (allowing President Trump’s proclamation banning entrants from certain countries to go into effect).

<sup>223</sup> See *Kerry*, 135 S. Ct. at 2146 (Breyer, J., dissenting) (noting the meaninglessness of the “reason” offered for Din’s husband’s exclusion on national security grounds). The ongoing litigation of Donald Trump’s travel ban has thus far suggested a greater willingness on the part of courts in looking behind the stated

Citizens can travel abroad without fear of losing status after being away for a length of time. Theoretically, they can re-enter the country without fear of exclusion at the border, as the immigration laws apply only to noncitizens. As a practical matter, this is sometimes messy on the ground.<sup>224</sup> The international mobility of citizens is far greater than that of noncitizens — they can leave the U.S. whenever, and for however long they want (assuming the existence of a receptive host country). However, the experiences of citizens in border crossings and domestic travel are not uniform. Citizens of Latin American descent — or, more to use the precise language of the court, those of “Mexican appearance”<sup>225</sup> — are sometimes subjected to immigration-motivated searches at the hands of both federal immigration officers and state and local immigration officials, citizenship notwithstanding.<sup>226</sup> The same is often true of individuals who trace their ancestry to certain Middle Eastern countries, or who are perceived as Arab or Muslim.<sup>227</sup>

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objectives offered by the executive branch for immigration exclusions in cases where perceived animus is at play and that animus has a negative impact on family unification. See, e.g., *Hawai'i v. Trump*, 241 F. Supp. 3d 1119, 1139-40 (D. Haw. 2017) (finding that a plaintiff separated from family by President Trump's March 6, 2017 Executive Order and raising an Establishment Clause challenge was likely to succeed on the merits). It remains to be seen whether appellate courts will continue to apply this atypically searching standard to the executive branch's proffered rationale for exclusions as the travel ban and related litigation evolve.

<sup>224</sup> Note how the recent Yemeni-American passport revocation cases shed light on the contingency of citizenship in this regard. See Ramzi Kassem, *Passport Revocation as Proxy Denaturalization: Examining the Yemen Cases*, 82 *FORDHAM L. REV.* 2099, 2101 (2014).

<sup>225</sup> *United States v. Brignoni-Ponce*, 422 U.S. 873, 887 (1975); see also *United States v. Martinez-Fuerte*, 428 U.S. 543, 571-72 (1976); Johnson, *supra* note 111, at 331-32.

<sup>226</sup> See AARTI KOHLI ET AL., *SECURE COMMUNITIES BY THE NUMBERS: AN ANALYSIS OF DEMOGRAPHICS AND DUE PROCESS* 1-4, 13 (2011), [http://www.law.berkeley.edu/files/Secure\\_Communities\\_by\\_the\\_Numbers.pdf](http://www.law.berkeley.edu/files/Secure_Communities_by_the_Numbers.pdf); Johnson, *supra* note 111, at 331-32; Letter from Tom Perez, Assistant Attorney Gen., to Bill Montgomery, Maricopa Cty. Dist. Attorney 1, 2 (Dec. 15, 2011) (on file with U.S. Dep't. of Justice); see also *Martinez-Fuerte*, 428 U.S. at 572 (finding that the vast majority of those stopped at an interior immigration checkpoint were of Mexican descent, and that most of those individuals were lawfully present, but upholding the continued use of race as the basis for stops at interior immigration checkpoints).

<sup>227</sup> See, e.g., Sarah Abdurrahman, *My Detainment Story, Or: How I Learned to Stop Feeling Safe in My Own Country and Hate Border Agents*, *ON THE MEDIA* (Sept. 19, 2013), <http://www.onthemedialife.org/story/my-detainment-story-or-how-i-learned-stop-feeling-safe-my-own-country-and-hate-border-patrol/> (describing Muslim travelers being detained, without explanation, by U.S. border patrol); see also Kassem, *supra* note 224, at 2101; Emma Graham-Harrison, *U.S. Border Agents Ask Muhammad Ali's Son: 'Are you a Muslim?'*, *THE GUARDIAN* (Feb. 25, 2017, 12:19 PM), <https://www.theguardian.com/us-news/2017/feb/25/muhammad-ali-son-detained-questioned-us->

More broadly, the Supreme Court has concluded that there is no fundamental constitutional right to international travel, so restrictions on such travel need only survive rational basis review.<sup>228</sup>

Citizens technically should be freed of many of the restrictions on internal mobility that are experienced by unauthorized residents. Yet the protections of citizenship are imperfect in this regard, too. Some citizens still run up against limits on internal mobility. Many of our respondents took note of this fact and understood that while their immigration status made them vulnerable to exploitation and removal, they were policed on the basis of their *perceived* immigration status, which was linked to race, not legal status. For example, Erasmo observed the police targeting Latinos and using this profiling to perform the auto stops that were the necessary precursor to license checks.<sup>229</sup> At a time when unauthorized residents were barred from obtaining driver's licenses, targeting these residents could provide revenue for police departments in the form of fines and fees. But since immigration status is not evident based on appearance, immigrants were often stopped as part of efforts that targeted Latinos regardless of immigration status, and this included citizens. For example, Erasmo told us "They detain because they see me as Latino — not — because they don't know your status yet whether you're an immigrant or not. I've seen people who are Latino, who have their license. They're not immigrants and they've been pulled over. The first thing they ask for is the license."<sup>230</sup>

Erasmo is far from alone in this view that law enforcement officials use racial profiling to select targets for investigation. Several of our interviewees referenced racial profiling as a reality of everyday life.<sup>231</sup>

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border-control (discussing Muslim-American being questioned for two hours after confirming to immigration officials that he was a Muslim). As the Graham-Harrison article demonstrates, the problem may have become more acute in the wake of the Trump administration's "extreme vetting" of Muslims seeking admission at the border.

<sup>228</sup> See, e.g., *Califano v. Aznavorian*, 439 U.S. 170, 177-78 (1978) (upholding denial of SSI benefits to individuals residing abroad); see also *Regan v. Wald*, 468 U.S. 222, 243-44 (1984) (finding plenary executive authority to deny issuance of a passport).

<sup>229</sup> Interview with Erasmo, *supra* note 114; see also Interview with Mario, *supra* note 96 (noting that police would target Latino drivers in particular geographic areas).

<sup>230</sup> Interview with Erasmo, *supra* note 114.

