Seventeen Years Since the Sunset: The Expiration of 245(i) and Its Effect on U.S. Citizens Married to Undocumented Immigrants

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INTRODUCTION

One of the most pervasive myths of U.S. immigration law is that marriage to a U.S. citizen confers citizenship, or at least some form of legal status, upon a foreign national. It is an intuitive notion: that a U.S. citizen enjoys, as part of his or her package of privileges and protections, the right to live anywhere in the United States with a spouse of his or her choosing, and to confer automatically some form of legal status upon that spouse. It comes as a surprise and an affront to many U.S. citizens that their immigration laws do not always comport with this notion.

The fact is that no marriage-based adjustment of a foreign national's immigration status occurs automatically. A U.S. citizen who wishes to confer permanent immigration status upon his or her spouse must sponsor that spouse for lawful permanent residency.[1] If and when the petition is approved, the foreign national spouse must then apply for adjustment of status to lawful permanent residency (if in the United States)[2] or an immigrant visa (if outside the United States).[3] Only after a period of three years as a lawful permanent resident may the foreign national spouse then apply for naturalization.[4] While this process is contrary to the intuitive notion of automatic conferral of citizenship via marriage, it is nevertheless a relatively painless and straightforward process for many families.

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1 8 U.S.C. § 1154(a) (2012).

2 8 U.S.C. § 1255(a).

3 8 U.S.C. § 1181(a).

4 8 U.S.C. § 1430.

Significant problems arise, however, for families in which the foreign national spouse entered the United States without inspection. Under current immigration law, foreign nationals who entered the United States without inspection[5] are ineligible to apply for lawful permanent residency in the United States, irrespective of the existence of an approved petition submitted by a U.S. citizen spouse.[6] Such individuals must instead depart the United States and apply for an immigrant visa abroad. This is much more than an inconvenience involving travel and temporary separation from loved ones. Another immigration provision bars any foreign national who has been unlawfully present in the United States for one year or longer from reentering the United States for ten years upon his or her departure from the United States.[7] Only a waiver granted on account of "extreme hardship" to the U.S. citizen spouse can overcome the bar.[8]

The reentry bars were enacted in 1996 as part of the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA"),[9] a sweeping immigration bill that sought to curtail illegal immigration to the United States and to facilitate the removal of noncitizens who commit crimes and administrative violations. In addition to creating the reentry bars, IIRIRA authorized increased personnel, fencing, and surveillance equipment for the Border Patrol;[10] amended the definition of an "aggravated felony" to include more offenses that would subject a noncitizen to permanent deportation;[11] enhanced the process of "expedited removal" by which an immigration officer may order a person deemed inadmissible deported without a hearing or supervisory review;[12] restricted judicial review of several types of

5 *See* 8 U.S.C. § 1182(a)(6) (designating as ineligible for visas or admission to the United States "[a]n alien present in the United States without being admitted or paroled, or who arrives in the United States at any time or place other than as designated by the Attorney General").

6 *See* 8 U.S.C. § 1255(a) (limiting eligibility for adjustment of status to aliens who were "inspected and admitted or paroled into the United States").

7 8 U.S.C. § 1182(a)(9)(B)(i)(II).

8 8 U.S.C. § 1182(a)(9)(B)(v).

9 Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546 (codified as amended in scattered sections of 8 U.S.C. and 18 U.S.C.).

10 *Id.* §§ 101–103, 110 Stat. at 3009-553 to -555.

11 *Id.* § 321, 110 Stat. at 3009-627.

12 *Id.* § 302, 110 Stat. at 3009-579. The Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214, enacted earlier the same year, created the expedited removal process.

immigration court decisions;[13] and facilitated the increased detention of certain noncitizens.[14]

Within two years of IIRIRA's enactment, a temporary but crucial provision found at section 245(i) of the Immigration and Nationality Act expired.[15] Section 245(i) allowed undocumented immigrants who married U.S. citizens to adjust their status in the United States rather than have to depart the United States and apply for an immigrant visa abroad. When 245(i) expired on January 14, 1998, undocumented spouses of U.S. citizens for whom spousal petitions were filed after that date not only became ineligible to adjust their status in the United States, but also triggered a three- or ten-year bar on reentering the United States as soon as they departed the country in order to apply for an immigrant visa. Except for a brief reinstatement of 245(i) from December 21, 2000 to April 30, 2001,[16] undocumented immigrant spouses of U.S. citizens have had to seek a waiver of the three- and ten-year bars in order to receive an immigrant visa.

This Article examines the rationale behind and effects of IIRIRA with respect to the inadmissibility of undocumented spouses of U.S. citizens. Part I explains the current framework for spousal petitions and family-based immigration to the United States. Part II reviews the political and immigration landscape that gave rise to IIRIRA and the reentry bars. Part III details the combined effects of the reentry bars and the unavailability of 245(i) upon the current generation of U.S. citizens seeking to sponsor undocumented immigrant spouses. Part IV evaluates the effects of the unavailability of 245(i), taking into account the intended goals and the actual effects of the reentry bars, and concludes that the unavailability of 245(i) for persons subject to the reentry bars does not contribute to the objectives advanced in support of IIRIRA. The Article concludes that truly comprehensive immigration reform legislation must include a permanent reinstatement of 245(i) for immediate relatives of U.S. citizens.

I. THE ROCKY ROAD TO LAWFUL PERMANENT RESIDENT STATUS

Another popular myth about U.S. immigration law is that in order to obtain lawful permanent resident status, one must

13 Illegal Immigration Reform and Immigrant Responsibility Act § 306, 110 Stat. at 3009-607.

14 *Id.* §§ 303, 305, 110 Stat. at 3009-585, -597.

15 8 U.S.C. § 1255(i) (2012).

16 Legal Immigration Family Equity Act, Pub. L. No. 106-553, 114 Stat. 2762A-142 (2000).

simply apply and wait in line for one's turn to legalize. In reality, immigration law strictly limits the ability to apply for lawful permanent resident status to certain categories of individuals.[17] Only certain family members sponsored by U.S. citizens and lawful permanent residents,[18] certain employment-based immigrants,[19] or other narrow categories of intending immigrants[20] are eligible to apply for lawful permanent resident status. Most of those aspiring immigrants must wait for years in quota-related backlogs to be able to apply for lawful permanent resident status.[21]

One of the few categories of intending immigrants who qualify as "immediate relatives" not subject to a quota is the category of spouses of U.S. citizens.[22] Nevertheless, as noted above, a U.S. citizen's conferral of permanent lawful immigration status upon a foreign spouse is neither automatic nor guaranteed.[23] The citizen must sponsor the foreign spouse and the foreign spouse must subsequently apply for lawful permanent resident status. For foreign spouses who entered the United States legally, the process is expensive and can be cumbersome, but it is fairly straightforward. For foreign spouses who entered the United States without inspection, however, the process involves significantly more stress, time, and cost, and affects

17 *See* 8 U.S.C. § 1255(a) (stating that only applicants with approved and immediately available immigrant visas are eligible to apply for adjustment of status).

18 8 U.S.C. § 1153(a).

19 8 U.S.C. § 1153(b).

20 *See, e.g.*, 8 U.S.C. § 1153(c) (permitting the issuance of immigrant visas to diversity immigrants, beneficiaries of a program popularly known as the "visa lottery"); 8 U.S.C. § 1255(*l*) (authorizing the adjustment of status for victims of trafficking who were granted a visa under 8 U.S.C. § 1101(a)(15)(T)); 8 U.S.C. § 1159 (authorizing the adjustment of status of refugees and asylees).

21 *See* 8 U.S.C. § 1151(c)–(e) (specifying the number of individuals who may become lawful permanent residents each year pursuant to a relative petition, employment, and the diversity visa program). The statutory quotas have resulted in long wait times for some categories of immigrants. *See Immigrant Numbers for June 2014*, VISA BULL. (U.S. Dep't of State, Washington, D.C.), June 2014, at 2, *available at* http://travel.state.gov/content/visas/english/law-and-policy/bulletin/2014/visa-bulletin-for-june-2014.html (reporting that immigrant visas are currently available for adult unmarried sons and daughters of U.S. citizens whose petitions were filed on or before March 22, 2007 (seven-year delay); adult unmarried children of permanent residents whose petitions were filed on or before April 1, 2007 (seven-year delay); married sons and daughters whose petitions were filed on or before October 1, 2003 (eleven-year delay); and siblings of U.S. citizens whose petitions were filed on or before December 15, 2001 (thirteen-year delay)). The delays are significantly longer for nationals of Mexico and the Philippines. For example, immigrant visas are not available for Filipino siblings of U.S. citizens whose petitions were filed after November 15, 1990, a twenty-four-year delay. *Id.*

22 *See* 8 U.S.C. § 1151(b)(2)(A)(i) (classifying children, spouses, and parents of U.S. citizens as immediate relatives not subject to statutory numerical limitations).

23 It is also not free. *See* 8 C.F.R. § 103.7(b)(1)(i)(L) (2014) (stating that the filing fee for a spousal petition is $420); 8 C.F.R. § 103.7(b)(1)(i)(U)(1) (stating that the filing fee for an application to adjust status is $985 for applicants age fourteen or older).

careers and fundamental family matters such as having and raising children.

A. On the Same Path: Petitioning for the Alien Spouse

Regardless of the immigration status of the foreign spouse, conferring lawful immigration status upon that spouse begins with the U.S. citizen filing a "Petition for Alien Relative."[24] The petition must include evidence of the petitioner's U.S. citizenship, a marriage certificate, passport-style photos of the petitioner and beneficiary, proof of termination of any previous marriages,[25] and a $420 fee.[26] Unless the foreign spouse is in removal proceedings or has past immigration violations or criminal convictions,[27] this is a fairly simple process in which the U.S. citizen in effect requests that the U.S. government recognize his or her marriage to a foreign national and allow the foreign spouse to apply for lawful permanent resident status.[28] An approved petition provides the basis for applying for adjustment of status if the foreign spouse is eligible for adjustment.[29]

It is at this point that the road divides. Foreign spouses who entered legally may apply for adjustment of status, regardless of their current immigration status.[30] Foreign spouses who entered without inspection are ineligible for adjustment of status and must seek an immigrant visa through the consular processing system.

