The Future of U.S. Immigration Law

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President Trump has exposed the longstanding inadequacy in the accepted model of immigration law. This model assumes that preferences range linearly from strongly pro-immigrant to strongly anti-immigrant, with "centrist" business groups holding the balance of power. This linear model ignores fundamental differences among family-based, humanitarian, and employment-based immigrants as well as the very different reactions many people have to different groups.

This linear model has allowed business interests to leverage anti-immigrant agitation to expand the number of employment-driven immigrants at the expense of family-based and humanitarian entrants. Employment-based immigration subsidizes businesses by driving down their labor costs.

The linear model has produced "comprehensive immigration reform" bills that would slash family-based and humanitarian admissions. It also has transformed immigration enforcement and access to subsistence benefits while spawning state and local anti-immigrant laws, all disadvantaging family immigrants.

President Trump's initiatives against immigrant families and refugees culminate this long trend of immigrant-employing businesses — like his — extorting concessions from those immigrants' allies.

Both the moral benefits of family-based and humanitarian immigration and strong economic arguments suggest a multi-dimensional model is politically feasible and normatively desirable. Employment-based admissions distort targeted labor markets. By contrast, family-based and humanitarian immigrants' effects are spread over many labor markets.

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Refugees are often people whose skills made them targets for repression. Families efficiently organize economic activity and relieve hardship. Family-based immigrants work as much as those admitted on work visas. Family ties and the refugee resettlement program reduce the vulnerability that causes many of the harms critics commonly attribute to immigration.

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INTRODUCTION

Even in our age of polarization, few issues seem to feature a sharper, more completely binary divide than immigration. President Trump made hostility to immigrants the centerpiece of his campaign. In his first few days in office, he signed three executive orders suspending the admission of refugees,[1] barring entry to nationals of seven majority-Muslim countries,[2] and dramatically increasing the role of state and local police, who generally lack training in the subtleties of immigration

[1] *See* Exec. Order No. 13,769, 82 Fed. Reg. 8977 (Jan. 27, 2017).

[2] Trump v. Hawaii, 138 S. Ct. 2392, 2403 (2018).

law, in seizing suspected unlawful immigrants.[3] He won the Supreme Court's support for a modified version of the travel ban. He sought to terminate the legal status of nearly 700,000 immigrant children[4] and withdrew legal protection from hundreds of thousands more from gang-ravaged countries in Central America.[5] His Administration proposed rules that would make it much harder for low- and moderate-income people to immigrate to this country even to reunite with their families.[6] He then triggered the longest partial federal government shutdown in history to secure funding for a wall on the country's southern border. When that failed, he defied warnings from members of his own party to declare a national emergency to build that wall, which he justified with sweeping condemnations of immigrants. Right-wing groups supporting the President have held noisy and violent demonstrations where they have chanted against a supposed Jewish plot to replace American workers with immigrants.[7] One of their sympathizers killed eleven people in an attack on a Pittsburgh synagogue that he believed was aiding immigrants;[8] another slaughtered twenty-two people at an El Paso Walmart targeting Mexican immigrants.[9]

Many Democrats and some Republicans take essentially the polar opposite stance. They litigated to block his Muslim Ban, his attempted rescission of Deferred Action for Childhood Arrivals ("DACA"), his revocation of Temporary Protected Status for those fleeing unstable countries, and other new anti-immigrant policies. They submitted over

[3] *See* Exec. Order No. 13,768, 82 Fed. Reg. 8799 (Jan. 25, 2017).

[4] *See* Robert Barnes, *Trump Can't Immediately End DACA, Appeals Court Rules, Setting up Supreme Court Battle*, CHICAGO TRIB. (Nov. 8, 2018, 2:27 PM), https://www.chicagotribune.com/nation-world/ct-trump-daca-ruling-20181108-story.html.

[5] *See* Brennan Weiss, *The Trump Administration Has Ended Protections for Immigrants from 4 Countries — Here's when They Will Have to Leave the US*, BUS. INSIDER (Jan. 11, 2018, 3:01 PM), https://www.businessinsider.com/trump-has-ended-temporary-protection-status-for-4-countries-2018-1.

[6] *See* Inadmissibility on Public Charge Grounds, 83 Fed. Reg. 51,114 (proposed Oct. 10, 2018).

[7] *See* Yair Rosenberg, *'Jews Will Not Replace Us': Why White Supremacists Go After Jews*, WASH. POST (Aug. 14, 2017, at 7:03 AM), https://www.washingtonpost.com/news/acts-of-faith/wp/2017/08/14/jews-will-not-replace-us-why-white-supremacists-go-after-jews/?utm_term=.6786d43dce13.

[8] *See* Kellie B. Gormly et al., *Suspect in Pittsburgh Synagogue Shooting Charged with 29 Counts in Deaths of 11 People*, WASH. POST (Oct. 27, 2018), https://www.washingtonpost.com/nation/2018/10/27/pittsburgh-police-responding-active-shooting-squirrel-hill-area/?utm_term=.079ccb10e835.

[9] Nicholas Bogel-Burroughs, *'I'm the Shooter': El Paso Suspect Confessed to Targeting Mexicans, Police Say*, N.Y. TIMES (Aug. 9, 2019), https://www.nytimes.com/2019/08/09/us/el-paso-suspect-confession.html.

200,000 comments, with a majority of the publicly obtainable comments opposing the Administration's "public charge" rule.[10] They made opposition to the President's border wall a non-negotiable political article of faith and have launched both judicial and legislative assaults on his emergency declaration seeking to build the wall without congressional support. Moderates and liberals who previously avoided discussing immigration have become staunch advocates for immigrants.

In this polarized, highly linear vision, the balance of power is held by a set of moderates with neither pro- nor anti-immigrant commitments. Some are thought to have rule-of-law concerns that make them hostile to undocumented immigrants but more responsive to those that "play by the rules." The most visible self-identified moderates are business groups that see economic benefits to at least some kinds of immigration. These moderates spend much of their time on the sidelines but are assiduously courted by both polarized factions.

Widespread embrace of this linear model has all but obliterated nuanced analysis of the political, economic, and social forces shaping immigration law. Neither the body of immigrants seeking to settle in this country nor the political actors engaged in immigration debates are nearly as monolithic as current rhetoric suggests. It is entirely coherent, and indeed relatively common, to favor some kinds of immigrants while opposing others. Moreover, in immigration policy as in the rest of U.S. politics, divides between those seeing issues in economic terms and those looking through social or political lenses are crucial. Immigration, more than most current issues, holds the potential for fracturing both the "left" and "right" coalitions. The current feverish rhetoric has obscured these fissures. The linear model's crudeness obstructs both our capacity to predict immigration law's future course and policymakers' ability to find solutions with the broadest possible support.

President Trump's policies are not the "new normal" in U.S. immigration law. But neither are a broad swing toward welcoming immigration across-the-board or the supposed "middle ground" of turning immigration into another business subsidy, as represented by "grand bargain" proposals. To see why, one must see President Trump's moves not only as a flare-up in xenophobia, although it certainly is that, but also as a culmination of longstanding efforts to shift opportunities to immigrate away from families and victims of foreign persecution and toward workers that will lower particular industries' labor costs.

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[10] Aaron Reichlin-Melnick, *Proposed 'Public Charge' Regulation Draws Hundreds of Thousands of Comments*, IMMIGRATION IMPACT (Dec. 11, 2018), http://immigrationimpact.com/2018/12/11/public-charge-comments/.

An attempt to break free from the linear model must start with a more refined understanding of immigration and immigrants to this country. People come to the United States overwhelmingly for one of three reasons: to reunite with their families, to work, or to escape foreign oppression. Those with each of these three motives include both legal and undocumented categories. One can perfectly reasonably have quite different opinions about immigration for one or another of these motives; indeed, apart from a few hard-core xenophobes and some strong champions of diversity, most informed people probably do.

Each of these groups of immigrants can be further subdivided in politically significant ways. Rightly or wrongly, many people have different degrees of sympathy for those seeking to re-unify with distant relatives and for those seeking to join their spouses, parents, children, or siblings. Economic immigrants tend to be either high-skilled or low-skilled. Some of the oppression driving immigrants to come here is based on religion, some is based on political beliefs, some is racially- or ethnically-based, and some springs from gender or sexual identity.

Although participants in immigration debates have learned to make social, economic, and political arguments as needed, most groups' motivations are anchored in one of these realms. But even here, important divisions remain. For example, some economic arguments focus on aggregate national income; others are concerned with specific sectoral effects. Social attitudes toward immigration may embody racism, desires to preserve or transform a perceived consensus on values, or enthusiasm for diversity.

To date, business groups have been the main advocates for economic immigration. To them, targeted immigration represents a subsidy to their operating costs. Their claim that no U.S. workers are qualified to perform high-skilled jobs, or that no U.S. workers are willing to perform low-skilled jobs, is patently bad economics: if labor supply is inadequate to meet demand at the employers' asking wage, that wage is insufficient to clear the market. Recruiting foreign workers with the desired skills expands the labor supply without requiring employers to pay market wages.

Leading supporters of family-based immigration are, unsurprisingly, immigrant communities in this country and the organizations and politicians representing them. Humanitarian immigration is championed by communities of immigrants from repressive states, human rights organizations, and some groups with political or religious affinities to victims of oppression. The linear model of immigration law, however, has caused many of these groups to support immigration generally, including economic immigration, as a matter of solidarity.

Some business groups have returned the favor. Many, however, have pressed steadily to replace family-based and humanitarian immigration with more economic immigrants. Business groups have successfully muted opposition from pro-immigrant groups by suggesting that the alternative to their proposals would be closing the borders completely at the behest of anti-immigrant groups. This gambit has resulted in a series of "comprehensive immigration reform" bills that have offered ever-more severe harm to family-based and humanitarian immigration. A few sophisticated pro-immigrant groups have rejected these bills, but most groups with broad political constituencies have acquiesced, believing that a deal with business interests is the only game in town. The rise of nativist fervor, culminating in the ascension of President Trump, the linear model has seemed to dictate that supporters of family-based and humanitarian immigration be even more dependent on business-oriented "moderates."

The consequences of this linear model, and of the leverage it provides to business-oriented moderates, goes far beyond shaping immigration reform legislation. Linear visions of the possibilities have yielded increasingly anti-family and anti-humanitarian immigration law across a wide array of policy areas, from admissions to public services access to enforcement. The farther this trend progresses, the more embattled pro-immigrant groups feel and the more dependent they feel they are on the business-oriented "moderates" for support.

A deep irony of business groups' exploiting anti-immigrant sentiments to force concession from those defending family-based and humanitarian immigrants is that the resulting policies often are even worse for many grassroots critics of immigration than those of the pro-immigrant groups. Never has this contradiction been more apparent than in the rise of Donald Trump. As a businessman who relies heavily on immigrants, notably undocumented immigrants, to drive down his labor costs, he clearly sees value in immigration. Yet his wielding of extreme xenophobic rhetoric, and his relentless attacks on immigrant families and humanitarian immigrants, have given business interests unprecedented influence over immigration policy.

This Article rejects the linear model of immigration law as descriptively flawed and normatively undesirable. Descriptively, this Article shows that many important political actors' preferences do not map onto a simplistic left-right political scale *and* that key aspects of current policy are anathema to large segments of the political left and the political right. Normatively, the linear model's disregard for important values is particularly important because immigration law is, and always has been, a fundamental means for a nation to define its

aspirations and priorities. Far from diffusing and moderating debates about the values underlying immigration law, the linear model fans those flames and obscures key points on which many agree.

The argument proceeds in five parts. Part I briefly describes the starting point for President Trump's initiatives: the current state of immigration to this country.

Part II surveys the history of recent attempts at comprehensive immigration reform. It describes the "grand bargain" from 2006 and 2007, the immigration bill that passed the Senate in 2013, the House Republicans' 2014 policy paper on immigration, and comprehensive immigration reform proposals that have been offered as solutions to President Trump's stand-off with congressional Democrats over the border wall. All these plans would radically shift immigration priorities away from family reunification and toward employment-based visas. The broad acceptance of this shift laid the groundwork for the current, far more public, attack on humanitarian immigration. Thus, not only did comprehensive reform fail to pass, but the conceptual concessions pro-immigrant groups made to win support for reform have left them ill-equipped to challenge President Trump's efforts to expand upon the shift away from family-based and humanitarian immigration policy. Particularly because the legalization provisions on the table in recent immigration reform bills would have benefited only a tiny minority of the undocumented immigrants whom advocates championed, these concessions were most ill-advised.

The longstanding impasse over immigration reform drove those seeking to make immigration policy to the field's periphery, as Part III shows. Enforcement legislation largely ignored by pro-immigrant groups has profoundly reshaped immigration law to be hostile both to those fleeing persecution and to immigrant families. We see a similar pattern in powerful but little-known rules threatening immigrants' legal status if a U.S. citizen family member accesses subsistence benefits to which she or he is indisputably eligible. A similar Hobson's choice is found in state and local anti-immigrant legislation that tried to drive out immigrant parents by threatening the well-being of their children. President Trump's executive orders leverage and bring to the fore each of these trends. Appreciating the foundation upon which he is building is crucial to understanding the impact of his actions and how difficult they will be to reverse.

Part IV analyzes the economic claims made in support of employment-oriented criteria for admitting immigrants. Skill-based admissions criteria are hidden, highly inefficient subsidies to particular sectors of the economy that undermine our capacity to produce our own

human capital. On the other hand, strong economic justifications support placing the reunification and strengthening of families at the center of U.S. immigration policy. Families provide enormous economic benefits, quite analogous to those offered by employers, banks, insurance companies, governments, and other conventional economic actors. Because they are not monetized, these benefits tend to be omitted from cost-benefit analyses.

Finally, Part V compares the politics of employment- and family-based immigration. It finds that employment-based approaches will not bring the political benefits that proponents claim and that a family-based immigration regime will be far more stable and, paradoxically, will better-protect the jobs of the insecure workers whose votes brought Donald Trump to the White House. This Part also anticipates corruption of the political process under an employment-based system as rent-seeking employers and industry groups struggle to win the labor cost subsidies provided by targeted immigration. Moreover, a shift toward employment-based admissions would work at cross-purposes with both parties' avowed goal of restraining illegal immigration. Obstructing families' strong desires to reunify will expand the pool of highly motivated illegal entrants, forcing even heavier reliance on command-and-control enforcement efforts that have already failed badly. Ironically, as Prohibition, Soviet state planning, and a host of other regulatory schemes have demonstrated, even massive commitments of heavy-handed enforcement resources often prove insufficient to overcome strong, widely disseminated incentives. And chronically under-enforced regulatory regimes lead to inefficient instabilities, evasions, and corruption as well as broader contempt for the rule of law.

I. THE CURRENT STATE OF IMMIGRATION POLICY

The United States admits immigrants for three main types of reasons.[11] Family reunification — admitting immigrants to reunify with close relatives who are U.S. citizens or legal permanent residents

[11] *See* NAT'L IMMIGRATION LAW CTR., GUIDE TO IMMIGRANT ELIGIBILITY FOR FEDERAL PROGRAMS 25 (4th ed. 2002); U.S. COMM'N ON IMMIGRATION REFORM, U.S. IMMIGRATION POLICY: RESTORING CREDIBILITY (1994). Several other small categories exist, including about 5% of the total admitted under a lottery system largely benefiting Western Europe (*see* 8 U.S.C. §§ 1151(a)(3), 1153(c) (2019); *see also* Liav Orgad & Theodore Ruthizer, *Race, Religion and Nationality in Immigration Selection: 120 Years After the Chinese Exclusion Case*, 26 CONST. COMMENT. 237, 291 (2010)), and much smaller numbers of former overseas employees of the State Department (*see id.* § 1101(a)(27)(D)), Amerasians (*id.* § 1101), and witnesses to certain crimes (*see id.* § 1101(a)(15)(S)-(U)).

("LPRs") of this country[12] — assumed a primary position in U.S. immigration law in the 1950s. It became still more important after Congress in the 1960s eliminated century-old racial quotas.[13] Some 66% of those receiving LPR status in 2017 came under a family-related category.[14]

Another 14% of immigrants received green cards for employment in positions for which the government or employer has determined that sufficient domestic workers cannot be found.[15] These positions include both those demanding high qualifications not found in sufficient numbers domestically as well as those paying very low wages, such as agricultural work. Family is important here, too: almost half of immigrants admitted under existing employment-based programs are spouses or minor children of workers.[16] Under the Immigration Act of 1952, half of all visas were employment-based; the current allocation is the result of the 1965 Act's prioritization of family reunification[17] and the partial reversal of that emphasis in the Immigration Act of 1990.[18]

Finally, an additional 13% of new LPRs were immigrants escaping foreign persecution.[19] About four-fifths of this group of immigrants is refugees,[20] who apply overseas and are admitted up to a quota if they are found to have a well-founded fear of persecution.[21] Although not widely recognized as such, refugee admissions are another major form of family immigration: some 85% of those admitted in this category are

[12] 8 U.S.C. §§ 1151(a)(1), (2), 1153(a), 1186a (2019). This preference only extends to the spouses, children, and parents of U.S. citizens and LPRs and to the siblings of U.S. citizens.

[13] *See* Zsea Bowmani, *Queer Refuge: The Impacts of Homoantagonism and Racism in U.S. Asylum Law*, 18 GEO. J. GENDER & L. 1, 12-13 (2017).

[14] *See* OFFICE OF IMMIGRATION STATISTICS, U.S. DEP'T OF HOMELAND SEC., 2017 YEARBOOK OF IMMIGRATION STATISTICS 20 tbl.7 (2018), https://www.dhs.gov/immigration-statistics/yearbook/2017 [hereinafter YEARBOOK]. Many of those receiving LPR status, particularly in employment- and persecution-based categories, were admitted years before; this data therefore lags behind the shift to employment-based admissions.

[15] *Id.*; *see* 8 U.S.C. §§ 1151(a)(2), 1153(b).

[16] *See* Michael Fix & Wendy Zimmerman, *Immigrant Families and Public Policy: A Deepening Divide*, *in* IMMIGRATION AND THE FAMILY: RESEARCH AND POLICY ON U.S. IMMIGRANTS 255 (Alan Booth et al., eds. 1997).

[17] *See* VERNON M. BRIGGS, JR., IMMIGRATION POLICY AND THE AMERICAN LABOR FORCE 68 (1984).

[18] *See* Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (codified as amended in scattered sections of 8 U.S.C.).

[19] See YEARBOOK, *supra* note 14, at 20 tbl.7.

[20] *See id.*

[21] *See* 8 U.S.C. § 1157 (2019).

close relatives of the individual facing foreign persecution.[22] Virtually all of the remainder in this category are asylees, who are similar to refugees but arrive in the United States on their own and apply for permission to stay on the basis of a well-founded fear of persecution.[23] Because of the demanding substantive standards for proving a sufficient risk of foreign persecution, and the quotas on these categories, many people escape oppression by immigrating under a family reunification category. Thus, the consequences of being denied the opportunity to immigrate under those categories, or of being sent back to their countries of origin after entering on a relative's petition, often can go beyond the breaking up of a family: for many, family reunification is a last chance to avoid political or religious persecution, or severe economic deprivation, in their countries of origin. Here again, the two major types of humanitarian immigration — family-based and persecution-based — are closely intertwined.

Caps on admissions under major immigration categories have created considerable backlogs.[24] People unwilling to wait years to join their families[25] slip into this country surreptitiously or enter on temporary visas and never leave. So, too, do those seeking employment here that would allow them to send money home to their families[26] or to escape oppressive regimes or the tenuous existence of refugee camps. Also swelling undocumented immigration are several legal grounds for exclusion — barring, for example, prospective immigrants with certain kinds of diseases, criminal records, or political beliefs and those deemed likely to become "public charges."[27] On the other hand, immigration law historically has recognized potential harm to family members

[22] *See* Fix & Zimmerman, *supra* note 16, at 255.

[23] *See* 8 U.S.C. § 1158 (2019). Immigrants fleeing oppression also arrive under several other, smaller categories. *E.g.*, *id.* §§ 1182(d)(5), 1231(b)(3), 1254a, 1255; Deferral of Removal Under the Convention Against Torture, 8 C.F.R. § 208.17 (2019).

[24] *See* WILLIAM A.V. CLARK, IMMIGRANTS AND THE AMERICAN DREAM: REMAKING THE MIDDLE CLASS 54-55 (2003).

[25] *See* BRIGGS, *supra* note 17, at 86-87.

[26] *See* JOHN ISBISTER, IMMIGRATION DEBATE: REMAKING AMERICA 113-15 (1996) (describing emigration to the United States by some members as a strategy to improve the security of families as a whole).

[27] The zeal with which these grounds are enforced varies considerably with the economic and political climate. For example, during the second and third decades of the twentieth century, when anti-immigrant sentiment was high, the United States deported roughly one thousand immigrants a year as "public charges"; it then barred most prospective immigrants during the Great Depression on this basis. MARION T. BENNETT, AMERICAN IMMIGRATION POLICIES: A HISTORY 67, 341 (1963).

lawfully in the United States as a valid reason for allowing undocumented immigrants to remain.[28]

The situations and legal positions of immigrants vary considerably depending on the basis on which they were admitted. Under some conditions, immigration law allows immigrants in a status with relatively few rights to "adjust" into a higher category after some length of time in the country.[29] The category with the broadest rights is LPR. Adjusting to LPR status is sometimes referred to as "getting a green card."[30] In most cases, only LPRs and U.S. citizens can apply to have their close relatives allowed to immigrate to the United States.[31]

After several years in the United States, LPRs can apply to naturalize as U.S. citizens.[32] The naturalization process is quite arduous. Naturalization ordinarily requires passing a test of English language proficiency. It also requires passing tests of U.S. history and civics that likely would defeat many native-born U.S. citizens.[33] The waiting period for classes to prepare immigrants for these examinations, to take the examinations, and for those that pass to be sworn in, all can be lengthy, sometimes lasting for years.[34]

Something over a quarter of the 28 million foreign-born people in the United States are Mexican. Almost another quarter are other Latinos and Latinas, particularly Central Americans, Cubans, and Dominicans. Another quarter are Asian, with roughly a million each from China, the Philippines, India, Vietnam, and Korea.[35]

II. PROPOSALS TO REDUCE FAMILY-BASED IMMIGRATION

President Trump's executive orders on enforcement at the southern border and in the interior of the United States, as well as the Department of Homeland Security's ("DHS") implementation memos,[36] would

[28] *See* Fix & Zimmerman, *supra* note 16, at 255.

[29] 8 U.S.C. § 1255 (2019).

[30] *See* Michael Maggio et al., *Immigration Fundamentals for International Lawyers*, 13 AM. U. INT'L L. REV. 857, 876 (1998).

[31] *See Immigration Basics*, NAT'L IMMIGRATION FORUM (June 29, 2010), https://immigrationforum.org/article/immigration-basics/.

[32] *See* § 1427(a)(1).

[33] *See* Allyson Escobar, *Most of Us Would Fail the U.S. Citizenship Test, Survey Finds*, NBC NEWS (Oct. 12, 2018, 7:33 AM), https://www.nbcnews.com/news/latino/most-us-would-fail-u-s-citizenship-test-survey-finds-n918961.

[34] *See* Shvartsman v. Apfel, 138 F.3d 1196, 1197 (7th Cir. 1998).

[35] *See* CLARK, *supra* note 24, at 32-35.