<sup>231</sup> See Interview with Yupanqui, *supra* note 187 (condemning the LAPD officers and the LA Sheriff's Department, including Latino officers.); *id.* ("[O]ne day, [along with the] ACLU [we] went to the police department and analyzed a lot of files and the results were that seventy percent of the times that they stopped somebody of color, there were no reasons to stop the person. Ninety percent of the times that they

These individuals recognized that citizenship could mitigate the consequences of racial profiling, but also know that citizenship only goes so far in alleviating differential treatment. They understood that formal citizenship does not protect people from discriminatory policing,<sup>232</sup> and most understood that, notwithstanding the diversity of the unauthorized population, it was Latinos who were at particular risk for this kind of profiling by local police.<sup>233</sup>

It is possible that this helps to explain why respondents did not always see citizenship as a crucial part of legalization. When citizenship does so little to protect against discriminatory state action, perhaps it becomes less valuable in the eyes of potential recipients.

Of course, it is precisely *because* these populations are likely to be policed more aggressively (regardless of citizenship) that citizenship

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stopped someone who was white, there was a reason to stop him.”); *see also* Interview with Mario, *supra* note 96; Interview with Oralia, *supra* note 88; Interview with Nestor, *supra* note 214 (reporting incidents where police “see people that are not from there, they start to put “buts” and ask them where they are from,” but noting that it had not happened to him); Interview with Fatima, *supra* note 97 (describing discriminatory encounter). Several interviews describe the profiling as based on markers of race and class. *See, e.g.*, Interview with Coni, *supra* note 96 (noting her older vehicle as a reason police stopped her); Interview with Herminia, *supra* note 108 (same). *But see* Interview with Patricio, *supra* note 90 (indicating that he did not fear the police because that if you do nothing wrong, the police will not bother you).

<sup>232</sup> *See* Chacón, *supra* note 10, at 753 (“[D]enizen on the edge of the criminal justice system has many shared characteristics with noncitizens given temporary reprieve from removal and with the citizens who are policed more heavily because they bear the visible markers of race or ethnicity that correlate to other forms of liminal legal status. Many individuals experience overlapping vulnerabilities due to the combination of their race, religion, class and immigration status.”); *see also* CHARLES R. EPPS ET AL., PULLED OVER: HOW POLICE STOPS DEFINE RACE AND CITIZENSHIP 135-36 (2014) (documenting patterns of racial bias in investigatory police stops and arguing that these “[p]olice stops that target minorities communicate to those stopped, and those shielded from such stops, that some citizens are not free to move about as equal members of society . . . . [I]ntrusive police stops carry on the legacy of long-repealed segregationist laws: they exclude African Americans from full and equal membership in the community.”); Kathryn M. Young & Joan Petersilia, *Keeping Track: Surveillance, Control, and the Expansion of the Carceral State*, 129 HARV. L. REV. 1318, 1322 (2016) (“[T]he constant surveilling presence of the criminal justice system has several corrosive consequences, including . . . creating a kind of ‘liminal,’ ‘second-class,’ or ‘peripheral’ citizenship from which it is difficult to escape. In important ways, the modern criminal justice system destabilizes lives, particularly those in poor and minority communities.”). Race is a leading driver of these patterns of exclusion, but class, gender (including how individuals perform their gender identity) and disability all play important roles in shaping patterns of criminal justice hyper-surveillance. *Id.* at 1320 n.11; *see also* MARIE GOTTSCHALK, CAUGHT: THE PRISON STATE AND THE LOCKDOWN OF AMERICAN POLITICS 2-3 (2015).

<sup>233</sup> *See supra* notes 148, 231–32.



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— with its relatively strong insurance against removal — is even more important for them as a practical matter. This example underscores the complexity of the bundle of rights associated with U.S. citizenship. It does not assure equal treatment in policing. It may, at times, ensure that some of the consequences of discriminatory policing are less severe than they otherwise might be; at a minimum, it takes lawful deportation off the table. But citizenship is certainly no guarantee against discrimination.<sup>234</sup>

### 3. Work and Educational Goals

Individuals who obtained legal authorization to work before or during the study period reported that they had greater latitude to find work commensurate with experience and to leave less desirable jobs. DACA recipients in particular frequently commented that their work authorization improved their employment situation dramatically.<sup>235</sup>

But immigrants with limited English proficiency and little formal education recognized that it was not just their legal status that affected their job prospects. The workplace discrimination and other status harms experienced and described by these immigrants were not simply the product of their legal status but by the combined operation of legal status, race, class, gender and limited English proficiency. Indeed, the plight of other low-wage citizen workers highlights the sharp limits of citizenship as a protective force against workplace exploitation and discrimination.<sup>236</sup>

Perhaps it was for this reason that legalization seemed to be a more important and immediate goal than citizenship for so many older immigrant workers. For them, LPR status would improve working conditions in much the same way citizenship would. Most people —

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<sup>234</sup> See, e.g., KIMBERLÉ CRENSHAW ET AL., *SAY HER NAME: RESISTING POLICE BRUTALITY AGAINST BLACK WOMEN 1* (2016) (documenting and challenging police excessive use of force against black women).

<sup>235</sup> Interview with Karina, *supra* note 144; Interview with Reese, *supra* note 146 (discussing the better work options available to those with DACA); see also Gonzales & Terriquez, *supra* note 71, at 1; Wong et al., *supra* note 71, at 1. One DACA recipient noted, however, that her prior lack of work experience had resulted in a limited employment history that continued to operate as a drag on her ability to find a good job, illustrating how unauthorized status can have effects that outlast the status. See Interview with Mireya, *supra* note 107.

<sup>236</sup> See, e.g., Llezlie Green Coleman, *Rendered Invisible: African American Low Wage Workers and the Workplace Exploitation Paradigm*, 60 HOWARD L. J. 61, 73-74 (2016) (arguing that low wage black workers suffer many of the same problems as low wage undocumented workers but that these workers are often excluded from the scholarly paradigm on low wage work, which centers on unauthorized immigrants).

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whether citizens or not — are probably unaware that the law provides anti-discrimination protections for citizens that do not apply to all lawful residents<sup>237</sup> and that alienage distinctions bar lawful residents from some jobs altogether.<sup>238</sup> Most of those we spoke with focused not on the technical differences between the statuses but on the kinds of exploitation facilitated by their lack of status. Either legal work authorization or citizenship could remediate the harms that flowed directly from employers taking advantage of the vulnerabilities created by lack of status. But neither legal work authorization nor citizenship protects fully against all workplace discrimination and exploitation.