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24 8 C.F.R. § 204.1(a)(1).

25 8 C.F.R. § 204.2(a)(2).

26 8 C.F.R. § 103.7(b)(1)(i)(L).

27 *See* 8 U.S.C. § 1154(g) (prohibiting the approval of a marriage entered into while the foreign spouse was in removal proceedings, unless the foreign spouse resides outside the United States for two years after the date of marriage or proves that the marriage is bona fide); *see also* 8 U.S.C. § 1255(e)(3) (requiring that the foreign spouse who married while in removal proceedings prove that the marriage was entered into in good faith and not "for the purpose of procuring the alien's admission as an immigrant").

28 *See* 8 U.S.C. § 1151(b)(2)(A)(i) (classifying spouses of U.S. citizens as immediate relatives who are eligible to apply for adjustment of status upon approval of the spousal petition). The regulations governing the process state that "a petitioner . . . [or] a beneficiary . . . residing in the United States at the time of filing an [application or petition] may be required to appear for . . . an interview." 8 C.F.R. § 103.2(b)(9).

29 A petition will only be denied if the eligibility requirements are not proven or the marriage is deemed fraudulent. *See* 8 C.F.R. § 103.2(b)(1) (requiring that the petitioner establish eligibility at the time of filing the petition); 8 U.S.C. § 1154(c) (prohibiting the approval of spousal petitions in cases in which the foreign spouse "has attempted or conspired to enter into a marriage for the purpose of evading the immigration laws"). Sponsors and beneficiaries may also be required to attend an interview. 8 C.F.R. § 103.2(b)(9). A beneficiary married to his or her spouse for less than two years at the time that adjustment is granted is subject to conditional residency, and must seek to have the conditions removed before being granted unconditional lawful permanent residency. 8 U.S.C. § 1186a.

30 8 U.S.C. § 1255(a).

B. The Paths Diverge: Consular Processing and Bars to Admissibility

Immigration law requires that an adjustment applicant have entered the United States legally, but does not require that the applicant have maintained his or her lawful status. An applicant who has been sponsored by a U.S. citizen spouse is exempt from the provision that prohibits individuals who are in unlawful immigration status or who have worked without authorization from adjusting their status.[31] Moreover, although a foreign spouse outside the United States can be barred from reentry if he or she was ever unlawfully present in the United States, a foreign spouse who entered legally is eligible to adjust his or her status without ever leaving the United States.[32]

This is the point at which the situation becomes drastically different for a foreign spouse who entered the United States without inspection. Adjustment of status is only available to applicants who have been "inspected and admitted or paroled into the United States."[33] Thus, the only way for a foreign spouse who entered without inspection to obtain lawful permanent resident status pursuant to an approved petition by a U.S. citizen is to depart the United States and apply for an immigrant visa abroad through the consular processing system.

Consular processing involves more than the inconvenience and expense of traveling abroad to obtain an immigrant visa. When a noncitizen leaves the United States, she or he must apply for admission in order to reenter the United States, irrespective of family ties to U.S. citizens. A noncitizen who departs the United States thus becomes subject to various grounds of inadmissibility that can prevent her or him from returning to the United States. An undocumented immigrant who entered without inspection and lived in the United States as an adult for six months or longer is inadmissible for a period of three years;[34] an undocumented immigrant who entered without

31 *See* 8 U.S.C. § 1255(c) (rendering ineligible for adjustment of status an applicant who "continues in or accepts unauthorized employment prior to filing an application for adjustment of status or who is in unlawful immigration status on the date of filing the application for adjustment of status or who has failed . . . to maintain continuously a lawful status since entry into the United States," unless the applicant qualifies for adjustment as the spouse of a U.S. citizen or other specified category).

32 8 U.S.C. § 1255(a).

33 *Id.*

34 Immigration and Nationality Act of 1952 § 212(a)(9)(B)(i)(I), 8 U.S.C. § 1182(a)(9)(B)(i)(I).

inspection and lived in the United States for one year or longer is inadmissible for a period of ten years.[35]

In order for the undocumented immigrant to overcome the three- or ten-year bar on reentry, he or she must apply for a waiver.[36] Discussed more fully below, the waiver process is fraught with anxiety and uncertainty. A family that has already spent considerable time and money to complete the petitioning process with United States Citizenship and Immigration Services ("USCIS") must now pay an additional fee and contend with an additional branch of the U.S. government: the State Department. Failure to obtain a waiver could result in indefinite undocumented status at best, and prolonged separation at worst.

C. A Treacherous Route: The Waiver Process

Applicants seeking a waiver of the three- or ten-year bar must prove that the reentry bar will result in extreme hardship to the U.S. citizen spouse who sponsored him or her.[37] USCIS officers adjudicating waiver applications must consider the U.S. citizen's family ties or absence thereof in the country to which she or he would have to relocate, the conditions in the country of relocation, the financial impact of having to depart the United States, and the U.S. citizen's health and ability to receive adequate medical care in the country of relocation.[38] The statute does not permit consideration of extreme hardship to U.S. citizen children.[39]

Until March of 2013, the waiver could not be filed until the undocumented spouse departed the United States.[40] Thus, since the expiration of 245(i) in 1998, U.S. citizens whose spouses are seeking a waiver of the reentry bar have had to wait for the decision while their undocumented spouses reside outside the United States. Often, this results in a separation of many months and even years.[41] Only upon approval of the waiver is the previously undocumented spouse permitted to enter the United States as a lawful permanent resident. Moreover, there is no guarantee that the waiver will be granted; approval rates vary

35 Immigration and Nationality Act § 212(a)(9)(B)(i)(II), 8 U.S.C. § 1182(a)(9)(B)(i)(II).

36 Immigration and Nationality Act § 212(a)(9)(B)(v), 8 U.S.C. § 1182(a)(9)(B)(v).

37 Immigration and Nationality Act § 212(a)(9)(B)(v), 8 U.S.C. § 1182(a)(9)(B)(v).

38 Cervantes-Gonzales, 22 I. & N. Dec. 560 (B.I.A. 1999).

39 8 U.S.C. § 1182(a)(9)(B)(v).

40 Provisional Unlawful Presence Waivers of Inadmissibility for Certain Immediate Relatives, 78 Fed. Reg. 536, 536 (Jan. 3, 2013) (to be codified at 8 C.F.R. pt. 103 and 212).

41 *See id.*

dramatically among the various U.S. consulates.[42] The effect that this situation has had on numerous families is well documented.[43]

On March 4, 2013, USCIS implemented a new process called a "provisional waiver" for spouses and other immediate relatives of U.S. citizens whose only ground of inadmissibility is unlawful presence.[44] This process allows the relative to seek a waiver before leaving the United States to apply for his or her immigrant visa. If the waiver is granted, the undocumented spouse may then depart the United States and apply for admission as a lawful permanent resident.[45]

Although this process is a welcome change that considerably shortens the length of separation for families, it is not an adequate substitute for the permanent reinstatement of 245(i). If the undocumented spouse cannot prove extreme hardship, or if there are any other possible grounds of inadmissibility that apply to the undocumented spouse, the family has no recourse but to endure a lengthy separation or residence outside the United States while the undocumented spouse pursues a waiver through the regular process. Even if the waiver is granted provisionally, it is not a guarantee that the undocumented spouse will not be delayed abroad. Applying for an immigrant visa entails a number of complex and expensive steps, including obtaining a medical exam from a U.S. government-approved physician, which prolong the process and increase the chances of a lengthy separation.[46] Moreover, the applicant might have other grounds of

42 *See I-601 Waivers of Inadmissibility: Does the Current Process Work? When Is Hardship Extreme? Do Alternative Models Exist?*, U.S. DEPARTMENT HOMELAND SECURITY (June 29, 2012), http://www.dhs.gov/i-601-waivers-inadmissibility-does-current-process-work-when-hardship-extreme-do-alternative-models ("I-601 approval rates for FY 2011 international offices were 54% in the Bangkok District, 50% in the Rome District, and 84% in the Mexico District.").

43 *See* Cain W. Oulahan, *The American Dream Deferred: Family Separation and Immigrant Visa Adjudications at U.S. Consulates Abroad*, 94 MARQ. L. REV. 1351, 1354–55, 1370–71 (2011) (describing the impact that the reentry bars have had on mixed-status families); IMMIGRATION POLICY CTR., SO CLOSE AND YET SO FAR: HOW THE THREE- AND TEN-YEAR BARS KEEP FAMILIES APART 3 (2011), *available at* http://www.immigrationpolicy.org/sites/default/files/docs/3_and_10_year_bars_072511.pdf (noting that the vast majority of applicants seeking waivers do so at the U.S. consulate in Ciudad Juarez, Mexico, where violent crime is so rampant that the U.S. Department of State has issued a travel advisory warning against travel there).

44 Provisional Unlawful Presence Waivers of Inadmissibility, 78 Fed. Reg. at 536.

45 *See id.*

46 *See* IMMIGRATION POLICY CTR., *supra* note 43 ("An applicant must first meet with a consular officer from the Department of State (DOS), be told that a waiver is required, wait for the case to be referred, obtain and wait for the appointment with USCIS, wait for the adjudication, and then get a new appointment with DOS if the adjudication is granted. Current wait times for the initial appointment with USCIS are 2 to 3 months, meaning that even under the best of circumstances, an applicant will have to be outside the U.S. for at least 3 months.").

inadmissibility of which she or he was not previously aware, and which trigger the reentry bars, effectively negating the provisional waiver.[47]

From a purely philosophical perspective, it would seem that the law should give more weight and respect to the fundamental life choices of the U.S. citizen than to the manner of entry of the foreign spouse. And yet, the opposite is true: the law places enormous stress and burdens on U.S. citizens married to undocumented immigrants and on the U.S. citizen children of those unions. The next section explains why the law became focused on the foreign spouse's manner of entry at the expense of respect for U.S. citizens, family unity, and fundamental life choices.