[36] Memorandum from John Kelly, Secretary, U.S. Dep't of Homeland Security, Enforcement of the Immigration Laws to Serve the National Interest (Feb. 20, 2017),

radically devalue family ties in the enforcement of immigration laws. They would almost completely eviscerate the protection that President Obama offered to parents of U.S. citizen children. They also would consign DREAMERs — children brought to the United States unlawfully when they were young, many of whom have U.S. citizen siblings — to lives of fear and uncertainty, not explicitly rescinding the Obama Administration's policies protecting them but declaring a policy of removing anyone unlawfully present in this country.[37] Although substantively these orders and memos are radical shifts, conceptually they are logical extensions of a trend of devaluing family ties, and humanitarian concerns generally, as a basis for determining who can stay in this country.[38]

The remarkable success of this business-led movement to eviscerate humanitarian immigration law has gone little-noticed to date. In part, the failure to notice the reconceptualization of immigration law away from our national aspirations reflects the overwhelming focus on the fate of this country's 11 million undocumented immigrants, which has left neither pro- nor anti-immigrant groups with much attention for anything else. The business-led coalition has cleverly played pro- and anti-legalization groups off against one another to maximize its leverage as kingmaker and insulate itself from scrutiny. In part, this coalition has capitalized on the prestige that arguments about economic rationality have attained in contemporary U.S. politics.

Remarkably, although "Comprehensive Immigration Reform (CIR)" is widely accepted as a term of art, with politicians and commentators declaring whether they are for or against it, no consensus exists as to what it means.[39] It is widely assumed to have something to say about

https://www.dhs.gov/sites/default/files/publications/17_0220_S1_Enforcement-of-the-Immigration-Laws-to-Serve-the-National-Interest.pdf [hereinafter Enforcement of the Immigration Laws]; Memorandum from John Kelly, Secretary, U.S. Dep't of Homeland Security, Implementing the President's Border Security and Immigration Enforcement Improvements Priorities (Feb. 20, 2017), https://www.dhs.gov/sites/default/files/publications/17_0220_S1_Implementing-the-Presidents-Border-Security-Immigration-Enforcement-Improvement-Policies.pdf [hereinafter Implementing the President's Border Security].

[37] *See* Rick Anderson, *"Dreamer" in Washington State Still Faces Deportation as Attorneys Accuse Immigration Agents of Deception*, L.A. TIMES (Feb. 17, 2017, 6:55 PM), https://www.latimes.com/nation/la-na-dreamer-daca-deportation-20170217-story.html.

[38] *See* PETER BRIMELOW, ALIEN NATION: COMMON SENSE ABOUT AMERICA'S IMMIGRATION DISASTER 262-63 (1995); PETER H. SCHUCK, CITIZENS, STRANGERS, AND IN-BETWEENS: ESSAYS ON IMMIGRATION AND CITIZENSHIP 327 (1998) (stating that "[c]alling his plan a drastic cutback is like calling Jack the Ripper unfriendly").

[39] *See, e.g.*, *What Does Comprehensive Immigration Reform Mean in Trump's America?*, NAT'L HISPANIC CHRISTIAN LEADERSHIP CONFERENCE, https://nhclc.org/what-does-

the problem of illegal immigration — both prospectively and to address the status of those undocumented immigrants already here — but no agreement has ever existed on even the rough outlines of what those policies should be. Business interests have argued that this is a good opportunity to change policies on which prospective immigrants to admit but have struggled to explain how, if at all, that change would fit with other groups' immigration agendas.[40]

This Part shows how pursuit of Comprehensive Immigration Reform paradoxically empowered opponents of humanitarian immigration by inducing pro-immigrant groups to legitimate principles they would not otherwise have accepted. These principles helped pave the way for President Trump's initiatives. Section A reviews the most recent major effort to enact such legislation, late in the George W. Bush Administration. Section B analyzes the persistence of "grand bargain" themes in key players' political rhetoric even after the prospects of legislation had subsided and attention turned to administrative actions. Late in his term, President Obama sought to reassert the importance of family, but by then the shift from family-based to employment-based immigration had strong momentum. Section C shows the folly of the "grand bargain" legislation: even if trading mass legalization for a sharp shift toward employment-based immigration was a good deal substantively, the actual proposal under consideration did not actually provide that trade.

A. The "Grand Bargain"

In 2006 and again in 2007, the Senate debated sweeping immigration reform legislation. Although this legislation was exceedingly complex, it fused three basic themes. First, enforcement of immigration laws would be increased substantially. This included new criminal penalties on many immigrants unlawfully in the United States, stricter verification requirements for employers, and a huge wall on part of the U.S.-Mexico border.

Second, family-based immigration would be reduced while employment-based immigration would be increased.[41] Specifically, the number of immigrants allowed to reunify families would be reduced

comprehensive-immigration-reform-mean-in-trumps-america/ (last visited Sept. 22, 2019).

[40] *See* Paschal O. Nwokocha, *American Employment-Based Immigration Program in a Competitive Global Marketplace: Need for Reform*, 35 WM. MITCHELL L. REV. 38, 65-66 (2008).

[41] *See* S. 744, 113th Cong. §§ 2301-2307 (2013).

sharply, with preferences for siblings and adult children eliminated and those for parents severely restricted. At the same time, immigration increasingly would be based on a point system in which employment skills would count far more than family ties.[42] In addition, a large new guest-worker program would provide inexpensive unskilled labor from workers not allowed to bring their families or to stay more than a short time in the United States without returning home.

And third, new procedures would give some fraction of undocumented immigrants currently in the United States a "path to citizenship." Because critics called this an "amnesty" that ignored, or even rewarded, these immigrants' unlawful prior presence, the legislation required these immigrants to pay a substantial fine and apply for legal entry as if they were outside of the United States.

Republican Senator Arlen Specter and Democratic Senator Edward Kennedy introduced an initial version of this legislation in 2006,[43] which proved broadly acceptable to President Bush but not to most other Republicans. Although it passed the Senate by the seemingly comfortable margin of 62-36,[44] senators understood that the bill was likely to die in the House. The following year, Senators McCain and Kennedy sought to reintroduce broadly similar legislation,[45] but found many Democrats unwilling[46] to take primary political responsibility for controversial decisions on immigration[47] and few mainstream Republicans prepared to cooperate.[48] To win over conservative

[42] Ironically, one of the groups that would be excluded under these proposals is siblings of U.S. citizens. *See id.* This class of immigrants has had higher initial earnings and faster earnings progression than those admitted under other family and employment categories. *See id.*

[43] Comprehensive Immigration Reform Act of 2006, S. 2611, 109th Cong. (2006).

[44] *See* 152 CONG. REC. S5189-90 (daily ed. May 25, 2006).

[45] Nicole Gaouette, *Fresh Potential on Immigration*, L.A. TIMES (Jan. 29, 2007, 12:00 AM), https://www.latimes.com/archives/la-xpm-2007-jan-29-na-immig29-story.html (noting that McCain and Kennedy were "develop[ing] a plan based on [2006's] comprehensive immigration bill").

[46] *See* Michael Sandler, *For Reid, a Tricky Course to Democratic Victory*, C.Q. WEEKLY (June 18, 2007), http://library.cqpress.com/cqweekly/document.php?id=weeklyreport110-000002533277.

[47] *See* David Nather, *Democrats' Turn at Immigration Split*, C.Q. WEEKLY (Mar. 5, 2007), http://library.cqpress.com/cqweekly/document.php?id=weeklyreport110-000002461937.

[48] *See* Gail Russell Chaddock, *Capitol Hill Closes in on Immigration Reform*, CHRISTIAN SCI. MONITOR (Mar. 13, 2007), https://www.csmonitor.com/2007/0313/p01s01-uspo.html ("[L]awmakers on both sides of the aisle say that reformers face an uphill climb to match last year's Senate vote."). By March, McCain appeared to be backing away from a leadership role in the legislation. *See* Rachel L. Swarns, *Kennedy, Eager for Republican Support, Shifts Tactics on Immigration Measure*, N.Y. TIMES (Mar. 13,

Republican Senator Jon Kyl,[49] sponsors sharpened the switch from family-based to employment-based immigration, toughened further the original bill's enforcement provisions, and narrowed considerably the path to citizenship.[50] Even then, however, House Republicans refused to entertain the bill.[51] With divisive amendments further fracturing the bill's fragile coalition[52] and House Democrats signaling that they were unlikely to move the legislation on a party-line vote, the Senate voted overwhelmingly to kill the bill.[53]

Although President Obama endorsed the "grand bargain" legislation during his campaign and continued to do so while in office,[54] no serious effort to pass immigration reform materialized in his first term. The "grand bargain" returned in 2013 when the Senate passed the Border

2007), https://www.nytimes.com/2007/03/13/washington/13immig.html (noting that "McCain, who led Republican lawmakers in championing immigration legislation last year, has appeared to be backing away from that role"). The effort to reintroduce a bill resembling S. 2611 finally stalled. *See* Kathy Kiely, *Supporters Still Committed: Immigration Bill Stalled; Lawmakers Must Overcome Divisions on Right and Left*, USA TODAY, Mar. 14, 2007, at 5A.

[49] *See* Julia Preston, *Senators Reach Outline on Immigration Bill*, N.Y. TIMES (May 9, 2007), https://www.nytimes.com/2007/05/09/us/09immig.html (describing daily closed-door talks between Senators Kyl and Kennedy and Homeland Security Secretary Michael Chertoff "trying to hammer out what would be the broadest revision of the immigration laws in two decades" and noting "[a] difference in the talks this year is the leading role played by Mr. Kyl, taking over the role of his fellow Arizona senator, John McCain, who has become less visibly active on the issue as he has campaigned for president"); Michael Sandler, *Negotiators Agree on Immigration Plan*, C.Q. WEEKLY (May 21, 2007), http://library.cqpress.com/cqweekly/document.php?id=weeklyreport110-000002515631.

[50] *See* Comprehensive Immigration Reform Act of 2007, S. 1348, 110th Cong. (2007).

[51] *See* Preston, *supra* note 49 ("[S]ix staunch opponents of any legal status for illegal immigrants, including Representatives Lamar Smith, Republican of Texas, and Steve King, Republican of Iowa, wrote an open letter criticizing the Senate proposals for overhaul. Those measures would 'pardon immigrant lawbreakers and reward them with the object of their crimes,' Mr. King said.").

[52] *See* Michael Sandler, *Immigration Overhaul Gains Ground in Senate*, C.Q. WEEKLY (May 28, 2007), http://library.cqpress.com/cqweekly/document.php?id=weeklyreport110-000002520629.

[53] The final vote was 46-53, with sixty favorable votes needed to cut off a Republican filibuster. *See* Robert Pear & Carl Hulse, *Immigrant Bill Dies in Senate: Defeat for Bush*, N.Y. TIMES (June 29, 2007), https://www.nytimes.com/2007/06/29/washington/29immig.html ("Opponents and some supporters said Senate leaders had made a mistake in taking the bill directly to the floor without hearings or review by the Senate Judiciary Committee.").

[54] President Barack Obama, Address Before a Joint Session of the Congress on the State of the Union, 2010 PUB. PAPERS 75, 84 (Jan. 27, 2010).

Security, Economic Opportunity, and Immigration Modernization Act[55] with support from thirteen Republicans and all Democrats.[56] It, too, sharply reduced family immigration to expand the number of employment-based visas.[57] Despite repeated prodding from President Obama, the House Republicans bottled it up in committee, where it died.[58]

Early in President Trump's administration, some Members of Congress,[59] commentators,[60] and even the President himself[61] suggested that controversies over his proposed border wall could be resolved by including the wall as part of a comprehensive immigration reform package. Although no particular bill came together, it appeared that the idea was a version of the "grand bargain" of prior years. For example, the President embraced legislation[62] introduced by two Republican senators that would sharply reduce family-based and humanitarian immigration in favor of admissions based on employment skills.[63] Here again, the threat of harm to immigrant families already in this country — in particular, beneficiaries of President Obama's Deferred Action on Childhood Arrivals ("DACA") — was dangled to induce pro-immigrant groups to accept a radical shift in the admission of future immigrants to benefit business interests. In 2019, the President unveiled his own immigration proposal, which would go even further than prior versions of the "grand bargain" in shifting immigration from humanitarian to

[55] Border Security, Economic Opportunity, and Immigration Modernization Act, S. 744, 113th Cong. (2013).

[56] *See* 159 CONG. REC. S5356-57 (daily ed. June 27, 2013).

[57] *See* S. 744, 113th Cong. §§ 2301-2307 (2013).

[58] *See* Howard F. Chang, *The Economics of Immigration Reform*, 52 UC DAVIS L. REV. 111, 113-14 (2018).

[59] *See* Lamar Alexander, *Trump Could Reopen the Government and Build a Lasting Legacy All at Once*, WASH. POST (Jan. 2, 2019), https://www.washingtonpost.com/opinions/trump-could-reopen-the-government-and-build-a-lasting-legacy-all-at-once/2019/01/01/0d7db9a2-0d44-11e9-831f-3aa2c2be4cbd_story.html?utm_term=.614a8fb227c4.

[60] *See* Ana Campoy, *Trump – Yes, Trump – May Be the One to Finally Deliver on Comprehensive Immigration Reform*, QUARTZ (Mar. 3, 2017), https://qz.com/920352/trump-yes-trump-may-be-the-one-to-finally-deliver-on-comprehensive-immigration-reform/.

[61] *See* Cristiano Lima & Matthew Nussbaum, *Trump Says He'll 'Take the Heat' Over Immigration Reform*, POLITICO (Jan. 9, 2018, 12:58 PM), https://www.politico.com/story/2018/01/09/trump-comprehensive-immigration-reform-329060.

[62] *Trump's RAISE Act Proposes Merit-Based Immigration System*, IMMIGRATION DIRECT (2017), https://www.us-immigration.com/blog/trumps-raise-act-proposes-merit-based-immigration-system/.

[63] *See* Reforming American Immigration for Strong Employment Act, S. 354, 115th Cong. (2017).

business-oriented grounds — and without any meaningful relief for undocumented immigrants.[64] As discussed in Section D, whether a formal "grand bargain" gets enacted into law, President Trump has already created the conditions for winning huge additional concessions for business interests.

B. The Effect of the "Grand Bargain" on Immigration Rhetoric

Most supporters of immigration legislation spoke as if the 2006-2007 formula were the only path to a bipartisan bill. Rent-seeking business interests encouraged that view, again offering their support in exchange for immigration rules lowering their labor costs.[65] Moreover, many liberals have gone from seeing the shift from family-based to employment-based immigration as the political cost of obtaining other items on their agendas to seeing it as a positive goal in itself.[66] Conservatives, too, show continuing enthusiasm for replacing family-based immigration with entrants matched to particular jobs. The Republican National Committee suggested that it could be "consistent with Republican economic policies that promote job growth and opportunity for all."[67] High-tech industries have pressed both parties to expand their access to immigrant workers.[68]

President Obama sent mixed messages about shifting immigration from a family base to one emphasizing employment skills. His 2011 "blueprint" for immigration reform relied heavily on arguments for immigrants' economic value, largely avoiding the merits of family reunification.[69] Part of one of his seven proposals would have modestly

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[64] *See* Annie Karni, *Trump's Immigration Plan Gets a Rose Garden Rollout and a Cool Reception*, N.Y. TIMES (May 16, 2019), https://www.nytimes.com/2019/05/16/us/politics/trump-immigration-plan.html.

[65] *See* Sean Lengell, *Accord Paves Way for Immigrants to Legally Take "Lesser-Skilled" Jobs*, WASH. TIMES (Feb. 21, 2013), https://www.washingtontimes.com/news/2013/feb/21/accord-between-chamber-of-commerce-afl-cio-paves-w/#ixzz2Lgqa5cot (describing agreement between U.S. Chamber of Commerce and AFL-CIO).

[66] *See* David Nakamura & Rosalind S. Helderman, *Schumer Says Immigration Deal Is Nearly Ready in the Senate*, WASH. POST (Mar. 21, 2013), https://www.washingtonpost.com/politics/schumer-says-immigration-deal-is-nearly-ready-in-the-senate/2013/03/21/858a9070-925a-11e2-bdea-e32ad90da239_story.html?utm_term=.b7b9fa4ac838.

[67] REPUBLICAN NAT'L COMM., GROWTH & OPPORTUNITY PROJECT 8 (2013).

[68] *See* Patrick Thibodeau, *House Republicans Consider High-Skills Immigration Bill*, COMPUTER WORLD (July 25, 2011, 7:00 AM).

[69] See OBAMA ADMIN., BUILDING A 21ST CENTURY IMMIGRATION SYSTEM 1, 23 (May 2011), https://obamawhitehouse.archives.gov/sites/default/files/rss_viewer/immigration_blueprint.pdf.

relaxed limits on family reunification; the rest focused on expanding economic immigration.[70] When announcing his DACA initiative to shield DREAMERs from deportation in 2012, he emphasized their economic potential rather than their family ties.[71] He went on to demand that Congress enact the "grand bargain," whose advantages he described in strictly economic terms.[72]

Early in his second term, President Obama began to recognize family values in immigration. He called for "modernizing the legal immigration system so that our citizens don't have to wait years before their loved ones are able to join them in America, and so that we're attracting the highly skilled entrepreneurs and engineers that are going to help create good paying jobs and grow our economy."[73] Doing both would be difficult without increasing the total number of immigrant admissions, which he did not advocate. Only as he was entering his final two years in office did he begin to emphasize family ties' centrality to immigration policy as he announced his Deferred Action for Parental Accountability ("DAPA") initiative.[74]

Congressional immigration rhetoric, too, reflected the influence of the campaign to subordinate family ties. A bipartisan "Gang of Eight" senators sought to revive comprehensive immigration reform in 2013. Their statement of principles was similarly ambiguous. On the one hand, it talked of reducing backlogs in family visas and criticized the current system for "forc[ing] families to live apart, which incentivizes illegal immigration."[75] On the other hand, it repeatedly spoke of "attracting and keeping the world's best and brightest."[76] Central to the group's plan, like earlier "grand bargains," was substantially reducing

[70] *See id.* at 23-26.

[71] *See generally* President Barack Obama, Remarks on Immigration Reform and an Exchange with Reporters (June 15, 2012), *available at* https://www.govinfo.gov/content/pkg/DCPD-201200483/pdf/DCPD-201200483.pdf (discussing immigration reform and how DREAMERS can advance the national economy).

[72] *Id.*

[73] President Barack Obama, Remarks by the President at a Naturalization Ceremony for Active Duty Service Members and Civilians (Mar. 25, 2013), *available at* http://www.whitehouse.gov/the-press-office/2013/03/25/remarks-president-naturalization-ceremony-active-duty-service-members-an.

[74] *See* President Barack Obama, Address to the Nation on Immigration Reform (Nov. 20, 2014), *available at* https://obamawhitehouse.archives.gov/the-press-office/2014/11/20/remarks-President-address-nation-immigration (noting that "undocumented immigrants who desperately want to embrace those responsibilities see little option but to remain in the shadows, or risk their families being torn apart").

[75] SCHUMER, MCCAIN, ET AL., BIPARTISAN FRAMEWORK FOR COMPREHENSIVE IMMIGRATION REFORM 3 (2013).

[76] *Id.*

family visas and increasing those for high-tech workers.[77] This brought relatively mild criticism from senators concerned about impacts on family immigration.[78] As the bill moved to Senate passage, its advocates emphasized the economic impact and had little to say about the adverse impacts on families.[79]

The next year House Republicans issued a statement of principles on immigration reform.[80] The statement criticized existing policy for "emphasiz[ing] extended family members and pure luck over employment-based immigration." Remarkably for a party that ordinarily scoffs at international comparisons, its first argument against this policy was that it was inconsistent with that of other developed countries.[81]

Throughout the Washington policy establishment, the assumption that family-based immigration will be slashed in favor of employment-based admissions is pervasive,[82] with numerous specific proposals from influential members.[83]

Thus, by making the "grand bargain" an article of faith among progressives, pro-immigrant groups surrendered many of the most important arguments that could otherwise have marginalized President Trump's initiatives. With some of its provisions, once pro-immigrant groups accepted them in the "grand bargain" they lost all leverage to prevent the provisions' enactment separately. For example, Democrats' acquiescence in the Secure Fence Act of 2006[84] has allowed President

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77 Nakamura & Helderman, *supra* note 66.

78 *See* David Nakamura, *Seven Democratic Senators Push to Maintain Family Visas*, WASH. POST (Mar. 20, 2013, 12:51 PM), https://www.washingtonpost.com/news/post-politics/wp/2013/03/20/two-democratic-senators-push-to-maintain-family-visas/?utm_term=.92401047ce60.

79 *See, e.g.*, 159 CONG. REC. S5339-40 (June 23, 2013) (remarks of Sen. Flake) (declaring that, apart from toughening enforcement, the bill's main goal was to put the United States "on the cutting edge of innovation and global competitiveness").

80 Laura Meckler, *House Republicans Release 'Standards' on Immigration Overhaul*, WALL ST. J. (Jan. 30, 2014, 4:30 PM), https://blogs.wsj.com/washwire/2014/01/30/house-republicans-release-standards-on-immigration-overhaul/.

81 *See id.*

82 *See* Seth Freed Wessler, *Immigration Reform May Throw Siblings Under the Bus*, COLORLINES (Mar. 26, 2013, 6:00 AM), http://colorlines.com/archives/2013/03/immigration_reform_may_throw_siblings_under_the_bus.html.

83 Several influential House Republicans introduced legislation to shift toward skills-based immigrant admissions. Press Release, Congressman Mike Quigley, Quigley, Paulsen Bipartisan Immigration Bill Encourages Advancements in Research and Technology (Mar. 15, 2013), https://quigley.house.gov/media-center/press-releases/quigley-paulsen-bipartisan-immigration-bill-encourages-advancements-in.

84 *See* Secure Fence Act of 2006, Pub. L. No. 109-367, 112 Stat. 2638 (2006).

Trump to argue that his border wall is already accepted U.S. policy and that Democrats' opposition is purely political. But even those enforcement provisions that did not get enacted into law provided invaluable precedent, with politicians across the spectrum insisting that immigration enforcement is "broken" and agreeing that immigration's primary role is to serve economic concerns. From there, it was a small step for President Trump to agree on the first point and offer a different prescription for economically advantageous immigration policy.

C. The False Promise of the "Grand Bargain"

Parts IV and V of this Article argue that shifting away from aspirational immigration law, and particularly shifting away from family-based admissions, is indefensible from both a normative and an economic perspective and was politically toxic even before the rise of populism in the 2016 campaign. This Section notes that the main justification many purported immigrants' allies give for supporting such a shift — that it is the price required to legalize the 11 million undocumented immigrants in this country — is disingenuous. The legalization provisions of the various "grand bargain" bills[85] have been fatally defective.[86]

First, all limit potential eligibility for legalization in ways likely to exclude a large fraction of the estimated 11 million undocumented people in this country. The ubiquity of the 11 million figure gives many the false impression that this is a stable, static set of individuals. In fact, the undocumented immigrant population is constantly in flux.[87] A steady, rapid increase in deportations over the past decade has not reduced the total undocumented population of this country appreciably because so many others are continually arriving.[88] The legalization

[85] The major "grand bargain" bills to gain traction in Congress over this period were S. 744, 113th Cong. (2013), S. 1348, 110th Cong. (2007), and S. 2611, 109th Cong. (2006).

[86] Immigrants' advocacy groups have been torn, recognizing the severe deficiencies in the paths to citizenship offered even in bills formulated in the relatively moderate Senate but not wanting to derail the process altogether. *See, e.g.*, Janet Murguía, Nat'l Council of La Raza, Letter to U.S. Senators on S. 744 (May 8, 2013) (on file with author) (urging the senator to pass the "Border Security, Economic Opportunity, and Immigration Modernization Act of 2013 (S.744)).