### B. Redefining Citizenship

One striking feature of the accounts of the immigrants we interviewed is that they expose the intertwined nature of exclusions that arise from a lack of legal immigration status and the exclusions that flow from social practices around race, class, gender and language ability. The social and legal exclusions of immigration law both mirror and help to generate exclusionary laws and practices around citizenship. Not only does immigration law make it harder for some noncitizens to acquire juridical citizenship, but it also contributes to official and private social practices that differentiate between and among citizens and that hollow out citizenship's protective force, producing and reproducing various forms of second-class citizenships.

#### 1. The Fluidity of Citizenship

Respondents' understanding of why they become targets of discriminatory policing practices sheds light on how citizenship can reshape itself depending on the social context in which it is embedded. Exclusionary conceptions of citizenship validate policing practices that redound to the disadvantage not only of noncitizens but of certain citizens as well.

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<sup>237</sup> See, e.g., 8 U.S.C. § 1324(b) (2018) (providing protections for citizens, TPS recipients, refugees and asylees, against discrimination on the basis of citizenship or national origin, but extending such protections to LPRs only if they naturalize within a certain window of time, and providing no such protections for most nonimmigrant visa holders). At least one of our respondents recognized this problem. Interview with Herminia, *supra* note 108 (expressing her interest in becoming a police officer and noting that the job is only available to citizens).

<sup>238</sup> Considering the dynamic nature of citizenship and alienage laws, one might query whether legalization without citizenship would also move some states to expand or contract alienage exclusions in public employment, depending on the preferences of a state's dominant political interests.

Unsurprisingly, the individuals that we interviewed split on the question of whether police officers treated unauthorized immigrants fairly, and their answers tended to reflect their own experiences. But consistently, in assessing how the police treat unauthorized immigrants, respondents included discussions of racist policing tactics (taking action against Latinos but not whites for the commission of the same kinds of offenses, or targeting Latinos in the absence of legal cause),<sup>239</sup> and police mistreatment of limited English proficiency residents.<sup>240</sup> But of course, many citizens have one or both of these characteristics — being Latino or having limited English proficiency — which suggests that many citizens may also be treated less fairly because of their race, class, and language ability.<sup>241</sup> The responses we received to questions about their treatment reflected this awareness among the immigrants we interviewed. And this awareness may, in turn, help account for some respondents' disenchanted view of citizenship.<sup>242</sup>

The observable shortcomings of citizenship as a vehicle to greater social equality and protection from arbitrary discrimination are significant for what they portend in the event that some subset of unauthorized residents is given a path to citizenship in the current context of entrenched and pervasive immigration enforcement systems. Based on past legislative proposals, it seems safe to conclude that legalization for some noncitizens — should it ever happen — will be accompanied by more aggressive immigration enforcement in communities that are perceived to be home to large numbers of

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<sup>239</sup> See *supra* text accompanying notes 231–34.

<sup>240</sup> See *supra* text accompanying note 234.

<sup>241</sup> This is consistent with much of the existing literature on policing. See, e.g., CRENSHAW ET AL., *supra* note 234, at 2 (discussing state violence against African American females); CHARLES R. EPP ET AL., PULLED OVER: HOW POLICE STOPS DEFINE RACE AND CITIZENSHIP 26 (2014) (discussing the implicit racial stereotypes built into police investigatory stops); VICTOR M. RIOS, PUNISHED: POLICING THE LIVES OF BLACK AND LATINO BOYS 74-75 (2011) (discussing the U.S. social system built on punitive social control that makes minority youth feel criminalized from a young age); I. Bennett Capers, *Policing, Race, and Place*, 44 HARV. C.R.-C.L. L. REV. 43, 61-65 (2008) (discussing how law-abiding minorities are disproportionately targeted for stop-and-frisks); Devon Carbado, *(E)Racing the Fourth Amendment*, 100 MICH. L. REV. 946, 964-67 (2002) (describing how people of color are socialized into engaging in particular kinds of performance for the police).

<sup>242</sup> Cf. generally PLASCENCIA, *supra* note 15 (offering an ethnographic and historical account to advance the claim that the process of the acquisition of citizenship for Mexican immigrants granted Temporary Status under the federal legalization provisions of 1986 ultimately lead to disenchantment with the status).

unauthorized residents.<sup>243</sup> If the past is any indication of what to expect in the future, the heightened emphasis on immigration enforcement will mean more stops on immigration-related grounds (whether formally or under a pretext), more inquiries into immigration status, and more cases in which citizens are erroneously identified and processed as noncitizens.<sup>244</sup> These effects will be exacerbated by official governmental policies in states and localities focused on immigration enforcement and perhaps mitigated to a certain extent in more immigrant-friendly jurisdictions.<sup>245</sup>

Citizens are already impacted differentially by the policing practices associated with ongoing immigration enforcement — increased enforcement will simply exacerbate these problems. Just as law enforcement initiatives have altered the meaning of citizenship for African American residents in urban communities with high rates of police searches, arrests, and use of force,<sup>246</sup> the increased targeting of immigrant communities for immigration enforcement has and will continue to alter the meaning of citizenship for members of immigrant communities and immigrant families, including those who are legally “citizens.”<sup>247</sup>

Perceptions of these developments might already be influencing our respondents’ perceptions of the value of citizenship. For many of our

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<sup>243</sup> See, e.g., Border Security, Economic Opportunity, and Immigration Modernization Act, S. 744, 113th Cong. (2013) (discussing federal pilot programs that can be awarded to state and local governments to integrate new immigrants into the community). The rollout of Secure Communities illustrates how race, rather than immigration status, may shape how officials define their enforcement priorities in this regard. See Adam B. Cox & Thomas J. Miles, *Policing Immigration*, 80 U. CHI. L. REV. 87, 114 (2013) (finding that Secure Communities roll-out correlated more closely with the percentage of Hispanics in the population than with the percentage of immigrants, unauthorized immigrants, or indicia of crime control needs).

<sup>244</sup> KOHLI ET AL., *supra* note 226, at 13; Jennifer M. Chacón, *A Diversion of Attention? Immigration Courts and the Adjudication of Fourth and Fifth Amendment Rights*, 59 DUKE L.J. 1563, 1596 (2010); Adam B. Cox & Thomas J. Miles, *Policing Immigration*, 80 U. CHI. L. REV. 87, 131-32 (2013). For example, in the workplace, citizens may be erroneously identified as unauthorized workers, as has happened in the past. See U.S. GEN. ACCT. OFF., IMMIGRATION REFORM: EMPLOYER SANCTIONS AND THE QUESTION OF DISCRIMINATION 3-8 (Mar. 1990); Stephen Lee, *Private Immigration Screening in the Workplace*, 61 STAN. L. REV. 1103, 1116 (2008); Juliet P. Stumpf, *Getting to Work: Why Nobody Cares About E-Verify (and Everybody Should)*, 2 UC IRVINE L. REV. 381, 396 (2012).