II. ILLEGAL IMMIGRATION REFORM AND IMMIGRANT RESPONSIBILITY ACT OF 1996

The 1970s and 1980s saw a significant increase in unauthorized immigration to the United States. Approximately 540,000 undocumented immigrants arrived in the 1960s,[48] presumably to fill labor shortages that persisted after a guest-worker program known as the Bracero Program ended in 1964.[49] That number increased to 941,000 illegal entries between 1975 and 1980.[50] By 1980, the undocumented population exceeded 2 million.[51]

Throughout this period of increasing unauthorized immigration, Congress passed laws attempting to address and control it.[52] Nevertheless, the 1990s saw a significant and rapid increase in unauthorized immigration. By 1992, the United

47 *See* 8 U.S.C. § 1182 (2012) (enumerating the various grounds of inadmissibility).

48 Robert Warren & Jeffrey S. Passel, *A Count of the Uncountable: Estimates of Undocumented Aliens Counted in the 1980 United States Census*, 24 DEMOGRAPHY 375, 380 tbl.2 (1987).

49 The Bracero Program was a temporary guest-worker program in place from 1942 to 1964 intended to fill agricultural labor shortages resulting from World War II. For a thorough description of the program and its effects on future Mexican immigration to the United States, see generally RONALD L. MIZE & ALICIA C.S. SWORDS, CONSUMING MEXICAN LABOR: FROM THE BRACERO PROGRAM TO NAFTA (2011).

50 Warren & Passel, *supra* note 48.

51 *Id.*

52 *See, e.g.*, Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (codified as amended in scattered sections of 8 U.S.C.) (increasing the number of border patrol personnel, imposing sanctions on employers hiring immigrants unauthorized to work in the United States, and creating legalization programs for undocumented immigrants who meet certain requirements); Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (codified as amended in scattered sections of 8 U.S.C. and 28 U.S.C.) (increasing legal admissions, particularly for employment-based immigrants and temporary workers; expanding the definition of "aggravated felony"; and eliminating judicial sentencing recommendations against deportation).

States was home to an estimated 3.4 million undocumented immigrants; the undocumented population reached 5 million by 1996.[53] In response to what were perceived as failed laws and policies, and increasing hostility towards undocumented immigrants at the state level, Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act of 1996.

A. Immigration Landscape in 1996

As unauthorized immigration to the United States increased in the 1990s, hostility towards undocumented immigrants rose proportionally. Although discrimination against and fear of immigrants had long been a reality in the United States, the phenomenon of illegal immigration endowed anti-immigrant sentiment with a new purpose and sense of righteousness. According to immigration restrictionists, anti-immigrant sentiment was not race- or national origin-based discrimination; it was a logical response to unlawful actions that were having a significant economic impact on states and localities.[54]

California's Proposition 187 is emblematic of the state and local response to unprecedented levels of unauthorized immigration to the United States. Proposition 187, a 1994 ballot initiative nicknamed "Save Our State," received the support of fifty-nine percent of California voters.[55] Its major provisions included denying public education to undocumented children from kindergarten through university, requiring public schools to verify the legal status of students and their parents, denying publicly funded non-emergency medical care to undocumented immigrants (including prenatal care and long-term nursing care, which were among the first services that then Governor Pete

53 OFFICE OF POLICY & STRATEGY, U.S. CITIZENSHIP & IMMIGRATION SERV., THE TRIENNIAL COMPREHENSIVE REPORT ON IMMIGRATION 39 (1997), *available at* http://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/tri3fullreport.pdf.

54 *See Quotes from Contemporary Public Officials*, FED'N FOR AM. IMMIGR. REFORM, http://www.fairus.org/facts/contemporary-public-officials (last visited Sept. 26, 2014) (February 1994 statement of Los Angeles County Supervisor Michael D. Antonovich) ("The question taxpayers keep asking is 'why should we pay for services for those who have broken the law to get here?' They should not, nor should they be forced to be the Health Maintenance Organization (HMO) and School District of the world. This is evidenced in every poll I have seen indicating that every ethnic group is opposed to illegal immigration and supports enforcement of the law."); *id.* (May 6, 1995 statement of President Bill Clinton in weekly radio address) ("[Illegal immigration] costs the taxpayers of the United States a lot of money. And it's unfair to Americans who are working every day to pay their own bills. It's also unfair to a lot of people who have waited in line for years and years in other countries to be legal immigrants.").

55 *Prop. 187 Approved in California*, MIGRATION NEWS (Univ. Cal. Davis, Davis, Cal.), Dec. 1994, *available at* https://migration.ucdavis.edu/mn/more.php?id=492_0_2_0.

Wilson ordered denied to undocumented immigrants),[56] and requiring state service providers to report suspected undocumented immigrants to the police and federal immigration authorities.[57] Referring to the initiative as "the first giant stride in ultimately ending the ILLEGAL ALIEN invasion," proponents saw the measure as a means to counteract the alleged "magnets" for unauthorized immigration: "[w]elfare, medical and educational benefits."[58]

In California and around the country, proponents of restrictive state measures targeting undocumented immigrants cited fiscal concerns, federal inaction, and sovereignty. Proposition 187 supporters, Pat Buchanan, and others decried the "alien invasion" of undocumented immigrants.[59] Pete Wilson, Newt Gingrich, and other federal and state lawmakers criticized the federal government for creating the situation that led to high rates of unauthorized immigration, failing to rectify it, and refusing to compensate states for the cost of dealing with it.[60]

The Clinton Administration responded with a flurry of actions designed to show that it was "tough on illegal immigration." Attorney General Janet Reno oversaw the implementation of Operation Gatekeeper, which increased border security and overhauled border enforcement strategies,[61] and ultimately had the effect of increasing unauthorized immigration

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56 *Id.*

57 California Proposition 187: Illegal Aliens. Ineligibility for Public Services. Verification and Reporting 51, 92 (1994), *available at* http://repository.uchastings.edu/ca_ballot_props/1104.

58 *Id.* at 54; *see also id.* ("The federal government and the state government have been derelict in their duty to control our borders. It is the role of our government to end the benefits that draw people from around the world who ILLEGALLY enter our country. Our government actually entices them.").

59 *See, e.g.*, Arthur Brice, *Immigration: One Candidate Grabs Issue: Buchanan Fears Dark Tide to Sink U.S.,* ATLANTA J. & CONST., Mar. 6, 1992, at B1 (quoting Pat Buchanan) ("Does this First World nation wish to become a Third World country? Because that is our destiny, if we do not build a sea wall against the waves of immigration rolling over our shores.").

60 *See, e.g.*, 104 CONG. REC. 24,817 (1996) (statement of Rep. Newt Gingrich) ("[H]ow can any Member [of Congress] walk on this floor, deny the citizens of California the right to implement proposition 187, without expecting California to come right back here and ask for $3 billion from the Federal Government annually to pay California for the cost of a Federal failure?"); Greg Krikorian & Dave Lesher, *Huffington Declares Support for Prop. 187*, L.A. TIMES, Oct. 21, 1994, at A1 (quoting Republican Senate candidate Mike Huffington) ("It's time to send a message to those illegal immigrants who disregard our laws and take advantage of our government's misplaced generosity. Equally important, it is high time we send a message to Washington. The taxpayers of California are sick and tired of paying for Washington's federally imposed mandates while Washington ignores their federal responsibility at the border.").

61 U.S. DEP'T OF JUSTICE & OFFICE OF THE INSPECTOR GEN., OPERATION GATEKEEPER: AN INVESTIGATION INTO ALLEGATIONS OF FRAUD AND MISCONDUCT (1998), *available at* http://www.justice.gov/oig/special/9807/gkp01.htm#P203_31548.

as well as increasing its attendant deaths and injuries.[62] Attorney General Reno also created the position of "border czar," appointing U.S. Attorney Alan Bersin to the post in October 1995.[63] Finally, President Clinton signed into law the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, which contained a number of restrictive immigration provisions, including the three- and ten-year reentry bars currently in place.[64] The legislation came into effect just as section 245(i) was about to expire.

B. The Rise of the Reentry Bars and the Sunsetting of 245(i)

Congress had passed 245(i) as a temporary measure in 1994.[65] According to the Senate Appropriations Committee, requiring undocumented immigrants to go abroad in order to obtain an immigrant visa "was originally designed to dissuade aliens from circumventing normal visa requirements, [but] has not provided the intended deterrent effect and merely creates consular workload overseas."[66] Persons seeking to adjust under 245(i) had to pay the "normal fee for adjustment of status, plus an additional fee"[67] that was originally $650 and was later increased to $1000 under IIRIRA.[68] Section 245(i) was set to expire in October 1997, but in November 1997 Congress extended

62 *See* Bill Ong Hing, *NAFTA, Globalization, and Mexican Migrants*, 5 J.L. ECON. & POL'Y 87, 131–32 (2009) ("Operation Gatekeeper has not stopped the flow of border crossers, but it has made crossing more dangerous. Gatekeeper and the increased militarizing of the border have ironically curtailed one thing: circularity. Mexican seasonal workers commonly traveled back and forth across the border because their families often remained in Mexico. But now the number of undocumented migrants who actually want to return to Mexico has been reduced. Given the difficulty in crossing into the United States, once many undocumented persons arrive, they remain to work and may even look for family members to join them. This has contributed to the increase in the undocumented population in the United States."); *see also* MARIA JIMENEZ, ACLU OF SAN DIEGO & IMPERIAL CNTYS. & MEXICO'S NAT'L COMM'N OF HUMAN RIGHTS, HUMANITARIAN CRISIS: MIGRANT DEATHS AT THE U.S.-MEXICO BORDER 17 (2009) (reporting a low incidence of border-crossing deaths in 1994 (estimates vary from 0 to 23) and a steady increase after the implementation of Operation Gatekeeper (estimates vary from 329 to 827 in specific fiscal years)); U.S. BORDER PATROL, SOUTHWEST BORDER DEATHS BY FISCAL YEAR, *available at* http://www.cbp.gov/sites/default/files/documents/U.S.%20Border%20Patrol%20Fiscal%20Year%20Statistics%20SWB%20Sector%20Deaths%20FY1998%20-%20FY2013.pdf (demonstrating an increase in border deaths from 263 in 1998 to 445 in 2013—down only slightly from 477 in 2012).