[87] *See generally* Mohammed M. Fazel-Zarandi et al., *The Number of Undocumented Immigrants in the United States: Estimates Based on Demographic Modeling with Data from 1990 to 2016*, 13 PLOS ONE (2018) (applying demographic principles to estimate the number of undocumented immigrants in the United States between 1990 and 2016).

[88] *See* YEARBOOK, *supra* note 14, at 103 tbl.39; U.S. DEP'T OF HOMELAND SEC., POPULATION ESTIMATES: ILLEGAL ALIEN POPULATION RESIDING IN THE UNITED STATES

provisions either require that a candidate have entered the country prior to a specific past date or, to much the same effect, establish a minimum duration for which the candidate for legalization must have been in the country prior to the law's effective date. Large numbers of more recently arrived undocumented immigrants would not qualify.

Second, taking advantage of the plans would be extremely expensive. In addition to application fees, the more recent proposals include large penalties that candidates for legalization would have to pay. They also would require candidates to travel to their home countries to submit their applications, an act that may seem largely symbolic for affluent senators but which would both be financially demanding for undocumented immigrants living on minimum or sub-minimum wages and put at risk their jobs, as many low-skill employers have little interest in granting their workers leaves of absence.[89] Moreover, because the criteria are relatively complex, immigrants seeking to legalize would likely need to consult attorneys to determine if they qualify. Ineligible immigrants applying for legalization would be serving themselves up for deportation and separation from any family members they have here. Many immigrant families can be expected to go to extreme, even self-destructive, ends to raise the costs required, but many likely will fall short. And those that can only afford a non-specialist attorney or a non-attorney advisor ("notario") may see potentially winning cases lost because of improper or untimely filings.[90] Indeed, those unable to afford counsel might not apply for fear of committing an error that precludes them from legalizing while making them known to Immigration and Customs Enforcement ("ICE").

Third, many of the proposals impose morals requirements that large numbers of undocumented immigrants cannot meet. Most obviously, the common practice of using someone else's Social Security number with employers can be redefined as identity theft and render the immigrant ineligible to convert.

Fourth, and related, many proposals require immigrants to stay continuously employed, often with the same employer. This gives their employers enormous power over them, leverage that can result in subminimum wages, unsafe working conditions, and sexual abuse. If an

(2018), https://www.dhs.gov/sites/default/files/publications/18_1214_PLCY_pops-est-report.pdf.

[89] *Cf.* Rascon v. US W. Commc'ns, Inc., 143 F.3d 1324, 1334 (10th Cir. 1998) (discussing how leave can impose "an undue hardship" on an employer).

[90] *See* Charles H. Kuck & Olesia Gorinshteyn, *Immigration Law: Unauthorized Practice of Immigration Law in the Context of Supreme Court's Decision in* Sperry v. Florida, 35 WM. MITCHELL L. REV. 340, 350 (2008).

immigrant becomes injured on the job or faces mistreatment that she or he finds intolerable, the worker will lose not only a job but also her or his legal status. Many of the employers willing to hire undocumented immigrants also seek to avoid paying payroll taxes by underreporting hours or whole employees, meaning that some immigrants who actually are continuously employed may not be reported as such.[91] Even if the employer is not overtly abusive, the kinds of work that most undocumented immigrants do is highly unstable, with employers often going out of business completely and those that remain often growing and shrinking their workforces in response to local market conditions and broader economic trends.[92] Historically, the eight- or ten-year probationary period specified in the legalization provisions would almost certainly include at least one recession, which likely would foreclose the path to legalization or citizenship for vast numbers of immigrants.

Fifth, significant numbers of immigrants would fall off the track to legalization through a number of other minor transgressions. Some will misunderstand reporting obligations, forget deadlines, have transportation breakdowns that prevent them from reaching crucial meetings, and the like. Low-income immigrants living at the margins of society lack the resources for the multiple redundancies and fallbacks that more affluent people equate with simple prudence. Others will have minor encounters with law enforcement that will disqualify them. Although no one wants hardened criminals to obtain legal immigration status, the 1996 legislation vastly expanded the range of crimes that are considered to involve "moral turpitude" for purposes of denying immigration relief.[93] And with law enforcement officials in many areas with large immigrant populations openly declaring their intention to get as many deported as possible, charging decisions could well become strategic.[94] Most obviously, working under a false Social Security

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[91] *See generally* Sachin S. Pandya, *Tax Liability for Wage Theft*, 3 COLUM. J. TAX L. 113, 115 (2012) (discussing wage theft).

[92] *See generally* Catherine K. Ruckelshaus, *Labor's Wage War*, 35 FORDHAM URB. L.J. 373, 383 (2008) (discussing the issues plaguing sectors at the bottom half of the economy).

[93] *See, e.g.*, Rachel Frankel, Note, *Sharks and Minnows: Using Temporary Alien Deportation Immunity to Catch the Big Fish*, 77 GEO. WASH. L. REV. 431, 435 (2009) (listing theft offenses as crimes considered aggravated felonies under the Illegal Immigration Reform and Immigrant Responsibility Act).

[94] *See* Tina Vasquez, *Despite Sanctuary Law, California Cops 'Bend Over Backwards' to Work with ICE*, REWIRE NEWS (Mar. 27, 2019, 2:11 PM), https://rewire.news/article/2019/03/27/despite-sanctuary-law-california-cops-bend-over-backwards-to-work-with-ice/.

number, a practical necessity for many undocumented immigrants, can be charged as identity theft.[95]

Finally, and consistent with the general anti-family trend in immigration law, the legalization proposals would require undocumented immigrants to wait many years before they could petition for the admission of their family members. By that time, and by the time the considerable waiting periods after petitions have passed, the legalizing immigrant would have missed out on virtually the entire childhoods of her or his daughters and sons. This is unlikely to prove tolerable to many immigrant parents, who will seek to bring their families here unlawfully. Alternatively, some undocumented families that are already here will have some members who qualify for legalization due to the length of time they have been in this country, their work history, and other factors. Having one member of the family obtain legal status can certainly help, but it falls far short of resolving the chronic fear, instability, and isolation that undocumented status causes.

Although quantifying these various effects is difficult, experienced immigrants' advocates estimate that few undocumented immigrants would obtain legal status through the mechanisms offered by the various "grand bargain" proposals.[96] Thus, even if one believed that mass legalization was worth a fundamental shift away from aspirational immigration law, that is not what is on offer. Indeed, as discussed below, this legislation would likely increase the flow of illegal immigration by denying more families legal means to reunify. The "grand bargain" is a fraud, and the concessions made to try to win its passage greatly strengthened President Trump's hand.

D. Restructuring Immigration Law Under President Trump

President Trump's executive actions would seem to eliminate the possibility of a "grand bargain" as it previously had been conceived. He has already met and far exceeded the level of aggressiveness in immigration enforcement that pro-immigrant groups had offered up in those negotiations. Moreover, he surely would not agree to, much less

[95] *See generally* Lynn M. LoPucki, *Human Identification Theory and the Identity Theft Problem*, 80 TEX. L. REV. 89 (2001) (discussing identity theft and the different manners of identity theft).

[96] *See Senate Judiciary Committee Considering Flawed Immigration Reform Bill*, NAT'L IMMIGRATION LAW CTR. (Mar. 2, 2006), https://www.nilc.org/issues/immigration-reform-and-executive-actions/cir-06-flawed/.

press congressional Republicans to support, any substantial legalization initiative.

Yet if the "grand bargain" is understood in terms of its practical effect — as a means of increasing immigration subsidies to agriculture, technology, and other specific sectors of the economy — President Trump's initiatives make a major restructuring of the Immigration and Nationality Act all too feasible. The challenge always has been freeing up enough visas in the humanitarian categories to increase the number of employment-based visas without outraging nativists. Reducing family-based visas requires a statute, with the "grand bargain" offering some relief for undocumented immigrants in exchange for pro-immigrant groups' acquiescence in the diminution in new admissions of close relatives. Reducing refugee and related admissions, on the other hand, can be achieved administratively. President Trump's imposition of a 30,000-refugee annual cap would cut that program by more than 80%, freeing up well over 100,000 visas.[97] This would allow nearly doubling employment visas without increasing overall immigration. Moreover, the prospect of eliminating some of President Trump's harshest anti-immigrant measures could induce some relatively pro-immigrant Members of Congress to support such legislation. Conversely, by imposing more aggressive enforcement measures than the "grand bargain" contained, President Trump has deprived pro-immigrant Members of most of what they had been offering in the trade, giving them even less leverage to achieve a deal without agreeing to the shift to employment-based visas.

More broadly, the more the nativists accomplish, the more pro-immigrant groups will be desperate for the support of business groups seeking to increase employment visas. In this respect, an attention-grabbing temporary travel ban targeting Muslims, although not having a major long-term impact on substantive immigration law, can help drive pro-immigrant and pro-tolerance groups into an alliance for which the subordinating of family immigration could be the price.

III. BROADENING THE PRESSURE ON IMMIGRANT FAMILIES

With disagreements about other issues blocking consensus on comprehensive immigration legislation, the movement opposing the humanitarian model prior to the 2016 election was unable to change the fundamental structure of the Immigration and Nationality Act.

[97] *See* Julie Hirschfeld Davis, *Trump to Cap Refugees Allowed into U.S. at 30,000, a Record Low*, N.Y. TIMES (Sept. 17, 2018), https://www.nytimes.com/2018/09/17/us/politics/trump-refugees-historic-cuts.html.

When a powerful movement is denied its primary goal, it commonly casts about for other, secondary objectives. When the horror of nuclear weapons prevented the western democratic and communist blocs from overrunning one another during the Cold War, they set about enlisting proxies in remote parts of the world with no natural affinity to either of them. With *Roe v. Wade*[98] blocking the Right to Life Movement's main mission, it broadened its sights to such eclectic topics as improving health insurance coverage for pregnant women[99] and expanding property exemptions in bankruptcy.[100] In the same way, the longstanding political deadlock over sweeping immigration legislation led critics of immigration to expand the battlefield. This Part describes how the build-up of hydraulic pressure from the campaign challenging the humanitarian model has expanded the scope of what has traditionally been thought of as immigration policy in search of outlets for its rising suspicion of immigrant families. Its accomplishments prior to 2016 are important both in their own right and as the foundations for President Trump's initiatives.

Section A shows the impact the shift away from family concerns has had on those laws enacted on peripheral aspects of immigration. Section B identifies a range of previously little-noticed policies that have the effect of pitting immigrant family members against one another when one of them has food, health care, or other basic needs that public programs could meet. Finally, Section C shows how this movement has helped expand the political arenas in which immigration policy is made to include state and local legislatures. Each of these areas has been the target for major initiatives by President Trump. Although the rise in anti-immigrant legislation has been noted widely, commentators have failed to appreciate its role in reconceptualizing immigration law.

A. The Anti-Family Transformation of Immigration Enforcement

In 1996, Congress passed and President Clinton signed two major laws restricting immigration, the Antiterrorism and Effective Death

98 410 U.S. 113 (1973).

99 *See* State Children's Health Insurance Program; Eligibility for Prenatal Care and Other Health Services for Unborn Children, 67 Fed. Reg. 61,956 (Oct. 2, 2002) (to be codified at 42 C.F.R. pt. 457) (interpreting the State Children's Health Insurance Program as covering unborn children).

100 Bankruptcy legislation with strong bipartisan support stalled for six years because of concerns about its effect on judgments against persons blocking entrances to abortion clinics. *See* Maura Reynolds, *Abortion Debate Still Tangled in Bankruptcy Bill*, L.A. TIMES (Feb. 28, 2005), https://www.latimes.com/archives/la-xpm-2005-feb-28-na-bankrupt28-story.html.

Penalty Act ("AEDPA")[101] and Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA").[102] Although fairly permissive with respect to the immigration categories that allow employers to meet their needs from overseas, this legislation sharply restricted admission and grants of permission to remain for the other two major categories of immigration: families seeking to reunify and persons fleeing foreign oppression. For example, it denied many immigrants the opportunity even to argue that they should be allowed to stay in the United States because of the danger that they would be persecuted in their country of origin.[103]

Although not drawing as much public attention, these two laws' transformation of this country's treatment of immigrant families was even more profound. Some of its provisions were directly implementing the economic model of immigration law, such as monetizing family ties. For example, it barred prospective immigrants seeking to join family members here unless they could demonstrate that they would be able to support themselves at a level at least 25% above the poverty line. Advocates of this legislation contended that it would improve the "quality" of the immigrants coming into the country. As the next Section shows, that view also heavily influenced the approach to immigration in the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 ("PRWORA," or the "1996 welfare law").[104] At the same time, this country reserved substantial numbers of visas — 3.9 million in 2017 alone[105] — to allow employers to obtain immigrants with specific work skills.

The 1996 legislation also attacked the centrality of family ties in immigration law even where no economic issues were present. Yet both pieces of legislation were strikingly uncontroversial at the time. Their sponsors' political sophistication is evident even in their cynical, almost Orwellian titles: few of AEDPA's provisions even arguably had anything to do with fighting terrorism or capital crimes, and IIRIRA had little to do with the responsibility (or irresponsibility) of immigrants. Both

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101 *See* Pub. L. No. 104-132, 110 Stat. 1214 (1996) (codified in scattered sections of 8 U.S.C.).

102 *See* Pub. L. No. 104-208, div. C, 110 Stat. 3009-546 (1996) (codified in scattered sections of 8 U.S.C.) [hereinafter IIRIRA].

103 *See* 8 U.S.C. § 1182(a)(6)(A)(i) (2019) (prohibiting immigrants that did not enter the United States at an official port of entry from claiming political or religious asylum).

104 *See* Pub. L. No. 104-193, 110 Stat. 2105 (1996) (most restrictions on immigrants codified at 8 U.S.C. §§ 1192, 1611-45).

105 See YEARBOOK, *supra* note 14, at 71 tbl.27.

sailed through to enactment because the advocates of an economic-based immigration policy had recognized the value of broadening the playing field while the disorganized collection of groups supporting the existing regime were still playing by the old rules in which immigration enforcement issues were routinely conceded to assuage anti-immigrant opposition to broader reform. The result was a major step toward realigning immigration law toward economics: the new laws required the nation to reconcile itself to inflicting grievous harm on immigrant families, and they eliminated enforcement provisions as a possible trade for future liberalizations. Without the ability to execute such a trade, those seeking to legalize undocumented immigrants were forced to seek alliances with business groups promoting the shift to an economic-driven immigration policy.

Although AEDPA and IIRIRA were both broad and complex, and were neither the beginning nor the end of the transformation of immigration enforcement to the detriment of families, a few examples illustrate four problematic themes. Once established in those two major laws, these themes subsequently have driven other aspects of enforcement policy to become far harsher on immigrant families. Many of President Trump's harshest measures involve aggressive attempts to maximize powers these laws granted.

1. Reducing Recognition of All Family Relationships

An "American citizen child has an absolute right to remain in this country . . . [which], because of his tender age, cannot be exercised meaningfully without allowing his parents to remain here as well."[106] Prior to 1996, immigration law authorized the cancellation of removal for otherwise deportable undocumented immigrants who had been in the United States for at least ten years and whose deportation would cause serious hardship to close family members who are U.S. citizens or legal permanent residents.[107] This would allow parents to stay with children born in this country, who are by definition U.S. citizens and who may have little understanding of the language or culture of their parents' countries of origin. Under IIRIRA, however, cancellation of removal is possible only if the immigrant's removal would cause "exceptional and extremely unusual hardship" to her or his spouse, parent, or child.[108] ICE deports the overwhelming majority of

[106] Lee v. INS, 550 F.2d 554, 558 (9th Cir. 1977) (Takasugi, J., dissenting), *overruled by* Wang v. INS, 622 F.2d 1341 (9th Cir. 1980), *rev'd per curiam*, 450 U.S. 139 (1981).

[107] *See* 8 U.S.C. § 1229b (1994).

[108] *Id.* § 1229b(b)(1)(D).

immigrant parents that come to its attention without regard to the harm their U.S. citizen children experience.[109] Thus, not only is the separation of the family deemed insufficient grounds to prevent the parent's removal, but immigration authorities routinely deny relief to parents of U.S. citizen children with medical conditions educational needs for which they would have difficulty obtaining adequate attention in the parent's country of origin.[110] IIRIRA also denied federal courts jurisdiction to review denials of relief on this basis.[111]

The result of this change, and the immigration authorities' aggressive implementation of it, is to "thrust[] an extremely difficult choice upon the child's parents if deportation is expected — a choice between the child's greater potential for health and general material welfare in the United States and the parental sustenance and guidance he would receive from his parents in [the parents' home country],"[112] which the child may never have seen.[113] Almost half a million U.S. citizen children currently live in Mexico, brought there by parents deported from this country. In Mexico, many struggle with learning in Spanish and as a result face high rates of academic problems and low graduation rates.[114] Those with medical problems may face reduced access to effective health care.

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[109] *See* NYU SCH. OF LAW IMMIGRANT RIGHTS CLINIC, INSECURE COMMUNITIES, DEVASTATED FAMILIES: NEW DATA ON IMMIGRANT DETENTION AND DEPORTATION PRACTICES IN NEW YORK CITY 3 (2012), http://immigrantdefenseproject.org/wp-content/uploads/2012/07/NYC-FOIA-Report-2012-FINAL.pdf.

[110] *See, e.g.*, Avila v. Mukasey, 284 Fed. Appx. 452, 453 (9th Cir. 2008) (denying relief despite the child's heart condition); Noriega v. Ashcroft, 104 Fed. Appx. 809, 810 (3d Cir. 2004) (denying relief despite child's asthma).

[111] *See* IIRIRA, *supra* note 102, at § 306(b).

[112] Lee v. INS, 550 F.2d 554, 558 (1977) (Takasugi, J., dissenting); *see* David B. Thronson, *Choiceless Choices: Deportation and the Parent-Child Relationship*, 6 NEV. L.J. 1165, 1170-72 (2006) (describing parents' potential legal arguments of "hardship to children").

[113] *See* Ramos v. INS, 695 F.2d 181, 188-89 (5th Cir. 1983) (requiring consideration of noneconomic harms, including that child's relocation to the Philippines could "cause . . . serious trauma because of the different culture"); Mejia-Carrillo v. INS, 656 F.2d 520, 522 (9th Cir. 1981) (noting deportation of mother would place child in "worst of situations," where return to Mexico would deprive him of "chance to further his education"); Choe v. INS, 597 F.2d 168, 170 (9th Cir. 1979) (asserting that the "young" child of a single parent would not face "as great" a hardship by deportation).

[114] *See* Nina Lakhani, *U.S.-Born Students in Mexico Risk Becoming 'Lost Generation*,' L.A. TIMES (Mar. 9, 2015, 5:45 AM), https://www.latimes.com/world/mexico-americas/la-fg-mexico-schools-americans-20150309-story.html.

The other option often is even worse. Each year, ICE deports tens of thousands of parents who had at least one U.S. citizen child.[115] Children of deported immigrants suffer from a sense of abandonment and commonly have health, behavioral, and academic problems as they struggle to cope with being raised by more distant relatives.[116] These policies, in effect, gratuitously convert children with loving parents into de facto orphans.[117] As his travel ban was stayed by the courts, President Trump stepped up the intensity and aggressiveness of immigration raids.[118]

Even where only one parent is deported, the economic and psychological consequences of being converted to a one-parent family can be severe.[119] IIRIRA imposed minimum durational bars for undocumented immigrants discovered in the United States, ranging from ten years to life. Because of the law's complexity, these bars serve as a trap for many couples in which a U.S. citizen comes forward to seek legal status for her or his spouse, only to find the spouse banished from

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115 Elise Foley, *Deportation Separated Thousands of U.S.-Born Children from Parents in 2013*, HUFFPOST (June 25, 2014, 9:22 PM), https://www.huffpost.com/entry/parents-deportation_n_5531552.

116 *See* RANDY CAPPS ET AL., PAYING THE PRICE: THE IMPACT OF IMMIGRATION RAIDS ON AMERICA'S CHILDREN 50-51 (2007), http://www.urban.org/sites/default/files/publication/46811/411566-Paying-the-Price-The-Impact-of-Immigration-Raids-on-America-s-Children.pdf.

117 This gratuitous infliction of orphanhood on children with loving parents was a theme in the 104th Congress. Newly-elected Speaker Newt Gingrich attracted widespread criticism when he suggested sending the children of welfare recipients to orphanages. *See* Richard O'Mara, *Are Orphanages Better for Kids than Welfare*, BALTIMORE SUN (Nov. 27, 1994), https://www.baltimoresun.com/news/bs-xpm-1994-11-27-1994331010-story.html. The final welfare law enacted in 1996 lacked specific provisions for funding orphanages but did so dramatically transform the funding structure and states' incentives with respect to cash assistance that assistance payments largely disappeared as a means to keep hard-pressed families together over the next several years. *See* Andrew Hammond, *Welfare and Federalism's Peril*, 92 WASH. L. REV. 1721, 1733-34 (2017) (describing the Act's effects on cash assistance to families). In 1997, Congress enacted the Adoption and Safe Families Act, which expedited the termination of parental rights for parents of children in foster care. *See* 42 U.S.C. § 675(5)(E) (1997).

118 *See* Julie Carrie Wong, *'Psychological Warfare': Immigrants in America Held Hostage by Fear of Raids*, GUARDIAN (Feb. 18, 2017, 6:00 AM), https://www.theguardian.com/us-news/2017/feb/18/us-immigration-raids-fear-trump-mexico.

119 *See* JOANNA DREBY, CTR. FOR AM. PROGRESS, HOW TODAY'S IMMIGRATION ENFORCEMENT POLICIES IMPACT CHILDREN, FAMILIES, AND COMMUNITIES: A VIEW FROM THE GROUND 17-20 (2012). *See generally* FRANK FURSTENBERG & ANDREW J. CHERLIN, DIVIDED FAMILIES: WHAT HAPPENS TO CHILDREN WHEN PARENTS PART (1994) (outlining the effects of divorce and family separation on children).

this country for most or all of their children's remaining youth.[120] Ironically, these bars are most likely to affect immigrants with family here because they depend on the length of time in this country — and the longer an immigrant is here, the more time she or he has to fall in love and start a family.

The very existence of these policies disrupts family life even before they are applied to particular immigrants. Parents afraid that ICE will arrest them as they drop off their children at school — and hearing that no relief will be available if they are picked up — avoid ordinary involvement in their children's educations and sometimes remove their children from school.[121] Families that have lost one parent to deportation may become even more impoverished and isolated as they fear what could happen to the other.[122] The reclusive lives of immigrant families afraid of being split up can cause social isolation, depression, weight loss, and acting out among their children.[123] Children's physical safety can be endangered: few immigrants facing domestic violence will dare seek protective orders after immigration agents, acting under President Trump's new policies, detained a woman as she sought such an order.[124]

In addition, children granted Special Immigrant Juvenile ("SIJ") status are forever barred from petitioning for the admission of their parents.[125] To be sure, youth only obtain SIJ status if they have been abused by one of their parents. But often the other parent is wholly innocent, perhaps also a victim of the abuse. A severely traumatized child's need for her or his non-abusive parent is likely to be especially strong, yet current rules disregard those family ties.