<sup>245</sup> See discussion *supra* Part I.B.1.b.

<sup>246</sup> EPPS ET AL., *supra* note 232, at 52-53; Tonja Jacobi et al., *The Attrition of Rights Under Parole*, 87 S. CAL. L. REV. 887, 889-90 (2014); Young & Petersilia, *supra* note 232, at 1320.

<sup>247</sup> Chacón, *supra* note 10, at 712.

respondents, social standing was a critical concern driving their interest in citizenship, and yet they were aware that citizenship does not always translate into greater or more secure social standing in the face of discriminatory enforcement practices.<sup>248</sup>

The changes to citizenship generated by enforcement have not been limited to the disenfranchising effects of the practices of particular officers — although such practices are themselves important. The formal legal rights of citizens are directly affected by changes in the law that are intended to enhance immigration enforcement. Concerns with immigration enforcement have legitimated differential state practices as against certain citizens under the law.<sup>249</sup> They affect political citizenship insofar as they implicate rights such as the right to vote.<sup>250</sup> They impinge on the core rights of juridical citizenship by

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<sup>248</sup> Indeed, these perceptions are deeply internalized. So much so that one respondent, for example, distinguished Latino police officers from “American Americans.” Interview with Fatima, *supra* note 97.

<sup>249</sup> See U.S. DEP’T OF JUSTICE, GUIDANCE FOR FEDERAL LAW ENFORCEMENT AGENCIES REGARDING THE USE OF RACE, ETHNICITY, GENDER, NATIONAL ORIGIN, RELIGION, SEXUAL ORIENTATION, OR GENDER IDENTITY 1 (2014). What makes the search of a resident “reasonable,” for example, is contingent upon the place. See, e.g., *Illinois v. Wardlow*, 528 U.S. 119, 124-26 (2000) (holding that when a person runs from police in a “high crime area,” this combination of facts is sufficient to justify a frisk of the person); *Adams v. Williams*, 407 U.S. 143, 144, 147-48 (1972) (finding the fact that the stop occurred in a “high crime area” among the relevant contextual considerations in determining whether a stop and frisk is reasonable). This analytical fact is significant and explicitly tied to racial profiling, in the policing of the borderlands. See *United States v. Brignoni-Ponce*, 422 U.S. 873, 877 (1975); Devon W. Carbado & Cheryl I. Harris, *Undocumented Criminal Procedure*, 58 UCLA L. REV. 1543, 1557 (2011); Jennifer M. Chacón, *Border Exceptionalism in the Era of Moving Borders*, 38 FORDHAM URB. L.J. 129, 130 (2010).

<sup>250</sup> Concerns about noncitizens’ voting have been an important motivator for the passage of voter I.D. requirements that disenfranchise many citizens — most notably, those who are poor, the elderly, Latinos and African Americans. Sari Horwitz, *Getting a Photo ID so You Can Vote Is Easy. Unless You’re Poor, Black, Latino or Elderly*, WASH. POST (May 23, 2016), [https://www.washingtonpost.com/politics/courts\\_law/getting-a-photo-id-so-you-can-vote-is-easy-unless-youre-poor-black-latino-or-elderly/2016/05/23/8d5474ec-20f0-11e6-8690-f14ca9de2972\\_story.html](https://www.washingtonpost.com/politics/courts_law/getting-a-photo-id-so-you-can-vote-is-easy-unless-youre-poor-black-latino-or-elderly/2016/05/23/8d5474ec-20f0-11e6-8690-f14ca9de2972_story.html). The myth that large numbers of noncitizens are voting in U.S. elections has been promoted heavily in recent years. See, e.g., Richard L. Hasen, *Trump’s Voter Fraud Endgame*, SLATE (June 30, 2017) [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2017/06/donald\\_trump\\_s\\_voter\\_fraud\\_commission\\_is\\_itself\\_an\\_enormous\\_fraud.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2017/06/donald_trump_s_voter_fraud_commission_is_itself_an_enormous_fraud.html); Jessica Huseman, *How the Case for Voter Fraud was Tested – and Utterly Failed*, ELECTIONLAND (June 19), <https://www.propublica.org/article/kris-kobach-voter-fraud-kansas-trial>; Amy Sherman, *Following Trump Voter Fraud Allegations, Claim That 5.7 Million Noncitizens Voted Is Wrong*, POLITIFACT (June 22, 2017, 3:28 PM), <http://www.politifact.com/florida/statements/2017/jun/22/ainsley-earhardt/following-trump-voter-fraud-allegations-claim-57-m/> (alleging that 5.7 million noncitizens voted in the 2008 election). The irony is that the

generating restrictions in the right to be documented as a citizen.<sup>251</sup> Citizens who are documented as such may still lose the right to be safe from formal legal banishment. Due to systemic errors that fall in predictable patterns, citizens have been placed in immigration detention and deported erroneously.<sup>252</sup>

Equally significantly, the pervasive surveillance and policing practices associated with immigration enforcement broadly recalibrate the relationship of the government and its citizens, resetting political defaults in ways that allow for increased surveillance of all residents, including citizens. These trends can already be discerned as a result of the increased immigration enforcement of the past two decades,<sup>253</sup> and are likely to be furthered by enforcement-heavy legalization packages<sup>254</sup> — with or without the creation of new paths to citizenship.

## 2. “Earning” Citizenship

Our interviews with immigrants also help to reveal how the political framing of the legalization debate is reshaping citizenship. The

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problem of noncitizen voting is not really a problem at all. *See, e.g.*, JUSTIN LEVITT, THE TRUTH ABOUT VOTER FRAUD 18 (2007), <https://www.brennancenter.org/publication/truth-about-voter-fraud>; *see also* *Debunking the Voter Fraud Myth*, BRENNAN CTR. FOR JUST. 1 (2017), <https://www.brennancenter.org/analysis/debunking-voter-fraud-myth>; Stephen Ansolabehere et al., *The Perils of Cherry Picking Low Frequency Events in Large Sample Surveys*, CCEs (Nov. 5, 2014), <https://cces.gov.harvard.edu/news/perils-cherry-picking-low-frequency-events-large-sample-surveys>.