63 Sebastian Rotella, *Reno Names Prosecutor as "Border Czar"*, L.A. TIMES, Oct. 14, 1995, at A1.

64 Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546 (codified as amended in scattered sections of 8 U.S.C. and 18 U.S.C.).

65 ANDORRA BRUNO, CONG. RESEARCH SERV., RL31373, IMMIGRATION: ADJUSTMENT TO PERMANENT RESIDENT STATUS UNDER SECTION 245(i), at 1 (2002).

66 S. REP. NO. 103-309, at 134 (1994).

67 *Id.*

68 BRUNO, *supra* note 65, at 3–4.

the deadline to January 14, 1998.[69] Notably, the Senate version of the legislation that extended the deadline included a permanent reinstatement of 245(i).[70]

The enactment of 245(i) and, likely, its temporary duration, led to a significant increase in applications for adjustment of status. Prior to 1995, the government typically had approximately 120,000 pending applications for adjustment of status.[71] By 1995, that number had jumped to 321,000.[72] By the end of 1997, when 245(i) was close to expiring, the government had 699,000 pending applications for adjustment of status.[73] Although the government does not report how many of those applications were the result of approved spousal petitions by U.S. citizens for undocumented spouses, the government attributes the increase to 245(i).[74]

The enactment of the three- and ten-year reentry bars in 1996 brought a new level of significance to the imminent expiration of 245(i). Prior to the enactment of 245(i), undocumented immigrant spouses of U.S. citizens merely faced the inconvenience of consular processing; now they would face a three- or ten-year bar to reentry as well. The expiration of 245(i) meant that undocumented immigrants whose U.S. citizen spouses submitted petitions for them after January 14, 1998 would be ineligible for adjustment of status and would need to apply for an immigrant visa abroad and petition for a waiver of the three- or ten-year bar. Not surprisingly, 1998 and 1999 saw a decrease in the number of applications for lawful permanent residence.[75]

The numbers of applications filed increased again in 2001 when 245(i) was briefly reinstated as part of the Legal Immigration Family Equity Act of 2000.[76] The number of applications approved in 2001 was 653,259,[77] up from 442,405 in

69 Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1998, Pub. L. No. 105-119, sec. 111 (a)–(b), §§ 245(i)(1), 506(c), 11 Stat. 2440, 2458 (1997) (codified as amended at 8 U.S.C. §§ 1255, 1182 (2012)).

70 BRUNO, *supra* note 65, at 4.

71 IMMIGRATION & NATURALIZATION SERV., U.S. DEP'T OF JUSTICE, 1997 STATISTICAL YEARBOOK OF THE IMMIGRATION AND NATURALIZATION SERVICE 17 (1999).

72 *Id.*

73 *Id.*

74 *Id.*

75 IMMIGRATION & NATURALIZATION SERV., U.S. DEP'T OF JUSTICE, 1999 STATISTICAL YEARBOOK OF THE IMMIGRATION AND NATURALIZATION SERVICE 15 (2002).

76 Legal Immigration Family Equity Act, Pub. L. No. 106-553, 114 Stat. 2762A-142 (2000); LIFE Act Amendments of 2000, Pub. L. No. 106-554, 114 Stat. 2763A-324.

77 IMMIGRATION AND NATURALIZATION SERV., U.S. DEP'T OF JUSTICE, 2001 STATISTICAL YEARBOOK OF THE IMMIGRATION AND NATURALIZATION SERVICE 13 (2003).

2000.[78] Although, as noted above, the government does not report the underlying bases for the adjustment applications, a 2004 memo from the Associate Director of USCIS Operations provides USCIS personnel with guidance on dealing with "the significant increase in [petition] filings at Service Centers immediately preceding the April 30, 2001 sunset date contained in Section 245(i)."[79]

One might safely assume, given the increase in petitions and applications for adjustment of status during periods when 245(i) was in effect, that many families co-headed by an undocumented immigrant spouse declined to pursue the legalization of the undocumented spouse when doing so would place the spouse in danger of being denied entry to the United States for many years. In fact, the number of families seeking provisional waivers since that option became available in March of 2013 gives some indication of how many U.S. families have been affected by the absence of 245(i): in the first seven months of the program, USCIS received nearly 24,000 applications for provisional waivers.[80]

The next section will discuss whether IIRIRA's reentry bars have served their intended purpose.

III. NINETEEN YEARS AFTER IIRIRA: TODAY'S IMMIGRATION LANDSCAPE

A number of facts indicate that IIRIRA has failed to achieve its primary goal of reducing unauthorized immigration to the United States and that the reentry bars serve only to make legalization more onerous for arguably some of the most deserving of undocumented immigrants: those married to U.S. citizens. First, the number of undocumented immigrants present in the United States has increased significantly since 1996, a response to economic factors that exist completely independently of any domestic immigration legislation. Second, states and localities are so dissatisfied with immigration law and enforcement that the United States has seen a resurgence of state attempts to punish or protect undocumented immigrants, depending on the culture and politics of the particular state. Finally, the United States is now home to an estimated

78 IMMIGRATION & NATURALIZATION SERV., U.S. DEP'T OF JUSTICE, 2000 STATISTICAL YEARBOOK OF THE IMMIGRATION AND NATURALIZATION SERVICE 14 (2002).

79 Interoffice Memorandum from Michael R. Yates, Assoc. Dir., USCIS Operations, to USCIS Reg'l Dirs. et al. (Apr. 22, 2004) (on file with the *Chapman Law Review*), *available at* http://www.avlawoffice.com/YatesMemoPendingI130.htm.

80 U.S. CITIZENSHIP & IMMIGRATION SERVS., QUESTIONS AND ANSWERS: USCIS MEETING WITH THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION (AILA) 3 (2013).

1.7 million undocumented immigrant children and young adults who did not enter the United States of their own volition but because their parents brought them;[81] it would seem that the deterrent effect of IIRIRA's reentry bars have been particularly ineffective with respect to that group of undocumented immigrants.

A. The Fluctuating Rate of Illegal Immigration to the United States

IIRIRA was predicated on the theory that undocumented immigrants respond to deterrence and punitive measures, and that generous immigration provisions serve only to encourage unauthorized immigration. What was true in 1996, however, remains true today: economics is the principle driving force behind migration. Consequently, the rate of illegal immigration to the United States has continued to respond to economic factors rather than laws. As economist Gordon Hanson has stated:

> Inflows of illegal immigrants tend to be highly sensitive to economic conditions, with inflows rising during periods when the U.S. economy is expanding and Mexico's is contracting. Examining month-to-month changes in apprehensions of illegal immigrants attempting to cross the U.S.-Mexico border reveals that when Mexican wages fall by 10 percent relative to U.S. wages, attempts at illegal entry increase by 6 percent. The responsiveness of illegal immigration to economic conditions is to be expected. These individuals come to the United States seeking work and their incentive to do so is strongest when the difference in job prospects on the two sides of the border is greatest. The illegal immigrant population is also quite mobile geographically within the United States. During the 1990s, U.S. job growth was strongest in mountain states and the southeast. These states also registered the largest percentage increases in the number of illegal immigrants.[82]

Other prominent law and economics scholars concur that economics, more than any other factor, drives immigration. The research of Dean Kevin Johnson, Professor Bill Ong Hing, and others[83] conclusively demonstrates that "immigrants, generally

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81 JEFFREY S. PASSEL & MARK HUGO LOPEZ, PEW HISPANIC CTR., UP TO 1.7 MILLION UNAUTHORIZED IMMIGRANT YOUTH MAY BENEFIT FROM NEW DEPORTATION RULES 3 (2012).

82 GORDON H. HANSON, THE ECONOMIC LOGIC OF ILLEGAL IMMIGRATION 12 (Council on Foreign Relations, Council Special Report No. 26, 2007).

83 *See generally* Donald J. Boudreaux, *Some Basic Economics of Immigration*, 5 J.L. ECON. & POL'Y 199, 199–200 (2009); Hing, *supra* note 62 (examining the laws and economic factors on both sides of the Mexico/U.S. border that influence migration); Kevin R. Johnson, *It's the Economy, Stupid: The Hijacking of the Debate Over Immigration Reform by Monsters, Ghosts, and Goblins (or the War on Drugs, War on Terror, Narcoterrorists, Etc.)*, 13 CHAP. L. REV. 583, 587 (2010) ("[M]ost immigration is connected,

speaking, historically have been attracted by the economic opportunities that exist in this country."[84] More than that, however, economics on both sides of the border—often created by economic policies that benefit the United States and harm its neighbors[85]—are tremendous push and pull factors that create high demand for unauthorized migration.[86]

Perhaps it is not surprising, then, that an immigration law regime focused on individual migrants rather than the economic conditions that drive migration has proven ineffective. The dissatisfaction with current immigration law is at its most intense in states and localities critical of federal efforts. The next section discusses state attempts to correct perceived flaws with federal immigration law and enforcement.