2. Excluding Some Family Relationships from Legal Recognition

Even when a family member would suffer such extreme hardship from a deportation to meet the cancellation of removal standard, IIRIRA denies any possibility of relief to an immigrant unless the afflicted

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120 *See* Susan Ferriss & Amy Isackson, *Separated by Law: Families Torn Apart by 1996 Immigration Measure*, CTR. FOR PUB. INTEGRITY (2012), https://publicintegrity.org/immigration/separated-by-law-families-torn-apart-by-1996-immigration-measure/.

121 *See* CAPPS ET AL., *supra* note 116, at 40.

122 *See* DREBY, *supra* note 119, at 10.

123 *See id.* at 19; CAPPS ET AL., *supra* note 116, at 52-53.

124 *See* Katie Mettler, *'This Is Really Unprecedented': ICE Detains Woman Seeking Domestic Abuse Protection at Texas Courthouse*, WASH. POST (Feb. 16, 2017), https://www.washingtonpost.com/news/morning-mix/wp/2017/02/16/this-is-really-unprecedented-ice-detains-woman-seeking-domestic-abuse-protection-at-texas-courthouse/.

125 *See* 8 U.S.C. § 1101(a)(27)(J)(iii)(II) (2019).

relative is her or his parent, child, or spouse. Whatever the merits of this country's heavy emphasis on the nuclear family, families in much of the rest of the world, including the regions sending the most immigrants here, define themselves much more broadly. By ignoring siblings, aunts and uncles, cousins, and grandparents, we force prospective immigrants who fully qualify to be in this country to abandon vital parts of their and their children's lives in order to claim that status. Historically, U.S. immigration law has at least recognized siblings to some extent, allowing U.S. citizens to petition for their sisters and brothers. For countries sending large numbers of immigrants, however, the priority system has effectively rendered those petitions meaningless.[126]

3. Forcibly Separating Families

As harrowing as are some of the choices to which immigration enforcement law puts immigrant families, often the separations are entirely involuntary. IIRIRA's mandate that large categories of immigrants be detained while their cases are adjudicated — often taking months or years — deprives large numbers of U.S. citizen children of their parents even when their parents have compelling legal reasons to remain in this country. Legislation mandating a minimum number of immigrants be detained at all times, a crass subsidy to private prison companies that run detention facilities on contract with ICE, further increases the pressure to detain parents. This often results in incarceration of whole families for one member's suspected violation of immigration laws.[127] President Trump's executive order on border enforcement strengthens the presumption of detention for immigrants whose status is being adjudicated.[128] Chilling stories about immigrant children being abused and killed in detention, and of the long-term psychological damage detention is doing to these children as well as their parents, are only giving greater prominence to a longstanding

[126] The United States has established country-specific quotas for immigrants based on petitions from residents who are U.S. citizens or legal permanent residents. Those quotas are more than sufficient to accommodate petitions to admit relatives from countries sending few immigrants here, such as Switzerland. By contrast, those quotas fall far short of the number of valid petitions for admitting citizens of China, India, Mexico, or the Philippines. Because sibling petitions receive lower priority than those for parents, children, and spouses, they have great difficulty gaining consideration.

[127] *See* Stuart Matthews, *Family-Based Punishment*, IMMIG. & NATURALIZATION COMM. NEWSLETTER (ABA Section of International Law), Fall 2007, at 5, 6-7.

[128] *See* Exec. Order No. 13,767 § 6, 82 Fed. Reg. 8793 (Jan. 25, 2017).

trend of exploiting familial bonds to put immigrant families to agonizing choices.[129]

Even if the parents alone are detained, the family suffers a devastating blow. If no relative is immediately available to take custody of their children, the children go into state foster care systems.[130] Although the federal government is creating the need for this care by detaining the children's parents, it provides no special assistance to the impacted states beyond the usual foster care matching payments.[131] Because they are incarcerated, and often transported to distant states, these immigrant parents are unable to appear at family court hearings or to interact meaningfully with child welfare workers. Either because of this apparent lack of involvement or after the passage of a specified number of months, some states commence proceedings to terminate the immigrants' parental rights, legally dissolving their families.[132] This, of course, can adversely affect some claims for immigration relief, resulting in the parent being banished from this country and legally stripped of their relationship with their children.

Although the Obama Administration detained not only adults but whole families, in its final years it began seeking alternatives to family detention. President Trump's executive order puts an end to that effort.[133] In addition to the obvious problems of incarcerating young children in converted prisons, this increase in family detention also has caused a wide range of stresses on the affected families. Facilities lack adequate child care arrangements for parents needing to prepare for their immigration cases. Most disturbingly, guards remove children from their families and place them in separate cells to punish the

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[129] *See* Hannah Rappleye & Lisa Riordan Seville, *24 Immigrants Have Died in ICE Custody During the Trump Administration*, NBC NEWS (June 9, 2019, 4:00 AM), https://www.nbcnews.com/politics/immigration/24-immigrants-have-died-ice-custody-during-trump-administration-n1015291.

[130] DREBY, *supra* note 119, at 2.

[131] By contrast, the federal government pays the full cost of foster care for unaccompanied children apprehended entering this country without authorization. *See* Daniel J. Steinbock, *The Admission of Unaccompanied Children into the United States*, 7 YALE L. & POL'Y REV. 137, 154-160 (1989) (discussing the care and protection of unaccompanied immigrant children).

[132] *See* EMILY BUTERA ET AL., DETAINED OR DEPORTED: WHAT ABOUT MY CHILDREN?, WOMEN'S REFUGEE COMM'N 1, 4 (2014), https://www.womensrefugeecommission.org/rights/resources/1022-detained-or-deported-parental-toolkit-english-interactive.

[133] *See* Exec. Order No. 13,767, 82 Fed. Reg. 8793 (Jan. 25, 2017).

children or parents for complaining or simply for the children acting their ages.[134]

4. Other Means of Increasing Stress on Families

In order to obtain humanitarian relief — as an asylee, as an SIJ, through cancellation of removal, or some other categories under immigration law — an immigrant must establish a legitimate fear of maltreatment should she or he be returned to her or his country of origin. Although this standard can occasionally be met without having already suffered abuse, the vast majority of immigrants obtaining relief demonstrate the seriousness of the threat they face in part with reference to what they have already experienced. Those picked up by Customs and Border Patrol ("CBP") or ICE receive an interview to determine whether they have a "credible fear" of persecution if returned home; this interview functions somewhat like a probable cause hearing in a criminal case. Those immigrants who fail to persuade U.S. Citizenship and Immigration Services ("USCIS") in the "credible fear" interview are immediately deported; those that do begin the long and uncertain process toward receiving a decision on the merits of their claims. Thus, these interviews are crucial.

Common USCIS practice, particularly for detained immigrants, is to conduct interviews in which both parent and child are present together.[135] This forces parents to choose between explaining all of the horrific details of what they experienced in front of their child — potentially disturbing the child and undermining the parent-child relationship — or omitting some of the details, which could result either in immediate deportation or in creating inconsistencies in the record that will be used to deny them relief should their case reach a hearing.[136] Many detained immigrant mothers have "children who listen to their mothers' stories of sexual abuse, rape, violence, and threats over and over again."[137]

More generally, the entire immigration enforcement structure is designed so that immigrants with strong family ties are at a huge

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[134] *See, e.g.*, LUTHERAN IMMIGRATION AND REFUGEE SERV. & WOMEN'S REFUGEE COMM., LOCKING UP FAMILY VALUES, AGAIN 11-13 (2014); Philip E. Wolgin, *Incarcerating Entire Families Cannot Be the Solution to the Separation of Children*, CTR. FOR AM. PROGRESS (Jun. 20, 2018, 4:39 PM), https://www.americanprogress.org/issues/immigration/news/2018/06/20/452571/incarcerating-entire-families-cannot-solution-separation-children/.

[135] *See* LUTHERAN IMMIGRATION AND REFUGEE SERV. & WOMEN'S REFUGEE COMMITTEE, *supra* note 134, at 11-13.

[136] *See id.*

[137] *Id.* at 12.

disadvantage to those on their own (or with sufficiently tepid affinity for their families that they are willing to accept separation). Thus, for example, ICE's guards leveraged immigrant women's desperation to keep their children from going back to their dangerous countries of origin to target them for sexual abuse.[138]

5. Anti-Family Immigration Enforcement Under President Trump

Even before President Trump took office, the effects of these policies were devastating. The country that enshrines "family values" as a magic elixir breaks up hundreds of thousands of peaceful families and bars countless others from reunifying here.[139] The country that declares "No Child Left Behind" left over 100,000 U.S. citizen children behind over a ten-year period as it deported their parents.[140] The Trump Administration intensified immigration enforcement across the board, but several of its actions place particular stress on families with immigrant members as well as those coming to the United States to escape foreign persecution. Their effect over time is likely to skew the immigrant population increasingly toward economic migrants, who will feel relatively modest impacts, by disproportionately burdening family-based and humanitarian immigrants.

First, as noted, President Trump dramatically expanded the detention of immigrants pending adjudication of their claims for asylum and other humanitarian relief from deportation.[141] Such a rapid increase in detention, combined with the commitment to hold immigrants near the border, has overwhelmed available capacity, leading to overcrowding and the hurried repurposing of facilities ill-equipped to hold families humanely.

Second, his "zero tolerance" policy has resulted in thousands of children being separated from their parents in immigration detention.[142]

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138 *See id.* at 8-9.

139 *See generally* Emma O. Guzman, *The Dynamics of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996: The Splitting-Up of American Families*, 2 SCHOLAR 95, 100 (2000).

140 *See* U.S. DEP'T OF HOMELAND SEC., OFFICE OF INSPECTOR GEN., REMOVALS INVOLVING ILLEGAL ALIEN PARENTS OF UNITED STATES CITIZEN CHILDREN 4 (2009).

141 *See* Exec. Order No. 13767, § 6, 82 Fed. Reg. 8793 (Jan. 25, 2017).

142 *See* Kevin Sieff & Sarah Kinosian, *29 Parents Separated from Children and Deported Arrive Back at U.S. Border to Demand Asylum, Reunification with Kids*, WASH. POST (Mar. 2, 2019, 5:19 PM), https://www.washingtonpost.com/world/the_americas/29-parents-separated-from-their-children-and-deported-last-year-arrive-at-us-border-to-request-asylum/2019/03/02/38eaba7a-2e48-11e9-8781-763619f12cb4_story.html?utm_term=.15b78570dfd4.

At times, the Administration has essentially admitted that its purpose is to leverage family ties to discourage immigration. Even after it purported to end this policy, and was enjoined to do so, it continued to exploit loopholes to separate many families.[143]

Third, former Homeland Security Secretary John Kelly ordered a vast expansion of "expedited removal."[144] This is a process IIRIRA created by which immigration officers may immediately deport an immigrant without a hearing based on those officers' assessment that that immigrant has no lawful right to be in this country.[145] The immigrant is given no right to counsel or to appear before an immigration judge.[146] The Obama Administration limited expedited removal to undocumented persons caught at, or within 100 miles of, the U.S. border who had been in the country less than two weeks, thus limiting it to those that had had little chance to establish ties in this country. Even with these limitations, the Obama Administration deported more people than the Bush Administration had, earning him the derisive nickname "Deporter-in-Chief" from some immigrants' advocates.[147] By his second term, over two-thirds of deportations were handled through these expedited means.[148]

Secretary Kelly, however, applied expedited removal to any undocumented immigrant apprehended anywhere in the country who has been in the country up to two years. Thus, parents of young children, as well as persons that have become primary caregivers relied upon by infirm relatives, would be subject to almost instantaneous removal. Judicial review is limited at best.[149] For undocumented immigrants in this country solely for economic reasons, expedited removal may not make a dramatic difference: they will be deported more rapidly, but the result would have been the same in any event. For those whose family ties or whose risk of persecution would create a defense against deportation, however, the shift to expedited removal is

143 *See* Michelle Goldberg, Opinion, *The Terrible Things Trump Is Doing in Our Name*, N.Y. TIMES (June 21, 2019), https://www.nytimes.com/2019/06/21/opinion/family-separation-trump-migrants.html.

144 Memorandum from John Kelly, *supra* note 36, § G.

145 *See* 8 C.F.R. § 1235.3(b) (2016).

146 *Id.* § 1235.3(b)(2)(ii).

147 Jennifer M. Chacón, *Immigration and the Bully Pulpit*, 130 HARV. L. REV. F. 243, 246 (2017).

148 *Removal Without Recourse: The Growth of Summary Deportations from the United States*, AM. IMMIGRATION COUNCIL 1, 1 (Apr. 24, 2014), https://www.americanimmigrationcouncil.org/research/removal-without-recourse-growth-summary-deportations-united-states.

149 *See* Smith v. U.S. Customs & Border Protection, 741 F.3d 1016 (9th Cir. 2014).

devastating.[150] Although immigration officers are supposed to check whether the immigrant has any defense, the lack of time or opportunity to learn one's rights, the absence of counsel, and the rough-and-ready tenor of the process makes recognition of those defenses unlikely. Secretary Kelly's extensive discussion of fraud in the process of interviewing detained immigrants about possible asylum claims, and his caution against reaching positive (but not negative) decisions without full consideration of the evidence[151] is likely to dissuade many agents further from allowing many immigrants to press humanitarian claims.

Fourth, the reinvigoration of the Section 287(g) program[152] and the reinstatement of the Secure Communities initiative[153] have transformed state and local law enforcement officers into immigration officers, empowered to take into custody and commence the deportation of an immigrant. Although theoretically limited to officers the Attorney General finds "qualified to perform" those functions,[154] these officers inevitably will have less training and expertise in the complexities of immigration law. Among the areas whose complexity makes it least likely they will achieve mastery are the various grounds for granting humanitarian relief to those with compelling family reasons to remain in this country and to victims of foreign oppression. When combined with the vast expansion of expedited removal, this means that a parent calling the local police to report an assault on a child could be deported that same day. This effectively leaves members of immigrant families, including U.S. citizen children, without effective recourse to law enforcement. These concerns led the Obama Administration to cancel the program.[155] Not only did President Trump reinstate Secure Communities but it threatened sanctions against cities and counties that resisted cooperating with ICE.[156]

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150 *See* U.S. COMM'N ON INT'L RELIGIOUS FREEDOM, REPORT ON ASYLUM SEEKERS IN EXPEDITED REMOVAL 4-8 (2005).

151 *See* Kelly, Implementing the President's Border Security, *supra* note 36, § I.

152 *See* 8 U.S.C. § 1357(g) (2019).

153 *See* Kelly, Enforcement of the Immigration Laws, *supra* note 36, § B.

154 8 U.S.C. § 1357(g)(1).

155 *See* Memorandum from Jeh Charles Johnson, Secretary U.S. Dep't of Homeland Sec., to Thomas S. Winkowski, Acting Dir., U.S. Immigration and Customs Enf't, Secure Communities Program (Nov. 20, 2014), https://www.dhs.gov/sites/default/files/publications/14_1120_memo_secure_communities.pdf.

156 Exec. Order No. 13,768, 82 Fed. Reg. 8799 (Jan. 30, 2017); Martin Kaste, *Trump Threatens 'Sanctuary' Cities with Loss of Federal Funds*, NPR (Jan. 26, 2017), https://www.npr.org/sections/thetwo-way/2017/01/26/511899896/trumps-threatens-sanctuary-cities-with-loss-of-federal-funds.

Fifth, the President's executive order compounded immigrant families' insecurity by vastly expanding the definition of criminal alien, even allowing deportation for alleged crimes of which the immigrant has been acquitted.[157] The Administration sought to emphasize its resolve to go after undocumented immigrants in the interior of the United States by launching high-profile raids across at least a dozen states[158] and issuing two sweeping memoranda making the substantial majority of undocumented immigrants high-priority enforcement targets.[159] In June 2019, President Trump threatened to arrest one million undocumented immigrants, likely separating hundreds of thousands of families.[160]

Sixth, Secretary Kelly denied unaccompanied minor status to children who are eventually placed with parents living in the United States without legal status.[161] Unaccompanied minors have been less commonly subject to detention, and they may present their claims for asylum or other humanitarian relief in a non-adversarial interview with an asylum officer rather than in an adversarial hearing before an immigration judge. Denying these crucial procedural advantages to children being cared for by parents would provide a strong disincentive to reunify families and result in more children being left in foster care despite the availability of loving parents.

Finally, Secretary Kelly's memo threatens parents with criminal liability for human trafficking when they facilitate their children's entry to this country.[162] His memo flatly dismisses humanitarian concerns, declaring that "[r]egardless of the desires for family reunification, or conditions in other countries, the smuggling or trafficking of alien children is intolerable."[163]

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157 *See* Memorandum from Jeh Charles Johnson, at §§ 5(b)-(c) (prioritizing for deportation those awaiting trial on criminal charges as well as those whom an immigration officer believes to have committed criminal activity regardless of what the courts may have decided).

158 *See* Alan Gomez, *Trump Immigration Raids Show Greater Focus on Non-Criminals*, USA TODAY (Feb. 16, 2017, 9:55 PM), https://www.usatoday.com/story/news/nation/2017/02/16/president-trump-immigration-raids-target-fewer-criminals/97988770/.

159 *See* Kelly, Implementing the President's Border Security, *supra* note 36, § L.

160 *See* Zolan Kanno-Youngs, *ICE Is Expected to Begin Operation on Sunday Targeting 2,000 Immigrant Family Members*, N.Y. TIMES (June 21, 2019), https://www.nytimes.com/2019/06/21/us/politics/ice-immigration-raids.html.

161 *See* Kelly, Implementing the President's Border Security, *supra* note 36, § L.

162 *See id.* §§ M-N.

163 *Id.* § M.

B. Dividing Low-Income Immigrant Families Needing Subsistence Assistance

Although the 1996 welfare law is best-known for ending the Aid to Families with Dependent Children ("AFDC") program, it also made tens of billions of dollars of cuts to anti-poverty programs. Almost one-third of those cuts came from denying legal immigrants eligibility for subsistence benefits.[164] (Undocumented immigrants long had been ineligible for major programs except emergency Medicaid.[165]) PRWORA made most newly arrived immigrants ineligible for major federal-state programs, such as cash assistance and Medicaid, for at least their first five years in the United States.[166] Anti-poverty programs with solely federal funding, such as Supplemental Security Income ("SSI") and Supplemental Nutrition Assistance Program ("SNAP"), were subject to even more stringent restrictions, with hundreds of thousands of existing beneficiaries purged from the rolls.[167] Numerous reports of elderly immigrants committing suicide after having their SSI and Medicaid benefits terminated sparked an outcry. Disqualifying legal immigrants from subsistence benefits became intensely controversial, with immigrants' advocates citing evidence that immigrants come here to work, not to receive public benefits. Congress found these arguments persuasive and restored some legal immigrants' eligibility for certain benefits.[168]

Lost in these debates and in subsequent battles over immigrants' eligibility for subsistence benefits, however, was a little-known parallel set of policies that leverage immigrants' family ties to deter them or their relatives — often U.S. citizen children — from receiving benefits for which they are concededly eligible. Thus, the formal, public eligibility policy was undermined by a set of covert policies leveraging family ties to avoid delivering the assistance that Congress, under strong constituent pressure, had agreed that low-income immigrants could receive. As with the grand bargain's undermining of family immigration, these effects are largely unacknowledged: both prominent liberals and

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164 *See* David Super et al., *The New Welfare Law*, CTR. ON BUDGET & POL'Y PRIORITIES (Aug. 13, 1996), https://www.cbpp.org/archives/WECNF813.HTM.

165 *See, e.g.*, 7 U.S.C. § 2015(f) (2019) (limiting categories of immigrants eligible for SNAP); 42 U.S.C. § 1396a(v) (2019) (same for Medicaid).

166 *See* 8 U.S.C. §§ 1612(b), 1613(a) (2019).

167 *See id.* § 1612(a).

168 David A. Super, *The Quiet "Welfare" Revolution: Resurrecting the Food Stamp Program in the Wake of the 1996 Welfare Law*, 79 N.Y.U. L. REV. 1271, 1347-51 (2004).

social conservatives have argued that public benefits policy should "stress the integrity and preservation of the family unit."[169]

These policies have little economic rationale. Because the benefits are quite parsimonious, these workers' taxes rapidly exceed the amounts they have received. The modest short-term costs of providing children with health or nutrition assistance are more than offset by the long-term benefits of healthier and more productive adults.[170] These policies also make little sense as attempts to discourage immigration: whether or not one believes that prospective immigrants consider their own possible receipt of public benefits when deciding to come here, it strains reason to suggest that the hypothetical eligibility of U.S. citizen children they might have years in the future could influence those decisions.

Just as the shift away from family-based admissions makes the levels of immigration allowed under "grand bargain" legislation appear more liberal than they are, so too these policies undermine many of the moderating features of nominal eligibility rules for immigrant families. Since the immediate aftermath of the 1996 legislation, policymaking concerning immigrants' access to subsistence benefits has been made by manipulating these rules. President Clinton sought to ease immigrant communities' anger with him and sought to ease some of these policies late in his second term. Presidents Bush and Obama largely continued the Clinton administration's policies.

The Trump Administration, by contrast, promulgated a massive set of rules that would powerfully coerce families not to seek needed subsistence benefits if any of their members is not a citizen.[171] These rules also would make it extremely difficult for low- and moderate-income immigrant families to petition to bring close relatives to this country. In doing so, it would further restrict family immigration, creating more opportunities for expanding employment-driven immigration without increasing total admissions.

Although many of these policies nominally apply only to some individuals while protecting others, all family members feel the impact. Parents' lack of health insurance can directly affect the care their insured children receive.[172] The lack of services for immigrant families

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169 DAN QUAYLE & DIANE MEDVED, THE AMERICAN FAMILY: DISCOVERING THE VALUES THAT MAKE US STRONG 280 (1996) (quoting John F. Kennedy).

170 *See* DAVID A. SUPER, PUBLIC WELFARE LAW 81-84 (2016).

171 *See* Inadmissibility on Public Charge Grounds, 84 Fed. Reg. 41,292 (Aug. 14, 2019) (to be codified at 8 C.F.R. pts 103, 212-14, 245, 248).

172 *See* Lisa Cacari Stone & Ana Guillermina Quiroz-Gibson, *¿Puerta Abierta o Puerta Cerrada? Citizenship, Health Care, and Welfare Reform New Mexico*, *in* IMMIGRANTS,

may further depress their already limited bargaining power with employers.[173] Clearly the choices these families are making to forego assistance are carrying a heavy cost.

Analyzing these policies closely therefore is important both in their own right and as a source of insights into the direction of immigration law generally. Subsection 1 examines policies that deter members of immigrant families from seeking public benefits by threatening their relationships with relatives that have helped them and those outside the United States with whom the immigrant family hopes to reunite. In many instances, these policies also require the immigrant family to compromise its relationship with more distant relatives in this country, typically sponsors who helped them immigrate, in order to obtain means-tested public benefits. Subsection 2 considers the even more devastating potential of policies that compel immigrant households to betray one of their own so that another, often a U.S. citizen child, can obtain means-tested benefits. Finally, Subsection 3 offers evidence that President Trump's policies are likely to have dramatic impacts.

1. Policies Requiring Immigrants to Betray Relatives that Help Them

One important set of policies deters receipt of public benefits by burdening the process by which immigrants reunify with family members overseas.[174] These policies may put an immigrant family to a heartbreaking choice: either forego benefits for which its members are eligible and in need or accept those benefits and strand relatives overseas, perhaps in perilous circumstances. These policies also may require a family to choose between foregoing needed benefits and undermining or alienating sponsors. Alienating a sponsor typically means not only estrangement from one branch of the immigrant's extended family but also social and economic isolation in this country and permanent separation from relatives overseas. In addition, immigrants, particularly immigrant women, may fear violence from the sponsor.[175] At a minimum, rupturing family ties destroys much of the

WELFARE REFORM, AND THE POVERTY OF POLICY 63, 71 (Philip Kretsedemas & Ana Aparicio eds., 1967).