<sup>251</sup> *See generally* BENJAMIN N. LAWRENCE & JACQUELINE STEVENS, CITIZENSHIP IN QUESTION: EVIDENTIARY BIRTHRIGHT AND STATELESSNESS, Introduction 1-23 (2017) (analyzing the ways that vulnerable and disfavored populations are excluded from citizenship and summarizing the various case studies collected in the volume on this topic); Rachel E. Rosenbloom, *The Citizenship Line: Rethinking Immigration Exceptionalism*, 54 B.C. L. REV. 1965, 1993 (2013) (discussing South Texas birth certificate denials). By way of example, Professor Jacqueline Stevens is currently documenting the Kafka-esque case of Roberto Dominguez, a U.S. citizen who has already been once deported by ICE and who is continuing to litigate his claim to U.S. citizenship under 8 U.S.C. § 1503 (Denial of Rights and Privileges as a U.S. Citizen). *See* Jacqueline Stevens, *How Many DOJ Attorneys Does It Take to Deport a U.S. Citizen? Boston Hearing Today*, STS. WITHOUT NATIONS (Feb. 19, 2016), <http://stateswithoutnations.blogspot.com/2016/02/how-many-us-attorneys-and-assistant.html>. This is one of several such examples she has discussed on her blog — all involving Black and Latino U.S. Citizens.

<sup>252</sup> DANIEL KANSTROOM, AFTERMATH: DEPORTATION LAW AND THE NEW AMERICAN DIASPORA 99-102 (2012); Jacqueline Stevens, *U.S. Government Unlawfully Detaining and Deporting U.S. Citizens as Aliens*, 18 VA. J. SOC. POL'Y & L. 606, 686 (2011).

<sup>253</sup> *See* Anil Kalhan, *Immigration Surveillance*, 74 MD. L. REV. 1, 5-6 (2014).

<sup>254</sup> Border Security, Economic Opportunity, and Immigration Modernization Act, S. 744, 113th Cong. § 5, 1106, 2103-11, 3104, 3303, 3409, 4411-12 (2013).

dominant frame for political discussions of immigration reform is one that posits citizenship as an earned right. Although themes of mercy and justice (particularly transnational justice) are deployed alongside this frame, they do not drive either the popular or the political discourse. No mainstream politicians are talking about a possible “amnesty” for the eleven million unauthorized migrants currently present in the United States. Supporters of mass deportation for these noncitizens certainly do not support amnesty for noncitizens.<sup>255</sup> Supporters of large-scale legalization without citizenship eschew amnesty on the debatable grounds that granting citizenship to someone with a period of unauthorized presence undermines the rule of law.<sup>256</sup> But even those who support a path to citizenship for some unauthorized residents now refrain from labeling such a plan “amnesty.” Nor do they frame legalization as an imperative of human dignity. Instead, tapping into the neoliberal zeitgeist, many immigration reform proponents have joined politicians in reframing the citizenship proposal not as an “amnesty” but as “earned citizenship.”<sup>257</sup> Immigrants who are sufficiently hard-working<sup>258</sup> and law-abiding earn the right to be a citizen.

Former President George W. Bush supported such a path to “earned citizenship” when calling for the passage of comprehensive immigration reform, and he urged that “[w]e need to resolve the

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<sup>255</sup> The opposition to amnesty is interesting given that immigration law incorporates a number of small-scale amnesties that are a part of the fabric of the law. Some of them — such as the T visa and the VAWA self-petition provisions — are bipartisan legislative achievements of recent vintage. MOTOMURA, *supra* note 7, at 196-97.

<sup>256</sup> Bush and Bolick, for example, would require individuals to plead guilty to unauthorized entry — which would not make sense for the nearly half of unauthorized residents who entered lawfully and overstayed — to pay fines or do community service and then to begin to “earn” lawful residence which could never lead to citizenship. Ignoring the many lawbreaking individuals who have already gained or were born with citizenship, they maintain that “[i]t must be a basic prerequisite for citizenship to respect the rule of law.” BUSH & BOLICK, *supra* note 37 at 43.

<sup>257</sup> See, e.g., *Calling for Comprehensive Immigration Reform Which Promotes the Reunification of Families, Provides Legal Status with a Path to Earned Citizenship, and a Plan for Current and Future Immigrant Workers*, U.S. CONF. OF MAYORS (June 20–24, 2008), <https://www.usmayors.org/the-conference/resolutions/?category=c962&meeting=76th%20Annual%20Meeting>; *Taking Action on Immigration*, WHITE HOUSE, <https://obamawhitehouse.archives.gov/issues/immigration/earned-citizenship> (last visited Aug. 16, 2018). The Democratic party platform favored “earned citizenship” in 2012. See *Immigration Highlights from the Republican and Democratic Party Platforms*, AILA (Sept. 5, 2012), <http://www.aila.org/infonet/2012platforms> (last visited Feb. 14, 2016); see also Shannon Gleeson, *They Come Here to Work: An Evaluation of the Economic Argument in Favor of Immigrant Rights*, in 19 CITIZENSHIP STUD. 400, 410 (2015).

<sup>258</sup> Gleeson, *supra* note 257, at 429.

status of the illegal immigrants who are already in our country without animosity and without amnesty.”<sup>259</sup> President Obama followed suit. In his 2012 State of the Union address, he urged:

We should be working on comprehensive immigration reform right now. But if election-year politics keeps Congress from acting on a comprehensive plan, let’s at least agree to stop expelling responsible young people who want to staff our labs, start new businesses, defend this country. Send me a law that gives them the chance to *earn their citizenship*. I will sign it right away.<sup>260</sup>

He continued to use the phrase throughout his administration.<sup>261</sup> Various groups advocating comprehensive immigration reform have used the term as well.<sup>262</sup>

Advocates for more limited paths to citizenship for students who arrived in this country as children have also tapped into this rhetoric of earning and worthiness,<sup>263</sup> although the putative beneficiaries of those efforts do not always embrace the worthiness rhetoric.<sup>264</sup> This

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<sup>259</sup> George W. Bush, President of the U.S., Address Before a Joint Session of the Congress on the State of the Union (Jan. 23, 2007), <http://www.presidency.ucsb.edu/ws/index.php?pid=24446#ixzz1ph5absu8>.

<sup>260</sup> Barack Obama, President of the U.S., Remarks by the President in State of the Union Address (Jan. 24, 2012), <http://www.whitehouse.gov/the-press-office/2012/01/24/remarks-president-state-union-address> (emphasis added).

<sup>261</sup> In his next State of the Union Address in January 29, 2013, President Obama again urged:

[W]e have to deal with the 11 million individuals who are here illegally. We all agree that these men and women should have to earn their way to citizenship. But for comprehensive immigration reform to work, it must be clear from the outset that there is a pathway to citizenship. We’ve got to lay out a path — a process that includes passing a background check, paying taxes, paying a penalty, learning English, and then going to the back of the line, behind all the folks who are trying to come here legally. That’s only fair, right?