B. States' Frustration with the Lack of Effective Immigration Laws

States and localities quickly became aware that IIRIRA, despite its sweeping provisions, was not living up to its potential. Some believe that the legislation itself is sufficient, but that the government is not effectively enforcing it; those states have

directly or indirectly, to labor migration of individuals and families and the relative economic opportunity in the United States."); Douglas S. Massey et al., *An Evaluation of International Migration Theory: The North American Case*, 20 POPULATION & DEV. REV. 699, 710 (1994) (reviewing numerous migration studies and concluding that "the accumulated empirical evidence generally supports neoclassical theory's fundamental proposition that immigration is tied to international differences in wage rates").

84 Johnson, *supra* note 83, at 601.

85 *See* Hing, *supra* note 62, at 98–99 (explaining how the failure of NAFTA and the proliferation of U.S. farm subsidies have increased poverty rates in Mexico); *id.* ("For years, Mexico provided support to rural areas through systems of price supports for producers and reduced prices of agricultural products for consumers, but after NAFTA, Mexico withdrew this support. The United States, however, continued to produce subsidized corn in huge quantities at low prices, undercutting Mexico's corn prices; this subsidized system displaced Mexican workers because corn was a major source of rural income. At best, the effects of NAFTA in Mexico have been uneven, especially in rural areas and among low-skilled groups that tend to migrate to the United States. The wages for low-wage workers have declined, and the rural poverty rate has increased. The idea of NAFTA-created jobs that would reduce pressure to migrate simply has not become a reality.").

86 *See* Douglas S. Massey, *Five Myths About Immigration: Common Misconceptions Underlying U.S. Border-Enforcement Policy*, IMMIGR. POL'Y FOCUS, Aug. 2005, at 1, 5–7 ("[H]ouseholds use international migration as a tool to overcome failed or missing markets at home. Mexico, in particular, lacks well-developed markets for insurance, capital, and credit . . . . Mexico has virtually no mortgage banking industry."); *see also Hearing Before the Subcomm. on Immigration and Claims of the H. Comm. on the Judiciary*, 104th Cong. 2 (1995) (statement of Barbara Jordan, Chair, U.S. Comm. on Immigration Reform) ("[W]e must face the fact that unilateral action on the part of the United States will never be enough to curb illegal immigration. Immigrants come here illegally from source countries where conditions prevail that encourage or even compel them to leave. Attacking the root causes of illegal migration is essential and will require international cooperation.").

enacted laws that attempt to augment or effectuate the enforcement provisions of IIRIRA. Others find the current laws to be unreasonably and counterproductively harsh towards undocumented immigrants and seek to assure undocumented immigrants that they will enjoy some protections and benefits in those states. The National Conference of State Legislatures reports that since 2007, an average of 1300 state immigration-related bills are introduced per year and an average of 200 are enacted.[87] Both types of state laws send a similar message to the federal government: current immigration laws are not working.

1. The Restrictive Model

States seeking to fill a perceived federal inability to reduce unauthorized immigration to the United States have passed laws similar to California's Proposition 187 and other measures popular in the 1990s. Provisions include barring undocumented immigrants from eligibility for in-state tuition at public colleges and universities;[88] enforcing federal restrictions on the employment of undocumented immigrants;[89] requiring law

87 ANN MORSE ET AL., NAT'L CONFERENCE OF STATE LEGISLATURES, 2013 IMMIGRATION REPORT 2 (2013).

88 *See, e.g.*, S. Con. Res. 1031, 47th Leg., 2d Reg. Sess., 2007 Ariz. Sess. Laws 1567, 1569 (prohibiting in-state tuition for undocumented students); S.B. 492, 149th Gen. Assemb., Reg. Sess., 2008 Ga. Laws 759, 761 (same); H.B. 1402, 117th Gen. Assemb., 1st Reg. Sess., 2011 Ind. Acts 2790, 2790 (same); H.B. 153, 129th Gen. Assemb., Reg. Sess., 2011 Ohio Laws 1436, 1438 (same); H.B. 4400, 117th Gen. Assemb., Reg. Sess., 2008 S.C. Acts 2325, 2354 (prohibiting undocumented students from attending public institutions of higher learning and from receiving in-state tuition).

89 *See, e.g.*, H.B. 56, 2011 Leg., Reg. Sess., 2011 Ala. Acts 888, 910–11 (requiring employers to comply with E-Verify, a federal system for ascertaining employment authorization); H.B. 2779, 48th Leg., 1st Reg. Sess., 2007 Ariz. Sess. Laws 1312, 1313 (prohibiting employers from employing immigrants unauthorized to work in the United States); H.B. 1343, 65th Gen. Assemb., 2d Reg. Sess., 2006 Colo. Sess. Laws 1694, 1695 (prohibiting state agencies from entering into contract agreements with contractors who knowingly employ unauthorized immigrants); Fla. Exec. Order No. 11-116 (May 27, 2011) (requiring state agencies as well as contractors and subcontractors who have contracts "for the provision of goods or services to the state in excess of nominal value" to use E-Verify); H.B. 2, 150th Gen. Assemb., Reg. Sess., 2009 Ga. Laws 970, 971 (requiring public employers to use E-Verify); H.B. 87, 151st Gen. Assemb., Reg. Sess., 2011 Ga. Laws 794, 808 (requiring certain private employers to use E-Verify); Idaho Exec. Order No. 2009-10 (May 29, 2009) (requiring companies with state contracts to verify the employment authorization of their workers); S.B. 590, 117th Gen. Assemb., 1st Reg. Sess., 2011 Ind. Acts 1926, 1959–62 (requiring state agencies, political subdivisions, contractors with public contracts, and certain business entities to use E-Verify); H.B. 646, 2011 Leg., Reg. Sess., 2011 La. Acts 2046, 2046–47 (requiring all private businesses to use E-Verify or maintain records of proof of eligibility to work in the United States); H.B. 5365, 96th Leg., Reg. Sess. (Mich. 2012) (requiring contractors and subcontractors working on certain state transportation projects to use E-Verify); S.B. 2988, 2008 Leg., Reg. Sess., 2008 Miss. Laws 386, 387 (requiring public and private employers to use E-Verify); H.B. 1549, 94th Gen. Assemb., 2d Reg. Sess., 2008 Mo. Laws 291, 296–97 (requiring public agencies, contractors, and subcontractors to use E-Verify); L.B. 403, 101st Leg., 1st Sess., 2009 Neb.

enforcement officers to attempt to ascertain the immigration status of individuals involved in a lawful stop;[90] penalizing the harboring and transporting of undocumented immigrants, without exceptions for mixed-status family members who live and travel together;[91] and imposing penalties on employers who hire undocumented immigrants and property owners who rent to them.[92]

The National Conference of State Legislatures reports that, presumably in response to the negative reception punitive

Laws 788, 789 (requiring all public employers and contractors to use E-Verify); H.B. 36, 2011 Gen. Assemb., Reg. Sess., 2011 N.C. Sess. Laws 975, 976–78 (requiring private employers to use E-Verify and requiring public employers to comply with federal employment authorization verification requirements); H.B. 1804, 51st Leg., 1st Reg. Sess., 2007 Okla. Sess. Laws 545, 549 (requiring public employers, contractors, and subcontractors to use E-Verify); S.B. 637, 2012 Gen. Assemb., Reg. Sess., 2012 Pa. Laws 1086, 1086 (requiring public contractors and subcontractors to use E-Verify); H.B. 4400, 117th Gen. Assemb., Reg. Sess., 2008 S.C. Acts 2325, 2331–34 (requiring public and certain private employers to use E-Verify); H.B. 1378, 107th Gen. Assemb., Reg. Sess. (Tenn. 2011) (requiring employers to use E-Verify); S.B. 81, 57th Leg., Gen. Sess., 2008 Utah Laws 746, 750–51 (requiring public employers to use E-Verify); S.B. 251, 58th Leg., Gen. Sess., 2010 Utah Laws 2733, 2733–34 (requiring private employers to use E-Verify); H.B. 737, 2010 Gen. Assemb., Reg. Sess., 2010 Va. Acts 1144, 1144 (requiring state agencies to use E-Verify); S.B. 659, 80th Leg., Reg. Sess. (W. Va. 2012) (requiring use of E-Verify for new employees working on the premises of the Capitol Complex).

90 *See, e.g.*, ARIZ. REV. STAT. ANN. § 11-1051(B) (2014) (West) (requiring law enforcement officers making a lawful stop, detention, or arrest to make a reasonable attempt to determine the immigration status of the person if reasonable suspicion exists that the person is unlawfully present in the United States); GA. CODE ANN. § 17-5-100(b) (2014) (requiring law enforcement officers investigating a criminal suspect to seek to verify the suspect's immigration status if the suspect is unable to provide proof of lawful status); S.C. CODE ANN. § 17-13-170(A) (2013) (requiring law enforcement officers making a lawful stop, detention, or arrest to make a reasonable attempt to determine the immigration status of the person if reasonable suspicion exists that the person is unlawfully present in the United States).

91 *See, e.g.*, OKLA. STAT. tit. 21, § 446(A)–(B) (2014) (making it a criminal offense "for any person to transport, move, or attempt to transport in the State of Oklahoma any alien knowing or in reckless disregard of the fact that the alien has come to, entered, or remained in the United States in violation of law," or to "conceal, harbor, or shelter from detection any alien in any place within the State of Oklahoma, including any building or means of transportation, knowing or in reckless disregard of the fact that the alien has come to, entered, or remained in the United States in violation of law"); GA. CODE ANN. §§ 16-11-200, -201 (2014) (subjecting to criminal penalties a person who "knowingly and intentionally transports or moves an illegal alien in a motor vehicle for the purpose of furthering the illegal presence of the alien," or who "knowingly conceals, harbors, or shields an illegal alien from detection in any place in [Georgia], including any building or means of transportation, when such person knows that the person being concealed, harbored, or shielded is an illegal alien").