[173] *See* Philip Kretsedemas & Ana Aparicio, *Introduction*, *in* IMMIGRANTS, WELFARE REFORM, AND THE POVERTY OF POLICY, *supra* note 172, at 9-10.

[174] These rules also can burden the children of immigrants that were born in the United States and seek to reunify with siblings, parents, and other relatives from overseas.

[175] *See* Linda Kelly, *Stories from the Front: Seeking Refuge for Battered Immigrants in the Violence Against Women Act*, 92 NW. U. L. REV. 665, 665-67 (1998); Leslye Orloff,

non-monetized value that family distributes to newcomer and long-time U.S. citizens alike.

a. Public Charge

Several adverse immigration consequences can befall an immigrant whom immigration authorities believe is likely to become a "public charge," or dependent on government benefits for her or his economic support.[176] The problems faced by such an immigrant can include denial of permission to enter the country as a Legal Permanent Resident, denial of permission to adjust her or his status to become an LPR, denial of permission for an LPR to re-enter the country after an absence of six months or more, and deportation during an immigrant's first five years in the United States.

Prior to the Trump Administration, designation as a public charge for receipt of public benefits was quite limited.[177] In 1998, ICE's predecessor limited the circumstances under which immigrants could be found public charges on the basis of receipt of public benefits[178] to only two circumstances: (1) receipt of cash for income maintenance, such as cash welfare from the TANF block grant, general assistance ("GA"), or SSI; or (2) receipt of medical assistance to pay for long-term institutional care (such as prolonged residence in a nursing home or psychiatric hospital). The guidance also makes clear that deportation because an immigrant has become a public charge will be extremely rare.

The Trump Administration's new rules radically expand the range of programs receipt of which could render an immigrant a "public charge" to any program for which eligibility or amount is determined in any way

Lifesaving Welfare Safety Net Access for Battered Immigrant Women and Children: Accomplishments and Next Steps, 7 WM. & MARY J. WOMEN & L. 597, 604-05 (2001).

176 *See* 8 U.S.C. § 1182(a)(4) (2019). Immigrants hoping to help a family member obtain legal status in the United States may be required to demonstrate sufficient income to support the relative, but they are not subject to the "public charge" test. *See* Laura L. Lichter, *The Nuts and Bolts of Family-Based Immigration (Part 2)*, PRAC. L., Feb. 2007, at 39, 50 (describing how an intending immigrant can overcome the public charge presumption).

177 *See* Cheryl K. Chumley, *ICE Agent Chris Crane Admits Law Limiting Welfare for Immigrants Not Enforced*, WASH. TIMES, (Feb. 14, 2013), https://www.washingtontimes.com/news/2013/feb/14/ice-agent-chris-crane-admits-law-limiting-welfare-/.

178 INS's guidance promises not to hold the receipt of public benefits against an immigrant who applies in reliance on the guidance even if the agency subsequently changes its policy. The State Department sent a similar cable to its consular officers. *See* 76 NO. 24 Interpreter Releases 980, 983 (June 28, 1999).

on the basis of income, resources, or financial need.[179] This would encompass numerous programs that provide help with discrete needs but make no pretense of supporting their recipients, even something as small as the program providing half-pints of milk to low-income children without access to school lunches. The proposed rules also would require far closer scrutiny of prospective family-based immigrants' earning power.[180] Moreover, they could prevent legal permanent residents from returning to this country after leaving to take care of ailing relatives.[181]

b. The Impact of Sponsorship Requirements

PRWORA and IIRIRA vastly expanded a system of "sponsor deeming" that had been established a decade and a half earlier.[182] Sponsor deeming requires means-tested programs to count ("deem available") the income and resources of an immigrant's sponsor when determining the immigrant's financial eligibility whether or not the immigrant actually has access to those moneys. Prior law limited sponsor deeming to AFDC, SSI, and food stamps; even in those programs, it generally applied only during the immigrant's first three years in the country.[183] PRWORA applied sponsor deeming to all "Federal means-tested public benefits."[184] PRWORA also made deeming permanent unless the immigrant becomes able to claim forty quarters or naturalizes as a U.S. citizen.[185] And it gave states the option to apply sponsor deeming to state and local means-tested public benefit programs.[186]

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[179] Inadmissibility on Public Charge Grounds, 84 Fed. Reg. 41,292, 41,298 (Aug. 14, 2019) (to be codified at 8 C.F.R. pt. 212.21(b)).

[180] *See id.*

[181] A public charge determination could prevent LPRs from re-entering the United States after six months out of the country, a potential concern to immigrants that return to their countries of origin to care for an ailing family member.

[182] 8 U.S.C. § 1631 (2019); *see* Michael J. Sheridan, *The New Affidavit of Support and Other 1996 Amendments to Immigration and Welfare Provisions Designed to Prevent Aliens from Becoming Public Charges*, 31 CREIGHTON L. REV. 741, 742 (1998).

[183] 7 U.S.C. § 2014(i) (2019) (imposing sponsor deeming for three years in SNAP); 42 U.S.C. § 1382j (2019) (imposing sponsor deeming for three years in SSI); 42 U.S.C. § 615 (1994) (repealed 1996) (imposing sponsor deeming for three years in AFDC).

[184] 8 U.S.C. § 1631(a) (2019).

[185] *See id.* § 1631(b)(2). Because refugees and asylees are admitted without conventional sponsors, they are effectively exempt from sponsor deeming as well.

[186] *Id.* § 1632. Prior to PRWORA, Graham v. Richardson, 403 U.S. 365 (1971), appeared to prohibit states from imposing sponsor deeming on their own. *See* El Souri v. Dep't of Soc. Serv., 414 N.W.2d 679, 681-82 (Mich. 1987).

Even under the prior, far more limited version of sponsor deeming, data appears to show that extremely few immigrants subject to deeming ever received benefits.[187] This may have been because immigrants (or agency staff) confused deeming with ineligibility. More broadly, it also likely reflects the fact that sponsor deeming deters participation in three separate ways: as substantive disqualification, as a procedural bar, and as a deterrent to application.

The human services agency combined the sponsors' incomes or resources (particularly cars in programs that count vehicles as resources) with the immigrants' own. If the total exceeds a program's financial eligibility limits, the immigrant is ineligible even if she or he is receiving no help from the sponsor. Because immigration authorities only accept affidavits from sponsors with sufficient income or assets to maintain their own immediate families as well as the prospective immigrant at 125% of the poverty line, deeming often will render the immigrant ineligible. Thus, for sponsored immigrants entering the United States after December 1997 (when PRWORA's new affidavits of support that trigger its deeming rules went into use), the expiration of the five-year bar on eligibility can be a hollow advantage since they remain subject to sponsor deeming.

Even where an immigrant is eligible despite income and resources deemed available from her or his sponsor, many will be unable to navigate the required procedures to provide, document and continually update the detailed financial information necessary to implement deeming. Where the immigrant's eligibility is conditioned on deeming, the sponsor can effectively block the immigrant's application by refusing to disclose the information needed to make deeming calculations. This has become more likely now that PRWORA and IIRIRA made these affidavits of support binding, making sponsors legally responsible for repaying the cost of any means-tested benefits provided to the immigrants for whom they signed affidavits of support. If the sponsor was not initially aware of this, PRWORA and IIRIRA require agencies administering benefits programs to inform sponsors whenever an immigrant they aided receives assistance, with the notification looking much like a bill. The Trump Administration has demanded that the agencies providing public benefits and the Department of Justice make sponsor reimbursement a priority.[188] Even

[187] *See, e.g.*, Thomas M. Parrott, et al., *Noncitizens and the Supplemental Security Income Program*, 61 SOC. SECURITY BULL. 3, 19-21 (1998).

[188] Memorandum for the President from Andrew Bremberg, Executive Order on Protecting Taxpayer Resources by Ensuring Our Immigration Laws Promote Accountability and Responsibility, §§ 2(c), 3(a)(iv), 3(i)(i) (Jan. 23, 2017).

sponsors initially willing to cooperate may quickly tire of repeated demands for updated information.[189]

Finally, sponsor deeming can deter applications because many immigrants are extremely uncomfortable asking their sponsors for the required information. Even if the immigrant is exempt from sponsor deeming because an agency administering an essential benefit finds that the immigrant is so destitute that she or he cannot afford basic food and shelter,[190] the agency must notify the Attorney General. Although during the Clinton, Bush, and Obama Administrations, ICE apparently used this information only for compiling statistical reports, the chilling effect on immigrants of having it in ICE's hands was profound. The Trump Administration's proposed rules would expand upon the statutory requirement by requiring agencies to notify DHS any time an immigrant receives any means-tested benefit, whether or not the immigrant was exempt from, or eligible despite, sponsor deeming.[191]

Some immigrants' sponsors strongly discourage them from applying for means-tested public benefits, either because the sponsors fear that they may have difficulty sponsoring further immigrants' entry to the United States or because the sponsors are aware that PRWORA and IIRIRA give public agencies the right to demand repayment of those benefits. In other cases, the sponsor may have less formal means of bending the immigrant to her or his will (for example, the immigrant may be working for or living with the sponsor or a friend of the sponsor's or the immigrant may want the sponsor's help to gain admission for another relative).

The problem here, as elsewhere, is with monetizing too rigidly the value, contributions, and obligations of families. A sponsor can promise in perfectly good faith to aid a prospective relative and yet have become unable to do so by the time the need arises. The sponsor also may be helping in numerous ways difficult or impossible to monetize but be unable to meet additional needs of the sponsored immigrant. For example, a sponsor who has taken time off work to provide home care to an ailing immigrant may lack the funds to reimburse the value of SNAP the immigrant received. The current rules' failure to recognize

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189 *See, e.g.*, 7 C.F.R. § 273.21(h) (2018) (requiring monthly reports with current income documentation from some SNAP households).

190 *See* 8 U.S.C. 1631(e)(2) (2019); *see, e.g.*, 7 C.F.R. § 273.4(c)(3)(iv) (2018) (implementing indigence exception in SNAP). If appropriate, the finding may be renewed as long as the immigrant remains indigent. *See* 7 C.F.R. § 273.4(c)(3)(iv).

191 *See* Inadmissibility on Public Charge Grounds, 84 Fed. Reg. 41,292 (Aug. 14, 2019) (to be codified at 8 C.F.R. pt. 212.21(b)).

either the complexity or the value of family ties results in actions both inhumane and inefficient.

c. Inability to Sponsor Relatives Seeking to Immigrate

Immigrants often have family members overseas whom they hope to help immigrate to the United States. Many LPRs reportedly have declined to enroll themselves and their families in benefits for which they are eligible for fear that doing so could adversely affect these decisions about whether they are adequate sponsors. Because they affect LPRs — who are broadly eligible for Medicaid and for the Children's Health Insurance Program ("CHIP") and the Temporary Assistance for Needy Families ("TANF") block grants — these concerns may be discouraging more eligible recipients than those relating to "public charge" determinations.

The DHS guidance followed under the Clinton, Bush, and Obama Administrations was helpful on this point. ICE stated that it will never hold receipt of means-tested benefits against a prospective sponsor when determining whether he or she can meet the 125% of poverty test. DHS would not count welfare or public assistance as income to *help* meet that test, but at the same time DHS declares that it will not deny any U.S. citizen or LPR who otherwise could meet that test because of receipt of public benefits.[192] Nonetheless, many immigration lawyers, and other people routinely consulted by immigrants seeking to bring in family members, long have urged potential sponsors not to seek benefits for themselves or family members.[193] In addition, USCIS's sponsorship form asks about receipt of public benefits, causing many immigrants to assume that a positive answer will be held against them. The Trump Administration's proposed rules would void this guidance,[194] vindicating immigrants' fears. As a result, sponsors — who may be U.S. citizens themselves or who may have U.S. citizen family members eligible for means-tested benefits — must choose between failing to meet basic needs with those benefits and abandoning relatives whom they wish to bring into this country from overseas.

[192] To be sure, an individual who is poor enough to qualify for TANF cash assistance, GA or SSI may have difficulty meeting the 125% of poverty test. But that problem is neither ameliorated nor exacerbated by the fact of accepting those benefits.

[193] See RANDY CAPPS, URBAN INST., HARDSHIP AMONG CHILDREN OF IMMIGRANTS: FINDINGS FROM THE 1999 NATIONAL SURVEY OF AMERICA'S FAMILIES, 27-28 (2001), https://www.urban.org/sites/default/files/publication/61116/310096-Hardship-Among-Children-of-Immigrants.PDF.

[194] *See* Inadmissibility on Public Charge Grounds, 83 Fed. Reg. 51,114, 51,220 (Oct. 10, 2018).

d. Chilling Effects

Even before most of the Trump Administration's policies go into effect, the chilling effect on immigrant families is likely to be dramatic. Even under the previous administrations, which were making at least tepid efforts to reduce fear in immigrant communities about receipt of public benefits, many eligible members of immigrant families avoided public benefits.[195] Although the 2007 recession brought a sharp increase in need among immigrant and long-time U.S. citizen families alike, immigrant participation has remained low, even allowing for substantive eligibility restrictions.[196] In particular, immigrant families with ineligible members now avoid public programs altogether.[197]

Nonetheless, fear of being designated a public charge is one of the key reasons eligible immigrants avoid seeking public benefits.[198] Almost half of Haitian immigrants in Miami-Dade erroneously believed using community health centers could render them public charges; about a third felt the same way about food banks and homeless shelters.[199] The Clinton Administration's policy limiting what benefits could lead to "public charge" determinations was almost entirely unknown in Miami-Dade's Haitian immigrant community: in summer 2001, respondents overwhelmingly — and incorrectly — believed they could be labeled a "public charge" for receiving SNAP, WIC, school lunches, short-term Medicaid, CHIP, child care subsidies, and even job training.[200]

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[195] *See generally* Philip Kretsedemas, *Reconsidering Immigrant Welfare Restrictions: A Critical Review of Post-Keynesian Welfare Policy*, 16 STAN. L. & POL'Y REV. 463 (2005); FAMILIES U.S.A., ONE STEP FORWARD, ONE STEP BACK: CHILDREN'S HEALTH COVERAGE AFTER CHIP AND WELFARE REFORM (1999).

[196] *See* Philip Kretsedemas, *Avoiding the State: Haitian Immigrants and Welfare Services in Miami-Dade County*, *in* IMMIGRANTS, WELFARE REFORM, AND THE POVERTY OF POLICY, *supra* note 172, at 107, 119-20.

[197] *See id.* at 122. This apparently is the combined result of PRWORA, AEDPA, and IIRIRA. *See id.* By contrast, before 1996 immigrant families would apply for eligible members and share the resulting benefits. *See* Audrey Singer, *Living with Uncertainty: Welfare Reform and Latin American Immigrants in New York and Los Angeles*, 3 RES. PERSP. ON MIGRATION 21, 22 (2001).

[198] See Philip Kretsedemas, *Avoiding the State: Haitian Immigrants and Welfare Services in Miami-Dade County*, *in* IMMIGRANTS, WELFARE REFORM, AND THE POVERTY OF POLICY, *supra* note 172, at 115.

[199] *See id.* at 120-21.

[200] *See id.* at 121. Some 74% said they could be labeled a public charge based on receipt of SNAP compared to just 4% knowing that they could not. For WIC, 57% believed they were in jeopardy compared with 3% knowing that they were not. For school lunches, immigrants divided 53% to 3%; for short-term Medicaid, 85% were afraid with just 1% realizing they were safe. For CHIP, child care subsidies, and job training, the divides were 67%-4%, 68%-5%, and 57%-4%, respectively. *Id.*

This problem goes beyond mere misinformation. Immigrants can be concerned that past receipt of public benefits could suggest to USCIS or consular officials that they are likely to become a "public charge" in the future. Because of the broad discretion these officials have to decide whether to admit or adjust the status of immigrants, few standards have constrained what they could ask or what benefit programs they could consider in making a determination. Since the passage of the 1996 welfare law, some USCIS and consular officers have taken a very aggressive (and sometimes illegal) interpretation of what could count towards this determination. Although INS (USCIS's predecessor) did not previously have a formal policy on how receipt of benefits can affect "public charge" determinations, many immigration lawyers and counselors had urged immigrants potentially subject to such determinations to avoid virtually all public benefits.[201] This advice has had a pervasive effect on the immigrant community.

SNAP participation by immigrant families *with citizen children* and incomes below 200 percent of the poverty line fell twenty-six percent between 1994 and 1997, compared to a fifteen percent drop in SNAP participation during the same time period by families with children in which all of the adults are U.S. citizens.[202] Similarly, enrollment in Medicaid declined twenty percent during this period among immigrant families with children with incomes below 200 percent of the poverty line, compared with an eleven percent decline among U.S. citizen families in the same income range.[203] Even though states elected to continue cash assistance and Medicaid to most immigrants already in the United States at PRWORA's enactment, immigrant families' participation dropped significantly faster than that of native-born families. That drop appeared to result from immigration-related fears as well as the increased earnings that were common among low-income people in the boom of the late 1990s.[204] Overall, Professor Borjas found that the percentage of mixed immigrant households — households in which at least some members were U.S. citizens who remained

[201] *See* CAPPS ET AL., *supra* note 116, at 46; Stone & Quiroz-Gibson, *supra* note 172, at 69-70.

[202] *See* MICHAEL FIX & JEFFREY S. PASSEL, URBAN INST., TRENDS IN NONCITIZENS' AND CITIZENS' USE OF PUBLIC BENEFITS FOLLOWING WELFARE REFORM: 1994-1997 3 (1999).

[203] *See id.*

[204] *See* ROB PARAL, NAT'L CTR. ON POVERTY LAW, IMMIGRANTS AND ILLINOIS WELFARE: IN MOST PROGRAMS, IMMIGRANT CASELOAD DECLINES OUTPACE THOSE OF NATIVES 6 (1999).

substantively eligible — receiving at least one major state-administered means-tested benefit fell five percentage points from 1994 to 1998.[205]

This loss of benefits had a substantial impact on immigrant families' well-being. Professor Borjas found that immigrant families losing food stamps after PRWORA were significantly more likely to have insufficient food.[206] The comprehensive National Survey of America's Families in 1999 found that families with children containing at least one immigrant were less likely to be receiving public benefits and more likely to be suffering from a host of problems. Immigrant families were twice as likely to be paying half or more of their incomes for rent or mortgage and four times as likely to be living in overcrowded housing.[207] They were twice as likely to be uninsured and to be in fair or poor health; they were three times as likely to have no usual source of health care.[208] They also were significantly more likely to have insufficient food.[209]

2. Policies Requiring Immigrant Families to Betray Relatives Living with Them

A separate set of policies require one member of a household to endanger another in applying for means-tested benefits. Most commonly, this means that to obtain Medicaid coverage or other benefits for a U.S. citizen child, the family must put at risk that child's parents, grandparents, aunts, uncles, or older siblings. The betrayal required here is even more personal than compromising a sponsor or stranding relatives overseas. These decisions also are complicated because the children that qualify for benefits generally cannot decide to apply on their own. A parent, then, must decide between seeking benefits that can be crucial to her or his child's well-being and development and risking her or his own deportation, that of the parent's own parents or siblings, or that of the parent's other children.[210]

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[205] *See* GEORGE J. BORJAS, CTR. FOR IMMIGRATION STUDIES, THE IMPACT OF WELFARE REFORM ON IMMIGRANT WELFARE USE 18-19 (2002). Participation by households composed entirely of U.S. citizens fell just two percentage points during this period. *See id.*

[206] *See* George J. Borjas, *Food Insecurity and Public Assistance*, 88 J. PUB. ECON. 1421, 1440 (2004).

[207] *See* CAPPS ET AL., *supra* note 116, at 3.

[208] *See id.* at 3.

[209] *See id.*

[210] Although an immigrant threatened with deportation may request a discretionary waiver for extreme hardship under 8 U.S.C. § 1182(h) (2019), these are rarely granted. The typical consequences of deportation, including family separation and financial deprivation, are insufficient to establish extreme hardship. *See* Palmer v. INS, 4 F.3d

Applying for benefits may bring the attention of one feared agency, ICE; leaving the children uninsured may bring the attention of another, child welfare services. Where the family decides to apply for benefits, a strong, pro-family argument can be made for shielding the information it discloses from ICE just as administratively compelled testimony and its fruits may not be used in criminal proceedings.[211] In the current atmosphere of suspicion towards immigrant families, however, policy is moving in the opposite direction.

a. Denials of Cancellation of Removal Based on U.S. Citizen Children's Receipt of Aid

Cancellation of removal is a crucial last option for both documented and undocumented immigrants facing deportation and protracted or permanent separation from their families. Suspension of deportation under the former section 244 plays a similar role for certain classes of immigrants. Both of these forms of relief are highly discretionary, however, and immigration authorities' exercise of that discretion is generally not subject to review.[212] The forms that immigrants must complete to apply for cancellation of removal[213] and for suspension of deportation[214] all inquire not only about the applicant's receipt of public benefits but also about the receipt of benefits by any member of the applicant's immediate family. The legal justification for these questions is unclear: the "public charge" grounds for exclusion, as discussed *supra*, does not apply to many of the benefits specifically listed in the forms' questions nor does it apply when relatives of the immigrant, rather than the immigrant her or himself, is the possible public charge. Nonetheless, failure to answer this question, or any withholding of information concerning it, is automatic grounds for denying the immigrant relief. Even before President Trump's executive orders,

482, 487-88 (7th Cir. 1993); Osuchukwu v. INS, 744 F.2d 1136, 1142 (5th Cir. 1984). A waiver may only be granted if the immigrant can show "at least hardship substantially different from and more severe than that suffered by the ordinary alien who is deported." Sanchez v. INS, 755 F.2d 1158, 1161 (5th Cir. 1985) (emphasis omitted).

211 See Garrity v. New Jersey, 385 U.S. 493, 496 (1967).

212 ROBERT PAUW, AM. IMMIGRATION LAWYERS ASS'N, LITIGATING IMMIGRATION CASES IN FEDERAL COURT 77-79 (4th ed. 2017).

213 *See* U.S. DEP'T OF JUSTICE, EXEC. OFFICE FOR IMMIGRATION REVIEW, APPLICATION FOR CANCELLATION OF REMOVAL AND ADJUSTMENT OF STATUS FOR CERTAIN NONPERMANENT RESIDENTS, Questions 44-45 (rev. July 2015), https://www.justice.gov/sites/default/files/pages/attachments/2015/07/24/eoir42b.pdf.

214 See U.S. DEP'T OF JUSTICE, EXEC. OFFICE FOR IMMIGRATION REVIEW, APPLICATION FOR SUSPENSION OF DEPORTATION, Question 45 (rev. July 2015), https://www.justice.gov/sites/default/files/pages/attachments/2015/07/24/eoir40.pdf.

immigrants and those advising members of immigrant communities naturally assume that the Justice Department would not be seeking this information if it did not bear on decisions. Moreover, immigrants' advocates report that some immigration judges inquire into the details of family members' receipt of public benefits during hearings.