Barack Obama, President of the U.S., Remarks by the President on Comprehensive Immigration Reform (Jan. 29, 2013), <https://obamawhitehouse.archives.gov/the-press-office/2013/01/29/remarks-president-comprehensive-immigration-reform>. The right to “earn” citizenship features as a recurring part of President Obama’s stump speech on immigration reform and is featured on the White House website.

<sup>262</sup> Ahmad, *supra* note 19, at 272 n.61, 273 n.67.

<sup>263</sup> Keyes, *supra* note 139, at 920-24 (observing and critiquing the deployment of the “worthiness” framework adopted by some proponents of the DREAM Act).

<sup>264</sup> Abrams, *supra* note 139, at 728; Abrams, *supra* note 139, at 8-10; Gonzalez & Terriquez, *supra* note 71, at 2 (all arguing that immigrant youth activists have challenged and subverted the worthiness framework in important ways); *see also*



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desire to reward the “good immigrant” not just to the exclusion of, but also at the expense of the “bad immigrant,” was also embodied in President Obama’s assertion that his immigration policies are designed to help “families,” not “felons,” and “mother[s]” not “gang-bangers.”<sup>265</sup>

In trading off the security of long-time residents who fail to fit aspirational citizenship criteria, for the citizenship (or, in the case of DACA and DAPA, the more limited immigration relief) of the most “worthy” subjects, these plans provide a visible example of the work that “supercitizen immigrants” are doing in our citizenship debates. Bonnie Honig described the frequently recurring appearance of the supercitizen immigrant in American political discourse in this way:

Neither needy nor threatening, as such, but always mirrored by and partnered with those others, the supercitizen immigrant is the object of neither American hostility nor charity but outright adoration. The stereotypically weak immigrant and the stereotypically powerful one both elicit disavowal. But the supercitizen immigrant is an object of identification. He is the screen onto which we project our idealized selves. He works harder than we do, he values his

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Interview with Eleana, in Orange County, Cal. (Nov. 24, 2014) (transcript on file with author) (noting the refusal of many unauthorized Asian youth to adopt or deploy model (immigrant) minority stereotype); Interview with Reese, in Orange County, Cal. (Mar. 20, 2015) (transcript on file with author) (DACA is “like a model minority of a whole new level”); Interview with Carla, in Los Angeles, Cal. (Nov. 20, 2014) (transcript on file with author) (observing and critiquing the different narratives applied to “DREAMERS” compared to everyone else); *see also* Interview with Karina, in Orange County, Cal. (May 6, 2015) (transcript on file with author) (discussing her disappointment that DAPA would not cover her parents even as it covered her later-arriving aunt because her parents have only undocumented children).

<sup>265</sup> President Obama promoted this problematic dichotomy in announcing the DAPA program in November 2014:

Even as we are a nation of immigrants, we’re also a nation of laws. Undocumented workers broke our immigration laws, and I believe that they must be held accountable — especially those who may be dangerous. That’s why, over the past six years, deportations of criminals are up 80 percent. And that’s why we’re going to keep focusing enforcement resources on actual threats to our security. *Felons, not families. Criminals, not children. Gang members, not a mom who’s working hard to provide for her kids.* We’ll prioritize, just like law enforcement does every day.

Barack Obama, President of the U.S., 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> (emphasis added).

family and community more actively than we do, and he also fulfills our fantasy of membership by way of consent.<sup>266</sup>

The earned citizenship story and the mainstream political narrative constructed around DREAMers<sup>267</sup> places the supercitizen immigrant at its core. The trope generates a political compromise that centers and rewards only the ideal (super)citizen (perhaps with citizenship, perhaps with less) while spurring on harsh treatment of those who fall short. The citizenship debates themselves might be seen as a form of neoliberal governmentality<sup>268</sup> pushing noncitizens to “govern themselves” into supercitizenship. This may help to explain our respondents’ hesitance to talk about their desire for government assistance, and also helps to account for their own insistence that they have earned citizenship through their hard work and assimilationist efforts.

The reluctance of some individuals seeking legal status to treat citizenship as a means of accessing a shared social safety net both mirrors and amplifies the dominant discourse of citizenship — one that recasts citizenship as a narrower “freedom from” certain oppressive exclusions, with little or no affirmative rights-bestowing content. The politics of respectability limits the imaginative possibilities of citizenship.<sup>269</sup> At the same time, the guarantees of citizenship as a form of freedom from arbitrary and unfair governmental actions is reduced by the emphasis on enforcement practices that form the other side of the coin of earned citizenship. Harsh and discriminatory practices that affect citizens and noncitizens alike become normalized even as, ironically, they undercut the fundamental protective functions of citizenship.<sup>270</sup> Honig might

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<sup>266</sup> BONNIE HONIG, *DEMOCRACY AND THE FOREIGNER* 67-68 (2001).

<sup>267</sup> Keyes, *supra* note 139. But note the contestation of this merit-based rights claiming. See Interview with Bryce, *supra* note 200; Interview with Josue, *supra* note 105; Interview with Karina, *supra* note 144.

<sup>268</sup> WENDY BROWN, *EDGEWORK: CRITICAL ESSAYS ON KNOWLEDGE AND POLITICS* 42-44 (2005) (describing the workings of neoliberal governmentality).

<sup>269</sup> Cf. EVELYN BROOKS HIGGINBOTHAM, *RIGHTEOUS DISCONTENT: THE WOMEN’S MOVEMENT IN THE BLACK BAPTIST CHURCH 1880–1920*, at 186-87 (2001) (introducing the concept of the politics of respectability in the context of African American community). One of our interviews with a mother and daughter exposed intergenerational differences around these questions within the same family, with the mother advocating for piecemeal reform that favored more popular immigrant groups and the daughter explicitly rejecting the embrace of a “politics of respectability.” Interview with Alondra, *supra* note 186; Interview with Carla, in Los Angeles, Cal. (July 19, 2016) (transcript on file with author).

<sup>270</sup> Cf. Keramet Reiter & Susan Bibler Coutin, *Crossing Borders and Criminalizing*

diagnose this as the ever-present xenophobic alter ego of the xenophilia that gives rise to the arguments in favor of “earned citizenship” for DREAMers and other supercitizens.<sup>271</sup>

In short, the framing of the immigration debate has been a force that has recalibrated what we can expect from citizenship. This has implications not just for conceptualizing the politics of immigration, but also for understanding citizenship more generally.