92 *See, e.g.*, Act of June 9, 2011, No. 535, § 13(a)(4), 2011 Ala. Acts 888, 907 (repealed 2012) (criminalizing the renting of dwelling units to unlawfully present immigrants); Hazleton, Pa., Ordinance 2006–10 § 5(A) (July 13, 2006) (criminalizing entering into rental agreements with unlawfully present immigrants), *invalidated by* Lozano v. City of Hazleton, 724 F.3d 297 (3d. Cir. 2013); Farmers Branch, Tex., Ordinance 2903 § 3(B)(f) (Jan. 22, 2007) (criminalizing entering into rental agreements with unlawfully present immigrants), *invalidated by* Villas at Parkside v. City of Farmers Branch, 701 F. Supp. 2d 835 (N.D. Tex. 2010), *aff'd*, 726 F.3d 524 (5th Cir. 2013) (en banc).

legislation has had in the federal courts,[93] coupled with the implementation of the executive program known as Deferred Action for Childhood Arrivals,[94] state immigration legislation since 2012 has shifted its focus away from enforcement and towards protections and benefits for undocumented immigrants.[95]

2. The Humanitarian Model

In direct contrast to the states that have passed the measures discussed above, other states have passed laws extending benefits to undocumented immigrants and protecting them from certain forms of immigration enforcement. Provisions include authorizing in-state tuition for undocumented immigrants;[96] extending eligibility for driver's licenses to undocumented immigrants;[97] allowing undocumented immigrants to practice law;[98] and prohibiting state law enforcement officers from engaging in certain enforcement

93 *See, e.g.*, Arizona v. United States, 132 S. Ct. 2492, 2503–07 (2012) (upholding the invalidation of key provisions of S.B. 1040, including section 5(C), which criminalized unlawful presence, and section 6, which authorized the warrantless arrest of lawfully present noncitizens where probable cause existed that they had committed a deportable offense).

94 *See* Memorandum from Janet Napolitano, Sec'y, U.S. Dep't of Homeland Sec., to David V. Aguilar, Acting Comm'r, U.S. Customs & Border Prot., Alejandro Mayorkas, Dir., U.S. Citizenship & Immigration Servs., and John Morton, Dir., U.S. Immigration & Customs Enforcement (June 15, 2012) [hereinafter Janet Napolitano Memo], *available at* http://www.ice.gov/doclib/about/offices/ero/pdf/s1-certain-young-people.pdf (instituting Deferred Action for Childhood Arrivals).

95 MORSE ET AL., *supra* note 87, at 1.

96 *See Table One: State Laws Allowing Undocumented College Students to Establish Residency, 2014*, U. HOUS. L. CENTER, http://www.law.uh.edu/ihelg/documents/Statute-TableOne.html (last visited Sept. 24, 2014) (reporting that the following states currently allow undocumented immigrants to pay in-state tuition: Texas, California, Utah, New York, Washington, Illinois, Kansas, New Mexico, Nebraska, Maryland, Connecticut, Rhode Island, Oregon, Colorado, Hawaii, Minnesota, New Jersey, and Florida).

97 *See* TANYA BRODER ET AL., NAT'L IMMIGRATION LAW CTR., INCLUSIVE POLICIES ADVANCE DRAMATICALLY IN THE STATES: IMMIGRANTS' ACCESS TO DRIVER'S LICENSES, HIGHER EDUCATION, WORKERS' RIGHTS, AND COMMUNITY POLICING 4 map (2013), *available at* http://www.nilc.org/document.html?id=963 (reporting that Washington, Oregon, California, Nevada, Utah, Colorado, New Mexico, Illinois, Vermont, Connecticut, Maryland, the District of Columbia, and Puerto Rico provide access to driver's licenses regardless of immigration status, and that Kansas, Minnesota, Iowa, Indiana, Wisconsin, Kentucky, Florida, Pennsylvania, New York, Massachusetts, New Jersey, and Rhode Island are considering doing so).

98 *See* CAL. BUS. & PROF. CODE § 6064 (West 2014) (authorizing bar admission for unlawfully present immigrants in California); FLA. STAT. § 454.021 (2014) (authorizing bar admission for undocumented immigrants in Florida who meet certain requirements); S.B. 7879, 237th Leg., Reg. Sess. (N.Y. 2014) (proposing that undocumented immigrants be admitted to law practice in New York); *see also* Wendi Adelson, *Lawfully Present Lawyers*, 18 CHAP. L. REV. 387 (2015) (explaining the federal prohibition on issuing professional licenses to undocumented immigrants absent specific authorization by state law, and discussing the effect of Deferred Action for Childhood Arrivals on undocumented DACA-eligible law school graduates).

activities, such as detaining immigrants arrested for minor crimes beyond the time at which they become eligible for release in order to turn them over to federal immigration authorities.[99]

States that have adopted the humanitarian model recognize that punitive measures targeting undocumented immigrants will have little, if any, effect on the rate of unauthorized immigration. In fact, nearly two million of today's undocumented immigrants are children and young adults who never had a choice about coming to the United States.[100] They arrived with their families as children, grew up here, attended school here, and know no other life.[101] The reentry bars and absence of 245(i) are particularly punitive and ineffective with respect to that group of undocumented immigrants.

C. A Generation of DREAMers

One important difference between the undocumented population in 1996 and the undocumented population of today is the presence of a generation of children and young adults who have grown up in the United States but have had no opportunity to legalize. For the estimated 1.8 million "unauthorized Americans" in the United States, there is no legalization eligibility as there was for earlier unauthorized entrants under previous immigrant statutes.[102] They are thus in the unenviable

99 *See, e.g.*, CAL. GOV'T CODE §§ 7282, 7282.5 (West 2014) (prohibiting California law enforcement officials from detaining an individual on the basis of an Immigration and Customs Enforcement ("ICE") hold after that individual becomes eligible for release from custody, unless, at the time that the individual becomes eligible for release from custody, certain conditions are met, including, among other things, that the individual has been convicted of specified crimes); CONN. GEN. STAT. § 54-192h (2014) (prohibiting Connecticut law enforcement officials from: holding an individual beyond the time when such individual would otherwise be released from custody; notifying federal immigration authorities of such individual's release; or facilitating the individual's transfer to ICE, unless certain conditions apply; and prohibiting an ICE hold of more than twenty-four hours under any circumstances); *see also*, Carrie L. Rosenbaum, *The Role of Equality Principles in Preemption Analysis of Sub-federal Immigration Laws: The California TRUST Act*, 18 CHAP. L. REV. 481 (2015) (providing an in-depth analysis of California's and Connecticut's TRUST Acts, cited above).

100 *See* IMMIGRATION POLICY CTR., WHO AND WHERE THE DREAMERS ARE, REVISED ESTIMATES: A DEMOGRAPHIC PROFILE OF IMMIGRANTS WHO MIGHT BENEFIT FROM THE OBAMA ADMINISTRATION'S DEFERRED ACTION INITIATIVE 1 (2012), *available at* http://www.immigrationpolicy.org/sites/default/files/docs/who_and_where_the_dreamers_are_two.pdf (estimating that 1.8 million undocumented immigrants meet the requirements for Deferred Action for Childhood Arrivals, which mirrors the requirements of the DREAM Act: that the immigrant be under the age of thirty-one, have entered the United States before age sixteen, have lived continuously in the country for at least five years, have not been convicted of certain crimes, and be currently in school, have graduated from high school, have earned a GED, or have served in the military).

101 Janet Napolitano Memorandum, *supra* note 94, at 1.

102 *See, e.g.*, Immigration and Nationality Act § 249, 8 U.S.C. § 1259 (2012) (permitting qualified persons who have resided continuously in the United States since 1972 to apply for lawful permanent residency); Immigration Reform and Control Act,

position of having grown up socially as Americans but being rejected legally as Americans.

These young undocumented immigrants are known as "DREAMers," a moniker reflecting their aspiration to qualify for relief under the as yet unenacted Development, Relief and Education for Alien Minors Act.[103] They have grown up and been educated in the United States, and thus absorbed U.S. culture to the same degree as their legally present and U.S.-born peers.[104] Despite their loyalty to the United States, dedication to the democratic process, and courageous efforts to effect legislative change, legalization remains elusive.[105]

Many DREAMers are members of "mixed-status" families, in which at least one member is undocumented and one member is a U.S. citizen or lawfully present immigrant.[106] Their relationship to a U.S. citizen or legally present immigrant, however, does not afford them the ability to apply for adjustment of status in the United States. Even though they did not, as minor children, have the mens rea to effect an illegal entry into

8 U.S.C. § 1182 (permitting qualified persons who had resided continuously in the United states since prior to January 1, 1982 to apply for lawful permanent residency); Nicaraguan Adjustment and Central American Relief Act, Pub. L. No. 105-100, 111 Stat. 2193 (1997) (permitting qualified Central Americans and citizens of former Soviet States to apply for adjustment of status, suspension of deportation, or cancellation of removal).

103 S. 3992, 111th Cong. § 1 (2010); *see* Michael A. Olivas, *Dreams Deferred: Deferred Action, Prosecutorial Discretion, and the Vexing Case(s) of DREAM Act Students*, 21 WM. & MARY BILL RTS. J. 463, 463 (2012) (chronicling the most recent failed attempts to pass the DREAM Act, which has been introduced in Congress almost annually since 2001).

104 *See* Michael A. Olivas, *The Political Efficacy of* Plyler v. Doe, 45 U.C. DAVIS L. REV. 1, 13 (2011) ("[T]he undocumented have every incentive to remain in the United States, to adjust their status through formal or discretionary means, and to contribute to the U.S. economy and polity. My own experiences over the years with these students have shown them to be extremely loyal to the United States. Despite their undocumented status, most are more Americanized than are many native born students. They believe in the immigrant success story, having lived it in most instances . . . .").