The message is clear: even if the immigrant her or himself receives no aid from the government, if her or his U.S. citizen child receives Medicaid or SNAP benefits to which the child is unquestionably entitled, the parent may be forever abandoning the chance to obtain important discretionary relief. In effect, these forms and inquiries pressure immigrant parents to disregard their children's best interests in deciding whether to apply on their behalf. Seeing one's child go hungry or lack basic medical attention is agonizing for any decent parent — but so is the prospect of being separated for life from that child or having to take her or him to a country with inferior educational, health care, and employment opportunities.

b. Application and Confidentiality Problems

Many children eligible for means-tested benefits live with parents or other relatives who either are undocumented or carry a relatively precarious immigration status that renders those relatives ineligible for some aid programs. The rules for Medicaid, SNAP, and other programs all allow citizens and eligible immigrants to participate independently of ineligible immigrant members of their families.[215] Nonetheless, by enrolling their eligible children, immigrant parents in these mixed households may fear they are exposing themselves or other relatives to action by ICE, potentially including deportation.[216] These parents therefore may feel they must choose between foregoing health coverage, nutrition meals, and other benefits crucial to their children's health and development, on the one hand, and exposing themselves or their relatives to deportation, on the other. The latter, too, has dire consequences for the children, who may be left without caretakers or forced to follow their parents to an unfamiliar land.

Several factors contribute to these fears. First, application forms commonly require all household members, rather than just those

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[215] *See, e.g.*, 42 U.S.C. § 1396(b)(11)(A) (2019) (basing Medicaid eligibility on the circumstances of each individual claimant); 7 C.F.R. § 273.11(c)(1) (2016) (establishing procedures for determining food stamp eligibility for households containing ineligible members).

[216] *See* Stone & Quiroz-Gibson, *supra* note 172, at 75-76; Philip Kretsedemas, *Avoiding the State: Haitian Immigrants and Welfare Services in Miami-Dade County*, *in* IMMIGRANTS, WELFARE REFORM, AND THE POVERTY OF POLICY, *supra* note 172, at 115.

applying for benefits, to disclose their immigration status.[217] Second, and related, application forms commonly require all household members, rather than just those applying for benefits, to disclose their Social Security Numbers (SSNs).[218] Immigrants who are undocumented or in categories ineligible for SSNs may fear that their inability to supply an SSN will spark suspicions about their immigration status and lead to potential ICE action. And third, eligibility workers' efforts to verify income and other information can bring unwanted scrutiny to members of the applicant's family that are undocumented or in another tenuous immigration status.[219]

Federal rules generally allow immigrants not to specify the immigration status or SSN of family members not seeking benefits, but this is not widely known. HHS's Office of Civil Rights (OCR), along with the federal agencies responsible for Medicaid and the TANF block grant, wrote to states urging them to clarify their applications to avoid discouraging immigrants and their families from participating.[220] Nonetheless, an OCR review of states' applications found all made one or another kind of improper demand for information that could deter mixed immigrant families from applying for their eligible members. Subsequent HHS investigations found continuing problems.[221]

Even if parents succeed in limiting the application for benefits to their eligible children, other aspects of the application process threaten to expose them. They may not be able to apply for benefits at all without photographic identification; indeed, absent such identification they may

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[217] PAMELA HOLCOMB ET AL., URBAN INST., THE APPLICATION PROCESS FOR TANF, FOOD STAMPS, MEDICAID AND SCHIP: ISSUES FOR AGENCIES AND APPLICANTS, INCLUDING IMMIGRANTS AND LIMITED ENGLISH SPEAKERS, 4-3 to 4-5 (2003), https://www.urban.org/sites/default/files/publication/42766/410640-The-Application-Process-For-TANF-Food-Stamps-Medicaid-and-SCHIP.PDF.

[218] *See id.* at 5-7.

[219] *See id.* at 5-8 to 5-10.

[220] See, e.g., Letter from Nancy-Ann Min DeParle, et al., to State Health and Welfare Officials, Policy Guidance Regarding Inquiries into Citizenship, (Sept. 21, 2000) (on file with author); Letter from Sally K. Richardson to State Health Officials (Sept. 10, 1998) (on file with author); Letter from William M. Daley to Doris Meissner (May 21, 1999) (on file with author); Letter from Doris Meissner to William M. Daley (May 26, 1999) (on file with author); Memorandum by Randolph D. Moss for Andrew D. Pincus (May 18, 1999) (on file with author).

[221] *See, e.g.*, U.S. DEP'T OF HEALTH & HUMAN SERVS. & FLA. DEP'T OF CHILDREN & FAMILIES, VOLUNTARY COMPLIANCE AGREEMENT PERTAINING TO IMMIGRANT ACCESS TO PUBLIC BENEFITS (2002), https://www.hhs.gov/sites/default/files/ocr/civilrights/activities/examples/National%20Origin/florida_vca.pdf.

not even be permitted to enter some offices.[222] And even if they are not applying, the income of parents and sometimes other family members must be reported and verified to the human services agency;[223] this, too, may expose their immigration status. President Trump's executive orders dramatically raise the stakes on these choices and seem likely to cause many parents in mixed-status households to remove their U.S. citizen children from Medicaid, SNAP, and other needed programs for which the children are clearly eligible.

c. Mandatory and Voluntary Reporting

The 1996 welfare law requires agencies operating TANF, SSI, and housing programs to report to ICE immigrants who are *known* to be unlawfully present in this country and whose applications are denied on that basis.[224] Pre-existing SNAP law is similar.[225] Because of immigration law's complexity, staff administering benefit programs is unlikely to be able to determine whether an immigrant's presence is unlawful unless he or she has a final order of deportation, and these requirements have been interpreted as requiring reports only when such an order comes to the attention of the agency. Moreover, immigrants in this country unlawfully are likely to be seeking benefits only for legal immigrant or U.S. citizen members of their households. Nonetheless, many eligibility workers may *believe* that an immigrant is present unlawfully, even without evidence. These workers may overlook the fact that their reporting obligation applies only to undocumented immigrants seeking benefits for her or himself. Even if made in error, a report cannot be rescinded. Moreover, both PRWORA[226] and IIRIRA[227] *allow* state and local agencies or individual eligibility workers to report any immigrant to ICE whether or not there is reason to believe that he or she is here illegally.

Concern about social services agencies' reporting to ICE is quite palpable in many immigrant communities. In some southwestern towns, public benefits eligibility workers are married to border patrol

[222] *See* HOLCOMB ET AL., *supra* note 217, at 5-8; Sara Simon Tompkins et al., *Without Photo Identification: Barriers and Strategies*, CLEARINGHOUSE REV. J. POVERTY L. & POL'Y, Nov.–Dec. 2003, at 433.

[223] *See, e.g.*, 7 C.F.R. § 273.11(c) (2016) (requiring ineligible immigrants' income and resources to be considered in determining the eligibility of their household members).

[224] *See* 42 U.S.C. §§ 611(a), 1383(e)(9), 1437y (2019).

[225] *See* 7 U.S.C. § 2020(e)(2)(16) (2019).

[226] *See* 8 U.S.C. § 1644 (2019).

[227] *See id.* § 1373.

officers and have reported suspected undocumented immigrants over the breakfast table. In the late 1990s, San Diego County announced that it would report to immigration authorities every family receiving TANF-funded cash assistance or SNAP in which there was a member not receiving benefits whose immigration status was unknown or was thought to be unlawful unless the entire family — including eligible U.S. citizen children — disenrolled by a certain date.[228] (The California welfare application at the time required applicants to give the status of each household member, with one option being "undocumented.") With the threat of voluntary reporting outstanding, many immigration lawyers and immigrants' organizations advised immigrants not to apply for benefits available to them under the post-PRWORA eligibility restoration legislation.

This issue is not solely a concern of undocumented immigrants. As noted, immigrants as a general rule prefer to limit their interactions with ICE. Given the fear of being declared a public charge under the Trump Administration's proposed executive order, immigrants especially do not want ICE to have information regarding their or their family members' use of public benefits.

Although no fan of means-tested public benefit in general,[229] former New York Mayor Giuliani challenged the voluntary reporting provisions of PRWORA and IIRIRA as violations of the Tenth Amendment for stripping state and local governments of the authority to prohibit their own employees from making reports to ICE.[230] The Second Circuit disagreed, finding that New York did not have an "untrammeled right to forbid all voluntary cooperation by state or local officials with particular federal programs."[231]

Advocates of forcing immigrants to choose between foregoing important public benefits and risking permanent separation from their families have proven quite ruthless. In 2004, legislation that would require hospitals to report undocumented immigrants seeking

[228] The San Diego fight was largely waged behind the scenes because both sides recognized that going public would make it impossible for the county to back down, which it eventually did. The author was deeply involved in this and thus writes from first-hand experience.

[229] *See, e.g.*, Reynolds v. Giuliani, 35 F. Supp. 2d 331 (S.D.N.Y. 1999) (finding that mayor's extensive efforts to discourage low-income people from applying for food stamps and Medicaid violated federal law).

[230] City of New York v. United States, 179 F.3d 29, 31 (2d Cir. 1999); *see* Printz v. United States, 521 U.S. 898, 935 (1997) (striking down gun control legislation requiring participation of state and local officials).

[231] *City of New York*, 179 F.3d at 35.

emergency medical care reached the House floor.[232] This proposal implies that undocumented immigrants with life-threatening illnesses or injuries should make a snap judgment about whether they are in sufficient danger to accept permanent separation from their U.S. citizen children or forcing those children to follow them to a country they have never known. Absent the current attitude toward immigrant families, policymakers might fear that such dire threats could drive immigrant parents to make snap decisions about both their and their children's health with disastrous long-term consequences.

C. State and Local Anti-Immigrant Legislation

The same efforts to leverage immigrants' family ties that has characterized the enforcement and public benefits-related policies described in the previous Sections has been even more evident in efforts to involve state and local governments in what long had been regarded as an exclusively federal area of policymaking. The proliferation of state and local anti-immigrant laws has been widely understood. President Trump's interior enforcement executive order is in part premised on this development, both seeking to empower anti-immigrant governments and threatening to cut off funds to pro-immigrant sanctuary jurisdictions.

What has gone largely unnoticed, however, is the increasingly anti-family character of those laws. Like the public benefits policies just discussed, these laws seek to increase pressure on immigrants by making life difficult for family members that may be U.S. citizens or legal immigrants. This suggests the rising strength of hostility to immigrant families, an impulse distinct from the oft-articulated concern about immigrants taking jobs that otherwise would go to members of families long in this country.

To be sure, some anti-immigrant initiatives stay within the structure of federal immigration law. Some require state officials to support federal immigration enforcement. Alabama, Georgia, Missouri, Oklahoma and South Carolina require or incentivize their attorneys general to negotiate cooperation agreements with federal agencies.[233] Alabama and Missouri forbid state and local officials from withholding

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232 *See* H.R. 3722, 108th Cong. (2004).

233 *See* Beason-Hamon Alabama Taxpayer and Citizen Protection Act, Ala. Laws Act 2011-535, § 4 (codified at ALA. CODE § 31-13-4 (2011)); GA. STAT. § 35-1-16 (2011); MO. STAT. § 43.032 (2013); Oklahoma Taxpayer and Citizen Protection Act of 2007, 2007 Okla. Sess. Law Serv. Ch. 112 (codified at 74 OKLA. STAT. § 20j (2007)); South Carolina Illegal Immigration Reform Act, H.B. 4400, 2008 Leg. Reg. Sess. (S.C. 2008), (codified at S.C. STAT. § 23-3-80 (2008)).

cooperation;[234] Georgia provides extra funding for immigration enforcement activities.[235] A few other laws limit themselves to situations in which undocumented immigrants are involved in otherwise criminal activity.[236]

Other initiatives expand upon federal law but target only the immigrant. Some effectively criminalize unlawful presence in this country[237] as well as applications for business licenses, license plates, and other services the state provides at a cost.[238] States also criminalize employment of undocumented immigrants[239] and prohibit their admission to college.[240] Several states require investigations into the status of people whose legality officials question;[241] these seem to invite racial profiling.

Several of the laws, however, create serious hardship for family members living with undocumented immigrants. Hazleton, a small, decaying coal town in eastern Pennsylvania that seems unlikely to attract many immigrants nonetheless initiated the current decentralization of immigration law. Its Illegal Immigration Relief Act of 2006 imposed criminal penalties against any property owner who "harbors" an undocumented immigrant.[242] Alabama and South Carolina now criminalize harboring undocumented immigrants without limitation to property owners.[243] Utah similarly created a new offense for driving undocumented immigrants in a motor vehicle.[244] Georgia and Oklahoma criminalize both harboring and driving undocumented

234 *See* ALA. CODE § 31-13-5 (2019); MO. STAT. § 67.307 (2019).

235 *See* GA. STAT. § 35-6A-10 (2019).

236 *See, e.g.*, ARIZ. STAT. § 13-2929 (2019) (creating a separate new offense to transport or harbor undocumented immigrants while engaging in otherwise criminal conduct); MO. STAT. § 577.675 (2015).

237 *See* ALA. CODE § 31-13-10 (2019); ARIZ. STAT. § 13-1509 (2019).

238 *See* ALA. CODE § 31-13-30.

239 *See* ALA. CODE §§ 31-13-15, 31-13-16 (penalizing businesses for deducting wages paid to undocumented immigrants); ARIZ. REV. STAT. ANN. § 13-2928 (2019); GA. CODE ANN. §§ 13-10-91, 16-9-121.1, 16-9-126, 36-60-6 (2019); MO. REV. STAT. §§ 285.525-285.535 (2019); S.C. CODE ANN. §§ 12-6-1175, 41-8-10, 41-8-30, 41-8-50 (2019) (revoking business licenses for employing undocumented immigrants).

240 *See* ALA. CODE § 31-13-8 (2019); S.C. CODE ANN. § 59-101-430 (2019).

241 *See* ALA. CODE §§ 31-13-12(a), 31-13-18, 31-13-19 (2019); ARIZ. REV. STAT. ANN. §§ 11-1051, 13-2319, 13-3883 (2019); GA. CODE ANN. § 17-5-100 (2019); IND. CODE § 11-10-1-2 (2019); MO. REV. STAT. § 544.472 (2019); OKLA. STAT. tit. 22, § 171.2 (2019); S.C. CODE ANN. § 23-3-1100 (2019).

242 Hazleton, Pa., Ordinances 2006-18, § 5 (2006).

243 *See* ALA. CODE § 31-13-13 (2019); S.C. CODE ANN. § 16-9-460 (2019).

244 *See* H.B. 497, 59th Leg., 2011 Gen. Sess., § 10 (Utah 2011).

immigrants.[245] These put U.S. citizens and legal immigrants at risk for the normal daily activities of living with undocumented family members.[246] Alabama renders contracts to which undocumented immigrants are party unenforceable,[247] which may seriously impede a parent's ability to protect her or his minor U.S. citizen children.[248] Alabama requires schools to report students with limited English proficiency to allow investigation of the students', and presumably their parents', status.[249] To obtain an education for her or his U.S. citizen child, an undocumented immigrant therefore must risk deportation — and separation — from that child. Similarly, Arizona, South Carolina and Utah moved to require law enforcement officers to investigate the immigration status of anyone they contact;[250] Indiana legislation allows similar actions.[251] Thus, to report a crime against, or seek protection for, a child, an immigrant parent must endanger her or himself. Arizona requires investigations into the legal status of persons applying for public benefits and reporting to ICE even if the individual is applying only for her or his U.S. citizen children.[252]

Courts enjoined the anti-harboring provisions in Alabama, Arizona, Georgia, and Hazleton[253] (although not Fremont, Nebraska[254]); they also blocked some of the suspicionless stop laws.[255] Justice Kennedy's strong reaffirmation of federal primacy in immigration policy-making, and its relatively formal approach to preemption in *Arizona v. United States*,[256] suggested to some that the practical impact of these laws is

[245] *See* GA. CODE ANN. § 16-11-200 (2019); OKLA. STAT. tit. 21, § 446 (2019).

[246] Recognizing this, Indiana limited its analogous offense to commercial activities and exempted close family members from its similar statute. *See* IND. CODE § 35-44-5-1 (2011).

[247] *See* ALA. CODE § 31-13-26(a) (2019).

[248] Thus, for example, an undocumented parent might not be able to execute a valid contract for necessary surgery on their child.

[249] *See* ALA. CODE § 31-13-27 (2019).

[250] *See* ARIZ. REV. STAT. ANN. § 10-1051 (2019); S.C. CODE ANN. § 17-13-170 (2019); H.B. 497, 59th Leg., 2011 Gen. Sess., §§ 3, 11 (Utah 2011).

[251] *See* IND. CODE § 35-33-1-1 (2019).

[252] *See* ARIZ. REV. STAT. ANN. § 46-140.01 (2019).

[253] *See, e.g.*, Valle del Sol Inc. v. Whiting, 732 F.3d 1006 (9th Cir. 2013); Lozano v. City of Hazelton, 724 F.3d 297 (3d Cir. 2013); United States v. Alabama, 813 F. Supp. 2d 1282 (N.D. Ala. 2011), *aff'd in part, rev'd in part, dismissed in part*, 691 F.3d 1269 (11th Cir. 2012); Ga. Latino All. for Human Rights v. Deal, 793 F. Supp. 2d 1317 (N.D. Ga. 2011), *aff'd in part, rev'd in part, remanded sub nom.*, Ga. Latino All. for Human Rights v. Governor of Georgia, 691 F.3d 1250 (11th Cir. 2012).

[254] Keller v. City of Fremont, 719 F.3d 931, 937 (8th Cir. 2013).

[255] *See, e.g.*, United States v. South Carolina, 840 F. Supp. 2d 898 (2011).

[256] *See* 567 U.S. 387, 394-400 (2012).

likely to be limited absent new federal legislation authorizing them. On the other hand, with President Trump having pardoned Arizona Sheriff Joe Arpaio, the most prominent face of local overreaching, private advocacy groups are on their own with a changed Court.

The Administration, and ultimately the courts, will likely have to decide whether to accept the localization of immigration law. Although technical legal arguments could distinguish pro-immigrant sanctuary cities from anti-immigrant Hazletons,[257] the country likely will have to decide if immigration policy is a proper venue for "uncooperative federalism" on either side.[258]

Beyond that, this relatively widespread willingness to put members of immigrant families to the kind of dilemma recognized as intolerable in other contexts[259] demonstrates a remarkable abandonment of "family values." This is all the more striking because these measures are largely superfluous to fending off the supposed economic threat of undocumented immigrants. As the following Part shows, somewhat more sophisticated versions of this argument have been dominating the formation of federal immigration legislation. The remainder of the article will explore whether these views are sound.

IV. THE ECONOMICS OF HUMANITARIAN IMMIGRATION

"[F]ew areas of public policy have explicitly pursued family goals to the degree that immigration policies have."[260] The humanitarian grounds for admitting immigrants seeking to reunify their families is well-known. And we have both celebrated our history of sheltering those oppressed overseas and lamented our failure to do more at crucial moments, particularly the 1930s. Advocates of employment-based reform, however, assert that the case for humanitarian immigration lacks analytical rigor.

To date, advocates of humanitarian immigration have generally responded to these contentions by arguing that immigration policy should reflect a nation's fundamental values, not crass economic maximization. This Part argues that, even if one rejects the non-economic defense of family-based immigration, a strong economic case

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257 *See generally* STRANGE NEIGHBORS: THE ROLE OF STATES IN IMMIGRATION POLICY (Carissa Byrne Hessick & Gabriel J. Chin eds., 2014).

258 *See* Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 YALE L.J. 1256, 1271-72 (2009) (seeing state and local resistance to federal decisions as part of the system of checks and balances).

259 *See* KENNETH S. BROUN ET AL., MCCORMICK ON EVIDENCE § 78 at 179 (7th ed. 2014) (discussing basis of marital privileges).

260 Fix & Zimmerman, *supra* note 16, at 237.

can be made for it as well. Indeed, it is employment-based immigration that is difficult to justify economically. Section A scrutinizes the claims made on behalf of employment-based immigrant admissions. Section B then shows that family-based immigration has large hidden economic benefits and avoid or minimize many of the problems with employment-based immigration. Section C finds that the impact of refugees and other immigrants escaping foreign oppression also have positive economic impacts that differ sharply from those of employment-based immigrants.

A. The Consequences of Skills-Based Immigration

Skills-based immigration became the presumptive core of any "grand bargain" immigration legislation reflects in part because of the political influence of industries seeking to reduce their labor costs. This effort sought political legitimacy through assertions that the "quality" of family-based immigrants — their education, job skills, and moral character — is inferior to that of non-immigrants and of immigrants admitted on employment-based visas.[261] Some of these claims cannot withstand close scrutiny: family-based immigrants' workforce attachment is comparable to that of their employment-based contemporaries.[262] And although family-based immigrants have lower wages at the time of entry, their earnings growth is much greater, eventually reaching parity.[263]

Two somewhat more sophisticated economic arguments have maintained the intellectual credibility of this position. On a macro level, proponents see admitting highly skilled immigrants as a way to increase this country's human capital.[264] And on a micro level, they see employment-based immigration as a solution to chronic labor shortages in particular industries.[265] Subsections 1 and 2 demonstrate that neither of these arguments can withstand close scrutiny. Subsection 3 shows

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[261] GEORGE J. BORJAS, HEAVEN'S DOOR: IMMIGRATION POLICY AND THE AMERICAN ECONOMY 19-22 (1999).

[262] *See* Fix & Zimmerman, *supra* note 16, at 240.

[263] *See id.* The major immigrant group with a lower rate of employment and higher use of public benefits is refugees. *See id.* Refugees are admitted due to humanitarian emergencies without regard to their earnings capacity or, significantly, family ties to persons already in the United States.

[264] *See* Darrell M. West, *Creating a "Brain Gain" for U.S. Employers: The Role of Immigration*, BROOKINGS (Jan. 12, 2011), https://www.brookings.edu/research/creating-a-brain-gain-for-u-s-employers-the-role-of-immigration/.

[265] *See* LAURIE BALL ET AL., PRINCETON UNIV., EMPLOYMENT-BASED IMMIGRATION: CREATING A FLEXIBLE AND SIMPLE SYSTEM 11 (2010).

that immigrants admitted on employment-based visas are likely to have greater negative externalities than even family-based immigrants doing the same work.

1. Aggregate Human Capital

Admitting high-skilled immigrants superficially seems to be the next-best thing to a free lunch. This country increases its human capital stocks without having to create more seats in its colleges and graduate programs.[266] Like most proposals offering something for nothing, however, it holds serious hidden drawbacks. In essence, this policy is a forced transfer from less-developed countries to the United States. Like other involuntary transfers, it creates inefficiencies. The involuntary donor country is deprived of the full benefit of its productive activity, here educating human capital. This reduces the marginal return on investments in education; with a lower marginal return, such investments are likely to become cost-ineffective at a lower total amount than they would have without the transfers. Educational opportunities in developing countries will decline.

The transfer's recipient, too, will see its incentives distorted: it will receive benefits not tied to its own productive activity. Assuming declining marginal returns of human capital, this will reduce the level of additional investments in education in the recipient country that will be cost-effective. Thus, transfers of human capital through targeted admissions policies in host countries tend to reduce educational investments below optimal levels in *both* the developing countries whose engineers and doctors we recruit *and* in this country.