### 3. Rethinking Citizenship Theory

The common tale of U.S. citizenship is that it is relatively easily acquired, and that (perhaps consequently) it guarantees very little. Barriers to entry are relatively low, and the bundle of rights associated with citizenship is relatively small. In this common telling, the United States rejects ethno-nationalist notions of citizenship. Citizenship is open to all comers and — at least since 1965 — this has been reflected in immigration and nationality laws that nominally afford citizens of all nations, races, and creeds equal opportunity to immigrate and to become U.S. citizens.

The truth of U.S. citizenship has always been more complicated. U.S. citizenship has a deep ethno-nationalist past that extends its tentacles into the present. Citizenship has been more accessible and less exclusive than in many other societies, but it has also been a tool

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*Identity: The Disintegrated Subjects of Administrative Sanctions*, 51 L. & SOC'Y REV. 567, 595-96 (2017).

[W]ith the rise of the administrative state, citizens and the nonincarcerated also become administrative subjects, but perhaps un-actualized ones. The boundaries that the state places around those deemed “the worst of the worst” are porous and unclear. Therefore, there is a sense in which anyone — particularly young people of color — could be swept away through policies that identify youth as gang members or Latinos as “illegals.” In fact, U.S. citizens have been mistakenly deported, and young people who are not gang members have nonetheless ended up on police lists, and in solitary confinement. The breadth of this potential criminalization and illegalization may help to explain the link between punitive-ness and nativism, because citizens and the non-incarcerated may fear being excluded so much that they therefore work to distinguish themselves from criminals and the undocumented. This work can include denigrating “felons” and “illegals,” as occurs all too often through private fears and in public debates. As a result, the disintegrated subject that lies at the center of these new hybrid civil-criminal laws, trapped in the space of non-existence may be none other than the citizen who used to think that s/he had rights.

<sup>271</sup> HONIG, *supra* note 266, at 68.

of racial exclusion and racial privilege,<sup>272</sup> and, relatedly (albeit in distinctive ways) a tool of conquest.<sup>273</sup> Consequently, the institution of citizenship has played a fundamental role in creating racial meaning and inscribing racial hierarchies in the United States.<sup>274</sup>

Nor has citizenship itself ever promised a neat and uniform bundle of rights. Some citizens have been denied rights that might be seen as fundamental rights of citizens — as when all women and African American men were systematically denied the right to vote.<sup>275</sup> Just as racial exclusions helped to create and sustain racial hierarchies, the unevenness of citizenship's protections has constructed social hierarchies as well. Citizenship rights in the U.S. may indeed be relatively thin, but it is important to recognize that they have never been uniform either.

These realities have bedeviled citizenship theory for some time. To explain what he saw, T.H. Marshall famously offered a territorially bounded notion of citizenship that evolved through history — one that initially encompassed civil rights, and that evolved through the nineteenth and twentieth centuries to more fully encompass political and social rights.<sup>276</sup> The normative gist of Marshall's argument is that true democratic citizenship cannot be realized until every citizen is endowed with the full array of rights.<sup>277</sup> For Marshall, formal legal citizenship ought to be “full citizenship” in its social, political and cultural dimensions. This aspirational vision of “full” citizenship is shared to some degree by many social democratic theorists.<sup>278</sup>

But this notion of citizenship — statist, territorial, rights-based, bounded and dialectic — is contested on all sides. Civic republicans<sup>279</sup>

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<sup>272</sup> See *United States v. Bhagat Singh Thind*, 261 U.S. 204, 208 (1923); *Dred Scott v. Sandford*, 60 U.S. 393, 517-18 (1857); see also HANEY-LÓPEZ, *supra* note 41, at 1.

<sup>273</sup> See Bethany Berger, *Red: Racism and the American Indian*, 56 UCLA L. REV. 591, 603-04 (2009) (discussing the use of citizenship as a tool of conquest); see also LAURA E. GÓMEZ, *MANIFEST DESTINIES: THE MAKING OF THE MEXICAN AMERICAN RACE* 136-38 (2007) (exploring the role that grants of U.S. citizenship and statehood played in defining U.S. racial categories and shaping U.S. racial hierarchy).

<sup>274</sup> HANEY-LÓPEZ, *supra* note 41, at 2-7, 13.

<sup>275</sup> *South Carolina v. Katzenbach*, 383 U.S. 301, 327-28 (1966) (reviewing the long line of state efforts to disenfranchise African American voters); *Minor v. Happersett*, 88 U.S. 162, 170-72 (1875) (affirming the constitutionality of the exclusion of women from the franchise).

<sup>276</sup> T.H. MARSHALL, *CLASS, CITIZENSHIP AND SOCIAL DEVELOPMENT: ESSAYS BY T.H. MARSHALL* 78 (1965).

<sup>277</sup> *Id.* at 77, 93.

<sup>278</sup> See, e.g., BRUCE ACKERMAN, *SOCIAL JUSTICE AND THE LIBERAL STATE* 69-80 (1980); JOHN RAWLS, *A THEORY OF JUSTICE* 171 (1991).

<sup>279</sup> ARISTOTLE, *POLITICS*, book III, ch. 1 at 125-26 (Benjamin Jowett trans., 1943).

and communitarians<sup>280</sup> argue for an understanding of citizenship defined in terms of participation or community relations respectively, and not in terms of state-granted rights and protections. Between or perhaps beyond these theoretical groupings lie accounts of citizenship as an iterative product of reciprocal exchange between “citizen” and “state” in which contextual notions of rights and obligations emerge discursively — an idea once associated mainly with ethnocentric notions of citizenship,<sup>281</sup> but one that has been reimagined pluralistically.<sup>282</sup>

As Elizabeth Cohen has observed, all of these versions of citizenship theory suffer from an overarching shortcoming. Namely, the “is” of citizenship has often been ignored in favor of the “ought.” Theorists elaborate normative visions of citizenship that do not map onto the actual workings and lived experience of citizenship in liberal democracies.<sup>283</sup> To maintain the integrity of theory, apparent imperfections in citizenship are either disregarded or are presented as examples democratic failures.<sup>284</sup> And while many elisions and exclusions certainly *do* evince democratic failure, this is not always the case. Citizenship will inevitably take a multiplicity of forms in liberal democratic societies.<sup>285</sup> It is neither sensible nor theoretically helpful to think of all the imperfect instantiations of citizenship as democratic glitches. As Cohen persuasively argues, liberal norms, democratic norms, and administrative governmental imperative necessarily circumscribe and bisect citizenship in ways that inevitably produce differentiated citizenships or “semi-citizenship” with variable bundles of rights.<sup>286</sup> Far from exceptional or rare, these semi-citizenships are ubiquitous (and they are not necessarily always undesirable).