105 *See* Nataly Tavidian, *Students Rally for DREAM Act Passage*, 89.3 KPCC (Sept. 21, 2010), http://www.scpr.org/news/2010/09/21/19419/students-rally-dream-act-passage/ (reporting that dozens of undocumented students spoke at a September 2010 rally in Los Angeles, urging federal lawmakers to pass the DREAM Act); Jason Linkins, *DREAM Act Rally in Tucson: Four Detained*, HUFFINGTON POST (May 25, 2011, 4:30 PM), http://www.huffingtonpost.com/2010/05/18/dream-act-rally-in-tucson_n_580733.html (reporting that in May 2010, a group of Arizona undocumented students led a sit-in at the offices of Senator John McCain to urge him to support the DREAM Act); *Young Illegal Immigrants Rally in Downtown L.A. to Support Dream Act*, L.A. NOW (June 15, 2012, 11:10 AM), http://latimesblogs.latimes.com/lanow/2012/06/young-illegal-immigrants-rally-in-downtown-la-to-support-dream-act.html (reporting that in June 2012, DREAMers rallied in Los Angeles to support the DREAM Act and President Barack Obama's decision to halt removal proceedings and deportations of DREAM Act-eligible immigrants).

106 *See* PAUL TAYLOR ET AL., PEW HISPANIC CTR., UNAUTHORIZED IMMIGRANTS: LENGTHS OF RESIDENCY, PATTERNS OF PARENTHOOD 6 (2011) (estimating that 9 million people are members of mixed status families, and that 400,000 undocumented immigrant children have U.S. citizen siblings).

the United States, the law does not provide an exception for minors; they are thus ineligible to apply for adjustment of status in the United States. Moreover, they began accumulating unlawful presence the day after they turned eighteen[107] and are consequently subject to the three- and ten-year bars once they depart the United States.

Considering the significant increase in unauthorized immigration since the enactment of IIRIRA, the states' disapproval of current immigration law and enforcement, and the growing number of fully acculturated but nevertheless undocumented children and young adults, it seems reasonable to conclude that IIRIRA has not achieved its goals and is particularly ineffective with respect to today's generation of undocumented immigrants. This realization should encourage a sea change in immigration law and policy, but that does not seem to be forthcoming. At the very least, however, the law should be amended to respect the fundamental life choices of U.S. citizens.

IV. 245(i) SHOULD BE PERMANENTLY REINSTATED

Despite the obvious failure of current immigration law, comprehensive immigration reform is not on the horizon. It is possible for reform to occur piecemeal, which might be the preferable way to proceed given the vast ignorance surrounding immigration and the resulting "emotionalization" of what is, in the end, primarily an economic issue. If true comprehensive immigration reform remains elusive, and legislators and policymakers single out discrete areas of immigration law for reform, permanently reinstating 245(i) should be the priority. Other niche areas of immigration law are also in dire need of reform, such as asylum (especially the one-year deadline)[108] and detention (particularly of children, families, and asylum seekers).[109] The reentry bars, however, stand out as provisions that disproportionately impact the United States' closest neighbors and interfere with the fundamental life choices of U.S. citizens, and in the end are not an effective deterrent for

107 Immigration and Nationality Act § 212, 8 U.S.C. § 1182(a)(9)(B)(iii)–(iv).

108 *See* 8 U.S.C. § 1158(a)(2)(B) (requiring applicants for asylum to file within one year of entering the United States); *see also* Philip G. Schrag & Michelle R. Pistone, *The New Asylum Rule: Not Yet a Model of Fair Procedure*, 11 GEO. IMMIGR. L.J. 267, 268 (1997) (criticizing the one-year deadline, among other changes that IIRIRA made to the asylum process).

109 *See* 8 U.S.C. § 1225(b)(1)(B)(iii)(IV) (mandating the detention of asylum applicants apprehended at a port of entry); 8 U.S.C. § 1226(c) (mandating the detention of certain noncitizens convicted of deportable crimes); *see also* LEADERSHIP CONFERENCE ON CIVIL RIGHTS EDUC. FUND & AM. BAR ASS'N COMM'N ON IMMIGRATION, AMERICAN JUSTICE THROUGH IMMIGRANTS' EYES 59 (2004) (criticizing mandatory detention laws).

marriage fraud or unauthorized immigration. Reinstating 245(i) is a simple solution to a problem of significant proportions for many U.S. citizens and their families.[110]

A. The Reentry Bars Target Undocumented Immigrants but Ignore Visa Violators, Disproportionately Affecting U.S. Citizen Family Members of Mexican and Central American Immigrants

There are two ways in which an immigrant may fall into the status of "undocumented": by entering the United States without inspection, or by overstaying a visa. Approximately fifty-five percent of undocumented immigrants entered the United States without inspection; the remaining forty-five percent have overstayed a visa.[111] Despite the fact that undocumented immigrants who entered without inspection do not form an overwhelming percentage of the undocumented population, they are overwhelmingly prejudiced by the reentry bars and the unavailability of 245(i).

As discussed at length above, the reentry bars only apply to those noncitizens who do not apply for adjustment of status in the United States but rather seek an immigrant visa through consular processing abroad.[112] The prohibition on adjusting status in the United States only applies to applicants who did not effect a legal entry into the United States. If an undocumented immigrant entered legally, overstayed her or his visa by any length of time, and even worked and continues to work without authorization, she or he is nevertheless eligible to adjust her or his status in the United States as the beneficiary of a spousal petition filed by a U.S. citizen.[113]

The law's targeting of noncitizens who entered the United States without inspection has a disparate negative impact on Latinos and persons of lower socioeconomic status. First, most entries without inspection are occurring at the U.S. border with Mexico, predominantly by Mexicans and Central Americans.[114]

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110 *See* U.S. CITIZENSHIP & IMMIGRATION SERVS., *supra* note 80, at 3 and accompanying text (indicating that at least 24,000 families are currently affected by the unavailability of 245(i)).

111 PEW HISPANIC CTR., MODES OF ENTRY FOR THE UNAUTHORIZED MIGRANT POPULATION 1 (2006); *see also id.* at 2 ("[T]he annual flow of new unauthorized migrants is almost evenly divided between those who enter legally and those who do not.").

112 *See* 8 U.S.C. § 1255(a) (rendering aliens who entered without inspection ineligible for adjustment of status); 8 U.S.C. § 1182(a)(6)(A) (rendering aliens who entered without inspection inadmissible).

113 *See* 8 U.S.C. § 1255(a) (authorizing aliens who were inspected and admitted into the United States to apply for adjustment of status); 8 U.S.C. § 1255(c) (exempting immediate relatives of U.S. citizens from ineligibility for adjustment based on unlawful presence or unauthorized employment).

114 *See* PEW HISPANIC CTR., *supra* note 111, at 4.

Second, in order to obtain a nonimmigrant visa to the United States, the applicant must provide a travel itinerary, demonstrate financial ability to make the trip, and provide assurance (such as proof of employment) that she or he intends to return to the home country.[115] Thus, a foreign national who is employed and can afford a trip for pleasure to the United States can secure a visa, overstay for decades, and never be subject to the reentry bars; but a working-class Mexican or Central American who arrived without inspection will be ineligible for adjustment of status and subject to the reentry bars, despite the fact that her or his U.S. citizen spouse is responsible for ensuring that she or he does not become a public charge.[116]

This seems particularly unjust with respect to the DREAMer population, many of whom did not choose to come to the United States and others of whom were compelled by desire to be with parents and siblings.[117] While many visa overstays conceivably had the intent to remain in the United States at the time they applied for their visas, many DREAMers never had or acted upon an intent to deceive U.S. immigration or consular officials; and yet it is the DREAMer, not the visa overstay, who is subject to the reentry bars.

Above all, the reentry bars and unavailability of 245(i) have a harsh impact on U.S. citizens. The undocumented immigrant who faces the possibility of a three- or ten-year bar to reentry is an illegally present alien in the eyes of the law, but is a husband or wife to a U.S. citizen and a mother or father to U.S. citizen children. Thus, for every one undocumented immigrant who is ineligible for adjustment of status, there is an entire family of U.S. citizens who must live with the stress, expense, upheaval, and uncertainty that the reentry bars create. There is a strong argument that such interference with fundamental life choices violates the Constitution.

115 *Visitor Visa*, U.S. VISAS, http://travel.state.gov/content/visas/english/visit/visitor.html#documentation (last visited Sept. 25, 2014).

116 *See* 8 U.S.C. § 1183a(a)(1), (3) (contractually obligating sponsors of aliens "to provide support to maintain the sponsored alien at an annual income that is not less than 125 percent of the Federal poverty line" for forty quarters).

117 *See* WILLIAM PEREZ, WE ARE AMERICANS: UNDOCUMENTED STUDENTS PURSUING THE AMERICAN DREAM, at xviii (2009) (noting that most DREAMers were brought to the United States as infants).

B. The Reentry Bars and Unavailability of 245(i) Are Inconsistent with the Due Process Clause Right to Marry, Establish a Home, and Raise Children

The three- and ten-year bars, combined with the unavailability of 245(i), constitute a significant imposition on a U.S. citizen's right to marry. The laws in effect dictate to a U.S. citizen who chooses to marry an undocumented immigrant that the U.S. citizen must be prepared to live outside the United States or endure a painful separation if a waiver of the reentry bars is not available. The only alternative to expatriation or separation is living in a mixed-status situation, with the U.S. citizen spouse and children enduring the precariousness, stress, and financial consequences attendant to undocumented status. Although a full discourse on the right to marry is beyond the scope of this Article, a brief discussion illuminates the questionable nature of the reentry bars with respect to that issue.[118]

Challenges to laws and regulatory schemes involving marriage arise in many contexts and take various forms. Generally, they range from cases in which marital status dictates an individual's or family's rights to some form of public benefit,[119] to those in which an individual's or couple's right to marry is at issue.[120] If the law, regulation, or policy does not directly and substantially interfere with the right to marry, courts apply rational basis review, evaluating whether it is rationally related to a legitimate governmental interest.[121]

Cases typically evaluated under rational basis review involve the termination of benefits or employment because of

118 For an in-depth discussion of the erosion of the right to marriage and family as a result of Congress's plenary power over immigration, see Linda Kelly, *Preserving the Fundamental Right to Family Unity: Championing Notions of Social Contract and Community Ties in the Battle of Plenary Power Versus Aliens' Rights*, 41 VILL. L. REV. 725 (1996).