This effect can be considerable. Many developing countries face a steeply rising marginal cost of capital; reductions in the marginal return of investing that capital in education may result in sharp reductions in education funding. Also, given our wealth of established, effective educational institutions, this country may well enjoy significant comparative advantage in producing human capital. Moreover, having that production within our borders produces a range of positive externalities. Yet as the recession has led to large state and local budget

266 *See, e.g.*, Thomas L. Friedman, Opinion, *The Open-Door Bailout*, N.Y. TIMES (Feb. 10, 2009), https://www.nytimes.com/2009/02/11/opinion/11friedman.html (insisting that "the cheapest and surest way to stimulate our economy" is high-skilled immigration); David J. Skorton, *Immigration Reform: The Economic Argument*, HUFFPOST (Oct. 1, 2011), http://www.huffingtonpost.com/david-j-skorton/immigration-reform-the-ec_b_914973.html ("Without the contributions of highly educated and skilled immigrants, the U.S. will lose ground in critical and robust high-tech areas such as the life sciences, nanotechnology, and sustainable energy systems.").

cuts, aid to higher education has dropped considerably. Employment-based visas have obscured the resulting shortages and encouraged disinvestment in our public universities. They also have shifted resources within educational budgets to units that are less affected by inflows of human capital, fostering the much-lamented over-production of lawyers.

This process is analogous to domestic tax-and-transfer policies: both the taxpayer and the recipient of the transfers will experience reductions in incentives to work or invest. Distributional concerns typically justify transfer payments to needy individuals and the taxes that support them, albeit subject to debates about how high a tax rate, and what level of transfer payments, is economically sustainable. In the case of immigration policy, by contrast, both efficiency and distributional concerns militate against skills-based admissions.

Even if manipulating rules to garner a higher-skilled pool of immigrants were desirable, its feasibility is far from clear. In the 1960s and early 1970s, Canada and Australia restructured their immigration policies to become more selective about the skills of those admitted.[267] Nonetheless, U.S. immigrants were better-educated during the period after these reforms' implementation.[268]

To be sure, remittances from immigrants to family members left behind complicate this analysis. Émigré engineers and doctors often send significant sums to relatives in their countries of origin. This partially offsets those countries' costs of educating these professionals and reduces this country's benefit from absorbing them. Remittances do not, however, mitigate the reduction in this country's incentive to invest in education. They also are a less stable and less durable source of income for the countries of origin than domestic economic activity. Immigration also is likely to prove an unreliable means of meeting our own human capital needs in the medium- and long-term. As source countries' economies develop, their better-educated workers will find appealing domestic opportunities and be less likely to come to the United States. Economic migrants therefore will begin to have lower skills.[269] By then, however, some of our domestic capacity to educate professionals in those fields may have atrophied. The most effective way

[267] *See* JEFFREY G. REITZ, WARMTH OF THE WELCOME: THE SOCIAL CAUSES OF ECONOMIC SUCCESS FOR IMMIGRANTS IN DIFFERENT NATIONS AND CITIES 69-70 (1998).

[268] *See id.* at 97.

[269] *See* MICHAEL J. GREENWOOD & JOHN M. MCDOWELL, LEGAL U.S. IMMIGRATION: INFLUENCES ON GENDER, AGE, AND SKILL COMPOSITION 179 (1999).

to expand the skills of the U.S. workforce is through education.[270] Such evidence as there is to the contrary is, at best, incomplete and anecdotal.[271] Employment-based immigration's supporters acknowledge the shortfalls of the U.S. educational system yet fail to explain why addressing those defects, rather than employment-based immigration, is not the appropriate response.[272]

2. Employment-Based Admissions as Industrial Subsidies

Business groups claim that native workers will not do some jobs at any price.[273] They assert that increasing the supply of workers with especially valuable skills will boost productivity and create multiplier effects throughout the economy. This argument's economic foundations are dubious. Basic supply-and-demand concepts suggest that adding workers with particular kinds of skills to the labor force effectively subsidizes the industries in need of those skills: as the supply increases, the equilibrium wage declines. If some identifiable market failure was retarding the domestic supply of workers with those skills, this infusion might prove efficient. Industry seeking immigrant labor for the most part, however, has not identified any such obstruction in the labor supply.[274]

Moreover, this response to perceived labor shortages — like so many public policies seeking to pick winners in markets — will have unintended consequences that actually exacerbate the problem. If wages for the kind of work in question are insufficient to attract enough domestic workers to enter that line of work (and, if necessary, to invest in the pertinent skills), depressing wages by bringing in immigrant workers will only push the domestic market farther out of equilibrium.[275] Thus, for example, claims that the United States has insufficient computer scientists to staff its high-tech sector likely tell us

[270] *See* DEMETRIOS G. PAPADEMETRIOU & MADELINE SUMPTION, MIGRATION POL'Y INST., THE ROLE OF IMMIGRATION IN FOSTERING COMPETITIVENESS IN THE UNITED STATES 4 (2011).

[271] *See id.*

[272] *The Economic Imperative for Enacting Immigration Reform: Hearing Before the Subcomm. on Immigration, Refugees and Border Security of the H. Comm. on the Judiciary*, 112th Cong. 1-3 (2011) (statement of Sen. Charles Schumer, Chairman, S. Comm. on Immigration, Refugees and Border Security).

[273] *See* FRANCES KELLOR, IMMIGRATION AND THE FUTURE 157 (1920).

[274] The current system's purported protections for domestic workers have proven broadly ineffective. *See* Davon M. Collins, Note, *Toward a More Federalist Employment-Based Immigration System*, 25 YALE L. & POL'Y REV. 349, 358 (2007).

[275] *See* HARRY J. HOLZER, MIGRATION POL'Y INST., IMMIGRATION POLICY AND LESS-SKILLED WORKERS IN THE UNITED STATES: REFLECTIONS ON FUTURE DIRECTIONS FOR REFORM 6-8 (2011).

little more than that wages in that sector have not reached the level that will induce more gifted students to forsake law schools for engineering programs.[276]

On the other end of the spectrum, assertions that U.S. citizens simply refuse to do agricultural work tell us nothing more than that growers are unwilling to pay equilibrium wages in the domestic market for their grueling chores. Rules seeking to prevent displacement of domestic workers through rights of first refusal and enforcement of the same labor standards that would have applied to domestic workers have proven unenforceable.[277] These rules are the kinds of labor market controls that many economists criticize as creating such severe inefficiencies that evasion is likely.[278]

3. Skills-Based Immigration's Impact on Domestic Workers

Substantial evidence suggests that the effect of focusing immigration on particular industries differs from introducing the same number of immigrants into the labor market without targeting. The aggregate impact on domestic workers of non-targeted immigration is very difficult to estimate. Some research suggests that, in the absence of low-cost immigrant labor, employers would automate low-skilled jobs or transfer them to lower-cost labor markets overseas.[279] This suggests that the inputs immigrant workers provide complement those of native-born workers, increasing returns to the education and experience of the latter by enough to offset the effects of their increase in the aggregate labor supply.[280] Immigrants have taken over low-skilled jobs vacated as native workers become better-educated.[281] Employers seek immigrant workers to avoiding paying the premium required for native workers in areas with high costs of living, such as California.[282]

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[276] *See* BRIAN Z. TAMANAHA, FAILING LAW SCHOOLS ix (2012) (criticizing this country's over-production of lawyers).

[277] *See* FARMWORKER JUSTICE, LITANY OF ABUSES: MORE — NOT FEWER — LABOR PROTECTIONS NEEDED IN THE H-2A GUESTWORKER PROGRAM 5-7 (2008).

[278] *See* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 352-55 (7th ed. 2007).

[279] *See* AUGUSTINE J. KPOSOWA, THE IMPACT OF IMMIGRATION ON THE UNITED STATES ECONOMY 35 (1998).

[280] *See* Francisco L. Rivera-Batiz & Selig L. Sechzer, *Substitution and Complementarity Between Immigrant and Native Labor in the United States*, *in* U.S. IMMIGRATION POLICY IN THE 1980S: A PRELIMINARY ASSESSMENT 108 (Francisco L. Rivera-Batiz et al. eds., 1991).

[281] *See* KEVIN F. MCCARTHY & GEORGES VERNEZ, CTR. FOR RESEARCH ON IMMIGRATION POLICY, IMMIGRATION IN A CHANGING ECONOMY: CALIFORNIA'S EXPERIENCE 141-42 (1997).

[282] *See id.* at 137.

Research has found that immigrants do not exacerbate recessions.[283] The rapid decline in illegal immigration in the current economic downturn suggests that immigration may be a little-recognized "automatic stabilizer": expanding the labor supply in a strong economy and shrinking it to match a reduction in the availability of jobs. Indeed, several analyses have found immigration to have a significant, positive impact on the earnings of native workers.[284]

Workers brought to work in particular industries, on the other hand, do appear to depress wages.[285] Immigrants tend to populate secondary labor markets rather than those of core industries, in part because of discrimination[286] and perhaps because of immigration rules tying them to those industries. Immigrants in the United States have been more concentrated in specific industries than those in other countries to a degree not readily explained in terms of labor market economics.[287] High-level job skills do not immunize immigrants lacking family ties from vulnerabilities that employers can exploit to depress their wages and those of domestic workers competing with them. Relatively few immigrants have skills that transfer in a direct and uncomplicated manner.[288] U.S. regulators may not honor foreign professional certifications. Business practices, market organization, and technological compatibilities here may be different than in the host country. More generally, evaluating paper credentials earned elsewhere may be difficult. And even if the immigrant is employable here, only a handful of employers may need those particular skills. Thus, many highly skilled immigrants still will depend heavily on their employers, both for work and to refrain from raising doubts with CIS about the genuineness of the immigrant's qualifications.

Even more severe problems arise when immigrants' visas tie them to the particular employer that petitioned for their admission, as many employment-based categories in the United States do. Employers seek rules that tie immigrants to them as a way of avoiding turnover without paying competitive wages.[289] Some employment-based immigration rules have made workers subject to deportation if they are laid off or even if they go to work in a different industry.[290] This would be true of

283 *See id.* at 192.
284 KPOSOWA, *supra* note 279, at 168.
285 *See* BRIGGS, *supra* note 17, at 101.
286 KPOSOWA, *supra* note 279, at 164.
287 *See* REITZ, *supra* note 267, at 165.
288 *See* HOLZER, *supra* note 275, at 5-6.
289 *See* KELLOR, *supra* note 273, at 160-61.
290 *See* BRIGGS, *supra* note 17, at 99.

legalized workers on the "path to citizenship" under the 2007 "grand bargain." Greater dependency on employers helps explain why immigrants in the United States, despite higher educational levels, earn less than their contemporaries in Canada and Australia.[291] Even highly skilled immigrants new to this country may be socially and linguistically isolated, may be unfamiliar with the operation of housing and other markets, and may have little idea of what legal rights they have, much less how to enforce them. Some employers may help with settling in, but that only heightens the immigrants' dependency on persons whose interests often will be fundamentally at odds with their own. Other employers find it advantageous to separate immigrants from native workers, who are better-paid and more familiar with the means to advocate for themselves.[292]

Research has found many immigrants vulnerable to a wide range of abuses on the job.[293] Employers pay immigrants substantially less than native workers, even controlling for education and occupation.[294] Immigrants' dependence on their employers make them wary of joining unions, which in turn gives them less protection against those employers' abuses.[295] Many immigrants seek security in working for labor contractors, who siphon off substantial shares of immigrants' earnings in exchange for translation services and perhaps transportation.[296] Immigrants' vulnerability to deportation, and their unfamiliarity with the U.S. legal system and lack of funds to retain counsel, have freed employers to break contracts with their workers.[297]

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[291] *See id.* at 95.

[292] *See* KELLOR, *supra* note 273, at 160-61.

[293] *See, e.g.*, Susan L. Brady, *"Female Troubles": The Plight of Foreign Household Workers Pursuing Lawful Permanent Residency Through Employment-Based Immigration*, 27 HOUS. J. INT'L L. 609, 629-30 (2005); Lori A. Nessel, *Undocumented Immigrants in the Workplace: The Fallacy of Labor Protection and the Need for Reform*, 36 HARV. C.R.-C.L. L. REV. 345, 346 (2001); Rebecca Smith et al., *Low Pay, High Risk: State Models for Advancing Immigrant Workers' Rights*, 28 N.Y.U. REV. L. & SOC. CHANGE 597, 598-99 (2004).

[294] *See* MCCARTHY & VERNEZ, *supra* note 281, at 133.

[295] *See* Jennifer T. Manion, *Cultivating Farmworker Injustice: The Resurgence of Sharecropping*, 62 OHIO ST. L.J. 1665, 1691 (2001) (noting immigrant farmworkers' reluctance to unionize due to their fear of retaliation by employers).

[296] *See* HUMAN RIGHTS WATCH, CULTIVATING FEAR: THE VULNERABILITY OF IMMIGRANT FARMWORKERS IN THE US TO SEXUAL VIOLENCE AND SEXUAL HARASSMENT (2012), https://www.hrw.org/sites/default/files/reports/us0512ForUpload_1.pdf.

[297] *See* KELLOR, *supra* note 273, at 163.

Immigrants' vulnerability also has resulted in frequent sexual exploitation.[298]

Efforts to regulate away employers' abuses of immigrants have proven ineffectual. Employers have easily obtained required certificates — that domestic workers are unavailable, that wages will not be reduced, and so forth — from the Department of Labor with little or no investigation.[299] Because workers admitted on their employers' applications "were captive workers who were totally subject to the unilateral demand of employers," regulators were unlikely to hear complaints from the workers themselves.[300]

In sum, immigrants entering without strong connections to persons other than their employers often face serious hardship and are far more likely to depress wages in the industries they enter.[301]

B. The Benefits of Family-Based Immigration

Section A showed that, not only are employment-based immigration's supposed economic benefits, it actually creates serious inefficiencies. This Section shows that the popular wisdom about family-based immigration is equally backwards: its presumed costs are greatly overstated while it has powerful if hidden economic benefits.[302] Subsection 1 focuses on the instrumental advantages of family-focused immigration, explaining the economic benefits of making family well-being the mainspring of immigration policy. Subsection 2, in turn, considers the instrumental costs of immigration. It finds that many of the effects that arouse opposition to immigration spring from the vulnerability of immigrants. It concludes that although most new immigrants are likely to be dependent, dependence on family members is less debilitating for the immigrant, and hence makes the immigrant's presence less destabilizing for society, than extreme vulnerability to the whims of employers.

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298 *See* Tala Hartsough, *Asylum for Trafficked Women: Escape Strategies Beyond the T Visa*, 13 HASTINGS WOMEN'S L.J. 77, 82 (2002).

299 *See* BRIGGS, *supra* note 17, at 99-101.

300 *See id.* at 101.

301 *See id.* at 165.

302 One of the few analyses to recognize economic benefits of family immigration does so only in a conclusory fashion, without attempting to relate it to those of employment-based immigrants. *See* Howard Chang, *Migration as International Trade: The Economic Gains from the Liberalized Movement of Labor*, 3 UCLA J. INT'L L. & FOREIGN AFF. 371, 385 (1998).

1. An Economic Case for Family Values

The humanitarian arguments for privileging family in immigration policy see the family as the locus of love and personal fulfillment. As important as that vision is, it captures only part of the role the family plays in our society. This subsection shows that the family also is a vital vehicle for organizing economic productivity and prioritizing consumption, rivaling the firm.[303] Economic analysis therefore complements humanitarian concerns in support family-based immigration. As subsection a shows, families offer significant efficiency advantages over other means of organizing the economic functions they commonly perform. This suggests that policies designed to aid families are likely to produce broad benefits, many of which are difficult to measure. Family reunification is thus the most effective way to spend the limited resources society is willing to allocate to immigration. Subsection b finds that appropriate pro-family initiatives can advance distributive justice. In particular, families have more and better information about the needs and capabilities of their members than public agencies, or even the most involved community groups, could acquire. Subsection c then shows that family-based visas are likely to maximize utility within this country (as well as beyond) at any specified level of immigration.

a. Families and Economic Efficiency

Family formation can be seen as a form of saving. Investment today in building bonds can produce an on-going stream of benefits in the future. Recognizing that family ties are a specialized form of social capital, many child support enforcement advocates have shifted their focus from a single-minded insistence on maximizing absent parents' financial contributions to seeking to maximize those parents' involvement with their children.[304]

Perhaps even more importantly, families can be seen as a particularly effective means for spreading certain kinds of risks.[305] Some of the

[303] For a simple version of this model, see POSNER, *supra* note 278, at 143-46.

[304] *See, e.g.*, NAT'L RESPONSIBLE FATHERHOOD CAPACITY-BUILDING INITIATIVE, INSPIRATION TO IMPLEMENTATION 2 (2011), *available at* http://cdn2.hubspot.net/hub/135704/file-630225243-pdf/Inspiration-To-Implementation-8.pdf?__hssc=162717731.1.1562476356869&__hstc=162717731.49b99f85e961280717d277da4922e34b.1562476356867.1562476356867.1562476356867.1&__hsfp=2033235453&hsCtaTracking=9ac8a986-b310-464f-b282-0199fdf0bbcf%7Cc7b92113-9cb7-4bdf-bbad-844001b257bc.

[305] *See* RISK, TRUST AND WELFARE ix-x (Peter Taylor-Gooby ed. 2000) [hereinafter RISK, TRUST].

greatest risks individuals face are not amenable to market insurance.[306] These include the risk of unemployment under conditions that do not meet the narrow criteria entitling workers to unemployment compensation (UC),[307] the risk that market conditions will erode the value of one's employment skills,[308] the risk that the market will find less desirable the neighborhood where one has bought a home,[309] and the risk that one will fall victim to an unsound investment scheme and be unable to recover.[310] Other kinds of risks may be commercially insurable but often are not because of unappealing premiums, individuals' impoverishment, or their skepticism about the insurance industry.[311] Families effectively insure their members against many of these risks.[312]

To be sure, families are too small and too homogeneous to spread some kinds of risk very effectively.[313] On the other hand, even a modest amount of de facto insurance may free individuals to take some personally and socially beneficial risks, such as quitting work to pursue education or training. Moreover, families' capacity to identify and reduce many kinds of bad risks typically is far greater than that of impersonal insurance companies. Allstate will never tell you "don't marry that rat."

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306 *See* Janet Ford, *Housing and the Flexible Labor Market: Responding to Risk*, *in* RISK, TRUST, *supra* note 305, at 95.

307 For example, one might be laid off before working enough weeks to have UC coverage, one might become unemployed in a labor market so difficult that one cannot obtain new work before UC benefits run out, or one might have to leave work because a crucial bus line or car pool ceases operation or because a partner's job relocates. *See* Karen Syma Czapanskiy, *Unemployment Insurance Reform for Moms*, 44 SANTA CLARA L. REV. 1093, 1108 (2004).

308 A highly competent elevator operator or manual typewriter technician still is not readily employable today.

309 Changing locational externalities — the perception that schools have gotten worse, the relocation of an important area employer, or appealing new growth in a different area — probably damages the property values of many more people than insurable fires, earthquakes, and the like.

310 The financially unsophisticated lose huge sums to schemes that are not technically fraudulent. Even where fraud may be demonstrable, the perpetrators may have fled or become insolvent.

311 *See* Ford, *supra* note 306, at 95-96.

312 *See id.* at 108-09; Peter Lunt & Justine Blundell, *Public Understanding of Financial Risk: The Challenge to Regulation*, *in* RISK, TRUST, *supra* note 305, at 124 (2000); JENNIFER ROBACK MORSE, LOVE AND ECONOMICS: WHY THE LAISSEZ-FAIRE FAMILY DOESN'T WORK 67-71 (2001); ROBERT J. SHILLER, THE NEW FINANCIAL ORDER: RISK IN THE 21ST CENTURY 40-41 (2003).

313 *See* SHILLER, *supra* note 312, at 41.

Families are far more efficient than bureaucracies at gathering information that can help them improve the well-being of their members.[314] They then can apply it beneficially without the costs and risks associated with large databases. Our family members, for example, are much more likely to discern when we "are not ourselves" or to remember when we last went to the doctor.[315] Ensuring that bureaucracies function in the intended manner requires difficult, costly, and error-prone alignment of incentives for the various individuals constituting that bureaucracy; altruism tends to motivate families' aid to their members.[316]

b. Families and Distributive Justice

Families are the largest providers of non-monetized benefits in our society, far beyond government.[317] Services family members give are exempt from regressive consumption taxes. Families may provide economies of scale analogous to those otherwise favoring more affluent people who can afford to purchase in bulk. People with low cash incomes receive a far higher proportion of their goods and services from family than do the more affluent. Increasing the in-kind benefits of family therefore will have a progressive effect: this is a true case of a rising tide lifting all boats.[318]

Incorporating family values, properly conceived, into social policy also avoids many problems plaguing policy built around economic incentives. In particular, we have much less need for limiting principles. We are told "greed is good" — but, if so, only until it drives someone

[314] *See* Jürgen Habermas, *Law as Medium and Law as Institution*, *in* DILEMMAS OF LAW IN THE WELFARE STATE 216-17 (Gunther Teubner ed. 1988).

[315] JAMES Q. WILSON, THE MARRIAGE PROBLEM: HOW OUR CULTURE HAS WEAKENED FAMILIES 16-18 (2002).

[316] *See* ROBIN WEST, CARING FOR JUSTICE 121-22 (1997).

[317] *See* Barbara Cossman, *Contesting Conservatisms, Family Feuds and the Privatization of Dependency*, 13 AM. U. J. GENDER SOC. POL'Y & L. 415, 420-21 (2005).

[318] To be sure, more affluent people seek to design family policies to meet their needs just as they do other types of policy. *See* Patricia Spakes, *A Feminist Approach to National Family Policy*, *in* THE RECONSTRUCTION OF FAMILY POLICY 33 (Elaine A. Anderson & Richard C. Hula, eds. 1991). As long as family-related stresses fall disproportionately on those without the means of buying themselves relief, however, policies that aid families are likely to have progressive effects. *See* Mary Jo Bane & Paul A. Jargowsky, *The Links Between Government Policy and Family Structure: What Matters and What Doesn't*, *in* THE CHANGING AMERICAN FAMILY AND PUBLIC POLICY 235-38 (Andrew J. Cherlin ed. 1988). Single parents, who are more likely to have low incomes, will benefit particularly from the support of family members assuming some of the burdens of their missing partner.

to cheat, to steal, to take wild chances with other people's well-being, etc. The more we increase the incentives for economic gain, the more we must guard against its anti-social expressions. By contrast, one can say "love is good" with many fewer caveats. True, a fair amount of crime and cruelty is committed under the influence of amorous passions. But much of that harm is motivated by desires far baser than love, and in any event public policy can hardly be said to have set those harms in motion.

Robin West argues that an ethic of justice is incomplete without an ethic of caring.[319] Although the ethic of caring should not be limited to family life,[320] families nonetheless are an important venue both for its operation and for instilling it in future generations.

To be sure, families' may lack the resources to meet their members' needs, and their internal allocation mechanisms can be strikingly unjust. Their members thus may require substantial help from broader community and public programs. Nonetheless, families provide quick, efficient, and well-targeted aid to countless people in need whom other institutions could not serve at all, as well, or certainly as accurately and inexpensively. Coming at a time when this country is sharply reducing the availability of social insurance and its flexibility,[321] this can fill important gaps. Because many of those benefiting from family immigration are U.S. citizens, these concerns can and should shape immigration policy.

c. Family-Based Immigration and Utility Maximization

Privileging immigration for family reunification purposes should provide more net benefits at any given level of authorized immigration. It prioritizes those prospective immigrants likely to benefit most from entering the United States: for immigrants with family already here, the United States is likely to be the only country they wish to enter, while some fraction of employment-based immigrants may obtain similar opportunities in Canada, the European Union, or other prosperous countries. By contrast, admitting individuals based on their employment skills fractures more families, creating non-monetized costs just as family-based immigration creates non-monetized benefits. Remittances offset only a fraction of those costs to the family members

319 *See* WEST, *supra* note 316, at 33-34.