Emerging literature on citizenship accordingly attempts to grapple in more complex ways with the question of how citizenship truly unfolds. This literature accepts the known fact that formal juridical citizenship is both over-inclusive and under-inclusive as a category

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<sup>280</sup> MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE 109-10 (1991); MICHAEL J. SANDEL, DEMOCRACY’S DISCONTENT: AMERICA IN SEARCH OF A PUBLIC PHILOSOPHY 202 (1996).

<sup>281</sup> See JEAN JACQUES ROUSSEAU, THE SOCIAL CONTRACT 25-26 (New York & London, M. Walter Dunne ed., 1901).

<sup>282</sup> See, e.g., SEYLA BENHABIB, THE RIGHTS OF OTHERS 179 (2004); JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS (William Rehg trans., 1999).

<sup>283</sup> COHEN, *supra* note 1, at 40.

<sup>284</sup> See, e.g., SHKLAR, *supra* note 1; SMITH, *supra* note 1.

<sup>285</sup> COHEN, *supra* note 1 at 7.

<sup>286</sup> *Id.*

through which to explain how rights, responsibilities, and virtues commonly associated with citizenship are bundled, and offers new theoretical tools to grapple with the persistence and multiplicities of citizenships within liberal democracies.<sup>287</sup> Cohen, for example, creates a matrix that groups semi-citizens into four orders, and sorts among them categories like lawful permanent residents, children, LGBT and “cultural minority” groups.<sup>288</sup> She recognizes that these categories themselves are internally riven and that individuals within these groupings themselves have differential rights bundles, and presents the matrix as a springboard for further contemplation.

The makeup of these bundles of rights — and of citizenship itself — are both evolving. By focusing on the experiences of long-time residents of the United States who are legally excluded from citizenship, this article tries to shed light on the dynamic nature of the meaning and protections of citizenship. Existing theoretical accounts of citizenship are often devoid of discussion of the significance of the presence of a large, stable unauthorized population in the U.S. in shaping the scope and meaning of citizenship.<sup>289</sup> And yet their presence, their inclusions, and their exclusions affect how all U.S. denizens and citizens understand U.S. citizenship.<sup>290</sup>

Immigrant residents who lack legal status are redefining the meaning of both citizenship and belonging through their articulated claims-making and the practices of their daily lives. By asserting their right to certain kinds of social inclusion regardless of formal legal status, immigrants have generated new forms of semi-citizenship, and more generally have succeeded in placing expansive pressure on

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<sup>287</sup> *Id.* at 40; BOSNIAK, *supra* note 8, at 122; *see also* Chacón, *supra* note 10, at 733.

<sup>288</sup> COHEN, *supra* note 1, at 72.

<sup>289</sup> Linda Bosniak, who notes the significance of the presence of rights-bearing alien residents in the United States in giving meaning to citizenship, is an outlier in this regard. *See* BOSNIAK, *supra* note 8, at 37-38.

<sup>290</sup> In this sense, the reflections offered here are responsive to Linda Bosniak’s critique of the artificial intellectual barriers between immigration law and citizenship theory. Bosniak observes that citizenship theory often presumes boundedness as a starting point and differentiates immigration law’s exclusions from imperfections of citizenship within the bounded state. She has argued:

The splitting strategy ultimately fails, however, because the separation between these jurisdictional domains is unachievable. Border and interior are in fact inevitably interpenetrated . . . . The impossibility of splitting citizenship means that citizenship’s contrasting normative impulses remain directly in contention within liberal democratic national societies. In this respect and in this context, citizenship stands against itself.

*Id.* at 16.

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dominant understandings of who belongs within national and sub-national communities. Indeed, immigrant activists increasingly aim to define belonging as something that operates independently of citizenship, and that generates its own protective legal force. Rather than focusing solely on citizenship for some, these advocates and activists prioritize the creation of communities that value the humanity of all their residents. They focus their efforts on reducing the negative influence of the state in the form of over-policing and deportation, and on increasing the positive influence of the state in the form of education and integrative social services regardless of citizenship and status. Perhaps, over time, their efforts will yield a new and more inclusive and protective framework for human thriving and dignity.

#### CONCLUSIONS

Immigrants recognize that citizenship is valuable, but they also see firsthand that it is not a panacea. It does not guarantee full social equality and inclusion. They see how individuals constructed as racial outsiders — those who are not white Americans (or what one interviewee revealingly referred to as “*American American*”<sup>291</sup>) contend with certain forms of discrimination regardless of immigration status.

Generally speaking, in recent years, discrimination against Latinos has increased in jurisdictions that have prioritized immigration control measures. Ironically, all of the comprehensive immigration reform measures that might grant citizenship (or something less) to some subset of the undocumented population are not only — or even primarily — legalization bills. They are, first and foremost, immigration enforcement bills. Immigration activist Victor Narra famously said that the Senate’s 2013 immigration bill was not immigration reform, but “a crime bill in disguise.”<sup>292</sup>

None of the immigration reform proposals of the past twenty years offer a path to citizenship for noncitizens with anything but the most minor of criminal records. All of the proposals exclude from legalization large numbers of noncitizens with old and more minor criminal records or with prior removals. None of the immigration reform proposals provide a path to citizenship (or even legalization) for most recent arrivals. All proposals, therefore, envision the continued presence of a significant unauthorized population and

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<sup>291</sup> Interview with Fatima, *supra* note 99.

<sup>292</sup> GOTTSCHALK, *supra* note 232, at 215.

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allocate resources accordingly; all have included a substantial increase in enforcement resources.

In other words, any grants of citizenship will not be made in a vacuum. They will be offered in the context of a legislative reform bill that will deny citizenship to many — perhaps to most — of the noncitizens currently unlawfully present in the country, not to mention future waves of *arrivants*. Many of those initially eligible also may not make it through the lengthy probationary period, particularly in light of the intensification of interior and border enforcement and surveillance against the noncitizens who remain or seek to enter in the future. These legislative tradeoffs will continue to change the juridical and social meaning of citizenship in important ways — and not just for the newest citizens, but for all citizens.

The way out is offered by the dreamers — and by this, we mean those people young and old, educated and not, with criminal records and without, with and without citizenship — who are envisioning and demanding new forms of belonging and who boldly and insistently demand that we all do the same.