119 *See, e.g.*, Califano v. Jobst, 434 U.S. 47 (1977) (addressing the question of whether Congress has the power to require that a dependent child's social security benefits terminate upon marriage even though he is permanently disabled).

120 *See, e.g.*, Loving v. Virginia, 388 U.S. 1 (1967) (addressing the constitutionality of anti-miscegenation laws).

121 *See, e.g.*, *Califano*, 434 U.S. 47 (applying rational basis review to the question of whether Congress has the power to require that a dependent child's social security benefits terminate upon marriage even though he is permanently disabled); Smith v. Shalala, 5 F.3d 235 (7th Cir. 1993) (applying rational basis review to the question of whether a statute conferring marriage onto unmarried cohabitants for purposes of determining whether they are eligible for disability benefits violates their freedom to choose to marry); Bautista v. Cnty. of L.A., 118 Cal. Rptr. 3d 714 (Cal. Ct. App. 2010) (applying rational basis review to the issue of whether termination pursuant to a policy prohibiting police officers from personally associating with suspects or known criminals violated the plaintiff's right to intimate association).

marriage: the legislature or employer has not prohibited marriage, but the law or policy substantially impacts the decision to marry by disadvantaging certain married couples. Examples include anti-nepotism policies, which place restrictions on spouses working for the same employer,[122] and the denial of certain public benefits upon marriage.[123] Courts have routinely found that such laws and policies are rationally related to legitimate interests and thus reside within constitutional bounds.[124]

The Supreme Court took a very different approach when it examined a statute that impacted a family's ability to reside together. In *Moore v. City of East Cleveland*,[125] the Supreme Court struck down a municipal code that prohibited certain family members from living together in a single dwelling. The Court cautioned that "when the government intrudes on choices concerning family living arrangements, this Court must examine carefully the importance of the governmental interests advanced and the extent to which they are served by the challenged regulation."[126] The Court found that the ordinance served "marginally, at best," the concededly legitimate governmental interests of "preventing overcrowding, minimizing traffic and

122 *See, e.g.*, Parks v. City of Warner Robins, Ga., 43 F.3d 609 (11th Cir. 1995) (applying rational basis review in evaluating the constitutionality of a policy prohibiting relatives of city employees in a supervisory position from working in the same department); Waters v. Gaston Cnty., N.C., 57 F.3d 422 (4th Cir. 1995) (applying rational basis review in evaluating the constitutionality of a policy prohibiting spouses from working in the same department); Montgomery v. Carr, 101 F.3d 1117 (6th Cir. 1996) (applying rational basis review in evaluating the constitutionality of a policy prohibiting married teachers from working at the same school).

123 *See, e.g.*, *Califano*, 434 U.S. 47 (applying rational basis review to the question of whether Congress has the power to require that a dependent child's social security benefits terminate upon marriage even though he is permanently disabled); *Shalala*, 5 F.3d 235 (applying rational basis review to the question of whether a statute conferring marriage onto unmarried cohabitants for purposes of determining whether they are eligible for disability benefits violates their freedom to choose to marry).

124 *See, e.g.*, *Califano*, 434 U.S. at 58 (upholding the termination of a dependent child's social security benefits upon marriage even though he was permanently disabled); *Shalala*, 5 F.3d at 240 (upholding a statute conferring marriage onto unmarried cohabitants for purposes of determining whether they are eligible for disability benefits); *Bautista*, 118 Cal. Rptr. 3d at 720–21 (upholding the termination of a police officer after his marriage to a prostitute, finding that a policy prohibiting police officers from personally associating with suspects or known criminals did not interfere with the right to marry); *Parks*, 43 F.3d at 618 (upholding a policy prohibiting relatives of city employees in a supervisory position from working in the same department); *Waters*, 57 F.3d at 427 (upholding a policy prohibiting spouses from working in the same department); *Montgomery*, 101 F.3d at 1118 (upholding a policy prohibiting married teachers from working at the same school).

125 Moore v. City of E. Cleveland, Ohio, 431 U.S. 494 (1977).

126 *Id.* at 499.

parking congestion, and avoiding an undue financial burden on East Cleveland's school system."[127]

The situation created by ineligibility for adjustment of status and subjection to the reentry bars is more analogous to the *Moore* case than to those dealing with employment and benefits. The laws intrude on choices concerning family living arrangements by forcing U.S. citizens either to live apart from their undocumented family members or to leave their rightful country and live abroad. As discussed in other parts of this Article,[128] the laws serve marginally, at best, the government interests of deterring and punishing unauthorized immigration. Thus, although the laws do not specifically prohibit certain family relationships or living arrangements, the impact the laws have on mixed-status families is severe and unmitigated by furtherance of government interests.

C. The Reentry Bars Do Not Deter Illegal Immigration, nor Would the Reinstatement of 245(i) Encourage Illegality

A final reason for reinstating 245(i) is that its absence has proven not to be an effective deterrent against illegal immigration. As discussed at length above, migration patterns rarely respond to laws but almost always respond to economics. In the case of the United States and the countries from which the majority of undocumented immigrants hail, there is the additional factor of family unification immigrants, or those who entered not in response to economic factors but because they were brought or sent for by their families as infants and young children.

Immigration statistics since the 1996 promulgation of the reentry bars demonstrate their inefficacy. In 1996, the Immigration and Naturalization Service estimated that 5 million undocumented immigrants resided in the United States.[129] Today, that number has grown to over 11 million.[130] Fluctuations within that time period track economic conditions on both sides of the Mexico/U.S. border.[131]

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127 *Id.* at 499–500.

128 *See supra* Parts IV.A, IV.C, and *infra* Part V.C.

129 IMMIGRATION & NATURALIZATION SERV., *supra* note 71, at 199.

130 MICHAEL HOEFER ET AL., OFFICE OF IMMIGRATION STATISTICS, U.S. DEP'T OF HOMELAND SEC., ESTIMATES OF THE UNAUTHORIZED POPULATION RESIDING IN THE UNITED STATES: JANUARY 2011, at 1 (2012).

131 *See* HANS JOHNSON & LAURA HILL, PUB. POLICY INST. OF CAL., ILLEGAL IMMIGRATION fig.2 (2011), *available at* http://www.ppic.org/content/pubs/atissue/AI_711HJAI.pdf (providing graphical illustration of the correlation between U.S. economic conditions and unauthorized immigration).

Despite the proven inefficacy of the reentry bars as a deterrent against illegal immigration, opponents of reinstating 245(i) argue that it rewards lawbreakers and encourages illegal immigration.[132] This argument contains several flaws. First, the vast majority of undocumented immigrants did not enter the United States with the intention of marrying U.S. citizens; in fact, many are married to non-U.S. citizens. Rather, they entered the United States to work. It is therefore unlikely that the United States' policy regarding the adjustment of status of undocumented immigrants married to U.S. citizens has much, if any, impact on migration patterns.

Second, the argument disregards the fact that the punishment—if punishment were even a legitimate concern in the area of immigration—is inflicted on U.S. citizen family members at least to the same degree as the undocumented immigrant.[133] It is the U.S. citizen who is denied the ability to live with the spouse of her or his choice in her or his rightful country. If such a denial of basic rights were at least effective, the flaw in this argument might be overlooked. Viewed in the context of the law's indisputable inefficacy, however, the disregard for U.S. citizens' fundamental life choices is insupportable.[134]

Finally, as intimated above, immigration laws intended to punish economic migrants are inherently flawed. They represent an emotional response to a situation that, albeit emotional in many respects, was born of and is powered by economics.[135] In essence, laws such as the reentry bars attempt to send a message to persons who entered or are considering entering the United States illegally: if you break the law to come to the United States, there will be consequences. But economics are sending much louder and more powerful messages to those same immigrants or intending immigrants: the United States desperately needs your labor; your home country cannot pay you a living wage for your labor; you will be better able to feed, clothe, and educate your children if you come to the United States. Technical laws such as

132 *See, e.g.*, 147 CONG. REC. 16,715 (2001) ("[W]e are, for hundreds of thousands of people, going to be basically granting them the right to amnesty without going to their home country to legalize their status. This does nothing but encourage the millions, and we are talking about tens of millions, of people who are standing in line throughout the world waiting to come into this country legally so they can become citizens; but we have done nothing but encourage them to come here illegally, to reward the law-breakers, and to punish those people who are following the law.").

133 *See supra* Parts I.C, IV.B (discussing the impact of the reentry bars on U.S. citizens).

134 *See supra* Part III.A (discussing the inefficacy of the reentry bars with respect to decreasing illegal immigration).

135 *See supra* Part III.A (discussing the economics of immigration).

the reentry bars, even if intending immigrants knew of them and understood their effects, are irrelevant in the face of such messages. To impose them as a punishment serves only to assuage those unable or unwilling to understand what actually compels indigent foreign nationals to migrate.

CONCLUSION

Sufficient time has passed since the sunsetting of 245(i) for lawmakers to accept the fact that the reentry bars and inability of certain undocumented immigrants to apply for adjustment of status in the United States have not curtailed illegal immigration. During that time, the burden that the reentry bars place on U.S. citizen family members of undocumented immigrants has become apparent. As violence has escalated in northern Mexico, the financial burden has been eclipsed by the danger that U.S. citizens and their family members must face in order to complete the lengthy ordeal of consular processing. Many of the undocumented immigrants potentially and actually affected by the reentry bars are Americanized DREAMers with significant ties and loyalty to the United States. Above all, the rate of illegal immigration has continued to reflect economic trends, increasing and decreasing according to economic conditions on both sides of the border. In light of the significant hardship that the reentry bars and unavailability of 245(i) impose on U.S. citizens, and their ineffectiveness in decreasing illegal immigration, it is time for 245(i) to be permanently reinstated.