320 *Id.* at 34-35.

321 *See* Anne L. Alstott, *The Earned Income Tax Credit and the Limitations of Tax-Based Welfare Reform*, 108 HARV. L. REV. 533, 566-68 (1995) (describing a mismatch between families' need and annual measures of income).

overseas but significantly reduce this country's benefit from the immigrants' work.

Although employment-based visas seek talent purposefully, some research suggests that this country has garnered at least as much through the happenstance of family reunification and refugee admissions.[322] As noted, family- and employment-based immigrants have identical rates of employment. Indeed, derivative beneficiaries of immigrant workers constituted half of those admitted under employment-based categories yet "were much *less* likely to be employed than derivative beneficiaries in the family-preference categories (29 percent, compared to 42 percent)."[323] More generally, research has discredited assumptions that family reunification is responsible for declines in the skills of immigrant workers.[324]

"[I]mmigrants with the closest family ties to those already resident within the country might represent the greatest probability for self-sufficiency."[325] For example, family-based immigration provides inexpensive labor for family businesses and uncompensated child care for extended family members.[326] These immigrants' cash wages likely understate their economic contribution. Eliminating this source of social capital could reduce both the initial earnings of new immigrants and the earnings growth of their predecessors.[327] It likely will increase the transaction costs in these segments of the employment market as prospective employers and employees have far less information about one another.

2. Minimizing the Harms of Immigration by Minimizing Dependence

The perceived severity of most menaces varies directly with their strength: we fear armed robbers more than unarmed robbers, opponents with good lawyers more than those acting pro se, competitors with established market presence more than newcomers, and so on. This is particularly true where the menace springs from moral deficiencies: if people wish us harm, we prefer that they be weak. The harm many fear from immigrants, however, is economic rather than physical, which makes this preference for weakness deeply counter-productive.

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322 *See* BRIGGS, *supra* note 17, at 71.

323 *See* REITZ, *supra* note 267, at 95 (emphasis in original).

324 *See* GREENWOOD & MCDOWELL, *supra* note 269, at 167.

325 REITZ, *supra* note 267, at 87.

326 *See* Fix & Zimmerman, *supra* note 16, at 257.

327 *See id.*

Longstanding xenophobia, the more recent equation of immigrants with terrorism, and our habit of attributing problems to personal vice rather than complex social and economic factors have led us to impose tight, often debilitating, controls on immigrants.[328] This is thoroughly counterproductive: many of the harms that may result from immigration vary *inversely* with immigrants' strength. Impoverished immigrants without alternatives may be desperate enough to underbid U.S. citizen workers; those facing deportation if they fall out of favor with their employer are even more likely to underbid. Impoverished immigrants will be less likely to seek medical care when they are ill and thus more likely to spread disease. Vulnerable immigrants will be less willing to take risks reporting crimes, workplace hazards, and consumer frauds, allowing noxious enterprises to prosper and spread. Frightened, insecure immigrants are more easily bullied by political machines, proselytizers for extremist beliefs of all kinds, and criminal organizations. Even poverty itself can be a result as well as a cause of vulnerability: desperate people tend to have truncated time horizons, foregoing investments in human capital or jobs with advancement potential to keep body and soul together in the near-term.

Some insecurity is inevitable when people come to a new land, for both practical and political reasons. The nature and degree of vulnerability can prove crucial to the well-being of natives and immigrants alike. Dependency on relatives is far less destabilizing than dependency on employers. This is in part a matter of accountability: employers' concern is profitability, which does not reliably coincide with respecting the immigrants' interests, while sponsoring relatives may feel accountable to other family members for how they treat the immigrants. These family ties form an informal system of checks and balances that, when it works, may be far superior to anything the courts could manage. Dependency on family sponsors is also superior because those relatives have a wider range of intermediate sanctions to apply: fear of denunciation as a malingerer within one's family and community will motivate hard work, but it does not incite the terror that deportation does.

[328] For example, the "grand bargain" requires legalized immigrants to maintain continuous employment or lose their legal status, allowing employers to pay them far less than domestic workers with little risk that they would quit. *See, e.g.*, Laura A. Hernández, *The Constitutional Limits of Supply and Demand: Why A Successful Guest Worker Program Must Include a Path to Citizenship*, 10 STAN. J. C.R. & C.L. 251, 266 (2014).

C. The Benefits of Admitting Refugees and Asylees

The traditional bipartisan support for refugees, and their relatively modest numbers, kept proposals to reduce their numbers out of "grand bargain" legislation. The Trump Administration, however, has placed refugees among its first targets. It has not proposed shifting their visas to employment-based immigrants, but industry groups likely will once the dust settles, presumably making similar arguments to the ones they wield against family admissions. If so, they will be on weak ground.

Although some refugees faced persecution merely because of their identity — their race, religion, tribe, gender, sexual orientation, etc. — many were targeted because they exercised leadership against the regime. These are more likely to be educated people with valuable skills, and even if they are not will be people with intangible leadership attributes. This is particularly true under current law, which emphasizes individualized risks, rather than under the Cold War regime of allowing in anyone fleeing communist countries.[329] Because they are not selected for their skills, however, their impact on employment markets is far more diffuse than that of employment-based immigrants. To date, the United States has wasted much of this economic potential by failing to recognize the foreign education and professional skills of refugees and asylees the way we do those of employment-based immigrants.[330] Removing these barriers would have many of the benefits often touted for skills-based immigration without the economic distortions.[331]

Although refugees need not have family ties in this country, a great many do: those ties are often why they were directed here rather than to another country accepting refugees. Even those that do not have U.S. family members often have friends here or resettle to communities where others of their nationality or ethnic group already reside, forming strong communal bonds with some of the attributes of familial ties.[332] Many refugees arrive here traumatized and receive public aid while they

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[329] Refugees leaving in the wake of political turmoil or repression tend to have higher skills and lifetime earning potential. *See* GEORGE J. BORJAS, FRIENDS OR STRANGERS: THE IMPACT OF IMMIGRANTS ON THE U.S. ECONOMY 127-29 (1990).

[330] *See Doctors as Taxi Drivers: The Costs of Brain Waste Among Highly Skilled Immigrants in the United States*, MIGRATION POL'Y INST. (Dec. 7, 2016), https://www.migrationpolicy.org/events/doctors-taxi-drivers-costs-brain-waste-among-highly-skilled-immigrants-united-states.

[331] *See* MARIA VINCENZA DESIDERIO, MIGRATION POL'Y INST., INTEGRATING REFUGEES INTO HOST COUNTRY LABOR MARKETS: CHALLENGES AND POLICY OPTIONS 2 (2016).

[332] *See* Susan W. Hardwick & James E. Meacham, *"Placing" the Refugee Diaspora in Suburban Portland, Oregon*, *in* TWENTY-FIRST CENTURY GATEWAYS: IMMIGRANT INCORPORATION IN SUBURBAN AMERICA 225, 232-53 (Audrey Singer et al. eds., 2008).

get settled, learn English and U.S. customs, and find employment. Once that has occurred, however, they have high rates of employment and entrepreneurship.[333]

V. THE POLITICS OF FAMILY AND HUMANITARIAN IMMIGRATION

After Donald Trump's stunning victory on a fiercely anti-immigrant platform, many have reassessed their assumptions about immigration politics. To a point, this makes sense: the strength of nativism within one segment of the electorate, and the tolerance of it among a much larger group of voters, demands our attention. On the other hand, this was by no means a victory for the forces seeking to shift to employment-based immigration. President Trump campaigned against immigrants taking jobs from U.S. workers: votes for him were not votes for any kind of immigration. If anything, the technocratic arguments for employment-based immigration resemble those of the small "never Trump" elite within the Republican Party whose lack of electoral support President Trump laid bare. Thus, those supporting the shift to self-interest-based immigration as a means of enacting of legislation resolving the status of undocumented immigrants have little reason to make that compromise. This Part shows that political arguments for self-interested immigration are no sounder than the economic arguments. To the contrary, we can and should reverse some of the anti-family initiatives already made.

Section A shows that proponents likely overestimate the political benefit broader immigration reform will gain from shifting to skills-based admissions. Section B then notes that expanding skills-based admissions also is likely to lead to undesirable rent-seeking political behavior. This will continually roil immigration policy, preventing the cloture that comprehensive reform is claimed to achieve and leaving continuously vulnerable all groups' gains made in the initial legislation. Section C finds that employment-based immigration is likely to exacerbate the enforcement problems that immigration reform is claimed to solve.

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[333] PEGGY HALPERN, U.S. DEP'T OF HEALTH & HUMAN SERVS., REFUGEE ECONOMIC SELF-SUFFICIENCY: AN EXPLORATORY STUDY OF APPROACHES USED IN OFFICE OF REFUGEE RESETTLEMENT PROGRAMS 5 (2008).

A. The Questionable Political Efficacy of Shifting to Employment-Based Immigration

Immigration advocates supporting the "grand bargain" likely overestimated the political benefits of shifting to employment-based immigration. Immigration advocates imagine that business support will tip the political scales in their favor. They fail to appreciate both the support that they could lose by downgrading family-based immigration and the political problems that will attend the economic model. Avoiding targeted subsidies lowering particular industries' labor costs was one reason organized labor supported expanding family reunification visas as an alternative in the 1965 Act.[334] Although the current populist backlash against immigration is far less thoughtful, its emphasis on job losses suggests similar concerns that could be ameliorated in a similar manner. Moreover, their emphasis on unlawful immigration, although partly a moralistic rhetorical move, also implies an awareness of the heightened bargaining power employers have with undocumented workers, leading to wages with which U.S. citizen workers cannot compete. In addition, the competitors of industries benefiting from targeted admissions may oppose legislation that increases those admissions.

1. Normative Support as an Alternative to Self-Interest

A wide array of politically diverse groups have strong normative reasons to support humanitarian immigration more than, or instead of, an employment-based model. These groups will be important both in passing legislation and in preserving it against inevitable political attacks in future years.

Economic libertarians see immigration controls and regulation of the domestic labor market as closely linked and oppose both.[335] They presumably would support family-based admissions and legalizations as less interventionist in the market than targeted employment-based visas. Conservatives generally value entrepreneurship. Family-based immigrants are far more likely to start small businesses than those brought here to serve as employees.

Social conservatives pursuing broader pro-family agendas are unlikely to support reducing family-based admissions. Prominent

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[334] *See* BRIGGS, *supra* note 17, at 69.

[335] *See, e.g.*, William McGurn, *Creative Virtues of the Economy*, *in* IS THE MARKET MORAL? A DIALOGUE ON RELIGION, ECONOMICS & JUSTICE 132-33 (Rebecca M. Blank & William McGurn eds., 2004).

Christian conservatives are beginning to argue that immigration policy should reflect "a concern for our neighbors as well as for ourselves."[336] A family-centric policy should have great appeal to them. Also, some Christian groups have taken a particularly strong interest in Christian immigrants;[337] immigrants admitted for family reunification tend to mirror the characteristics of those already here more than those brought in based on work skills.

Those concerned with social equity also have reason to oppose employment-based immigration. It tends to produce a bifurcated flow, with newcomers having either highly advanced skills or virtually none at all. This contributes to the bifurcation of U.S. society into the affluent and the destitute.[338] The Catholic Church has broadly defended immigrants' rights[339] and has been particularly critical of efforts to impede family reunification.[340] A coalition of Catholic, Pentecostal, evangelical, and mainline protestant churches recently declared that "[f]amily reunification should be the cornerstone of our nation's immigration policy" and argued for expansion of those categories.[341]

More broadly, family-based immigration can be tied to widely shared U.S. values in a way that the supposed economic maximization of employment-based admissions cannot. A developed theory of the non-monetized benefits of family also helps to expose the reductionist character of arguments about immigrants' "quality." "In the popular American conception, … anyone, from any origins, no matter how destitute or lacking in social breeding, could with hard work and a practical bent of mind, 'make it.'"[342] This country was built by people

336 Pauline J. Chang, *Religious Leaders Call for Immigration Reform as Senate Begins Battle*, CHRISTIAN POST (Mar. 3, 2006), https://www.christianpost.com/news/religious-leaders-call-for-immigration-reform-as-senate-begins-battle.html.

337 *See* ISBISTER, *supra* note 26, at 203-04.

338 *See* CLARK, *supra* note 24, at 18-21.

339 *See* José Roberto Juárez, Jr., *Hispanics, Catholicism, and the Legal Academy*, *in* CHRISTIAN PERSPECTIVES ON LEGAL THOUGHT 172-73 (Michael W. McConnell et al. eds., 2001); Bart Jones, *Dispelling "Myths" About Immigrants*, NEWSDAY (Feb. 19, 2006) (describing catholic bishops' launching a pro-immigrant campaign); Holly Selby, *U.S. Bishops Condemn California Anti-Immigration Law, Euthanasia*, BALT. SUN (Nov. 18, 1994), http://tech.mit.edu/V114/N57/bishops.57w.html.

340 *See* JUSTICE FOR IMMIGRANTS, CATHOLIC BISHOPS' CALL FOR COMPREHENSIVE IMMIGRATION REFORM (2011), https://ecatholic-sites.s3.amazonaws.com/13519/documents/2016/3/catholic-bishops-call-for-comprehensive-immigration-reform.pdf.

341 *See CCT Call the Churches and Elected Leaders to Act on Immigration Reform Now*, CHRISTIAN CHURCHES TOGETHER (Feb. 1, 2013), http://christianchurchestogether.org/cct-call-the-churches-and-elected-leaders-to-act-on-immigration.

342 REITZ, *supra* note 267, at 83.

who demonstrated their own "quality" when given the chance, many of whom were scorned when they arrived.

2. Family-based Immigration and Political Sustainability

A shift away from family-based immigration also will make any immigration legislation easier to sustain politically. Employers rebuffed in their pleas for immigration targeted for their needs have alternatives such as training domestic workers, recruiting new family-based immigrants, and automation. This will temper their on-going advocacy to raise immigration ceilings. By contrast, rebuffed families have no substitutes for bringing their family members over and are likely both to continue political advocacy for higher ceilings and to reunite with their loved ones illicitly.

Ordinarily, one might expect collective action dynamics to favor the relatively small, cohesive group of businesses seeking immigrant labor over the more diffuse array of competitors and native workers.[343] Immigration policy's extremely high profile, however, makes these factors far less important. Moreover, family-based immigration is likely to generate less focused interest-group advocacy against immigration. By diffusing immigrants' impact across many labor markets, immigration should prove less threatening to any particular group of workers already in the country as well as causing fewer distortions to domestic labor markets (including those in which employers paying less than the market-clearing wage complain about labor shortages). By contrast, the anti-immigrant populist movement has come to see immigration as a direct threat to their jobs and are likely to hear the claims made for employment-based immigration as elite obfuscation of threats to their livelihood.

Industry's dominant political preferences in this area have fluctuated wildly over the years. In the 1960s, business interests preferred an "unorganized and comparatively docile labor pool" and supported family unification as a means to that end; unions sought more skilled immigrants whom they could more easily organize.[344] By the 1990s, with organized labor in sharp decline, business groups saw highly skilled professionals as the source of their fastest-rising labor costs and

[343] *See generally* Jade Brewster, *A Kick in the Class: Giving Class Members a Voice in Class Action Settlements*, 41 W. ST. U. L. REV. 1, 9 (2013) ("The collective action problem is when an individual fails to contribute to a group activity even though all of the members of the group would benefit if everyone contributed.").

[344] *See* REITZ, *supra* note 267, at 85.

shifted their orientation toward immigration in that group.[345] This effectively lowered the return to native workers' investments in education. The industries designated to receive workers on employment-based visas naturally have supported legislation, including the comprehensive bills in 2006 and 2007 and the Gang of Eight plan from 2013, that would expand that type of immigration. Interests connected with these industries similarly have supported conservative politicians and advocacy groups, such as the Cato Institute, that favor liberalized immigration.

B. Rent-Seeking under Employment-Based Immigration Regimes

Quite apart from the direct inefficiencies of manipulating immigration policy to benefit certain classes of employers, an employment-based regime would create an expensive and inefficient political competition for implicit subsidies among industries seeking to shave labor costs. Even a company or industry seeking relief from a very real market failure still expends resources lobbying that otherwise could be applied to productive activity. Thus, even if one has boundless optimism that the government will only subsidize business for economically efficient reasons, the process of reaching that outcome may nonetheless be so costly and inefficient as to render the overall enterprise undesirable. The more typical employer, who could obtain workers by offering wages at equilibrium levels, will have to judge whether its money is better-spent raising wages or lobbying for immigration relief. Expanding the share of admissions based on skills will raise the stakes and cause more industries to compete politically against one another for the subsidies implicit in rules favoring the skills each requires.

In theory, the inefficiency of immigration rules' implicit subsidies could be reduced by charging fees recapturing what business gains by not having to pay equilibrium wages in the native labor market. Not surprisingly, however, business groups killed congressional proposals to tax employers seeking admission of high-skilled workers.[346]

C. Impacts on Enforcement and Future Immigration

President Trump's success mobilizing voters with nativist rhetoric was possible in part because of the perceived failures of prior legislation sold as a solution to unauthorized immigration. A shift to self-interested

[345] *See id.* at 85-86.

[346] *See, e.g.*, GREENWOOD & MCDOWELL, *supra* note 269, at 195.

immigration would exacerbate such immigration and thus further strengthen nativists.

Any serious attempt to reduce unwanted activity must address the positive motivations for that activity as well as punitive responses to it. "No cash held on premises" signs are just as much a part of robbery prevention as are police and prosecutors. Subsection 1 shows that blocking legal avenues for family reunification will increase the pool of determined unlawful entrants to a far greater degree than restricting employment-based immigration would. Critics respond by charging that family-based admissions lead to "chain migration," in which each new immigrant opens the door to additional relatives. Subsection 2 explains the fallacy of this critique.

1. Employment-Based Immigration and the Rule of Law

Making family reunification the guiding principle of immigration law supports rule of law concerns by recognizing that people seeking to reunite with their families will be powerfully motivated to immigrate illegally, even at great cost and risk;[347] prospective immigrants with no prior ties to this country are more readily deterred from entering the country. Shifting to employment-based admissions would prevent existing immigrants' families from unifying in the short-term and compound that problem over time once the workers establish themselves and want to bring over their families.[348] The subordination of family-based immigration thus raises major long-term concerns for advocates of reducing illegal entries. Similarly, those fleeing foreign oppression have little choice but to seek any haven they can find, welcoming or otherwise. To the extent that illegal immigration is stoking anti-immigrant animus generally, legislation that would reduce legal immigration for family reunification has little chance of stemming illegal immigration no matter how harsh the enforcement regime may be.

Direct command-and-control enforcement cannot begin to address the number of undocumented immigrants already in the country, and the numbers that attempt unlawful entry each year. Success therefore depends on altering prospective illegal immigrants' incentives so that entry becomes unattractive. Tougher enforcement can increase their costs. Reducing employment opportunities for undocumented immigrants can reduce the expected benefit of their entry and may make other options — other income development strategies in their home

[347] *See* Nancy S. Landale, *Immigration and the Family: An Overview*, *in* IMMIGRATION AND THE FAMILY 289 (Alan Booth et al. eds., 1997).

[348] *See* REITZ, *supra* note 267, at 88.

countries or immigration to Canada or the E.U. — comparatively more attractive. Thus, economic migrants can be effectively deterred. To prevent illegal economic immigration, granting visas is not necessary — nor is it sufficient, as the pool far exceeds the number of visas that plausibly could be granted.

By contrast, the incentive to immigrate for those separated from relatives in the United States is powerful and not subject to policy manipulation. These prospective immigrants have fewer alternatives and are unlikely to be deterred by tough enforcement. The only way to prevent the hydraulic forces of family reunification from driving unlawful immigration is to grant prospective immigrants visas. This country will have little prospect of controlling its borders as long as those borders separate close relatives. By splitting more families, employment-based immigration actually increases those hydraulic forces.[349]

2. The Phantom Menace of Chain Migration

The present family-based admissions structure was actually designed to achieve chain migration. Opponents of diversity among immigrants in the 1960s saw chain migration as a way of keeping the then-existing racial mix without formal quotas.[350] In practice, however, the extremely narrow character of the family preferences makes any significant chain effect extremely unlikely.

Only very close relatives may petition for a prospective immigrant's entry under a family-based preference. U.S. citizens may petition for the admission of their spouses, children, and siblings.[351] Permanent resident aliens may petition only for the admission of their spouses and children.[352] Thus, when someone petitions for admission of her or his spouse and children, none of them are likely to be eligible to petition for any other family members' entry. At most, the spouse may petition for the admission of any additional children he or she may have. When the admitted spouse achieves U.S. citizenship — which theoretically could occur within five years but more realistically takes several more years due to administrative backlogs — he or she could petition for the

[349] The two-year guest-worker program in the "grand bargain" is particularly absurd. *See generally supra* Parts II.A.-C. If one is seeking to prevent unauthorized immigration, little could be more counter-productive than giving people who want to work here two years to learn the ways of this country and establish contacts here.

[350] *See* BENNETT, *supra* note 27, at 277-78; SCHUCK, *supra* note 38, at 134-35.

[351] *See* 8 U.S.C. § 1151(b)(2)(A)(i) (2019); *id.* at § 1153(a)(1), (3)-(4).

[352] *See* 8 U.S.C. § 1153(a)(2).

admission of his or her siblings. Sibling petitions, however, receive the lowest of the family priorities competing for space within immigration quotas. They are likely to languish for years on the waiting list and may never be admitted.[353]

CONCLUSION

Some politicians, advocates, and voters are deeply hostile to immigration for reasons too entrenched to reverse. That group, however, is relatively small. From the beginning, a majority of Americans opposed President Trump's travel ban, and an even broader majority opposed shutting down refugee admissions from Syria.[354] If hard-core nativists were the only force driving these policies, we could expect the tide to turn, just as it did on other shameful episodes when nativism seized control of U.S. immigration law.[355]

Anti-immigrant policies have the traction that they do because of the support of two other groups whose agendas are almost diametrically opposed to one another. Business groups do not object to the volume of immigration but see strong anti-immigrant sentiment as providing leverage to change the composition of admissions to provide subsidies for themselves. Conservative groups value families and identify with at least some religious and political refugees but fear that too much immigration will change U.S. society and politics in ways they oppose. As long as they assume a linear model of immigration law, these conservatives are likely to support anti-immigrant forces to prevent rapid social transformation.

A multi-dimensional model changes all of this. Progressives and many conservatives can unite in preferring family-based and humanitarian admissions to admitting people coming here solely to work. Genuine moderates who prioritize the rule of law should share this preference as job-seekers are much easier to restrain than people desperate to rejoin their families or to flee repression. Indeed, even some who have prioritizing restricting the numbers of immigrants admitted may come to realize that the biggest threat to their jobs and values comes from employment-based immigrants and others kept vulnerable and insecure.

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353 Spouses and children of U.S. citizens can be admitted much more quickly.

354 *See* Frank Newport, *About Half of Americans Say Trump Moving Too Fast*, GALLUP (Feb. 2, 2017), https://news.gallup.com/poll/203264/half-americans-say-trump-moving-fast.aspx.

355 *See, e.g.*, Chae Chan Ping v. United States, 130 U.S. 581, 603-04 (1889) (upholding the Chinese Exclusion Act).

And once these possibilities are understood, nativists and business interests will have little reason to support one another. This will derail the recent anti-immigrant juggernaut and allow reversal of the long-term effort to destabilize immigrant families.

A smarter, more humane immigration policy worthy of this country's history and values is much more achievable than many believe.